

RUTH MASON: We are excited to be able to close with such a thought provoking paper. Before we begin, I will make introductions. So I'm Ruth Mason. I'm the Edward S. Cohen Distinguished Professor of Law at the University of Virginia and an affiliated member of the Virginia Center for Tax Law.

My co-convenor for this workshop series is Tsilly Dagan, known to all of you. Tsilly is Professor of Taxation Law at Oxford University and one of the directors of the MSc in Taxation at Oxford University Faculty of Law.

By now everyone knows our format. Tsilly and I invite tax academics that we admire to choose a work by a non-tax academic that they admire. Then we invite the author of the work to discuss it with us here on Zoom.

So today our commentator is Anne Alstott, the Jacquin Bierman Professor of Taxation at Yale Law School. She previously held appointments at Harvard and Columbia, and she's the author of several books, some co-authored, including *The Public Option, A New Deal for Old Age*, and *Taxation in Six Concepts*. She's also the author of *No Exit-- What Parents Owe Children and What Society Owes Parents* and *The Stakeholder Society*.

Given Anne's scholarship, and in particular I'm thinking of her writing on feminism and tax policy, it's perhaps no surprise that she chose to comment on the article for today that was co-authored by her Yale colleague Amy Kapczynski.

So the work for today is "Building a Law-and-Political-Economy Framework-- Beyond the 20th Century Synthesis." It's co-authored by Jedidiah Britton-Purdy, J. Grewal, Amy, and Sabeel Rahman. So really pleased to have Amy with us here today as well.

In addition to being a Professor at Yale Law School with Anne, Amy is a Faculty Co-Director of the Global Health Justice Partnership and Faculty Co-Director of the Collaboration for Research Integrity and Transparency. Most relevant for us today, Amy is also Faculty Co-Director of the Law and Political Economy Project and co-founder of the Law and Political Economy Blog. Her areas of research include information policy, intellectual property law, international law, and global health.

Welcome Anne and Amy.

Now before we jump into the paper, I just want to note the format. Anne is going to comment, Amy will respond, and then Tsilly and I will make some remarks before opening the conversation up. If you want to be in the queue, please use the Raise Hand function in your browser. Just click Participants and then Raise Hand. OK. So Anne.

ANNE ALSTOTT: All right, thank you. Thank you so much, Ruth and Tsilly, for convening us. What a wonderful idea.

And I have to tell you, I just really like the spirit of what you're doing. It's critical and constructive, and I really like it. And I want to thank everybody who's here. There are people I understand on five continents, which is amazing. We have to get to six and seven.

Do I remember correctly? I've kind of forgotten my elementary school social studies, but I think there are seven continents. You'll correct me.

But thank you all for being here. It's really lovely. And I see many people that I know and whose work I know, and I'm just delighted that you're here.

So here's what I want to do. I want to do three things. First is to explain why I suggested this article and why I admire it. The second is to-- and so that's the first thing.

And then the second two things, really, I want to examine the two elements of what Amy and her co-authors call the 20th century synthesis, and I want to examine them with reference to our field, tax scholarship, tax policy. And so I'll talk about the abdication of constitutional authority over economic life and about the uses and abuses of economics, both of which have a lot of salience in tax.

So let me start with why I suggested the article. This is, again, Ruth's and Tsilly's idea is so, so important I think. I am one of the older people here and it has only gotten more difficult over the 30 years I've been in this profession to keep up not only with scholarship in our field, but with scholarship in other fields. It's just, you know, we could talk about technology and other things, but it's become very difficult.

And so they have oriented us very nicely I think to the really important continuing task of not being isolated, of not just being siloed, of really keeping in touch. And luckily, we have this article from Amy and David and Jed and Sabeel that helps us do that, because it's kind of a rare piece and legal scholarship that I feel like almost everybody, whatever their field is, could read and benefit from.

So I want to suggest-- so I have mixed feelings about invoking this, but I'm going to invoke it. Many of you will know that David Foster Wallace little anecdote about water, right? Just in case you don't, this is from a 2005 Kenyon College graduation speech.

In case you don't know it, it just was resonating in my head as I was thinking about this piece. So the little anecdote, the little metaphor is there are two fish and the two fish are swimming along together, right? And then there's another fish swimming the other way. I know you need the hand gestures. That's why I'm that's why I'm providing these artful hand gestures.

And so the two fish are swimming along and the other fish kind of crosses their path and says, Hey guys, how's the water? And they're kind of like, heh, heh heh. And then when he's gone, the water questioner, the other two look at each other and say, What's water?

And so David Foster Wallace structures his speech around this. And his speech really goes to things like being kind, getting out of your own head, really thinking hard about what other people might be going through in the structure of society, all that stuff. But for me, it actually captured, I think the reason it was in my head was that it captured what I think the big contribution of this paper is, at least for me.

And that is that we do our scholarship and we're swimming along in the water and we are, I don't know, this metaphor is going to break down really fast, but we're catching little fish and we don't really think about the water. And this piece made me think about the water. It made me think about con law in a way that I generally don't, and we'll talk about why, and it made me think about law and economics in some ways that I do think about, but in other ways that I don't.

Before I go on and talk about the two elements of the 20th century synthesis, I just want to say that this is such a rich paper that I'm just going to scratch the surface. So I know a lot of you will have great things to say and questions and other things. It's so nice of Amy to spend her time to be here with us.

But I wanted to do a little shout out to a paper by Jeremy Bearer-Friend, Ari Glogower, Ariel Kleiman, and Clint Wallace. I wanted to get all of those names right. They have a paper in draft that Ariel nicely sent to me that is a very thorough examination of what law and political economy might offer to tax, and what tax might offer to help PE. So I just thought that was a really great engagement. I'm not generally kind of repeating their points or drawing on that, but they have even more to say. So I thought I'd stay kind of broad brush. And it looks like Jeremy's here, Clint is here. I don't know if Ariel's here. But anyway, that is a great piece.

All right. So that was thing one. Thing one was why did I choose this piece? Thing two is I want to talk a little bit about the first element of the 20th century synthesis. And I know that everybody's read the paper, so I'm just diving in. I'm not summarizing the paper at all.

But the first element, you'll recall, of the 20th century synthesis is the abdication of constitutional authority over what I'm calling economic life. And so I have to start here with a confession. And my confession is that as old as I am-- and I've been teaching tax for 29 years-- I had given little or no thought to US Constitutional law in my scholarship. I had read other people's papers, and I have friends that do Con law. And I read their papers and blah, blah, blah.

But I had given little or no thought to US Constitutional law in my own work until five years ago. And for me, the absence of Con law, which is what Amy and her co-authors are talking about, the absence of Con law for me, was the water. I just didn't think of it. And when I did think of it, I thought, thank God, honestly. I thought, thank God that I don't have to do what the Con law people do, which is to endlessly pore over the words of these cases written by nine lawyers and read the tea leaves of what this one's personality and age and commitments. And I just didn't want to have to do that.

And even at the level of theory, I like theory, but Constitutional theory often strikes me-- I'm just going to say it-- as kind of bowdlerized because they are stuck with Constitutional doctrine. So I felt like tax was, in a way, a purer, better field because we just go right to political theory. You want to talk about equality? Let's talk about equality. We don't have to talk about the Supreme Court's reading of the 14th Amendment. We just talk about equality. You want to talk about social welfare? Let's talk about it.

