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Martin Luther King, Jr. Lecture - "Skin in the Tax Game": Invisible Taxpayers? Invisible Citizens?

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Martin Luther King, Jr. Lecture

"*SKIN IN THE TAX GAME*": INVISIBLE TAXPAYERS? INVISIBLE CITIZENS?

MILDRED WIGFALL ROBINSON*

I. INTRODUCTION

PROFESSOR Mullane, in extending this invitation to deliver the 2014 Dr. Martin Luther King, Jr. Memorial lecture here at the Villanova University School of Law, noted that she was seeking someone who could speak from an economic justice perspective informed by work done in the area of taxation.

As I seek to respond to her invitation, let me first establish a context. You will recall that at the time of his assassination in 1968, Dr. King was campaigning in Memphis, Tennessee on behalf of the city's striking, predominantly black sanitation workers.[1] In Memphis at that time, more than one half of all black residents lived below the poverty line.[2] Comparatively, one in seven white Memphians lived below the poverty line.[3] "Four out of [ten] sanitation workers qualified for welfare, and they received no medical insurance, workers' compensation, or overtime pay."[4] The workers wanted improved working conditions, and they wanted to unionize.[5] Dr. King had long viewed racial injustice and economic injustice as inextricably intertwined.[6] But his proposals for redressing the conditions in which the sanitation workers lived and worked were, in terms of race, broadly cast. They included an economic and social bill of rights promis-

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1. *See Memphis 1968: Sanitation Workers' Strike Spurs Cause of Economic Justice*, APWU MAGAZINE (2005), http://apwumembers.apwu.org/laborhistory/05-1_memphissanitationworkers/05-1_memphissanitationworkers.htm.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* Even during his formative years, he viewed economic injustice as the inseparable twin of racial injustice. *See generally* Martin Luther King, Jr., "*My Pilgrimage to Nonviolence*," FELLOWSHIP (Sept. 1, 1958), *available at* http://mlk-kpp01.stanford.edu/primarydocuments/Vol4/1-Sept-1958_MyPilgrimageToNonviolence.pdf.

ing *all* citizens the right to a job, adequate education, decent housing, and a minimum income.[7]

II. ECONOMIC JUSTICE AND TAX BURDENS: WHY IT MATTERS . . .

There is no hint of direct concern for tax matters in any of this. Indeed, Dr. King may have been initially taken aback at the notion that concern for economic justice could extend to the ways in which we in this country *raise* revenue in addition to concerns regarding the ways in which we *use* those resources. But the importance of our taxing systems, writ large, cannot be overstated. Oliver Wendell Holmes quite likely said it best: "Taxes are what we pay for civilized society . . . ."[8] Given the centrality of raising revenues to financing our way of life, I submit that the ways in which we talk about and implement the tax laws allocating the *burdens* of this civilized society are just as important as the ways in which we use those resources to accord the *benefits* of living in this civilized society.

In fact, Holmes's observation is quite powerful. Let's think about his words a bit more. *TAXES . . . are what WE pay . . . for CIVILIZED SOCIETY.* These words are carved over the doors of the building housing the Internal Revenue Service in the nation's capital.[9] During the process of emblazoning those words upon that building, for a time the words were "taxes are what we pay." Had only those words remained, we would likely be having quite a different conversation here today. But as completed, Mr. Justice Holmes did not say *tax* is the price that we pay. Nor did he say that taxes are paid only by a few. "*Taxes*"—the word is plural. And *we* pay. So let's think more deeply about this quote. Just who is "*we*"; what are these *taxes*; and what does this *civilized society* look like?

III. "SKIN IN THE GAME"

Let me digress for just a moment. How many of you have heard or used the phrase "skin in the game?" To my surprise, while watching the Golden Globe awards on January 12th (for all of ten minutes), I heard Matthew McConaughey use the phrase in his acceptance speech upon re-

7. *See* Letter from SCLC, to the President, Congress, and Supreme Court of the United States (Feb. 6, 1968), *available at* http://www.thekingcenter.org/archive/document/economic-and-social-bill-rights. Dr. King had earlier shared this vision on the world stage during his 1964 Nobel Prize acceptance speech. *See* Martin Luther King, Jr., Nobel Prize Acceptance Speech (Dec. 10, 1964), *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-acceptance_en.html ("I have the audacity to believe that peoples everywhere can have three meals a day for their bodies, education and culture for their minds, and dignity, equality and freedom for their spirits.").

8. Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

9. *See* Jay Netherton, *A "Higher" Calling for the IRS?*, WETHEPEOPLE.ORG (June 19, 2013), http://wethepeoplehq.org/2013/06/19/a-higher-calling-for-the-irs/.

ceiving the award for his starring role in *Dallas Buyers Club*.[10] McConaughey said, "This film . . . was an underdog . . . turned down 86 times. . . . We got the right people together five years ago, stuck to it, put some *skin in the game*, and here it is."[11] I assume that as used here, he was referring to investing capital in the project, deemed to be an important signal to possible investors. The message to potential investors: We have put our money on the line . . . we are committed to this project . . . you should be too.

"Skin in the game"—I was instantly more attentive. Not because of his receipt of the award (well deserved in my view), but because of his use of the phrase. In non-political settings, it has been the currency demanded of those seeking to influence an outcome in a variety of circumstances including business, finance, betting, and war: "Skin in the game"—some *thing* that the interested party has at risk. Though he denies it, Warren Buffett was thought to have coined the phrase in the business world.[12] No doubt he, like many others, has demanded that ante when it appeared strategically useful to do so. Indeed, William Safire, writing in 2006, cited a 1912 news report in which the phrase was used and suggested that the concept of, at the very least a *skin* game, predated that 1912 report by almost 100 years![13]

I had encountered that phrase on a recurring basis in recent political discourse. The phrase with its unmistakable message has become a part of everyday American politics. It may have first been introduced into political jargon by Senator Tom Coburn (R-OK) in 2006 as the United States Senate considered health savings accounts (H.S.A.). During the Senate debate on a bill that its sponsors claimed would reduce health insurance premiums, Senator Coburn argued that "H.S.A.'s [would] give consumers some *'skin in the game'* by putting them in charge of health-care dollars."[14] The phrase has been used in both the executive and legislative branches of government and across party lines. It has been deployed by then President-elect Barack Obama,[15] Representative David Camp (R-MI),[16] and

10. Mr. McConaughey has since received the 2014 Oscar award for the Best Performance by an Actor in a Leading Role for *Dallas Buyers Club*.

11. *71st Golden Globe Awards* (NBC television broadcast Jan. 12, 2014) (emphasis added).

12. *See* William Safire, *Skin in the Game*, N.Y. TIMES (Sept. 17, 2006), http://www.nytimes.com/2006/09/17/magazine/17wwln_safire.html.

13. *See id.*

14. *Id.* (quoting Sen. Tom Coburn).

15. *See* Jennifer Parker, *Obama Calls for 'Grand Bargain' on Economy: 'Everybody's Going to Have to Give'*, ABC NEWS (Jan. 10, 2009, 2:25 PM), http://abcnews.go.com/blogs/politics/2009/01/obama-calls-for-2/ (noting that President-elect Obama explained that long-term fix for economy would demand sacrifices from all Americans, "Everybody's going to have to give. Everybody's going to have some skin in the game").

16. *See* George F. Will, *Dave Camp's Plan: Taxes Made Simple*, WASH. POST (Dec. 23, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122203771.html ("'I believe . . . you've got to have some responsibility

Senator Mark Warner (D-VA).[17] In short, it seems that "skin in the game" is becoming the price for participation in the political process. Personal financial risk—some *personal* stake—is demanded of all "players." The implications are clear: no skin, no play. If you want to participate in the conversation, you must bring something to the table.

