Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa

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Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa

William B. Barker*

I. Introduction

Most democracies profess a desire for equality in public life while tolerating inequality in socioeconomic status. Yet, within the structure of the democratic state lies the potential for economic equity. This equality can be achieved by redistributing citizens' resources through the political process on the basis of the egalitarian principles of one person one vote, and majority rule. In today's democratic states, the ideology that government must strive to improve the lot of its less fortunate members through programs of wealth distribution is generally accepted.

In the United States, the federal income tax was instituted as a result

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of a democratic struggle to change the distribution of wealth by taxing
the income of the wealthy. Income tax heralded new hope for economic
rights by changing the way government taxed. Taxation was changed
from regressive consumption taxes based on one’s needs and wants to a
progressive tax based on one’s ability to pay. The legislative goal was
not mere rhetoric. The federal income tax law of 1913 was exemplary
for its simplicity and its proximity to the ideal comprehensive income tax
base. The ideological promise of progressive comprehensive income
taxation is the promise of greater economic equality. Economic equality
is advanced through the tremendous ability of income taxation to provide
the revenue for social programs, “the expenditure function,” in a manner
that imposes the obligation to a greater extent on those with greater
command of resources, “the tax function.”

Modern democratic governments collect taxes in amounts as a
percentage of Gross Domestic Product that range from 27.6% in the
United States to 51.9% in Denmark. Of these taxes, income taxes are
almost always the dominant tax. Such substantial government control of
economic resources through income taxation means that income taxation
has the force through the tax function and the resources through the
expenditure function to fulfill its ideological promise to address
economic inequity.

Yet, though income taxation is the most progressive tax, it is not
living up to its potential to promote economic equality through the tax
function. How do we get it back on course? The study of comparative
tax law may suggest new directions by removing tax law from the
confines of one nation’s practice, and by placing it within the wider
context of human kind’s struggle for greater economic equality. The
process of comparing tax law, however, like the process of democratic
tax reform, cannot simply be the consideration of, or the juxtaposition of,
rules and doctrines. The comparing of tax law must also be a study of
the motivating forces and teleology of taxation and how stated and and

1. William B. Barker, Statutory Interpretation, Comparative Law and Economic
Theory: Discovering the Grund of Income Taxation, 40 SAN DIEGO L. REV. 821, 860-61
(2003).
2. Id.
3. Recent figures for tax as a percentage of GDP for several major Western
democracies showed the following: Denmark at 51.9%, Germany at 38.2%, the United
Kingdom at 35.1%, Japan at 28.8%, and the United States at 27.6%. JOSEPH P. QUINLAN
& KATHRYN L. STEVENS, 101 TRENDS EVERY INVESTOR SHOULD KNOW ABOUT THE
GLOBAL ECONOMY 144-45 (Lincolnwood Contemporary Books 1998).
4. The recent 2001 and 2003 tax cuts in the United States have disproportionately
targeted high income taxpayers leading to a substantial reduction in the progressive
aspect of the income tax system. See William Gale et al., Distributional Effects of the
2001 and 2003 Tax Cuts and Their Financing, Table 1 at http://www.taxpolicycenter.org/
uploadedpdf/411018_tax_cuts.pdf (June 3, 2004).
implicit goals can be realized.

Comparative tax analysis should not end with tax theory. It must also be situated within a general theory of law that should develop an understanding of the law-in-action, that is, the dynamic of the legislative act, its purpose, and its implementation by law's actors. Understanding this interplay illuminates the possibilities of achieving tax law's goals and values. An approach to comparative tax law, as outlined in this work, gives us a new and useful perspective on how tax law can be held to its task of promoting equality in human development.

This article will view these issues, not simply through the eyes of the Western world, but through the lens of the struggles and accomplishments of an emerging democracy, the Republic of South Africa. What South Africa can help teach complacent democracies is that its founding principle, political emancipation, is not sufficient to achieve a democratic society; along with political emancipation must come economic emancipation.

