

## CHRISTIANITY AND THE LIBERAL(ISH) INCOME TAX

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Liberalism is back on its heels, pushed there by political movements in the United States and Europe and by the critiques of legal scholars and political theorists. Some of the most vigorous recent critiques of liberalism have come from Christian scholars arguing from Christian perspectives. These scholars criticize what they regard as liberalism's false neutrality and false anthropology, defects alleged to threaten both religious freedom and human flourishing more generally. Some propose to commandeer the state's legal apparatus to steer society toward the common good as they understand it. Others only want the liberal state to accommodate insular Christian communities. Tax law is a natural place for both sets of critics to focus their attention, given the pervasive influence tax has over individual and corporate activity. And yet, tax law has been mostly ignored. In this article, I evaluate just how "liberal" is federal income tax law, and I explore sites of tension between Christian commitments and the income tax's liberal features. I conclude that income tax law is liberal—in the main and generally in its aspirations—but that even Christian scholars with misgivings about liberalism should leave tax law with its liberal features.

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## INTRODUCTION

It is hard to overstate the influence of the liberal tradition over American political, legal, and economic institutions.<sup>1</sup> And yet, liberalism appears to be back on its heels,<sup>2</sup> with some scholars celebrating what they perceive to be the late stages of liberal hegemony.<sup>3</sup> Christian scholars arguing from Christian perspectives have been some of the most visible and prominent of these celebrants. These scholars argue that contemporary liberal commitments to individual autonomy and legal neutrality between different moral, religious, and ethical viewpoints are misguided and disingenuous.<sup>4</sup> They say that these commitments are misguided because they are based on a false conception of what it means to be human,<sup>5</sup> according to which we are only “choosers” who seek to satisfy our desires unfettered by constraints of any kind. They say that the liberal conception of the individual ignores the importance of geographic place, personal relationships, community, and the boundaries set by tradition, culture, and obedience to God in creating the conditions for human flourishing.

The critics further argue that this understanding of what a person is feeds into liberalism’s logic of what government should do. Liberalism, on their view, seeks the liberation of individuals from all constraints—cultural, environmental, technological—on their freedom of choice. Because the satisfaction of individual desires and the expression of one’s autonomy is itself an account of what makes for a good life, liberalism’s purported commitment to neutrality as between substantive theories of the good is an illusion. For these Christian critics, liberalism has at its heart a conception of the individual that is inconsistent with the Christian understanding, and it enforces a morality of individual freedom and autonomy grounded in that conception. Since that

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1. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2006); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1998). There are, of course, many conspicuous exceptions to the hegemony of liberalism in American law. See, e.g., Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2105 (1997) (“When it comes to immigration policy, we do not apply the liberal principles that Sandel finds so pervasive elsewhere in our legal and political culture.”).

2. Adrian Vermeule, *Integration from Within*, AMERICAN AFFAIRS JOURNAL (2018), <https://americanaffairsjournal.org/2018/02/integration-from-within/> (There is a “widespread sense that liberalism is visibly teetering.”).

3. See, e.g., PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2019).

4. Vermeule, *supra* note 2 (“[L]iberalism claims to eschew comprehensive substantive theories of the good, yet inevitably embeds and enforces just such a comprehensive substantive theory, based on a particular and erroneous anthropology.”).

5. This is not a new criticism. Many scholars have argued that “liberalism is necessarily premised on an abstract conception of individual selves as pure choosers, whose commitments, values[,] and concerns are possessions of the self, but never constitute the self.” Gerald Gaus et al., *Liberalism*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (Jan. 22, 2018), <https://plato.stanford.edu/archives/fall2020/entries/liberalism/> at 10. Michael Sandel provided an influential critique along these lines. Michael Sandel, *Liberalism and the Limits of Justice*, in *DEBATES IN CONTEMPORARY POLITICAL PHILOSOPHY* 140 (Derek Matravers & Jon Pike, eds., 2005).

conception is wrong, liberal institutions promote a society that is fragmented, selfish, and characterized by individual isolation and despair.

For some Christian scholars, the cure for liberalism's corrosive dishonesty is a takeover.<sup>6</sup> They argue that law—including the extensive apparatus of the contemporary administrative state—should help realize a Christian conception of the common good.<sup>7</sup> Virtue should be nourished, and vice should be discouraged. Other scholars agree about the proper aim of law—ordering society toward the common good and instructing people in virtue—but they are more pessimistic about the possibility of obtaining the political power necessary to realize that goal. Resigned to this outcome, they hope mainly to be left alone, to form Christian communities structured around shared norms where they can nourish thick bonds of fellowship among people who share a common worldview.

Many of the sites of tension between liberalism and these Christian critics are located in areas of social regulation, pertaining to questions with a very obvious moral valence such as abortion, pornography, or environmental protection. These areas implicate First Amendment law, criminal law, environmental law, and health care law, which often regulate with the threat of stigma and incarceration. Tax law has a much lighter touch, only changing the prices of how we spend our time and resources. But this does not put tax law beyond moral scrutiny, both as to matters of justice and for how it shapes the lives that people lead. The economist and theologian Daniel Finn argues that social and legal structures can properly be regarded as sinful because they have a causal impact on people's choices, steering them toward virtue or vice, directing society toward the common good or away from it.<sup>8</sup> So, for example, when markets encourage the conservation and careful stewardship of resources, they are good, and when they promote the ruthless exploitation of those resources, they are bad. In much the same way, tax law influences the choices we make, the families we form, where we live, and how we steward resources. In fact, the United States' federal income tax is so broad in its scope that it may well pervade our lives even more than the marketplace.<sup>9</sup>

In this article, I ask how Christian skeptics of liberalism should assess liberalism's imprint on tax law, and I explore some Christian critiques of the federal income tax. I consider what taxation can offer by way of orienting society toward the common good and teaching virtue. And I consider the ways that it can accommodate the Christian who wants the freedom to create political communities where members can fully live out their religious commitments without undue influence from the state or the marketplace.

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6. See, e.g., Vermeule, *supra* note 2.

7. Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1041 (2019). See also Vermeule, *supra* note 2.

8. Daniel K. Finn, *What Is a Sinful Social Structure?*, 77 THEOLOGICAL STUD. 136, 138 (2016).

9. The presence of markets where goods and services are traded invariably leads to income, which is subject to tax. But tax reaches both market and non-market transactions, such as charitable donations and gifts.

I examine first whether the federal income tax is guilty of the two charges made by liberalism's Christian critics. First, is it predicated on a self-interested, autonomous, rational actor model of the individual? And second, does it aspire to be neutral with respect to substantive conceptions of the good? I answer both questions mostly in the affirmative. I also explain some of the important substantive and institutional features of federal income tax law, with an eye on using them to evaluate the income tax's suitability for helping to realize a Christian conception of the common good. In Part II, I set the liberal income tax alongside Christian anthropology and ethics to identify points of conflict. In Part III, I introduce three general considerations for Christians interested in the potential of the income tax to serve the common good. I then turn to three specific sites of conflict to explore the nuances of using tax law to advance Christian values: the value of work, the value of the family, and the relationship between political authorities.

Although the federal income tax is a mostly liberal institution, I conclude that Christians critical of liberal institutions should mostly leave tax law with its liberal features.<sup>10</sup> This does not mean that there is no room for Christian values to influence tax policy choices such as the allocation of resources between different levels of political authority or the amount of income redistribution, but it does mean that the most contested issues of individual morality should be negotiated elsewhere in law, politics, and culture. My arguments are mostly pragmatic—rather than theological—in nature because I view the question of tax law's role in pursuing the common good as one that, to quote Pastor Timothy Keller, is “not [a] matter[] of biblical command but of practical wisdom.”<sup>11</sup>

This article is an intervention in a conflict between liberalism and the Christians who struggle to reconcile themselves to it. In that spirit, I attempt to be sympathetic to the existence of the conflict. However, it is important to emphasize that many Christians can rather easily reconcile their faith with liberalism. The antagonistic postures taken by some of liberalism's Christian critics are theologically controversial, and liberalism has its Christian defenders just as it has its Christian critics.<sup>12</sup> The Catholic tradition from which some of liberalism's recent critics write elevates individual freedom as an essential component of human dignity and might be read to be consistent with liberalism broadly understood.<sup>13</sup> But I do not address this internal theological debate.

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10. My argument is that prudence gives Christians good reason to accept tax law's liberal features. Although not limited to strands of thought, such as Catholic integralism, it is relevant for that perspective.

11. Timothy Keller, *How Do Christians Fit into the Two-Party System? They Don't*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/opinion/sunday/christians-politics-belief.html>.

12. See, e.g., ERIC GREGORY, POLITICS AND THE ORDER OF LOVE: AN AUGUSTINIAN ETHIC OF DEMOCRATIC CITIZENSHIP (2008).

13. The Second Vatican Council said in *Gaudium et Spes*. that “man's dignity demands that he act according to a knowing and free choice that is personally motivated and prompted from within, not under blind internal impulse nor by mere external pressure.” POPE PAUL VI, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: *GAUDIUM ET SPES*, § 17 (Dec. 7, 1965),

Instead, I write from the perspective of a Christian tax scholar to those who view liberalism with suspicion, and to help negotiate what might be done with that suspicion in thinking about income tax law and policy.

## I. THE INCOME TAX AND ITS LIBERAL VALUES

In this Part, I provide a high-level overview of the federal income tax's basic structure and mechanisms of enforcement. The purpose of this overview is to illuminate, in a general way, the different ways that tax law can be used to help realize individual and social values and the practical limitations that get in the way. I then describe two channels through which taxation affects individuals' choices, preferences, and well-being. Understanding the potential of the income tax to either orient society toward the common good or merely to create space for Christian communities to do so themselves requires attending carefully to the mechanisms of how tax law works. I then consider whether the federal income tax is guilty of two charges leveled by Christian critics against liberal institutions. First, does federal income tax law assume that people are self-interested individuals—primarily, consumers—who reason only instrumentally to satisfy their preferences? Second, is the federal income tax in fact, or does it aspire to be, neutral between contested theories of value or the good life?<sup>14</sup>

I do not evaluate whether the accusations made by liberalism's Christian critics against liberalism are true. As I discuss below, liberalism has such a wide range of expressions that it is hard to generalize about much, and what may be true of some versions of liberalism may not be true of others.<sup>15</sup> Instead, I ask whether U.S. federal income tax law, specifically, is based on a shallow conception of the human person and whether income tax law reflects and aspires to value neutrality. It is beside the point, for my purposes, whether these are actual hallmarks of liberal institutions more generally.

### A. *What the Income Tax Is*

#### 1. Substance

The income tax is, roughly and approximately, a tax on gross income less the costs of earning that income. The Internal Revenue Code defines income as

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[http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_cons\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html). The Council also writes that “[o]nly in freedom can man direct himself toward goodness,” *Id.* at § 17, and “[r]espect and love ought to be extended also to those who think or act differently than we do in social, political, and religious matters. In fact, the more deeply we come to understand their ways of thinking through such courtesy and love, the more easily will we be able to enter into dialogue with them.” *Id.* at § 28.

14. The aim of political liberalism, at least as John Rawls articulated it, is to be neutral between “comprehensive doctrines,” and any controversial metaphysics of individuals and ethical theories. Gaus et al., *supra* note 5, at 7.

15. *Id.* (“Given that liberalism fractures on so many issues—the nature of liberty, the place of property[,] and democracy in a just society, the comprehensiveness and the reach of the liberal ideal—one might wonder whether there is any point in talking of ‘liberalism’ at all.”).

“all income from whatever source derived.”<sup>16</sup> This, of course, is circular. Because income is not defined by statute, courts have had to determine its outer boundaries. Early questions in the history of the income tax included whether stock dividends,<sup>17</sup> cancellation of indebtedness,<sup>18</sup> and punitive damages,<sup>19</sup> were “income.”<sup>20</sup>

An influential touchstone for identifying income is known as the Haig-Simons definition of income, described by Henry Simons as “the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question.”<sup>21</sup> It is conventional among tax scholars to represent this algebraically as  $y = c + \Delta w$ , which means that income ( $y$ ) is equal to the market value of consumption ( $c$ ) plus the change in the taxpayer’s wealth ( $\Delta w$ ) over the relevant accounting period (typically a calendar year).

This simple equation implies several things about what is properly subject to an income tax. The uncompensated loss of wealth represents a loss of income. By contrast, wealth spent on something that yields consumption benefits is not a loss of income, because the decline in wealth is offset by the increase in consumption. The value of the consumption is presumed to be equal to the wealth used to purchase it. Operationalizing the Haig-Simons definition of income therefore requires distinguishing between expenditures that generate consumption benefits and those that do not, such as a business expense that one incurs for the sole purpose of earning income. In some cases, the distinction between personal consumption expenses and expenses incurred to earn income is clear, but in many cases, it is not. For example, consider tuition for higher education, which both increases one’s earning potential and is its own source of satisfaction and fulfillment.

The federal income tax base differs in many ways from Haig-Simons income. Certain kinds of income are excluded from the income tax base because Congress has decided that doing so is useful for public policy reasons, such as to encourage investment in certain areas of the economy or to favor

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16. I.R.C. § 61. The statutory definition of gross income also includes a list of illustrative examples and references other sections of the Code that explicitly include or exclude items from gross income.

17. *Eisner v. Macomber*, 252 U.S. 189 (1920).

18. *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931).

19. *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955).

20. For a rare case in which a provision of the Internal Revenue Code was deemed unconstitutional because it taxed something that was not income, see *Murphy v. I.R.S.*, 460 F.3d 79 (D.C. Cir. 2006) (holding that nonphysical damages are not taxable as income). *Murphy* was subsequently reversed when the case was reheard en banc. In the current Term, the Supreme Court will hear arguments about whether “income” within the meaning of the Sixteenth Amendment to the Constitution incorporates a requirement that the income be “realized.” *Moore v. United States*, No. 2:19-cv-01539, 2020 WL 6799022 (W.D. Wash. Nov. 19, 2020), *aff’d*, 36 F.4th 930 (9th Cir. June 7, 2022), *reh’g denied*, 53 F.4th 507 (9th Cir. Nov. 22, 2022), *cert. granted*, No. 22-800 (June 26, 2023).

21. HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* (1938).

certain industries. For example, although interest is generally taxable, interest on municipal bonds is generally excluded.<sup>22</sup> Because investors are not taxed on municipal bond interest, they are more willing to lend to municipal governments and are willing to accept lower pre-tax returns than they otherwise would. The net effect is to reduce borrowing costs for state and local governments. Another example is the exclusion of up to \$500,000 in gain from the sale of one's home from the tax base,<sup>23</sup> which makes investments in homeownership more attractive.

Providing a deduction for the expenses incurred to carry on a specified activity is another mechanism for doing public policy through tax law and has a similar effect on taxpayer incentives as excluding income from that activity. Both deductions and income exclusions increase the after-tax benefits of engaging in the activity. Congress has been enthusiastic about providing deductions for favored activities, including providing a deduction for the cost of capital investments by small businesses<sup>24</sup> and providing a deduction for the interest on debt incurred to acquire a principal residence.<sup>25</sup>

In other cases, income is excluded not because of a desirable public policy outcome but because of the administrative difficulty of taxing that income. For example, note that the Haig-Simons definition of income includes consumption regardless of who provides that consumption to the taxpayer. An individual who enjoys the use of an apartment has "income"—the consumption benefit of living in the apartment—regardless of whether she is given the use of the apartment by her employer or she happens to own the apartment herself. The latter is an example of "imputed income," which is income in the Haig-Simons sense but is not taxed under federal law. The idea of taxing imputed income may sound fanciful but, in fact, some countries do tax the owner of property on its imputed rental value.<sup>26</sup> Although the taxation of imputed income might seem like only a curiosity, it is worth considering in a little more depth because of what it illustrates about the limits and complications of using tax law as a tool of social engineering.