That these are very high stakes indeed should go without saying. Broad participation in political debate has long been the aspiration for American governance. Limiting political participation on the basis of economic participation would certainly undermine that goal and would also arguably compromise the concept of what it means to be a citizen. A required economic ante (or the absence thereof), with its vast potential for constitutional mischief, should not be the litmus test for political participation. In fact, this tactic has actually been previously deployed. The poll taxes of the late nineteenth and early twentieth centuries, primarily instituted as part of the Jim Crow laws,[18] imposed a tax as a precondition to exercising the right to vote—precisely the kind of economic ante that "skin in the game" implicitly requires. Poll taxes were finally deemed unconstitutional in *Harper v. Virginia State Board of Elections*[19] in 1966. Any conceptual descendants having a similar effect should meet the same constitutional fate.

Furthermore, the suggestion that a significant percentage of Americans do *not* have "skin in the game" is specious. The fact of the matter is that most Americans—indeed, the vast majority of Americans—*do* have "skin in the game."

The requirement for "skin in the game," in the context of the recent deficit debate,[20] along with the "concern" so widely discussed in the 2012 campaign—that almost 50% of Americans pay no federal income tax[21]—is

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for the government you have.' People have co-payments under Medicare, and everyone should have some 'skin in the game' under the income tax system.").

17. *See* Naftali Bendavid & Damian Paletta, *Senate 'Gang' Hashes out Deficit Plan*, WALL ST. J. (May 2, 2011, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748704569404576297221814287188 ("[T]here's no option but to push ahead. A way forward won't be found 'unless there's a grand enough bargain that everybody feels they've got some skin [in] the game' . . . .").

18. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 84 (2001) (noting that poll tax was "esteemed . . . as the most reliable means of curtailing the franchise . . . .").

19. 383 U.S. 663 (1966).

20. *See, e.g.*, Travis Waldron, *Taxing the Poor: The Only Tax Increase Republicans Support*, THINKPROGRESS (July 25, 2011, 2:20 PM), http://thinkprogress.org/economy/2011/07/25/278175/taxing-the-poor-republicans-support/ (providing quotes from Sen. Orrin Hatch, Sen. John Cornyn, Sen. Dan Coats, and Rep. Eric Cantor that working poor need to contribute more to tax revenues).

21. The surreptitiously recorded comment made by then presidential candidate Mitt Romney during a 2012 private reception for wealthy donors remains illustrative. Romney was recorded as he described almost half of Americans as "people who pay no income tax," are "dependent upon government," and "believe the government has a responsibility to care for them." Michael D. Shear & Michael Barbaro, *In Video Clip, Romney Calls 47% 'Dependent' and Feeling Entitled*,

but the latest version of the ongoing political "cut-taxes/reduce governmental size" wrangling. Paul Krugman noted in a New York Times op-ed that the downsizing argument has at its heart an "effort to . . . bully the nation into slashing social programs—especially programs that help the poor."[22] The deficit debate is yet another play on the high political visibility of the *federal income tax* as an institution. Though a year apart, the deficit and 47% comments share a common thread: all are driven by the view that those Americans who are *federal income tax* "freeloaders" are not entitled to a political voice. Rather, these Americans can be shut out of the conversation regarding governmental imperatives. Both sets of comments, however, share a fatal flaw: neither look beyond the federal level—and the federal income tax at that—in assessing the extent to which Americans across the income spectrum bear the burden of costs of governance *writ large.*

An editorial published in the *New York Times* in the summer of 2011 addressed this myopia.[23] The editorial conceded, as it must, that in the context of that debate, the group from whom skin was demanded was the 47% of Americans who did not pay federal income tax.[24] Of critical importance, however, as the *New York Times* editorial also pointed out, the absence of liability on the lower end of the socio-economic scale results from deliberate tax policy.[25] A combination of deductions, exemptions, and credits—along with the progressive structure of the internal revenue code—ensures that the poorest Americans are shielded entirely from income tax liability.[26] Many (though not all) of those earning more than this minimal amount are advantaged by tax expenditures designed to accord tax relief to Americans hardest pressed economically. An important element of this deliberate policy has been the Earned Income Tax Credit (EITC), implemented with bipartisan support during the Nixon administration and substantially reformed during the Reagan administration.[27]

N.Y. TIMES (Sept. 17, 2012, 6:51 PM), http://thecaucus.blogs.nytimes.com/2012/09/17/romney-faults-those-dependent-on-government/?_php=true&_type=blogs&_r=0.

22. Paul Krugman, Op-Ed., *The Populist Imperative*, N.Y. TIMES (Jan. 23, 2014), http://www.nytimes.com/2014/01/24/opinion/krugman-the-populist-imperative.html.

23. *See* Editorial, *The New Resentment of the Poor*, N.Y. TIMES (Aug. 30, 2011), http://www.nytimes.com/2011/08/31/opinion/the-new-resentment-of-the-poor.html.

24. *Id.*

25. *See id.* The editorial defines the poor as those families making less than $40,000 annually, noting that nearly ninety percent of those families paying no income tax make less than this figure. *Id.* The average income for an American household is, presently, approximately $50,000 annually.

26. *See id.* Taxpayers will not be subject to liability until taxable income exceeds an amount greater than the combination of the standard deduction and the appropriate number of personal exemptions.

27. *See* Thomas L. Hungerford & Rebecca Thiess, *The Earned Income Tax Credit and the Child Tax Credit: History, Purpose, Goals, and Effectiveness*, ECON. POLICY INST.

The editorial also correctly notes that the federal income tax is not the only source of governmental tax liability.[28] Exemption of liability for federal income tax purposes does not necessarily carry with it similar exemption from other levies either on the federal level or on the state and local levels.[29] In the words of the editorial, "[e]ven if [Americans] earn too little to qualify for the [federal] income tax, they pay payroll taxes . . . gasoline excise taxes and state and local taxes."[30]

The editorial's key point bears repeating: Americans who do not pay federal income taxes pay *state and local* taxes *in addition to* any levies to which they remain subject on the federal level. A close examination of the effect of this cumulative liability makes even more powerful the editorial's assertion that "a vast majority of Americans have skin in the tax game."[31]

The simple fact is that the American system of governance is not unitary but deliberately federalist. Further, *fiscal* federalism is inextricably a feature of this stratified American governance. As such, government on *each* level must identify sources of revenue adequate to defray services provided and—with the exception of the federal government—must do so within the confines of a balanced budget.[32]

In reality, the state and local taxes upon which subnational governments rely inevitably impose an additional economic burden on less affluent taxpayers. Because of either the inherently regressive nature of many of the levies upon which subnational governments rely or the manner in which they have been implemented (and sometimes both), less affluent Americans may well carry *more* than their "fair share" of the aggregate tax burden. That is, they pay more than they may reasonably be expected to pay in light of their more limited disposable income. Further, the taxes paid may have little political salience, thus gaining little traction for affected taxpayers. In short, these taxpayers may have little or no political visibility. Finally, because of the long-term economic effects of decades of racial discrimination, marked racially demarcated differences in wealth exist. Black and brown Americans are demonstrably less affluent (and have

(Sept. 25, 2013), http://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/.

28. *See* Editorial, *supra* note 23.

29. For an explanation of the impact this can have on taxes paid, see CONG. BUDGET OFFICE, THE DISTRIBUTION OF HOUSEHOLD INCOME AND FEDERAL TAXES, 2008 AND 2009 14 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/43373-06-11-HouseholdIncomeandFedTaxes.pdf ("For most income groups, the 2009 average federal tax rate was the lowest observed in the 1979–2009 period . . . . Payroll tax rates rose steadily for the lowest income group, offsetting some of the decline in their individual income tax rates.").

30. Editorial, *supra* note 23.

31. *Id.*

32. *See generally* NAT'L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS (October 2010), *available at* http://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements-provisions-and.aspx (discussing various state balanced budget requirements).

less disposable income) than their white counterparts.[33] As a result, the burden of regressive taxes is quite likely borne disproportionately by Americans of color.