And so I felt, actually, grateful that tax is this kind of really wide open field where you're not constrained by the Constitution. I'm not saying, this is great attitude. I'm saying it was my attitude. And was it challenged? I didn't challenge myself until relatively recently. And actually, it was only my engagement with family law that made me do that because family law is a field where Con law is very, very important. And it was my engagement with family law that led me to see, wow, this is really weird. Where does the Constitution apply? Where doesn't it?

And of course, the students always ask. The students are all bright-eyed and Constitutional, and they want to say, couldn't we litigate under the 14th Amendment? And you're like, no, no, no, you can't.

And so this article really invites us to look at and take a hard look at the court's abdication of Constitutional authority over economic matters. And so that's true in tax. I think it's largely true in corporate law. It's mostly true in social welfare policy, which is another field where I work. The Supreme Court has chosen to interpret our Constitution to have little or no role in promoting economic equality, and post-Lochner, arguably, little or no role, really, even in establishing negative economic rights. It's really just very seldom a constraint. And that's because of rational basis review.

So could a tax law fail rational basis review? I suppose it could. But we don't normally think about that. I mean, I don't know about you, but when I'm writing a tax policy piece, I just go right from whatever theory I want to use and defend to whatever proposals I want to defend. And unless it's something where there's clearly a Constitutional issue like wealth taxation, I don't even think about it.

So the article, though, suggests that my attitude of kind of taking the water for granted may really not be a good thing because the authors argue that the court's abdication-- and here I'm quoting-- "encased economic and other structural forms of inequality from answerability to the principle of equality." And that's absolutely true at the Constitutional level. I just said it. Rational basis review, there's not going to be an opportunity for Constitutional review of equality in taxation.

And then the article goes on. I'm going to quote just one more time. I don't generally quote, but I just thought these quotes were so good. "The courts produced, and scholarship adapted to a denuded and distorted version of liberalism, one unable to demand or defend the institutional arrangements necessary for robust conceptions of liberty or equality." And that, I think, is really important, too, because it explains, again, kind of my attitude of superiority that I began with, that the court, having adopted these arguably very watered down ideas of liberty and equality, then kind of just operates in a very small space.

And so that's why the realm of Constitutional law often seemed to me, and seems to me, to be debating very, very limited questions. What is liberty? What is equality? But only in small ways, whereas, again, in tax, I feel like we have this robust connection to theories of distributive justice that really offer us much bigger and much more challenging mandates around equality and around things like equality of opportunity in a very rich sense, not just jobs open to talents, but a very rich [INAUDIBLE] or robust conception.

So what are the implications for tax scholarship? So as I was thinking about it-- I mean, you guys may have more. I'm sure you'll have more. But it struck me a couple of implications. One is I think tax law might have something to offer as we engage with the question of whether the court's abdication is a good thing or a bad thing. You know, I'm pretty persuaded by Amy's and her co-authors' idea that the court's abdication has insulated tax legislation, let's say, or economic legislation from Constitutional review. That's just clearly true. There is just rarely, if ever, a hook to examine, say, that 2017 tax legislation and have it subject to any kind of higher level scrutiny by a court. So that's just clearly true.

The question is, is that a good thing or a bad thing? So one result-- and I think we can contribute here because we're the experts in what it feels like to operate in a field where there aren't these Constitutional constraints. What happens to equality? What happens to distribution? What happens to liberty, richer conceptions of positive liberty, when you throw a field open to ordinary politics, because that's the water we swim in. The water we swim in is very much the water of ordinary politics. Tax legislation will come and go. It's highly sensitive to political changes.

And so an open question, I think, is whether or not the kind of Constitutional review that might be extended to taxation would, on net, be a good thing or a bad thing. And in ideal theory, it would be pretty much a good thing, I think. In ideal theory, if you had a reliable Supreme Court that was going to thoughtfully apply rich notions of liberty and equality, that sounds pretty good, right? And it would do what Constitutional law does, which is to put a frame around, or boundaries around ordinary politics.

On the other hand, there's our Supreme Court as it exists, and there precisely the denuded and watered down conceptions of liberty and equality that Amy and her co-authors mentioned. And so the bad scenario would be that we essentially get Lochner-type review. And we're told that we can't have, I don't know, progressive income tax rates because that violates equality. Or we're told that we can't have tax rates higher than x because that violates liberty.

You can imagine a kind of strong libertarian. I mean, the court's work doesn't even qualify as principled libertarianism. It's less than that. And so are we eager to jump into that water, or are we not? And I think it's a serious question that we might be able to answer. What are the institutions in tax, if any, that preserve commitments to equality, that preserve commitments to liberty even as politics changes? And so that strikes me as a very interesting set of agendas.

And I said there were several implications. But that was the only one I wrote down, so I'm going to stop there. Forget the several. That was the implication. We'll go with that. All right. So that was thing two, thinking about the Constitutional abdication that the authors talk about.

Thing three, and my third thing, is the uses and abuses of economics. So tax, I think, is such an interesting field because although it's been heavily-- colonized is not a good word-- although it's been heavily-- I don't want to say occupied. Why are only bad words coming to me? It's been heavily infused with law and economics. It is not a field that is, I would say, completely occupied by either. There's still plenty of room for political theory-- maybe I say that because that's what I do-- political theories that are non-utilitarian. But I see it in other people's work as well. There are plenty of people working in non-utilitarian political theory and bringing that into tax.

And so it means that there's a certain tension around the use of law. So I'm just looking down the line here. I'm seeing Ted and I'm seeing Linda, and I'm seeing lots and lots of people who are doing the same thing. And so it's an interesting field because I would say-- you guys can correct me if you think I'm wrong-- I feel like we're all conversant with public economics, that it's just if you want to read the papers in the field, you want to be capable of consulting empirical work from economics or theoretical work from economics, that it's like a baseline competence for us. But it's not like corporate law, where it's very hard to do anything else. So that's what I'm trying to say.

Now the article criticizes the use of law and economics not in tax. Tax is not one of their examples, and that's fine because that opens it up for us. But the article criticizes the use of law and economics in several ways. And some of these critiques, I think, just don't hit for us because we draw on public economics and not private law and economics.

So one critique, which is an important one-- it's very important in other fields, but I don't think it's important for us-- is the use of wealth maximization and ability to pay and transaction costs. So those are features of law and economics that, in American law schools, are used in lots of fields. Environmental law, they give an example, intellectual property and so on.

Those actually are not concepts that we use. Because we draw on public economics, we make moves that I think private economics just don't make. We, at least in principle, deal with utility, not money. And that gets us out of the hole wealth maximization ability to pay thing. And in principle, we make interpersonal comparisons of utility. Like one of the most basic things we teach is that progressive tax rates can be justified if you think about the declining marginal utility of money. And that involves an interpersonal utility comparison. And so that's just a thing we do.

Another thing we do is that, coming from welfare economics, we look to a social welfare function. We acknowledge that there are many different efficient markets that could exist. There's a kind of Pareto frontier beyond which you can't get more efficient. But the Pareto frontier itself doesn't solve any problem until you import a social welfare function. And so we're comfortable with that as well, the idea that maybe the social welfare function maximizes total utility. Again, we're comparing interpersonal utilities there, at least in principle. And then depending on what the social welfare function is, we are choosing a point on the Pareto frontier.