The failure to tax imputed income is not only a departure from the Haig-Simons definition of income—which would make it a preoccupation of tax scholars and probably no one else—but it also has significant consequences. Using data from 2003, economists estimate that taxing net imputed rental income from homeownership would increase average homeowner tax liabilities

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22. I.R.C. § 103.

23. *Id.* § 121.

24. *Id.* § 179.

25. *Id.* § 163(h) (disallowance of personal interest, which does not include qualified residence indebtedness).

26. These countries are Iceland, Luxembourg, the Netherlands, Slovenia, and Switzerland. Dan Andrews, Aida Caldera Sánchez & Åsa Johansson, *Housing Markets and Structural Policies in OECD Countries* (OECD Econ. Dep't, Working Paper No. 836, 2011), [https://www.oecd-ilibrary.org/economics/housing-markets-and-structural-policies-in-oecd-countries\\_5kgk8t2k9vf3-en](https://www.oecd-ilibrary.org/economics/housing-markets-and-structural-policies-in-oecd-countries_5kgk8t2k9vf3-en).

by \$1,900.<sup>27</sup> But some people would have paid much more than others. For example, homeowners who are over fifty years old and made more than \$250,000 per year would have paid \$10,000 more in income taxes.<sup>28</sup> These homeowners would have had higher tax bills for two reasons: their marginal tax rate is higher so the exclusion of a dollar of taxable income is worth more to them, and they have more valuable homes. This highlights an important consideration when using tax law to nudge people in one direction or another with tax deductions or exclusions: the force of the nudge will vary based on household income.

The nontaxation of imputed income from services is even more significant than the exclusion of imputed income from property. The value of household services—work performed in the home, such as childcare and home maintenance—is roughly one-quarter of the national gross domestic product, so an enormous share of national economic output is outside of the income tax system.<sup>29</sup> An individual considering whether to take a paid position in the formal labor market must reckon with the fact that his compensation in the market will be taxed, but the value of any services he provides to his household will not. This creates a powerful incentive to engage in “household production” rather than enter the formal labor market. And, predictably, these incentives have disparate impacts by gender.<sup>30</sup>

Whatever the substantive merits of taxing imputed income, any proposal to do so would run into two likely insurmountable administrative and political problems. The first problem is valuation. Real estate is already appraised in many places for the purposes of local property tax collection, but it is often done imperfectly and in a biased manner. Less valuable homes tend to be over-appraised.<sup>31</sup> Determining the value of caregiving services or household maintenance with any reasonable degree of precision is even harder. In many places, market prices for comparable services may be unavailable.

Moreover, taxing imputed service income would require intolerably intrusive and costly data collection by taxpayers and the tax authority, including the number of hours spent providing such services, the character of the facilities used to provide the services, and details about the nature of those services. Taxing imputed income would also create liquidity issues for taxpayers who

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27. James Poterba & Todd Sinai, *Tax Expenditures for Owner-Occupied Housing: Deductions for Property Taxes and Mortgage Interest and the Exclusion of Imputed Rental Income*, 98 AM. ECON. REV. 84, 89 (2008). Researchers in Finland find that the nontaxation of imputed rental income from homeownership is a large benefit since imputed rental income makes up roughly ten percent of a homeowner’s disposable income. They also find that nontaxation tends to favor higher-income households. Tuukka Saarimaa, *Imputed Rental Income, Taxation and Income Distribution in Finland*, 48 URB. STUD. 1695, 1695 (2011).

28. Poterba & Sinai, *supra* note 27, at 89.

29. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1589 (1996).

30. For a summary of these effects, see Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921 (2009).

31. See Carlos Avenancio-Leon & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation*, 137 Q. J. ECON. 1383, 1385 (2022).



have income, in the economic sense, but lack the cash to pay the tax.<sup>32</sup> Perhaps even more importantly, whatever the logic of the Haig-Simons definition, it seems unlikely that regular taxpayers would think it appropriate to tax the market value of services they provide to themselves. Imputed service income just seems too far removed from a commonsense understanding of income to gain popular acceptance.

As illustrated by the case of imputed income, choices about what to exclude from the tax base have distributional implications, benefiting high-income taxpayers more than low-income taxpayers if the income tax has a progressive rate structure. Exclusions also have effects on the allocation of resources, encouraging taxpayers to earn the kind of income that is excluded from tax. If these effects are undesirable, then extending the tax base to include that income may make sense as a theoretical matter. However, choices about the tax base must also be sensitive to the administrative costs borne by the Internal Revenue Service and the taxpayer and be cautious about transgressing popular intuitions about whether the thing being taxed is income.<sup>33</sup> Any attempt to use tax law to change individual behavior must consider these constraints.

## 2. Enforcement

The question of how to collect a tax on imputed income needs a little more explanation. Tax law enforcement works hand in hand with substantive tax law in determining the efficacy of the tax system. A facially just law that is inequitably enforced may result in greater injustice. If imputed income were taxed but mismeasured, and more dramatically mismeasured for certain taxpayers than others, the result may be worse than no tax on imputed income at all. Substantive choices about what to tax and how much to tax are not independent from choices about enforcement. If it is impracticable to equitably administer the law because of resource or informational limitations, then we must be skeptical of the law itself.<sup>34</sup>

Moreover, in deciding what forms of income should be taxed and at what rates, we must also account for the fact that the drafters and enforcers of the law, no less than its subjects, are vulnerable to corruption and vice. More than fifteen years ago, David Skeel and William Stuntz argued that this reality about the sinfulness of legislators, prosecutors, and police—no less than the sinfulness of ordinary people—counsels in favor of a “modest” rule of law that does not

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32. Andrew T. Hayashi, *The Quiet Costs of Taxation: Cash Taxes and Noncash Bases*, 71 TAX L. REV. 781, 803 n.90 (2018).

33. Whereas tax scholars take it for granted that unrealized income is income, most people disagree. See Zachary Liscow & Edward Fox, *The Psychology of Taxing Capital Income: Evidence from a Survey Experiment on the Realization Rule*, 213 J. PUB. ECON. 1, 12 (2022).

34. Resources can be reallocated from other places to improve the enforcement of a facially just law and technological progress may make it easier to collect the necessary information. But although the practical limitations on enforcing a facially just law may be contingent on our time and economic circumstances, they are limitations nonetheless.

seek to police aspects of morality that cannot be fairly enforced.<sup>35</sup> Tax law is not immune from these enforcement concerns. For example, there is a long and sordid history of inequitable and racially biased practices of property assessment, in the property tax context.<sup>36</sup>

In this section, I provide a brief overview of tax compliance and enforcement mechanisms. The limits of the tax enforcement apparatus should temper enthusiasm about using tax law aggressively as a tool of moral education or for steering individuals to virtue. The prudential approach I adopt in this article shares many of the sensibilities of Skeel and Stuntz's classic article *Christianity and the (Modest) Rule of Law*.<sup>37</sup> Skeel and Stuntz emphasize law's limits, and the dangers of moving Christian morality from being a matter between God and one's conscience or among a group of fellow believers, into the realm of government regulation with all of the pathologies that accompany it. The core of the problem is that Christian morality demands *everything* of the believer—that all aspects of one's life, including the most private actions and thoughts, be brought into obedience to God's good purposes for our flourishing—and a state that tried to coerce *everything* about our lives would be a tyrannical nightmare.<sup>38</sup>

Skeel and Stuntz note the tendency of federal lawmakers to take symbolic stands on matters of personal vice—such as sexual immorality, prohibition, gambling, and narcotics—by promulgating laws that cannot be consistently enforced, and therefore delegate discretion to law enforcers about who to prosecute and when.<sup>39</sup> Skeel and Stuntz also argue that using the law to police morality too aggressively can not only fail but even backfire or lead to a mutually destructive game of tit-for-tat that only one side—and not necessarily the side one prefers—can win.<sup>40</sup> Thus, Skeel and Stuntz conclude that:

[L]egal moralism is nearly always counterproductive. In Christian terms, it is also deeply wrong. . . . Good moral principles are often vague and open-ended, and they reach into every nook and cranny

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35. David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809, 831 (2006). Skeel and Stuntz argue that sin is “woven into our very being,” and we are “prone to selfishness and exploitation, ready to seize opportunities for our own advancement even if doing so brings injury and injustice to others. Sin is not just what we do (though we do a lot of it); it is who we are.” *Id.* at 814.

36. Andrew W. Kahrl, *The Power to Destroy: Discriminatory Property Assessments and the Struggle for Tax Justice in Mississippi*, 82 J. S. HIST. 579 (2016).

37. Skeel & Stuntz, *supra* note 35.

38. The theologian David VanDrunen similarly argues that “[t]he theme of inward purity not justiciable in human courts continues through Jesus’s emphasis upon the heart as the source of moral action” and that, in any event, the sermon on the mount is a “kingdom ethic,” only meant to apply to Christians. David VanDrunen, *Jesus Came ‘Not to Abolish the Law but to Fulfill It’: The Sermon on the Mount and Its Implications for Contemporary Law*, 47 PEPP. L. REV. 523, 546 (2020).

39. Skeel & Stuntz, *supra* note 35, at 824–25.

40. *Id.* at 832–33 (“When the public is sharply divided about the rights and wrongs of some class of conduct, both sides of the debate will strive to use extreme and inflammatory cases against one another. But only one side will succeed.”).

of our lives and our thoughts. Legal principles that have these qualities only serve to invite arbitrary and discriminatory enforcement. Arbitrariness and discrimination in turn invite contempt for the law.<sup>41</sup>

Skeel and Stuntz are primarily concerned with the effects of criminalization, mostly because the stakes are higher in the criminal context than in a merely regulatory setting. Criminal punishment brings with it social stigma and possibly incarceration, and these heightened stakes counsel extra caution. But there are perils in the overregulation of conduct as well. Skeel and Stuntz argue that areas of law with long lists of detailed rules—such as the tax law—encourage people to adopt a mindset focused on avoidance and gamesmanship. People focus on navigating the rules in clever ways rather than exercising independent moral judgment, and, in this way, overly detailed regulation “deters the very thing it seeks to promote.”<sup>42</sup>

Enforcement is not a mere sideshow to substantive law. Proper enforcement is a crucial consideration in designing a tax system. If the collection of taxes requires costly or invasive inquiries into taxpayer circumstances, requires too much of them in the way of compliance, or requires too much of the tax collector in the way of computation, data collection, or verification, the system will collapse under its own weight. Moreover, if the assignment of taxes depends on subjective determinations, it can raise suspicion that the tax authority is not administering the law in an evenhanded manner and encourage taxpayers to take very aggressive positions designed to exploit legal uncertainty. More generally, greater enforcement discretion may lead to irregular application of the law and to suspicion about whether tax law administration conforms to rule of law principles.

In the United States, an individual assesses her own income tax liability in the first instance. This requires that the individual tabulate her income and deductible expenses for the prior tax year and determine her tax liability. In practice, many taxpayers use either a paid tax return preparer or tax preparation software.<sup>43</sup> Although preparers and software can help determine the proper tax treatment of a particular item of income or expense and ensure that calculations are accurate, the taxpayer herself bears legal responsibility for the reporting of income and expenses.

The temptation for a taxpayer to commit either outright fraud by lying about the income she has received or the expenses she has incurred can be significant because of the low probability of being caught. In 2019, the audit rate for individual taxpayers was 0.45%.<sup>44</sup> For taxpayers who engage mostly in

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41. *Id.* at 838.

42. *Id.* at 839.

43. In 2017, eighty-three million taxpayers used a paid preparer. *Choosing a Paid Tax Return Preparer*, INTERNAL REV. SERV. (July 11, 2022), <https://www.irs.gov/newsroom/choosing-a-paid-tax-return-preparer>.

44. Aimee Picchi, *Your Chance of Getting Audited by the IRS Is Lower than Ever*, CBS NEWS (Jan. 7, 2020, 3:53 PM), <https://www.cbsnews.com/news/irs-audit-rate-lowest-in-at-least-a>

cash transactions, underreporting income is especially easy because there is no paper trail. For this reason, the largest amount of tax evasion is committed by individual business owners who transact in cash. Twenty-five percent of the \$441 billion tax gap is attributable to this group.<sup>45</sup>

But even if taxpayers are unwilling to commit fraud, they may be tempted to engage in mild self-deception to achieve a favorable tax result. For example, the deductibility of an expense depends on its purpose: whether it was incurred for the production of income or for personal consumption.<sup>46</sup> In truth, many expenses have more than one purpose or motive and those motives may be opaque even to the individual herself. Consider, for example, an author who intends to write a novel that takes place in Hawaii. The author may set off for a four-week trip to Oahu planning to do research about the island for her book, but she will also look forward to the enjoyable setting of her research, which is a place that many people pay to travel to for vacation. Are her purposes in taking the trip business or personal, and if her purposes are both then how important is each purpose? This kind of genuine uncertainty can give the taxpayer license to adopt the self-serving belief that she primarily has a business purpose.<sup>47</sup> When the tax law is vague, unclear, or subjective, it extends an invitation to dishonesty accompanied by plausible deniability, a tempting combination.

One important feature of tax enforcement that distinguishes it from criminal punishment is that the civil penalties for tax avoidance and evasion do not obviously convey any moral judgment. Criminal penalties for underreporting income require the taxpayer's "willful" violation.<sup>48</sup> But in settings where the tax treatment of a particular tax item is unclear, criminal penalties are inappropriate, and there are robust defenses against the assertion of civil penalties for the underpayment of tax. A taxpayer can avoid penalties for the underpayment of tax if she has only "substantial [legal] authority" for how she reported an item of income or deduction.<sup>49</sup> Tax practitioners have coalesced on the view that a taxpayer with "substantial authority" for her position need only think that there is a forty percent probability of succeeding

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decade/. The overall audit rate masks significant variation depending on what is included in one's tax return, such as whether the taxpayer claims the earned income tax credit.

45. *IRS Releases New Tax Gap Estimates; Compliance Rates Remain Substantially Unchanged from Prior Study*, INTERNAL REV. SERV. (Sept. 26, 2019), <https://www.irs.gov/newsroom/irs-releases-new-tax-gap-estimates-compliance-rates-remain-substantially-unchanged-from-prior-study>; see also Melanie R. Krause et al., *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2014–2016*, I.R.S. RSCH, APPLIED ANALYTICS & STAT. (2022), <https://www.irs.gov/pub/irs-pdf/p1415.pdf> at 20.

46. Compare I.R.C. §§ 212, 162 (deductibility of expense incurred for the production of income or for the taxpayer's trade or business) with I.R.C. § 262 (non-deductibility of personal expenses).

47. On choosing among competing fairness norms in a self-interested way, see Andrew T. Hayashi, *Occasionally Libertarian: Experimental Evidence of Self-Serving Omission Bias*, 29 J. L. ECON. & ORG. 711 (2013).