The South African Constitution couples the goals of "an open and democratic society," with the economic goals of "improv[ing] the quality of life of each person and free the potential of each person." This democratically adopted constitution guarantees to its citizens certain critical economic rights. These include the right to equal access to land and natural resources and to land reform, access to adequate housing, access to health care, sufficient food and water, social security, and education. These rights or expectations are difficult to accomplish in any society no matter how good the intentions. Indeed, the South African Constitutional Court has indicated that it will not be energetic in determining cases based on resource allocation. Unfortunately, "the pride and respect engendered by ownership of the Constitution will wane if the rights it established, particularly socio-economic rights, do not result in concrete changes in the lives of citizens. This is critical because the legacies of apartheid continue to plague the young democracy, in the form of poverty, illiteracy, homelessness and other social ills." Tax can be a major component of the solution to economic inequality. The important tax reforms implemented by post-Apartheid South Africa illustrate how a country can use the income tax law to redefine itself as a

11. Id. at 86.
democratic nation.

II. An Introduction to Comparative Analysis

The traditional positive law, doctrinal approach of comparative law, however, is inadequate to the purposes behind comparative tax law.\textsuperscript{12} Comparative tax law's roots in comparative law cannot be ignored. "The basic methodological principle of all comparative law is that of \textit{functionality}."\textsuperscript{13} The analysis begins with the question that a system wants to solve. What rule has a foreign system chosen? The theory is that function orders law and that analogous problems produce equivalent solutions.\textsuperscript{14} The traditional approach is based on the presumption that law is "a body of coherent principles,"\textsuperscript{15} and that all practical results are similar.\textsuperscript{16} This largely analytical approach to law does not advance a realistic view of law and thus does not promote comparative tax law's ability to advance legal theory.\textsuperscript{17}

Central to the traditional approach is the notion that solutions are coherent and similar.\textsuperscript{18} This is a tenant of analytical philosophy that has a "tendency to confine the study of law to the exposition and analysis of legal doctrine,"\textsuperscript{19} due to the sharp distinction it makes "between the is and the ought."\textsuperscript{20} General comparative tax scholarship follows this analytical approach.\textsuperscript{21} Traditional tax scholarship, however, especially in

\begin{itemize}
  \item \textsuperscript{13} \textsc{Konrad Zweigert} \& \textsc{Hein Kotz}, \textit{An Introduction to Comparative Law} 31 (1992) (emphasis in original).
  \item \textsuperscript{15} \textit{Id.} at 428.
  \item \textsuperscript{16} \textit{See Zweigert \& Kotz, supra} note 13, at 36-37.
  \item \textsuperscript{17} \textsc{Twining}, \textit{supra} note 12, at 48.
  \item \textsuperscript{18} \textit{See supra} notes 14 and 16.
  \item \textsuperscript{19} \textsc{Twining, supra} note 12, at 48.
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} In taxation, comparative analysis is usually conceived with a survey and description of the positive law. It usually takes one of two solution forms. The more common approach analyzes a particular rule-based solution to a problem in international tax law. \textit{See, e.g., Phillip Baker}, \textit{Double Taxation Agreements and International Tax Law} (1991). In the European Union, due to the large interest in the problems of tax coordination among members in an ever more integrated economy there is a growing interest in corporate tax systems and cross-border arrangements. \textit{See generally Ben Terra and Peter Watel}, \textit{European Tax Law} (1993). The primary audiences of these works are legal professionals engaged in international practice and the lawmakers who seek answers to important issues of international taxation. There are also works that take on a more ambitious task of looking at the structures of income tax systems. \textit{See, e.g., Hugh Ault}, \textit{Comparative Income Taxation, A Structural Analysis} (1997). In
America, tends to be critical, not simply descriptive; it tends to be normative, not simply analytical.

Comparative tax scholarship should be rooted solidly in the normative tradition of tax scholarship. This article attempts to expand on the traditional scheme of comparative tax law in several ways. It examines the methods of, and purposes behind comparative tax law from the perspective of income tax law in societies that aspire to democratic ideals. It suggests that there is teleology inherent in income tax law in a democratic society and that comparative analysis can illuminate these values, demonstrate their relation to income tax theory, and test whether the promise of the income tax to democratic policy is, in fact, being realized.

III. The Place of Comparative Tax Law

Comparative tax law, like public law in general, is not considered part of mainstream comparative law. That may be because tax law is considered peripheral to the subject matter of comparative law and its private law emphasis. Tax law also may be ignored because public law holds little interest for traditional comparativists as much of public law, especially in the case of income tax law, is a fairly recent development in the history of law. Comparativists likely believe that private law addresses the needs of individuals, and thus expresses universal truths, whereas public law typically expresses the particular needs and cultural vagaries of different governments and thus does not share in the general movement toward uniformity. For example, the International Encyclopedia of Comparative Law project does not include constitutional law, administrative law, criminal law and tax law. The traditional comparativist focus on private law ignores the important role that public laws have in understanding humankind’s relation to law today.