So nevertheless, I do think that their critique about efficiency should give us some pause because-- and here I think it's because we sometimes adopt shorthands. Like any field, when you talk to other people in the field, you're going to adopt shorthands because you don't need to be lecturing to each other about common premises. So we all know in principle a few things, but we sometimes forget them. And I felt like this article reminded me of that piece of the water, that element of the water, that part of the chemical composition of the water that we swim in.

And here's what I mean by that. We all know, thanks to this basic competence in public economics, that even working within the utilitarian framework of public economics, efficiency is a very weak criterion for policy. We know this. It's a weak criterion for policy because of what I just said. Efficiency will tell you, if you're within the Pareto frontier, how to move toward it. But it does not, standing alone, tell you anything about where on the Pareto frontier you want to be.

And in particular we also know that the efficiency criterion doesn't deal with questions of distribution. And we know that questions of distribution, in a utilitarian framework, can be just as important, if not more important, than questions of efficiency. In other words, the utility gain that the society might get from, say, a really massive structural redistribution might swamp a little tiny efficiency gain by being a little more neutral along some margin.

We know this. And if you read the canonical sources, Louis Kaplow's book on the theory of taxation and public finance. He's extremely clear about this. And so that's just one example of if you pick up any textbook on public economics, we know this. And yet, and yet, on a day-to-day basis, we sometimes will debate efficiency.

And I'm thinking here of a debate that's been around longer than I've been around, way longer than I've been around, and that is the consumption tax-income tax debate. We constantly are debating efficiency. And I'm not saying that that's not important. It is important. It's a component of tax policy. But conclude, hey, this tax is more efficient than another tax, that should only be a small piece of an outcome.

And I feel like sometimes efficiency is so comfortable, and it's so tractable in a way that these big questions of distribution are not, that we certainly see our colleagues from economics departments often kind of-- again, bad words are coming to me. Trafficking. Why am I coming up with bad words? But working in the vein of efficiency because it's tractable. It's mathematically modelable. And you can do these little partial equilibrium things. You can look at one market.

And so again, how many papers have we all read that talk about neutrality along the decisional margin of present and future consumption? We've all read lots and lots of papers, and they're good papers and they're important papers. But we need to be able to back off from that and realize that that's really, potentially, a very, very tiny component of a socially just society.

I mean, we would need numbers to know. But absent some kind of a bigger structural redistribution, it could be that neutrality along that margin is as insignificant as-- I'm going to pick up my iced tea again-- I guess I'm big on visual aids today. But you know, this is peach oolong tea. I mean, maybe the decisional margin between peach oolong and unsweetened tea is as socially important or unimportant as the present consumption-future consumption margin. I don't know that to be true. It sounds kind of silly, really.

And yet, why is it that without evidence, we treat one of those margins as incredibly important, and we often treat that margin of neutrality-- this is one of the points that Amy and her co-authors make-- we treat that idea of neutrality as itself self-evidently important without taking into account.

And still, I haven't even gotten out of economics yet. Like I'm still working within public economics. Why is it that we don't systematically consider the background distribution? Why is it that we don't systematically consider externalities and other-- again, working in canonical public economics-- things that we ought to consider before we say, oh, here's an efficiency problem, and it's really important.

So I know lots of us in this room and outside this room know all these points. And in a lot of the work of the people here and people outside, we are all kind of resisting this current in the water. And yet I want to say I'm as guilty as anybody. So I'm a co-author on a textbook, and it talks about equity, efficiency, and administrability, as if those are separate things to be weighed one against the other. I teach my students about efficiency in taxation as a freestanding value. And I tell them, I explain, I give them the intuition around efficiency with reference to neutrality. And I give them an example like present or future consumption, or even hot dogs and hamburgers, or something like that.

And so there's a line in Amy and her co-authors' piece where it's like, law and economics got hold-- and I think they're quite right about this-- because once you understand the framework, it's relatively simple and you can run with it. And I feel like efficiency talk and tax has that element as well. It's why I teach it in fed tax, because you can run with it. You could say something about it. And yet I think that those shorthands can be quite dangerous.

All right. So I'm going to stop. But just by way of conclusion, I do think that the LPE framework is an important one. I'm so grateful to Amy and Jed and Sabeel and David for the work that they're doing. This is a ton of work. And also to Ariel and Jeremy and Clint and Ari for the work that they're doing. So thank you all for doing this. It's helping us kind of look at the water. And I think I'll stop there.

AMY Thank you so much.

KAPCZYNSKI:

RUTH MASON: Sorry. Amy.

AMY I was about to say the same thing. So I just jump in? Great. Anne, thanks so much for that characteristically
KAPCZYNSKI: generous and warm introduction to some of what you took from our paper and some of what we're trying to do. And also to all of the organizers, thanks so much for-- as Anne said, I really admire the format. I don't get to talk to tax law professors very often outside of Anne.

And I think all of us really value these opportunities to get outside of our ordinary conversations because in some sense, the siloing is a little bit what we're talking about in this paper, and the need to, in certain ways, step back and, as Anne said, see the water in which we're swimming. And I think in many ways, this is precisely the kind of thing we hoped we would be able to do by writing the paper.

And the paper's obviously-- even though it's long in some registers-- very much working at a 30,000 foot level, and an invitation, I think, as we thought of it, for others just to see how well these ideas that we're describing about the 20th century synthesis and the movement of certain kind of neoliberal ideas into, to some extent, the Academy, but also in policy. And so this is a great chance for me to get to hear your thoughts about that.

Anne, I loved so many things that you said. And let me just start, I guess, with the first piece. And I'll offer just a few responses. The Constitutional law and the way that Constitutional law is organized, in some sense, defer to markets, I think, is a really important feature for us to think about. It goes all the way back to-- I've been reading a fair amount of Hale recently, that law operates when it doesn't intervene as well as when it does intervene. And one can see the coercive power of law as much in the staying of the hand as in the intervention.

And so the fact that Constitutional law treats as areas that we shouldn't intervene in the market, having that feature so frequently. If you look through say anti-discrimination law and how it operates, that's one way to think about. And of course, the deference to rational basis review for economic policy, and also matters of class. That's obviously very much a part of what we were thinking about.

There's another way to think about the Constitutional law piece, which comes out a little bit more in other things that Jed and I both have been writing, and others in the world of political economy, which is that Constitutional law also, and the courts more broadly outside of Constitutional law-- and I'll end this with a kind of question for you about whether this is featured this way in tax-- I think also, in certain subtle ways, in the same period of decades, reorganized some of how they talked about how markets worked and how the state worked and who subjects even are.

And so some of what we were trying to trace was not merely the deference to markets in the sense of like, oh, anti-discrimination law should stop, where we shouldn't intervene too much in markets. And so if there's a bona fide occupational qualification, for example, or disability has to be, there's going to be some intervention in markets, but we shouldn't intervene too much.

But there's also this other, maybe more subtle way in which politics, through the language of public choice and rent seeking, for example, gets modeled as just about a bunch of trade-offs, and that the logical thing to think about when we're thinking about policy is concentrated interest and diffuse interests. All of us find that very powerful. I've used it pretty much in my own work.

And yet it does have the feature of modeling what happens in politics as precisely a kind of thing that we might not have talked about in that way in previous eras, where we would have seen politics as a place where people debate what our interests are, in fact, and engage in acts of public-minded-- or in fact, ought to be accountable. So the question about what the public needs and what we need as a community, as opposed to kind of a simple model of interest-based politicking.