48. See, e.g., I.R.C. §§ 7201, 7203.

49. *Id.* § 6662(d)(2)(B)(i).

on the merits.<sup>50</sup> And, if the taxpayer discloses an uncertain position on her tax return, she can avoid penalties if she has only a “reasonable basis” for the position,<sup>51</sup> a threshold degree of confidence that practitioners have set at roughly fifteen percent.<sup>52</sup> This means that a taxpayer may take a position that *is most likely to be incorrect* and yet she will not be subject to penalties. The tax law can hardly be said to recognize the aggressive (but nonfraudulent) avoidance of paying tax as wrongdoing.

Given low audit rates and weak penalties for underreporting, taxpayer compliance (for income not subject to information reporting by third parties) is largely reliant on taxpayer morale. The stakes are high because a government that cannot collect taxes will swiftly lose its ability to govern. The determinants of tax morale are not well understood, but there is evidence that morale is affected by the perceived legitimacy of the state, the fairness of the tax schedule, and cultural norms around taxpaying.<sup>53</sup>

### B. *What the Income Tax Can Do*

In thinking about whether income tax law is an appropriate vehicle for ordering society to encourage human flourishing, we must focus on what exactly tax law accomplishes and how it does it. What are the effects of changing the tax rate on income from a particular activity? There are three such effects, two economic effects, and one expressive effect.

The economic effects of taxes operate on individual preferences and desires as they already are. Taxes increase the price of engaging in the taxed activity. Doing this discourages some people from pursuing that activity altogether, and extracts wealth from those who carry on with the activity despite the additional tax cost. By contrast, the expressive effect of tax law has the potential to change individual preferences and desires themselves.<sup>54</sup> It communicates to people what forms of conduct and ways of life the community values and upholds.<sup>55</sup> A person who wants to comply with those values may change her behavior in response to the tax for reasons other than financial self-interest. Although seemingly independent, the economic and expressive functions of the law may also work together. If the behavioral change induced

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50. Joe Fore, “A Court Would Likely (60–75%) Find . . .”: *Defining Verbal Probability Expressions in Predictive Legal Analysis*, 16 LEGAL COMM. & RHETORIC: JAWLD 49, 68 (2019).

51. I.R.C. § 6662(d)(2)(B)(ii).

52. Fore, *supra* note 50, at 69.

53. For a review of the literature, see Erzo F. P. Luttmer & Monica Singhal, *Tax Morale*, 28 J. ECON. PERSP. 149 (2014).

54. Cf. Michael D. Gilbert & Andrew T. Hayashi, *Do Good Citizens Need Good Laws? Economics and the Expressive Function*, 22 THEORETICAL INQUIRIES L. 153 (2021).

55. Some scholars from the critical tax tradition think that tax has an important expressive function. Professor Anthony Infanti writes: “The tax law provides a view of both who we are as a society and what we aspire to be. Less proverbially (and more accurately), one might say that the tax law serves an expressive function by showcasing what the dominant group(s) in American society purport to value and how they value it.” Anthony C. Infanti, *LGBT Families, Tax Nothings*, 17 J. GENDER RACE & JUST. 35, 35 (2014). For example, Infanti argues that the tax law values most highly the nuclear family composed of a different-sex couple and their children. *Id.* at 36.

by the economic effect causes people to discover things about their desires that they didn't previously know—to learn about themselves and the world—they may reconsider their desires in light of that discovery.

### 1. The Effect of Taxes on Prices

The normative economic analysis of tax law is primarily concerned with efficiency, which involves minimizing the distortionary effect of taxes on people's choices, the effect of redirecting them away from what they would otherwise do based on pre-tax market prices. The most efficient tax is one that does not affect the decisions that people make, including decisions about how to allocate their time, their energies, and their resources. The background presumption of this approach is that the prices set by markets in the absence of taxes lead to an efficient allocation of resources. This creates a strong default presumption against interfering with market prices. There are, of course, circumstances in which the presumption does not hold, such as in the presence of positive or negative externalities. When one's actions create harms or benefits on third parties, a tax that forces the individual to account for those costs can increase efficiency.

It is not only externalities that undermine the pro-market presumption. Laws and regulations may undermine the assumption that market outcomes are efficient. For example, if trade restraints result in rents or monopoly power in a particular industry, taxing that industry's profits may be efficiency-enhancing. The price distortion created by the regulation is offset by the price distortion created by the tax,<sup>56</sup> and, in these cases, disturbing market prices can be efficiency-enhancing because the market prices do not reflect social costs and benefits.

Of course, one may choose to reject efficiency—measured in terms of how well law and the economy satisfy individual preferences—altogether as a normative guidepost. Individuals harbor all kinds of “tastes” and preferences that the market will satisfy but Christian ethics would probably say should not be satisfied or honored by society. These tastes, for things like domination, exploitation, self-aggrandizement, and so on, are vices. The fact that it would be better for these preferences not to exist would seem to entail that a distribution of income and wealth that is derived from the satisfaction of these preferences is morally suspect, if not clearly illegitimate.<sup>57</sup> And in that case, the deference shown to market outcomes by the economic approach is unjustified.

My focus is not yet on *whether* tax should be used to ameliorate undesirable market outcomes, but instead to lay out some of the questions that must be answered before doing so. To illustrate some of the complications arising from market interference, consider the following example. Pat is considering whether to relocate to Nevada to take a new job. Her tax rate is twenty percent and her moving expenses are \$2,000. If she can deduct her moving expenses then, on an after-tax basis, the move will only cost her \$1,600.

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56. This is an example of the problem of the second best. Cf. R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

57. Gilbert & Hayashi, *supra* note 54.

If worker mobility is desirable, then a deduction would be helpful by reducing the cost to her of moving.

But this is not the end of the story. The deduction reduces the after-tax cost of moving (by twenty percent, in Pat's case). This will increase demand for moving services, which will tend to increase the price of those services. Exactly how much the price will increase depends on the responsiveness of supply and demand. Assume that the price of Pat's move increases by ten percent to \$2,200 after the deduction is enacted, due to an increase in demand for moving services. The after-tax cost to Pat of moving is now \$1,760.<sup>58</sup> Here we make our first observation about the effect of the deduction: if Pat was going to move to Nevada regardless of the availability of a deduction, then the deduction has no effect on her behavior and simply increases her wealth by \$240 and increases the revenues of the moving industry by \$200. If the deduction has no effect on Pat's behavior, we say that the effect is "inframarginal." But suppose that Pat, daunted by the costs of moving, would not have moved but for the fact that her expenses are deductible. In that case, the deduction changes her behavior and causes her to move when she wouldn't have otherwise.

For Christian scholars thinking about the consequences of using tax law to encourage virtuous behavior, it is crucial to understand whether a tax has primarily an inframarginal effect or if instead, it will induce a significant behavioral response. The inframarginal effect is desirable if we want to affect the wealth of the people who engage in the activity as a matter of distributive justice. In evaluating these distributional effects, it is crucial to answer the empirical question of how the tax affects market prices—which leads to the division of the benefits of the tax deduction between Pat and the moving company in our case. Even if we had reason to think that people who wanted to relocate in pursuit of employment were relatively worse off than others and perhaps deserving of lower taxes, a deduction for moving may be a poor means of providing that benefit if most of it is passed along to moving companies in the form of higher prices.

Let's turn now from the inframarginal wealth effects that implicate distributive justice to the marginal effects that change behavior. Suppose that the benefits to Pat of moving were worth \$1,900 in monetary terms. Given her twenty percent tax rate, Pat will move if she can deduct the moving expenses but will not move if she cannot.<sup>59</sup> Should we use tax law to encourage Pat to stay put? Perhaps we have reason to think that Pat would be better off staying where she is, that she is wrong in thinking that she would be better off in Nevada and that she underestimates the happiness and meaning she will derive from remaining in one place and cultivating relationships there. This might provide a *prima facie* case against a deduction, and I evaluate this case in greater detail in Part III. For now, however, we should note that even a focus on behavioral responses has a distributional aspect. The people who are discouraged from moving by the denial of a financial incentive may not (and in general, will not)

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58.  $\$1,870 = 85\% \times \$2,200$ .

59.  $\$2,000 > \$1,900$  but \$1,900 is more than both \$1,870 and \$1,700 (i.e., it does not matter in this hypothetical whether the price of moving services is increased by ten percent or not).

be representative of all people. People like Pat are closer to being indifferent between moving and remaining where they are, and they are people whose decision about where to work is relatively sensitive to financial inducements. Thus, an evaluation of the benefits of encouraging or discouraging relocation through a deduction needs to focus on the benefits for the people who will actually respond to the incentive.

## 2. The Effect of Taxes on Preferences

The second way that tax law might change the choices people make is by changing what it is that individuals actually desire, not just the price of satisfying those desires. Perhaps tax law can be a teacher that helps form individuals' views about right and wrong, good and bad. If so, we can consider two mechanisms through which tax law might have these preference-changing effects. The first mechanism is by communicating a norm that the individual takes to be directly instructive about the kinds of preferences that she should have. The second mechanism operates through the effect of taxes on choices back to preferences. By encouraging an individual to change the choices she makes, tax law may cause someone to discover something about their own desires and satisfactions that they may not have known before. For example, an individual who is induced by tax incentives to own—rather than rent—her home may discover that she derives a lot of pleasure from homeownership that she did not expect, such that she may prefer to own her next home rather than rent it.

Can tax law be a moral teacher? Drawing on virtue ethics, Daniel Finn argues that a social structure that steers a person's decisions in one direction or another also “alters the person's dispositions over time . . . slowly shaping the person as one more inclined to make those kinds of decisions.”<sup>60</sup> The Catholic economist Anthony Annett suggests that tax policy could be used to “inculcate virtue and more prosocial norms.”<sup>61</sup> I would guess that most tax scholars would be skeptical of this. The notion that law's expressive effect can influence a person's moral judgments must be premised on the law itself reflecting the considered moral judgments of persons whom the individual takes either to be in a position of moral authority or to be in a superior epistemic position with respect to morally relevant facts. For example, suppose that the legislature made it a crime to attend a public gathering knowing that one had a specified infectious disease. A reflective person may decide that attending a gathering under these circumstances was morally blameworthy. This would be rational if they thought that the legislature either had information that the individual herself did not have about the risk of harm posed by the specified disease, or that the legislative process somehow produced a more reliable judgment of how the rights of the individual to carry on her affairs should be balanced against the rights of the public to not be exposed to the risk of harm.

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60. Finn, *supra* note 8, at 158.

61. ANTHONY M. ANNETT, CATHONOMICS: HOW CATHOLIC TRADITION CAN CREATE A MORE JUST ECONOMY 205 (2022).



The expressive theory is most likely to have purchase in criminal law. Moral arguments are common there, where retributivism is influential among scholars, legislators, and the public. Claims about right and wrong, culpability and morality, and judgments about individual character are ubiquitous. By contrast, moral arguments in tax law and policy are relatively scarce. And, when they are invoked, it is generally in the context of discussions about distributive justice. Scholars frequently make moral arguments about income and wealth inequality, whether the poor carry too heavy a tax burden, or whether the rich are paying their fair share. But it would be unusual for a tax scholar or policymaker to argue that income arising from a certain activity should be subject to tax at an unfavorable rate because the activity that gave rise to it is immoral.<sup>62</sup> And if lawmakers do not typically invoke moral reasons to justify tax laws, it is hard to see why a regular taxpayer would treat a tax law as expressing a moral judgment. Even if lawmakers did use moral reasons to justify favorable tax treatment, why would a regular person think that the congressional committees responsible for drafting and reconciling tax legislation are in positions of moral authority?

Another complication of the expressive theory of taxation is the nature of the tax legislative process. Even if moral reasons are given for taxing one activity more harshly than another, those reasons often co-exist alongside other reasons that influence tax legislation. Since taxing an activity tends to shift economic resources away from that activity, public choice concerns are acute in the tax context as interest groups lobby not only for favorable treatment for their own activities but also for harsher treatment for their competition. Concerns about alliances between “bootleggers and Baptists” in the tax context loom large,<sup>63</sup> and whatever the real influence of bootleggers in a particular context, their presence muddies the waters from which tax legislation emerges and undermines the expressive clarity of tax legislation.

In thinking about the expressive function of tax law, we should consider also the mechanism tax law uses to discourage undesirable conduct—raising the price—and how this differs from a criminal prohibition. There is, of course, a formal sense in which one can think of a criminal sanction as a price.<sup>64</sup> From the perspective of the actor, the prospect of being imprisoned, fined, socially sanctioned, or paying a tax for engaging in a particular activity all change the relative economic costs and benefits of engaging in that activity. But the economic account flattens a great deal of texture. A richer account of psychology must allow that criminal activity is much more complex than most

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62. There are “sin taxes” on things like alcohol, soda, and tobacco, but these are imposed by states and localities as sales taxes, not income taxes.

63. Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177 (2002); ADAM SMITH & BRUCE YANDLE, *BOOTLEGGERS & BAPTISTS: HOW ECONOMIC FORCES AND MORAL PERSUASION INTERACT TO SHAPE REGULATORY POLITICS* (2014).

64. This is the basis for the economic approach to crime. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

economic models admit.<sup>65</sup> Much of criminal law exists as a set of prohibitions and statements about conduct being unlawful and, usually by implication, immoral. Tax law does not prohibit anything, it simply assigns higher taxes to the income from some activities than others. If one thinks that conduct is immoral, it is confusing to communicate that one expects it to happen and that if it does it will result in more tax. There is no stigma generated from paying a higher rate of tax, and stigma and shame are hallmarks of criminal punishment.

### C. *Is the Income Tax Liberal?*

Answering the question of whether federal income tax law is “liberal” or not is bedeviled by the wide variety of forms of liberalism. One scholar writes: “Liberalism is a woolly doctrine, a canopy sheltering a colorful array of theories about the legitimate scope of state power and the just distribution of social resources and opportunities.”<sup>66</sup> It resists many generalizations.<sup>67</sup> As a result, one can either directly confront only one, perhaps idiosyncratic, liberal theory carefully, or try to find very general values for comparison with the Christian view. I take the latter approach. My focus will be on two principles that exist as core commitments in the liberal tradition: individual liberty,<sup>68</sup> and, as a corollary of that respect for individual liberty, neutrality with respect to the diverse ethical and religious views that people hold and their substantive conceptions of the good.<sup>69</sup> I will not consider whether the tax law reflects a liberal conception of distributive justice. Distributive justice is another central theme of contemporary liberal theories,<sup>70</sup> but it has already received a lot of

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65. Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2477 (1997).

66. Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX. L. REV. 419, 419 (1996). See also Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1344 (2020) (“Liberalism is often ill-defined. Most critics agree, however, that liberalism is a political, economic, and social theory of personal autonomy, rights (property and otherwise), a distinction between public and private spheres, religious toleration (if not religious neutrality), and the rejection of rule based on inherited authority and tradition.”).

67. David Hasen, *Liberalism and Ability Taxation*, 85 TEX. L. REV. 1057, 1076 (2007) (“‘Liberalism’ is an umbrella term that encompasses a wide array of normative and positive theories of modern government and society. . . . Generalizations applicable to all such theories are unlikely to be substantive or helpful.”).

68. Liberty is a central value of liberalism. Freedom is, in some sense, “normatively basic.” Gaus et al., *supra* note 5, at 2.