IV. REVENUE SOURCES: AN OVERVIEW

A cursory review of the kinds of levies to which taxpayers are likely to be subject on each level of government is helpful here. Recall that government on *each* level must identify sources of revenue adequate to defray services provided. Without exception, on each level, in recent years and as a matter of fiscal necessity, income items for such budgets have been of mixed source; that is, both major and minor sources of revenue have been tapped.[34] Relatively speaking, income, retail sales, federal government transfers, and property taxes are major sources of revenue and "everything else"—including user charges, license fees, and excise taxes—are minor but increasingly important sources of revenue.[35]

A. *The Federal Government*

On the federal level, the individual income tax has been the major income source and currently accounts for approximately 46% of federal revenue.[36] As has been widely reported, this burden is not borne by all Americans; approximately 47% of American taxpayers paid no federal income tax at all in 2011.[37] A point lost in the heated rhetoric of the deficit debates and the 2012 presidential campaigns is that the percentage had not always been that high. The 2011 percentage reached what was then a historic high as a result of the great recession of 2008; the historical average is about 40%.[38] More recently, in 2013, approximately 43% of Ameri-

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33. *See* U.S. CENSUS BUREAU, TABLE 695. MONEY INCOME OF FAMILIES—NUMBER AND DISTRIBUTION BY RACE AND HISPANIC ORIGIN: 2009, http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth.html (providing data on family incomes grouped by race and national origin).

34. *See* CHERYL H. LEE ET AL., U.S. CENSUS BUREAU, STATE GOVERNMENT FINANCES SUMMARY REPORT 2–4 (Jan. 23, 2013), *available at* http://www2.census.gov/govs/state/12statesummaryreport.pdf (discussing various sources of state revenues).

35. *See* TAX POLICY CTR., *State and Local Tax Policy: How Have the Sources of Revenue for State and Local Governments Changed over Time*, fig. 1 (May 8, 2013), http://www.taxpolicycenter.org/briefing-book/state-local/revenues/overtime.cfm.

36. WHITE HOUSE OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES, TBL. 2.1, *available at* http://www.whitehouse.gov/omb/budget/historicals.

37. *See* Editorial, *supra* note 23; *see also* Chuck Marr & Chye-Ching Huang, *Misconceptions and Realities About Who Pays Taxes*, CTR. ON BUDGET & POLICY PRIORITIES (Sept. 17, 2012), http://www.cbpp.org/cms/?fa=view&id=3505.

38. *See* Marr & Huang, *supra* note 37.

can taxpayers had no liability.[39] New estimates project a continually declining percentage until, by 2024, only about one-third will pay no tax.[40]

It remains significant that a sizeable minority of Americans will continue to have no federal income tax liability. This assumption rests on the expectation that the present deliberate tax policy will remain in place. Given that assumption, as is presently the case, quite likely a substantial percentage of this exempt group will remain the working poor.[41] For these Americans, the combination of the standard deduction and the personal exemption will lop off the bottom of the income curve.[42] Further, many of the taxpayers who exceed those minimal incomes but remain at quite low income levels will continue to receive disbursements as appropriate from the federal treasury through the Earned Income Tax Credit (EITC), making the system a negative income tax to this extent.[43] Importantly, despite its shortcomings, many economists and policy makers regard the EITC as having been highly effective in lifting substantial numbers of the American working poor out of poverty.[44] Additional relief for earners on the lower end of the income spectrum is provided through the Child and Dependent Care Credit and the Child Tax Credit (CTC), which in combination, effectively exempt an additional segment from liability.[45] When these numbers—those advantaged by the EITC and those advantaged by the Childcare Credits—are increased by the number of

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39. *See* Roberton Williams, *And Now for the Movie: Fewer Americans Pay No Federal Income Tax*, TAX POLICY CTR. (Aug. 29, 2013, 11:51 AM), http://taxvox.taxpolicycenter.org/2013/08/29/and-now-for-the-movie.

40. *Id.* This projection is predicated upon the expectation that the economy will continue to improve and, possibly, the expiration of tax cuts.

41. *See* Marr & Huang, *supra* note 37 ("Most of the people who pay neither federal income tax nor payroll taxes are low-income people who are elderly, unable to work due to a serious disability, or students . . . .").

42. *See* IRS, Publication 501 (2013), *available at* http://www.irs.gov/publications/p501/ar02.html#en_US_2013_publink1000289305 (showing that standard deduction is $12,200 for married couple filing jointly and personal exemption is $3,900, for total non-taxable amount of $20,000 for married couple filing jointly).

43. *See* CTR. ON BUDGET & POLICY PRIORITIES, *Policy Basics: The Earned Income Tax Credit* (Jan. 31, 2014), http://www.cbpp.org/cms/?fa=view&id=2505. The EITC subsidizes low-income working families. It provides a refundable credit equal to a fixed percentage of earning from the first dollar of earning until the credit reaches its maximum. After that point, it is phased out until it disappears entirely. *See* I.R.C. § 32 (2012).

44. *See* CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 43. The Center on Budget and Policy Priorities, using Census Bureau data, estimates that in 2012, the credit "lifted about 6.5 million people out of poverty, including about 3.3 million children." *Id.*

45. *See* IRS, *Ten Things to Know About the Child and Dependent Care Credit* (March 7, 2011), http://www.irs.gov/uac/Ten-Things-to-Know-About-the-Child-and-Dependent-Care-Credit (illustrating tax relief and requirements for Child and Dependent Care Credit); *see also* I.R.C. § 21 (providing tax credit for expenses for household and dependent care services necessary for gainful employment); I.R.C. § 24 (providing for child tax credit). The CTC is the largest tax code provision benefiting families with children.

(most likely elderly) taxpayers, who are in receipt of modest pensions and Social Security benefits,[46] a substantial minority exists. Finally and inevitably, some segment of potential taxpayers may have no liability in spite of substantially higher incomes because of the confluence of other tax preferences or because of strategic tax planning. Included in this final category are taxpayers who are advantaged by deductions for mortgage interest, state and local taxes, charitable contributions, and exclusion for contributions to pensions, 401(k) plans, and employer-sponsored health insurance.

In any case, all of those who fall into this group will remain subject to other federal taxes and levies. Payroll taxes constitute the next major source of revenue, generating approximately 35% of federal revenues.[47] This category includes social security and Medicare taxes as well as unemployment insurance and federal workers' pension contributions.[48] In 2011, a *New York Times* editorial noted that "[o]nly 14 percent of households pay neither income nor payroll taxes . . . ."[49] This remains the case.[50] Bringing up the rear insofar as individual taxpayers are concerned are excise or transactional taxes—proceeds of which comprise approximately 3% of federal revenues.[51] Included here are levies on alcohol, tobacco, telephone, ozone-depleting chemicals/products, and transportation fuels.[52]

B. *State Governments*

States' major income items have been either the retail sales tax,[53] or individual income tax,[54] or some combination thereof for a significant share—about two-thirds—of revenue generated.[55] Both of these systems

46. *See* IRS, *Topic 410—Pensions and Annuities* (Feb. 27, 2014), http://www.irs.gov/taxtopics/tc410.html.

47. *See* CTR. ON BUDGET & POLICY PRIORITIES, *Policy Basics: Where Do Federal Tax Revenues Come From?* (Mar. 31, 2014), http://www.cbpp.org/cms/?fa=view&id=3822.

48. *See* IRS, *Understanding Employment Taxes*, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Understanding-Employment-Taxes (last updated June 13, 2014) (providing information on employment taxes).

49. Editorial, *supra* note 23.

50. *See* Williams, *supra* note 39.

51. *See* CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 47.

52. *See id.*

53. *See State Sales Taxes*, FED'N OF TAX ADM'RS (Jan. 1, 2014), http://www.taxadmin.org/fta/rate/tax_stru.html (providing data on retail sales tax and states' income).

54. *See State Income Taxes*, FED'N OF TAX ADM'RS (Jan. 1, 2014), http://www.taxadmin.org/fta/rate/tax_stru.html [hereinafter *State Income Taxes*] (providing data relating to individual income tax and states' income).