Things like that, or markets just being presumed to be clearing. And so we use the example of the First Amendment, obviously, in the paper. And part of what I'm interested in is whether, in other places, whether in tax jurisprudence or in tax policy, you see similar shifts to that, too, Constitutionally but also statutorily speaking.

Do you see what I would-- and we could get a little deeper, if people are interested, into the history of neoliberal thought-- do you see the moves that we're talking about in your area, in both debates and scholarship and in policy and the courts, where there are subtle shifts away from thinking about politics as a place of the definition of interests and debate among citizens to rent-seeking and navigating-- well, let me go on-- and markets as presumptively clearing or presumptively-- like the market of ideas, that kind of piece of it.

So I'm curious the degree to which those features of changing-- and even subjects. And I think in tax, I found very helpful-- I did actually read the draft that you mentioned, Jeremy and Clint's paper, and I found very helpful looking at some of that paper and thinking about-- I know very little about tax scholarship-- some of the way that maybe tax-- perhaps it's always been, or perhaps it became more reorganized around people as preference satisfiers.

That's what you are fundamentally, and so the questions in tax are about individual preference satisfaction as much as, or more so, than they are about the collective establishing of, in fact, what our preferences ought to be. And so they used an optimal tax theory of corn versus wheat as the model, the consumer, and it's corn versus wheat as opposed to thinking about EV vehicles versus SUVs.

And of course, when we talk about EV and SUVs, everyone says, oh, it's externalities. Also, we might be saying politics is a place where we establish what it is that we want, in part because in the process of individuals establishing their preferences, there's different orders of existence, in some sense, for ourselves. There's times when we're preference satisfiers-- that's a market model-- and there's times when we're establishing what it is that we think we ought to do, what our values are and how we live together. Politics conventionally would be a place where we express that.

And so when we're deciding on tax policy, we might not just be trying to figure out what people's preferences are, but recognizing that preferences are endogenous. We're establishing preferences. We use politics as a different means than the market to figure out what preferences we ought to value. So what do we value about our values?

On the do we want to have Constitutional law more engaged with these questions or not, it's a wonderful question. And I think one of the things very much worth grappling with is whether or not you have to have courts as a mediator of the Constitutional law questions. Willy Forbath and Joy Fishkin have a book coming out about Constitutional political economy, which they've been working on for years. And it's traversing this ground of how courts have encased certain kinds of market power and privilege from democratic reorganization.

And so of course, on the one hand, one can say courts are always involved. You don't get to have them out. So for example, if the courts see campaign finance law as something that impinges upon free corporate speech-- because precisely of the way they're thinking about markets when the state is for how everybody operates-- and then they strike down campaign finance law, that's not the courts staying out of Constitutional law or staying out of questions of wealth distribution. That's the court in. And you could imagine how a reorientation of how you thought about equality and its importance, markets and how they operate, wealth and its implications for democracy could shift how the court would think about simply letting legislation alone, deferring to democratic outcomes.

And so in some sense, we don't get to have the court out. The court is always in. And so that's one piece to think about. And of course, it's in very much interpreting statutes as much as the Constitution. But another is that a change-- and this is very much what Willie and Joey are trying to do in their book-- that a change in the way we talk Constitutionally about things like wealth distribution might be an important political move.

And so while, Anne, you're absolutely right that in many ways taxes avoided some of the problems, some of the dynamics we're talking about have created in other subfields, but it also seems like there might be a connection between the retreat from Constitutional language and the failures of politics to follow what tax scholars think ought to be done.

And so now I think, where it's inescapable that things like wealth distribution matter for the survival of our democracy, we are seeing new shifts in the kinds of taxes that we're willing to talk about. And so that might be a more compatible way, I think, both given our concerns about elite capture of institutions like courts, and the work that you all are very much doing to elucidate how tax law could be much more egalitarian, that those might meet in a public and legislative politics of Constitutionalism as opposed to necessarily a judicial review striking down to litigate us towards a more equal future.

So I guess I want to hold both of those ideas together. On the one hand, we have to confront these ideas in the courts because they are remaking the landscape, often, in fact, striking down legislation. On the other, you don't have to rely upon them at the destination of your Constitutional claims. But simply raising the level of these concerns to ones about the stakes of our political order and our Constitution might be helpful in addressing some of the political dynamics that I know you all think very much about.

OK. So I think I'll say a few more things about whether or not-- so I love the comment, Anne-- I take very seriously the point the tax has been a place where there's never been-- and it's true of certain other subfields, too. I think labor law is never a field that was completely colonized by a private law way of thinking about law and economics.

And there's all kinds of reasons we could talk about. One thing that I think is kind of cool about taxes you were the people who were supposed to talk about distribution, even within law and economics. You were the one authorized place. You got to do it all. And my view is that that's not a neutral move. And you all know this, that the idea of here's the market over here, and then here's redistribution over here, is part of where the whole game is kind of set up at that point to make it quite difficult to do some of the things that are very much drawing on political theory and so forth you might say you want to do with the tax system.

And so that seems like an important part of the story, that you get to keep your political theory, but in a place that maybe actually-- and one thing we often talk about in law and political economy circles is what I call the distribution dodge. We'll do distribution later, and it always goes over there. And it can always be undone by the legislature if we do this over here. And it's not rocket science. Everybody knows this. We are just of putting it into this framework that distribution of time one is going to affect distribution of time two. And so that isn't a neutral thing to be doing.

And so in some sense, you've been given too much of the work, but very much through public economics, I think, and through the role of things like diminishing marginal utility, able to make claims on the broader both distributed and, to some extent, democratic and citizenship elements the tax ought to bear.

That seems right, although I also wonder-- and this is genuinely just a question-- is it really that you avoid wealth maximization in a really thoroughgoing way, because my own experience in many of the fields that I work in is that there's moments where everybody talks like a welfare maximizer. And then you start trying to calculate things, and then you turn around and you figure out, where am I going to get my numbers? And you get them from the market.

And so one thing I was thinking, in fact, reading the paper that Jeremy and Clint wrote was, when you start to ask about optimal tax and distortions, and you turn around and you say, is this going to distort, and what kind of activity is it going to distort, how do you measure distortion? I would assume you measure it by looking at preferences as revealed in markets and elasticities as revealed in markets.

And so in some sense, there's a kind of laundering of the way preferences are exhibited in markets because that's where you get your inputs for calculations about what the elasticities are if we're going to tax here or tax there. And you don't, then, go back and say, well, diminishing marginal utility in the corn for people at this income level versus the corn for people at this income level, and we've got to undo the way that people's ability to pay is fed into a system that would be measuring, let's say, elasticities or something like that.

And so that's, I think, one of the very powerful things about the efficiency framework is precisely that it offers us these empirical tools, like the way markets actually operate and reveal preferences and so forth, to give you inputs into something that then feels very tractable. And yet there's, I think, a risk that the tractability ends up substituting for the ability to see all the way down into the models, what's this actually built upon? And are we maintaining our commitment to a welfare maximizing approach? Or are we by necessity, in some sense, bringing back in revaluing this through wealth-maximizing models?

So that's a kind of a question. And then I love the last piece. And Anne, I very much just want to agree with what you're suggesting, which is that in some sense, the kind of crises of the moment-- and I hope that our paper is helpful in this-- but the crises of the moment are asking all of us to think differently about simply, what's the terrain of question that we operate on? And where might the questions that we should have been debating? Because they're not the small marginal thing that we can get traction on, but the big question for our democracy.