69. This does not mean it is neutral across all values. Schwartzman & Wilson, *supra* note 7, at 1066 (“No serious political liberal claims that liberalism is neutral across all values.”).

70. Rakowski, *supra* note 66, at 437 (“[T]he claim that a liberal state should redistribute income to promote equality of material resources and of opportunity and the claim that it should safeguard political and economic liberties—have garnered widespread support from liberal philosophers.”). “Liberal egalitarians” tend to focus on ameliorating the role played by chance in generating differences in opportunities. *Id.* at 430 (“[A]n overwhelming number of liberal egalitarians agree that justice demands greater equalization than nature supplies of people’s chances to acquire and achieve.”).

attention and has not been the focus of liberalism's contemporary Christian critics.<sup>71</sup>

### 1. The Liberal Taxpayer

Tax law—a collection of statutes, regulations and judicial opinions—is not an internally consistent set of rules, deduced by solving the problem of how to raise revenue efficiently and equitably from individuals with their own aims, desires, constraints, and commitments. It is not that rational. There is no model of the taxpayer that Congress, the courts, and the U.S. Department of the Treasury explicitly invoke in making tax law. And yet, for practitioners and scholars in the area, it is hard to look at most areas of tax law and not see how they have been designed with the self-interested, rational, wealth-maximizing, fictional character known as *homo economicus* in mind. The conception of the individual that critics argue is at the heart of liberalism does seem, more or less, to be the one that Congress, courts, and the U.S. Department of the Treasury rely on in constructing tax policy.

Proving this is hard to do. Perhaps the best argument in defense of my claim that tax law is generally predicated on the view that taxpayers are remorseless individualists, concerned exclusively with maximizing their after-tax wealth, is by looking at the tax law and asking what sort of person such laws could have been written for. Areas of tax law such as the rules applicable to qualified and nonqualified deferred compensation rely on finely tuned incentives and disincentives designed to achieve a particular result involving the proper timing of income inclusion by the employee and deduction by the employer.<sup>72</sup> A wide variety of detailed and technical rules, such as those applicable to wash sales,<sup>73</sup> trafficking in tax losses in the context of corporate reorganizations,<sup>74</sup> and straddles,<sup>75</sup> contemplate taxpayers who ruthlessly exploit inconsistencies or lacuna in the tax law to improve their economic position.<sup>76</sup>

What one finds across a wide range of areas in tax law are rules that either exploit an individual's pursuit of their self-interest to steer taxpayers to desirable behavior,<sup>77</sup> or rules that are designed to deter even the most cynical tax planning. For an example of the latter, consider § 1014(e) of the Code. That section is an anti-abuse rule targeting a particular transaction: a taxpayer who

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71. See, e.g., Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1 (2002).

72. I.R.C. §§ 83, 409, 409(a).

73. *Id.* § 1031.

74. *Id.* § 382.

75. *Id.* § 1092.

76. Perhaps the best counterexample is the case of joint filing, which is generally justified by the presumption that married couples share economic resources. Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 63 (1993). There is also the fact that the civil penalties for legal tax avoidance are so low and easily defended against. This may be evidence that Congress expects a reasonable amount of tax moral or at least severe risk aversion.

77. See, e.g., I.R.C. § 45 (tax credit for production of electricity from renewable resources).

transfers appreciated property—such as stock that has increased in value over time—to a terminally ill relative shortly before her death under an agreement that the property will be returned to the taxpayer from the decedent immediately afterward. But for § 1014(e), the taxpayer would receive the property back from the decedent with a basis equal to its fair market value, meaning that any gain that accrued while the taxpayer held the property would escape tax forever. To be clear about the cynicism of the Internal Revenue Code on this point, this transaction involves using a terminally ill or elderly relative as a tax shelter.<sup>78</sup>

Tax law cannot afford to be naive about individual motivation when it comes to making financial contributions to the state. Nearly eighty years ago, Judge Learned Hand wrote in dissent that:

Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.<sup>79</sup>

If those who make tax law have *homo economicus* in mind when they are drafting tax laws, this should not be a surprise.<sup>80</sup> Economics has been a very influential framework for making tax policy, and the rationally self-interested and wealth-maximizing taxpayer is a premise of this framework. The optimal taxation approach has exerted enormous influence over income tax scholarship and policy. In fact, it is the dominant approach.<sup>81</sup> The form of tax law suggests that it has evolved for autonomous, self-interested, materialistic agents, and the influence of economics in this sphere explains why this should be the case. If liberalism's Christian critics have in mind *homo economicus* when they think of a "liberal person," then federal income tax law is indeed built on a liberal conception of the individual.

## 2. Neutrality

Since liberals prioritize individuals' freedom to shape their own lives, the liberal state generally strives for laws that are neutral with respect to substantive

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78. Transactions between family members are generally subject to special rules. *See, e.g., id.* § 267 (no deduction for loss on sale of property between certain family members). The constructive ownership rules in I.R.C. § 318 attribute stock actually owned by one person to certain members of his family. This attribution—premised on the idea that people in close familial relationships may be able to cooperate to avoid taxes—is used in various places in the Code to prevent tax avoidance. *See, e.g., id.* § 958(b) (incorporating constructive ownership rule if the effect if the effect is to treat a United States person as a United States shareholder).

79. *Comm'r v. Newman*, 159 F.2d 848, 850–51 (2d Cir. 1947) (Hand, J., dissenting).

80. Professor Bogenschneider writes that "[a] unique feature of tax jurisprudence is its origins in natural law. Tax jurisprudence is premised upon a description of human nature as individualistic and competitive as given by Thomas Hobbes." Bret N. Bogenschneider, *Tax Jurisprudence with Benevolence and Love*, 25 KAN. J.L. & PUB. POL'Y 65, 65 (2015).

81. Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers Economists and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 381–82 (1998).

views of what the good life requires.<sup>82</sup> This neutrality, and the notion that the state should not promote a particular moral view, is a core commitment of liberalism.<sup>83</sup>

In practice, however, liberal neutrality is a complicated objective because freedom has a variety of meanings within the liberal tradition. For the classical liberal, liberty requires only noninterference by other persons. For some theorists, liberty also requires the absence of nonrational compulsions, such as addictions,<sup>84</sup> and for others, freedom is the opposite of domination, of being subject to the will of another person.<sup>85</sup> Contemporary liberal theories tend to link freedom closely to autonomy and to positive freedoms,<sup>86</sup> to the ability to be efficacious in bringing about one's desired ends, which generally requires access to material resources. Under an autonomy account of freedom, individuals are free if they can change their religious or ethical views without it affecting their basic rights and liberties. Equality is a corollary of this view, requiring that the distribution of rights and liberties does not depend on persons' fundamental moral and ethical commitments.<sup>87</sup>

For the most part—and subject to an important caveat explained below—the federal income tax does not take sides on contested moral questions. Tax law does not generally disfavor categories of income based on moral judgments about the activities giving rise to that income,<sup>88</sup> and, when it does, it is generally piggybacking on a criminal prohibition rather than operating as an independent

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82. Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L. J. 967, 980 (1999) (“[L]iberals seek to ensure that every individual has the greatest possible freedom to shape her own life. Liberals generally agree on state neutrality toward competing visions of the good life in order to give primacy to individuals’ decisions about their own lives.”); Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 883 (1989) (“A distinctive feature of contemporary liberal theory is its emphasis on ‘neutrality’—the view that the state should not reward or penalize particular conceptions of the good life but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued.”).

83. Rakowski, *supra* note 66, at 436 (“Liberalism’s rejection of the notion that the state is an apt religious or moral tutor historically has been one of its defining features, and it is one that most liberals wish to preserve.”); cf. Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL’Y 289, 389–90 (2003) (“Some civic renewal advocates emphasize the role of institutional or governmental actions. Among these are efforts to use tax incentives and appropriations to encourage individuals and companies to adopt practices deemed beneficial to the moral fabric of society, especially in the area of family policy.”).

84. See Gaus et al., *supra* note 5, at 3.

85. *Id.*

86. *Id.*

87. Schwartzman & Wilson, *supra* note 7.

88. For the classical liberal, this is as it should be. Richard A. Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL’Y 49, 55 (1986) (“The ideal of tax neutrality simply provides that the system of taxation, as far as possible, should preserve the relative priorities that individuals attach to various activities. The function of the state is to protect liberty and property. It is not to aid one group or another in skewing the uses to which individuals put their natural endowments.”).

mechanism of social regulation. Tax's role is strictly complementary.<sup>89</sup> Before 1969, the common law "frustration of public policy" doctrine was available to deny deductions for "ordinary and necessary" business expenses that would have otherwise been available under § 162 of the Code, but invoking the doctrine required "a governmental declaration and not merely by the mores of the community."<sup>90</sup> However, since the Tax Reform Act of 1969, the public policy doctrine is no longer available to deny business deductions and has been replaced with more limited statutory prohibitions on deductions for illegal bribes and kickbacks to government officials and payments that are illegal under federal or generally-enforced state law.<sup>91</sup> The frustration of public policy doctrine has only very limited vitality now, denying deductions for losses under § 165 of the Code.<sup>92</sup> Professors Kahn and Bromberg argue that even illegal expenses should be deductible, mostly because the denial of a deduction constitutes a kind of penalty, the measure of which bears no relationship to the severity of the crime.<sup>93</sup>

Perhaps the best-known example of a moral overlay on tax law is the so-called "public policy exception" for tax-exempt organizations created by the Supreme Court in *Bob Jones University v. United States*.<sup>94</sup> Applying this exception, the Court concluded that schools that otherwise qualified as exempt from taxation on account of their educational mission were nonetheless denied that status on account of their racially discriminatory practices. *Bob Jones* is a controversial decision, and the public policy exception has not yet been extended to cover other forms of discrimination.<sup>95</sup> Nevertheless, the public

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89. The Code also denies a deduction for illegal medical procedures (Treas. Regs. § 1.213-1(e)(1)(ii)) and plays a complementary role in U.S. foreign policy. For a history of this role, see Ashley Deeks & Andrew Hayashi, *Tax Law as Foreign Policy*, 170 U. PA. L. REV. 275 (2022).

90. Douglas A. Kahn & Howard Bromberg, *Provisions Denying a Deduction for Illegal Expenses and Expenses of an Illegal Business Should Be Repealed*, 18 FLA. TAX REV. 207, 209 (2016).

91. I.R.C. § 162. In the specific case of trafficking in a federally controlled substance, Congress enacted I.R.C. § 280E to disallow deductions for even legal expenses incurred in carrying on such a business and even if the business is legal under state law. For analyses of the various tax issues this creates, see Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014); Benjamin M. Leff, *Marijuana Taxation: Theory and Practice*, 101 B.U. L. REV. 915 (2021); Benjamin M. Leff, *Tax Benefits of Government-Owned Marijuana Stores*, 50 U.C. DAVIS L. REV. 659 (2016).

92. I.R.C. § 165.

93. Kahn & Bromberg, *supra* note 90, at 207. Professor Jeessoo Nam argues instead that the public policy doctrine should be resurrected and expanded to deny credits and deductions associated with criminal wrongdoing. Jeessoo Nam, *Just Taxation of Crime: Should the Commission of Crime Change One's Tax Liability?*, 54 ARIZ. ST. L.J. 1213, 1213 (2022).

94. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

95. For a discussion of *Bob Jones*, see Paul B. Stephan III, *Bob Jones University v. United States: Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33, 81 (1983). Stephan's concluding thoughts about the public policy doctrine sum up much of my views about eagerness to use tax law as a tool of social regulation: "*Bob Jones* reflects a simplistic belief that the government, when confronted with something bad (whether illegal or immoral is unimportant), must attack the offending act with every resource at its disposal. . . . There is nothing sacred about tax law, and no

policy doctrine survives waiting to be invoked again, with the next frontier perhaps being religious organizations that discriminate on the basis of gender or sexual identity.<sup>96</sup>

Although federal income tax law is mostly morally neutral with respect to different categories of income, there is an important caveat. Focusing on the neutrality of the income tax, *as an income tax*, ignores the very important normative choice to adopt an income tax in the first place and to preserve, as much as possible, market outcomes as the appropriate baseline. And while the income tax is mostly neutral with respect to different kinds of market income, it is not neutral with respect to the values that generate pre-tax income precisely because it is so deferential to the market. But the values and history that are reflected in the marketplace are not all benign.

The pre-tax distribution of market income is not only morally tainted, riddled as it is with the effects of discrimination, violence, and injustice of various kinds, but it is also a product of government policies—investments in education, antitrust enforcement policy, and environmental regulation, to give just a few examples—that influence market returns. We cannot even imagine a pre-tax income distribution, particularly given the pervasive influence of the administrative state in the twenty-first century, without the effects of government policies and institutions enabled by an income tax.<sup>97</sup> To feel the truth of this, a lawyer need only imagine what her practice (and her income) would be without courts, judges, or complex regulatory schemes creating demand for compliance advice.

Moreover, using income as the basis for assigning tax liabilities can obscure contested subjective judgments about what counts as income, and it neglects other important individual characteristics that one might think are normatively relevant in determining who pays taxes.<sup>98</sup> For example, one scholar argues that compensation received as a result of a Title VII claim for race discrimination in the employment context should be excluded from income because bearing that discrimination is part of the cost of earning income for

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intrinsic reason why revenue collection should be the only policy taxes serve. But given [how] Leviathan the federal tax system has become, the likelihood that piecemeal introduction of new policies will backfire is too great to permit casual injection of public policy arguments into the creation of new tax rules and the resolution of disputes about old ones.” *Id.* at 81–82.

96. Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions after Obergefell*, 92 IND. L.J. 1175, 1201 (2016) (“Using the Supreme Court’s analysis in *Bob Jones*, it is clear that there is theoretically no constitutional impediment to revoking a religious university’s tax exemption if that university discriminates against LGBT students and such discrimination violates a fundamental public policy.”). Arguing that churches should not be subject to this “fundamental public policy” exception, see Lloyd Hitoshi Mayer & Zachary B. Pohlman, *What Is Caesar’s, What Is God’s: Fundamental Public Policy for Churches*, 44 HARV. J.L. & PUB. POL’Y 145, 145–46 (2021).

97. See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002).

98. Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1200–02 (2007). See also Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996).

people of color.<sup>99</sup> Against the backdrop of injustice embedded in market outcomes, taxing all income equally can perpetuate or exacerbate injustice.<sup>100</sup>

The idea to tax income, and to tax it at progressive rates, has always been grounded in moral claims about distributive justice. The choice of income as a base is not neutral as to different conceptions of the good. The person whose conception of the good life involves earning as much cash income as possible is burdened in a way that the person who desires to live as an itinerant surfer is not. Someone who is primarily concerned with accumulating savings to pass on to her children is disadvantaged as compared to someone who spends all her income immediately, because an income tax taxes the return to savings. But as an income tax, the contemporary federal income tax does not much moralize the decision about whether to tax different kinds of income at different rates.<sup>101</sup>

Although the income tax is liberal in the sense of being mostly neutral with respect to different categories of income, it is not primarily because of a liberal commitment to freedom or equality. The commitment to neutrality in federal income tax law is largely grounded in welfare economics, which defers to market prices in steering resources to their highest and most valued use, and which values individual freedom only instrumentally insofar as it helps people realize their preferred ends. By contrast, liberalism tends to give pride of place to individual freedom because of the intrinsic value of autonomy or because it is necessary for moral improvement or the cultivation of virtue.