55. *See* SHEILA O'SULLIVAN ET AL., U.S. CENSUS BUREAU, STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2012 2 (Apr. 11 2013), *available at* http://www2.census.gov/govs/statetax/2012stcreport.pdf (noting that general sales and individual income taxes generated 30.5% and 35.3% of state income respectively, for total of 65.8% of revenue).

have been subject to intensive review and fiscal tweaking recently as states have struggled in the wake of the latest economic downturn to accommodate falling revenues, sometimes in the face of increasing demand for services.[56] Retail sales taxes have been particularly volatile as state legislative bodies seek continuously to offset budget deficits by increasing collections through this mechanism.[57]

C. *Local Governments*

Local governments[58] have since the 1930s relied principally upon the *ad valorem* property tax for financial support.[59] The property tax is, in its purest form, levied against all real property, residential and business, within the geographic confines of the taxing district. This tax has almost from its inception been unpopular with taxpayers and commentators alike.[60] Its most salient feature is the factor that likely has contributed most to its lack of popularity; again, in its purest form, it is an annual tax on wealth as measured by the value of property imposed without regard to taxpayer liquidity.

D. *General Observations*

In addition, on both the state and local levels, a variety of transaction-based targeted taxes, fees, and user charges are in place.[61] This hodgepodge of additional revenue sources has steadily become more diverse and of greater fiscal importance over the last several decades. Prominently included in this last group of levies are the so-called sin taxes: taxes on alcohol, tobacco, and gaming.[62]

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56. *See, e.g.*, Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POLICY PRIORITIES (June 27, 2012), http://www.cbpp.org/cms/?fa=view&id=711.

57. *See* Gary C. Cornia & Ray D. Nelson, *State Tax Revenue Growth and Volatility*, 6 REG'L ECON. DEV. 23, 32 (2010), *available* at *https://research.stlouisfed.org/publications/red/2010/01/Cornia.pdf* (discussing volatility with regard to retail sales tax).

58. Included here are county commissions, city councils, town councils, school districts, and special government districts having financial independence.

59. *See* WERNER Z. HIRSCH, THE ECONOMICS OF STATE AND LOCAL GOVERNMENT 96 (Seymour E. Harris ed., 1970); JAMES A. MAXWELL & J. RICHARD ARONSON, FINANCING STATE AND LOCAL GOVERNMENTS 135–37 (3d ed. 1977).

60. For example, in 1994, 28% of Americans chose the local property tax as the worst tax, over the federal income tax, social security tax, state income tax, and state sales tax. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES 1 (1994), *available at* http://www.library.unt.edu/gpo/ACIR/Reports/survey/S-23.pdf (highlighting survey in which 28% of Americans chose local property tax as worst tax); *see also* HIRSCH, *supra* note 59, at 95.

61. *See* LEE ET AL., *supra* note 34.

62. The legalization of marijuana may present the next big opportunity for significant increases in sin tax collections. Legalization is being viewed by officials in Colorado as a potential tax bonanza. Colorado's most recent budget proposal estimated that sales of marijuana for recreational use could reach $610 billion in the next fiscal year. The proposal projected sales tax collections of $134 million

Importantly, with the exception of *potentially* progressive taxes on individual incomes (and in a few states on estates and gifts),[63] on all levels the additional sources of revenue described—major and minor—are generated through the use of flat-rates. Whether imposed annually (e.g., federal payroll taxes)[64] or transactionally (e.g., retail sales taxes), structurally, the levy is a single fixed rate imposed on a targeted transaction. As such, because the same flat rate is imposed over, and over, and over again, regressive effect is unavoidable. The federal income tax, on the other hand, is an annually determined progressive tax.[65] Those taxpayers who have more pay more and, consequently, bear a larger share of the costs of government. A caveat here: state income tax systems may or may not be progressive. Progressivity may mirror that of the federal system or may be muted primarily by virtue of a relatively tight state marginal rate structure.[66] State income tax systems may, in fact, be regressive in effect if the state relies upon a flat rate to determine liability.

V. WHY CARE ABOUT REGRESSIVE EFFECT? ORIGIN AND MANAGEMENT

A quick example demonstrates regressive effect. Again and briefly, to characterize a tax or system of charges as regressive is to say that the levy exacts more, relatively speaking, from those having *less* from which to pay it. Assume that we have two individual taxpayers. Taxpayers *A* and *B* are both domiciled in the State of Bliss. Both are required to pay 10% of incomes received during the calendar year to the State of Bliss. Taxpayer *A* has $10,000 in income from which to pay the tax and Taxpayer *B* has $45,000. Taxpayer *A*'s tax bill of $1,000 imposes a much greater real cost

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from such transactions. *See* Jack Healy, *Colorado Expects to Reap Tax Bonanza from Legal Marijuana Sales*, N.Y. TIMES (Feb. 20, 2014), http://www.nytimes.com/2014/02/21/us/colorado-expects-to-reap-tax-bonanza-from-legal-marijuana-sales.html (explaining potential tax effects of legalization of marijuana). Whether that outcome will be realized is, of course, unknowable. As noted in a recent Washington Post editorial, "[o]ver time, the tax take from legal pot probably won't live up to the hype because producers, distributors and consumers could develop into a powerful lobby opposed to taxation." Editorial, *Tax Revenue from Legalized Marijuana May Not Meet Expectations*, WASH. POST (Mar. 5, 2014), http://www.washingtonpost.com/opinions/tax-revenue-from-legalized-marijuana-may-not-meet-expectations/2014/03/05/4b14865e-a2f7-11e3-a5fa-55f0c77bf39c_story.html.

63. *See State Income Taxes*, *supra* note 54.

64. Federal payroll taxes are flat-rate taxes that apply without exemption on salaries up to (most recently) $106,800. As a result, these taxes have a very regressive effect.

65. *See* IRS, *2013 Form 1040 Tax Table & 2013 Form 1040 Tax Computation Worksheet* (2013), *available at* http://www.irs.gov/pub/irs-pdf/i1040tt.pdf (demonstrating that federal income tax is annually determined progressive tax).

66. *See State Individual Income Tax Rates*, FED'N OF TAX ADM'RS (Jan. 1, 2014), http://www.taxadmin.org/fta/rate/ind_inc.pdf [hereinafter *State Income Tax Rates*] (showing that Colorado, Illinois, Indiana, Massachusetts, Michigan, North Carolina, Pennsylvania, and Utah all have single tax bracket, while, Hawaii, for example, has twelve brackets ranging from 1.4%–11%).

to *A* than will be true for Taxpayer *B*, whose $4,500 liability is higher but who also has more disposable resources from which to pay the levy.

Regressive effect is not intentional. Rather, it inevitably results from the use of any flat rate levy. As a policy matter, whether and how regression *should or could* be managed is a separate and important question. The extent to which mitigation can be realized will be driven by several factors. These include (1) the level of government whose fiscal structure is under the microscope; (2) its fiscal challenges; (3) the nature of the levy in question in conjunction with other revenue sources; and, inevitably, (4) political dynamics. Regression in retail sales taxes, for example, is typically eased by providing exemptions for designated transactions.[67] For example, exemptions for the cost of foods purchased for preparation and consumption at home are in place in thirty-one of the forty-five states that have a retail sales tax. Of the remaining states, seven tax groceries at lower rates than other goods, five tax groceries fully but offer credits offsetting some portion of the cost, and two apply sales tax fully without relief.[68] One should not necessarily take tax solace from this well-intentioned relief provision, however. As will be shown, relief from regressive effect may prove illusory because of the happenstance of personal circumstance.

Broadly speaking, political considerations will inevitably come into play as legislative bodies address fiscal issues including the mix of revenue-generating systems. Consider this hypothetical. State *A* needs to raise additional revenue in order to maintain its spending *status quo*. This is not a matter of providing additional services. The legislature has three options: (1) increase income taxes by raising marginal rates—coincidentally realizing a progressive effect; (2) increase sales taxes by raising the applicable rate—exacerbating regressivity; or (3) increase the state cigarette tax—also regressive in effect. We will assume, reasonably, that all of the legislators have the best interests of State *A* in mind but of course included in that calculus is the importance of retaining their seats![69] Practically, credible data establish that any of the three possibilities can generate the needed revenues, but voters—through emails, tweets, and facebook postings—have in no uncertain terms urged the decision-makers to refrain from manipulating either income or sales tax rates. Reasons pressed upon lawmakers by these involved taxpayers are those that you can imagine and may well have heard: among others, higher income tax rates will cause

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67. *See generally* ANDREEA MILITARU & THOMAS STRATMANN, MERCATUS CTR., A SURVEY OF SALES TAX EXEMPTIONS IN THE STATES: UNDERSTANDING SALES TAXES AND SALES TAX EXEMPTIONS (Jan. 7, 2014), *available at* http://mercatus.org/publication/survey-sales-tax-exemptions-states-understanding-sales-taxes-and-sales-tax-exemptions.