But should we be debating reparations instead of talking about the small difference between structuring the tax this way or structuring the tax that way? Or should we be revisiting questions about the pre-distributive dimensions of the way property is organized, as opposed to debating the marginal impact of this or that change that is maybe easier to talk about.

And this is very much, I think, something that in all fields we're trying to think about today. And I'd love the chance to talk to you about how we might-- not even, in some sense-- the work may be there, but framing the questions somewhat differently and reorienting the terrain of debate. Is this move better for distribution, or this move better for distribution or equality? That itself might be part of what we, as scholars, want to be doing.

I'll stop there. And thanks again so much for joining me in talking about this.

RUTH MASON: Well, thank you so much to Ann and Amy. This discussion has already been really fascinating. The paper is very provocative. At the risk of making it even more complicated, I actually want to talk about international. So we're lucky we have a nice international audience here. And I want to just talk about some of these ideas and how they play out in international talk.

So Amy, your paper it's all about how legal academia has used the appeal of efficiency, its apparent neutrality, to kind of seal off, to encase the status quo distribution against criticism, some of the inequality politics, democracy.

The authors of this tax paper that's responsive to your paper, Jeremy Bearer-Friend, et al, I'll leave it to them to make their points. Some of them are here today. But one of their points is that-- and Anne made this point, too-- tax has always, as far back as Adam Smith, emphasized pluralistic values, equity, in terms of ability to pay, not willingness to pay, efficiency, and administrability. And Clint might want us to add democracy or accountability to that. But these values have always been plural when it comes to domestic tax. And we can argue maybe there's been too much focus on efficiency and too little on equity.

But a place where equity gets short shrift is international. So there is some work on what we call inter-nation equity and the work on the regressive shift in tax treaties is well known. But the topic just hasn't received as much attention in international as domestic tax. And there's often this hand-waving excuse of that's a domestic issue. This would be your distribution dodge. Like you have to do that stuff at the national level. So the question gets just pushed down.

Part of this is there's no polity internationally to decide the issues. We can't do it democratically. But just because there's no policy doesn't mean there's no politics. We see lots of politics and fighting over the distribution of tax and entitlement to tax, how it's distributed among states.

So what you have in international is a real focus on efficiency and administrability, these issues that seem technocratic. Like if you just had a calculator and a pad and a pencil, you could figure it out. Now there's caveats that have to be made for that point, one of which is that even the efficiency concepts that we use in international tax have welfare conceptions embedded in them. So you won't know our jargon, but for people on the call, everyone now is thinking about capital export neutrality and capital import neutrality. These are our received welfare benchmarks.

And interestingly, the leading concept pursued by the United States, at least in terms of documents put out by the Treasury Department, is capital export neutrality, which has as its goal the pursuit of worldwide welfare. And no less prominent a scholar than Michael Graetz, your longtime colleague at Yale, has taken the government to task for that, asking why should it be the business of the United States to pursue worldwide welfare rather than national welfare?

But interestingly, CEN is at bottom a cosmopolitan approach. Now of course, everyone who's on this call is scoffing at the idea that the United States ever actually pursues anything other than national self-interest in the international arena for tax.

But this brings me to a question that-- it's not for you, Amy. It's unfair to put to you. But for the group. So how does this concept of value creation that we're seeing in international tax fair on the type of criticism that Amy and her co-authors are advancing here?

So just to fill you in, Amy, international tax has at its core this really difficult question, which is which country gets what? Who gets to tax the profits of integrated multinational companies that are engaged in business in lots of different countries? And we have rules for that. The goal is that not more than one country should tax the income. So you've got to split it up.

The problem is that firms have traditionally had a lot of choice, what's thought to be too much choice, about where, and in some cases, even whether to declare their profits. So there's a feeling that the old rules-- we call them the transfer pricing rules-- that they were relying too much on what the company said was happening. So if one part of the company wrote a contract with another part of the company that assigned risks and responsibilities, then the tax systems the world would look at that and believe it and allocate the income accordingly.

And so several years ago, OECD countries got together and started talking about a different way of assigning the income, which was value creation. Rather than taking the contract at face value, tax should be paid where value is created. And then this concept ended up morphing into not just a rule for transfer pricing, a rule for splitting up income among the parts of companies, but rather as sort of a slogan for how income should be divvied up among countries generally.

So then you have lots of academic papers about value creation. Whole books have now been written about value creation. A huge amount of academic energy has been poured into this, not to mention the energy that's been poured in by officials in the finance ministry.

So my question, unfair as posed to you, Amy, but something for the group to think about, but very much provoked by your paper, and in the spirit of interrogation of unseen motives, is whether value creation is a tool of encasement, or whether it's a chisel to remove encasement.

So just as a sketch, here's the argument that it's a tool of enhancement. So as wielded by each country, value creation is just a stalking horse for that country's interests. But it has the patina of credibility. It's similar to how Amy and her co-authors describe efficiency being used in the domestic, the US legal literature. How could you possibly want a mismatch between tax and value creation?

So it seems neutral. If I can make a persuasive argument that value was created in state x, then state x should be entitled to tax that value. And never mind the distributive effects, and an extra never mind, the initial distribution, that put the country in the position to have contributed to the value in that way in the first place.

And then the argument against, the argument that it's chiseling away at some kind of older distribution, is it's a new invention. You can pour into it what you want, including new distributive arguments. So whereas old paradigms rely too much on contracts and too much on physical and intellectual property and where they were, now maybe we look more to labor. Now we look to consumers, maybe even to digital users of social media products.

And so because it's an empty concept-- maybe not entirely, but it's undefined-- then it can be a tool for challenging the status quo.

It's interesting that both arguments for stasis and change are made in terms of economics. So value creation sounds vaguely economic. People have certainly interpreted it in that vein. So the fact that we're even arguing about value creation means that we've ceded the terrain, maybe, and we're not talking about distributive justice directly.

So I just toss that out for the international people as sort of idea to consider. Now I know that Tsilly wants to make a remark as well before we open up the queue. And remember, just use the Raise Hand function.

TSILLY DAGAN: So thanks, Ruth. And not surprisingly, maybe, I too went to the international level. But first I wanted to thank you, Anne, for your presentation. And thanks even for the selection of this particular paper for a series. And thank you, Amy, for your comment.

It's probably no surprise that they loved the paper, and that I find it both important and timely. And the ideas of shifting legal thinking-- and for me, legal tax theory-- from efficiency to power, from neutrality to equality, from anti-politics to democracy, are imperative and provide us with a particularly important alternative as a focal point to guide us through our legal thinking.

And all three moves that you describe in the paper, the power move, the equality move, and the democracy move, are critically important in the era of tax law, of course. It is critical that tax law treats us all as equal members in the political community. And there are many examples for that on the domestic front.

So I read the article in the tax context as a call for tax analysis that treats individuals with equal respect and concern, that focuses on alleviating power gaps, and that stresses our roles as members in the political community rather than atomistic consumers of goods and services that are the object of tax law.

Now this obviously puts a lot of pressure on the states, and particularly on the political democratic process as a way to secure a thriving society and as a way to prevent inequality, and to alleviate power imbalances, and to protect the weaker segments of society. But if what we care about is people, and particularly the weakest among them, and if we think power imbalances and inequality are a problem, as I do, we must draw attention to the global level.