## II. CHRISTIAN VALUES AND THE INCOME TAX

Comparing the liberal income tax that we do have with the income tax that we might have if tax law reflected Christian values and commitments requires being able to stipulate what those values and commitments might be. But if liberalism is a “woolly doctrine” covering a wide range of views, then what must we say about Christianity, a religion with many and varied expressions even within the United States in the twenty-first century? Rather than try to identify values or beliefs about human nature to which all Christians assent—an approach that will inevitably invite theological disagreement that would distract from my focus on the income tax—my discussion will be shaped by themes expressed in one particular area: Catholic Social Teaching (CST).

These themes address conditions for human flourishing and the realization of the common good, and although they emerge from a long history of Catholic

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99. Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do with It?*, 21 U. ARK. LITTLE ROCK L. REV. 759, 766 (1999).

100. The same can be true of property taxes. For an analysis of how they operate in a real estate market where people have racial preferences about their neighbors, see Andrew T. Hayashi, *Dynamic Property Taxes and Racial Gentrification*, 96 NOTRE DAME L. REV. 1517 (2020).

101. Neutrality has historically been the guide star for tax reform. The justification is based in efficiency, but it has liberal consequences in terms of its evenhandedness toward different conceptions of the good. By taking the income tax as given, my analysis resides in a middle ground of nonideal theorizing. It takes certain historical contingencies as given, rather than reconsidering the question of whether we should have an income tax, a consumption tax, or something else altogether as part of a wholesale evaluation of whether we live in a liberal society.



teaching about community life, they are not idiosyncratic. CST is sufficiently open-textured that the core values it reflects will find resonance in Protestant and Orthodox traditions as well, even if those traditions might differ in the details and application of those values to public life. CST is a well-developed set of ideas for thinking about what is necessary—such as the role of law and politics—to help realize the common good. Moreover, CST represents the official teachings of a church that includes 1.2 billion Christians,<sup>102</sup> and it is also the well from which many of liberalism’s contemporary Christian critics—who are themselves Catholic—draw their criticisms.

I begin by describing the historical influence of Christian values on the development of the federal income tax. This history has been documented elsewhere, and my only purpose is to highlight how arguments grounded in Christian morality have been influential on particular tax policy decisions, and indeed were present at the inception of the income tax. Thus, we have inherited a federal income tax that already reflects certain Christian values.<sup>103</sup>

I then describe some of the basic features of a Christian anthropology, relying largely on liberalism’s Christian critics to address them on their own terms. I then turn to some core Christian values for political life that I draw from CST. We can compare these understandings of the nature and purposes of the individual, and of the values to which politics should be directed, against the assumptions built into the income tax. There will be tensions, as the liberal income tax does not appear to direct human efforts consistently toward the common good. I then describe two salient approaches to the tensions between Christian morality and the liberal income tax: the approaches of the conversionist and the separatist.

#### A. *Distributive Justice*

The theologian and priest Charles Curran observed in 1985 that “there has been very little written on a just system of taxation”<sup>104</sup> in a systematic theological way from the Roman Catholic tradition. But the fact that there may not be much theological analysis of tax policy does not mean that theology has not left its mark on tax law. Legal historian Ajay Mehrotra has documented that Christian values were frequently invoked in support of the adoption of the first federal income tax in 1894, and Christian values have been used since then to

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102. *How Many Roman Catholics Are There in The World?*, BBC (Mar. 14, 2013), <https://www.bbc.com/news/world-21443313>.

103. The fact that income tax proponents relied on theological arguments does not preclude non-religious justifications for the income tax, of course. Some scholars argue that only such non-religious reasons should be permitted to influence public laws. *See, e.g.*, Micah Schwartzman, *Must Laws Be Motivated by Public Reason?*, in *PUB. REASON AND CTS.* 45, 45 (Silje Langvatn et al. eds.).

104. Charles E. Curran, *Just Taxation in the Roman Catholic Tradition*, 13 *J. RELIGIOUS ETHICS* 113, 113 (1985). He writes: “Official Roman Catholic social teaching since Leo XIII has discussed many significant moral issues facing society, but one is surprised to see how seldom the issue of tax justice has been addressed.” *Id.* at 116. *See also* Donald W. Shriver, Jr. & E. Richard Knox, *Taxation in the History of Protestant Ethics*, 13 *J. RELIGIOUS ETHICS* 134, 134 (1985) (referring to the “slender Protestant heritage on this issue [of taxation].”).

argue for progressive income tax rates.<sup>105</sup> Writing at the end of the nineteenth century, the early American economist H. C. Adams wrote that “[t]he move towards progressive taxation based on ability to pay . . . was derived from the ‘New Testament doctrine of service.’”<sup>106</sup> A tax based on the individual’s income was thought to be a more just way of collecting revenue than the alternatives (such as tariffs).<sup>107</sup> Religion might have left an even deeper imprint on the income tax than it did but, according to Professor Mehrotra, the early political economists who worked on the income tax and who were influenced by their faith were ultimately captured by a more “pragmatic” approach to taxation, and so they set aside the more radical demands for economic justice that they saw in their faith traditions.<sup>108</sup>

To this day, Christian thought and scholarship on the income tax speaks almost exclusively to the question of distributive justice and the care for the poor.<sup>109</sup> In the 1961 papal encyclical *Mater et Magistra*, John Paul XXIII wrote that something like the “ability to pay” principle embedded in federal income tax law is fundamental to a just and equitable tax system.<sup>110</sup> Charles E. Curran writes that “[d]istributive justice calls for a proportionate and progressive distribution of the tax burden” and that to serve the common good “taxation must promote just economic growth and the prosperity of the nation.”<sup>111</sup> The U.S. Catholic Bishops Conference concludes that taxes should raise revenue, be progressive, and exempt the poor.<sup>112</sup> Statements such as this are characteristic

105. Ajay K. Mehrotra, “Render unto Caesar . . .”: *Religion/Ethics, Expertise, and the Historical Underpinnings of the Modern American Tax System*, 40 LOY. U. CHI. L.J. 321, 356–57 (2009).

106. *Id.* at 356 (quoting HENRY CARTER ADAMS, *THE SCIENCE OF FINANCE: AN INVESTIGATION OF PUBLIC EXPENDITURES AND PUBLIC REVENUES* 329 (1899)).

107. See Joshua Cutler, *The Religious Roots of the Progressive Income Tax in America*, 68 CATH. U. L. REV. 473, 497 (2019) (“From elites and academics down to the common man, there was a broad consensus that an income tax based on ability to pay was the fairest system, while the tariff was the epitome of unfairness because it taxed the poorest citizens proportionally more.”). This is not to say that religious arguments were all one-sided. Some made religious arguments that the income tax was equivalent to theft or that it reflected covetousness, and that it would tempt people to lie to avoid the tax. See, e.g., Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 747 (2006).

108. Mehrotra, *supra* note 105, at 324.

109. On religious arguments about progressivity, see Michael A. Livingston, *Public Reason, Private Virtue, and Political Philosophy: Religious Approaches to the Progressive Income Tax*, 2 J. L. RELIGION & STATE 168 (2013).

110. POPE JOHN XXIII, *MATER ET MAGISTRA*, para. 132 (1961) (“In a system of taxation based on justice and equity it is fundamental that the burdens be proportioned to the capacity of the people contributing.”).

111. Curran, *supra* note 104, at 129. See also RONALD D. PASQUARIELLO, *TAX JUSTICE: SOCIAL AND MORAL ASPECTS OF AMERICAN TAX POLICY* (1985).

112. U.S. CONF. CATH. BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* 88–89 (1986), <https://www.usccb.org/resources/economic-justice-all-pastoral-letter-catholic-social-teaching-and-us-economy>. Professor Barrett argues that the same principles should apply to diocesan taxes under canon law. Matthew J.

of the depth of religious pronouncements on tax law. Legal scholarship on Christianity and tax law is also limited almost exclusively to the question of whether the ability-to-pay-principle is just, and whether flat tax rates or progressive rates are more consistent with Christian values.<sup>113</sup>

The historical Christian emphasis on the role of the income tax in improving the lot of the poor and in promoting economic prosperity seems entirely appropriate. There is nothing that the income tax is as well suited for as allocating the burden of paying for government and making provision for the poor. Moreover, the income tax has only gradually become a tool of social regulation and policy—instead of merely a tool for collecting revenue—over time.<sup>114</sup> The usefulness of tax law in pursuing non-revenue goals is now taken for granted. For example, scholars argue that tax can be a useful tool for mitigating business cycle fluctuations,<sup>115</sup> pursuing foreign policy,<sup>116</sup> tackling climate change,<sup>117</sup> and so on. But the Christian imagination for how tax law might fit within a scheme of social regulation for the common good has not kept up with these developments.

### B. Human Nature

If liberalism imagines individuals as pursuing—and best served by—individual freedom, moral and spiritual autonomy,<sup>118</sup> then what do liberalism's Christian critics think is the alternative? According to the political theorist Patrick Deneen, both holy scripture and experience teach that humans thrive when they participate in family, social, and cultural practices that “perpetuate and deepen personal and intergenerational forms of obligation and gratitude,

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Barrett, *The Theological Case for Progressive Taxation as Applied to Diocesan Taxes or Assessments Under Canon Law in the United States*, 63 JURIST 312, 315 (2003).

113. See Hamill, *supra* note 71. An exception is Robert W. McGee, *Is Tax Evasion Unethical?*, 42 U. KAN. L. REV. 411 (1993); see also Roger Paul Peters, *Tax Law and Natural Law*, 26 NOTRE DAME LAW. 29 (1950). Professor Peters examines certain features of the income tax and argues that the imprint of natural law is everywhere. The most detailed work trying to understand the role of tax-like payments in the Bible and what they might suggest about taxation today has been done by Professor Chodorow. Adam S. Chodorow, *Agricultural Tithing and (Flat) Tax Complexity*, 68 U. PITT. L. REV. 267 (2006). Chodorow has also argued that it is inappropriate to look to these tax-like payments for guidance about contemporary principles of tax justice, mostly because of the historical circumstances and the religious purposes of those earlier taxes. Adam S. Chodorow, *Biblical Tax Systems and the Case for Progressive Taxation*, 23 J.L. & RELIGION 51, 54 (2007).

114. William McBride, *A Brief History of Tax Expenditures*, TAX FOUND. (Aug. 22, 2013) <https://taxfoundation.org/brief-history-tax-expenditures/> (“According to both Treasury and JCT, the number of tax expenditures remained steady following the Tax Reform Act of 1986, then began increasing in the mid- to late 1990s.”).

115. Andrew T. Hayashi, *Countercyclical Property Taxes*, 40 VA. TAX REV. 1 (2020).

116. Deeks & Hayashi, *supra* note 89.

117. Roberta Mann, *Tax Policies for Green Manufacturing: Implementing the Green New Deal*, 17 PITT. TAX. REV. 1 (2019).

118. Jonathan Chaplin, *Rejecting Neutrality, Respecting Diversity: From “Liberal Pluralism” to “Christian Pluralism”*, 35 CHRISTIAN SCHOLAR’S REV. 143, 145 (2006).

duty and indebtedness.”<sup>119</sup> This account conceives of human communities as complex ecological systems of interdependence, rather than mechanistic organizations of autonomous parts. When we misunderstand human nature, it is said, and arrange society to simply facilitate individuals’ pursuit of their self-interest, the result is individual isolation and loneliness.

Whereas the liberal person is most free when there is the least interference in her ability to pursue her own ends, a Christian becomes most free as she conforms her will to God’s will, when she pursues the right goals, and when she cultivates the right desires. For liberalism’s critics, accepting and operating within physical and cultural constraints, rather than seeking the unlimited realization of our desires whatever they might be, is the path to true freedom. The “limits” imposed by geography, culture, history, time, and our embodiment, are a part of who we are. Trying to unfetter ourselves of those binds leaves us unmoored and dissatisfied.

### C. *The Common Good*

In this section, I describe some of the values expressed in CST that help promote the realization of the common good. The origins of CST are in Pope Leo XIII’s *Rerum Novarum* in 1891, and they reflect the particular concerns of the Catholic church at that time.<sup>120</sup> These values are open-textured, and do not obviously entail any particular government policy, tax policy or otherwise. But these themes do provide a distinctive orientation for reflecting on the proper ends of law and politics, and they are grounded in values and understandings about the nature of humanity that should be recognizable to most Christians.

The core tenets of CST are: the life and dignity of each person; the call to family, community, and participation; the rights and responsibilities of humanity; the needs of the poor and vulnerable; the dignity of work and the rights of workers; solidarity;<sup>121</sup> and care for God’s creation.<sup>122</sup> The theme of CST that runs throughout these tenets is the promotion of the “common good,”<sup>123</sup> which is “the sum of those conditions of social life which allow social groups and the individual members relatively thorough and ready access to their own fulfillment.”<sup>124</sup>

Given tax law’s long reach and its pervasive influence on the structure of social life, one could perform a separate analysis of the ways that tax law could

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119. PATRICK DENEEN, *CONSERVING AMERICA?: ESSAYS ON PRESENT DISCONTENTS* 3 (2016).

120. POPE LEO XIII, *ENCYCLICAL LETTER RERUM NOVARUM* (Daughters of St. Paul 1969). See also *Seven Themes of Catholic Social Teaching*, U.S. CONF. CATH. BISHOPS, <https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/seven-themes-of-catholic-social-teaching> (last visited Aug. 11, 2020).

121. *Seven Themes of Catholic Social Teaching*, *supra* note 120.

122. *Id.*

123. *Id.*

124. POPE PAUL VI, *PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: GAUDIUM ET SPES* (Dec. 7, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_cons\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html).

help realize all these aspects of the common good. For example, the call to solidarity in CST includes the obligation to promote justice and peace not only locally but globally,<sup>125</sup> and one might consider how international tax policy affects the global allocation of resources. How we allocate the burden of funding government through the tax system is an important way to show care for the poor and vulnerable, and so the progressivity of the income tax is clearly a question on which CST would bear. And thinking about how to regulate economic life in a way that cares for God's creation naturally raises questions about the role of taxes in encouraging prudent stewardship and discouraging abuse and exploitation of common resources.

It would be a mistake to try and cover all of these topics in a single article, and my hope is that future work will pick up where I leave off. In the remainder of this article, I focus on three principles of CST: (1) the call to family and community, (2) the nature of work, and (3) the principle of subsidiarity. Focusing on these three aspects of CST not only reveals some of the less obvious ways that tax law might be put in service of the common good but also helps reveal some of the limits of what tax law can do. I briefly describe these three aspects in a bit more detail below and return to them in Part III to consider how they can best be promoted through tax law.

### 1. Family and Community

A core value in CST is the call to family, community, and participation. Christianity is a trinitarian religion, with three aspects: Father, Son, and Spirit constituting a single, triune, Godhead. For this reason, humanity, which is made in God's image, is composed of social beings made for relationship just as the three aspects of the Godhead are in relationship with each other.<sup>126</sup>

Marriage and the family occupy particularly important places in this theology of relationship and community, both as expressions and places of nurture for our human nature and as arrangements that benefit society in general.<sup>127</sup> It is an ongoing project of the Catholic church in the United States to strengthen marriage and family life,<sup>128</sup> and to encourage childbearing by supporting policies to make that possible.<sup>129</sup>

The church has not traditionally focused on tax law as an instrument of family policy, notwithstanding empirical evidence that taxes have at least some effect on the rate and timing of marriage and separation,<sup>130</sup> and that taxes affect

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125. *Seven Themes of Catholic Social Teaching*, *supra* note 120.