68. *See State Sales Tax Rates and Food & Drug Exemptions*, FED'N OF TAX ADM'RS (Jan. 1, 2014), http://www.taxadmin.org/fta/rate/sales.pdf [hereinafter *State Sales Tax Rates*] (showing differences in food and drug exemptions among states).

69. *See generally* WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES (10th ed. 2000).

affluent voters to exit the state[70] and increased sales taxes will place retailers at a competitive disadvantage.[71] Ah, but an increase in cigarette taxes—*who cares*? Political action groups composed of smokers or others interested in resisting an increase in a cigarette tax are rare and, in any event, may be relatively dispassionate in light of an agenda unrelated to the tax burden *per se*. How much credence, after all, is the tobacco industry now likely to enjoy as a proponent of lower taxes?[72] And when last have you seen a bumper sticker declaring that "I am a smoker and I vote!"? An increase in a tax on sin often seems the path of least political resistance, hence the proliferation of this category of levies in particular.[73] As a practical matter, many—non-smokers—never expect to be affected by the levy, and those who will pay are unlikely to seek political sympathy. Coincidentally, there is one interest group that would strongly *support* an increased cigarette tax, but not for reasons of revenue enhancement. Here we would find anti-smoker coalitions that would, quite rightly, anticipate reduced cigarette usage as an ultimate consequence of higher tax cost.[74] Cigarette tax revenues are price sensitive and have, in fact, declined over time after a period of enhanced collections.[75]

To give this discussion more immediacy, let's stop for a moment and examine the Pennsylvania tax structure. You have a tax on individual incomes that uses a *flat rate, 3.07%*, on incomes.[76] By the way, Pennsylvania's reliance on a flat rate makes it one of only eight states utilizing a flat rate among the forty-five states that tax income.[77] (Interestingly, one of the other seven states is Massachusetts; both of these states are adjacent to New York.[78] There is likely an intriguing story of tax competition be-

70. *But see* Robert Smith, *Studies: Rich Don't Flee High-Tax States*, NPR (Apr. 29, 2011, 12:01 AM), http://www.npr.org/blogs/money/2011/04/29/135813061/studies-rich-dont-flee-high-tax-states.

71. *See* Jeff Bell, *Tired of Disadvantage, Retailers Stump for Online Sales Tax*, CINCINNATI BUS. COURIER (Oct. 28, 2011, 6:00 AM), http://www.bizjournals.com/cincinnati/print-edition/2011/10/28/tired-of-disadvantage-retailers-stump.html?page=all.

72. *See* Michael S. Givel & Stanton A. Glantz, *Tobacco Lobby Political Influence on US State Legislatures in the 1990s*, 10 TOBACCO CONTROL 124 (2001), *available at* http://tobaccocontrol.bmj.com/content/10/2/124.full.

73. *See* Katrina Trinko, Opinion, *Political Cowards Love the Sin Tax*, USA TODAY (Sept. 20, 2010, 5:13 PM), http://usatoday30.usatoday.com/news/opinion/forum/2010-09-21-column21_ST_N.htm?loc=interstitialskip.

74. *See generally* Frank J. Chaloupka et al., *Tobacco Taxes as a Tobacco Control Strategy*, 21 TOBACCO CONTROL 172 (2012), *available at* http://tobaccocontrol.bmj.com/content/21/2/172.full.pdf+html (demonstrating that over 100 studies have found that tobacco excise taxes are powerful tool for reducing tobacco use).

75. *Id.*

76. *See State Income Tax Rates*, *supra* note 66.

77. *See id.*

78. *See id.*

tween states here). Your sales tax rate is 6%[79]—sixteenth highest in the country—with exemptions for "not-ready-to-eat" food,[80] most wearing apparel, legally available drugs both prescribed and over-the-counter,[81] and some textbooks.[82] The sales tax rate is 8% in Philadelphia and 7% in Allegheny County (Pittsburgh).[83] Cigarettes are taxed at the rate of $1.60/pack—twenty-second highest in the country.[84] Your tax on gasoline has just been increased by $.095/gallon for 2014,[85] setting you on course to have the highest such tax in the country by 2017.[86] Finally, I found particularly interesting the fact that Pennsylvania generates over $1.4 billion annually from gambling revenues,[87] more money from casino gambling than any other state.[88] In 2013, over half that amount, $782.5 million, will be used for property tax relief on the local level.[89] The property tax is the principal source of revenue on the local level (excluding inter-governmental transfers)[90] and is only levied on those who can afford to own property.[91] Thus, Pennsylvania uses levies on gambling revenues, costs borne overwhelmingly by the poor,[92] to alleviate property tax levies—relief that benefits only the class of individuals who own property. Overall, this is a pretty regressive structure.

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79. 61 PA. CODE § 31.2 (1972). For the proposition that the 6% rate is the sixteenth highest in the nation, see *State Sales Tax Rates*, *supra* note 68.

80. 61 PA. CODE § 60.7(b)(5) (1994); *see also State Sales Tax Rates*, *supra* note 68.

81. 61 PA. CODE § 52.1(b) (1990).

82. *Id.* § 58.9 (1971).

83. *See* PA. DEP'T OF REVENUE, *Sales, Use and Hotel Occupancy Tax*, http://www.portal.state.pa.us/portal/server.pt/community/sales,_use_hotel_occupancy_tax/14487 (last visited Aug. 1, 2014).

84. *See State Excise Tax Rates on Cigarettes*, FED'N OF TAX ADM'RS (Jan. 1, 2014), http://www.taxadmin.org/fta/rate/cigarette.pdf.

85. *See* 43 Pa. Bull. 7360 (Dec. 14, 2013).

86. *See* Peter Mucha, *Pa. Gas Tax to Rise Jan. 1, Again in 2015 and '17*, PHILA. INQUIRER (Dec. 31, 2013, 12:28 PM), http://www.philly.com/philly/news/Pa_gas_tax_to_rise_Jan_1_again_in_2015_and_17_.html (explaining that by 2017, new tax rate could add up to 25 cents to each gallon, making Pennsylvania's gas tax rate higher than any current gas tax rate in country).

87. Harold Brubaker, *Pa. Leads in Casino Tax Revenue*, PHILA. INQUIRER (Aug. 26, 2013), http://articles.philly.com/2013-08-26/business/41446163_1_casino-tax-revenue-casino-advocate-gambling.

88. *Id.*

89. *Id.*

90. *See* Roberton Williams & Yuri Shadunsky, *State and Local Tax Policy: What Are the Sources of Revenue for Local Governments?*, TAX POLICY CTR. (May 7, 2013), http://www.taxpolicycenter.org/briefing-book/state-local/revenues/local_revenue.cfm (illustrating sources of local revenue).

91. The property tax, however, is not in itself progressive; it is technically regressive for those upon whom it is levied.

92. *See generally* Mary O. Borg et al., *The Incidence of Taxes on Casino Gambling: Exploiting the Tired and Poor*, 50 AM. J. ECON. & SOCIOLOGY 323 (1991) (discussing impact of casino taxes on poor).

I submit that regressive effect *should* be a policy concern. Regression imposes a greater financial burden on those with fewer resources from which to service the levy. This nagging question persists: should public budgets, in the final analysis, be balanced on the backs of those least able to pay?[93]

So where are we now in this analysis? Recall point one: Americans who do not pay federal income tax nonetheless have "skin in the game;" they are subject to other federal taxes and levies as well as a wide range of tax and non-tax levies on the state and local level. Here I reiterate point two: In light of the regressive effect of, especially state taxing structures, less affluent Americans may actually bear *more* than their fair share of financing the burdens of government!