And I think we must consider how the global level affects not only individuals, but states themselves. And what happens on the global front is that the state itself becomes a market actor. The state itself is competing with other states for resources as well as for residents. And the forces of the global market, forces of tax competition, undermine states' ability to independently pursue their policy goals, and in particular, undermine their ability to use taxes for redistribution.

Now, states have basically two options to fight back against this tax competition effect of the global [? sphere. ?] They can either insist on their coercive power by putting barriers on the inflow and outflow of capital of residents and of resources. And by doing that, they take the risk of leveling down their domestic economies. Or states could opt, as they have in previous years, to cooperate with other states in an effort to harmonize the rules in order to create more equitable regimes.

The problem is that both these options actually aggravate rifts between poor and rich states, and importantly, between the weakest of the weak, between the poor in developing countries and other groups. And the reason is that restrictions on cross-border movement and harmonization of tax rules across national borders are both actual privileges that cater to the needs of rich countries that can afford the trade-off between a more prosperous economy and a more equitable society.

So sure, if the US decides to put its foot down and insist on some justice-promoting policies, taxpayers may not be all that quick to leave. And the size of the US economy can probably afford the loss of a certain amount of resources. In other words, the US market, or the US market power, provides the US with some leeway in pursuing justice. But the poor country may not be able to afford the privilege of allowing for redistribution.

So similarly, when the OECD sets cooperative agenda for international taxation, or when the G7 countries get together to increase tax levels and allocate taxing rights, they tend to prefer their own needs rather than those of developing countries. So instead of the domestic power gaps that we try to fix, what we find is actually international power gaps. And one of the key problems with the global arena is, of course, the democratic deficit at the global level.

So global mechanisms of governance are far from the ideal picture of accountable and responsive institutions that we may imagine when we trust democracy as a solution for the current power gaps. And when political institutions are deficient, as they are on the global level, they cannot be the solution to what we are trying to target. Now obviously, the market, too, is deficient just as much as the political institutions, just like your article, Amy, so eloquently demonstrates.

So the truth of the matter is that both institutions, both the market and political governance, are in reality far from the ideal depiction that we kind of put on them. And to be honest, it is unclear, at least for me, how to actually fix them.

So I guess the bottom line of what I'm trying to say is that we should keep our eye on the target, and the target being human flourishing, reducing power imbalances, mitigating inequalities. And the kind of solutions that we used to this being a market solution or a political solution shouldn't matter that much. We should use whatever mechanism that best fits our goal. And this could be either a market mechanism, could be a political mechanism, could be a hybrid of both, which is probably my preferable reply. In other words, whatever fits the purpose.

RUTH MASON: OK. So Amy, I don't know if you want to respond to that? Or should I go to the queue? Or Anne?

AMY Those are wonderful comments. I know there's a number of folks in the queue. So I think maybe we should just
KAPCZYNSKI: go to the queue, and then I'll get a chance to add some other thoughts.

RUTH MASON: Sure. And Anne, also feel free to respond if you wish. So Linda, Linda Sugin.

LINDA SUGIN: Hi, everybody. Nice to see you. Thank you so much for putting this together. This was a really interesting conversation and a really great paper. I want to say three quick things, and I promise I'll be quick because the queue is long, one about equity, one about efficiency, and one about constitutional abdication and tax.

So the first about equity. And I think that this relates to what Tsilly was just talking about. But I think that in tax, we often think of equity in terms of some very lean, narrow version of economic fairness. And I think that what we need to do in tax is we need to think beyond just the financial. And so I know that Clint has developed this idea-- that was some time ago when I started talking about democratic fairness in taxation-- as being an independent norm that really connects to the things that Tsilly is talking about, to the dignity of the person and equal respect and concern.

And there are ways in which looking solely at financial distribution does not get at this notion of equity. And so I think that we need to be thinking about that when we're talking about equity and taxation. So that's the equity piece.

The second piece, about efficiency. And this goes back to what Anne was talking about as wealth maximization. And I totally agree with Anne that we don't generally think in terms of wealth maximization when we're talking in taxation. But we're almost obsessed with waste. And just when you say waste, like that's value-laden. Waste. Oh my god, we don't want waste. We got to get rid of waste.

But come on. Maybe waste is OK. Why are we so obsessed with waste? And so I think that that's another way in which the way that we talk about efficiency in taxation is incredibly narrow. It's not narrow in the wealth maximization way, but it's narrow in this other way. And so how do we see waste? And that we haven't really investigated, I think, why we think waste is such a bad thing, and that we should be avoiding dead weight loss because that's really the bad thing.

So I think that as tax people, we've been patting ourselves on the back for a long time, saying, we have always known that economics is a value, just like other values, and we're going to weigh it with other values. But I think that we could actually have a wider view of what we're talking about when we talk about economics.

And just the last thing I want to say is about Con law abdication in tax. And this is something that I've been writing on pretty much for my whole career about Constitutional law and taxation. And I just really want to point out that it's not just that the Con law side has abdicated in the area of tax. It's actually worse than that.

And like 10 years ago, I wrote a paper that I called "The Great and Mighty Tax Law". And it was basically the idea that if you just stick something in as a tax provision, as a tax expenditure, then that essentially protects it from any kind of Constitutional scrutiny because it's very easy for the legal analysis to see tax expenditures as an absence of anything. It's not taxing. And so therefore, it's not even treated as legally important.

And I see this, actually, as tremendously dangerous. And the more and more that we use the tax law-- one of my colleagues recently, who was in the poverty law area, said to me when the child tax credit was announced, he was like, oh, Linda, it seems like your area has swallowed mine up.

So the idea being that we can really protect anything that we want from Constitutional scrutiny by designing it as a tax expenditure. And I think that that's even maybe more, Amy, than the way that you were thinking about this protected sphere because that gives the tax law the ability to really reach into all other areas of the law and to make provisions beyond Constitutional review.

RUTH MASON: So Amy and Anne, if it's OK with you, I'll collect some more questions, then maybe- OK, great. So John Vella. Thanks, Linda.

JOHN VELLA: Hi, everyone. I've got two questions. So the first one regards whether this is actually about US legal scholarship rather than legal scholarship in other countries, too. And so I was thinking about this because when I read the paper, which I really enjoyed-- and I thank Tsilly and Ruth for this because I'm guilty of not reading many non-tax papers.

But when I read this, "The 20th century synthesis makes up the air we breathe, and that is the only disciplinary atmosphere that younger scholars and lawyers have known," I mean, that definitely wasn't my experience studying law in continental Europe and in England. So it would be interesting to think, OK, is this a particularly US phenomenon? If it is, then what does it tell us about the relationship between this issue and the problems we are identifying if we see the same problems in other countries, too? So maybe that's something worth thinking about.

And the second point was, I think I agree with Anne on the issue of efficiency and how we see it in tax law. So I must say I haven't come across an economist who would say when we think about tax policy, all we need to think about is efficiency. If that were the case, we would have lump sum taxes and all go home. We know how to design efficient taxes.

But all the economists I've met in our areas would say efficiency is an important issue to think about. Yeah, but it's just one of a number of issues. And you have efficiency, you have administration, you have fairness, and you have other considerations. So with that in mind, I'm not that concerned with the nefarious influence of economists and their concept of efficiency in our work. Thanks.

RUTH MASON: Andrew. Andrew Hayashi.

ANDREW HAYASHI: Sure. Thanks. So I just want to start with a compliment and say it's beautifully and persuasively written, which I think is especially remarkable given that you had a number of authors on this piece. So to have one voice is no small thing.