126. Genesis 2:18 ("It is not good for man to be alone.").

127. *Marriage: Love and Life in the Divine Plan*, U.S. CONF. CATH. BISHOPS, <https://www.usccb.org/topics/marriage-and-family-life-ministries/marriage-love-and-life-divine-plan> (last visited Oct. 23, 2020).

128. *Id.*

129. *Call to Family, Community, and Participation*, U.S. CONF. CATH. BISHOPS, <https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/call-to-family-community-and-participation> (last visited Jan. 10, 2024).

130. James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 *ECONOMICA* 297, 297 (1999); James Alm & Leslie A. Whittington, *Income Taxes*

the timing of childbearing.<sup>131</sup> One exception is the economist Jay Richards, who has argued that tax law should encourage people to get married before they have children and to remain married.<sup>132</sup>

Any intrusion of tax law into the marriage decision is generally disfavored by the dominant secular modes of tax analysis, which seek to remain neutral with respect to the decision to get married. The tax treatment of children, including the deductibility of expenses providing for children or the availability of exemptions or credits in support of parents, is much more controversial, with many more people in support of public assistance for child rearing than in support of subsidizing marriage.<sup>133</sup>

## 2. Work

Tax law generally treats work as something that is performed in exchange for compensation and from which the individual does not derive any intrinsic benefit. Work is toil, on this account. By contrast, according to the U.S. Conference of Catholic Bishops, work “is a form of continuing participation in God’s creation.”<sup>134</sup> There is dignity to work that is protected by securing the right to productive work, to fair wages, to organize, to private property, and to economic initiative.<sup>135</sup> Some Christian writers in fact argue that work has sacramental value, and glorifies God.<sup>136</sup> On this view, work is a form of spiritual worship, not different in kind from participating in communal religious services.<sup>137</sup>

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*and the Marriage Decision*, 27 APPLIED ECON. 25, 25 (1995); David L. Sjoquist & Mary Beth Walker, *The Marriage Tax and the Rate and Timing of Marriage*, 48 NAT’L TAX J. 547 (1995); James Alm & Leslie A. Whittington, *Income Taxes and the Timing of Marital Decisions*, 64 J. PUBLIC ECON. 219, 222 (1997); Stacy Dickert-Conlin, *Taxes and Transfers: Their Effects on the Decision to End a Marriage*, 73 J. PUB. ECON. 219, 219 (1999).

131. Leslie A. Whittington, *Taxes and the Family: The Impact of the Tax Exemption for Dependents on Marital Fertility*, 29 DEMOGRAPHY 215, 215 (1992); Stacy Dickert-Conlin & Amitabh Chandra, *Taxes and the Timing of Births*, 107 J. POL. ECON. 161, 161 (1999); Sara LaLumia, James M. Sallee & Nicholas Turner, *New Evidence on Taxes and the Timing of Birth*, 7 AM. ECON. J.: ECON. POL’Y 258, 258 (2015).

132. Matthew Bunson, *A Catholic Approach to Tax Reform*, NAT’L CATH. REG., <https://www.ncregister.com/daily-news/a-catholic-approach-to-tax-reform> (last visited Aug. 11, 2020).

133. For a summary of the conceptual issues at play in the taxation of children, see Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349 (1994).

134. *The Dignity of Work and the Rights of Workers*, U.S. CONF. CATH. BISHOPS, <https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/the-dignity-of-work-and-the-rights-of-workers> (last visited Aug. 11, 2020).

135. *Id.*

136. ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* (2017).

137. See generally BROTHER LAWRENCE, *THE PRACTICE OF THE PRESENCE OF GOD: THE BEST RULE OF A HOLY LIFE: BEING CONVERSATIONS AND LETTERS OF NICHOLAS HERMAN OF LORRAINE (BROTHER LAWRENCE)* (1895).

This richer and more complex view of work—that market labor confers dignity and that it involves participating alongside God in the work of creation—infuses in work intrinsic value that is absent from the economic approach that dominates tax law discourse. In the optimal tax framework, discussed above, work is toil. Each hour spent at work rather than leisure is a burden, with each subsequent hour generating a heavier burden than the one before. People are willing to bear this burden only because the work yields income that can be used for the purchase of market goods. We can acknowledge the central importance of work as a means of providing life’s necessities while also acknowledging that its instrumental value is only one aspect of its worth.

### 3. Subsidiarity

The principle of subsidiary contemplates that there are separate roles for different levels of political authority, among federal and state and local governments, community organizations, unions, and families. In the papal encyclical *Quadragesimo Anno*, Pope Pius XI wrote:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.<sup>138</sup>

Neither an endorsement of individualism nor statism, the subsidiarity principle complements the CST view that a healthy society has vibrant mediating institutions, such as churches, unions, and families, between individuals and both the marketplace and the state.<sup>139</sup>

Maintaining a plurality of institutions helps balance both excessive state power, which can lead to oppression, and excessive individualism, which can lead to selfishness and isolation. It is the responsibility of higher-level authorities, such as the state, to support lower levels of authority and coordinate with them to help realize the common good.<sup>140</sup> Liberalism’s Christian critics believe that this co-operation is disappearing as the market and the state expand their power over ever larger domains. This is not an accident, according to these critics. Deneen argues that the logic of liberalism inevitably leads to the withering of these alternative sources of authority,<sup>141</sup> and Professor Adrian Vermeule agrees that “liberalism tends to dissolve intermediate institutions and traditional groupings—family, community, church.”<sup>142</sup>

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138. POPE PIUS XI, *QUADRAGESIMO ANNO* PARA. 79 (1931).

139. On the role of tax law in encouraging civic engagement, see Andrew T. Hayashi & Justin Hopkins, *The Charitable Tax Deduction and Civic Engagement*, 2023 U. ILL. L. REV. 1179 (2023).

140. CATECHISM OF THE CATH. CHURCH 1883. See also Meghan Clark, *Subsidiarity Is a Two-Sided Coin*, CATH. MORAL THEOLOGY (Mar. 8, 2012), <https://catholicmoraltheology.com/subsidiarity-is-a-two-sided-coin/>.

141. Deneen, *supra* note 3.

142. Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism>.

Tax law can play an important role in forming the balance of power and responsibility between federal, state, and local governments, as well as with unions, churches and other non-profit organizations, fraternal organizations, and individual households. Tools such as the deduction for state and local taxes and the exclusion of interest on state and local bonds effectively subsidize subnational governments and delegate to them more fiscal autonomy and financial capacity. And the rules applicable to federal income tax exemptions and the deductibility of charitable contributions effectively regulate the nonprofit sector. These rules help determine the capacity of subordinate groups to work for the common good.

#### D. Christian Responses

How should a Christian holding to the values described above think about the liberal tax law, and the tensions between the goods that CST singles out—family and community, work, and the allocation of decision-making power among levels of political authority—and their treatment under income tax law? There is no single and obvious way that the state’s coercive power, manifested through tax law or any other legal instrument, should be deployed for the common good. Professor Nathan Chapman argues that the human government is best understood as “a temporary institution, resulting from the human rejection of God’s rule, which God nevertheless uses to contain and punish human wrongdoing,”<sup>143</sup> and that the “New Testament does not give a clear vision of whether, and how, a follower of Jesus ought to participate in governmental judgment. Christ told his followers to give to Caesar with his, but he did not tell them what belonged to Caesar.”<sup>144</sup>

And indeed, there is disagreement about how enthusiastically Christians should attempt to engage with the state, and there are multiple good-faith responses that Christians can have to secular institutions that are in tension with Christian values. Perhaps the best-known taxonomy of approaches was provided by the theologian H. Richard Niebuhr in his classic text *Christ and Culture*.<sup>145</sup> Niebuhr observed that the question of how the Christian should be related to “civilization”—human culture, including its institutions—is one where “Christian perplexity in this area has been perennial, and that the problem has been an enduring one through all the Christian centuries” and that reflecting on these questions has yielded not a single answer but a variety of responses.<sup>146</sup>

Professor Bob Cochrane has applied Niebuhr’s taxonomy to categorize different relationships between Christians and the law.<sup>147</sup> On one extreme are what Cochrane calls the “conversionists,” who argue that the law should be used

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143. Nathan S. Chapman, *The Practice of Law as Christian Discipleship*, 47 PEPP. L. REV. 331, 334 (2020).

144. *Id.* at 344–45.

145. H. R. NIEBUHR, *CHRIST AND CULTURE* (1951).

146. *Id.* at 2.

147. Robert F. Cochran, Jr., “‘Christian Traditions, Culture, and Law’: An Update and a Few Reflections”, 47 PEPP. L. REV. 563, 563–64 (2020).



to enforce and express Christian values and understandings of the good.<sup>148</sup> There are disagreements among conversionists about tactics, and whether it makes sense to use law to remake culture from the “top down” or whether to use other, less coercive, sources of influence to change culture from the “bottom up.”<sup>149</sup> But in both cases the result is the same: a remaking of society so that its culture and institutions are directed at the common good, as understood from a Christian perspective.

On the other extreme are what Cochrane calls separatists, who see law and mainstream culture as mostly beyond redemption. As a result, separationists believe that the best option for Christians is to withdraw from public life and create insular communities of the faithful. Another approach is that of “synthesists,” who have private religious reasons for thinking that the law should be a certain way, but who offer reasons rooted in natural law and in the goods that all humans value to justify their views in the public square.<sup>150</sup> Synthesists intervene in debates about what the law should be by making arguments that are meant to be accessible to all, regardless of one’s religious or non-religious commitments. And there are of course other ways of relating to the law and our legal culture as a Christian.

In this article, I will consider two stylized alternatives, which correspond to the conversionist position and the separatist position with respect to law described by Cochrane and adapted from the Niebuhrian taxonomy. These two positions also roughly correspond to positions staked out by some of liberalism’s recent prominent Christian critics and I consider them for that reason, not because they are necessarily the most compelling or popular answers to the question of how Christians should relate to law and culture. The conversionist approach would seek to use tax law to realize the common good by forming individuals to be more virtuous, even if those individuals disagree about what virtue is. Conversionists would make tax law a teacher, and a moral guide. The separatist views the law as irredeemable, either as a general matter or because of their assessment of contemporary politics and their pessimism about pursuing a moralistic project involving federal law in the United States in the twenty-first century. Instead, the best the separatist hopes for is accommodation by the secular liberal state. The separatist seeks economic and regulatory space to create small Christian communities that are ordered toward the common good and where Christian virtues can be cultivated and encouraged without qualification or interference from outside authorities.

### 1. The Conversionist

The conversionist believes that law should be used in a paternalistic fashion to direct individuals toward the “common good.”<sup>151</sup> Although the

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148. *Id.* at 572.

149. *Id.* at 575.

150. *Id.* at 570.

151. The view that the law should direct people toward human flourishing is not necessarily a religious one. See, e.g., Lawrence B. Solum, *Virtue as the End of Law: An Aretaic Theory of Legislation*, 9 *JURIS*. 6, 6 (2018).

conversionist approach can find adherents from many Christian traditions, one of the more well-known and articulate contemporary proponents of this view is Adrian Vermeule, whose conversionist perspective is expressed through a view of the relationship between church and state known as integralism. Along with many other liberal critics, Vermeule argues that liberalism's aspiration of ruling in a manner that is agnostic with respect to substantive conceptions of the good is an illusion.<sup>152</sup> Not only is governance without aiming at a concept of the good undesirable, but it is also impossible. And, if liberalism is on equal footing with other ethical theories in advancing a substantive morality, then we have an inescapable choice among ethical theories. Vermeule thinks that the liberal account of morality is implausible and that the correct moral principles for ordering society are the following:

respect for the authority of rule and of rulers; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and workers' unions, trade associations, and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to "legislate morality."<sup>153</sup>

The principles share some language with the principles of CST but omit some, and add others about respect for "the authority of rule and rulers," "the hierarchies needed for society to function," and the willingness to "legislate morality."<sup>154</sup> Vermeule's mode of constitutional interpretation—known as "common-good constitutionalism"—would use the law to direct society toward the common good, confident in the knowledge that "strong rule in the interest of attaining the common good is entirely legitimate."<sup>155</sup> Solidarity and subsidiarity work together in this framework to favor unions, cities and localities, and the family. The state would work to support these lower levels of association and community.<sup>156</sup>

By Vermeule's lights, liberty for the secular liberal is "an abstract object of quasi-religious devotion."<sup>157</sup> The goal of liberalism is "the relentless expansion of individualistic autonomy."<sup>158</sup> By contrast, he views liberty as only instrumentally valuable. It is something to be accommodated because its

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152. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> ("Promoting a substantive vision of the good is, always and everywhere, the proper function of rulers. Every act of public-regarding government has been founded on such a vision; any contrary view is an *illusion*. Liberal and libertarian constitutional decisions that claim to rule out 'morality' as a ground for public action are incoherent, even fraudulent, for they rest on merely a particular account of morality, an implausible account.")

153. Vermeule argues that "Such principles promote the common good and make for a just and well-ordered society." *Id.*

154. *Id.*

155. *Id.* ("[L]aw is parental, a wise teacher and an inculcator of good habits.")

156. *Id.*

157. *Id.*

158. *Id.*

“protection is a duty of justice or prudence on the part of the ruler,”<sup>159</sup> not because freedom (at least, the freedom that comes from non-interference) itself is a good. If the ruler can coerce the individual to make her virtuous, it is the ruler’s right to do so and to the good of the individual that he can. This paternalistic ‘vision of law’s potential relies heavily on the expressive function and contemplates that by changing the individual’s choices, her desires will follow. Vermeule writes:

Just authority in rulers can be exercised for the good of subjects, if necessary *even against the subjects’ own perceptions* of what is best for them—perceptions that may change over time anyway, as the law teaches, habituates, and re-forms them. Subjects will come to thank the ruler whose legal strictures, possibly experienced at first as coercive, encourage subjects to form more authentic desires for the individual and common goods, *better habits*, and beliefs that better track and promote communal well-being.<sup>160</sup>

For the conversionist, law (as with any form of coercion) can be a teacher.<sup>161</sup> The law is one way people learn what the common good requires.<sup>162</sup> According to liberalism’s critics, the liberal state’s purpose is to facilitate the satisfaction of an individual’s desires, whatever they may be and however they may understand them. By contrast, for conversionists with the paternalistic inclinations of integralists, such as Vermeule, there ought not be any question that incentives and disincentives created by tax law are on the table as tools for steering individuals toward the common good. Since outright coercion is permitted to steer people toward virtue, then so too are “lighter touches” such as taxes and “nudge”-type interventions based on insights from behavioral economics.<sup>163</sup>

To be clear, a conversionist approach need not be a strongly paternalistic one, and the strong paternalism of Vermeule’s integralism is not representative of mainstream Catholicism. Even if one thought the ideal state is a confessional

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159. *Id.*

160. *Id.*

161. Edmund Waldstein, *An Integralist Manifesto*, FIRST THINGS (Oct. 2017), <https://www.firstthings.com/article/2017/10/an-integralist-manifesto> (“As long as we are in this mortal life, there will be a place for the use of coercive measures, as pedagogical aids to fallen human beings, helping them to rectify their passions and to prepare themselves to enter into a deeper peace. Just as God himself uses such aids in salvation history, so too the Christian community continues to use them in its attempt at the realization of an ever-greater peace.”).