VI. SOCIO-ECONOMIC STATUS, RACE, AND REGRESSION

Even more troubling, regression's socio-economic skew has a racial component. This is inevitable in light of present income distributions and given the long-term economic consequences of racial discrimination. The racial component is inevitable because less affluent Americans *remain* disproportionately black and brown.[94] The Great Recession of 2008 has taken a fearsome toll on Americans generally—almost daily we hear reports of the disappearing middle class.[95] Adding to this concern is the fact that Americans of color, latecomers to the middle class, are losing the battle to remain there at greater rates. Unemployment rates for African Americans have persistently been twice those of non-Hispanic whites.[96] As of January 2014, the seasonally adjusted unemployment rate for whites was 5.7% (17.5% for sixteen to nineteen year olds); for black or African Americans, the comparable figures were 12.1% and 38%.[97] Hispanic or Latino Americans suffer rates greater than those of white Americans, though they have been and remain less hard hit than African Americans.[98] Average household incomes show a similar disparity: As of 2009, white households

93. *See generally* Martin A. Sullivan, *Taxing the Sins of the Poor: Do Two Wrongs Make a Right?*, 2000 TAX NOTES TODAY 54-104 (2000) (discussing regressive effect of cigarette taxes and charges incident to state-run lotteries and suggesting that cigarette taxes be reduced and government-sponsored lotteries be discontinued).

94. *See* SUZANNE MACARTNEY ET AL., POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011, US CENSUS BUREAU (Feb. 2013), *available at* http://www.census.gov/prod/2013pubs/acsbr11-17.pdf.

95. *See, e.g.*, Robert Reich, *America's Vanishing Middle Class*, SALON.COM (Aug. 31, 2012, 3:34 PM), http://www.salon.com/2012/08/31/americas_vanishing_middle_class; Nelson D. Schwartz, *The Middle Class Is Steadily Eroding. Just Ask the Business World.*, N.Y. TIMES (Feb. 2, 2014), www.nytimes.com/2014/02/03/business/the-middle-class-is-steadily-eroding-just-ask-the-business-world.html.

96. *See* BUREAU OF LABOR STATISTICS, *Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age* (Feb. 7, 2014), http://www.bls.gov/news.release/empsit.t02.htm.

97. *Id.*

98. *See* BUREAU OF LABOR STATISTICS, *Table A-3. Employment Status of the Hispanic or Latino Population by Sex, and Age* (Feb. 7, 2014), http://www.bls.gov/

had an average income of $51,861;[99] black households had an average income of $32,584;[100] and Hispanic households had an average income of $38,039.[101] The "wealth gap" between white Americans and Americans of color is widening.[102] In 2011, the average white household had almost eighteen times as much wealth as the average African American household and almost fifteen times that of the average Latino household.[103] Americans generally are losing ground. Income inequality is accelerating—presently the top 1% of Americans hold 42.1% of all financial wealth;[104] the bottom 80% hold only 4.7% of all financial wealth.[105] Indeed, since the onset of 2008's Great Recession, the number of American households with *no* marketable assets has increased from 18.6% to 22.5%.[106]

How does all of this lead to political invisibility? Let me provide examples of the effects of intertwined lower socio-economic status and reliance on regressive revenue generating systems—even with safe harbors such as exemptions—on potential political leverage.

A. *Income Taxes*

Flat income tax rates have a regressive effect. To the extent, however, that tax relief measures protect those in the lowest income strata from liability (for example, through the federal EITC, or a state equivalent thereof), such taxpayers may be viewed as having no basis for complaint of unfairness. This is, of course, in spite of the fact that such tax relief can only be provided to those least able to pay as the result of deliberate tax policy. On the other hand, you may be surprised to learn that—of the forty-one states (including the District of Columbia)[107] that tax individual incomes—only twenty-four in addition to the District of Columbia permit

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news.release/empsit.t03.htm (noting seasonally adjusted unemployment rate for Hispanics, for January 2014, was 8.4% overall).

99. U.S. CENSUS BUREAU, *Table 691. Money Income of Households—Median Income by Race and Hispanic Origin, in Current and Constant (2009) Dollars: 1980 to 2009* (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0690.pdf.

100. *Id.*

101. *Id.*

102. *See id.* (showing from 2000–2009, median household income for white households rose by 18.1% while rising just 9.8% for black households and 14.6% for Hispanic households).

103. *See* U.S. CENSUS BUREAU, *Net Worth and Asset Ownership of Households: 2011* (June 21, 2013), *available at* http://www.census.gov/people/wealth.

104. G. William Domhoff, *Wealth, Income, and Power*, WHO RULES AMERICA? (Feb. 2013), http://www2.ucsc.edu/whorulesamerica/power/wealth.html.

105. *Id.*

106. *See* Edward N. Wolff, *The Asset Price Meltdown and the Wealth of the Middle Class* 9 (Soc'y for the Study of Econ. Inequality, Working Paper, 2012), *available at* http://appam.confex.com/data/extendedabstract/appam/2012/Paper_2134_extendedabstract_151_0.pdf.

107. *See State Income Tax Rates*, *supra* note 66.

an earned income tax credit for reporting purposes.[108] Further, in four of those twenty-five taxing jurisdictions, the credit is not refundable.[109] That is, the taxpayer may be relieved from liability but will not receive a check from the state treasury should liability be negative. By the way, Pennsylvania does not have an EITC in its income tax system at all![110]

B. *Retail Sales Taxes*

Retail sales taxes have a regressive effect, but that effect may be eased through exemption. As I have noted, "foods-not-ready-to-eat" are exempt from sales tax but the exemption does not extend to prepared foods. To the extent then that Pennsylvanians purchase and consume prepared foods, the retail sales tax applies.

This regressive effect remains particularly troubling when one considers the plight of those who live in fresh-food deserts[111] or who for legitimate non-recreational reasons frequently purchase prepared foods. For residents in fresh food deserts, because of generally impoverished economic circumstances, the rates of participation in non-exempt transactions may actually be higher than comparable rates for their more affluent counterparts. Of necessity, they purchase from prepared-food providers in their neighborhoods. Result: no exemption.

The second group? Imagine the person who is trying to manage two to three part-time jobs in a difficult quest to remain financially solvent.[112] This is not an uncommon pattern in this tough economic environment. The work demands of this arrangement will likely leave little time to purchase and prepare "foods-not-ready-to-eat." Of necessity they, too, purchase from prepared food providers. Result: no exemption. Who would have thought that a sales tax exemption for "foods-not-ready-to-eat" would prove particularly advantageous to suburban residents with nine-to-five jobs who enjoy the convenience of neighborhood supermarkets while providing relatively less relief, if any, for their less financially fortunate counterparts?

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108. IRS, *State and Local Government EITC Programs*, http://www.eitc.irs.gov/EITC-Central/press/overview/stateeitc (last updated June 12, 2014).

109. *Id.*

110. *See id.*

111. *See generally* JUDITH BELL ET AL., THE FOOD TRUST, ACCESS TO HEALTHY FOOD AND WHY IT MATTERS (2013), *available at* http://thefoodtrust.org/uploads/media_items/access-to-healthy-food.original.pdf. Food deserts are census tract located in either urban or rural low-income areas having no ready access to fresh, healthy, and affordable food available through grocery stores or affordable food retail outlets. *See id.* at 9–11. These areas are, instead, served only by fast food restaurants and convenience stores offering few healthy food options. *See id.* at 6.

112. *See* BUREAU OF LABOR STATISTICS, *Table A-16. Persons Not in the Labor Force and Multiple Jobholders by Sex, Not Seasonally Adjusted* (Feb. 7, 2014), http://www.bls.gov/news.release/empsit.t16.htm (showing that about 5% of workers hold multiple jobs).

C. *Property Taxes*

Property taxes, relied upon on the local level, are widely though not universally viewed as having a regressive effect.[113] Rates of ownership of taxable property will almost certainly be lower among less affluent persons. Further, it logically follows that to the extent that the less affluent are property owners, their properties are likely to have lower market values.[114] Several studies have shown, however, that such property owners are statistically more likely to have a higher percentage of that value subjected to the property tax levy.[115] In other words, assessment ratios for such properties have been comparatively higher than for similar properties of greater value. Hence, comparatively higher property tax burdens will ensue.