So I have a question that's kind of related to something Tsilly said, and maybe Linda as well, and then sort of funny request. So it's actually near the end of the paper where you describe your basic commitment to democracy, you say. And I guess that surprised me just a bit, given what seemed like a primarily egalitarian motivation, that that was really the value that you thought legal scholars needed to be attentive to. And I just wondered what you thought, if you could say a little bit more about what you think the relationship between the two is, because there's lots of ways that democratic politics, obviously, could play out once you bring these distributional decisions about the allocation of power above board.

So tax scholars are always vexed and shake their fists at the fact that nobody likes the estate or inheritance taxes. Why don't they understand that this is they're not going to pay it, it's good for them, it's distributively just. Why is that? But no matter how you ask the question, they're unpopular.

Zack Lisko has a paper about how people do not want to tax unrealized income. It's unfair. Why is that my own experiences no matter how hard I try, I cannot shake my fed tax students of their intuitive entitlement to their pre-tax income. I can talk about the role of the government till I'm blue in the face. These are people who are going to be lawyers and be paid because of the law itself. And the intuitive appeal is just very resilient.

I wonder, Linda asks, why are we so fixated on waste as tax scholars? I don't know. A lot of people, maybe, care about waste. And when we involve more people in the process of tax policy, we might find they care about waste even more than we do.

So anyway I just kind of wondering if it's, is democracy important as an expression, you want equal participation, so democratic participation is an expression of egalitarianism. Or is it instrumental? Or maybe that's a little bit beyond the scope. But I felt that thrust was so much about egalitarianism and then the democracy. I wasn't quite sure how important that was.

So the funny request is-- and this has to do with the politics as well-- I think it's really fascinating to be observing this deliberate and ambitious attempt to create a movement right now. I think that's really exciting. I wondered-- and hear me out-- if you've considered a conference with some of these conservative folks on the right-- I'm thinking like Patrick Deneen at Notre Dame, Oren Cass, who's a public policy guy. He has his own think tank called American Compass Or maybe even somebody like-- I don't know if Adrian Vermeule fits in that category or not.

And so just what I'm observing as I'm reading the story, and people have expressed this in different ways, you're very focused on neoliberalism. They want to get off the liberalism train before it leaves the station, some of them. They see neoliberalism as, I think, a natural or inevitable expression of liberalism. Maybe there's differences. This basic commitment to democracy you have, they may not share. I'm not really sure.

But there are a lot of striking similarities that I think are more than superficial. You're both drawing on the work of people like Karl Polanyi, the relationship between markets and politics and law, how the failure to think about those things in the right hierarchy cashes out in the kind of capitalism we have, inequality, environmental degradation. You all kind of favoring unions, local associations as alternative sites of power.

I appreciate that gathering that group together could be awkward. But intellectually, I would be fascinated to see those differences worked out. And it would also bring a whole lot of visibility, I think, to the project as well. And I would just say, Suresh Naidoo has this really nice review in *The Boston Review* of Oren Cass's book about industrial policy and worker-centered economy that I think is exactly the kind of thing I'm talking about.

Probably where you end up diverging is the kinds of politics you think will emerge. But I think having that conversation would be really illuminating. So it's a funny request. Take it for what it's worth.

AMY

KAPCZYNSKI:

Ruth, should pause for a minute? Because there are so many awesome questions on the table now. And I'm happy to jump in, and then also others to react to them.

So first of all, thank you. What a wonderful series of questions. Let me start, I guess, talk a little bit in reverse order, Andrew, on the Oren Casses of the world.

So I think one thing that we're obviously doing in this paper is kind of running together a descriptive and a normative project. But I think it's important to say that one can do political economy analysis with a different normative orientation. And I think part of what you're describing is, in fact, the proof in the world that there are fundamental openings in neoliberal consensus. And you can go back to Polanyi and say, after the gold standard and the kind of collapse of a certain kind of stability of market society, you get fascism or you get socialism. And that was his view, and you got fascism.

And I think that there's very much an attempt in certain corners of the Republican party to reopen the question of the neoliberal consensus, exactly that it's Marco Rubio and Oren Cass. And I have actually been at a meeting kind of like what you describe. But the interesting thing was it had to be secret, and it wasn't because of us. It was because of them it had to be secret. So they wouldn't do it publicly.

But think you're very much right that there is going to be, I thin-- and there's potentials around which values ought we reorient if we say we're just going to allocate political decision-making to the market. And of course, I have great differences with some of them. I'm a feminist. Oren Cass objects to the decline of the white male factory owner, the family wage, things like that.

And so I do think, though, that there's certain kinds of intersections about the failures of a world in which other kinds of values are denigrated as compared to values of kind of satisfying consumer preferences. And so not so surprisingly, a number of the folks that you describe in that mix are religious, actually, and have a commitment to either Catholicism or Mormonism or other forms of traditions that would elevate, in fact, other values over the market.

That also, I would say-- I'm not sure that that way of thinking has much future in the party that it is organized within. And in part, you look at the attacks on Facebook and so forth. It seems to be the only megamonopoly that certain kinds of conservative politicians are going after. So I'm not sure that it's going to really transform the party.

But I do think the debate's super interesting and important. And in some ways, simply shifting the terrain of which values ought we be prioritizing if we're going to shift away from the idea of the neoliberal market settling this for us in this kind of neutral terrain of consumer preferences or something like that, is exactly a good debate to have. And I would be interested in having it with people like Oren Cass.

So democracy versus equality. I think it's a very important and deep question. I guess the way that I think about it-- and I think my co-authors share this with me-- is that democracy is a political order based upon the value of equality. And so when you're looking for alternatives to markets, which tend to prioritize according to people's ability to pay, and pre-existing distributions that are encoded in law, and bear all of the forms of subjugation that our history has encoded into our law, that politics as a place, and democracy as a place where we are all stand as equals, is an appealing alternative to that.

And so I'm not sure-- of course, in any particular moment, you could say, well, from whatever we can tell, like opinion polling or for what they vote for, the people don't like this egalitarian thing. But fundamentally, I think there's a way in which democracy is precisely organized around a kind of egalitarianism that allows us to put both equality and democracy in the story about the reorientation that we're looking for.

And it doesn't answer the enormously good questions about what the hell democracy even really is, and how do you know what it is that people want? And there's, maybe, a piece of this, though, too, that maybe didn't come out so much in our conversation but I hope comes out in the paper, which is that we have the sense that a bet on using elites or technocratic institutions-- whether that's courts or let's all just get together at the Central Bank and figure it out, or let's all just get together in the law professor world and figure it out, and we'll engineer equality into our system-- have not been a successful way to actually get to things that look more radically egalitarian.

In fact, periods in our history-- and this is true, I think, in the US as well as beyond-- where we've gotten really egalitarian moves, very substantial shifts in the tax code, are periods of enormous social conflict where there are powerful forces at work that are not elites organizing an argument that sidesteps the objections of the voters because they don't really understand or they don't really like.

So I think the bet-- and this is the part of the shift from anti-politics to a risky bet on democracy-- is that you need to be open to a kind of democratic and power-building relationship to what legal change and progressive legal change really looks like.

And it's a question I have for you all, is what does power-building look like in tax? How do you think about whether or not the moves that you're making inside of tax actually build the power of people to change, assuming we're not going to imagine more radically egalitarian change coming through violent means or truly grave social dislocation?