162. Thomas Pink, *In Defence of Catholic Integralism*, PUB. DISCOURSE (Aug. 12, 2018), <https://www.thepublicdiscourse.com/2018/08/39362/>.

163. Professor Vermeule writes: “[A]gents with administrative control over default rules may nudge whole populations in desirable directions, in an exercise of ‘soft paternalism.’ It is a useless exercise to debate whether or not this shaping from above is best understood as coercive, or rather as an appeal to the ‘true’ underlying preferences of the governed. Instead it is a matter of finding a strategic position from which to sear the liberal faith with hot irons, to defeat and capture the hearts and minds of liberal agents, to take over the institutions of the old order that liberalism has itself prepared and to turn them to the promotion of human dignity and the common good.” Vermeule, *supra* note 2.

state where Christianity explicitly shapes institutions and legislation, some Catholic thinkers argue that the culture must be suffused with Christian virtue before its politics are,<sup>164</sup> and that in most modern circumstances prudence cautions against attempting to create a confessional state.<sup>165</sup> The Catholic priest, influential public intellectual, and political liberal Richard John Neuhaus wrote: “[L]earning from the bitter experience of grandiose notions of the state, contemporary Catholic teaching sharply delimits its [i.e., the state’s] role as spiritual or moral tutor.”<sup>166</sup>

## 2. The Separatist

A second response that a Christian might have to the tension between liberalism and Christian values is not to control the state and enforce on others substantive Christian morality but to withdraw into smaller communities in which those norms can be sustained by the consent of its members. Under this approach, the most that Christians can hope for from the state is non-interference. For advocates of this separatist approach, the best response to the totalizing aspirations of the secular state and the de-personalized marketplace is “exile in place” and the formation of vibrant but insulated countercultures.<sup>167</sup> Alternatively, one might call this the “Benedict” alternative, in the manner of its most famous contemporary proponent, Rod Dreher.

Dreher’s diagnosis of the current situation is that it is characterized by the disintegration of communities, the traditional family, and traditional moral values. For him, the decline of mediating and subsidiary institutions happens alongside a decline of individual virtue, as the mutually sustaining relationship between flourishing institutions and flourishing individuals unravels. The separatist’s diagnosis of liberalism’s failures—its self-undermining individualism and disingenuous claims on neutrality—is roughly the same as the diagnosis of the conversionist. What distinguishes the conversionist—particularly in the paternalistic expression of the integralist—from the separatist is the conversionist’s willingness, indeed his felt obligation, to legislate

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164. Joseph G. Trabbic, *The Catholic Church, the State, and Liberalism*, PUB. DISCOURSE (May 2, 2018), <https://www.thepublicdiscourse.com/2018/05/21405/> (“The principal point of a Catholic state, I take it, is for the Gospel to inform deeply not only the culture but the legislation too. However, we always need to work on the culture first. Of course, that doesn’t mean abandoning the political sphere. The idea is simply that without a receptive cultural base, the political superstructure will be of little value. A Catholic political order will emerge organically and freely only from a Catholic culture. Such a culture is what Catholics should focus on building today.”).

165. *Id.* (“I shall argue, perhaps not very controversially, that according to previous papal teaching, a Catholic confessional state is the ideal, even if in most modern situations it’s not a practical possibility, and prudence would steer us away from it.”)

166. Christopher O. Tollefsen, *Can States “Confess” Religious Belief? Should They?*, PUB. DISCOURSE (June 5, 2018), <https://www.thepublicdiscourse.com/2018/06/21542/>.

167. DREHER, *supra* note 136. See also Deneen, *supra*, note 3; Joseph Hogan, *The Problems of Liberalism: A Q&A With Patrick Deneen*, NATION (May 28, 2018), <https://www.thenation.com/article/archive/the-problems-of-liberalism-a-qa-with-patrick-deneen/>.

Christian morality for non-Christians because the “promotion of morality is a core and legitimate function of authority.”<sup>168</sup>

Dreher argues that “[t]he first goal of Benedict Option Christians in the world of conventional politics is to secure and expand the space within which we can be ourselves and build our own institutions.”<sup>169</sup> Professor Steven Smith has suggested that retreat from secular politics may actually benefit the Christian church, as the loss of political and cultural power associated with that retreat would cause it to more closely resemble the early church.<sup>170</sup> And yet, Smith also notes that such a retreat may be less feasible than ever before, given the long reach of the contemporary state’s ability to monitor, supervise, influence, and regulate. For example, we might ask just how far the church can retreat from the state when it is entangled by all of the rules that ensure federal tax-exempt status and ensure that donations are tax-deductible.

### III. THE IMPRUDENCE OF ILLIBERAL TAXATION

To help fix ideas about the advantages and disadvantages of using tax law in a paternalistic manner toward the common good or merely to create space for insular Christian communities, I revisit the discussion in Part I of what the federal income tax does and what it can do as a moral teacher. I introduce several general considerations and then consider three specific areas of tax law to illustrate how these considerations are relevant. I conclude that the prudential scope for using the income tax for illiberal purposes is very narrow, but that there are greater opportunities for structuring the income tax to shift more resources to lower levels of government and forms of social organization other than the state. When it comes to tax law, there is potential to help promote the common good, but the separatist has a better case than the conversionist and it is best to leave the federal income tax with its (mostly) liberal features.

#### A. General Considerations

##### 1. Motivations

Returning to the economics of the income tax, recall that the tax either reduces the amount of the taxed activity, or it reduces the wealth of those who continue to engage in the activity, or both. The way that taxes cause people to change their behavior is not, generally, by changing their desires or preferences. A tax increases the relative price of engaging in the taxed activity relative to the alternatives. There are certain activities for which we may not care about the reasons why an individual chooses what she does, but in other cases, it might matter. In extreme cases, the wrong motives may undermine the nature of the conduct that the legislature wants to encourage.

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168. Vermeule, *supra* note 142.

169. DREHER, *supra* note 136, at 86. In his book *Why Liberalism Failed*, Patrick Deneen contemplates a similar response. Deneen, *supra* note 3.

170. Steven D. Smith, *One Step Enough*, 47 PEPP. L. REV. 549, 556 (2020).

Consider a household in which the second earner would like to take a job as a social worker because he believes that he has talents that would make him effective in that job and allow him to help other people in distress. The market, recognizing his talents in this area, offers him a wage that would allow him to pay for childcare and household maintenance expenses with some money left over, but only if he is able to deduct the costs of childcare and home maintenance.

Suppose that members of the legislature believe, for religious reasons, that it is morally preferable in two-parent households for one parent to take primary child-rearing responsibility. They may have the view that children are better off when they have a stay-at-home parent, that the community is better off when parents take primary responsibility for childcare, or that parenting is an important responsibility that helps develop the character of the parent himself. Perhaps they think that the parents will live happier, fuller, less hectic lives with more time for cultivating meaningful friendships and practicing their faith if only one of them works. Should the legislature put a thumb on the scale of single-earner households by denying a deduction for household expenses?

A central question that the legislature should answer before denying the deductibility of childcare and other expenses is whether a parent who stays home because it is unaffordable for them to do otherwise will tend to promote the same goods as a stay-at-home parent who chooses to stay home because of her personal preferences. The person who makes a choice for financial reasons is apt to conduct herself differently in that role than someone who makes the same choice when she is not financially constrained from doing otherwise. The use of taxes to encourage people to engage in a socially desirable activity creates a selection effect, whereby the kinds of people who will tend to engage in this activity—in this case, childcare—are doing so out of financial necessity.

In the extreme case, coercing behavior through the use of financial incentives or punishment might completely empty the action of the meaning that is necessary for the act to have the desired effect. This was the objection of some Christian leaders to church taxes during the founding era; the church taxes were a form of coerced worship or religious observance,<sup>171</sup> and that the coercion associated with the tax rendered the act of “worship” inert. Sacrificial tithes and offerings are to be given freely to support the church according to God’s command, and the decision by the magistrate to coerce such tithing replaces a free act with a coerced one.<sup>172</sup>

Of course, it is possible that people who have been steered to a life that is better for them and the ones that they love will come to recognize this and stop

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171. Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 111 (2020).

172. *Id.* at 142 (citing Isaac Backus, *An Appeal to the Public for Religious Liberty, Against the Oppression of the Present Day* (1773), in ISAAC BACKUS ON CHURCH, STATE AND CALVINISM: PAMPHLETS 1754–89 2–3 (William G. McLoughlin ed., 1968) at 313, 315) (“As God has always claimed it as his prerogative to appoint who shall be his ministers and how they shall be supported, so under the Gospel the people’s communications to Christ’s ministers and members are called *sacrifices* with which God is *well pleased*. . . . And what government on earth ever had, or ever can have, any power to make or execute any laws to appoint and enforce *sacrifices to God!*”).

resenting being coerced, but it is also possible that they will not. Tax law cannot be an effective teacher if it makes it impossible to realize goods that can only be obtained by free choice and if it does not lead to a change of heart, and we should not blithely assume the effectiveness of coercion in changing people's desires.

## 2. Equity Tradeoffs

A second consideration in using tax law to steer people toward individual virtue is the distributional implications arising from the fact that only some people will respond to tax incentives. The people who will have the greatest response are those who can least afford the additional financial cost of paying the tax. These will tend to be lower-income individuals, and there is no a priori reason to think that lower-income households need more "steering" than higher-income households.

Moreover, if individuals are very resistant to changing their behavior, then the inframarginal effect of the tax will dominate the behavioral effect and the tax will simply reduce the wealth of households who engage in the activity. Depending on the facts, this could bring Christian commitments to distributive justice into conflict with a desire to curb undesirable behavior. Consider, for example, "sin taxes" on alcohol, tobacco, or soft drinks.<sup>173</sup> If lower-income households consume a disproportionate share of these goods but are mostly unresponsive to the tax, then the tax will simply impoverish them. The balance between steering people toward the "right" behavior and foisting upon them economic burdens must be struck very carefully.

## 3. Mission Creep and Tax Morale

A third consideration for the conversionist and separatist about whether to use tax law in a non-neutral way comes from thinking about tax enforcement. Imposing punitive taxation on certain kinds of income increases the incentive for tax evasion and avoidance. Of course, just as the fact that people try to avoid being punished is not a reason not to punish crimes, the possibility of avoidance is not a reason not to tax. But tax evasion and avoidance are contagious social phenomena, and widespread tax avoidance has consequences that go beyond simply the failure to deter immoral conduct. Also at stake is the most important role of the federal income tax: raising revenue.

Although I have focused in this article on the incentives created by tax law for individuals to change their behavior, the primary purpose of the income tax is to raise revenue for core government functions. Although Americans

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173. The economics of sin taxes are complicated, and because they aim to correct self-harmful consumption an important factor in their desirability is which income group is most likely to change their behavior in response to the tax and which group is more likely to be overconsuming the taxed good because of some bias. Hunt Allcott, Benjamin B. Lockwood & Dmitry Taubinsky, *Regressive Sin Taxes, with an Application to the Optimal Soda Tax*, 134 Q. J. ECON. 1557, 1557 (2019). Recent evidence suggests that soda taxes are helpful in reducing the sugar consumption of the young but are less successful at deterring those who consume large amounts of dietary sugar. Pierre Dubois et al., *How Well Targeted Are Soda Taxes?*, 110 AM. ECON. REV. 3661, 3661 (2020).

generally judge the income tax to be fairer than the leading alternatives, such as property taxes, the estate tax, and sales taxes, Congressional support for the IRS has been declining for years. The suspicion that the tax law favors some people at the expense of others is already pervasive.<sup>174</sup> Explicitly incorporating contested moral views into taxation and making the income tax a site of political controversy may endanger the voluntary compliance on which the income tax relies so heavily. This collateral consequence is likely to outweigh whatever modest benefits may be obtained by using tax law, rather than government appropriations or regulation, in service of a notion of the common good that is not widely shared.

Tax morale is a precious and precarious thing. If tax law were to enshrine differential treatment of individuals based on contested moral judgments, it would not be surprising if aggrieved taxpayers took more aggressive positions on their tax returns or even engaged in outright fraud. They would probably feel justified in doing so. The so-called targeting scandal involving conservative tax-exempt organizations illustrates the challenges the IRS has in administering highly political responsibilities and the severe blowback that can arise.<sup>175</sup>

The enforcement capacity of the IRS is far too limited to deal with widespread avoidance of this kind. As it stands now, when people disagree with federal law and policy on matters that are highly morally salient, they tend to fight over those matters in circumscribed areas of legal doctrine. They argue about First Amendment law and pornography, abortion, and the application of equal protection law to women and racial and sexual minorities. Happily, it is rare for individuals to refuse to pay their taxes because they are unhappy with how the revenues are spent. This is as it should be. Insulating tax policy from contested moral judgments as much as possible helps ensure voluntary taxpayer compliance so that revenues remain stable.

Using tax law more aggressively to encourage people to structure their lives in ways that are ethically controversial or that reflect particular religious or moral conceptions of the good may threaten taxpayer morale. Individuals who are subject to punitive taxes on disfavored forms of income (one could imagine income from providing certain reproductive services, publishing pornography, and so on) may evade or exploit textual ambiguities in the law to adopt aggressive tax positions that avoid the higher tax. Individuals who view the tax system as less legitimate because it reflects a particular religious view may withdraw compliance and may even feel justified in doing so. Although

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174. Yehonatan Givati & Andrew T. Hayashi, *Tax Law Enforcement and Redistributive Politics*, FLA. TAX REV. (forthcoming 2024).

175. Arguing that the oversight function should move out of the IRS, see Lloyd Hitoshi Mayer, "The Better Part of Valor Is Discretion": *Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations*, 7 COLUM. J. TAX L. 80 (2016). The problems created by having the IRS perform social and regulatory functions in addition to revenue collection are argued by Professor Kristen E. Hickman. Kristin E. Hickman, *Pursuing a Single Mission (or Something Closer to It) for the IRS*, 7 COLUM. J. TAX L. 169, 171–72 (2016). See also Evelyn Brody & Marcus Owens, *Exile to Main Street: The I.R.S.'s Diminished Role in Overseeing Tax-Exempt Organizations*, 91 CHI.-KENT L. REV. 859 (2016).



the moral responsibility for tax evasion must rest with the evader, the Christian may also doubt whether a tax that makes it so easy to be dishonest is serving as a good moral teacher.

### B. Examples

In this section, I reflect on several features of federal income tax law that are in tension with Christian values, to analyze them in light of the core features of the income tax described in Part I and the general considerations in Section A.

#### 1. Family and Community

The effect of federal income tax law on marriage formation and child-rearing is nuanced and depends on the family's circumstances. If one member of a couple earns a much higher income than the other, there is often a marriage "bonus," in which their joint tax liability is lower if they marry than if they remain single. For two-earner couples with comparable incomes, however, there is often a marriage penalty. This result is an artifact of the structure of the marginal rate structure. Marriage penalties and, consequently, disincentives to marry, tend to have a disparate impact on African American couples (who are more likely to have comparable incomes), and low-income couples<sup>176</sup> (whose joint tax liability is significantly affected by the availability of the earned income tax credit and the child tax credit).

The income tax is not neutral with respect to marriage because it cannot be, if income tax rates are progressive and all couples with the same incomes pay the same amount of tax (couples neutrality). This is the well-known marriage "trilemma."<sup>177</sup> The liberal income tax is caught between two neutralities and progressivity, and one of these seemingly desirable features of the income tax has to give. If marriage is a sufficiently important good, perhaps it is marriage neutrality that the income tax should forsake?

If marriage is a good thing, then it would seem obvious that marriage penalties should be avoided and replaced with an incentive for marriage. But it is not so obvious. Marriage may be good, but the reasons why people enter it may affect how good it is. Marriages that are entered into for financial reasons entrench the view that it is a contract like any other and are at odds with its

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176. DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021). This is also true of other low-income transfers such as Medicaid and SNAP. See *Marriage Penalties in Means-Tested Tax and Transfer Programs*, OFF. FAM. ASSISTANCE, <https://www.acf.hhs.gov/ofa/resource/marriage-penalties-in-means-tested-tax-and-transfer-programs> (last visited Nov. 25, 2023); BRADFORD WILCOX ET AL., *MARRIAGE PENALTIES IN MEANS-TESTED TAX AND TRANSFER PROGRAMS: ISSUES AND OPTIONS* (Oct. 2019).

177. For a discussion, see, for example, Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 *TAX L. REV.* 185 (2014); Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *STAN. L. REV.* 1389 (1975). Daniel Hemel has observed that the trilemma can be avoided by combining a flat tax and a per-person demogrant, which creates progressivity by other means. Daniel Hemel, *Beyond the Marriage Tax Trilemma*, 54 *WAKE FOREST L. REV.* 661, 661 (2019).

sacramental nature.<sup>178</sup> Visible financial motives may pollute the public understanding of marriage and diminish the couple's ability to realize the goods that marriage provides.

In any event, the effect of the marriage bonus on marriage rates is small. Most of the effect of the bonus is inframarginal, reducing the tax liabilities of married couples while not having much of an effect on the number of marriages. And so, the question about eliminating the marriage bonus should not be so much about whether marriage as an institution serves the common good, but whether the tax system should redistribute wealth to couples who would have married anyway. This implicates distributive justice and introduces an equity tradeoff. Over time, marriage rates have diverged, with white and Hispanic women more likely to marry and have stable marriages than Black women, across all levels of education.<sup>179</sup> Marriage rates have also fallen more quickly among low-income individuals.<sup>180</sup> These distributional effects should be the focus of an analysis of whether marriage subsidies serve the common good.

All things considered, it is hard to be enthusiastic about using tax law to encourage marriage even if one thinks that it would be better if more people were married. The expressive effect of using tax law to increase the financial benefits of marriage is counterproductive. The actual effect of using tax law to create a marriage bonus is likely to be small. And the distributional effects are apt to be regressive.

## 2. Work

Another site of conflict between liberal and religious values is the treatment of work. Recent years have seen the emergence of radically different solutions to the reconfiguration of the U.S. labor market around services rather than production and industry and to anxiety about the further displacement of labor by technological innovation. One proposed solution to this conflict is a universal basic income. Anne Alstott has argued that liberalism supports unconditional cash transfers, arguing that the "case for employment subsidies rests on mistaken or morally dubious claims about the intrinsic or instrumental value of paid work."<sup>181</sup> She writes that "[o]ne of the most common arguments for employment subsidies is a moral claim. The basic idea is that hard work is morally required, and people who display this kind of virtue should be guaranteed a job at a decent wage."<sup>182</sup>

A contemporary proponent of this view is the conservative writer Oren Cass, who argues that work has value for the workers, for their families, and for

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178. Taxes do affect the marriage and separation rates, although the overall effect is modest. Solum, *supra* note 151.

179. R. Kelly Raley et al., *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, 25 *FUTURE CHILD*. 89, 100 (2015).

180. *Id.* at 104–05.

181. Alstott, *supra* note 82, at 971.

182. *Id.* at 989.

their communities.<sup>183</sup> Cass believes that liberalism—specifically, its neoliberal variant—has undermined the stability and availability of work. Cass attributes to work many of the same benefits as CST does, and because work has intrinsic value, he endorses a wage subsidy rather than a guaranteed income. For Cass, a universal basic income deprives “work of the meaning associated with self-sufficiency . . . it eliminates self-sufficiency as a norm and thus the pride associated with fulfilling that expectation and the shame associated with failing.”<sup>184</sup>

How might tax policy look differently if we took seriously the intrinsic value of work? If one were concerned solely with helping people find market jobs that are economically and personally rewarding, it might make sense to subsidize the costs of moving for the purpose of finding employment.<sup>185</sup> One of the persistent causes of inequality in the United States is the mismatch between the location of people—particularly in distressed rural areas—and the location of physical capital and employment opportunities. Providing a generous deduction or tax credit for the costs of moving to find employment might ameliorate that mismatch. And yet, attempts to facilitate greater labor market mobility may have adverse effects on the stability of families and local communities, creating a tension between the kinds of tax incentives that increase the productivity of labor and those that nurture local communities.<sup>186</sup>

But even as Cass’s view captures more of what is important about work, it misses something meaningful in the Christian understanding. Cass links the benefit of work to productivity, and for him the dignity of work derives from being “productive”<sup>187</sup> and from being self-sufficient. But self-sufficiency is an illusion, because humans are dependent both on other people and on common

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183. Oren Cass, *The Case for the Wage Subsidy*, NAT’L. REV. (Nov. 16, 2018, 6:30 AM), <https://www.nationalreview.com/2018/11/case-for-wage-subsidy-government-spending-book-excerpt/>.

184. OREN CASS, *THE ONCE AND FUTURE WORKER: A VISION FOR THE RENEWAL OF WORK IN AMERICA* 177 (2018). The goal of Cass’ productive pluralism is a labor market where “all Americans can be contributors, achieve self-sufficiency, and support strong families and communities.” *Id.* at 209.

185. Professor David Schleicher argues that there are a wide array of state and local rules that inhibit interstate migration, and that this has undesirable macroeconomic effects. David Schleicher, *Stuck: The Law and Economics of Residential Stagnation*, 127 YALE L. J. 78, 89 (2017). An alternative approach to moving expenses, never taken in the U.S., would be to make the costs of moving fully creditable.

186. An alternative to making it easier for people to move would be to provide place-based development incentives such as those for “Opportunity Zones.” See, e.g., *Place-Based Tax Incentives for Community Development*, U.S. DEP’T HOUS. & URBAN DEV.’S OFF. POL’Y DEV. & RSCH. (last visited Nov. 25, 2023), <https://www.huduser.gov/portal/periodicals/em/SpringSummer19/highlight1.html>.

187. Professor Don Boudreaux highlights this distinction between work, which produces something of greater economic value than its inputs, and toil, which does not. According to Boudreaux, protectionism, through its coercion, undermines the dignity that comes from satisfying others’ wants. DONALD J. BOUDREAU, *THE CASE AGAINST OREN CASS*, AM. INST. FOR ECON. RSCH., <https://www.aier.org/article/oren-case/> (last visited Aug. 10, 2020).

grace in ways that are both seen and unseen.<sup>188</sup> The ultimate purpose of work on a Christian view is not productivity in the sense of generating an output that is more valuable than the inputs used to produce it. Christianity is not agnostic about sources of value, and market prices measuring the value of inputs and the value of outputs reflect demand for those goods and services that derive from individuals' tastes and desires. Individuals' tastes and desires, needless to say, can be corrupt. Therefore, the value of Christian work is not measured—certainly not *only* measured—in terms of productivity. Work is sacramental. It is an opportunity to worship God, and it is a way of participating in God's creation.

This Christian understanding of work does not devalue the importance of paid market labor that helps provide oneself and one's family with a livelihood, but it requires that one hold lightly the external validation of the marketplace and it elevates all forms of work, whether remunerated or not. Although a guaranteed income may not be an effective way of ensuring that people are able to perform meaningful work regardless of whether it is valued by the marketplace (we must be realistic about the temptation to shirk) our economic policies should not demand validation from the market for all work. This might suggest that wage subsidies—such as the earned income tax credit—should be available for certain non-market work, including care for one's family.<sup>189</sup>

### 3. Subsidiarity

In this last section, I consider two ways that federal tax policy may support the stability, cohesiveness, and vibrance of local communities. The first is the federal deduction for state and local taxes. This deduction affects the tax capacity of state and local governments, which in turn affects their ability to raise revenue and pay for policies that reflect local values.<sup>190</sup> Second, I return to the tax treatment of moving expenses.

The ability of a tax to raise revenue and direct behavior depends on the tax capacity of the taxpayer. If the federal government and local government both agree about wanting to tax a certain behavior, then the more the federal government taxes the behavior, the less revenue there is for the local government. By providing a federal income tax deduction for state and local taxes, the federal government provides more room for lower levels of government to implement their own tax policies. To illustrate this, consider the following example. A taxpayer with children is considering whether to take a market job and earn a wage of \$40,000. Suppose that doing so will require him

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188. On the theological neglect of dependency as a central feature of human existence, see SANDRA SULLIVAN-DUNBAR, *HUMAN DEPENDENCY AND CHRISTIAN ETHICS* (2017).

189. There is evidence that the introduction of the earned income tax credit increased maternal employment in the United States by one million mothers. Jacob Bastian, *The Rise of Working Mothers and the 1975 Earned Income Tax Credit*, 12 AM. ECON. J.: ECON. POL'Y 44, 54 (2020).

190. In fact, most states with an income tax conform to the federal income tax in most respects. Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1276 (2013).

to spend \$30,000 on childcare and various household services. Assume that if he were to stay at home with the children, the value of his work to his household would be \$35,000. Note that the taxpayer would be better off taking the job than by staying at home.

In the absence of a federal income tax, a local government that wanted to raise revenue without causing the taxpayer to withdraw from the labor market could impose a tax of up to 12.5%, collecting \$5,000 in revenue. Suppose however that the federal government imposed a tax of ten percent on the taxpayer's wages, so that his wages after paying federal taxes were \$36,000. Now the local government could only impose a tax of up to 2.5% and collect only \$1,000 in revenue before it induces the taxpayer to withdraw from the market. If the capacity to tax is exhausted by the federal income tax in this way, then the locality will have to use other taxes, such as a sales tax or property tax. In this way, federal taxes limit the ability of local governments to raise revenue for their own purposes. The federal deduction for state and local taxes is one way of preserving the tax base for lower levels of government. In this hypothetical, if the local income tax were deductible for federal purposes, then the state could impose tax of 2.8% without inducing the taxpayer to withdraw from the labor market.<sup>191</sup>

This example contemplates that the local and federal governments agree about wanting to avoid distorting the individual's behavior away from labor force participation. If the federal and local governments both wanted to *discourage* labor market participation and encourage stay-at-home parenting, then one might guess that the locality would be indifferent about the tax rate set by the federal government as long as the total federal and local tax burden was at least 12.5%.

But the local government will care. Even if the local government is convinced that the individual should withdraw from the labor force, the individual himself may prefer to work, and he may move localities so he can do so. He will "vote with his feet" to move into a jurisdiction where his tax rate is lower. Not only will raising local taxes cause the would-be worker to flee the jurisdiction, undermining the effect of the tax on his behavior, but it will also drive people with high wages away from the local community, thereby undermining community stability.

If the federal and local governments *disagree* about whether it is better for the taxpayer to withdraw from the labor force, then their tax laws may work at cross purposes. Specifically, suppose that federal law was concerned with the violation of neutrality arising from the nontaxation of imputed income. Federal tax law might be changed to provide a deduction for household expenses—such as childcare costs—incurred to take a job outside the home. If it did, our individual's tax liability would fall to \$1,000 because his taxable income of \$10,000 (\$40,000 in wages less the costs of childcare and keeping the

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191. The SALT deduction has other incentive effects, such as encouraging states to adopt progressive income taxes. Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 UCLA L. REV. 1389, 1395 (2004).

household) would be taxed only at the ten percent rate. For the state to induce the taxpayer to stay home, it must collect a tax of more than \$4,000, which requires a tax rate of forty percent. If the federal government provides a deduction for state and local taxes, the state will need to increase its local tax rate to roughly forty-one percent to discourage labor market participation.

Thus, the state and local tax deduction generally blunts the disincentive effects of state and local taxes. The deduction is helpful for localities wanting to raise revenue without discouraging the taxed behavior. On the other hand, the deduction is unhelpful when the locality disagrees with the federal government about wanting to discourage a particular activity. In that case, the state and local tax deduction requires the locality to raise its tax rate higher to get the same outcome, and this may destabilize the community by driving taxed workers away.

A second place that federal income tax law could be used to support the common good is through its effect on household mobility. A central concern that critics have of the liberal state is the priority it gives to individual freedom and autonomy. Many individual choices, it is argued, have effects on other people and the cumulative effects of these individual decisions can be a destabilization of communities and local ways of life, as people exercise the freedom to flout the conventions, norms, and values of the communities in which they were raised or leave those communities altogether.

The migration from depressed communities is partly a collective action problem. To see how, imagine an individual considering whether to relocate in pursuit of economic opportunity. This individual might prefer to move to a place with more economic opportunity but return to their home community periodically to see old friends and reconnect. But this individual's friends face the same choice, and if they all migrate, then none of them remain to provide the cohesive home community that each of them desires. Individually, each would prefer to move, but the group would be collectively better off if they all remained. In this case, increasing the cost of moving might stabilize smaller towns and also help the individuals exercise their freedom cooperatively to arrive at an outcome that they collectively prefer.

Until 2017, moving expenses incurred to take a new job were deductible. The free movement of labor, at least within U.S. borders, has historically been regarded as a good thing. From an economic perspective, the stranding of human capital in places where employment opportunities have disappeared results not only in inefficiencies and lost economic growth but also in noneconomic human costs as well. And yet, it is trivializing to tell people with a deeply felt connection to a particular place to simply up and move if they can't find employment. Their departure may have adverse effects on the community around them, as dwindling populations destroy economies of scale and disrupt social networks. And according to liberalism's critics, the relentless chasing of better opportunities is a temptation that tends to lead us away from deeper and more lasting bonds of human connectedness.

Taxing moving expenses could help stabilize local communities and discourage the migration of high-ability workers.

## CONCLUSION

The federal income tax is a mostly liberal tax. And yet, contemporary Christian critics of liberal institutions should leave the income tax with its liberal features. Using tax law to paternalistically steer people toward individual morality will often fail. The effects of tax law can be subtle, surprising, and sometimes counterproductive. Financial incentives may crowd out the development of moral character, the desire to manipulate behavior will have unpredictable distributional consequences, and the collateral effects of moral coercion on revenue collection will undermine the primary purpose of the tax law. But tax law *can* have a role in promoting the common good, even beyond ensuring a just distribution of the tax burden. Carefully tailored tax incentives could help increase the financial rewards of work through an expanded wage subsidy, and with a little imagination might also affirm the value of non-market labor, such as caregiving to dependents. And the federal income tax can openly balance the power of the federal government against the power given to lower levels of political authority—specifically state and local governments—through the state and local tax deduction, which cedes tax jurisdiction to lower levels of government and will typically enable them to fund policies that reflect local values. Finding this balance will require practical wisdom, just as it does everywhere else.