Renters will also likely bear some part of the property tax cost for the spaces in which they reside. This cost may be passed through to those renters from property owners in the form of higher rents.[116] They will be unable, however, to deduct any part of that levy for income tax purposes should they be so fortunate as to itemize. Further, as renters they have no political voice. Simply put, they are not property owners!

As noted earlier, income, retail sales, and property taxes are all major sources of governmental revenues. Because of the regressive structure of most of these sources, in combination with income and wealth distribu-

113. Opinions differ. *Compare* George E. Peterson, *The Issues of Property Tax Reform*, *in* PROPERTY TAX REFORM 5 (George E. Peterson ed., 1973) (asserting that "[t]here is considerable agreement among the authors that the property tax as administered today, with all the variations of property tax rates that actually occur among jurisdictions, and with the flaws of assessment, is a regressive tax"), *with* HENRY J. AARON, WHO PAYS THE PROPERTY TAX?: A NEW VIEW 38 (1975) (arguing that property tax is not regressive). The consensus view is likely best captured in RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE THEORY AND PRACTICE 268 (3d ed. 1980) (arguing that property tax is mildly regressive).

114. *See* George C. Galster et al., *Estimating the Costs of Concentrated Poverty to American Neighborhoods* 19 (Nat'l Poverty Ctr. Working Paper Series, Working Paper No. 06-42, Oct. 2006), *available at* https://www.maxwell.syr.edu/uploadedFiles/cpr/events/cpr_seminar_series/previous_seminars/Galster.pdf (showing that property values decline substantially when neighborhood poverty rates exceed 20%).

115. *See* Alan Finder & Richard Levine, *Unequal Burden: New York's Property Tax; Hodgepodge of Home Valuations Produces Disproportionate Taxes*, N.Y. TIMES (July 6, 1991), http://www.nytimes.com/1991/07/06/nyregion/unequal-burden-new-york-s-property-tax-hodgepodge-home-valuations-produces.html. *See generally* Lee Harris, *'Assessing' Discrimination: The Influence of Race in Residential Property Tax Assessments*, 20 J. LAND USE & ENVTL. L. 1 (2004) (assessing extent to which levies upon taxable property may be driven by relatively lower market values).

116. *See* Mireya Navarro, *Among Cuomo's Proposals, a Tax Break for Renters*, N.Y. TIMES (Jan 9. 2014), http://www.nytimes.com/2014/01/10/nyregion/among-cuomos-proposals-a-tax-break-for-renters.html?_r=0. Again, the extent to which this systematically occurs is difficult to determine. Normatively, rents are likely a product of supply and demand, and price would be divorced from the costs otherwise incurred by landlords. This outcome may be affected, however, when socioeconomic status and race are factored into the equation.

tions, each source imposes additional costs, relatively speaking, on those less able to bear those costs. This economic reality is no less skewed with regard to excise taxes—sin taxes, in particular.

D. *"Sin Taxes"*

Consider our current view of smokers. Thirty years ago, cigarette ads were ubiquitous on television.[117] Iconic images from that bygone period include the Marlboro Man, whose handsome, rugged demeanor as seen through a haze of cigarette smoke depicted decisiveness, sophistication, and poise—all desirable characteristics, to be sure.[118] Further, the tobacco industry's marketing effort cut across gender lines. Television advertisements for Virginia Slim cigarettes targeted female smokers. These ads featured the newly liberated, pert, saucy, and attractive Virginia Slims girl sashaying into camera view, cigarette in hand, as the jingle over intoned: "You've come a long way, Baby. You've got your own cigarette now, Baby."[119] As a society, we now look down upon smokers.[120] Our present smoker's image is that of the haggard cancer victim in the public service announcement who struggles to speak in spite of her tracheotomy. She implores the viewer not to smoke because smoking can kill you.[121]

Public attitudes about smoking mirror this shift in media messaging. For example, in July of 2001, only 39% of adults surveyed in the United States thought smoking should be "totally illegal" in "all public places"; by July 2013, that percentage had risen to 55%.[122] In addition, a 2012 survey found that 94% of respondents viewed cigarettes as a problem to society.[123] Furthermore, the Surgeon General recently released a report marking the fifty years since the first Surgeon General's warning about the harmful effects of smoking, a 978 page compendium railing against the harmful effects of smoking.[124]

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117. *See generally* Richard W. Pollay, *Exposure of US Youth to Cigarette Television Advertising in the 1960s*, 3 TOBACCO CONTROL 130 (1994).

118. *See* JULIANN SIVULKA, SOAP, SEX, AND CIGARETTES: A CULTURAL HISTORY OF AMERICAN ADVERTISING 235 (2012).

119. HAL WEINSTEIN, HOW AN AGENCY BUILDS A BRAND—THE VIRGINIA SLIMS STORY 16 (1969), *available at* http://legacy.library.ucsf.edu/tid/efc64e00/pdf; *see also* SIVULKA, *supra* note 118, at 278.

120. *See* Omar Shafey et al., *The Tobacco Atlas*, THE AM. CANCER SOC'Y (3d ed. 2012), http://www.cancer.org/aboutus/globalhealth/cancerandtobaccocontrol resources/the-tobacco-atlas-3rd-edition.

121. *See Anti-Smoking Ads 2012: CDC Offers GRAPHIC Reasons to Quit Smoking*, HUFFINGTON POST (Mar. 19, 2012, 4:08 PM), http://www.huffingtonpost.com/2012/03/19/cdc-anti-smoking-ads-2012_n_1364946.html.

122. *Tobacco and Smoking*, GALLUP, http://www.gallup.com/poll/1717/tobacco-smoking.aspx (last visited Aug. 5, 2014).

123. *Id.*

124. *See generally* OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL (2014), *available at* http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf.

Similarly, gambling is negatively perceived by the public. It is generally viewed as a socially harmful activity.[125] For example, a 1999 Gallup survey found that 56% of adults "believed that casinos damage everyday family and community life."[126] Furthermore, in a recent survey of Iowans, when asked whether "[g]ambling is dangerous for family life," 64% of respondents agreed,[127] and 51% agreed that "[g]ambling is a harmful form of entertainment."[128]

Finally, those who drink (especially to excess) are regarded with suspicion.[129] While alcohol consumption on some level is the norm in the United States, 86% of Americans believe that alcohol is a problem in society.[130] The likely targets of that sentiment are heavy drinkers and alcoholics, who continue to be stigmatized. For example, a 2011 study found that, when asked whether a social stigma associated with alcoholism persisted, 83% of psychiatrists and 70% of doctors asserted there was a strong stigma.[131]

Think of what this portends insofar as political visibility is concerned. How likely is it that successful taxpayer coalitions built upon patterns of personal tobacco consumption might form and participate in the political process? Moreover, with public attitudes generally hostile to gambling's effects on society, it is unlikely that gamblers' views receive much credence in the political arena. Finally, with attitudes generally averse to drinking and drinkers, it is difficult to imagine such individuals organizing powerfully. Further complicating this picture, an economic skew clearly exists with regard to cigarette and gaming taxes. Numerous studies have established that sin taxes—especially on tobacco and gaming—are disproportionately borne by those lower on the socio-economic scale.[132] Currently available data suggest that the disparity between the propensity to smoke for individuals who live below the poverty level and smokers who live above the poverty level is steadily growing. In 1995, a person living below the poverty level was 37% more likely to smoke than a person living above the poverty level; by 2011, that number had risen to 62%.[133] Simi-

125. *See* GERDA REITH, GAMBLING: WHO WINS? WHO LOSES? 226–27 (2003).

126. *Id.* at 227.

127. MELVIN E. GONNERMAN, JR. & GENE M. LUTZ, GAMBLING ATTITUDES AND BEHAVIORS: A 2011 SURVEY OF ADULT IOWANS 43 (2011), *available at* http://www.csbs.uni.edu/dept/csbr/pdf/Gambling_Attitudes_Behaviors_Report.pdf.