One alternative to that is the idea of non-reformists reforms, where you build power, not just you do a good thing because you made the tax code more egalitarian, but you build power so that in this iterative struggle of over the shape of our political economy, the forces that tend to be more egalitarian will actually tend to prevail.

So that's a long-winded answer. And I think, in some ways, it runs into the questions that Ruth and Tsilly asked at the beginning about internationalism. And I think one of the difficulties of framing the alternative through trying to put together equality and democracy is precisely the question of a transnational. I think my own work has been transactional to a large extent. And to some extent, there's not a tension. In part, what we might do, and what you both beautifully did, I think, is diagnosed the way that transnational legal orders are, in fact, used in case power or in case existing distributions from redistributive demands.

And that is very much part of my work on the TRIPS agreement and the kind of global trading order. I hear from you that there's very rich work in international tax. And I assume lots of the different levers that are being pulled in international tax and organized actually build a similar critique around that these are not neutral forms, but this is, in fact-- and the idea of neoliberalism is like, let's tear down the state and deregulate, in fact.

No, particularly when you looked at internationally, you see that those with capital very much want state borders. And they want state borders because they want to be able to move around them. And in fact, the threat to leave is precisely one way that you discipline democratic publics from taking your stuff.

And so that's exactly what happens. And tax law, like international trade law, is probably organized to facilitate that, in part because-- and this is where we get into a difficulty. It's not surprising, in a way, because it's a product of the same kind of elite, technocratic domain. It's very hard to get beyond, that the field of international tax, like the field of international trade, is very heavily technocratically oriented. And even though there's lots of good people within it, there's few spaces where a kind of transformative power that would demand more egalitarianism can be expressed.

So what's the alternative to that? Historically, I've thought about global social movements as the functional alternative to a democratic structure transnationally that can actually give voice to more democratic or egalitarian aims. But of course, I run aground the problem that is obviously there, which is the ability to mobilize around some of these highly complex issues. And the resources and so forth are very limited.

And so we do run aground, I think, very fundamental problems as we start to think beyond borders, not necessarily only because the emphasis on democracy might require us to think nationally. I think many definitions of democracy would say that democracy is the ability to have an influence over politically the things that influence you. That's obviously not a domestic story anymore. Only in the United States, I think, could we imagine that we can deal with stuff in the United States. Everybody else knows that that's a fundamentally transnational enterprise to try to affect the things that influence you.

And Linda, I loved some of your comments about moving beyond the financial. I think one way that we are also very much trying to do that in our own thinking-- and I'm thinking here of the way that certain kinds of things in tax are encoded as what's work and what's income, and the way that care work is probably left out of all kinds of things in tax. They're just not counted as financial because they aren't actually encoded as work or productive in the way that the economy is organized. And so they don't earn you credits toward your social security.

So I think that's one dimension of how to bring, let's say, feminist analysis into the account of how to mark, in a way, this unmarked space of the financial. But I'd love to hear about other ideas about how to do that. And I think I should stop because there's lots more questions. And I'm sure my co-panelists may have other things they want to add.

RUTH MASON: So Anne, should we collect the last couple of questions?

ANNE ALSTOTT: Yeah, let's hear from other people. I have no particular need to speak. This is a great conversation.

RUTH MASON: Ari.

ARI: Thanks so much to everyone, and particularly thanks to Tsilly and Ruth for creating this really important forum, and of course to Amy and Anne for launching these conversations that need to be undertaken. And I have a question, but first I can't help but thinking about Amy's challenge right now, this question of how do you build power in tax. And it's really a challenging question.

And my initial thought is just this work of bringing views that were maybe thought of as departures from the standard model, or exotic, but really normalizing and bringing to the center of tax thought and scholarship this range of perspectives that frankly, our country critically needs. But that's a hard project. And this is also really helpful for our paper. And I just made a SSRN link, so I will post the link to an early draft if anybody's interested. And I know Ariel wanted to be here as well, so we will give her a full report.

So I just wanted to tap this question that's in the background of the LPE framework project. And then also, it's something that we have struggled with in our paper, and it's something that I don't necessarily expect a clear or a simple answer on. But it's this fundamental question of what are people's views on the role of tax in our structural challenges and possible solutions as the situs for redistribution?

And of course, there's been a lot of recent literature on this recently. And in tax, it's so easy to fall under the spell of tax exceptionalism. Of course, it's the most directly and powerful means to correct these distorted market outcomes. And as Anne said, there are these robust connections to theories of distributive justice. And practically, there's a lot of room or slack within the tax system to achieve really substantial, even radical, redistribution while still taking care of the economy. But of course, we haven't really seen this motion, this movement in the policy arena, and even in a lot of tax scholarship, despite this radical potential.

So just at the most general level, do we think in tax that we're just doing it wrong, and there are ways that we can internally be rethinking the role of the tax system to achieve this redistributive potential, maybe, through the wider lens that LPE provides? And really feels to me like there's this real risk, on the other hand, of tax abdicating this role. On the other hand, is it a fundamental mistake to be thinking about focusing on tax as the redistributive tool? And as soon as we think about tax as this exceptional or special instrument for redistribution, are we, to a degree, constraining or predicting the outcome?

And maybe, really, for tax, what we should be doing is accepting and even embracing the limitations of tax as the situs for redistribution. And as we said, maybe it really is doing too much work here for all of the reasons that we've discussed. So I see that as kind of a basic tension that I struggle with and I don't have a simple answer to.

AMY
KAPCZYNSKI: I'll just say one thing in response to that, which is one of the things I came in wondering whether anyone would raise, is kind of MMT and new theories about the way spending and taxation can be disassociated. And so I think without going full MMT, one could just simply look at what happened in the COVID moment. Maybe it would be important to actually break the relationship between tax and distribution precisely because there are other techniques for funding all kinds of important programs that if you suture them to tax, and you say, well, great, health insurance is redistributive, and so we got to raise the taxes, you're going to end up with a political dilemma that maybe you don't need to have.

Anne, did you want to add? I don't think we're going to have time for another question, so if you wanted to make any last remarks, Anne.

ANNE ALSTOTT:No. I'll let Amy or you or Tsilly have the last word. But thank you again. So

AMY Are we going to cut Jeremy out, then, because maybe I'd like to give Jeremy the last word. I think he was the last
KAPCZYNSKI: person in the queue.

JEREMY: Just only to say thank you all for this phenomenal forum. It really is fantastic. And the way you've challenged tax exceptionalism is so helpful to tax itself. I know in my work on the omission of race and ethnicity from federal tax data, tax has been so far behind on race, and our status quo is so behind other fields.

But it also seems like tax exceptionalism has enabled some bad behavior in other fields, this idea of bracketing off distribution as our problem and not their problem. And so it's just been so fruitful to see all the work that's going to come out of this conversation. Thank you.

RUTH MASON: Excellent. Wow. I mean, what a way to end the first year of the Oxford Virginia Legal Dialogue. This discussion was totally fascinating. Thank you both so much for coming. Thank you to everyone who came. And we wish we had a little more time. I'm going to let Tsilly say a couple of things.

TSILLY DAGAN: I'd like to say thank you to everyone, and have a good night and a good weekend. That's all. Thanks.

RUTH MASON: We will be doing this again next year, so watch your inboxes and Twitter. So thank you, everyone.

AMY Thanks so much for having me.

KAPCZYNSKI: