Fiscal Citizenship and Taxpayer Privacy

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Abstract

Should individual tax data be public or kept confidential? Within the United States, secrecy has been the rule since the Tax Reform Act of 1976. However, at three critical junctures—the Civil War, the 1920s, and the 1930s—Congress made individual tax records open for public inspection, and newspapers published the incomes of the billionaires of the time. Today, Finland, Norway, and Sweden all mandate a significant degree of transparency for individual tax information.

This Article intervenes in the tax-confidentiality debate by building a new analytical framework of fiscal citizenship. Until now, scholars have focused on compliance—whether disclosure incentivizes honest reporting of income, and if it does, whether compliance gains outweigh the intrusion into a generalized notion of taxpayer privacy. But the choice between confidentiality and transparency implicates more than compliance. It rests on the taxpayers' dynamic interactions with the fiscal apparatus of a state that aspires to democracy and egalitarianism. This Article posits that fiscal citizens play the roles of reporters, funders, stakeholders, and policymakers in the tax system. Within these roles, transparency and privacy have distinct valences. Further, the degree to which any taxpayer partakes in each role depends both on her own income and on the extent of income inequality within the community structured by federal taxation. Under this taxonomy, the propriety of disclosure falls into a spectrum, and transparency is more appropriate for ultra-wealthy taxpayers in times of high economic inequality. The Article thus provides insights to help policymakers design public-disclosure regimes that cohere with the norms implicit in our fiscal social contract with the state.

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INTRODUCTION

Economic inequality in the United States has reached record levels, and poses serious threats to the egalitarianism that forms the foundation of our democracy.[1] Exacerbating this inequality is a perception that the ultra-wealthy have not borne their fair share of the costs of governance.[2] In response, policymakers and advocates have renewed calls for not only substantive tax and welfare reforms but also transparency in the tax records of the wealthy and the powerful.[3] Former President Trump's tax returns provided the most dramatic illustration. During his presidential campaign and tenure, Trump refused to release his tax returns, breaking from the longstanding practice—since 1973—of voluntary disclosure.[4] The fight for Trump's tax returns prompted the House Ways and Means Committee to request his tax records from the Treasury Department.[5] The New York District Attorney and the House Financial Services Committee likewise

[1] *See* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (2022); Ajay K. Mehrotra, *The Missing U.S. VAT*, 117 NW. U. L. REV. 151, 159–63 (2022); Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1423-24 (2018); Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 371-74 (2018); Frederick Solt, *Economic Inequality and Democratic Political Engagement*, 52 AM. J. POL. SCI. 48, 57-58 (2008); Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1292-93 (2016); Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553, 557(2018); Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 523 (2016).

[2] *See, e.g.*, Alex Raskolnikov, *Taxing the Ten Percent*, 62 HOUS. L. REV. (forthcoming 2025).

[3] *E.g.*, Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN. J.L. & JURIS. 1 (2005); Daniel J. Hemel, *Can New York Publish President Trump's State Tax Returns?*, 127 YALE L.J.F. 62 (2017); Joshua D. Blank, *Presidential Tax Transparency*, 40 YALE L. & POL'Y REV. 1 (2021); Joseph J. Thorndike, *Presidential Tax Disclosure Is Important—and Not Because of Trump* [hereinafter Thorndike, *Presidential Disclosure*], 165 TAX NOTES 1722 (2019); Joseph J. Thorndike, *The Thorndike Challenge*, 123 TAX NOTES 691 (2019) [hereinafter Thorndike, *Challenge*]; Lily Batchelder & David Kamin, *Taxing the Rich: Issues and Options*, https://papers.ssrn.com/abstract_id=3452274; Binyamin Appelbaum, *Everyone's Income Taxes Should Be Public*, N.Y. TIMES (Apr. 13, 2019), https://www.nytimes.com/2019/04/13/opinion/sunday/taxes-public.html.

[4] Julie Hirschfeld Davis, *Trump Won't Release His Tax Returns*, N.Y. TIMES (Jan. 22, 2017), https://www.nytimes.com/2017/01/22/us/politics/donald-trump-tax-returns.html; Blank, *supra* note 3, at 11-14.

[5] Letter from Richard E. Neal, Chairman, H. Comm. on Ways and Means, to Charles P. Rettig, Comm'r, IRS (Apr. 3, 2019); *see* Ways and Means Comm.'s Request for the Former President's Tax Returns Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C., slip op. at 1-2 (2021).

subpoenaed them from Mazars LLP and Deutsche Bank.[6] It culminated in two Supreme Court rulings on separation of powers and the criminal-investigation authority of state grand juries,[7] as well as an order quietly acquiescing to the disclosure of Trump's tax returns to the House Ways and Means Committee under the Internal Revenue Code ("Code").[8] After the House released those tax returns to the public, it became clear that Trump had engaged in years of tax avoidance, often reported no income-tax liability due to business losses, and broke his campaign promise to donate his salary.[9]

Even more consequential is the leak of thousands of ultra-wealthy Americans' tax records to ProPublica in 2021.[10] These records, including the tax information of Jeff Bezos, Elon Musk, and Warren Buffett, reveal how the wealthy use legal doctrine and loopholes to achieve substantial tax avoidance. According to the ProPublica report, with the help of the realization doctrine and the non-taxation of borrowed funds,[11] Musk paid no federal income tax in 2018.[12]

The ProPublica leak triggered investigations by the Department of Justice and the Inspector General for Tax Administration after lawmakers decried the "egregious and unprecedented disclosure of confidential taxpayer information."[13] Ken Griffin, the billionaire founder of a major hedge fund, sued the Internal

[6] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2027 (2020); Trump v. Vance, 140 S. Ct. 2412, 2420 n.2 (2020).

[7] *Mazars*, 140 S. Ct. at 2035-36; *Vance*, 140 S. Ct. at 2429.

[8] Trump v. Comm. on Ways & Means, 143 S. Ct. 476 (2022) (mem.); *see* 26 U.S.C. § 6103(f)(1).

[9] Jim Tankersley, Susanne Craig & Russ Buettner, *Trump Tax Returns Undermine His Image as a Successful Entrepreneur*, N.Y. TIMES (Dec. 30, 2022), https://www.nytimes.com/2022/12/30/us/politics/trump-tax-returns.html; Russ Buettner, Susanne Craig & Mike McIntire, *Long-Concealed Records Show Trump's Chronic Loses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html.

[10] Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021), https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax; *see* David Gamage & John R. Brooks, *Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform*, 100 N.C. L. REV. 487, 512 n.123 (2022).

[11] In general, the realization doctrine requires disposition of property before taxing appreciation so that, for example, appreciated stocks are not taxed until sold, if ever. *See* Eisner v. Macomber, 252 U.S. 189, 212 (1920); Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 430-31 (1955); Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 559 (1991).

[12] Eisinger et al., *supra* note 10; Edward McCaffery, *The Death of the Income Tax (or, The Rise of America's Universal Wage Tax)*, 95 IND. L.J. 1233, 1263–64 (2020).

[13] Letter from Jason Smith, Chairman, H. Comm. on Ways and Means, to J. Russell George, Inspector Gen. of Tax Admin. (Feb. 16, 2023).

Revenue Service ("IRS") in federal court for willful and grossly negligent disclosure of his tax return, citing provisions of the Code that—according to his complaint—show "Congress's promise" to safeguard taxpayer privacy.[14] In January 2024, a federal district court sentenced the leaker—a former IRS contractor—to five years of imprisonment for his "egregious" crime of "attack[ing] our constitutional democracy."[15] In June, the IRS settled Griffin's lawsuit, "sincerely apologized" for the leak, and promised "to strengthen its safeguarding of taxpayer information" by investing in data security.[16]

Recent events thus foreground the enduring debate whether individuals' tax information should be public records or kept confidential.[17] In the United States, the Tax Reform Act of 1976 enacted the statutory scheme that governs taxpayer privacy today.[18] I.R.C. § 6103 prohibits employees and officers of the United States from disclosing to the public any tax information or returns, broadly defined to include the taxpayer's identity, income, deductions, exemptions, liability, and net worth.[19] Exceptions authorize disclosure only to congressional committees in charge of tax legislation (e.g., the House Ways and Means Committee which obtained Trump's tax returns), state and federal law enforcement, and the taxpayer's designees.[20]

But confidentiality has not always been the rule. The nation's first income tax, enacted to fund the Civil War, authorized public inspection of tax records.[21] By 1865, the *New York Times* regularly printed the incomes and the tax liabilities of the

[14] Complaint at 8, Griffin v. IRS, No. 1:22-cv-24023 (S.D. Fla. Dec. 13, 2022).

[15] Press Release, Department of Justice, Former IRS Contractor Sentenced for Disclosing Tax Return Information to News Organizations (Jan. 29, 2024), https://www.justice.gov/opa/pr/former-irs-contractor-sentenced-disclosing-tax-return-information-news-organizations; Brian Faler, *Trump Tax Return Leaker Sentenced to 5 Years in Prison*, POLITICO (Jan. 29, 2024) https://www.politico.com/news/2024/01/29/irs-charles-littlejohn-tax-prison-trump-00138367; *see also* Reuven Avi-Yonah, *Littlejohn's Unjust Tax Sentence*, 183 TAX NOTES 1441 (2024).

[16] Press Release, IRS statement as part of the resolution of Kenneth C. Griffin v. IRS, Case No. 22-cv-24023 (S.D. Fla.), IR-2024-172 (June 25, 2024).

[17] Within the United States, the debate on tax confidentiality is as old as the income tax itself. *See infra* Section I.A (describing tax-disclosure provisions associated with the first federal income tax during the Civil War).

[18] Pub. L. No. 94-455, § 1202, 90 Stat. 1520, 1667-85 (1976) (codified as amended at 26 U.S.C. § 6103).

[19] 26 U.S.C. § 6103(a), (b)(1)-(2).

[20] *Id.* § 6103(d)-(i).

[21] Revenue Act of 1862, chap. 119, §§ 15, 19, 12 Stat. 432, 437, 439; Revenue Act of 1864, chap. 173, § 19, 13 Stat. 223, 228.

richest Americans, like the Vanderbilts.[22] Transparency again prevailed in the mid-1920s, after progressive lawmakers pushed for public scrutiny of tax evasion,[23] and for a moment in 1934, at a time of heightened economic inequality during the Great Depression.[24] Today, Finland,[25] Norway,[26] and Sweden,[27] among others, allow a significant degree of disclosure of individual income and wealth tax information to the public. Importantly, both historical legislative debate and contemporary disclosure regimes ground tax transparency in egalitarian terms. That is, disclosure of tax information instantiates a foundational, democratic commitment to open fiscal governance.

In this lasting contest between taxpayer privacy and disclosure, scholarship has had a clear focus: compliance. It has questioned whether publicity aids compliance with tax laws, and if it does, whether the compliance gains outweigh the intrusion into a generalized notion of the taxpayer's right to privacy.[28] Proponents

[22] *Our Internal Revenue*, N.Y. TIMES, July 8, 1865, at 5 (boasting the headline, "William B. Astor's Income One Million Three Hundred Thousand Dollars").

[23] MARK LEFF, THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933-1939, at 67 (1984); Revenue Act of 1924, chap. 234, § 257(b), 43 Stat. 253, 293 (mandating public inspection of income-tax liabilities).

[24] Revenue Act of 1934, Pub. L. No. 73-216, § 55(b), 48 Stat. 680, 698; Saez & Zucman, *supra* note 1, at app. fig. B2 (showing that the top 10%'s share of wealth reached a height of above 80% from the mid-1920s to the mid-1930s); *see* Marjorie E. Kornhauser, *Shaping Public Opinion and the Law: How a "Common Man" Campaign Ended a Rich Man's Law*, 73 LAW & CONTEMP. PROBS. 123, 129-30 (2010).

[25] Laki verotustietojen julkisuudesta ja salassapidosta [Act on the Public Disclosure and Confidentiality of Tax Information], L. No. 1346/1999, § 5 (Fin. 1999) (defining as public information a taxpayer's annual income, as well as income tax and wealth tax liabilities); Maria Kristiina Äimä, *Tax Transparency: Finland*, *in* ANNUAL CONGRESS: EUROPEAN ASSOCIATION OF TAX LAW PROFESSORS 1 (2018).

[26] *See* Ricardo Perez-Truglia, *The Effects of Income Transparency on Well-Being: Evidence from a Natural Experiment*, 110 AM. ECON. REV. 1019, 1019-20 (2020).

[27] TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.) (Freedom of the Press Act of 1766, providing public access to all official documents); 27 ch. 6 § OFFENTLIGHETS OCH SEKRETESSLAG (Svensk författningssamling [SFS] 2009:400) (Swed.) (provision of the Public Access to Information and Secrecy Act of 2009 authorizing public disclosure of tax decisions, which include the taxpayer's earned income and capital gains). *See generally* Anna-Maria Hambre, *Tax Confidentiality in Sweden and the United States—A Comparative Study*, 43 INT'L J. LEGAL INFO. 165, 171-198 (2015).

[28] *See generally* Boris I. Bittker, *Federal Income Tax Returns—Confidentiality vs. Public Disclosure*, 20 WASHBURN L. REV. 479, 479 (1981); Joseph J. Darby, *Confidentiality and the Law of Taxation*, 46 AM. J. COMP. L. 577, 587 (1998); Michael Hatfield, *Privacy in Taxation*, 44 FLA. ST. U. L. REV. 579, 606 (2018).

of disclosure stress its potential as an automatic enforcement tool.[29] They argue that public access to tax information could deter tax evasion by increasing the perceived risk of detection and lower revenue-collection costs by fostering social norms of voluntary compliance.[30] By contrast, defenders of privacy dispute the enforcement potential of publicity.[31] They contend that taxpayers entrust the state with private information on the expectation that it will keep such information confidential.[32] More recently, scholars have argued that privacy enables the federal government to exploit taxpayers' cognitive biases to influence their perception of its tax-enforcement capacity, thus aiding compliance goals.[33]

But the choice between privacy and transparency implicates more than just tax compliance.[34] Federal taxation not only aims to maximize the revenues collected within the bounds of rules that determine taxpayers' liability. It also structures our fiscal relationship with a state that aspires to democracy and egalitarianism.[35] Whether the government should disclose any individual citizen's tax records to the public therefore depends on the nature of this dynamic relationship between the

[29] *See infra* notes 285-291 and accompanying text.

[30] *E.g.*, Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1791, 1796 (2000); Leandra Lederman, The Interplay Between Norms and Enforcement in Tax Compliance, 64 Ohio St. L.J. 1453, 1457-62 (2003); Erlend E. Bø, Joel Slemrod & Thor O. Thoresen, *Taxes on the Internet: Deterrence Effects of Public Disclosure*, 7 AM. ECON. J. 36, 37 (2015); Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 KAN. L. REV. 1065, 1076-78 (2003); Susan Laury & Sally Wallace, *Confidentiality and Taxpayer Compliance*, 58 NAT'L TAX J. 427, 428-29 (2005); Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN. J.L. & JURIS. 1, 2 (2005); Marc Linder, *Tax Glasnost for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum*, 18 N.Y.U. REV. L. & SOC. CHANGE 951, 977 (1990); *see also* David Lenter, Joel Slemrod & Douglas Shackelford, *Public Disclosure of Corporate Tax Return Information*, 56 NAT'L TAX J. 803, 823-35 (2003).

[31] *See infra* notes 292-298 and accompanying text,

[32] 1 OFF. TAX POL'Y, TREAS. DEP'T, REPORT TO CONGRESS ON THE SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS 18-19 (2010); *see* Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265, 280-82 (2011) (describing the taxpayer-trust theory); Hatfield, *supra* note 28, at 606 (same).

[33] Blank, *supra* note 32, *passim*; Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized*, 30 VA. TAX REV. 1, 5-8 (2010); *see also* Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & BUS. 31, 77-79 (2014); Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 259 (2011).

[34] For historical and comparative arguments that ground the demand for public disclosure in values beyond tax enforcement, see *infra* Section I.A.

[35] Conversely—and much more discussed in scholarship—democratic institutions and the design of their bureaucracies influence tax policymaking. *E.g.*, SVEN STEINMO, TAXATION AND DEMOCRACY: SWEDISH, BRITISH AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE 7-13 (1993).

taxpayer and the state. This Article constructs such a model, positing that taxpayers play four main roles as they interact with the fiscal apparatus of a democratic regime: (1) as reporters of nonpublic information; (2) as funders of the state; (3) as stakeholders entitled to what they deserve as a matter of law and dignity; and (4) as policymaking partners with the government in shaping federal tax law.[36] Within these roles, transparency and privacy have distinct valences. Further, the degree to which any taxpayer partakes in each role depends on two factors: (a) the taxpayer's own income and wealth; and (b) the extent of inequality in the distribution of income and wealth within the community structured by federal taxation.[37] I refer to the "community structured by federal taxation" because non-citizens, including unregistered immigrants and foreign workers, also contribute to and occasionally derive benefits from the federal fiscal machinery.[38] This Article's taxonomy suggests that the propriety of disclosure falls into a spectrum. Rises in economic inequality and in the taxpayers' own income or wealth accentuate the need for transparency. Given this normative conclusion, lawmakers can limit disclosure regimes to segments of the population who exercise significant fiscal power. They can even leave the choice between transparency and privacy to taxpayers themselves.[39]

This Article thus makes three contributions. First, it uncovers historical arguments that ground demands for tax transparency in egalitarianism in addition to compliance. Second, it intervenes in the taxpayer-privacy debate by developing a novel conceptual model to analyze when, and for which taxpayers, privacy values should prevail. In the process, it propels the scholarly discourse beyond tax enforcement and compliance, and yields insights to help policymakers design public-disclosure regimes that cohere with the norms implicit in our fiscal social contract with the state.[40] Third, this Article contributes to the burgeoning literature on fiscal citizenship. Drawing on the federal income tax's use of voluntary compliance, scholars have conceptualized taxpayers' political and civic engagement

[36] *Infra* Part II.

[37] *Infra* Sections II.B-C.

[38] *See* Vanessa S. Williamson, READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES 41–44 (2017).

[39] *Infra* notes 484-485 and accompanying text.

[40] As Section II.B shows, the existing literature focuses on issues of tax enforcement and compliance. To be sure, this focus is not exclusive: Some scholars have looked to past egalitarian justifications to frame their own views on tax publicity. *E.g.*, Kornhauser, *supra* note 24, at 6 (quoting 79 CONG. REC. 3403 (1935)). But none has developed, as this Article does, a substantive framework and taxonomy of fiscal citizenship applicable to the privacy debate.

with the state as they self-assess their tax liabilities.[41] The Article adds to this scholarly dialogue a positive, analytical model of precisely what roles taxpayers occupy as they shape, and are shaped by, the fiscal state.[42]

This Article proceeds in three Parts. Part I examines past disclosure regimes of the federal income tax. It shows that tax confidentiality has always been contested in the United States. It also uncovers historical arguments in favor of disclosure not (only) to increase revenue collection, but also to advance egalitarian goals. Part II discusses contemporary treatment of tax transparency. It provides a comparative analysis of the disclosure regimes in Nordic countries, as well as an overview of the scholarly literature. Part III builds a taxonomy of fiscal citizenship. It articulates the four roles of taxpayers as they interact with the fiscal state and explains the distinct valences of privacy and transparency within each role. It examines how each component of our fiscal citizenship—as reporters, funders, stakeholders, and policymakers—varies based on our income levels and the degree of equality in the

[41] *E.g.*, LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX (2013); AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929 (2013) [hereinafter MEHROTRA, AMERICAN FISCAL STATE]; JAMES T. SPARROW, WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT (2011); Ajay K. Mehrotra, *Reviving Fiscal Citizenship*, 113 MICH. L. REV. 943 (2015) [hereinafter, Mehrotra, *Reviving Fiscal Citizenship*]; James T. Sparrow, *"Buying Our Boys Back": The Mass Foundations of Fiscal Citizenship in World War II*, 20 J. POL'Y HIST. 263 (2008); Assaf Likhovski, *"Training in Citizenship": Tax Compliance and Modernity*, 32 LAW & SOC. INQUIRY 665 (2007); Ajay K. Mehrotra, *The Price of Conflict: War, Taxes, and the Politics of Fiscal Citizenship*, 108 MICH. L. REV. 1053 (2010) [hereinafter, Mehrotra, *Price of Conflict*]. Of course, the payment of federal taxes is not voluntary. By "voluntary," scholars refer to the fact that taxpayers self-assess their income-tax liability, instead of paying the state up front. *See, e.g.*, *infra* notes 302, 311, 410–411 and accompanying text.

[42] This Article therefore focuses on federal taxation of *individuals*. Whether the state should permit public access to *corporate* tax returns raises distinct questions, including the nature of corporations' interactions with the fiscal state. *See* Blank, *supra* note 32; David Lenter, Joel Slemrod & Douglas Shackelford, *Public Disclosure of Corporate Tax Return Information: Accounting , Economics, and Legal Perspectives*, 56 NAT'L TAX J. 803, 814-23 (2003); Note, Alex Freund, *Western Corporate Fiscal Citizenship in the 21st Century*, 40 NW. J. INT'L L. & BUS. 123, 144-50 (2019). Two factors in particular counsel the inclusion of corporate tax records into a transparency regime. First, if individuals set up corporate structures to evade taxes or hide their fiscal contributions to the state, then the responsibilities of their *individual* fiscal citizenship might flow to those corporate structures. *See infra* Section III.A (providing a taxonomy of individual fiscal citizenship). Second, expending corporations' societal roles to include, for example, furtherance of public norms like transparency could also make corporate tax disclosure appropriate independent of individual fiscal citizenship. *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience*, 72 STAN. L. REV. 381, 384–85 (2020).

distribution of income within the community structured by federal taxation. Finally, it discusses scholarly and policy implications. It contends that transparency values, instead of privacy demands, prevail as to the tax records of the ultra-wealthy, especially in times of high economic inequality.

One final note: By "democracy" and "egalitarianism," this Article refers broadly to a notion of democratic equality.[43] In democratic regimes, citizens should have, all else being equal, an equal share in ruling, instantiated in, for example, equal opportunity to ventilate their views in public debate and, absent justification, roughly equal influence in policy outcomes.[44] Importantly, this is not to require political power be, in substance, equally shared. Deviations from the baseline of equality are quite common and not necessarily illegitimate. It only shifts the burden to demand reasons for any inequality in governance. Expertise, for example, grounds certain forms of inequality in a democracy. Transparency may do the same. Importantly, transparency serves a higher-order and trans-substantive value: It allows the public to see whether any inequality—deviations from the principle of equal share in ruling— is in fact grounded in a legitimate value. It enables the state to write policy on an informed basis, thus fulfilling its reciprocal duty to ensure a fair and effective tax system.[45] Both are key to democratic fiscal governance.

[43] This notion of democratic equality traces its origins to Classical Athenian law and Aristotle, and is the subject of continued discussion in contemporary political theory. *See, e.g.*, JAMES LINDLEY WILSON, DEMOCRATIC EQUALITY 5 (2019); T.M. SCANLON, WHY DOES INEQUALITY MATTER 75–76 (2018) (quoting JOHN RAWLS, A THEORY OF JUSTICE 46 (1971)); Alex Zhang, *Separation of Structures*, 110 VA. L. REV. 599, 624-26 (forthcoming 2024).

[44] This is not to say that democracy is a transhistorical Platonic form. Instead, its content has been contested. *See generally* James T. Kloppenberg, Toward Democracy: The Struggle for Self-Rule in European and American Thought 1-18 (2016); Sarah E. Igo, The Known Citizen: A History of Privacy in Modern America (2018). But a baseline of *some type of* equality in the exercise of political power is common to most democracies. It is inherent in the world's first radical democracy, which allowed all citizens to participate in lawmaking, selected executive offices by lottery or sortition, and enabled ordinary people to serve the dual role of jury and the judge in the courtroom. *See* DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 25 (1986); PAUL CARTLEDGE, DEMOCRACY: A LIFE 108, 170, 310 (2016); MICHAEL GAGARIN, DEMOCRATIC LAW IN CLASSICAL ATHENS 18 (2020); Adriaan Lanni, *"Verdict Most Just": The Modes of Classical Athenian Justice*, 16 YALE. J.L. & HUMAN. 277, 284-86 (2004). It is embodied, perhaps most directly, in the one-person-one-vote principle our representative democracy. Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Reynolds v. Sims, 377 U.S. 533 (1964).

[45] This duty flows from fiscal citizenship. *Infra* note 300 and accompanying text. It also flows from the state's need to foster quasi-voluntary tax compliance, to create confidence among the citizenry that fiscal rulers will keep their part of the bargain by (1) enforcing existing tax law and (2) maintaining relative fairness in tax policy (e.g., declining favoritism of special interest

I. HISTORICAL TAX-TRANSPARENCY REGIMES IN THE UNITED STATES

This Part of the Article examines three instances of legislatively mandated disclosure regimes in the early history of the U.S. federal income tax. It uncovers congressional proceedings that grounded tax transparency in egalitarianism. As we shall see, lawmakers contended that publicity would not only result in revenue gains but also serve important constitutional and democratic functions.

The norm of confidentiality embodied in I.R.C. § 6103 emerged with the transformation of the federal income tax from a wartime tax and a "class tax" to a "mass tax."[46] In its infancy, income taxation of individuals targeted the rich[47] and featured a rate structure like that of wealth taxes proposed by progressive policymakers today.[48] Transparency values prevailed at three junctures during this formative time: during the Civil War, when Congress taxed income for the first time;[49] in 1924, a decade after the Sixteenth Amendment paved the path for a

groups). *See infra* notes 356, 415 and accompanying text; MARGARET LEVI, OF RULE AND REVENUE 54 (1989) (describing the concept of quasi-voluntary compliance as an aspect of "legitimacy," and as a species of tax compliance that is neither based solely on state coercion nor purely voluntary, because taxpayers will comply only if others do too).

[46] *See* Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685, 731-32 (1988); Leonard E. Burman, *Taxes and Inequality*, 66 TAX L. REV. 563, 563-64 (2013).

[47] *See generally* W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A HISTORY 58-123 (3d ed. 2016). Far fewer than half of the population were covered by the Civil War income tax or the first two decades of the modern federal income tax. The Revenue Act of 1862 exempted income below $600, while the average monthly wage of farm labor in 1860 was just under $15. *See* Revenue Act of 1862, ch. 119, § 90, 12 Stat. 432, 473; STATISTICS OF THE UNITED STATES (INCLUDING MORTALITY, PROPERTY, &C.,) IN 1860, at 512 (1866); Sheldon D. Pollack, *The First National Income Tax, 1861-1872*, 67 TAX LAW. 311, 320 (2014). From 1918 to 1932, an average of 5.6% of the population filed taxable returns. The fiscal demands of World War II led to a dramatic expansion in the income-tax base and hike in rates: By 1945, more than 42 million people had income-tax liabilities, and the top marginal tax rate reached 94%. Individual Income Tax Act of 1944, chap. 210, § 2, 58 Stat. 231, 231-32 (providing a 3% tax on income and a 91% surtax on income in excess of $200,000); Jones, *supra* note 46, at 688. The revenues needed to finance World War I and the economic vicissitudes of the Depression led to significant variation in the coverage of income taxation during this period. In fiscal year 1919, for example, nearly 20% of the labor force filed income taxes. *See* MEHROTRA, AMERICAN FISCAL STATE, *supra* note 41, at 299–300.

[48] The Revenue Act of 1913, ch. 16, § 2, 38 Stat. 114, 166, provided for marginal tax rates of 1%-7% based on income levels. By comparison, Senator Elizabeth Warren has proposed a wealth tax of 2%-6% based on wealth levels. *Ultra-Millionaire Tax*, ELIZABETH WARREN (Apr. 13, 2023), https://elizabethwarren.com/plans/ultra-millionaire-tax; *see* Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 719 n.1 (2020).

[49] *Infra* Section I.A.1.

permanent, unapportioned income tax;[50] and during the Great Depression, when a well-organized grassroot campaign led to the demise of the disclosure regime before it went into full effect.[51]

A. *Public Inspection of Income-Tax Records During the Civil War*

During the Civil War, the federal government taxed income for the first time to meet its increasing fiscal needs.[52] At first, the House Ways and Means Committee proposed a direct tax on land, apportioned among the states in accordance with their census population as required by the Constitution.[53] The federal government had taxed land in 1798 and 1813.[54] Proponents in Congress suggested that a land tax would aid post-war recovery of lost revenue: Uncollected taxes would result in a lien on the land that could be collected after the war, while efforts to collect taxes on personal property in Southern states would be futile.[55] But other lawmakers attacked the land tax as unfair. For them, it would disproportionately burden land-rich states while exempting personal property (primarily tangible assets like equipment during this period, in contrast to stocks and securities today) that formed the bulk of wealth in manufacturing states.[56] Congress found compromise in the Revenue Act of 1861, imposing both an apportioned tax on land and an income tax at a uniform rate of 3% on incomes above $800.[57] As a practical matter, however, the 1861 Act never went into effect.[58] In 1862, Congress enacted a more comprehensive internal revenue system. It established the post of the Commissioner of Internal Revenue and imposed

[50] *Infra* Section I.A.2.

[51] *Infra* Section I.A.3.

[52] Sheldon D. Pollack, *The First National Income Tax, 1861-1872*, 67 TAX LAW. 311, 312 (2014); *see generally* ROGER LOWENSTEIN, WAYS AND MEANS: LINCOLN AND HIS CABINET AND THE FINANCING OF THE CIVIL WAR (2022); STEVEN A. BANK, KIRK J. STARK & JOSEPH J. THORNDIKE, WAR AND TAXES (2008).

[53] H.R. 71, A Bill to Provide Additional Revenues for Defraying the Expenses of Government, 37th Cong. (1st Sess. 1861); CONG. GLOBE, 37th Cong., 1st Sess. 246 (1861).

[54] An Act to Lay and Collect a Direct Tax Within the United States, chap. 70, § 1, 1 Stat. 597, 597 (1798) (imposing a direct tax of $2 million, apportioned among the states); An Act to Lay and Collect a Direct Tax Within the United States, chap. 13, § 1, 3 Stat. 53, 53 (1813) (imposing a direct tax of $3 million, apportioned among the states); John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75, 102-03 (2022).

[55] *See* CONG. GLOBE, 37th Cong., 1st Sess. 306 (1861); CONG. GLOBE, 37th Cong., 2d Sess. 2040 (1862).

[56] CONG. GLOBE, 37th Cong., 1st Sess. 248 (1861); Pollack, *supra* note 52, at 317.

[57] Revenue Act of 1861, chap. 45, §49, 12 Stat. 292, 309. The Revenue Act of 1861 provided preferential treatment to income derived from interest on government securities, taxing it at 1.5%, and penalized U.S. citizens abroad, taxing their income at 5%. *Id.*

[58] EDWIN R.A. SELIGMAN, THE INCOME TAX 435 (1911); Pollack, *supra* note 52, at 320-21.

numerous taxes on bonds, dividends, salaries, and goods like liquor and coffee.[59] Income was taxed for the first time at graduated rates: at 3% for income between $600 and $10,000, and at 5% for income above $10,000.[60] The exemption for any income under $600 meant that only about 1% paid any income tax.[61] This system of progressive income taxation targeting the rich survived for most of the 1860s. Congress let it expire in 1871, and returned to a fiscal order that relied heavily on protective tariffs.[62]

Between 1861 and 1870, income-tax records were open to public inspection and routinely published by leading newspapers. The Revenue Act of 1861 directed tax collectors to advertise collection lists in newspapers and public places in their respective districts.[63] This requirement was intended to provide notice to taxpayers, given the absence of administrative procedures to notify taxpayers of liability.[64] The 1861 Act also made an oblique reference to publicity: After income taxes were "assessed and *made public*," they operated as liens on the property of delinquent taxpayers.[65] The Revenue Act of 1862 went further, authorizing the public to examine taxpayers' names and liabilities within a fifteen-day statutory period and directing tax assessors to advertise opportunities for public examination in local newspapers.[66] By 1864, Congress codified the public's right to inspect and publish full tax records, requiring assessors to submit their "proceedings" and "annual lists . . . to the inspection of any and all persons who may apply for that purpose."[67] This requirement of tax publicity generated sensational headlines in the 1860s: In a July 1865 report on "our internal revenue" for the Sixth Collection District (which included Manhattan), the *New York Times* exclaimed, "William B. Astor's Income One Million Three Hundred Thousand Dollars."[68]

Tax publicity was contested from the very beginning. The *Times*'s internal revenue reports from 1865 disclaimed any desire to "gratif[y] an idle or morbid curiosity" and purported to broadcast "only specimen returns which are of interest to the public."[69] But opponents attacked the income tax itself and the public-

[59] Revenue Act of 1862, ch. 119, 12 Stat. 432.

[60] *Id.* § 90, 12 Stat. at 473.

[61] Pollack, *supra* note 52, at 320.

[62] *Id.* at 330.

[63] Revenue Act of 1861, § 35, 12 Stat. at 303.

[64] CONG. GLOBE, 37th Cong., 2d Sess. 1259 (1862).

[65] Revenue Act of 1861, § 49, 12 Stat. at 309.

[66] Revenue Act of 1862, §§ 15, 19, 12 Stat. at 437, 439.

[67] Revenue Act of 1864, ch. 173, § 19, 13 Stat. 223, 228.

[68] *William B. Astor's Income One Million Three Hundred Thousand Dollars*, N.Y. TIMES, July 8, 1865, at 5.

[69] *Id.*

inspection requirements as "inquisitorial"[70]—i.e., involving excessive public inquiry into the personal finances and property ownership of private individuals. Both the *Times* and the Treasury Department resisted publicity at first. In 1863, the Treasury Department interpreted the Revenue Act of 1862 to authorize inspection of taxpayers' names and liabilities only (i.e., to provide notice) and instructed assessors to withhold full tax returns from the public.[71] Treasury conceded the impropriety of its interpretation and requested Congress to remove the "doubt . . . by express enactment" guaranteeing confidentiality.[72] The *Times* initially favored privacy on "policy and morality" grounds and criticized the "very disgraceful" fact that "the Evening Post or any-body out of the Assessor's office should know anything about [taxpayers' incomes]."[73] Publicity, the *Times* criticized, was "another illustration of the hasty and slipshod way in which our system of taxation has been formed."[74] Beyond this generalized complaint about undue intrusion into private affairs, opponents of publicity made two concrete arguments: First, publicity harmed businessmen's credit in years when they suffered (and must report for all to see) tax losses.[75] Second, publicity incentivized pervasive "false returns[] when everybody feels that everything he puts down [on the tax return] will be known to the whole city"—a primitive version of the taxpayer-trust theory of confidentiality.[76]

By 1865, however, publicity appeared settled as a feature of federal income taxation. In the Revenue Act of 1864, Congress rebuked the Treasury Department's request for confidentiality by expressly requiring public inspection.[77] The Treasury Department, in turn, directed tax assessors to "give full effect to [the publicity] provision with respect to the lists . . . containing the assessments upon the income

[70] REPORT OF THE SECRETARY OF TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR ENDING JUNE 30, 1863, at 70 (1863).

[71] *Id.*

[72] *Id.* (interpreting Revenue Act of 1862, §§ 15, 19, 12 Stat. at 437, 439).

[73] *The Internal Revenue Law—Telling Other People's Secrets*, N.Y. TIMES, Dec. 29, 1864, at 4.

[74] *Id.*

[75] *The Publication of Incomes*, N.Y. TIMES, July 9, 1866, at 4; CONG. GLOBE, 39th Cong., 1st Sess. 2789 (1866).

[76] *The Internal Revenue Law—Telling Other People's Secrets*, *supra* note 73. Under the taxpayer-trust theory, individuals honestly report financial information to the government on the assumption of confidentiality. *See infra* Section I.C.

[77] Revenue Act of 1864, § 19, 13 Stat. at 228.

for the year 1863."[78] Newspapers started publishing those lists, and defended publicity as an important value in tax administration.[79]

At this time, publicity was desirable for both administrability and normative reasons. The absence of an administrative apparatus to enforce tax laws made disclosure a cost-effective means of providing notice. There was no Commissioner of Internal Revenue until 1862, and the Treasury Department relied on bounties to collect taxes until their abolition in 1872.[80] Further, a peculiar notion of equality drove efforts to publicize tax records. As described, Congress taxed income to fund the war in part because it was more equitable than taxing land.[81] Instead of concentrating tax burdens among landowners, income taxation fell on all forms of property, thus spreading the costs of governance over a broader swath of individuals who were "able to pay."[82] In 1866, for example, the *Times* framed compliance explicitly in egalitarian terms, as a species of horizontal equity. Income was "the most just and equitable" tax base, and "the regularity and certainty of the publication" of returns would "equalize" tax burdens by incentivizing honest reporting and increasing revenue collection.[83]

This notion of tax equity in part concerns compliance—the refrain of contemporary scholarship.[84] The Treasury Department's 1864 circular to tax assessors mandated implementation of the publicity provisions "in order that the amplest opportunity may be given for the *detection of any fraudulent returns*" and asked assessors to "seek the co-operation of all tax-paying citizens."[85] In 1866, James Garfield, the representative from Ohio who later became President, proposed

[78] W. P. FESSENDEN, TREASURY DEP'T, REGULATIONS FOR THE ASSESSMENT AND COLLECTION OF THE SPECIAL INCOME TAX UPON THE INCOME OF 1863 (July 20, 1864), *in* COLLECTION OF CIRCULARS AND SPECIALS ISSUED BY THE OFFICE OF INTERNAL REVENUE TO JANUARY 1, 1871, at 298, 299 (Washington, Gov't Publ'g Off. 1871).

[79] *See The Publication of Incomes*, *supra* note 75.

[80] Revenue Act of 1862, chap. 119, § 1, 12 Stat. 432, 432 (creating the office of the Commissioner of Internal Revenue "for the purpose of superintending the collection of internal duties" imposed pursuant to the Act); *see* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 222 & n.5 (2013) (discussing the abolition of bounties for internal revenue and custom officers).

[81] Land and real estate taxes were also costly for the federal government to administer. *See* Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288 *passim* (2021).

[82] CONG. GLOBE, 37th Cong., 1st Sess. 248-51 (1861); *see* SELIGMAN, *supra* note 58, at 143.

[83] *The Publication of Incomes*, *supra* note 75.

[84] *See infra* Section I.C.

[85] FESSENDEN, *supra* note 78, at 299 (emphasis added).

an amendment to the Revenue Act that would prohibit any publication of taxpayer information.[86] Defenders of tax publicity appealed to its role in revenue collection. Speaking in the House, Hiram Price stated that "the amount given in by persons upon which they pay income tax has been increased from the fact that they knew it would be published." Price warned that the federal government stood to "lose millions of dollars" without the publication of income-tax records.[87] Even opponents of publicity conceded its revenue potential. Garfield noted that some degree of "publicity [was] necessary to act as a pressure upon men to bring out their full incomes."[88] Justin Morrill, chair of the House Ways and Means Committee, acknowledged publicity's "tendency to increase []revenue" but dismissed it as an "inconvenience [that] cause[d] a great deal of complaint."[89]

But the egalitarian language went farther than the distribution of tax burdens: It encompassed a more foundational commitment to structuring a political community of equal citizens. Glenni Schofield, a representative from Pennsylvania, spoke on the House floor in 1866 to defend newspapers' publication of income-tax returns (i.e., as distinct from public inspection of returns at assessors' offices).[90] Raising "the constitutional question," Schofield drew a baseline of transparency for all government records, including its transaction with taxpayers.[91] "[A]ll the proceedings of this government," Schofield argued, "are public," and if Congress denied newspapers access to wealthy citizens' tax records, "the public can have no real information upon this subject."[92] Confidentiality was akin to "put[ting] a padlock on the return which the wealthy man makes" and hiding data crucial to governance from the poor who would be burdened by the wealthy's tax evasion.[93] Transparency of tax returns was therefore a matter of public discourse, grounded in the media's scrutiny whether the rich bore the due costs of governance—information critical to constituting a democratic regime.[94] For egalitarians like Schofield, any deviation from the baseline of publicity required justification. And whatever arguments made by opponents of publicity—that it harmed business credits or undermined trust in government—failed to meet this burden.

[86] CONG. GLOBE, 39th Cong., 1st Sess. 2789 (1866).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] CONG. GLOBE, 39th Cong., 1st Sess. 2789 (1866).
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*

B. *Tax-Transparency Regime in 1924*

The Civil War's end diminished the need for an income tax. As public opposition to income taxation grew, Congress first replaced the progressive rate structure with a flat five-percent tax in 1867.[95] In 1870, Congress repealed the publicity provision, raised the amount for personal exemption, and provided that the income tax would expire by the end of 1871.[96] For the next forty years, the federal government relied heavily on tariffs and excises to raise revenue.[97]

The question of tax transparency returned as soon as income taxation itself. By the end of the nineteenth century, federal fiscal policy shifted from taxing goods to people.[98] Pursuant to its power under the Sixteenth Amendment, ratified in 1913, the federal government imposed and administered the first income tax in peacetime.[99] During World War I, Congress maintained a robust income-tax regime—taxing marginal income at 77% in 1918—and a strong fiscal apparatus to wage a global war.[100] The 1920s saw consolidation. Andrew Mellon, who headed the Treasury Department for most of the 1920s, and other Republican officials dismantled the "steeply progressive" tax-rate structure, reducing the highest marginal tax rate to 25% by 1925 while repealing the excess-profits tax.[101] But they could not fully retrench the wartime fiscal state or the administrative framework that enabled a progressive income tax.[102] All this happened while economic inequality climbed, reaching a crescendo by the late 1920s.[103]

It was against this background that Congress started discussing publicity in 1921 and enacted, as part of the Revenue Act of 1924, a provision for public

[95] Revenue Act of 1867, ch. 169, §§ 13–14 Stat. 471, 477–80; Pollack, *supra* note 52, at 327.

[96] Revenue Act of 1870, ch. 255, § 11, 16 Stat. 256, 259 (prohibiting the publication of any information from "Income returns" except "general statistics"); *id.* § 6, 16 Stat. at 257 (levying an income tax of 2.5% for 1870 and 1871, and "no longer"); *id.* § 8, 16 Stat. at 258 (providing for an exemption amount of $2,000). The $2,000 exemption amount meant that only 74,775 individuals (fewer than 0.2% of the U.S. population) paid income-taxes in 1870. *See* ANNUAL REPORT OF THE COMMISSIONER OF INTERNAL REVENUE ON THE OPERATION OF THE INTERNAL REVENUE SYSTEM FOR THE YEAR 1872, at VI (Washington, Government Printing Off. 1872).

[97] Pollack, *supra* note 52; MEHROTRA, *supra* note 41, at 3, 7 tbl.1.1, 72 tbl.1.1 (describing "customs duties and excise taxes on alcohol and tobacco" as "the two dominant sources of late-nineteenth-century federal revenue").

[98] MEHROTRA, *supra* note 41, at 8; Brownlee, *supra* note 47, at 93-123.

[99] Revenue Act of 1913, ch. 16, 38 Stat. 114.

[100] *See* Revenue Act of 1918, ch. 18, §§ 210–211, 40 Stat. 1057, 1062–64; MEHROTRA, *supra* note 41, at 32.

[101] MEHROTRA, *supra* note 41, at 33; Revenue Act of 1926, ch. 27, §§ 210–212, 44 Stat. 9, 21–23.

[102] MEHROTRA, *supra* note 41, at 349–408.

[103] *See infra* notes 147–148 and accompanying text (discussing economic inequality in the 1920s).

inspection.[104] Instead of providing access to *all* return information, Congress directed the Commissioner of Internal Revenue to "prepare[] and ma[k]e available to public inspection" lists containing taxpayers' names and the amounts of income tax paid by each.[105] Leading newspapers soon started reporting on the income-tax liabilities of the ultra-wealthy of the time: J.D. Rockefeller, for example, paid over $7 million of income taxes in 1924.[106]

Transparency of individuals' income-tax liabilities was a political compromise and the product of persistent advocacy for full disclosure. Throughout the early 1920s, progressive lawmakers called for both public and congressional access to tax records. This legislative debate was far more extensive than during the Civil War and reflected four aspects of an egalitarian commitment to fiscal governance: (1) a constitutional baseline for tax returns to be public records; (2) the instrumental democratic value of tax transparency; (3) the potential for transparency to curb government abuse of selective release of information; and (4) a distinction between tax evasion and tax avoidance, as well as the capacity of transparency to remedy both.

First, progressive lawmakers argued that tax publicity, rather than confidentiality, was the baseline in a political community of equals. Benjamin Harrison, a former President, laid the foundation for this view at a speech that he gave in 1898 at the Union League Club in Chicago.[107] In this speech, *The Obligations of Wealth*, Harrison noted how "accumulated property and corporate power" had "submerged" the country's commitment to "equality of opportunity and right."[108] But instead of "indiscriminate denunciation of the rich," Harrison argued that the "security of wealth" was conditional upon accepting the associated fiscal responsibility: "Equality" was "the foundation stone of our government structure," and demanded a "doctrine of a proportionate and ratable contribution to the cost of administering the Government."[109] That is, Harrison did not see market, pre-tax distribution of resources as determinative. For the generation and maintenance of

[104] *See* 60 CONG. REC. 7364–74 (1921); Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293.

[105] Revenue Act of 1924, § 257(b), 43 Stat. at 293.

[106] *Income Tax Returns Made Public; J.D. Rockefeller Jr. Paid $7,435,169; Ford Family and Company Pay $19,000,000*, N.Y. TIMES, Oct. 24, 1924, at 1.

[107] *Harrison on Tax Dodging: Evasion of Obligations to the State a Universal Disgrace Destructive to Individuals and Communities—Patriots Must Seek Remedy*, N.Y. TIMES, Feb. 23, 1898, at 3.

[108] *Id.* During this period, lawmakers also called for the transparency of corporate information. *See* Marjorie Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 72-82 (1990); Steven A. Bank & Ajay Mehrotra, *Corporate Taxation and the Regulation of Early Twentieth-Century American Business*, *in* THE CORPORATION AND AMERICAN DEMOCRACY 177 (Naomi Lamoreaux & William Novak eds., 2017).

[109] *Id.*

wealth itself were predicated on the state's provision of security and government services.[110] He therefore called for a "system that shall equalize tax burdens." Central to this system was transparency.[111] Harrison asserted:

> We have treated the matter of a man's tax return as too much of a personal matter. We have put his transactions with the State on much the same level as his transactions with the bank[]. Each citizen has a personal interest, a pecuniary interest, in the tax return of his neighbor. We are members of a great partnership, and it is the right of each to know what every other member is contributing to the partnership []. It is not a private affair: it is a public concern of the first importance.[112]

Harrison thus saw tax transparency as integral to egalitarian fiscal governance. Progressive lawmakers shared this vision as they pushed for a publicity provision in Congress. In 1921, Senator Robert La Follette proposed a publicity amendment to the Revenue Act of 1921 while heavily quoting from *The Obligations of Wealth*.[113] (La Follette was a key politician of the Progressive Era, and championed inter alia the regulation of railroads and utilities.[114]) Like Harrison, La Follette contended that "our individual covenant as citizens with the State" demanded proportionate contribution to governance costs.[115] This meant a baseline norm of tax transparency, that is, "a cardinal principle" in government of "absolute open publicity."[116] La Follette noted that Government records should be,

[110] Modern scholars have made similar (and more developed) versions of this argument. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 8 (2002) (arguing that tax burdens must be assessed as part of the overall system of property which government services help to create); *see also* Taisu Zhang & John D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 YALE L.J. 1970, 1970 (2023) (arguing that the rise of modern business corporations "requires the support of a powerful state with the geographical reach, coercive force, administrative power, and legal capacity necessary to enforce the law uniformly among the corporation's various owners"). Progressive lawmakers shared Harrison's view: "[S]ecurity of property rests upon property bearing its fair share of taxation." 60 CONG. REC. 7366 (1921) (statement of Sen. La Follette).

[111] *Harrison on Tax Dodging*, *supra* note 107.

[112] *Id.*

[113] 60 CONG. REC. 7372–74 (1921); *see* Revenue Act of 1921, ch. 136, 42 Stat. 227.

[114] *Robert La Follette: A Featured Biography*, U.S. SENATE (2024), https://www.senate.gov/senators/FeaturedBios/Featured_Bio_LaFollette.htm; *see also infra* notes 133–137 (discussing analogies between ultra-wealthy taxpayers and public utilities put forth by supporters of tax transparency in 1924).

[115] 60 CONG. REC. 7373 (1921) (statement of Sen. La Follette).

[116] *Id.* at 7365 (statement of Sen. La Follette); *see also id.* at 7366 (statement of Sen. La Follette) ("[I]t is a fundamental proposition of government that all matters pertaining to the Government

and in general were, open to public scrutiny, criticizing the statutory exception for privacy in *tax* enacted by the Revenue Act of 1913.[117] He therefore proposed to amend the statute to provide that income-tax filings "shall constitute public records and be open to inspection as such under the same rules and regulations as govern the inspection of public records generally."[118]

This effort to put access to tax returns on the same footing as other public records did not meet with initial success. La Follette's publicity amendment failed in the Senate by a vote of 33-35.[119] Three years later, progressive lawmakers renewed their call for transparency. As this Section will explain, the political landscape shifted in 1924 and featured a bitter, personal fight between Congress and the executive branch, in particular Treasury Secretary Andrew Mellon.[120] This fissure helped unite Congress to pass a limited publicity provision, and proponents again started with a foundational distrust of any secrecy in government. Speaking on the House and Senate floors, lawmakers noted that tax transparency was integral to a "republic" and the "democratic form of government." [121] Tax returns were "inherently public records," and their confidentiality deviated from the baseline of open and transparent governance.[122] "The burden of proof," therefore, "lie[d] with those who oppose publicity" and public scrutiny of income-tax records.[123] In this regard, lawmakers often analogized tax administration to exercises of the judicial power. Federal courts maintained legitimacy by adjudicating on the basis of open records (and thus by its accountability to "an enlightened public conscience").[124] So too in fiscal governance, especially in the wealthy's transactions with the federal government.

Lawmakers grounded transparency in not only democratic governance but also constitutional text. Speaking on the Senate floor, Kenneth McKellar argued that "[p]ublicity of tax returns" cohered with "the very letter of the Constitution."[125] He pointed to the Appropriations Clause, which requires Congress to publish "[a]

should be open to the inspection of the public, and I believe that when applied to tax returns it will work a very great reform . . . .").

[117] *See infra* notes 149–150 and accompanying text; Revenue Act of 1913, § II G.(d), 38 Stat. at 177.

[118] 60 CONG. REC. 7365 (1921) (proposed amendment to § 257 of the Revenue Act of 1913).

[119] *Id.* at 7374.

[120] *See infra* notes 152–159 and accompanying text.

[121] 65 CONG. REC. 9405 (1924) (statements of Sen. Caraway and Sen. Norris).

[122] 65 CONG. REC. 7682, 7684 (1924) (statement of Sen. McKellar) ("Tax claims, the most important of all claims to our citizens, are alone singled out to be determined in secret.").

[123] 65 CONG. REC. 7688 (1924) (statement of Sen. Copeland).

[124] 65 CONG. REC. 7690 (1924) (statement of Sen. Reed).

[125] 65 CONG. REC. 7679 (1924) (statement of Sen. McKellar).

regular statement and amount of the receipts and expenditures of all public money . . . from time to time."[126] By way of historical context, the federal government was starting to issue large amounts of refunds to income-tax payers during this time. In 1923, the Treasury Department refunded over $100 million, roughly 8% of the total federal receipts from income and profits taxes.[127] Lawmakers complained about the secrecy of these refunds, noting the possibility of corruption, bureaucratic incompetence, and regulatory capture.[128] After all, one of the wealthiest men of the time, Andrew Mellon, headed the Treasury Department.[129] But they also made the broader claim that *any* large tax refund—even if correctly made—fell within the meaning of "expenditures" subject to the constitutional accounting and disclosure requirement (and exempt from the statutory provision of secrecy).[130] This claim had some intuitive appeal. At the most basic level, an income-tax refund was an "expenditure[] of public money" disbursed from the Treasury Department.[131] But a correct refund was, in general, for previous overpayment of the tax, that is, money to which the federal government was never entitled.[132] To characterize all tax refunds as government expenditures was therefore a stretch.

[126] U.S. CONST. Art. I, § 9, cl. 7; 65 CONG. REC. 7679 (1924) (statement of Sen. McKellar); 65 CONG. REC. 4017 (1924).

[127] *See* ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR 1923, at 431 (showing total refunds of $123,992.820.94 in fiscal year 1923, and total receipts of $1,691,089,534.56 from the income and profits tax). Lawmakers claimed that the Treasury Department made $229 million of refunds in 1923. 65 CONG. REC. 7679 (1924) (statement of Sen. McKellar).

[128] 65 CONG. REC. 7682 (1924) (statement of Sen. McKellar) (opposing secrecy in the determination of enormous claims of tax refund, and charging that "rich taxpayers having a 'pull' can get refunds when the poorer taxpayers are unable to do it"); *id.* at 6521 (noting the possible role of "campaign contributions" and "corruption" in the distribution of tax refunds); *id.* at 4630 (statement of Sen. King) (observing that "[i]nferior and subordinate officials" held power over refund claims of millions of dollars); *see also id.* at 1204 ("There never was a greater representative of the moneyed interests in the Treasury Department than is there at this particular time.")

[129] M. Susan Murnane, *Selling Scientific Taxation: The Treasury Department's Campaign for Tax Reform in the 1920s*, 29 LAW & SOC. INQ. 819, 819 (2004).

[130] *See, e.g.*, 65 CONG. REC. 4015 (1924) (letter from Sen. McKellar to Sec'y of Treas. Mellon) (asserting that a $4 million refund to an oil-refining corporation fell within the constitutional requirement of disclosure and outside of the secrecy provision of the Revenue Act of 1913).

[131] U.S. CONST. Art. I, § 9, cl. 7.

[132] Congress does not appear to have provided any refundable tax credits until the 1960s. *See* MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM (2019) ("The EITC was not the first refundable tax credit enacted by Congress—the first was a refundable gasoline tax credit, enacted ten years earlier in the Excise Tax Reduction Act of 1965.").

This peculiar notion of tax refunds rested on a nascent view of the (small-c) constitutional status of the wealthy. The few decades before 1924 saw immense expansion of economic activity and corporate power, as well as the rise of the federal machinery in antitrust and taxation to curb abuse and effect redistribution.[133] This transformation "compelled" Congress "to realize that great industries [] bec[a]me more and more important in their relations to the private citizens, more and more important in their relation to the Government itself."[134] The distinction between private affairs and public governance was one of degree, not of nature. And as the market power of corporations and industrialists (as well as their influence over the public fisc) grew, they became more like "public utilities" than private institutions.[135] Like other public utilities, they were "capable of great good and of great injury"—a feature that increases "the necessity . . . for a full advisement to the public" of their activities.[136] Wealthy taxpayers therefore played an outsized role in fiscal governance that subjected them to a heightened publicity requirement. Transparency accorded with the constitutional mandate of public accounting of government expenditures. Thus, at one point during the legislative debate, a representative suggested, at a minimum, a limited publicity provision for the tax returns of the wealthiest 100 taxpayers in the country.[137]

Second, in addition to a constitutional default, lawmakers ascribed to tax publicity an instrumental democratic value—it helped citizens deliberate on fiscal governance and legislators craft tax laws in an informed way. Lawmakers decried the "thousands of ways the real spirit of the law was being violated" through loopholes in the income tax,[138] but no one outside of the Bureau of Internal Revenue knew how.[139] Before the Revenue Act of 1924, the President and the Treasury

[133] *See* Herbert J. Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 107–20 (1989); Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793, 1857-58 (2005).

[134] 65 CONG. REC. 7690 (1924) (statement of Sen. Reed); *see also* K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1628-31 (2018).

[135] *Id.*; *see also* Steven A. Bank & Ajay Mehrotra, *Corporate Taxation and the Regulation of Early Twentieth-Century American Business*, *in* THE CORPORATION AND AMERICAN DEMOCRACY (Naomi Lamoreaux & William Novak eds., 2017) (discussing early efforts to regulate corporate power through taxation).

[136] *Id.*

[137] *Id.* at 2958 (statement of Rep. Garner).

[138] 65 CONG. REC. 9405 (1924) (statement of Sen. Norris).

[139] *See* 65 CONG. REC. 9405 (1924) (statement of Sen. Norris); *id.* at 7677 (statement of Sen. Norris) ("Nobody knows just to what extent [a recently discovered loophole] has been carried on in the past because of the secrecy of these returns. . . . No person anywhere outside of the

Department controlled the release of tax returns.[140] Congress had access to individual tax information only through specific requests to the President, and the request was not always granted.[141] In practice, this led to legislative ignorance about how tax policy worked on the ground.[142] Regarding income taxation, for example, members of Congress explained that they "d[id] not know whether Mr. Rockefeller or Mr. Ford or Mr. Mellon or any other taxpayer [was] paying his just proportion."[143] Congress was forced to discuss tax legislation "in the darkness" and without the benefit of "governmental experience."[144] Public inspection of tax returns would allow Congress to "legislate correctly" and to provide the "general public" with the "necessary accurate information" in political decision-making.[145] Lawmakers thus charged that "[s]ecrecy [was] a prime cause for failure to secure needed curative financial legislation."[146]

This instrumental democratic value was salient at the time. According to scholarly estimates, income inequality in the United States started to grow during the antebellum period, reaching a plateau after the Civil War and a crescendo by 1929.[147] One recent study attributes the ownership of roughly half of American wealth in the late 1920s to the top one percent of households.[148] Economic inequality enlarged the gulf between the wealthy and the poor, heightening the

Bureau itself knows to-day how many million dollars of taxation have been avoided by the taxpayers creeping through that one loophole.").

[140] Revenue Act of 1913, § II G.(d), 38 Stat. at 177; *see infra* notes 149–150 and accompanying text.

[141] *See infra* notes 165–177 and accompanying text.

[142] 65 CONG. REC. 2953 (1924) (statement of Rep. Frear) ("Today we have no means of access [to tax returns] except to go to the President of the United States after the Secretary of Treasury has determined what the rules are. Nobody ever goes or attempts to go."); *id.* at 1207 (statement of Sen. Norris) ("The Secretary of the Treasury has [the tax information], but it is locked up. We have not access and the people have not access to the records. We who are going to be called upon to pass a new law on the subject are kept in absolute ignorance as to what the experience under this law has shown during the time it has been on the statute books.").

[143] *Id.* at 2708 (statement of Sen. McKellar).

[144] *Id.* at 1208 (statement of Sen. Norris).

[145] 65 CONG. REC. 7677 (1924) (statement of Sen. Norris); *id.* at 7689 (statement of Sen. Reed).

[146] *Id.* at 648 (statement of Rep. Frear).

[147] *E.g.*, Gene Smiley, *A Note on New Estimates of the Distribution of Income in the 1920s*, 60 J. ECON. HIST. 1120, 1123 tbl.1 (2000); JEFFREY WILLIAMSON & PETER LINDERT, AMERICAN INEQUALITY: A MACROECONOMIC HISTORY 77 (1981).

[148] Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. ECON. PERSPS. 3, 10 fig.1 (2020).

former's civic duty to contribute to the state because of their ability to pay. This made access to income-tax records even more important for Congress and the public.

Third, lawmakers justified transparency on its potential to curb government abuse of selective release of information. Before the 1924 Act's publicity provision, the governing law featured a startling discrepancy between rhetoric and reality. Under the Revenue Act of 1913, income-tax returns "shall constitute public records and be open to inspection as such."[149] But the statute also provided that public inspection of tax returns was possible only by order of the President, under presidentially approved regulations promulgated by the Treasury Department.[150] Tax returns were therefore "public records" in name only, and the authority to grant access to tax returns rested entirely in the hands of the executive department. Members of Congress criticized this regime as "manifest subterfuge"—a regime that declared tax returns public records but in practice kept them secret from public scrutiny.[151]

This power asymmetry between Congress and the executive branch over tax returns fueled a bitter contest. Treasury Secretary Andrew Mellon led a campaign to reduce high surtax rates, relying on quasi-supply-side arguments that they discouraged investment and incentivized tax evasion.[152] On the other side was Congress, in particular Senator James Couzens, who accumulated significant wealth through his management of Ford Motor.[153] Like his progressive colleagues, Couzens opposed the reduction of surtaxes.[154] In the course of the debate over surtaxes, Couzens revealed that he had invested in tax-exempt securities issued by state and local governments.[155] Couzens argued that he had "prepaid" income taxes on those bonds in the form of a lower rate of return—in effect a tax subsidy for fiscal federalism.[156] But Mellon insinuated that Couzens's opposition to surtax reduction

[149] Revenue Act of 1913, § II G.(d), 38 Stat. at 177.

[150] *Id.* ("[A]ny and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.").

[151] 65 CONG. REC. 7684 (1924) (statement of Sen. McKellar).

[152] George K. Yin, *James Couzens, Andrew Mellon, the Greatest Tax Suit in the History of the World, and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 816 (2013); *see also* Murnane, *supra* note 129, at 827, 837 (2004). Mellon also led an effort to repeal the federal estate tax. *See* M. Susan Murnane, Andrew Mellon's Unsuccessful Attempt to Repeal Estate Taxes, Tax Notes (Sept. 7, 2005), https://www.taxnotes.com/tax-history-project/andrew-mellons-unsuccessful-attempt-repeal-estate-taxes/2005/09/07.

[153] Yin, *supra* note 152, at 814.

[154] *Id.* at 822–24.

[155] *Couzens Invites Mellon to Debate*, N.Y. TIMES, Jan. 13, 1924, at 3.

[156] *Id.*

stemmed from self-interest.[157] Exemption from high surtaxes was built into the pricing of the securities held by Couzens. If surtax rates dropped, so would the value of Couzens's investment. During one heated moment, one of Mellon's allies in Congress asked Couzens on the Senate floor whether Couzens had paid any income taxes in 1920–1924.[158] This startling question made Couzens, as well as other lawmakers, accuse Mellon of illegally leaking Couzens's tax returns, and using his access to them for political advantage.[159]

The feud between Mellon and Couzens thus bred suspicion of leaks by the Treasury Department. At the same time, Congress was attempting—in vain—to gain access to individuals' tax returns for legitimate ends. The Senate Committee on Public Lands was investigating bribes paid by oil companies to a former Secretary of the Interior in exchange for leases of oil fields at low rates.[160] This would become the Teapot Dome scandal, the most infamous example of government corruption before Watergate.[161] To complete its investigation, the Senate requested the income-tax returns filed by the lessees of the oil fields.[162] As discussed, under the Revenue Act of 1913, tax returns were "open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President."[163] Pursuant to this provision, the Senate resolved to request President Coolidge to direct Mellon, as Secretary of Treasury, to "turn over" to the Public Lands Committee the relevant income-tax returns.[164]

At first, President Coolidge refused the request and disclaimed any power to turn over tax returns to Congress.[165] Coolidge relied on a memorandum from the Department of Justice, which made two specious distinctions. First, the memorandum read heavily into the statutory language. Because tax returns were

[157] *Mellon Reproves Couzens on Taxes*, N.Y. TIMES, Jan. 16, 1924, at 2.

[158] 65 CONG. REC. 1203 (1924) (statement of Sen. Reed).

[159] *Id.* at 1204 (statement of Sen. Couzens). Lawmakers' discontent stemmed less from the act of disclosure than from the information *asymmetry* between the Treasury Department, which held the records, and Congress, which had little information about individual tax information. After all, Couzens himself had revealed his purchases of tax-exempt bonds. *See supra* notes 155-156 and accompanying text.

[160] *See id.* at 3220

[161] *E.g.*, The Oxford Companion to United States History 764 (Paul S. Boyer ed., 2001) (describing the Teapot Dome scandal as "one of the most sensational in American political history").

[162] S. Res. 180, 68th Cong. (1924); *see also* 65 CONG. REC. 3220 (1924).

[163] Revenue Act of 1913, § II G.(d), 38 Stat. at 177; *see supra* notes 149–150 and accompanying text.

[164] 65 CONG. REC. 3220 (1924).

[165] *Id.* at 3699 (recording a communication from the President to the Senate, in response to S. Res. 180, 68th Cong. (1924), on March 5, 1924).

"open to *inspection*" under Treasury regulations, the statute did not authorize the President to "turn over" any tax information.[166] While Congress could have viewed the returns in the Treasury Department, the President had no power to "furnish" them to the Senate Public Lands Committee.[167] This distinction between inspection and transmission was self-defeating: Recall that the Revenue Act of 1913 made tax returns "public records" but made them open to inspection only by order of the President.[168] If the Justice Department's distinction had been genuine, the clause making tax returns open to *inspection* only by order of the President would not have applied to *transmission* of tax returns to Congress. Instead, the transmission of tax returns to Congress would have fallen under the general provision of tax returns as "public records."[169] That is, the Senate Public Lands Committee would have been able to ask the Treasury Department to turn over the tax returns as they could any other public record. This result obviously ran contrary to the statutory regime of confidentiality (under the Revenue Act of 1913) and the executive branch's preferred policy.

The Justice Department relied on a further distinction in reading the regulations. The Treasury rules delegated the power over tax returns back to the President.[170] By executive order, President Harding had allowed "the head of an executive department (other than the Treasury Department) or of any other United States Government establishment" to request inspection of returns.[171] In its memorandum, the Justice Department concluded that "any other United States Government establishment" did not include Congress (or one of its chambers).[172] The Acting Attorney General contended that the word "other" must have limited "United States Government establishment" to executive departments or agencies, and that the phrase "head of a[] department" made the provision inapplicable to Congress.[173] This argument was again unsatisfying. The word "other" modified "United States Government establishment," which ordinarily would include

[166] Department of Justice, Memorandum *in re* Power of Senate to direct the President to Transmit to It Copies of Income-Tax Returns (1924), *reprinted in* 65 CONG. REC. 3700 (1924).
[167] *Id.*
[168] Revenue Act of 1913, § II G.(d), 38 Stat. at 177.
[169] *Id.*
[170] Treasury Regulation Article 1090, *in* REGULATIONS 62 RELATING TO THE INCOME TAX AND WAR PROFITS AND EXCESS PROFITS TAX UNDER THE REVENUE ACT OF 1921, at 279 (1922).
[171] Executive Order Dated January 24, 1922, *reprinted as* Treasury Regulation Article 1090, Inspection of Returns ¶ 12, *in* REGULATIONS 62 RELATING TO THE INCOME TAX AND WAR PROFITS AND EXCESS PROFITS TAX UNDER THE REVENUE ACT OF 1921, at 279, 281 (1922).
[172] *Id.*
[173] *Id.*

Congress.[174] The word "any" gestured toward a broad reading of the term, "United States Government establishment."[175] And Congress did have heads, for example, the Speaker of the House.[176] But because the Justice Department read "United States Government establishment" to exclude Congress, the executive order did not allow the President to provide any tax return information to the Senate Public Lands Committee.[177]

The executive branch's refusal to turn over tax returns angered many in Congress. Speaking on the Senate floor, lawmakers characterized it as "whimsical and trivial"—a "belabored attempt . . . to find some possible technicality" between inspection and transmission to obstruct the legitimate work of the Public Lands Committee.[178] The broader difficulty for Congress to obtain tax returns contrasted with (and was rendered particularly salient by) the Treasury Department's seemingly cavalier attitude in exposing Senator Couzens's tax information. Speaking on the House floor, one representative complained: "[T]he Senate of the United States could not go to the Treasury and look at a single tax return, or get the same information. Yet the Secretary of the Treasury took these secret returns of the Senator and made them public."[179] While the Treasury Department eventually provided the requested tax returns, this saga inevitably created a perception that the Executive used the statutory secrecy provision to impede the work of Congress.[180] Tax publicity was thus a matter of separation of powers. By equalizing information, it worked to preserve an equilibrium between the constitutional branches such that none can gain a competitive advantage through its superior access to tax records.

[174] *Id.*

[175] *Id.*; *see* United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976))).

[176] U.S. CONST. Art. I, § 2, cl. 5.

[177] The memorandum identified one remaining source of authority for the inspection of tax returns. The Revenue Act of 1921 empowered the Commissioner of Internal Revenue "to make all needful rules and regulations for the enforcement" of the income-tax act. Revenue Act of 1921, ch. 136, § 1303, 42 Stat. 227, 309. Pursuant to this provision, the Commissioner promulgated regulations that did allow the Treasury Department to *furnish* tax returns to other government entities. However, this provision only applied to U.S. Attorneys who needed the tax returns as evidence in a case or in preparation for litigation. Treasury Regulation Article 1091, *in* REGULATIONS 62 RELATING TO THE INCOME TAX AND WAR PROFITS AND EXCESS PROFITS TAX UNDER THE REVENUE ACT OF 1921, at 282 (1922).

[178] 65 CONG. REC. 3701 (1924) (statement of Sen. McKellar).

[179] *Id.* at 2959 (statement of Rep. Browne).

[180] *See* S. Res. 185, 68th Cong. (1924), *printed in* 65 CONG. REC. 3702 (1924); Yin, *supra* note 152, at 856 & n.366.

Finally, lawmakers noted publicity's revenue potential. They distinguished illegal noncompliance from tax evasion: The former was straight-up dishonesty or fraud, and public inspection of tax returns would deter it.[181] By contrast, the latter minimized the wealthy's tax burdens through legal means. (This nomenclature may strike the modern audience as strange. Contemporary scholars generally use "tax evasion" to refer to illegal, deliberate underpayment of taxes, and "tax avoidance" to refer to legal efforts that minimize tax liability. By contrast, lawmakers during the 1920s often used "evasion" to denote what modern scholars describe as "avoidance.") For example, speaking in favor of full tax publicity, Senator Copeland pointed to "an accumulation of evidence [of] an evasion of the *spirit* of our tax laws."[182] Similarly, Senator McKellar explained that the wealthy were evading the "manifest purpose" of the federal income tax. By "evasion of taxes," he meant *not* that "men are doing dishonest or illegal things to escape taxation," but that the wealthy had "legally [] taken advantage of" Congress's "lack of power to reach them and the [tax] deductions" allowed under the Revenue Acts.[183]

Especially thorny was the issue of surtaxes: additional marginal taxes on income above a high exemption amount.[184] Led by Secretary Mellon, the Treasury Department had repeatedly proposed to reduce the surtax rates, in part on the ground that high surtax rates—as high as 50% under the Revenue Act of 1921—incentivized tax evasion.[185] But lawmakers had a different perspective. They thought that the Treasury Department got it backwards: Evasion of high surtax rates was not a reason to eliminate surtaxes.[186] Instead, it should prompt the government to minimize tax evasion by the rich.[187] And publicity of returns would allow Congress to close the loopholes that enable such evasion.

Underlying this conception of tax evasion was a commitment to fairness in fiscal policy. Like former President Harrison, progressive lawmakers recognized the economic inequality of their time, and advocated the use of tax instruments to "adjust [the] burdens of government" and compel "great wealth [to make its] fair contribution."[188] This commitment motivated the adoption of the income tax itself,

[181] 65 CONG. REC. 1209 (1924) (statement of Sen. Norris).
[182] *Id.* at 7688 (statement of Sen. Copeland).
[183] *Id.* at 1204 (statement of Sen. McKellar).
[184] The Revenue Act of 1921, for example, imposed surtaxes starting at 1% on income between $6,000 and $10,000, rising up to 50% on income above $200,000. *See* Revenue Act of 1921, § 211(a)(1), 42 Stat. 227, 237; Roy G. Blakey, *The Revenue Act of 1921*, 12 AM. ECON. REV. 75, 81 (1922).
[185] *See* Yin, *supra* note 152, at 815.
[186] 65 CONG. REC. 2959 (1924) (statement of Sen. Browne).
[187] *Id.* at 1204 (statements of Sen. McKellar and Sen. Reed).
[188] *Id.* at 647 (statement of Rep. Frear).

which was designed as a "substitute" for the "personal-property tax" and meant to reach the property holdings of the wealthy.[189] Lawmakers defended the progressive nature of income taxation—and the high surtax rates—on the ground that they could not be passed onto ordinary workers and consumers.[190] Given the perception that the incidence of high marginal tax rates fell on the wealthy, some elevated the redistributive function of income taxation to constitutional status and called for its "preserv[ation] as a part of our fundamental law."[191] Clever lawyers can read the statutory *text* to minimize surtax burdens for their wealthy clients.[192] But the "*spirit*" or the "manifest purpose" of the regime of federal income taxation was to effect a fair distribution of resources that reflected citizens' civic fiscal duties and their divergent abilities to bear the costs of governance.[193] Wealthy taxpayers' deviation from the redistributive norms inherent in the statute therefore warranted disclosure.[194] This view reflected two other grounds for transparency which this Section has already discussed: Publicity of returns served an instrumental democratic value by helping Congress legislate with knowledge. And wealthy taxpayers, with their influence over fiscal governance, were akin to public utilities subject to heightened requirements of disclosure.[195] Lawmakers thus concluded: "Publicity is the only way to bring about a fair and equitable adjustment of income taxes."[196]

[189] *Id.* at 2960 (statement of Rep. Nelson).

[190] This claim made more sense in the context of the fiscal tools in the early 1920s: The income tax was in its infancy, and the federal government otherwise relied on excise and tariffs—forms of consumption taxation whose costs could easily be passed onto to consumers. *See, e.g.*, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR 1921, at 12 (1922). Some lawmakers also voiced the fear that the wealthy was campaigning to replace income taxes with sales taxes. *See* 65 CONG. REC. 2449 (1924) (statement of Rep. Dickinson); *see also id.* at 649 (statement of Rep. Frear) (criticizing the Mellon tax-reduction plan and the Supreme Court's decision in *Eisner v. Macomber*, 252 U.S. 189 (1920), which held pro rata stock dividends constitutionally untaxable, for "emasculat[ing]" and "weaken[ing]" the income tax).

[191] *Id.* at 2449 (statement of Rep. Dickinson).

[192] *See* 60 CONG. REC. 7369 (statement of Sen. La Follette) (accusing the wealthy of "devis[ing] cunning plans to defeat the intent of legislation" based on "the advise of lawyers and tax experts").

[193] 65 CONG. REC. 1204, 7688 (1924) (statements of Sen. McKellar and Sen. Copeland); *see generally* Mehrotra, *supra* note 41.

[194] *See, e.g.*, *id.* at 2449.

[195] *See supra* notes 134–145 and accompanying text.

[196] 65 CONG. REC. 1211 (1924) (statement of Sen. McKellar).

Progressives' advocacy for tax transparency met resistance in Congress. Opponents criticized what they saw as the "saturnalia of inquisitorial publicity."[197] They relied heavily on the arguments of Cordell Hull, who as a representative from Tennessee drafted much of the federal income tax.[198] Hull had argued against publicity of returns in 1918, five years after the ratification of the Sixteenth Amendment.[199] He believed in the normative and distributive superiority of income taxation because it achieved "relative fairness . . . more accurately" than other tax bases or methods.[200] Hull was thus cautious to ensure the survival of the federal income tax at its very infancy, when its legitimacy and existence as a fiscal tool were contested.[201] He warned that publicity of returns could result in broader opposition to the income tax itself, because it could expose business strategies of the taxpayer.[202] And he questioned whether publicity would generate more revenue, pointing to defects in state and local property tax regimes (where tax information was in general public), as well as existing provisions for third-party reporting in the federal tax system.[203] Hull therefore saw publicity "unwise," as it might "seriously jeopardize," "discredit[,] or break down the income-tax system."[204] Opponents to publicity in Congress accordingly argued that the Treasury's disclosure of general statistics, instead of individual tax information, was enough.[205]

In the end, those arguments against publicity did not prevail, and progressive lawmakers succeeded in enacting a limited transparency provision, § 257(b), as part of the Revenue Act of 1924.[206] This provision required Treasury to make available for public inspection the amount of income taxes paid by individual taxpayers, and leading newspapers quickly published the tax liabilities of ultra-wealthy Americans at the time.[207]

[197] *Id.* at 9544 (statement of Rep. Threadway).

[198] *See* LAWRENCE ZELENAK, FIGURING OUT THE TAX: CONGRESS, TREASURY, AND THE DESIGN OF THE EARLY MODERN INCOME TAX 1–26 (2017).

[199] Letter from Cordell Hull on the Publicity of Income-Tax Returns, June 13, 1918, *reprinted in* 65 CONG. REC. 2956–57 (1924).

[200] *Id.* at 2956.

[201] *Id.* ("Both now and after the war it is extremely vital that [the income tax] should be safeguarded by the most effective means."). Lawmakers still felt that the income tax was threatened in 1924, as some campaigned to replace it with a sales tax. *See supra* note 190.

[202] Letter from Cordell Hull, *supra* note 199, *reprinted in* 65 CONG. REC. 2956 (1924).

[203] *Id.*, *reprinted in* 65 CONG. REC. 2957.

[204] *Id.*, *reprinted in* 65 CONG. REC. 2956.

[205] 65 CONG. REC. 2957 (statement of Rep. Mills).

[206] Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293.

[207] *Id.*; *see supra* notes 105–106 and accompanying text.

The 1924 Act's transparency provision did not stop the executive branch from its pursuit of secrecy. Soon after the newspapers' publication of individual tax information, the federal government indicted them in the district court.[208] The government alleged that it made the tax lists publicly available "not for the purpose of being printed in newspapers or public prints."[209] The district court dismissed the indictment, both on statutory grounds and because restraining newspapers from publishing what the federal government had already publicized violated the First Amendment.[210] The government appealed from the district court. Arguing before the Supreme Court, the Solicitor General relied on § 3167 of the Revised Statutes, which made it unlawful for anyone to publish tax information "in any manner whatever not provided by law." [211] One might expect that the 1924 Act's transparency provision provided precisely this authorization. After all, § 257(b) made available for public inspection both the taxpayer's name and her tax liabilities. [212] But the Solicitor General distinguished public *inspection* from *publication*, arguing that the right to *inspect* did not entail "the right to communicate the information so [inspected]."[213] The Supreme Court rejected this distinction, reminiscent of that between public inspection and transmission made by the Justice Department's memorandum to Congress. [214] Instead, the Court held that the question over tax-return privacy primarily belonged to legislative discretion. [215] And as a matter of statutory construction, Congress clearly liberalized § 3167's secrecy provision by making tax information open to public inspection.[216]

The transparency regime enacted by the Revenue Act of 1924 lasted for a couple of years. After the Court's decision in *Dickey* to allow newspaper publication of taxpayer information, the executive branch continued to oppose tax publicity

[208] United States v. Dickey, 3 F.2d 190 (W.D. Mo. 1924); United States v. Baltimore Post, 2 F.2d 761 (D. Md. 1924).

[209] *Id.*

[210] *Id.* at 192 (sustaining the defendants' demurrers to the indictment, on the grounds that "the name of the taxpayer and amount paid by him was not considered by the lawmakers such an important part of the return as to cover it with the cloak of secrecy," and that "[e]ven if the Congress sought to maintain a measure of secrecy upon this information, it not only exceeded its authority, but inpinged upon the First Amendment to the Constitution").

[211] United States v. Dickey, 268 U.S. 378, 379 (1925); Revenue Act of 1924, § 1018, 43 Stat. at 345 (re-enacting § 3167 of the Revised Statutes).

[212] Revenue Act of 1924, § 257(b), 43 Stat. at 293.

[213] *Dickey*, 268 U.S. at 380.

[214] *See supra* notes 165–169 and accompanying text.

[215] *Dickey*, 268 U.S. at 386. As the Court noted, no contention was made that the transparency regime invaded the constitutional rights of the taxpayer. *Id.* at 386. The Court thus decided the case on statutory grounds and assumed Congress's power to require disclosure of taxpayer data.

[216] *Dickey*, 268 U.S. at 388.

with vigor. In part because of persistent lobbying by Mellon (whose own tax liabilities were routinely exposed), Congress stopped requiring the publication of individual tax data as part of the Revenue Act of 1926.[217]

C. The Pink-Slip Requirement of 1934

Within a decade of its repeal, tax publicity returned to the table when the federal government faced a far different fiscal reality. Congress had enacted the transparency regime in 1924 amid a sizable budget surplus.[218] This triggered discussions about how best to distribute government largesse—for example, whether to cut surtax rates or issue bonus payments to World War I soldiers.[219] The healthy surpluses explained in part why progressive lawmakers heavily relied on egalitarian, democratic, and constitutional arguments in favor of transparency. By 1932, the budget surpluses—often totaling hundreds of millions in the 1920s—vanished. Instead, the Treasury Department ran enormous deficits throughout the Great Depression, surpassing $3 billion in 1934 (i.e., more than the total federal revenues received during that year), because of both declining receipts and increased spending as part of the New Deal.[220]

Fiscal constraint thus resurrected tax publicity. The legislative debate reflected continuity from the discussions in the early 1920s and featured some of the same progressive proponents of publicity. Lawmakers again pointed to the "fundamental," "constitutional right" to public inspection of tax returns and drew a baseline of transparency for all records that document the federal government's fiscal decisions.[221] According to its supporters, publicity served an epistemic

[217] Revenue Act of 1926, ch. 26, § 257(e), 44 Stat. 9, 52; *see Andrew W. Mellon Paid $1,173,987 Tax; Brother of Secretary of the Treasury Paid $348,646 and a Nephew $225,834*, N.Y. TIMES, Oct. 25, 1924, at 2; REVENUE REVISION, 1925: HEARINGS BEFORE THE COMMITTEE ON WAYS & MEANS, HOUSE OF REPRESENTATIVES 8 (1925) (statement of Andrew W. Mellon, Sec'y of Treas.) (characterizing the tax publicity provision under the Revenue Act of 1924 as "utterly useless"); Blank, *supra* note 32, at 277.

[218] *See Historical Table 1.1: Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2028*, WHITE HOUSE (2023), https://www.whitehouse.gov/omb/budget/historical-tables (showing a federal surplus of $509 million in 1921, growing to $1,155 million in 1927).

[219] 65 CONG. REC. 647 (1924) (discussing the estimated $310 million Treasury surplus, Mellon's tax-cuts plan, and bonus payments to soldiers); *see also* Anne L. Alstott & Ben Novick, *War, Taxes, and Income Redistribution in the Twenties: The 1924 Veterans' Bonus and the Defeat of the Mellon Plan*, 59 TAX L. REV. 373, 411-20 (2006).

[220] *Historical Table 1.1.*, *supra* 218 (showing a deficit of $3,586 million in 1934, and total federal receipts of $2,955 million).

[221] 75 CONG. REC. 5939 (1932) (statement of Rep. Peavey); *see* 75 CONG. REC. 6972 (1932) (statement of Rep. Connery) (contending that the public is "entitled" to "all the knowledge about [income-tax] returns" like committee votes and deliberations in Congress); 78 CONG. REC.

function in a democracy, enabling all citizens to see the extent of economic inequality and whether wealth fulfilled its civic duty to bear tax burdens in accordance with its ability to pay.[222] As in 1924, members of Congress appealed to separation of powers and the executive branch's abuse of its superior knowledge of tax information. They again accused Mellon of "making large refunds to himself and to his own companies," and blamed the Treasury Department for dumping "truckloads" of paperwork "for the deliberate purpose of preventing" congressional investigation.[223] Because the federal government ran large deficits during the Great Depression, lawmakers emphasized the potential revenue gains from tax publicity. They contended that publicity would "force [] honest and adequate [reports] of incomes," deter taxpayers from hiring accountants and lawyers "skilled in the art of tax-law evasion," result in "billions" of additional revenue, and foster the citizens' "recognition of public duty."[224] By contrast, tax secrecy was "a badge of permission to commit fraud," and put the government's revenue collection in "the same position as a blind man passing around the hat."[225]

Proponents of transparency thus put forth egalitarian, constitutional, and revenue-based arguments like those articulated in 1924. Opponents, on the other hand, developed rather different objections. As discussed, hostility to tax publicity in 1924 rested on the intellectual foundations laid by Cordell Hull.[226] Hull was both

946 (1934) (statement of Rep. Patman) ("[P]ublic funds should be collected and disbursed in a way that will permit them to be subject to public inspection."); 78 CONG. REC. 2601 (1934) (statement of Rep. Patman) ("[T]he Government should deal with its taxpayers in an open and above-board fashion[, and] no secrecy should be allowed either in the expenditure or collection of public money.").

[222] *See, e.g.*, 75 CONG. REC. 6972 (1932) (statement of Rep. Connery) ("[A]nything which would shed a little light for the benefit of the American people on the amounts which are paid into the Treasury of the United States . . . certainly can not do any harm but will give the people an opportunity to determine just where the concentration of wealth in the United States is.").

[223] 78 CONG. REC. 2515 (1934) (statement of Rep. Patman); *see also id.* at 2600 (alleging that it would take twenty-five years for the Joint Committee on Taxation to investigate one case of refund, given the enormous amount of record that the Treasury Department sent to Congress); 78 CONG. REC. 6553 (1934) (statement of Sen. Couzens) (accusing the Bureau of Internal Revenue of discriminatory applications of tax rulings).

[224] 75 CONG. REC. 5939 (1932) (statement of Rep. Peavey); 77 CONG. REC. 5419 (1933) (statement of Sen. La Follette); 78 CONG. REC. 2434 (1934) (statement of Rep. Lewis); 78 CONG. REC. 2600 (1934) (statement of Rep. Patman); *see* Steven A. Bank, When Did Tax Avoidance Become Respectable?, 71 Tax L. Rev. 123, 131 (2017) (documenting the rise of the tax-avoidance industry during the 1920s and 1930s, when "creative tax lawyers and accountants focused on observing the letter, but not the spirit of the law").

[225] 78 CONG. REC. 946 (1934) (statement of Rep. Patman); 78 CONG. REC. 2521 (1934) (statement of Rep. Frear).

[226] *See supra* notes 198–205 and accompanying text.

concerned with the survival of income taxation and unconvinced as to publicity's revenue potential, at least in 1918.[227] By 1932, opponents to publicity took a populist turn and focused on the potential abuse of transparency regimes in far-fetched scenarios that captured the imagination of ordinary people. Publicity could, for example, "embarrass" businessmen engaged in unprofitable activities and expose others to "blackmail."[228] Taxpayers would be "hounded by bond and stock salesmen, promoters [] trying to get a commission," as well as "every panhandler in America, every soliciting organization in America, . . . every organization looking for a hand-out, [and] even [their] relatives" greedy for their fortune.[229]

At first, progressive lawmakers succeeded. The Revenue Act of 1934 provided for a limited transparency regime. It directed all taxpayers to file along with their tax returns pink-colored forms—the so-called "pink slips"—which contained the following information: (1) names and addresses; (2) total gross incomes; (3) total deductions; (4) net incomes; (5) total amount of tax credits; and (6) taxes payable.[230] The Act then directed the Commissioner of Internal Revenue to make the pink slips "available to public examination and inspection" for at least three years since filing.[231] The statutory regime therefore did not provide for full transparency as lawmakers called for.[232] But it imposed a broader disclosure requirement than the Revenue Act of 1924, which publicized only taxpayers' names and income-tax liabilities.[233]

Congress repealed the pink-slip requirement before it went into effect.[234] As documented by other scholars, a group called the Sentinels of the Republic ran a tenacious campaign against publicity.[235] Like congressional opponents to publicity (but in a cruder style), the Sentinels took advantage of populist arguments that preyed on everyday fears. They predicted, for example, that "criminal racketeers,

[227] Letter from Cordell Hull, *supra* note 199, *reprinted in* 65 CONG. REC. 2956 (1924).

[228] 75 CONG. REC. 2602 (1934) (statement of Rep. Treadway).

[229] 75 CONG. REC. 6792 (1932) (statement of Rep. O'Connor); 78 CONG. REC. 2602 (1934) (statement of Rep. Treadway)

[230] Revenue Act of 1934, ch. 277, § 55(b), 48 Stat. 680, 698.

[231] *Id.*

[232] 78 CONG. REC. 6545 (1934) (statement of Sen. La Follette) ("[T]he examination of a statement showing a man's name and how much taxes he has paid does not reveal any material facts. The individual making out his return knows full well that no question as to how he has computed his tax or what devices he may have used to reduce it [is] revealed.").

[233] *See supra* Section I.A.2.

[234] *'Pink Slip' Repeal Is Voted by Senate; Count Is 53-16 on Measure, Already Passed by House, to Ban Tax Publicity*, N.Y. TIMES, Mar. 29, 1935, at 1 (noting that the first set of pink slips, filed along with the income-tax returns for 1934, "will never be made public").

[235] Kornhauser, *supra* note 24, *passim*.

kidnappers[,] and gangs of the underworld" would descend on ordinary taxpayers and render them victims of heinous crimes.[236] The reference to and focus on kidnapping were designed to capture the public's attention when the Lindbergh kidnapping generated headlines and spurred legislative reform.[237] The irony, of course, was that only the wealthy was ever subject to any disclosure requirements—whether in 1864, 1924, or 1934—as only a small minority of Americans filed any tax returns before the expansion of income taxation during World War II.[238] The Sentinels thus secured secrecy—a benefit for the wealthy—by appealing to ordinary citizens whose information would never have been disclosed on a pink slip.[239]

⋆ ⋆ ⋆

The discussion in this Part of the Article yields three main insights. First, at the most basic level, the history of transparency regimes shows that secrecy of tax return information has often been contested. During the nation's first income tax and the infancy of our current income tax, Congress enacted statutes providing for varying degrees of disclosure of tax information. Lawmakers—even opponents of publicity—never assumed that secrecy was the natural default.

It was not until the Tax Reform Act of 1976 that Congress firmly settled on a policy of confidentiality.[240] Curiously, the immediate trigger for this confidentiality regime was President Nixon's abuse of the executive branch's superior access to tax information. Nixon had repeatedly asked for his opponents' tax returns and pressured the IRS to audit them for his political gain.[241] By contrast, in the 1920s and 1930s, complaints about the tax-information asymmetry between

[236] *Id.* at 137; *accord* Petition to the Congress of the United States Protesting Against the Inquisitorial Publication of the Personal Incomes of Citizens, by Raymond Pitcairn on Behalf of the Sentinels of the Republic (Feb. 20, 1935), *printed in* 79 CONG. REC. 2267 (1935).

[237] Kornhauser, *supra* note 24, at 131; *see* Federal Kidnapping Act, Pub. L. No. 72–189, 47 Stat. 326 (1932) (codified in 18 U.S.C. § 1201).

[238] *See, e.g.*, ANNUAL REPORT OF THE COMMISSIONER OF INTERNAL REVENUE FOR 1872, *supra* note 96, at VI; INTERNAL REVENUE BUREAU, DEPARTMENT OF THE TREASURY, STATISTICS OF INCOME FROM RETURNS OF NET INCOME FOR 1924 INCLUDING STATISTICS FROM CAPITAL STOCK TAX RETURNS, ESTATE TAX RETURNS, AND GIFT TAX RETURNS 1 (1926).

[239] This is similar to the strategy adopted by opponents to the estate tax. *See generally* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2006).

[240] *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202, 90 Stat. 1520, 1667.

[241] Eileen Shanahan, *An Explanation: The Allegations Nixon's I.R.S. Interference*, N.Y. TIMES, June 14, 1974, at 12; *see generally* JOHN A. ANDREW III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON (2002).

Congress and the Executive fueled calls for transparency, not confidentiality.[242] But this coheres with one of the arguments that Part III will make, that disclosure of tax information is more appropriate for ultra-wealthy taxpayers.[243] Few paid federal income taxes in 1924, making transparency a ready option to resolve the information asymmetry between Congress and the President: The entire public would have access to the tax records of the wealthy few who filed returns.[244] Far more paid federal income taxes in 1976, making the general rule of confidentiality a more appropriate choice.[245]

Second, this Part of the Article uncovers powerful historical arguments in favor of disclosure. In particular, the extensive legislative record from the early 1920s shows that tax transparency is not merely a matter of revenue collection. Instead, lawmakers justified tax publicity with reference to an egalitarian vision of fiscal governance. They argued for a small-c constitutional baseline for the transparency of tax returns like any other public records, noted its instrumental value for democratic decision-making and discourse, and grounded transparency in separation of powers and executive overreach.[246] To be sure, lawmakers contended that publicity would result in significant revenue gains to the federal government, especially during the 1930s when it ran large deficits. But they also grasped the intrinsic, not only the consequentialist, value of transparency.

Finally, previous legislative advocacy for transparency mirrored today's debate in tax and redistributive policy. As in 1924, today's progressive lawmakers have seen—and found alarming—record economic inequality and its erosion of the norms constituting our society.[247] They have also accused the wealthy of not bearing a fair share of the costs of government due to both evasion and design flaws

[242] Of course, either resolves the problem of asymmetry: A baseline of confidentiality means neither Congress nor the President has access to tax information, while a baseline of transparency means everyone does. *See also supra* notes 149–180 and accompanying text.

[243] *See infra* Part III.

[244] Fewer than ten percent of the population would have been subject to the pink slip requirement in the 1930s. *See* Kornhauser, *supra* note 24, at 142.

[245] The IRS received more than eighty million tax returns in 1976. OFF. OF TAX ANALYSTS, U.S. TREASURY DEP'T, HIGH INCOME TAX RETURNS, 1975 AND 1976: A REPORT EMPHASIZING NONTAXABLE AND NEARLY NONTAXABLE INCOME TAX RETURNS 25 tbl.8 (1978), https://home.treasury.gov/system/files/131/Report-High-Income-1978.pdf.

[246] *Supra* Section I.B.

[247] *See, e.g.*, Jim Tankersley, *Warren Revives Wealth Tax, Citing Pandemic Inequalities*, N.Y. TIMES (Mar. 1, 2021), https://www.nytimes.com/2021/03/01/business/elizabeth-warren-wealth-tax.html.

in tax law.[248] Those precise concerns drove policymakers to seek transparency of returns during the infancy of our current income tax.[249] Further, selective release of public figures' tax information for political gain has drawn scrutiny today as in the 1920s. Hunter Biden, for example, has sued the IRS, and blamed the Republican-controlled House Ways and Means Committee, for a "public campaign to selectively disclose [his] confidential tax [] information."[250] At the same time, former President Trump has criticized the Democratic-controlled Ways and Means Committee for "weaponizing" his tax returns and releasing them to the public.[251] These concerns thus cut across the political spectrum today. That same fear of selective information leak led lawmakers in the 1920s to draw tax transparency as a constitutional baseline.

II. TAX TRANSPARENCY TODAY

This Part of the Article examines contemporary treatment of tax transparency. Section II.A describes the disclosure rules of Sweden, Finland, and Norway. This discussion serves three purposes. First, along with Part I's historiography, it shows feasibility. Disclosure was a recurring feature of our federal income tax and remains a critical component of Nordic tax administration. Contemporary data also provide practical insights into the design of transparency regimes for policymakers. Second, Nordic counties and the United States share a commitment to egalitarianism and transparency in governance. Such commitment might be more foundational in Nordic legal cultures and constitutionally mandated, but it is also embodied in super-statutes like the Freedom of Information Act in the United States.[252] Section II.A's discussion therefore fleshes out how this commitment translates into regulatory regimes, enacted through political systems different from the United States. Third, Nordic countries have grounded tax transparency—as did lawmakers in 1924 and 1934[253]—in democratic values like open governance rather than compliance. This accentuates the lacuna in contemporary

[248] Jonathan Weisman & Alan Rappeport, *An Exposé Has Congress Rethinking How to Tax the Superrich*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/06/09/us/politics/propublica-taxes-jeff-bezos-elon-musk.html.

[249] *See supra* notes 107–118 and accompanying text.

[250] Complaint at 4, Biden v. IRS, No. 1:23-cv-02711 (D.D.C. Sept. 18, 2023).

[251] Jim Tankersley, Susanne Craig & Russ Buettner, *Trump Tax Returns Undermine His Image as a Successful Entrepreneur*, N.Y. TIMES (Dec. 30, 2022), https://www.nytimes.com/2022/12/30/us/politics/trump-tax-returns.html.

[252] *Infra* notes 279-284.

[253] *See supra* Part I.

scholarship.[254] Section II.B offers a brief survey of the scholarly literature on tax privacy and fiscal citizenship.

A. *Contemporary Tax-Transparency Regimes*

While Congress settled on confidentiality in 1976,[255] Nordic countries today have robust transparency rules under which everyone's basic tax information is public. Importantly, tax disclosure in Finland, Norway, and Sweden is premised on a constitutional default of open governance. Sweden, for example, has required transparency of government records since the Freedom of the Press Act of 1766.[256] The current version of the Act was drafted in 1949 and is one of the four fundamental laws that form Sweden's modern Constitution. The Act provides for a general guarantee of "public access to official documents," defined broadly as any records held by (and received or drawn up by) a public authority.[257] This constitutional entitlement aims to "encourage the free exchange of opinion [and] the availability of comprehensive information."[258]

Similarly, Norway's Constitution confers "a right of access to documents of the State and municipal administration."[259] It explicitly puts the burden on the government to "create conditions that facilitate open and enlightened public discourse."[260] Transparency of government records is therefore an integral component of the state's performance of its constitutional duty to develop the

[254] *See infra* Section II.B.

[255] *See supra* note 240 and accompanying text.

[256] TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.) (Freedom of the Press Act of 1766); *see also* Jonas Nordin, *The Swedish Freedom of Print Act of 1776—Background and Significance*, 7 J. INT'L MEDIA & ENT. L. 137, 137 (2018).

[257] TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.) (1949:105) (Freedom of the Press Act of 1949) ch. 2, art. I, III; *see* REGERINGSKANSLIET (MINISTRY OF JUSTICE OF SWEDEN), THE CONSTITUTION OF SWEDEN (2013), https://www.government.se/contentassets/7b69df55e58147638f19bfdfb0984f97/the-constitution-of-sweden ("In most cases a state's constitution is contained in a single document. Sweden, however, has four[, including] the 1949 Freedom of the Press Act (which contains the principle of the public nature of official documents and rules about the right to produce and disseminate printed matter).").

[258] TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.) (1949:105) (Freedom of the Press Act of 1949) ch. 2, art. I.

[259] CONST. Art. 100, cl. 5 [CONSTITUTION] (Nor.) ("Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically elected bodies.").

[260] *Id.* Art. 100, cl. 6 ("It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.").

infrastructure of free expression.[261] This duty entails an "inclusive" design of a public sphere "with genuine access to information and opportunities for participation."[262] Finland's Constitution does the same: Article 12 provides that documents "in possession of" government institutions are public, to which all shall have access.[263]

Transparency is therefore the default in the Nordic countries. The constitutional right of access to public records covers a broad swath of data deposited with government institutions, and the state has an affirmative duty to facilitate information exchange and open discourse. Because transparency is crucial to the functioning of democracy, Nordic countries allow government secrecy only to achieve defined goals and through explicit statutory exemptions.[264] In Sweden, for example, the government may restrict the freedom of information only if necessary to achieve specific interests enumerated in the Constitution, including national security, fiscal policy, and "protection of the personal or economic circumstances of individuals."[265] Finland's Constitution provides that the state may, by statute, specifically restrict the publication of a document held by the government, but only "for compelling reasons."[266] Similarly, Norway allows the government to limit access to public documents to protect individual privacy or "for other weighty reasons."[267]

The Nordic constitutions thus balance the democratic guarantee of transparency against compelling government interests in secrecy, like the protection of personal information. This framework has produced three tax-transparency regimes that disclose important individual tax information, but not full returns, to

[261] NORWEGIAN MINISTRY OF CULTURE AND EQUALITY, THE NORWEGIAN COMMISSION FOR FREEDOM OF EXPRESSION REPORT 12 (2022), https://www.regjeringen.no/contentassets/753af2a75c21435795cd21bc86faeb2d/en-gb/pdfs/nou202220220009000engpdfs.pdf.

[262] *Id.*

[263] CONST. ch. 2, § 12(2) [CONSTITUTION] (Fin.) ("Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.").

[264] *See, e.g.*, REGERINGSKANSLIET (MINISTRY OF JUSTICE OF SWEDEN), *supra* note 257, at 3; *Openness in Sweden*, SWEDEN SVERIGE (Oct. 12, 2023), https://sweden.se/life/democracy/openness-in-sweden ("Openness and transparency are vital parts of Swedish democracy.").

[265] TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.) (1949:105) (Freedom of the Press Act of 1949) ch. 2, art. II (listing seven grounds that justify government restriction of public access to public documents); REGERINGSKANSLIET (MINISTRY OF JUSTICE OF SWEDEN), *supra* note 257, at 6 (noting that the freedom of information may be properly restricted by statute upon defined conditions).

[266] CONST. ch. 2, § 12(2) [CONSTITUTION] (Fin.).

[267] CONST. Art. 100, cl. 5 [CONSTITUTION] (Nor.).

the public. For example, Finland's Act on the Public Disclosure and Confidentiality of Tax Information first provides that tax information on "identifiable" taxpayers is confidential.[268] The Act then lays out exceptions to the rule of confidentiality, making public the following data: (1) taxable earned income; (2) taxable capital income and property; (3) income and net wealth tax;[269] (4) amount of withholding taxes; and (5) amount of tax refund or payment.[270] Similarly, Norway discloses its citizens' net income and wealth, as well as taxes paid, on a searchable internet database, organized by the names, post codes, and cities of the individual taxpayers.[271] The Norwegian Tax Administration balances the ease of online access to tax information with a deterrent: Anyone who inspects the tax information of an individual taxpayer will have her own identity disclosed to the taxpayer whose information has been accessed.[272]

As discussed, Sweden's Constitution explicitly allows the government to curtail disclosure to protect the "personal and economic circumstances" of individuals.[273] Sweden's Public Access to Information and Secrecy Act of 2009 ("PAISA") effects this constitutional provision. Similar to the Finnish statute, PAISA first mandates confidentiality for information about individuals' personal and financial circumstances held by the state in connection with tax

[268] Laki verotustietojen julkisuudesta ja salassapidosta [Act on the Public Disclosure and Confidentiality of Tax Information], L. No. 1346/1999, ch. 2, § 5 (Fin. 1999).

[269] Finland abolished its wealth tax in 2006. *Taxable Incomes: Documentation of Statistics*, STATISTICS FINLAND (2003), https://www.stat.fi/en/statistics/documentation/tvt; Sarah Perret, *Why Were Most Wealth Taxes Abandoned and Is This Time Different?*, 42 FISCAL STUD. 539, 540 (2021).

[270] Act on the Public Disclosure and Confidentiality of Tax Information, L. No. 1346/1999, § 5(1)–(6) (Fin. 1999); *see also* Äimä, *supra* note 25, at 3; *Public Information on Individual Income Taxes*, VERO SKATT (FINNISH TAX ADMINISTRATION) (Oct. 2, 2023), https://www.vero.fi/en/About-us/finnish-tax-administration/data-security-and-information-access/public-information-on-taxes/public-information-on-individual-income-taxes (making public individual taxpayers' earned income, capital gains, tax liability, withholding taxes, and tax payments or refunds).

[271] *Search the Tax Lists*, SKATTEETATEN (THE NORWEGIAN TAX ADMINISTRATION) (2023), https://www.skatteetaten.no/en/forms/search-the-tax-lists; Ken Devos & Marcus Zackrisson, *Tax Compliance and the Public Disclosure of Tax Information: An Australia/Norway Comparison*, 13 J. TAX RSCH. 108, 121 (2015).

[272] *See Search the Tax Lists*, *supra* note 271 ("You can also see who has accessed your information. If you access the tax information for a person, they can see that you have been searching for them.").

[273] *See supra* note 265; TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.) (1949:105) (Freedom of the Press Act of 1949) ch. 2, art. II.

administration.[274] However, full secrecy as to individual tax information contradicts Sweden's constitutional guarantee of public inspection of documents held by the state.[275] PAISA thus provides that all tax *decisions*, and the basis for determining tax liability, are public.[276] That is, the government's determinations of the taxpayer's income and tax liability are public, but sources of income (or of specific deductions) reported on the tax returns are confidential.[277] Further, if the government denies a taxpayer's deduction in an audit, it would have to disclose its decision explaining the denial and publicize information about the deductions that would otherwise be confidential.[278] The underlying principle is that the government must disclose the revenue agency's findings and decisions, whereas unprocessed information filed on the tax returns is confidential. As a result, the public has access to some of the most salient tax data, including the total amount of earned income, capital gain, and tax liability.

The Nordic countries have thus developed extensive regimes that disclose individuals' income, wealth, and tax liability to the public.[279] Importantly, they have not justified transparency on the ground that it would result in increased revenue and better compliance.[280] Instead, tax disclosure flows from a

[274] 27 ch. 1 § OFFENTLIGHETS OCH SEKRETESSLAG (Svensk författningssamling [SFS] 2009:400) (Swed.). For translations of relevant portions of PAISA, see Anna-Maria Hambre, *Tax Confidentiality in Sweden and the United States—A Comparative Study*, 43 INT'L J. LEGAL INFO. 165 *passim* (2015).

[275] *See* TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.) (1949:105) (Freedom of the Press Act of 1949) ch. 2, art. I, III; Hambre, *supra* note 274, at 198.

[276] 27 ch. 6 § OFFENTLIGHETS OCH SEKRETESSLAG (Svensk författningssamling [SFS] 2009:400) (Swed.); *see also Public Information*, SKATTEVERKET (SWEDISH TAX AGENCY) (2023), https://www.skatteverket.se/servicelankar/otherlanguages/inenglishengelska/moreonskatteverket/publicinformation.4.2106219b17988b0d2314cf.html (showing that "decisions on taxation" are public and not subject to the general rule of confidentiality).

[277] *See* Hambre, *supra* note 274, at 198.

[278] *Id.*; *see* Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 499 (2017).

[279] Japan has also mandated tax disclosure in the past. Between 1950 and 2004, Japan instituted a high-income taxpayer notification system, and posted the name, the address, and either the taxable income or the income-tax liability of select individual taxpayers for two weeks in bulletin boards of tax offices. As many as 6.9% of all taxpayers' information was made public each year. Japan abolished the notification system in 2005, but started mandating public disclosure of highly compensated corporate executives in 2010. *See generally* Makoto Hasegawa, Jeffrey L. Hoopes, Ryo Ishida & Joel Slemrod, *The Effect of Public Disclosure on Reported Taxable Income: Evidence from Individuals and Corporations in Japan*, 66 NAT'L TAX J. 571, 576–78, 579 n.17 (2013).

[280] Devos & Zackrisson, *supra* note 271, at 121 ("In the latest revision of the Tax Assessment Act (1980) it was argued that public disclosure of tax lists is contributing to transparency in the tax assessment, and to the fairness of the system; increased compliance was not explicitly

constitutional default of open public records and governance and channels democratic functions.[281] This open-governance basis for tax transparency is not foreign to the United States. As discussed, progressive lawmakers had grounded calls for tax publicity in the constitutional requirement of public accounting of federal receipts and expenditures.[282] Today, the Freedom of Information Act is a super-statute that entrenches a normative framework of transparency in not only fiscal but all matters of governance.[283] To be sure, the Nordic countries differ from the United States in their egalitarianism (manifested in, for example, robust social-welfare programs), their historical traditions of transparency, and their trust of government power.[284] But the core commitment to government transparency is one to which all democracies, including ours, aspire.

B. Scholarly Approaches

This Section surveys the existing literature on tax privacy and fiscal citizenship. First, scholars have criticized the current statutory guarantee of tax confidentiality, grounding their calls for transparency in compliance-based arguments.[285] They argue for the use of publicity as an effective "tool to attack intentional and unintentional non-compliance with the tax laws," characterizing privacy (at least as to tax information) as a "fading social norm" and IRS enforcement mechanisms as overly "intrusive" and "not sufficient."[286] These scholars reject the view that confidentiality encourages accurate reporting of income.

mentioned. . . . The transition from paper to electronic distribution [of the tax lists] was not primarily driven by any concerns about compliance, but rather as a consequence of the Norwegian government's digitalization strategy.").

[281] *See supra* notes 256–267 and accompanying text.

[282] *See supra* notes 131–137 and accompanying text; U.S. CONST. art. I, § 9, cl. 7.

[283] 5 U.S.C. § 552 (2018); *see* William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001); John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. ON REG. 579, 614–16 (2019); *see also* Vivian M. Raby, *The Freedom of Information Act and the IRS Confidentiality Statute: A Proper Analysis*, 54 U. CIN. L. REV. 605, 624-25 (1985).

[284] *Compare, e.g.*, *Public Trust in Government: 1958-2023*, PEW RSCH. CTR. (Sept. 19, 2023), https://
www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023; *with* Elsa Pilichowski, *Building Trust to Reinforce Democracy: Main Findings from the OECD Trust Survey*, OECD (July 13, 2022), https://www.oecd.org/governance/oecd-presentation-trust-report-launch-2022.pdf; *see supra* notes 256–263 and accompanying text.

[285] *See supra* note 30 (collecting examples of scholarly arguments in favor of tax transparency); *see also* George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115, 1124–40 (2014). For earlier debate, see, for example, Bittker, *supra* note 28; Archie W. Parnell, Jr., *The Right to Privacy and the Administration of the Federal Tax Laws*, 31 TAX LAW. 113 (1977). For a general overview, see Darby, *supra* note 28.

[286] Kornhauser, *supra* note 30, at 3, 4, 7; *see also* Mazza, *supra* note 30.

Instead, they contend and offer evidence that publicity could deter tax evasion and foster the social norms of voluntary compliance, thus resulting in revenue gains.[287] In their view, the knowledge of disclosure would increase the taxpayers' perceived risk of detection of any potential fraud and disincentivize underreporting of income.[288] And because people tend to abide by laws more if they perceive a high level of compliance by others—due to the operation of social norms—tax publicity would aid compliance by providing information on compliance rates and promoting trust in tax administration.[289] Transparency of full tax returns, however, could undermine that trust. Scholars have thus proposed limited disclosure of key data (or ranges) of all income taxpayers, including their incomes and tax liabilities.[290] They conclude that the "social auditing" instantiated in transparency regimes could serve as an "automatic enforcement device."[291]

Second, a different group of scholars and commentators has defended confidentiality on the grounds of both compliance and taxpayer privacy.[292] They dispute the value of publicity in facilitating revenue collection. Earlier arguments focused on the taxpayer-trust theory: Taxpayers entrust the state with private information on the expectation of confidentiality.[293] On this view, government

[287] *E.g.*, Mazza, *supra* note 30, at 1076; Linder, *supra* note 30, at 977; Bø, Slemrod & Thoresen, *supra* note 30, at 36; Laury & Wallace, *supra* note 30; *see also* Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 407 (1978); Paul Schwartz, *The Future of Tax Privacy*, 61 NAT'L TAX J. 883, 887-90 (2008).

[288] *E.g.*, Leandra Lederman, *Statutory Speed Bumps*, 60 STAN. L. REV. 695, 697 (2007) [hereinafter Lederman, *Statutory Speed Bumps*]. Ignorance of disclosure enables opportunities for tax evasion. *See* Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 IOWA L. REV. 1153, 1188–90 (2021).

[289] *See* Kornhauser, *supra* note 30, at 10; Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1468-75 (2003). Some scholars have described these social effects in terms of reciprocity. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003); Posner, *supra* note 30.

[290] *E.g.*, Joseph Thorndike, *Show Us the Money*, 122 TAX NOTES 148, 149 (2009); Kornhauser, *supra* note 30, at 21–22 (proposing to publicize the taxpayer's name, rough address, narrow income range, capital gains range, exclusions, deductions, credits, and tax rates).

[291] Thorndike, *supra* note 3, at 691; Anna Bernasek, *Should Tax Bills Be Public Information?*, N.Y. TIMES (Feb. 13, 2010), https://www.nytimes.com/2010/02/14/business/yourtaxes/14disclose.html (quoting Laurence J. Kotlikoff, Professor of Economics); *see also* Lederman, *supra* note 30, at 1457-62.

[292] *See supra* notes 32–33 (collecting examples of arguments in favor of tax privacy); *cf.* Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 455 (2017) (proposing privacy in *ex post* tax enforcement actions but transparency in *ex ante* tax rulings and agreements).

[293] The *locus classicus* of the taxpayer-trust theory is an argument made by Mellon to oppose the 1924 transparency regime. Mellon contended:

disclosure of individual tax data, instead of enlisting the public in tax enforcement, discourages taxpayers from submitting accurate information to the state in the first place.[294] More recently, scholars have turned to behavioral insights. They contend that disclosure could disincentivize tax compliance by revealing the extent of noncompliance to other taxpayers, who then reduce their own compliance levels.[295] By contrast, confidentiality allows the state to make salient instances of successful enforcement actions (e.g., those that result in criminal sanctions for tax fraud), without exposing its tax-enforcement weaknesses (e.g., the IRS's failure to audit or penalize underreporting of income).[296] The government could therefore exploit taxpayers' cognitive biases to maximize revenue collection. Further, taxpayers today submit a broad swath of personal information to the IRS, and scholars have defended tax confidentiality based on the state's obligation to safeguard individual

> While the government does not know every source of income of a taxpayer and must rely upon the good faith of those reporting income, still in the great majority of cases this reliance is entirely justifiable, principally because the taxpayer knows that in making a truthful disclosure of the sources of his income, information stops with the government. It is like confiding in one's lawyer.

Hearings on Revenue Revision 1925 Before the House Ways and Means Comm., 69th Cong. 8–9 (1925); *see also* OFF. TAX POL'Y, *supra* note 32, at 18–19; S. REP. NO. 94-938, at 317–18 (1976).

[294] *See* Blank, *supra* 32, at 280–82; Hatfield, *supra* note 28, at 606.

[295] *E.g.*, Blank, *supra* 32, at 322–26; Jonathan Bob, Philipp E. Otto & Nadja Wolf, *The Effect of Tax Privacy on Tax Compliance—An Experimental Investigation*, 26 EUR. ACCT. REV. 561, 577 (2017); *see also* Kahan, *supra* note 289, at 83; Lederman, *supra* note 289;Yair Listokin & David M. Schizer, *I Like To Pay Taxes: Taxpayer Support for Government Spending and the Efficiency of the Tax System*, 66 TAX L. REV. 179, 185–86 (2013) (discussing the literature on tax morale); *cf.* Michael Blumenthal, Charles Christian & Joel Slemrod, Do Normative Appeals Affect Tax Compliance? Evidence from a Controlled Experiment in Minnesota, 54 Nat'l Tax J. 125, 134-35 (2001). *But see* Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 700 (2009).

[296] Blank, *supra* 32, *passim*; *see also* Blank & Levin, *supra* note 33; Schenk, *supra* note 33. 26 U.S.C. § 6103(h)(4)(A) allows the federal government to disclose tax-return information in "judicial or administrative proceedings" to which the taxpayer is a party. Courts have read this provision to permit the government to disclose in press releases information already disclosed in previous judicial proceedings. *E.g.*, Lampert v. United States, 854 F.2d 335, 337 (9th Cir. 1988).

privacy and autonomy.[297] Part III of the Article discusses this literature in greater detail in connection with taxpayers' role as stakeholders.[298]

Third, an outgrowth of this debate focuses on the narrower question whether the tax records of public figures should be public. In partial response to former President Trump's refusal to release his tax returns, scholars and commentators have argued for the need of mandatory disclosure of presidential candidates' tax returns and financial data.[299] They have also contested Congress's power to release them to the public under existing law and constitutional constraints.[300]

Finally, beyond the debate over privacy and transparency as revenue-raising tools, tax scholars have begun a lively conversation about fiscal citizenship, that is, "the constellation of reciprocal rights and responsibilities" that bind individuals to the fiscal apparatus of the government.[301] Under this view, taxation forms an integral part of the social contract between individual citizens and the state: the former should make appropriate fiscal contributions based on their ability to pay, while the latter bear the reciprocal duty to ensure a fair and effective tax system.[302] Further, the voluntary nature of the income tax's self-assessment system fosters a beneficial tax consciousness and encourages civic engagement in the discourse about redistribution.[303] Scholars have in particular pointed to wars as times of shared sacrifice and heightened sensibility of the fiscal duties of citizenship.[304]

[297] *E.g.*, Hatfield, *supra* note 28, *passim*; James N. Benedict & Leslie A. Lupert, *Federal Income Tax Returns—The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 943–46 (1979); *see also* Hayes Holderness, *Taxing Privacy*, 21 GEO. J. ON POVERTY L. & POL'Y 1 (2013); Cynthia Blum, *The Flat Tax: A Panacea for Privacy Concerns?*, 54 AM. U. L. REV. 1241, 1242-43 (2005).

[298] Section III.A.2.

[299] *E.g.*, Thorndike, *Presidential Disclosure*, *supra* note 3; Blank, *supra* note 3; Hemel, *supra* note 3; Thorndike, *Challenge*, *supra* note 3.

[300] *E.g.*, Amandeep S. Grewal, *The President's Tax Returns*, 27 GEO. MASON L. REV. 439, 440 (2020); *see also* George K. Yin, *Preventing Congressional Violations of Taxpayer Privacy*, 69 TAX LAW. 103, 105-07 (2015).

[301] Thorndike, *supra* note 3, at 1725; *see supra* note 41 (collecting scholarly voices on fiscal citizenship).

[302] *E.g.*, Mehrotra, *Reviving Fiscal Citizenship*, *supra* note 41, at 946; MEHROTRA, AMERICAN FISCAL STATE, *supra* note 41, at 61–67; *see also The Fiscal Citizenship Project*, FISCAL CITIZENSHIP (2023), https://fiscal-citizenship.com (describing a new research initiative on fiscal citizenship).

[303] *E.g.*, ZELENAK, *supra* note 41, *passim*; Mehrotra, *Reviving Fiscal Citizenship*, *supra* note 41.

[304] Mehrotra, *Price of Conflict*, *supra* note 41, *passim*; Sparrow, *supra* note 41; *see* STEVEN A. BANK, KIRK J. STARK & JOSEPH J. THORNDIKE, WAR AND TAXES 1-2 (2008); Steven A. Bank, *When Did Tax Avoidance Become Respectable*, 71 TAX L. REV. 123, 128 (2017) (theorizing the public's tacit

As this survey shows, contemporary discussions of tax confidentiality focus (albeit not exclusively) on the question of compliance, that is, to what extent publicity regimes incentivize compliance with tax law, and whether the resulting revenue gains outweigh an intrusion into individual privacy. This focus contrasts with historical debates and contemporary disclosure regimes, both of which emphasize transparency as a (sometimes small-c) constitutional default critical to democratic and egalitarian fiscal governance.[305] Further, scholars treat the tax records of presidential candidates and elected officials as exceptions to the general rule of confidentiality, presumably on account of their significant political power. But this leaves unanswered the question whether others who exercise significant (for example, economic) power in the political community must also do so on the basis of transparency. Finally, while the fiscal-citizenship literature has theorized individual taxpayers' relationship with the fiscal state, it has often emphasized its attitudinal component.

III. TOWARD AN ANALYTICAL MODEL OF FISCAL CITIZENSHIP

This Part of the Article constructs an analytical model of taxpayers' dynamic interactions with the fiscal state. The model provides insights into the debate over tax confidentiality, and contributes to the discourse on fiscal citizenship. In contrast to prevailing scholarly approaches, it incorporates compliance as only one of the multiple reasons that counsel in favor of or against privacy of individual tax records. Further, it grounds demands for tax transparency in broader democratic and egalitarian values, thus cohering with the terms of the historical legislative debate uncovered in Part I, as well as the goals of contemporary tax-disclosure regimes described in Part II.[306]

Under this model, taxpayers play four different roles as they engage with the fiscal apparatus of a democratic regime: (1) They report nonpublic information to the state as they self-assess their income-tax liabilities;[307] (2) they fund the state by providing resources that pay the costs of governance;[308] (3) they are stakeholders in an egalitarian community who are entitled to claim fiscal benefits with dignity;[309] and (4) they shape the operation of tax policy on the ground by exercising their delegated discretion in interpreting tax law.[310] Section III.A examines the distinct

approval of tax avoidance today as compensation for the wealthy's fiscal sacrifice in the form of high marginal tax rates after the 1950s).

[305] *Compare* notes 285–297 and accompanying text, *with supra* Part I, Section II.A.

[306] *See, e.g.*, Sections I.B, II.A.

[307] *See infra* Section III.A.1.

[308] *See infra* Section III.A.2.

[309] *See infra* Section III.A.3.

[310] *See infra* Section III.A.4.

valences of privacy and transparency within each role. Further, the degree to which each taxpayer engages in these respective roles depend on two factors: (a) their own income and wealth level; and (b) the distribution of income and wealth within the fiscal community structured by federal taxation.[311] As this Part of the Article will show, transparency is more appropriate for ultra-wealthy taxpayers in times of heightened economic inequality.

A. *Taxpayers' Roles in a Democratic Regime*

1. *Taxpayers as Reporters of Nonpublic Information*

At the most basic level, taxpayers report nonpublic information to the state as they self-assess their income-tax liabilities. Under 26 U.S.C. §§ 6011–6012, all taxpayers must submit to the IRS annual statements of their incomes.[312] In practice, this means filing Form 1040, either electronically or by mail.[313] This two-page document (and additional schedules) require filers to report a broad swath of mostly financial information that determines how much income tax they must pay (or be refunded, if withheld taxes exceed overall liability). These data include identifying information like names, addresses, and social security numbers; filing status (e.g., single or married); data about net income, like wage, interest, dividends, annuities, Social Security benefits, and the standard or itemized deductions; data about taxes withheld and tax credits (e.g., the child tax credit or the earned income tax credit); and the amounts to be paid or refunded.[314]

Beyond the financial data reported on Form 1040, the IRS holds significant information about individual taxpayers in the form of supporting records filed in connection with their tax returns or disputes with the agency. This ranges from the mundane to the highly sensitive. For example, taxpayers who have wage income—roughly eighty percent of all filers—must include a W-2 statement that reveals the sources of their wage income (i.e., their employers).[315] Further, audited taxpayers who claim the medical-expense deduction might need to produce evidence that they

[311] *See infra* Section III.B.

[312] 26 U.S.C. §§ 6011–6012 (2018); *see* Rev. Rul. 2007-20; 2007-1 C.B. 863.

[313] *See* 26 CFR § 1.6011-1(b) (2023) (requiring taxpayers to report information on "prescribed forms").

[314] *Form 1040*, DEP'T OF TREASURY, INTERNAL REVENUE SERV. (2023), https://www.irs.gov/pub/irs-pdf/f1040.pdf

[315] Erica York & Michael Hartt, *Sources of Personal Income, Tax Year 2020*, TAX FOUND. (June 28, 2023), https://taxfoundation.org/data/all/federal/personal-income-tax-returns-pi-data; *About Form W-2, Wage and Tax Statement*, INTERNAL REVENUE SERV. (July 14, 2023), https://www.irs.gov/forms-pubs/about-form-w-2.

incurred those expenses for legitimate medical care, and that evidence could include hospital treatment records and doctors' notes describing their symptoms.[316]

Tax controversy reveals an even broader array of personal information. In one case, a transgender taxpayer claimed the medical-expense deduction for gender-affirming care.[317] To support her claim, the taxpayer revealed to the IRS intimate details about her early life, including her physiological traits at birth, her discomfort with her assigned sex, her affinity with women's clothing, and the anxiety and low self-esteem that resulted from the incongruence between her assigned sex and her gender.[318] In another case, the taxpayers claimed an exclusion for gains received from the sale of real property.[319] Because the Code excludes certain gains from sale of "principal residence" from gross income, taxpayers do not ordinarily report them on their tax returns.[320] However, whether a home is the taxpayer's "principal" residence (and therefore whether the taxpayer is entitled to an exclusion) entails a fact-intensive inquiry. Courts consider non-exhaustive factors like the taxpayer's place of employment, the "place of abode of the taxpayer's family members," and the locations of the taxpayer's banks, recreational clubs, and places of worship.[321] To show their entitlement to the principal-residence exclusion, taxpayers in that case revealed a host of details about their personal lives, including their family members' use of the hot tubs and extramarital sexual activities.[322] Beneath the surface of Form 1040 thus lies a deep repository of private individual information held by the IRS. This will not surprise viewers of the Academy-Award winning film, *Everything Everywhere All at Once*, who know well that IRS agents will chase

[316] *See* 26 U.S.C. § 213; *IRS Audits: Records We Might Request*, INTERNAL REVENUE SERV. (Mar. 2, 2023), https://www.irs.gov/businesses/small-businesses-self-employed/audits-records-request.

[317] O'Donnabhain v. Comm'r, 134 T.C. 34 (2010); *see* Hatfield, *supra* note 28, at 614–15.

[318] *O'Donnabhain*, 134 T.C. at 35–36.

[319] Farah v. Comm'r, No. 23412–05, 94 T.C.M. (CCH) 595, 2007 WL 4440980, at *1 (T.C. Dec. 19, 2007). For additional documentation of private information held by the IRS, see Hatfield, *supra* note 28, at 619–23.

[320] 26 U.S.C. § 121 (2018) ("Gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more."). The exclusion is currently limited to $500,000 for married taxpayers filing jointly. *Id.* § 121(b)(2)(A).

[321] Treas. Reg. § 1.121-1(b)(2) (2023); *see* Cohen v. United States, 999 F.Supp.2d 650, 669 n.6 (S.D.N.Y. 2014) (listing the factors under the Treasury Regulations).

[322] *Farah*, 94 T.C.M. (CCH) 595, 2007 WL 4440980, at *4; Brief for Petitioners at 29, 2007 WL 5113055, *Farah*, 94 T.C.M. (CCH) 595.

taxpayers through the multiverse to obtain receipts of karaoke machines bought by laundromat owners.[323]

For taxpayers-reporters, the value of privacy lies in the protection of personal and sensitive information that individuals may reasonably want the state to keep secret.[324] That is, tax disclosure sounds primarily in informational privacy—the dissemination of individually identifiable data by state actors.[325] And it affects decisional privacy at the margins. If individuals anticipate the state to disclose the records of their actions, they may decline to engage in certain activities *ex ante* and structure their lives and choices in ways different from a state of presumed secrecy. In other words, the possibility of scrutiny by others could reduce the "breathing room" that enables self-development, in the process burdening self-governance critical to a democracy.[326] Scholars have thus criticized unwarranted disclosure of private information for obstructing individual autonomy and inhibiting the "civility rules" that constitute both the individual and the community.[327]

These principles on informational and decisional privacy entail two corollaries. First, only the *dissemination* of information intrudes upon privacy norms. The government therefore leaves the individual undisturbed if it holds identifiable data (as it must for effective governance), limits circulation within government employees performing relevant duties, and withholds public access. As a result, modern regimes of tax transparency have not publicized the troves of data held by tax agencies which contain the most sensitive and personally revealing information. For example, the Revenue Act of 1924 mandated disclosure of only individual tax liabilities.[328] The 1934 pink slips asked for the taxpayer's name, address, gross

[323] *See* EVERYTHING EVERYWHERE ALL AT ONCE 16:40–17:29 (A24 Pictures 2022).

[324] For early treatment of the legal concept of privacy, particularly in connection with common law and torts, see, for example, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (discussing the four privacy torts, including public disclosure of private information); RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977) (setting out general principles that govern privacy torts).

[325] *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 523–48 (2006) (describing information dissemination as a category of privacy harms).

[326] Julie E. Cohen, *What Privacy Is for*, 126 HARV. L. REV. 1904, 1906 (2013).

[327] Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 963 (1989); *see also* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423-28 (2000).

[328] Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293; *see supra* Section I.B.

income, total deductions, taxable income, and taxes payable.[329] Similarly, the Nordic countries today publicize only the amounts of the taxpayer's earned and capital income, along with her tax paid.[330] These transparency provisions thus keep confidential, for example, records used to substantiate the medical-expense deduction that describe the symptoms of the taxpayer's illness. That is, they protect the most valuable forms of informational privacy, while disclosing less sensitive financial data.

This corollary extends to decisional privacy. Scholars have justified informational privacy on the ground of individual autonomy.[331] The knowledge that the state will disclose one's medical records could discourage transgender individuals from seeking gender-affirming care (or from seeking the tax deduction). This would impose a serious burden on their autonomy. By contrast, the knowledge that the state will disclose one's income range is much less likely to discourage the kind of self-development and experimentation that implicate privacy norms. To be sure, disclosure could incentivize or disincentivize work.[332] But it is unclear whether the decision to work harder in fact sounds in decisional privacy. Even if disclosure of income levels affects motivation to engage in economic activities, the change results from the individual's decisionmaking process based on *full* information obtained from the transparency regime. And informed decisionmaking could in fact enhance the exercise of individual autonomy in comparison with the individual's agency under conditions of imperfect knowledge.[333] A legislative directive to disclose only income ranges and tax liabilities therefore leaves many forms of decisional privacy protected.

[329] Revenue Act of 1934, ch. 277, § 55(b), 48 Stat. 680, 698; *see supra* note 230 and accompanying text.

[330] *E.g.*, Act on the Public Disclosure and Confidentiality of Tax Information, L. No. 1346/1999, § 5(1)–(6) (Fin. 1999); *see supra* Section II.A.

[331] *Supra* notes 326–327 and accompanying text.

[332] *See, e.g.*, Zoë Cullen & Ricardo Perez-Truglia, *How Much Does Your Boss Make? The Effects of Salary Comparisons* (Nat'l Bureau of Econ. Rsch. Working Paper No. 24841, 2021), https://www.nber.org/system/files/working_papers/w24841/w24841.pdf (offering empirical evidence that employees work harder when they find out that managers earn more than expected, and lose motivation when they find out that peers earn more than expected). It is of course a separate (but related question) whether taxpayers would try to increase their earnings in a disclosure regime that does not unbundle the sources of income (i.e., a disclosure regime that does not publicize whether a higher-income taxpayer earns more because of wage or because of, for example, capital investments).

[333] *See also* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 354 (2011) (noting that disclosure regimes in other contexts have not intruded upon autonomy).

Second, only the dissemination of *nonpublic* information intrudes upon privacy norms. If the information is already publicly accessible from credible sources, disclosure by the IRS or the Treasury Department is unlikely to undermine individual privacy. Judicial doctrine on tax confidentiality has recognized this corollary. In *Lampert v. United States*, for example, taxpayers challenged the federal government's disclosure of their tax-return information in press releases.[334] The taxpayers in *Lampert* had participated in tax-evasion schemes which the government prosecuted in court.[335] In the process of litigation, the government disclosed tax information about those taxpayers (which became public court records), and subsequently issued press releases that contained the same tax information disclosed in court.[336] The Code authorizes the disclosure of tax information in judicial proceedings, but it does not explicitly allow the government to do so in a press release.[337] The taxpayers thus argued that the government breached the statutory guarantee of confidentiality by releasing tax information that is already publicly accessible as court filings. The Ninth Circuit disagreed, and held on the basis of legislative purpose: "Congress sought to prohibit only the disclosure of *confidential* tax return information. Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information."[338] To be sure, not all courts follow the Ninth Circuit.[339] But their disagreement derives from differing approaches to reading § 6103, not the underlying principle that privacy norms do not extend to information in the public sphere. That principle has gained broad acceptance.[340]

The extent to which tax-transparency regimes violates privacy thus depends on how much information the public already has. In the past few decades, the

[334] 854 F.2d 335, 337 (9th Cir. 1988).

[335] *Id.* at 336.

[336] *Id.*

[337] *See* 26 U.S.C. § 6103(h)(4)(A); *Lampert*, 854 F.2d at 337.

[338] *Lampert*, 854 F.2d at 338 (emphasis added) (citing Thomas v. United States, 671 F. Supp. 15, 16 (E.D. Wisc. 1987); United Energy Corp. v. United States, 622 F. Supp. 43, 46 (N.D. Cal. 1985)).

[339] Johnson v. Sawyer, 120 F.3d 1307, 1318 (5th Cir. 1997); *see also* Mallas v. United States, 993 F.2d 1111, 1121 (4th Cir. 1993). *But see* Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996) (following *Lampert*, 854 F.2d at 335); Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1489–90 (9th Cir. 1991) (reaffirming *Lampert*).

[340] *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494 (1975) (citing W. PROSSER, LAW OF TORTS 810–811 (4th ed. 1964)) (noting that under the *Second Restatement of Torts*, "ascertaining and publishing the contents of public records are simply not within the reach of . . . privacy actions"); United States v. Posner, 594 F. Supp. 930, 936 (S.D. Fla. 1984); Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1105 (2002) (describing the disclosure of previously *concealed* information as a violation of privacy interests).

availability of and people's willingness to disclose financial information about themselves have expanded the public sphere at the expense of the domains of individual privacy.[341] That is, modern media contain a large depository of data about individuals and households. It includes financial data that would be disclosed under a tax-transparency regime. For example, *Forbes* publishes an annual, "definitive ranking of the wealthiest Americans," and lists precise estimates of their net worth, with real-time updates pegged to changes in the value of their stocks and property.[342] It also publishes the residence, citizenship, marital status, education history, sources of wealth, and the history of net worth for those billionaires.[343] To be sure, third-party reporting does not accurately disclose *every* aspect of one's wealth and income, and the government may have access to far more financial data. However, careful design of the legal regime can mitigate these concerns. As the historical analysis has shown, disclosure can advance transparency goals without exposing every aspect of the taxpayer's financial life.[344] Knowledge of reported income and tax liabilities can be enough. Further, as Part III will discuss, policymakers can make disclosure a matter of taxpayer choice.[345]

Further, federal statutes require officials and nominees for federal offices to submit financial disclosures. The Ethics in Government Act of 1978 imposes this filing requirement on the President, the Vice President, members and certain employees of Congress and the judiciary, administrative law judges, nominees whose appointment requires Senate confirmation, along with federal employees compensated at level 15 of the General Schedule.[346] The content of federal financial disclosures is expansive.[347] Office of Government Ethics Form 278e includes information about employment incomes, employers, retirement accounts, bank account balances, debt, and spousal financial records.[348] State law mandates even greater disclosure. In general, the salary of any state or local employee is publicly

[341] *See* Post, *supra* note 327, at 998 (describing mass media's role in constructing the public sphere).
[342] Rob LaFranco & Chase Peterson-Withorn, *The Forbes 400: The Riches People in America*, FORBES (Sept. 8, 2023), https://www.forbes.com/forbes-400.
[343] *E.g.*, *Warren Buffett*, FORBES (Jan. 10, 2024), https://www.forbes.com/profile/warren-buffett.
[344] *See, e.g.*, *supra* Sections I.B-C.
[345] *See infra* notes 484-485 and accompanying text.
[346] 5 U.S.C. § 13103(a), (b), (f) (2018); *see* 5 U.S.C. § 13101.
[347] Scholars have criticized Form 278e for being vague and not conveying important information. *See* Blank, *supra* note 3, at 18–19 (summarizing the scholarly critique).
[348] *See OGE Form Library*, OFF. GOV'T ETHICS (2023), https://www.oge.gov/web/oge.nsf/OGE+Forms.

accessible on online databases under the operation of state public-record laws.[349] California alone discloses the precise amounts of the salaries and benefits of more than two million employees.[350] Employees have challenged the public-records law as an invasion into their privacy, and state courts have in general disagreed. The California Supreme Court, for example, has relied on the values of open governance and democratic accountability to exclude state-employees' salaries from the zone of individual privacy.[351]

This Section thus provides two main insights. First, policymakers can design—and have designed—tax-transparency regimes to mitigate harms to privacy values. Disclosing income ranges and tax liabilities, for example, would impose a much lower cost on the exercise of individual autonomy than public inspection of full tax records. Second, taxpayers *qua* reporters have attenuated privacy interests if they are ultra-wealthy or hold political power. Tax-transparency regimes could disclose information about them some of which is already public knowledge, and state dissemination of public facts does not produce any cognizable claim of invasion of privacy. This is not to dismiss the privacy interests of the wealthy, only to say that they are more attenuated today than in a world where individually identifying information is not publicly shared online. Further, wealthy taxpayers may have greater incentives and latitude to misreport financial data, both because the potential benefits of tax avoidance are significant and because they can more easily hide their income.[352] This aspect of the reporter role will be discussed in greater detail in the next Section.[353] Of course, norms generated by other interactions with

[349] *E.g.*, Public Records Act, CAL. GOV'T CODE §§ 7920.000–7931.000 (West 2024); MASS. GEN. LAWS ch. 66, §§ 1–21 (2024); *see Public Records Law and State Legislatures*, NAT'L CONF. ST. LEGISLATURES (May 30, 2023), https://www.ncsl.org/cls/public-records-law-and-state-legislatures (providing a fifty-state survey of state transparency and public-records legislation).
[350] *See Government Compensation in California*, CAL. ST. CONTROLLER (2024), https://gcc.sco.ca.gov.
[351] Int'l Fed'n of Prof'l & Tech. Emps. v. Sup. Ct. of Alameda Cty., 165 P.3d 488, 491 (Cal. 2007) ("[W]ell-established norms of California public policy and American public employment exclude public employee names and salaries from the zone of financial privacy protection." (quoting Int'l Fed'n of Prof'l & Tech. Emps. v. Sup. Ct. of Alameda Cty., 27 Cal. Rptr. 3d 262, 267 (Ct. App. 2005)).
[352] Wealthy taxpayers tend to have much more capital gains and less labor income than middle- or lower-income taxpayers. It is difficult to underreport wage and salaries because of third-party reporting. *See* Lederman, *Statutory Speed Bumps*, *supra* note 288, at 698; William G. Gale & Semra Vignaux, The Difference in How the Wealthy Make Money—and Pay Taxes, Brookings Inst. (Sept. 7, 2023), https://www.brookings.edu/articles/the-difference-in-how-the-wealthy-make-money-and-pay-taxes.
[353] *Infra* Section III.A.2.

the fiscal state can defeat even strong privacy interests as reporters.[354] By contrast, lower- and middle-income taxpayers without government employment have much stronger privacy interests in their capacity as reporters. This distinction extends to the populist arguments against disclosure advanced, for example, by the Sentinels of the Republic in 1934[355]: If information about the income and wealth of the ultra-rich is publicly accessible, tax disclosure will not put them at additional risk of falling victims to crimes (e.g., kidnapping). By contrast, the Sentinels' arguments appealed to the public precisely because lower- and middle-income households have strong privacy interests in their financial records.

2. *Taxpayers as Funders of the State*

Taxpayers perform another fundamental function in their interactions with the federal fiscal apparatus: They fund the state by collectively bearing the costs of governance. In our voluntary-compliance system, fiscal citizens self-assess their taxable income, subject to some third-party reporting.[356] For ultra-wealthy taxpayers who derive most of their income from capital rather than labor, this self-assessment is accompanied by little oversight from administrative or enforcement agencies.[357] After years of underfunding, the IRS examined (or audited, in common parlance) only 0.2% of all personal income-tax returns in fiscal year 2022.[358] Regarding most forms of income derived from property dealings and investments (i.e., non-wage income), income taxes are not withheld at the source.[359] The federal tax system thus relies on the public's cooperation to distribute the costs of government services and programs which enable wealth accumulation in the first place.

[354] *See infra* Sections III.A.2–4.

[355] *See supra* notes 235–238 and accompanying text.

[356] *See* Levi, *supra* note 45, at 50-54 (distinguishing coercion from voluntary compliance, and articulating the concept of "quasi-voluntary compliance"). Examples of third-party reporting include employer reports of wage income on the Form W-2, and reports of securities transactions by investment brokerages on the Form 1099-B. *See About Form W-2, Wage and Tax Statement*, INTERNAL REVENUE SERV. (July 14, 2023), https://www.irs.gov/forms-pubs/about-form-w-2; *About Form 1099-B, Proceeds from Broker and Barter Exchange Transactions*, INTERNAL REVENUE SERV. (Feb. 14, 2023), https://www.irs.gov/forms-pubs/about-form-1099-b. Third-party reporting fosters compliance. *See* Leandra Lederman & Joseph C. Dugan, *Information Matters in Tax Enforcement*, 2020 BYU L. REV. 145, 147–48.

[357] Scholars have documented the inadequate information reporting for high-income and wealthy taxpayers. *See* Joshua D. Blank & Ari Glogower, *The Tax Information Gap at the Top*, 108 IOWA L. REV. 1597, 1601 (2023).

[358] *Compliance Presence*, INTERNAL REVENUE SERV. tbl.17 (Apr. 17, 2023), https://www.irs.gov/statistics/compliance-presence.

[359] *See* 26 U.S.C. § 3402 (2018) (requiring collection of taxes at the source for labor income).

As to taxpayers as funders, the values of privacy and disclosure sound in the egalitarian distribution of tax burdens. This concept has two components: (1) compliance and (2) democratic response. Compliance centers on the possibility that disclosing or safeguarding individual tax data would incentivize honest reporting of income and consequently honest assessment of income taxes. By contrast, democratic response centers on the possibility that disclosing or safeguarding individual tax data would create political pressure and mobilize legislation to improve tax fairness. In a democratic regime, this notion of tax fairness consists in the fiscal community's judgment after deliberation based on adequate information. This Section discusses these two components in turn.

The effect of disclosure on tax compliance has received extensive scholarly treatment.[360] As discussed in the literature review, the conceptual underpinnings include: the *taxpayer-trust theory*, which posits that taxpayers entrust the government with nonpublic information on the promise of confidentiality, and that disclosure would disincentivize honest reporting of income;[361] the *social-audit theory*, which posits that disclosure functions as automatic enforcement because taxpayers more accurately report their income when they know others will see the returns;[362] and *behavioral (e.g., reciprocity-based) theories*, which posit that taxpayers calibrate their compliance in accordance with their perception of overall compliance in the fiscal community.[363]

Studies have provided empirical support for these divergent theories. In one influential paper, for example, scholars examined the shift in Norway to an internet-based mechanism of tax disclosure.[364] Before 2001, some but not all Norwegian municipalities distributed tax information through widely circulated print catalogues.[365] The shift to internet disclosure in 2001 therefore substantially increased public access to tax information in localities without those catalogues. The study found that this stronger transparency regime resulted in a 3.1% increase in reported income, equivalent to a 20% reduction of tax evasion in one income group.[366] By contrast, an experimental study found that disclosure could in fact

[360] *See supra* notes 30–33 and accompanying text; Section II.B.

[361] *Supra* notes 32, 293–294 and accompanying text.

[362] *Supra* notes 286–287, 291 and accompanying text.

[363] *Supra* notes 295–296 and accompanying text.

[364] Bø, Slemrod & Thoresen, *supra* note 30.

[365] *Id.* at 41–42.

[366] *Id.* at 49. Indeed, because Norway had a transparency regime before the shift to internet disclosure in 2001, any deterrence effect would have resulted from the degree to which internet disclosure strengthened the existing transparency regime. That is, *ceteris paribus* the shift from a full confidentiality regime to online disclosure of tax data would have resulted in even more honesty in income reporting.

lead to decreases in revenue collection, because effects of social norms crowd out the social-audit effect when taxpayers see the significant level of noncompliance in the tax system.[367]

The empirical debate thus has not produced consensus. A recent intervention in this literature has pointed to the value of exploiting taxpayers' bounded rationality and cognitive biases in incentivizing compliance.[368] For example, due to the salience bias, taxpayers pay more attention to specific, conspicuous instances of tax evasion or enforcement than general statistics released by the IRS.[369] Disclosure could expose the federal government's enforcement weakness, reified as concrete examples of successful tax evasion by the wealthy, public figures, and celebrities.[370] This would lower taxpayers' perceived, subjective assessment of the government's enforcement power. By contrast, confidentiality allows the federal government to hide those concrete examples of enforcement failures and to publicize only concrete examples of enforcement success.[371] This would "inflate" taxpayers' perception of (1) the costs of noncompliance (e.g., penalties for underreporting of income) and (2) the risk that the IRS would find out about their noncompliance.[372] Under this framework, tax transparency disables powerful tools of revenue collection.

While scholars have not reached conclusive answers as to the revenue potential of disclosure/confidentiality, the cognitive-bias framework highlights the variation of privacy values at different income levels. Two principles are at work here. First, salience bias is more pronounced when taxpayers encounter conspicuous examples of *similarly situated* taxpayers.[373] That is, Joe the cashier will likely lower his assessment of IRS enforcement capability if he sees vivid examples of other cashiers or wage-earning taxpayers get away with tax evasion. By contrast, vivid examples of tax evasion by, for example, Martha Stewart will not have the same effect. Joe might chalk up any successful tax evasion to tax-avoidance techniques available to Martha Stewart but not himself.[374] Second, upper-income

[367] *See* Bob, Otto & Wolf, *supra* note 295.

[368] Blank, *supra* 32; *see also* Schenk, *supra* note 33.

[369] *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, 50 STAN L. REV. 1471, 1519 (1998) (describing the salience bias as a form of availability heuristic); David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19 (2011).

[370] Blank, *supra* 32, at 271.

[371] *Id.* at 272.

[372] *Id.*

[373] *See* Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155 (1996).

[374] This effect is due to the operation of two factors. First, seeing similarly situated individuals engage in tax evasion might trigger the salience bias to a more significant degree simply because

(in particular ultra-wealthy) taxpayers have substantial resources to mitigate their cognitive biases. Those resources include tax lawyers and professionals who can present an accurate view of IRS enforcement capability to their clients.[375]

The combined operation of these two principles suggests that privacy norms are more valuable to lower- and middle-income taxpayers *qua* funders of the state. That is, lower- and middle-income taxpayers tend to lower their subjective assessment of IRS enforcement capacity upon seeing conspicuous examples of tax evasion by *other* lower- and middle-income taxpayers.[376] This leads to decreased compliance levels at that income group. It also leads to revenue loss in comparison to a confidentiality regime in which the government can advertise to lower- and middle-income taxpayers *only* conspicuous examples of successful enforcement. The dynamic is different for wealthy taxpayers. They, too, might lower their subjective assessment of IRS enforcement capacity upon seeing conspicuous examples of tax evasion by other wealthy taxpayers. After all, economic power eliminates some but not all cognitive and decisional biases.[377] But unlike their lower- and middle-income counterparts, wealthy taxpayers have immense resources at their disposal to mitigate the effects of any cognitive bias.[378] An $89 subscription

it is more relevant to one's decision whether to evade taxes, and relevance grabs attention. Second, individuals might learn of tax evasion by similarly situated individuals in more salient ways than tax evasion by others. For example, restaurant workers might find out first-hand that others in the restaurant have failed to report tips on income-tax returns. Those same workers are more likely to learn about tax evasion by ultra-wealthy individuals in newspaper articles, which tend to attract less attention or appear less vivid. *See generally The Salience Bias, Explained*, THE DECISION LAB (2024), https://thedecisionlab.com/biases/salience-bias.

[375] *See* David M. Schizer, *Enlisting the Tax Bar*, 59 TAX L. REV. 331, 331 (2006) (describing the resources of the private tax bar and how they "outmatch" even the government in "sheer numbers, [] access to information, and, at least in some cases, [] sophistication and expertise").

[376] To be sure, examples of low-level tax evasion abound in nontax settings (e.g., in cash transactions like restaurant tipping). But disclosure of tax returns still confirms and provides additional data about the extent of such evasion.

[377] *See* Kai Ruggeri, Sarah Ashcroft-Jones, Giampaolo Abate Romero Landini, Narjes Al-Zahli, Natalia Alexander, Mathias Houe Andersen et al., *The Persistence of Cognitive Biases in Financial Decisions Across Economic Groups*, 13 NATURE 10329, 10329-30 (2023). *But see* Renu Isidore R. & Christie P., *The Relationship Between Income and Behavioral Biases*, 24 J. ECON. FIN. & ADMIN. SCI. 127, 141 (2019) (finding that higher-income investors exhibit lower cognitive biases except the overconfidence bias). This Article argues that even if the wealthy suffers as much from bounded rationality as ordinary people, the wealthy has substantially more resources to mitigate cognitive biases then ordinary people.

[378] There is reason to think that wealthy taxpayers are more likely to use the resources at their disposal to mitigate cognitive biases with respect to tax planning than in other decisionmaking processes. For the notorious complexity of income-tax rules may increase the perceived need to rely on expert advice.

to TurboTax is unlikely to correct a middle-income taxpayer's inaccurate perception of IRS enforcement strength.[379] But a tax lawyer at a large law firm who charges $2,000 an hour will.[380] Disclosure of wealthy taxpayers' tax records thus activates compliance-reducing cognitive biases to a much lower degree.

The possibility of democratic response may also effect the values of privacy/transparency for taxpayers *qua* funders. An egalitarian distribution of tax burdens concerns not only taxpayers' compliance with the existing tax regime. It also concerns the fairness (or lack thereof) inherent in the existing regime itself. To use the terminology of the transparency debates in 1864, compliance goals "equalize" tax burdens by incentivizing honest reporting of liability.[381] By contrast, democratic response equalizes tax burdens by helping the public deliberate on fiscal governance and reach informed legislative solutions to improve tax fairness. It serves an instrumental and epistemic function which lawmakers emphasized in 1924.[382]

Transparency thus holds the promise of improving tax fairness. The critical question is whether state disclosure of *individual* tax records can invigorate distributive discourse and force legislative action. This depends on two factors: (1) the degree of variation between different taxpayers' tax liabilities in the *same* income range; and (2) the extent to which the (average or individual) tax burdens in one income group deviates from the public's conception of fairness.

The first factor reflects horizontal equity, the principle that tax law should treat similarly situated taxpayers similarly.[383] Scholars have criticized horizontal equity, arguing that it is a derivative norm without any independent value.[384] But the public has broadly agreed on an aspiration of equal tax treatment on the basis of

[379] *TurboTax Online Tax Software & Pricing 2023-2024*, INTUIT (2024), https://turbotax.intuit.com/personal-taxes/online.

[380] *See* Roy Strom, *Big Law Rates Topping $2,000 Leave Value 'In Eye of Beholder'*, BLOOMBERG LAW (June 9, 2022), https://news.bloomberglaw.com/business-and-practice/big-law-rates-topping-2-000-leave-value-in-eye-of-beholder.

[381] *The Publication of Incomes*, *supra* note 75; *see supra* notes 84–83 and accompanying text.

[382] *See supra* notes 138–146 and accompanying text.

[383] David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 43 (2006).

[384] For examples of the classic debate over horizontal equity as an independent principle of tax fairness, see Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113 (1990); Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 103 (1989); Ira K. Lindsay, *Tax Fairness by Convention: A Defense of Horizontal Equity*, 19 FLA. TAX REV. 79 (2016); see also A Half Century with the Internal Revenue Code: The Memoirs of Stanley S. Surrey, at xxxv-xxxviii (Lawrence Zelenak & Ajay K. Mehrotra eds., 2022) (discussing Surrey's keen awareness of horizontal equity as a politically important principle).

market income.[385] Knowledge of large-scale violations of horizontal equity could therefore trigger democratic response to shape the law in accordance with the public's perception of fairness. Most lower- and middle-income groups feature some but not substantial variation in individual tax liability.[386] Their income derives primarily from labor. And the federal government taxes wage as ordinary income, withholds it at the source, and provides virtually no option for tax deferral besides retirement savings.[387] By contrast, wealthy taxpayers have diversified income streams that may receive preferential federal tax treatment in the form of lower tax rates (for certain capital gains) and opportunity for deferral (due to the realization doctrine).[388] The variation in income-tax liability among the wealthy is therefore more substantial. ProPublica's analysis of the leaked tax returns shows, for example, that Ken Griffin had an effective income-tax rate of 29.2%, while Michael Bloomberg was taxed at 4.1%.[389] Disclosure of this variation is thus more likely to trigger democratic response than disclosure at lower income levels.

The second factor is a species of vertical equity, the principle that tax law should appropriately differentiate among differently situated taxpayers.[390] The precise content of vertical equity depends on a full theory of distributive justice, which is beyond the scope of this Article. To analyze the values of privacy, however, it is enough to note most Americans believe that the wealthy is not paying their fair share of taxes. A recent poll shows that 60% of the public is bothered "a lot" by wealthy people's unwillingness to shoulder their tax burdens—a figure far higher

[385] Martin Feldstein, *Compensation in Tax Reform*, 29 NAT'L TAX J. 123, 123 (1976) ("The principle of horizontal equity is not a mere abstraction of academic theory but a fundamental belief that is widely held and strongly felt. Many otherwise desirable tax reforms may never be enacted because doing so would violate this injunction that government action should not treat equals unequally."); Conor Clarke, *Taxing Height: Emmanuel Saez Responds to Mankiw*, ATLANTIC (May 29, 2009), https://www.theatlantic.com/politics/archive/2009/05/taxing-height-emmanuel-saez-responds-to-mankiw/18486.

[386] *See* York & Hartt, *supra* note 315 (showing that wage and salaries constitute the vast majority of personal income for taxpayers earning less than $1 million).

[387] 26 U.S.C. §§ 61, 3402 (2018).

[388] York & Hartt, *supra* note 315 (showing a mix of business, investment, and wage income for taxpayers earning more than $1 million); 26 U.S.C. §§ 1, 1001 (2018).

[389] *America's Top 15 Earners and What They Reveal About the U.S. Tax System*, PROPUBLICA (Apr. 13, 2022), https://www.propublica.org/article/americas-top-15-earners-and-what-they-reveal-about-the-us-tax-system. Ken Griffin is the founder and CEO of Citadel, a leading hedge fund. *See Kenneth C. Griffin*, CITADEL (2024), https://www.citadel.com/our-teams/leadership/kenneth-c-griffin.

[390] Musgrave, *supra* note 384, at 113.

than the 38% of the public bothered by their own taxes.[391] Disclosure of individual tax records—and salient examples of tax evasion by the wealthy—is then more likely to result in legislation to move the law closer to the public's vision of vertical equity. The strongest evidence for this claim perhaps lies in the very response to the leak of tax returns to ProPublica.[392] After ProPublica's reporting showed the extent of the ultra-wealthy's evasion of income taxes, a chorus of lawmakers, think tanks, and commentators called for structural tax reform.[393] This culminated in President Biden's proposal for accrual taxation.[394] While Congress has yet to pass any major tax reform legislation, the saga shows the potential of tax disclosure at the top income levels to foster distributive dialogue and initiate change.

Thus, for taxpayers *qua* funders, transparency values may overcome privacy norms at the highest income and wealth levels. Disclosure of the ultra-wealthy's tax records will not result in significant reduction of tax compliance attributable to cognitive biases. It may in fact trigger democratic response to effect a more egalitarian distribution of tax burdens. By contrast, neither compliance nor the possibility of democratic response counsels tax disclosure at the lower- and middle-income levels.

[391] J. Baxter Oliphant, *Top Tax Frustrations for Americans: The Feeling That Some Corporations, Wealthy People Don't Pay Fair Share*, PEW RSCH. CTR. (Apr. 7, 2023), https://www.pewresearch.org/short-reads/2023/04/07/top-tax-frustrations-for-americans-the-feeling-that-some-corporations-wealthy-people-dont-pay-fair-share.

[392] *See supra* notes 10–14 and accompanying text.

[393] *E.g.*, John Cassidy, *The ProPublica Revelations Show Why We Need to Tax Wealth More Effectively*, NEW YORKER (June 8, 2021), https://www.newyorker.com/news/our-columnists/the-propublica-revelations-show-why-we-need-to-tax-wealth-more-effectively; Chuck Marr, *ProPublica Shows How Little the Wealthiest Pay in Taxes: Policymakers Should Respond Accordingly*, CTR. ON BUDGET & POL'Y PRIORITIES (July 15, 2021), https://www.cbpp.org/research/federal-tax/propublica-shows-how-little-the-wealthiest-pay-in-taxes-policymakers-should; Jonathan Weisman & Alan Rappeport, An Exposé Has Congress Rethinking How to Tax the Superrich, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/us/politics/propublica-taxes-jeff-bezos-elon-musk.html.

[394] *See President's Budget Rewards Work, Not Wealth with new Billionaire Minimum Income Tax*, WHITE HOUSE (Mar. 28, 2022), https://www.whitehouse.gov/omb/briefing-room/2022/03/28/presidents-budget-rewards-work-not-wealth-with-new-billionaire-minimum-income-tax; Samantha Jacoby, *Biden Proposal Would Eliminate Tax-Free Treatment for Much of Wealthiest Households' Annual Income*, CTR. ON BUDGET & POL'Y PRIORITIES (July 15, 2021), https://www.cbpp.org/blog/biden-proposal-would-eliminate-tax-free-treatment-for-much-of-wealthiest-households-annual (characterizing the accrual-tax proposal as a response to the ProPublica investigation).

3. *Taxpayers as Stakeholders in a Fiscal Community*

In addition to their reporting and funding roles, taxpayers are stakeholders entitled to claim fiscal benefits with dignity.[395] In the United States, given the lack of robust spending programs, like universal healthcare, tax law and administration are the primary redistributive tools of the federal government.[396] Congress has embedded critical welfare benefits in the Code. For example, the Earned Income Tax Credit ("EITC") is one of the largest federal transfer programs and subsidizes low-income working families by providing them with a refundable income-tax credit equivalent to a percentage of their earnings, up to a maximum amount.[397] The EITC reduces the regressive effects of payroll taxes, providing about $57 billion of benefits to more than 23 million low-income taxpayers in 2023.[398] To use a more recent example, the COVID-19 pandemic prompted Congress to expand the child tax credit.[399] The American Rescue Act of 2021 increased the maximum credit per child to $3,600, which contributed to the largest drop—46%—in childhood poverty in history.[400] Both the EITC and the child tax credit are implemented by the tax system, in part because tax-based administration is less costly, and determination of the benefit amount under either regime requires income measurement. Taxpayers must file taxes—usually the Form 1040—to claim those benefits.[401] Those filings, of course, become part of the tax records that a disclosure regime could publicize.

Disclosure of lower- and middle-income taxpayers' records thus threatens their privacy interests as stakeholders. To be sure, scholars have contested the

[395] *See generally* ANNE ALSTOTT & BRUCE ACKERMAN, THE STAKEHOLDER SOCIETY (1999).

[396] *E.g.*, Lily Batchelder & David Kamin, *Policy Options for Taxing the Rich*, ASPEN ECON. STRATEGY GRP. (Nov. 21, 2019), https://www.economicstrategygroup.org/publication/policy-options-for-taxing-the-rich (noting that other high-income countries rely much more heavily on direct spending programs to redistribute income and wealth).

[397] 26 U.S.C. § 32 (2018).

[398] *See* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 534 (1995); *Statistics for Tax Returns with the Earned Income Tax Credit (EITC)*, INTERNAL REVENUE SERV. (Jan. 8, 2024), https://www.eitc.irs.gov/eitc-central/statistics-for-tax-returns-with-eitc/statistics-for-tax-returns-with-the-earned-income.

[399] *See Coronavirus Tax Relief*, INTERNAL REVENUE SERV. (May 1, 2023), https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments.

[400] American Rescue Plan Act of 2021, Pub. L. No, 117–2, § 9611, 135 Stat. 4, 144–45; Kalee Burns, Liana Fox & Danielle Wilson, *Expansions to Child Tax Credit Contributed to 46% Decline in Child Poverty Since 2020*, U.S. CENSUS BUREAU (Sept. 13, 2022), https://www.census.gov/library/stories/2022/09/record-drop-in-child-poverty.html; Press Release, Beyer Backs Legislation to Expand Child Tax Credit, Boost Affordable Housing (Jan. 29, 2024).

[401] *See supra* notes 313–314 and accompanying text (describing the Form 1040).

extent to which tax administration indeed reduces stigma—a dignitary harm associated with traditional means-tested entitlement programs.[402] But embedding a welfare program in the tax-filing process in which most middle- and upper-income groups participate must reduce stigma at least somewhat. That is, a reduction in income-tax liability attributable to the child tax credit is surely less stigmatizing than applying for food stamps at an agency.[403] And for purposes of this Article, it is enough that public knowledge of a taxpayer's claim of welfare benefits because of state disclosure is more stigmatizing than unawareness under a confidentiality regime. This is important because Congress decided to write welfare spending into the Code precisely on the ground that it minimizes stigma. The EITC, for example, was designed to help the working poor "without . . . a stigmatizing, invasive, and often degrading welfare system."[404] A recent sociological study showed that recipients of tax-administered welfare benefits see them as legitimate springboards for upward mobility.[405] Those programs thus foster a sense of "citizenship and social inclusion."[406] This is in part because tax confidentiality shields recipients from the loss of equal social standing and other people's scrutiny of their low-income status. A disclosure regime that covers lower- and middle-income taxpayers detracts from these worthy goals.[407]

The same conclusion does not follow for wealthy taxpayers. To be sure, they derive substantial fiscal benefits from the tax system. But disclosure does not intrude upon their privacy interests as stakeholders in the same way as lower- and middle-income taxpayers. The largest tax benefits for upper-income groups include

[402] *See, e.g.*, Alstott, *supra* note 398, at 535; David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 1004 n.152 (2004) (discussing, but not endorsing, scholarly views that tax transfers have diminished stigmatizing effects); Robert Moffitt, *An Economic Model of Welfare Stigma*, 73 AM. ECON. REV. 1023, 1033-34 (1983); Carlos Andrade, *The Economics of Welfare Participation and Welfare Stigma*, 2 PUB. FIN. & MGMT. 294 (2002).

[403] *See* Tianna Gaines-Turner, Joanna Cruz Simmons & Mariana Chilton, *Recommendations from SNAP Participants to Improve Wages and End Stigma*, 109 AM. J. PUB. HEALTH 1664, 1664-65 (2019).

[404] DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 115 (1988); *see also* ALSTOTT, *supra* note 398, at 539 nn.25–26 (collecting congressional statements).

[405] Jennifer Sykes, Katrin Križ, Kathryn Edin & Sarah Halpern-Meekind, *Dignity and Dreams: What the Earned Income Tax Credit (EITC) Means to Low-Income Families*, 80 AM. SOC. REV. 243 (2015).

[406] *Id.* at 243; see generally Williamson, *supra* note 38.

[407] Scholars have also argued against using tax administration to implement welfare programs. *E.g.*, Alstott, *supra* note 398. This Article does not take a stance on this debate. It starts with the assumption that tax-administered welfare programs will continue to exist. If this is so, lower- and middle-income taxpayers receiving those benefits have heightened privacy interests as stakeholders.

tax deferral due to the realization doctrine, the charitable-contributions deduction, the exclusion of employer-provided healthcare coverage, and preferential tax treatment of capital gains and retirement contributions.[408] Some of these—for example, exclusions and tax deferral—are not ordinarily reported in tax filings and may not be subject to disclosure in a transparency regime. Further, it is unclear whether any of these fiscal benefits implicate concerns like stigma or dignitary harms. Saving more or less for retirement has little to do with social equality, and disclosure of charitable contributions likely elevates rather than degrades one's social standing.[409] Privacy values for wealthy taxpayers *qua* stakeholders are thus more attenuated than their lower- and middle-income counterparts.[410]

4. *Taxpayers as Policymakers in Fiscal Governance*

Finally, in a democratic regime, taxpayers are policymaking partners with the state in shaping fiscal governance on the ground. As discussed, our federal income tax rests on voluntary compliance and self-assessment of liability.[411] The law requires taxpayers to submit to the IRS an annual statement of income. It provides for little oversight by agencies beyond limited withholding, information-return matching, math-error notices, and highly selective audits.[412] Those tools of administrative oversight, in particular information reporting, often apply to specific activities like wage earning—an approach that benefits high-income taxpayers while subjecting others to significant scrutiny.[413] Absent audits or nonpayment of admitted liability, taxpayers' own assessments control and put an end to their interaction with the fiscal state.[414]

[408] *See JCX-22-22: Estimates of Federal Tax Expenditures for Fiscal Years 2022–2026*, JOINT COMM. ON TAX'N (Dec. 22, 2022) https://www.jct.gov/publications/2022/jcx-22-22.

[409] *See* Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1019-20 (1996).

[410] It is also an open question whether wealthy taxpayers truly "deserve" these fiscal benefits in the first place. See supra Section III.A.2.

[411] *See supra* notes 312–314, 356–358 and accompanying text.

[412] 26 U.S.C. §§ 3402, 6011–6012 (2018); *Compliance Presence*, *supra* note 358.

[413] Blank & Glogower, *supra* note 357.

[414] In litigation, the government bears the burden of proving a tax deficiency, but the taxpayer must comply with extensive recordkeeping regulations. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3001, 112 Stat. 685, 726–27 (codified as amended at 26 U.S.C. § 7491). Section 7491 is a statutory override of the longstanding rule that IRS determinations are presumptively correct, and that the taxpayer bears the burden of proof. *See* Welch v. Helvering, 290 U.S. 111, 115 (1933) (citing Wickwire v. Reinecke, 275 U.S. 101 (1927); Jones v. Comm'r, 38 F.2d 550, 552 (7th Cir. 1930)) ("[The Commissioner of Internal Revenue's] ruling has the support of a presumption of correctness, and the [taxpayer-]petitioner has the burden of proving it to be wrong."). Section 7491 has helped taxpayers, but only sparingly (e.g.,

In conceptual terms, *delegation* is thus key to modern income taxation: Congress has delegated to ordinary citizens the authority to determine their tax liabilities.[415] It could have adopted a completely different model of agency adjudication. For example, it could have authorized the Treasury Department to conduct independent factfinding and reach de novo conclusions of law as to the liability of each taxpayer. But it did not. Instead, Congress chose a less intrusive path. Based on a balance of factors like administrative costs, expertise, information asymmetry, and the degree of ordinary people's honesty in dealing with the state, the federal government gave individual citizens control over how to frame their economic power and how to bear the costs of governance. Scholars have noted that the statutory evolution of the Code has shifted power away from federal courts and the executive branch to Congress.[416] It has also shifted policymaking power to taxpayers themselves.

This delegation comes with substantial discretion in interpreting federal statutes and regulations, as well as freedom to structure economic transactions to minimize tax burdens. One might think that a rules-based regime like taxation would constrain interpretive discretion.[417] Quite the opposite: Complex tax rules and long-exploited, structural loopholes have broadened the range of tax outcomes at the top income levels, often at the election of the taxpayer. As discussed in the context of democratic response, taxpayers have achieved vastly different effective tax rates while enjoying similar levels of income and accretion to their wealth.[418] The distinction between Ken Griffin's 29.2% estimated effective tax rate and Michael Bloomberg's 4.1% estimated effective tax rate amounts to more than $400 million

in case of an evidentiary tie). *See* Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 414 (1999).

[415] To be sure, taxpayers exercise delegated power in the shadow of state enforcement, but declining audit rates and an underfunded IRS has eroded this supervision. See Levi, *supra* note 45, at 52-54 (discussing the relationship between state coercion and quasi-voluntary tax compliance); *supra* notes 357-358 and accompanying text. The IRS has promised to increase audit rates for the wealthiest taxpayers, large corporations, and partnerships, but whether it will continue to have the resources to do so remains an uncertain question of political economy. See Press Release, IRS Releases Strategic Operating Plan Update Outlining Future Priorities, IR-2024-130 [hereinafter IRS Press Release] (May 2, 2024).

[416] *E.g.*, James Hines & Kyle Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 248-49 (2015); James Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 267 (1995) ("The shift from a simple statute composed of broad standards to a complex set of rules has reduced the power of the courts and the Treasury over the tax law.").

[417] *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 609 (1992); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 864-65 (1999).

[418] *See supra* notes 388–389 and accompanying text.

of potential federal revenue each year, from just one taxpayer.[419] This does not even take into account unrealized gains, the liability on which taxpayers can indefinitely defer and which the federal government forgives upon death.[420] If we do so, the differential balloons to more than $6 billion in potential income-tax liability over five years.[421] For two taxpayers with roughly the same incomes, this surely indicates an exercise of vast, congressionally delegated discretion. In 1934, Judge Learned Hand famously wrote: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[422] But the degree to which today's taxpayers have successfully avoided income taxes touches the outer bounds of permissible interpretations of the statute. This is precisely why lawmakers in 1924 accused wealthy taxpayers of violating not the letter but the "manifest purpose" of the income tax.[423]

Take the example of wash sales. Since 1921, Congress has disallowed deductions for loss incurred through sale of "stock or securities" if taxpayers acquire "substantially identical stock or securities" within a short period of the sale.[424] The provision is designed to prevent taxpayers from harvesting tax losses (which may offset their income) when they repurchase substantially the same investments, thus maintaining their old portfolio—a critical provision in any realization-based income-tax system.[425] The past few decades have seen the rise of ETFs and other traded funds that track stock indices like the S&P 500.[426] The ProPublica tax leak has revealed that ultra-wealthy taxpayers are selling depreciated ETFs (thus harvesting the tax loss) and then repurchasing another ETF with roughly the same stock holdings but issued by a different investment brokerage.[427] All without

[419] *America's Top 15 Earners and What They Reveal About the U.S. Tax System*, *supra* note 389.

[420] *See* 26 U.S.C. § 1014 (2018).

[421] *See* Eisinger, Ernsthausen & Kiel, *supra* note 10.

[422] Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (citing United States v. Isham, 84 U.S. (17 Wall.) 496, 506 (1873); Bullen v. Wisconsin, 240 U.S. 625, 630 (1916)).

[423] *See supra* notes 182–183 and accompanying text; 65 CONG. REC. 7688 (1924) (statement of Sen. Copeland).

[424] 26 U.S.C. § 1091 (2018); LAWRENCE ZELENAK, FIGURING OUT THE TAX: CONGRESS, TREASURY, AND THE DESIGN OF THE EARLY MODERN INCOME TAX 271–72 (2017); Revenue Act of 1921, Pub. L. No. 67-98, § 214(a)(5), 42 Stat. 227, 240 (1921).

[425] David M. Schizer, Scrubbing the Wash Sale Rules, 82 TAXES 67, 69 (2004).

[426] Itzhak Ben-David, Francesco Franzoni & Rabih Moussawi, *Exchange-Traded Funds (ETFs)* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22829, 2017).

[427] Paul Kiel & Jeff Ernsthausen, *How the Wealthy Save Billions in Taxes by Skirting a Century-Old Law*, PROPUBLICA (Feb. 9, 2023), https://www.propublica.org/article/irs-files-taxes-wash-sales-goldman-sachs.

triggering the wash-sale rules.[428] That is, those taxpayers have read "substantially identical stock or securities" to exclude *ETFs* that hold substantially the same stocks.[429] That might be a permissible reading of the statute. But it is also—perhaps more—reasonable to read "substantially identical stock or securities" to include ETFs that hold substantially the same stocks.[430] Given the ambiguity in the statute, this is a textbook example of an exercise of interpretive discretion and policymaking power. This enabled one taxpayer alone, the former CEO of Microsoft, to claim more than $500 million of tax loss in a few years.[431]

Taxpayers have thus exercised their interpretive discretion to attain vastly different income-tax outcomes. To be sure, these might well be *legal* exercises of their delegated power. After all, Congress wrote the law and is free to override any outcome it dislikes. But the basis of any legitimate act of legislative delegation is transparency. Take the example of administrative agencies, another set of entities to which Congress has delegated significant interpretive discretion and policymaking power.[432] The modern administrative state was born against the background of transparency in governance.[433] Section 3 of the Administrative Procedure Act ("APA")—the first substantive provision of the statute—was devoted to administrative publicity.[434] It directed all agencies to publish its substantive rules, policy statements, and interpretations of the law in the *Federal Register*.[435] And unless public interest requires secrecy, or the matter concerns solely an agency's internal management, APA § 3 makes the "official record" available to concerned parties.[436] In 1967, Congress broadened this commitment to transparency by enacting the Freedom of Information Act ("FOIA").[437] FOIA allows anyone to request agency records for whatever purpose, requires agencies to produce all

[428] End runs around the wash-sale regime are not new. *See* Schizer, *supra* note 425, at 67 ("Indeed, it is only a slight exaggeration to say that compliance with the regime is voluntary for very wealthy taxpayers—or, at least, for those who are willing to take aggressive positions.").

[429] 26 U.S.C. § 1091.

[430] *Id.*

[431] Kiel & Ernsthausen, *supra* note 427.

[432] David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 265 (2013) ("Congressional delegation of broad lawmaking power to administrative agencies has defined the modern regulatory state.").

[433] *See generally* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 107–23 (2018).

[434] Administrative Procedure Act, Pub. L. No. 79-404, § 3, 60 Stat. 237, 238–39 (1946).

[435] *Id.* § 3(a)(3).

[436] *Id.* § 3(c); *see also* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 17 (1947) (noting that APA § 3 should be read "broadly" to "assist the public in dealing with administrative agencies").

[437] Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2018)).

nonexempt materials, and imposes little cost on the public for its requests.[438] Agencies today often make policy and exercise delegated power through notice-and-comment rulemaking.[439] This (even if oblique) mandate of democratic participation at a minimum requires disclosure of key administrative findings and purposes.[440]

Policymaking power thus demands transparency. Like agencies, today's taxpayers exercise interpretive discretion delegated by Congress. But the distribution of policymaking function among taxpayers is uneven, for two reasons. First, as discussed, wealthy taxpayers have diversified income streams that enlarge the zone of possible tax outcomes.[441] By contrast, lower- and middle-income groups receive mostly compensation for employment (wages and salaries). Tax liability for labor income is straightforward, and absent fraud, features little variation in outcomes.[442] Second, upper-income taxpayers' decisions matter more to the public fisc by virtue of their wealth. Michael Bloomberg's use of tax-avoidance techniques led to a loss of more than $6 billion of federal revenue over five years.[443] Exercise of interpretive discretion by lower- and middle-income taxpayers—to the extent they have any—will not have the same result. Both the *type*

[438] 5 U.S.C. § 552(a)(3)(A), (a)(4)(A), (a)(6) (2018); Pozen, *supra* note 433, at 118.

[439] 5 U.S.C. § 553 (2018).

[440] *See, e.g.*, Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 930 (2009) ("Compared to many other countries, the United States has long had a relatively open and transparent rulemaking process. Following procedures outlined in statutes such as the APA, the Freedom of Information Act ("FOIA"), and the Government in the Sunshine Act, agencies regularly make information available to the public and give the public opportunities to comment on proposed rules." (footnotes omitted)); Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 209, 262 (2019) (describing the transparency requirements of informal rulemaking during the official comment period). For the traditional view of notice-and-comment rulemaking as an attempt at democratic participation and legitimacy, as well as criticism and refinement of this view, see generally Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005); Joshua D. Blank & Leigh Osofsky, *Democratizing Administrative Law*, 73 DUKE L.J. 1615 (2024); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

[441] *See supra* notes 386–389 and accompanying text.

[442] Third-party information reporting and withholding of wage income (e.g., through W-2s) makes evasion difficult. *See* INTERNAL REVENUE SERV., PUBLICATION 1415—FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP ESTIMATES FOR TAX YEARS 2014–2016, at 14 fig.3 (Aug. 2022), https://www.irs.gov/pub/irs-pdf/p1415.pdf (showing a 1% misreporting rate for income subject to substantial reporting and withholding, and a 55% misreporting rate for income subject to little or no information reporting).

[443] *See supra* note 389 and accompanying text.

and the *magnitude* of wealthy taxpayers' income thus bolster their role as policymakers in fiscal governance. That role heightens the need for disclosure.

B. *The Impact of Economic Inequality*

This Section has built a taxonomy of fiscal citizenship, and analyzed privacy and transparency norms within taxpayers' roles in a democratic regime. This model is dynamic, not static, for two reasons. First, as already discussed, the valences of privacy and transparency drift within *each* of the roles based on the taxpayer's own income and wealth. Ultra-wealthy taxpayers, for example, share in fiscal governance and exercise policymaking power much more then wage earners. Table 1 illustrates the model:

TABLE 1. TAXONOMY OF FISCAL CITIZENSHIP

Fiscal Function of the Taxpayer	**Values of Privacy and Transparency**	**Wealthy Taxpayers**	**Lower- and Middle-Income Taxpayers**
Reporter of nonpublic information	Informational and decisional privacy, grounded in autonomy	Weaker claim to privacy due to the availability of public information	Stronger claim to privacy due to the unavailability of public information
Funders of the state	Compliance and democratic response, grounded in an egalitarian distribution of tax burdens	Robust operation of transparency due to (1) mitigation of cognitive bias and (2) deviation of tax burdens from the public's perception of equity	Defective operation of transparency due to (1) compliance-reducing cognitive bias and (2) adherence to the public's perception of equity
		* Inconclusive empirical data on compliance	
Stakeholders in a fiscal community	Dignity and stigma, in claiming fiscal benefits through tax administration	Weaker claim to privacy due to the absence of stigma in tax benefits	Stronger claim to privacy due to the stigmatizing effect of disclosure in means-tested welfare programs
Policymakers in fiscal governance	Open governance and lawmaking, pursuant to Congress's delegation in a self-assessment tax regime	Robust operation of transparency due to taxpayers' exercise of vast interpretive discretion	Inadequate justification for transparency due to lack of delegation of significant discretion

As Table 1 illustrates, taxpayers' dynamic interactions with the fiscal state produce diverse privacy/transparency interests across their roles as reporters, funders, stakeholders, and policymakers. These values include individual autonomy, egalitarian distribution of tax burdens, dignity, and open governance. They operate to different effects across income levels. For example, lower- and middle-income taxpayers have stronger claims to privacy as reporters and stakeholders. For disclosure would make available nonpublic information that stigmatizes their entitlements to fiscal benefits in means-tested welfare programs. By contrast, transparency norms prevail for wealthy taxpayers as funders and policymakers. For variation in their tax liabilities violates the public's vision of vertical equity. And exercise of significant interpretive discretion delegated by Congress—while perfectly legal—demands transparency. A taxpayer's income and wealth thus affect the valence of privacy/transparency in her fiscal functions.

The discussion in this Part of the Article refers to both "ultra-wealthy" and "high-income" taxpayers. These are, of course, two distinct concepts. Wealth does not necessarily generate income. It certainly does not—as the ProPublica leak shows—necessarily generate *taxable* income.[444] But the two concepts at their core point to the high degree of economic power exercised by a small group of fiscal citizens, whether the old money or the nouveau riche, by virtue of capital accumulation. This power (in large part but not exclusively) differentiates them from other taxpayers under this Article's taxonomy. For example, it enables them to mitigate their cognitive biases, interpret statutory ambiguities in ways that implicate policymaking, and help bring about a distribution of tax burdens that the public perceives to be unfair.[445]

Second, the degree of economic inequality itself may affect the operation of privacy/transparency norms. That is, the valence of privacy/transparency rests not only on the income of the taxpayer in her respective roles. It also rests on the *extent* to which she partakes in that role. For example, in a fiscal community with little inequality, the government has a more limited role in redistribution.[446] Lower- and

[444] *See* Eisinger, Ernsthausen & Kiel, *supra* note 10; *supra* notes 10–12 and accompanying text.

[445] *See supra* Sections III.A.2, III.A.4.

[446] Such communities might be hard to imagine, but they likely existed in the premodern period. Classical Athens, for example, combined relatively low inequality in wealth distribution and relatively weak redistribution carried out by the state. Scholars have estimated that the top 8% of Athenian households held title to 30% to 35% of the land in Attica. Despite its radical democracy (all Athenian citizens participated in lawmaking, and many occupied key offices by lottery), the state did not enact legislation to deprive the propertied class of their wealth and only required them to fund public activities or defense as part of the liturgy (i.e., tax) system. *See* Lin Foxhall, *Access to Resources in Classical Greece: The Egalitarianism of the Polis in Practice*, *in* MONEY, LABOUR AND LAND: APPROACHES TO THE ECONOMIES OF ANCIENT GREECE 209 (P. Cartledge, E. Cohem & L. Foxhall eds., 2002); Geoffrey Kron, *The Distribution of Wealth at Athens in Comparative Perspective*, 179 ZEITSCHRIFT FÜR PAPYROLOGIE UND EPIGRAPHIK 129, 134 & tbl.1 (2011); Matthew R. Christ, *Liturgy Avoidance and Antidosis in Classical Athens*, 120 TRANSACTIONS AM. PHILOLOGICAL SOC'Y 147, 148-51 (1990).

middle-income taxpayers rely less on means-tested welfare programs administered through the tax system (although the government might offer non-means-tested programs like universal basic income).[447] In other words, those taxpayers partake less in the stakeholder role and have diminished privacy interests because they no longer participate in stigmatizing entitlement programs.[448] Further, wealthy taxpayers partake less in the policymaking role. Their exercise of interpretive discretion in minimizing taxes has a smaller impact on the public fisc because they control less disproportionate shares of the tax base (e.g., income).

By contrast, rises in economic inequality generate the opposite result. A fiscal community with a highly unequal distribution of income and wealth will have to make greater use of means-tested welfare programs to guarantee relative equality and economic security to poorer populations.[449] Lower- and middle-income taxpayers will therefore partake more in the stakeholder role where their privacy interest is strong. Further, wealthy taxpayers will partake more in the policymaking role, by virtue of their greater control of economic resources and power that form the basis of income taxation.[450] Economic inequality thus accentuates the need for tax transparency among upper-income groups: It bolsters the already-strong privacy interests of lower- and middle-income taxpayers as stakeholders, while cementing demands for open governance for wealthy taxpayers as policymakers.

C. *Policy and Scholarly Implications*

1. *Tax Transparency Beyond Compliance*

This Section articulates scholarly and policy implications. First, the fiscal-citizenship model counsels that the scholarly discourse should move beyond just compliance.[451] As discussed, modern scholars have focused on whether tax-transparency regimes can deter tax evasion and result in revenue gains.[452] They have asked whether taxpayers would more honestly report their incomes if (1) they know their tax returns are made public and (2) they can see the returns of other

[447] *See generally* Walter Korpi & Joachim Palme, *The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality and Poverty in the Western Countries*, 63 AM. SOCIO. REV. 661 (1998).
[448] *See supra* Section III.A.3.
[449] *See* Korpi & Palme, *supra* note 447, at 661-670.
[450] In 2021, for example, the top one percent in adjusted gross income controlled roughly half of the federal income tax base. Erica York, *Summary of the Latest Federal Income Tax Data, 2024 Update*, TAX FOUND. (Mar. 23, 2024), https://taxfoundation.org/data/all/federal/latest-federal-income-tax-data-2024; *see supra* Section III.A.4.
[451] *Supra* Parts I, Section III.A–B.
[452] *See supra* notes 285–297, 360–372 and accompanying text (surveying the existing literature on tax disclosure).

taxpayers.[453] The compliance question has generated wide-ranging theories like taxpayer trust, social audit, and reciprocity, as well as empirical data that support or disfavor disclosure to varying degrees.[454] Recently, the scholarly discourse has stalled, in part because of inconclusive empirical data.[455]

This Article shows that tax transparency concerns more than compliance. To be sure, disclosure's effect on tax evasion—and whether it will aid the federal government in collecting revenue, thus lowering administrative costs—is an important value in fiscal citizenship. But the reason we care about compliance is that it will "equalize" tax liability and enhance fairness, broadly conceived as a matter of the public's judgment on an informed basis.[456] Democratic response to disclosure and political pressures to enact legislative change, will also make tax law cohere more with the public's vision of distributive justice. Compliance thus constitutes only one of the values for taxpayers as funders. A fuller analysis of taxpayer privacy requires an assessment of taxpayers' other roles in interacting with the fiscal state. In particular, taxpayers often use the self-assessment power delegated to them by Congress to minimize income-tax burdens. For wealthy taxpayers, that power implicates vast discretion in interpreting statutes and the potential loss of substantial federal revenue. Their exercise of policymaking authority heightens the need for transparency, which might trump an individual's privacy interests in her tax information. All such norms—compliance, democratic response, open governance, autonomy, and dignity—are *pro tanto* reasons for allowing disclosure or guaranteeing confidentiality. The scholarly discourse on taxpayer privacy thus needs to examine these values to move forward. This Article fills that gap.

This Article's historical and comparative discussions highlight the lacuna in scholarship. Part I has brought to light a treasure trove of past legislative debate that emphasized transparency's function in shaping egalitarian and democratic

[453] *E.g.*, Blank, *supra* 32, at 269.

[454] *Supra* notes 361–363 and accompanying text; *see, e.g.*, *The Internal Revenue Law—Telling Other People's Secrets*, *supra* note 73 (taxpayer-trust theory); *Hearings on Revenue Revision 1925*, *supra* note 293, at 8–9 (same); OFF. TAX POL'Y, *supra* note 32, at 18–19 (same); S. REP. NO. 94-938, at 317–18 (same); Mazza, *supra* note 30 (social-audit theory); Linder, *supra* note 30 (same); Schwartz, *supra* note 287 (same); Blank, *supra* 32 (behavioral and reciprocity theory); Kahan, *supra* note 289 (same).

[455] *Compare, e.g.*, Bø, Slemrod & Thoresen, *supra* note 30 (showing in a case study of Norway that transparency increased compliance), *with* Bob, Otto & Wolf, *supra* note 295 (showing in an experimental setting that transparency did not increase compliance).

[456] *The Publication of Incomes*, *supra* note 75; *see supra* notes 84–83 and accompanying text. This is the state's reciprocal obligation to ensure an effective tax system as part of its social contract and the concept of fiscal citizenship. *Supra* note 302 and accompanying text.

governance. In 1924, lawmakers justified tax disclosure on the ground of a constitutional baseline for tax returns to be public records, as well as the potential for transparency to curb government abuse.[457] Increasing compliance levels was only one—and a subsidiary—reason for publicity. Today's main tax-transparency regimes are in the Nordic countries. And they all ground disclosure in a constitutional default of open public records and governance. The scholarly literature's focus on compliance thus departs from the historical debate within the United States and the conceptual underpinnings of transparency today.

2. *Fiscal Citizenship: Taxation Within a Public-Law Framework*

Second, the taxonomy built by this Article adds to the discourse on fiscal citizenship. As discussed, the existing literature has focused on the attitudinal component of citizenship, that is, the public's civic engagement and sense of shared sacrifice in paying tax bills.[458] This Article articulates a positive (i.e., analytical) framework that complements the attitudinal component of fiscal citizenship.

The analytical framework raises additional questions about tax and its deep, under-explored relationship with American public law. For example, this Article shows that Congress has delegated immense interpretive discretion to ultra-wealthy taxpayers. Our federal income tax depends on voluntary compliance and self-assessment of liabilities. But is this delegation justified? Delegation to administrative agencies to interpret statutes traditionally rests on the agency's superior expertise and on occasions, their democratic accountability through presidential control.[459] Neither value is present here.[460] To be sure, wealthy taxpayers could hire armies of expert lawyers and accountants. But their expertise is directed toward the singular goal of reducing their clients' tax burden. Congressional delegation of policymaking power to the ultra-wealthy thus appears

[457] *See supra* notes 107–137, 149–180 and accompanying text.

[458] *See supra* notes 301–304 and accompanying text; ZELENAK, *supra* note 41; Mehrotra, *Price of Conflict*, *supra* note 41; Sparrow, *supra* note 41.

[459] *E.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 341–49 (5th ed. 2015); Aditya Bamzai, *Delegation and Interpretive Discretion*, 133 HARV. L. REV. 164, 190 (2019); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2139–59 (2004); Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2011 (2016); *see* Leandra Lederman, *Avoiding Scandals Through Tax Rulings Transparency*, 50 FLA. ST. L. REV. 219, 275–76 (2023) (discussing transparency and accountability in the tax context).

[460] *See, e.g.*, James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 335 (1976) ("Private parties, on the other hand, often do not possess a similar, if not unique, competence to exercise the particular legislative powers delegated to them. The doctrine of delegation of legislative power to private parties thus searches the fundamental question of institutional competence to perform a governmental task.").

grounded in administrative cost—that is, it would be too expensive for the government rather than the taxpayer to produce the initial determination of income-tax liability.[461] However, as the ProPublica leak has revealed, the exercise of that delegated power, in the form of tax-avoidance techniques used by the ultra-wealthy, has resulted in substantial loss of federal revenue. Beyond the cost calculus, only upper-income taxpayers exercise interpretive discretion due to the nature of our income-tax regime. That distribution of power alone might pose problems for an egalitarian society. This should prompt policymakers and scholars to rethink the conceptual foundations of delegation to taxpayers.[462]

Adding to the problem of delegation is the reality of deference. The past decade has witnessed a dramatic decline in the audit rates of tax returns.[463] As a result, most taxpayers' preferred readings of statutes and regulations receive controlling weight: they are not subject to even the remotest regulatory supervision. The current administration has vowed to strengthen oversight of ultra-wealthy individuals' self-assessment of income taxes.[464] However, IRS funding remains a perennial, highly ideological contest, and the private tax bar usually outlawyers the government.[465] In this landscape, the *effect* of wealthy taxpayers' use of delegated discretion is akin to the deference traditionally accorded to administrative

[461] Of course, self-assessment itself imposes compliance costs on taxpayers. *See* Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 295 (2002); ZELENAK, *supra* note 41, at 2.

[462] This Article is thus in conversation with the influential literature on privatization: Scholars have analyzed the shift of regulatory power to the private sector in terms of legislative delegation. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000). Of course, taxpayers' exercise of delegated power does not derive from the process of *privatizing*: Self-assessment has been the administrative mode of income taxation since its inception. But it is even more problematic than delegation to private entities to administer public programs. The latter is at least premised on the potential of the private sector's expertise and innovation to improve public welfare.

[463] *What Is the Audit Rate?*, TAX POL'Y CTR. (Jan. 2024), https://www.taxpolicycenter.org/briefing-book/what-audit-rate ("The audit rate of individual income tax returns fell by two-thirds between 2011 and 2018—from 0.9 percent of 2011 tax returns to 0.3 percent of 2018 returns. . . . The decline in audit rates was more marked for high-income individuals and corporations. About 7.2 percent of taxpayers with positive income above $1 million were audited on their 2011 returns; that figure dropped to 1.6 percent on 2018 returns.").

[464] *See* IRS Press Release, *supra* note 415.

[465] *E.g.*, Schizer, *supra* note 375, at 331; Tobias Burns, *House GOP Proposes IRS Funding Cuts, Defunding Free Tax Filing System*, HILL (June 4, 2024), https://thehill.com/business/4703208-house-gop-proposes-irs-funding-cuts-defunding-free-tax-filing-system.

policymaking. This is not to imply the existence of formal legal doctrines which ask courts to decline independent exercises of interpretation when the taxpayer has put forth a reasonable construction. Instead, low audit rates mean that no agency or court will pass judgment on taxpayers' inventive interpretations of tax law—similar in practice to granting them deference. Importantly, none of this is predicated on transparency. By contrast, statutory guarantees of transparency accompanied the rise of the administrative state.[466] They paved the path for the development of regulatory deference, which shifted interpretive power from the courts to agencies.[467] It is unsurprising that subsequent refinement of this doctrinal strand has the effect of preserving an agency's policymaking function where the statutory mandate for transparency and democratic participation is at the highest (e.g., notice-and-comment rulemaking).[468] In this past term, the Supreme Court overruled *Chevron*, the most muscular of the agency-deference regimes.[469] The disagreement between the majority and the dissent centered on whether agencies or courts have more expertise in statutory interpretation and the regulated subject matter.[470] But this is a comparative exercise, as even the majority does not argue that agencies have *no* knowledge or stands in perpetual tension with the interests of the federal government. *Loper Bright* thus problematizes the practice of deferring to taxpayers. If agencies are not entitled to deference by the courts, why should the government defer to taxpayers, who lack the requisite expertise and exercise power in the dark?

Take a step back and assume that the current regime of delegation and self-assessment continues. This Article's framework raises less foundational but equally pressing questions. We live in an age that has questioned both the entrenched power of the wealthy and the delegation of lawmaking power to unaccountable bureaucrats. Scholars have criticized "the wealthy [for] exercising vastly disproportionate power over politics and government," and the "constitutional

[466] *Supra* notes 432-440 and accompanying text.

[467] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944); Nat'l Muffler Deals Ass'n v. United States, 440 U.S. 472 (1979).

[468] *See* United States v. Mead Corp., 533 U.S. 218, 229-31 (2001); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 50, 57-58 (2011) (applying *Chevon* to Treasury regulations promulgated pursuant to express congressional delegation of rulemaking authority and after notice-and-comment procedures).

[469] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[470] *Compare, e.g.*, *id.* at 2267 (majority) ("Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often 'may fall more naturally into a judge's bailiwick' than an agency's." (quoting Kisor v. Wilkie, 588 U.S. 558, 578 (2019))), *with id.* at 2294 (Kagan, J., dissenting) ("Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not.").

revolution" in letting agencies rather than Congress make federal policy.[471] The Supreme Court has cut back on agencies' statutory-interpretation powers with the major-questions doctrine, before overruling *Chevron* this past term.[472] In unsettling the core of American administrative law, the majority contended: "[M]ost fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[473] But again, if expertise forms the foundation of delegated power, what kind of expertise could conceivably justify ultra-wealthy taxpayers' exercise of that power? Scholars who care about the administrative state's political accountability should also favor restrictions on Congress's delegation to private parties like taxpayers. That is, what would be the equivalent of a major-questions inquiry for ultra-wealthy taxpayers' use of interpretive discretion to resolve ambiguities in the federal income tax? In past decades, searching scrutiny by the agency (e.g., higher audit rates for ultra-wealthy taxpayers' returns) has limited that discretion. But the landscape today is far different. In broader conceptual language, what is the political—or even the constitutional—status of ultra-wealthy taxpayers? Their deeply entrenched economic power is a fixture in our system of governance. This problematizes their exercise of congressionally delegated power.

3. Design of Disclosure Regimes

Third, this Article provides insights into designing tax-disclosure regimes that cohere with our implicit social contract with the fiscal state. The main takeaway of Part III's model is the *dynamic* rather than static nature of taxpayers' interactions with the government. Under this model, the propriety of disclosure falls into a spectrum. The taxpayer's own income and wealth, as well as economic inequality in the broader fiscal community, all affect whether privacy or transparency values predominate. In general, disclosure is more appropriate for the tax records of the ultra-wealthy in times of high economic inequality. For wealth and inequality augment the policymaking function of upper-income taxpayers, while cementing lower- and middle-income taxpayers' privacy claims as stakeholders. This upshot

[471] Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power*, 130 YALE L.J. 546, 548 (2021); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994); *see also* Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8-51 (2017) (summarizing judicial, political, and academic attacks on the administrative state); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022).

[472] West Virginia v. EPA, 597 U.S. 697, 723 (2022) (major-questions doctrine); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

[473] *Loper Bright Enters.*, 144 S. Ct. at 2266.

coheres with the historical narrative of Part I: Tax-transparency regimes flourished in the United States when the income tax targeted the rich, when disclosure would only affect ultra-wealthy taxpayers.[474] They also flourished when economic inequality and the demand for redistribution were high.[475] As the income tax transformed from a class tax to a mass tax during World War II and inequality diminished with the New Deal, the drive for tax transparency diminished.[476] But as we enter another age of record inequality, calls for tax disclosure—and scrutiny of the ultra-wealthy's fiscal contribution to the state—have intensified.[477]

This Article's model of fiscal citizenship accommodates variation across cultures and political systems in, for example, public trust and preferences for transparency/privacy. As a result, in regimes with a tradition of open governance like Sweden, economic inequality or the taxpayer's own fiscal power (e.g., as exemplified in wealth and exercises of interpretive discretion) need not be high to justify transparency. By contrast, in societies that tolerate government secrecy, economic inequality and the taxpayer's own fiscal power must reach record levels to ground disclosure. This yields a range of policy options for more robust tax transparency in today's United States.

If it decides to enact a tax-disclosure regime, Congress should thus account for the following.[478] Defining the term "ultra-wealthy" requires line-drawing, but this Article's taxonomy provides guidance. Recall that disclosure is more appropriate for ultra-wealthy taxpayers because there is public information about their finances (*qua* reporters), because they have resources to mitigate their cognitive biases (*qua* funders), because transparency could mobilize legislation to improve tax fairness (*qua* funders), because they do not participate in means-tested welfare programs (*qua* stakeholders), and because they exercise interpretive discretion pursuant to Congress's delegation of power (*qua* policymakers).[479] The

[474] *See supra* Sections I.A-B (describing calls for transparency during the Civil War and in the 1920s).

[475] *See supra* Section I.C (describing calls for transparency during the Great Depression).

[476] Zucman & Saez, *supra* note 1, at 521 fig.1 (showing a decline of economic inequality from 1933 to 1978); *see also* Carolyn C. Jones, *supra* note 46.

[477] *See supra* notes 1–3 and accompanying text.

[478] Taxpayers may challenge on First Amendment grounds transparency mandates enacted by Congress. It is beyond the scope of the current project to assess the constitutionality of possible disclosure regimes. However, it is noteworthy that the Supreme Court has upheld, albeit on somewhat narrow grounds, the transparency regime of 1924, and commented that the choice between tax secrecy and disclosure belongs primarily to Congress. United States v. Dickey, 268 U.S. 378, 386 (1925). *Dickey* did not address the transparency regime's possible invasion into the constitutional rights of taxpayers, as no such claim was raised.

[479] *Supra* Section III.A, tbl.1.

income and wealth thresholds that activate the operation of transparency (and the diminishment of privacy) values for each might be different. For example, taxpayers who earn more than $1–2 million each year likely can afford sophisticated tax lawyers to mitigate their cognitive biases.[480] For their financial information to be publicly available and capture media attention, they might need to earn more than $10 million. The opportunity to exploit statutory ambiguities might arise when taxpayers' income rises above a few million, but their privacy interests as stakeholders diminish as soon as the child tax credit fades out—at roughly $200,000.[481] Additional empirical findings will help policymakers determine the precise amounts, but a rule of thumb is the top 0.01%. These 16,000 households receive on average $18.9 million in income each year, grew their wealth much faster than even the top 1% in the past few decades, and have sufficient income to activate the value of transparency for each of the four aspects of fiscal citizenship.[482] Congress need not mandate disclosure of all records of these taxpayers. It could make available, in precise numbers or narrow ranges, their incomes, sources of those incomes, various deductions, and tax liabilities.[483] This would bring to light ultra-wealthy taxpayers' fiscal contributions to the state, and how they have exercised their delegated discretion in self-assessment, without revealing sensitive data that do not facilitate public scrutiny.

Congress can even structure statutory transparency to enable taxpayer choice. This could enhance the political feasibility of disclosure, but also flows from a key conceptual implication of fiscal citizenship. As Section III.A has shown, ultra-wealthy taxpayers serve as policymaking partners with the federal government as

[480] Between 1999 and 2002, Ernst & Young LLP, a major accounting firm, designed and sold tax shelters to high-net-worth clients. The Department of Justice considered criminal prosecution of the firm but ended up settling. According to the statement of facts attached to the settlement agreement, Ernst & Young received gross fees of around $123 million from the sale of those tax shelters, or an average of $615,000 per client. *See* Ex. B, Statement of Facts, Settlement Agreement Between Ernst & Young LLP and the Southern District of New York (Feb. 26, 2013), https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/EY%20NPA.pdf. Assuming a combined state and federal marginal tax rate of 40%, anyone with more than $1.5 million of taxable income in the highest bracket will find these tax shelters—and sophisticated tax advice—attractive.

[481] IRS Tax Tip 2019-141, INTERNAL REVENUE SERV. (Oct. 9, 2019) https://www.irs.gov/newsroom/the-child-tax-credit-benefits-eligible-parents.

[482] Zucman & Saez, *supra* note 1; Howard R. Gold, *Never Mind the 1 Percent. Let's Talk About the 0.01 Percent*, U. CHI. BOOTH SCH. BUS. (Nov. 29, 2017), https://www.chicagobooth.edu/review/never-mind-1-percent-lets-talk-about-001-percent.

[483] Congress designed the pink-slip requirement in 1934 in precisely this way. *See supra* Section I.C.

they self-assess their income-tax liabilities.[484] In exercising their delegated authority, those taxpayers resolve statutory ambiguities and fill in the interstices of the law, much as agencies used to do before *Loper Bright Enterprises*. And *that* exercise of public power grounds demands for transparency. As a corollary, eliminating taxpayers' wide discretion in assessing income-tax liabilities diminishes the need for disclosure. Thus, Congress could present the choice to ultra-wealthy taxpayers: Either (1) continue to exercise delegated power and agree to public scrutiny by disclosing their tax records or (2) limit their exercises of delegated power by submitting to a guaranteed IRS audit of their tax returns, and continue to enjoy privacy protections. This two-tiered system accommodates taxpayers who place outsized value on privacy.[485] It channels the core insight of Section III.A.4: Power-wielding taxpayers cannot have their cake and eat it too.

Further, if it decides against publication of individualized tax information, Congress could ameliorate existing mechanisms of disclosure. This Article's conclusion that tax transparency is more appropriate for ultra-wealthy taxpayers might rekindle hopes for the IRS 400 Report. From 1992 to 2014, the Treasury Department compiled anonymized data about the top 400 individual income-tax returns with the largest adjusted gross incomes.[486] (The Trump administration discontinued the reports.[487]) It then publicized these data as part of the IRS's statistics of income.[488] Today, the IRS continues to publish selective information about tax returns with adjusted gross incomes of above $10 million.[489]

Such anonymized disclosure can also advance transparency, even if it is an imperfect substitute for more robust disclosure. The trick is to present the data without generating an *illusion of justice*. That is, existing and past IRS disclosure mechanisms can mislead the public as to the real tax burdens borne by the wealthy.

[484] *See supra* Section III.A.4.

[485] *See also* Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 742-43 (2009).

[486] *E.g.*, *The 400 Individual Income Tax Returns Reporting the Largest Adjusted Gross Incomes Each Year, 1992–2014*, INTERNAL REVENUE SERV. (Dec. 2016) [hereinafter 2014 IRS 400 Report], https://www.irs.gov/pub/irs-soi/14intop400.pdf.

[487] Scott Klinger, *President Trump Axed an IRS Report on the Richest 400 Americans. Let's Bring It Back.*, INEQUALITY (Feb. 9, 2022), https://inequality.org/research/irs-report-on-richest-400-americans.

[488] *SOI Tax Stats — Top 400 Individual Income Tax Returns with the Largest Adjusted Gross Incomes*, INTERNAL REVENUE SERV. (Jan. 5, 2024), https://www.irs.gov/statistics/soi-tax-stats-top-400-individual-income-tax-returns-with-the-largest-adjusted-gross-incomes.

[489] *SOI Tax Stats—Individual Statistical Tables by Size of Adjusted Gross Income*, INTERNAL REVENUE SERV. (Aug. 20, 2024), https://www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-size-of-adjusted-gross-income.

For example, the IRS 400 Report is parasitic on the *legal* definition of income to extract data: The top 400 taxpayers identified in the report are those who had the largest *tax* income, not those who had the largest accretion to their wealth or economic power. An individual with hundreds of millions of unrealized gain and little earned income will not appear on the list. Further, because the IRS 400 report calculates the average tax rates on the basis of tax (generally realized) income, it hides the extent of tax avoidance at the top. The 2014 report, for example, shows a plurality of the 400 bearing an average effective tax rate of 20% to 25%.[490] Likewise, the statistics-of-income report for tax year 2021 shows households with more than $10 million of adjusted gross income bearing an average tax rate of 25.1%.[491] All this might prompt the public to think that the ultra-wealthy faces a low but reasonable tax burden. But this is incorrect. Because the most significant forms of economic power for ultra-wealthy taxpayers are untaxed, their actual tax burden is far lower—closer to 1% or 2%, according to the ProPublica Report.[492]

An easy fix is to make clear—and make salient to the public—that the IRS 400 and statistics-of-income reports calculate average tax rates on the basis of *tax* income, and that tax-law income deviates from economic income, often by wide margins for the wealthy. This would preempt any insinuation that the ultra-wealthy pay 25% of their actual income in federal taxes. After all, ordinary people might not grasp the nuanced distinction between tax income and economic income, or the strictures of the realization doctrine. A more ambitious reform is to present tax information at the top income levels with not only a warning that the average tax rates do not track economic income, but also data about (1) their estimated *economic* income during the taxable year and (2) their average tax rates as a percentage of their estimated economic income. Treasury can use its own estimates or rely on academic studies. These reforms will ensure that existing and past mechanisms of disclosure present an accurate picture of the ultra-wealthy's tax burdens. What they cannot replicate, however, is individualized disclosure's potential to mobilize public pressure for structural tax reform. Knowledge from ProPublica's report that Jeff Bezos had so little federal income-tax liability that he claimed the child tax credit will make the public much more indignant than knowledge that the ultra-wealthy as a group paid an average of 2% of economic

[490] 2014 IRS 400 Report, *supra* note 486.

[491] *All Returns: Selected Income and Tax Items, by Size and Accumulated Size of Adjusted Gross Income, Tax Year 2021 (Filing Year 2022)*, INTERNAL REVENUE SERV. (Aug. 20, 2024), https://www.irs.gov/pub/irs-soi/21in11si.xls.

[492] Eisinger, Ernsthausen & Kiel, *supra* note 10.

income in federal taxes.[493] But for the short term, perhaps the ProPublica report itself has generated enough political momentum with staying power.

To be sure, any disclosure regime—whether anonymous or individualized—based on the income tax necessarily misses the tax records of many wealthy taxpayers because of existing loopholes. As the ProPublica leak showed, some of the richest Americans like Elon Musk and Jeff Bezos relied on *inter alia* the realization doctrine to report no taxable income in multiple years.[494] Enactment of a wealth tax would thus improve the implementation of tax-disclosure regimes. It would provide more accurate metrics of taxpayers' economic power and catch what an income-tax disclosure regime would miss. But absence from the list of ultra-wealthy taxpayers disclosed by the IRS itself invites scrutiny. Media widely publicize the extent of Musk's and Bezos's wealth, and their failure to appear on the top 0.1% list by income suggests an aggressive use of interpretive discretion and tax-avoidance techniques.[495] This reveals another virtue of transparency: Even limited disclosure of ultra-wealthy taxpayers' records could galvanize and enrich distributive discourse.[496] That is, it would supply the data that enable public conversation about the distribution of tax burdens, and tax law's role in shaping and channeling economic power.[497] These dialogues are critical to a legitimate, well-functioning democracy.[498]

[493] *Id.*

[494] *Id.*

[495] *E.g.*, LaFranco & Peterson-Withorn, *supra* note 342.

[496] In an ideal world, anonymous disclosure of tax data by income groups would generate robust discourse. As long as the agency (1) has knowledge of taxpayers' real economic power (e.g., economic income as opposed to the statutory tax concept of income that does not include, for example, most unrealized gains), and (2) discloses such information in epistemically sensible categories (e.g., with sufficiently precise ranges to make clear the distribution of tax burdens across income groups), the public can deliberate about distributive justice on an informed basis. In reality, however, people have bounded rationality, making disclosure of salient data—for example, tax records of Elon Musk—a more effective discursive tool. The state, in addition, often lacks robust data about the real economic power of individuals because of tax-avoidance techniques. Of course, as this Article has shown, the discursive value of individual tax disclosure is only part of the inquiry.

[497] Distributive discourse (that is, speech about economic inequality and the extent of the state's obligation to foster egalitarianism) and the role of the broader legal regime in creating or stifling distributive discourse are important topics for future research.

[498] *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482–83 (2011); Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409, 415-16 (2012).

CONCLUSION

Recent events have re-ignited the debate about tax privacy in the United States. Until now, the scholarly literature has focused on whether tax disclosure would incentivize compliance. But a historical and comparative analysis shows transparency's potential in effecting open fiscal governance. This Article then constructs a model of fiscal citizenship, positing that taxpayers play the roles of reporters, funders, stakeholders, and policymakers in their dynamic interactions with the fiscal apparatus of a democracy. Under this model, disclosure is more appropriate for ultra-wealthy taxpayers in times of high economic inequality. The Article thus pushes the scholarly discourse beyond compliance and provides insights in designing a transparency regime grounded in our fiscal social contract with the state.