128. *Id.*

129. *See* James W. West, *Is There Still a Stigma with Alcoholism?*, BETTY FORD CTR. (Sept. 27, 2011), http://www.bettyfordcenter.org/treatment/doctors-office/is-there-still-a-stigma-with-alcoholism.php.

130. *See Alcohol and Drinking*, GALLUP, http://www.gallup.com/poll/1582/Alcohol-Drinking.aspx (last visited Aug. 5, 2014).

131. *See* West, *supra* note 129.

132. *See generally* Rosemary Hiscock et al., *Socioeconomic Status and Smoking: A Review*, 1248 ANNALS N.Y. ACAD. OF SCIS. 107 (2012).

133. *Compare* CDC, *Current Cigarette Smoking Among Adults—United States, 1995*, MORBIDITY AND MORTALITY WEEKLY REPORT (Dec. 26, 1997), http://www.cdc.gov/mmwr/preview/mmwrhtml/00050525.htm, *with* CDC, *Current Cigarette Smoking*

larly, several studies have concluded that the implicit gaming tax falls disproportionately on less affluent taxpayers.[134] The picture with regard to alcohol usage and consequent tax incidence is more mixed. One recent study reported that while patterns of alcohol use and problem prevalence varied among ethnic groups, rates of abstention from alcohol use were generally higher for black and Hispanic men than they were for white men. The study concluded that whites and Native Americans have a greater risk for alcohol use disorders.[135] Alcohol dependence, however, when it occurred, was likely to be more problematic for black and Hispanic men.[136] These data, however, provide little insight into tax incidence. Economists view taxes on alcohol as generally, relatively underproductive. Unlike taxes on tobacco products, alcohol taxes have not been raised in recent decades. Proponents for increases argue that were taxes on alcohol raised, given patterns of alcohol consumption, the vast majority of Americans would be unaffected. In short, no definitive conclusions can be drawn with regard to the likely incidence of taxes on alcohol.

E. *One Who Pays a Tax—Any Tax—Is a Taxpayer*

I intend no value judgment in sharing with you, in particular, the facts about the incidence of sin taxes. The primary question remains: How much political credence do we presently accord to these taxpayers? I suspect relatively little. They are invisible. Indeed, if, as Jean-Baptiste Colbert asserted, "[t]he art of taxation consists of so plucking the goose as to obtain the most feathers with the least possible amount of hissing,"[137] sin taxes are near perfect taxes, for they are "easier to collect than income taxes and less visible than direct taxes."[138] The prevailing sentiment among lawmakers and their advisors seems to be that, for example, "[n]o

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Among Adults—United States, 2011, MORBIDITY AND MORTALITY WEEKLY REPORT (Nov. 9, 2012), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6144a2.htm.

134. *See* Thomas A. Garrett, *Earmarked Lottery Revenues for Education: A New Test of Fungibility*, 26 J. EDUC. FIN. 219, 237 (2001) ("[L]otteries are generally accepted as regressive . . . ."); Ross Rubenstein & Benjamin Scafidi, *Who Pays and Who Benefits? Examining the Distributional Consequences of the Georgia Lottery for Education*, 55 NAT'L TAX J. 223, 236 (2002) ("[T]he vast majority of research has found lotteries to be a highly regressive method of raising revenue . . . .").

135. *See* Karen Chartier & Raul Caetano, *Ethnicity and Health Disparities in Alcohol Research*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, http://pubs.niaaa.nih.gov/publications/arh40/152-160.htm (last visited Aug 6., 2014).

136. *See* Frank H. Galvan & Raul Caetano, *Alcohol Use and Related Problems Among Ethnic Minorities in the United States*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, http://pubs.niaaa.nih.gov/publications/arh27-1/87-94.htm (last visited Aug. 6, 2014).

137. CHRISTOPHER SNOWDON, ADAM SMITH INST., THE WAGES OF SIN TAXES 5 (2012), *available at* http://www.adamsmith.org/sites/default/files/research/files/The%20Wages%20of%20Sin%20Taxes%20CJ%20Snowdon%20ASI_0.pdf (quoting Jean-Baptiste Colbert).

138. *Id.* at 8.

one can get mad at you for taxing people who drink too much . . . ."[139] Nevertheless, the persons who bear these costs—including the burden of sin taxes—*are* taxpayers, and they should be heard. They should not be ignored—treated as invisible because they have been relieved of liability for compelling policy reasons, or because the levies have a dimly appreciated regressive economic effect, or because they are imposed upon behaviors that strike some as unseemly.

VII. CONCLUSION

Politicizing the federal tax policy discourse—indeed, tax policy discourse in general—with this most disingenuous demand for "skin" erroneously and wrongly characterizes a significant percentage of Americans as free-riders who contribute little or nothing to government finances. The characterization distorts fiscal policy debate in several important ways. *First,* at its extreme, the putatively unmet demand deprives affected citizens of a political voice on that governmental level, whatever it may happen to be. On the federal level, the vast majority of those who fall within the 47% do so because of deliberate Congressional action. I suspect that the vast majority of these Americans would opt for more income, consequent tax liability notwithstanding. On the national level, taxpayers, already disproportionately burdened with low visibility taxes or levies imposed upon behaviors deemed undesirable (i.e., smoking, drinking, or engaging in gaming activities) on the state and local level, are likely further disadvantaged both politically and fiscally on both the state and the federal level. *They become invisible. Second,* meaningful tax reform at all levels could be thwarted or stalled due to an incomplete understanding of the demands and consequences of fiscal federalism leading—in a worst case scenario—to further distortions of relative tax burdens. *Third,* unchecked increased reliance on low visibility taxes, special taxes, and non-general sources of revenue (the sin taxes, in particular, given the amounts of revenue raised by these levies), all of which tend to be regressive, accelerates opacity rather than transparency in fiscal practices. As a practical matter, our failure to understand how we all pay compromises the effort to reliably determine the extent to which any "share" could be deemed "fair." Too much of the aggregate tax burden is invisible, poorly understood, and simply unknown.

Americans who do not pay federal income tax have "skin in the tax game." They bear, at least, their fair share of the economic burden of sustaining government. Indeed, the argument that they bear more than their fair share is compelling. Yet because of the way in which this burden is borne, these Americans may gain little in the way of political traction in

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139. Catherine Rampell, *For Cash Strapped States, Sin Is Sure Lucrative,* N.Y. TIMES (Apr. 17, 2010), http://www.nytimes.com/2010/04/18/weekinreview/18rampell.html (quoting Peter L. Faber, tax lawyer and partner at McDermott Will & Emery in New York).

spite of their financial participation. In the final analysis, attention to tax matters has inherent within it elements of both economic justice and racial justice. All Americans participate financially in bearing the burdens of government; as such, all should share in the benefits of government. Simultaneously, if some measure of economic justice is to be achieved, attention must be accorded to the fairness and, as appropriate, remediation of disparate tax burdens.

Overall, the demand for "skin," with its dubious link to the realities of aggregate tax burdens, ignores reality. It is pernicious and potentially economically and racially divisive. It breeds a disregard for and foments a failure to accommodate competing interests across the socio-economic spectrum. At worst, it leads to essential disenfranchisement—invisibility for those taxpayers whose tax burdens go unrecognized. Simply put, *all* Americans but for those who are abjectly destitute have "skin in the tax game." Through some mix of the several revenue-generating systems of whatever description, all have financially invested in this "civilized society." Less affluent taxpayers are no less entitled than are their more affluent counterparts to having questions of allocation of the burdens of government at all levels resolved as fairly as possible. The debate with regard to tax issues on each level must, as a matter of fairness and economic justice, acknowledge the revenue burdens concurrently borne on all levels.

In short, attention to economic justice in our revenue systems *should* be a matter of national concern.

So I have now talked about the "*taxes*" paid and the "*we*" who pay them. That leaves the "*civilized society.*"

I will simply remind you of Dr. King's vision of the civilized society. Again, he believed that economic justice must necessarily include an economic bill of rights, promising *all* citizens the right to a job, the right to an adequate education, and the right to decent housing and a livable income. I believe that, were he alive today, he would agree that economic justice must also include attention to achieving a fairer allocation of the burdens of financing government.