The comparative law preoccupation with private law is a preoccupation with the relation of individuals in civil society. Public law focuses instead on the duties and relation of individuals to government and society. Though private law may manipulate individual choice by resolving private conflict for the public good, such is not its essence. Public law’s primary purpose, however, is to define, control, change and contrast, these works are primarily aimed at students, with the common object of better educating them about their own system through comparison. See id. at 1.

22. Ewald, supra note 12, at 2122.
24. See Ewald, supra note 12, at 2122.
25. See Barker, supra note 1, at 827.
modify individual conduct for the public good.\textsuperscript{26} Those who study comparative law must take up the challenge of the centrality of public law in the world today. The importance of public law is no more dramatically illustrated than by income tax law, the breadth of which is indicated by its many classifications, including public finance, budget, administrative, and social welfare law.\textsuperscript{27}

IV. The Objects of Comparative Tax Law

Why should one study comparative tax law? What is its purpose? Whom does it target? Whether the audience is students, who want to gain a better understanding of their own system, or students or practitioners who need knowledge of a foreign system in an ever-expanding global environment, or legislators who wish to consider foreign solutions for their own country, comparative tax law performs an important role. In South Africa, detailed consideration of foreign solutions is a regular part of tax reform.\textsuperscript{28} As noted in the legislative history to the Capital Gains Tax Act, "[w]hen considering the introduction of a new tax, South Africa can learn much from the lessons of other countries."\textsuperscript{29}

Can a doctrinal approach that only looks at formalistic legal solutions to tax problems accomplish this role? The answer is no. While summaries and surveys, and the comparative process of juxtaposition, explanation, and analysis of the rules are important and useful, they are not enough. Comparative law must free itself from the strictly analytical in order to present a complete and useful picture. It must embrace the normative philosophy of law by becoming a critical advocate for reform,\textsuperscript{30} directing its efforts toward the improvement of the lot of people in society. It should be concerned with tax law's role in accomplishing democratic ideals. Thus, to be truly useful, comparative tax law must illuminate tax law's purposes, that is, it must be about tax policy.

Evaluation must be critical, not just descriptive. Comparative analysis needs to confront the assumptions underlying tax law including its effect, efficiency, fairness, and acceptance by the people. This means it must go beyond descriptive focus on the "is," and evaluate the "is" in terms of the "ought to be." Comparative tax law needs to go beyond law

\textsuperscript{26} Id. at 822-23.
\textsuperscript{27} Victor Thuronyi, Comparative Tax Law 7 (2003).
\textsuperscript{29} Id.
\textsuperscript{30} See George P. Fletcher, Comparative Law as a Subversive Discipline, 46 AM. J. COMP. L. 683, 695 (1998) (describing comparative law as "cultural criticism").
as doctrine to examining law-in-action. Comprehending the reality of the law is necessary to be able to establish the validity of the critique. Thus, comparative tax law should be a jurisprudential study, a study of ideology.

Examples of an evaluative rather than a strictly analytical approach are rare, as an examination of two works that have followed this approach will demonstrate. The first is an English work on the judicial approach to tax avoidance. It made a detailed study of the American case law, contrasting it with the British, in order to determine whether the American approach to tax avoidance could validly be used as a model in the United Kingdom. The author, Professor Tiley, was not optimistic about the comparison's utility because of the different ideological starting points for tax law analysis in the United Kingdom and the United States. The second piece was an American work comparing the structure and substance of the tax laws of the United Kingdom and the United States with a particular emphasis on the concept of realization. This article traced the rules, underlying theory, and development of this concept through statutes, administrative materials and case law. The article concluded that the English doctrine was much more comprehensive than the American. This comprehensive treatment was supported by the English courts' rationales that went to the very heart of income taxation as a fair and equitable means of taxation. The most significant factor was that reasoned development of the rationale of income taxation was necessary to prevent a major gap in the system, to prevent the transfer or escape of capital gains through gift or devise or through transfer of property from a business to a personal activity.

Clearly, the promise of equitable taxation in America suffers because of the absence of a broader understanding of realization. Unlike Professor John Tiley's conclusion with respect to tax avoidance, the conclusion of the latter article was that the English doctrine actually could fit easily into the substance and ideology of the American system. The English doctrine could fit even though the structure of English tax law that facilitated the development of the English doctrine was quite different from that of the United States.

33. Barker, supra note 23.
34. Id. at 69-74.
35. Id. at 74-76.
The reason such works are rare is that comparative analysis almost always takes an external approach. This view of the outsider requires a doctrinaire approach. The normative approach outlined in this article requires an internal or insider's approach to comparative law.36 As William Ewald has pointed out, even within general comparative scholarship, there has been "no effort to comprehend the foreign legal system as it appears from inside."37 Due to this problem, some will always criticize the true comparativists because their approach "is necessarily laden with the concepts values and visions derived from their local legal culture and experience."38

Moreover, William Ewald's suggestion that one needs to know how a foreign lawyer thinks may appear quite impossible.39 The struggles of the law professors who emigrated from Nazi Germany to become part of the American education system demonstrates this great difficulty.40 Some of the greatest insights into Comparative Law were achieved, however, by those who succeeded.41

The author's own experience may suggest an alternate position to going native. Having taught both United Kingdom income tax and South African income tax in the host countries, I have found that with the support of generous colleagues, one can teach foreign tax law to foreign students using a provocative Socratic, problem solving approach. The students have always seemed to appreciate the nontraditional insights my method and cultural bias have unfolded. "There is no guarantee against misunderstanding what is strange and new, but there is always the possibility that such misunderstanding can be productive and inspiring."42

V. The Process of Comparing Tax Law: A Roadmap

Comparative tax law, unlike comparative law in general, has not been explicitly self-conscious.43 Comparative tax law needs defined methodology. The process cannot be divorced from its object, so we

36. See Ewald, supra note 12, at 1895.
37. Id.
38. Frankenberg, supra note 14, at 442.
39. See Ewald, supra note 12, at 1896.
42. Frankenberg, supra note 14, at 445.
43. An exception to this statement is my own 1996 work that suggested some methodological approaches to comparative tax work and attempted to place comparative taxation within the framework of comparative law in general. See Barker, supra note 23, at 7-12, 74-76.
need to begin, like a legislature, with our objective. The object should be to create a view of tax law as a tool of human development. A roadmap is needed to guide us in our work. The success of this map depends on its ability to communicate the context underlying the comparison and the critical concepts to be examined.

The fundamental contextual starting place of comparative law is that different nations belong to different legal families. South Africa is unique because it contains elements of the two principal legal families, the civil and the common law. South Africa adopted the civil law tradition from its Afrikaner heritage, but interprets that law through an English common law-oriented judicial approach. The South African Constitution guarantees the right of the courts to develop the common law.

Legal families are predominantly characterized by their style of legal thought. These traditional systemic differences are not as important in tax law as they may be in private law. That is because tax law in its present forms, such as income tax, corporate tax, and value added tax, are relatively new when compared with private law. Taxation as an immense and incredibly complicated revenue-raising machine is mostly a post-Nineteenth Century development. The impetus for its rapid development was mostly in the Western democracies where tax ideas flowed freely.

Comparative analysis that aspires to an understanding of law-in-action must confront the view that the context of the law may include attitudes developed over many years, unconscious motivations, or frames of reference which rely on special moral judgments. Income tax law, however, may be somewhat immune from such influences because income tax law has arrived newborn to the nation stage and brings with it modern (possibly nontraditional) democratic values.

Taxation worldwide evidences some clear patterns. Indeed, tax professionals speak a common language and the audience for

44. See Zweigert & Kotz, supra note 13, at 63.
46. Zweigert & Kotz, supra note 13, at 471.
48. See Zweigert & Kotz, supra note 13, at 69.
50. See id.
51. See Legrand, supra note 12, at 267.
52. See Ewald, supra note 12, at 1839.
comparative tax law shares background knowledge.\(^{53}\) The professionals deal with similar economic events or conditions. Even in South Africa, where there are two quite different economic systems, one that is fully developed and one that is emerging from traditional forms, tax law confronts both systems pursuant to the same categories of legal norms.\(^{54}\)

Nevertheless, income taxation worldwide also shows considerable variations in the rules, and in the scope and breadth of many concepts. Due to the diversity of human relations and the ingenuity of tax planners, tax law has had to become incredibly complex in order to cast a fine net. In these circumstances, if comparative analysis needed to cover every facet, the task would be truly daunting. This article suggests, however, that there are certain defining elements of income tax systems that provide the critical structure for comparative analysis.

A. Defining Elements of Income Taxation for Equitable Taxation

Modern critics of comparative law claim that scholars must be more explicit in defining their methodology.\(^{55}\) Twining, after reviewing the literature, indicated his surprise at its lack of "comparators—that is standards, measures or indicators that provide a basis of comparison."\(^{56}\)

This article suggests that taxation does have its own taxonomy, but that these general standards have not been made explicit in comparative analysis to date. The most significant of these "comparators" are normative; they can be referred to as "defining elements" in an income tax system that must be critically studied to determine the true effect it has in accomplishing democratic values. The normative underpinnings of democratic taxation are equity, both horizontal and vertical, and redistributive justice. By viewing the concepts of income taxation from this ideological perspective, there are certain critical concepts that have the power of fulcrums to determine the fulfillment of democratic values. These defining elements can undo the progressive goal of income taxation by reallocating the financial burden of the tax.

The function and purposes of the income tax system are varied. "Income taxation is the primary way democratic societies allocate the financial burden of government to its people."\(^{57}\) In a democratic society, "civil society brings with it the reality of tremendous economic

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55. TWINING, supra note 12, at 191-192.
56. Id. at 192.
57. Barker, supra note 1, at 822.
inequality." Democratic values may require a different distribution of income or wealth than that created by the market economy and the accumulation of wealth through inheritance.

Redistribution can occur through both the expenditure and the revenue gathering functions of government. Progressive taxation is generally accepted as a method for financing public goods under redistributive principles. Indeed, modern income tax's grounding in principles of burden allocation on the basis of ability to pay implies redistributive justice. To effectuate redistribution, ability to pay theory depends upon as comprehensive an assessment of the taxpayer's circumstances as is possible. This requires a comprehensive income tax base, which must begin with residence-based taxation, that is, taxing the total worldwide income of a taxpayer.

The structure of income tax systems takes one of two general forms. The first is global, in which income is treated the same no matter what its source. Global systems are linked to residence-based tax. The second is the schedular system, which focuses on the source or location of income. Schedular taxation is often identified with a territorial, source based scheme of international taxation. The United Kingdom, whose tax system is important because it was the model for many of its former colonies, adopted a schedular structure of income taxation soon after it enacted comprehensive income tax legislation. Nevertheless, the United Kingdom has always followed residence based worldwide taxation.

Though the United Kingdom adopted residence-based principles for the modern democracy of the British home state, its policy toward its colonies imposed a territorial, sourced-based tax. Under the English view, only income arising in the colony came within the "colonial

58. Id. at 864.
60. See generally, Barker, supra note 1, at 864-65. In addition, income taxation can accomplish its distributive function through direct tax transfers. In the United States, the earned income credit is the principle acknowledged redistributive transfer. See I.R.C. § 38 (2000).
62. For a comprehensive treatment of this point in the context of international tax principles, see id. at 186-88.
64. Id. at 16-17.
65. Id.
66. See id. at 18.
67. Id. at 19.
jurisdiction” to tax.69 Thus, South Africa began its income tax experience with a colonially imposed, territorial system of taxation.70 The rule of Apartheid maintained the colonial-based, territorial system.71 Certainly, the importance of democratic reform of its tax system to achieve democratic values is amply supported by the following statement to the legislature: “Historically, generations of people in this country see tax as a tool that funded their own oppression. It is a major attitude adaptation to see that the funds from taxation are for maintaining a broader democracy.”72 Not surprisingly, one of the first income tax reforms of the new democratic government in South Africa was the change to a residence based income tax.73

Progressive income taxation evidences the ideological potential of the tax law to serve distributive justice. The critical assumptions or presuppositions underlying the legal discourse of income taxation in the world today are the general economic definitions of the income tax base.74 The starting place for most tax policy discussions is the accretion concept of income and what is now known as the comprehensive income base.75 For example, when considering the introduction of capital gains taxation in South Africa, the legislature noted the definitions provided by Haig and Simons and considered capital gains relation to the “‘comprehensive income’ concept as the ideal tax base.”76 The ideal of democratic reform is the synthesis of graduated rates and the most comprehensive base possible.

Other objectives of society, however, may conflict with this ideal. After all, the issue of redistribution involves conflicting views and values that vary based on political trends. In addition, the tax law serves other ends including price stabilization, employment, economic stimulation, and behavior manipulation. Finally, tax law in many cases provides transfer payments to taxpayers through tax mitigation usually aimed at high income taxpayers. This mitigation often reverses the redistributive tendency of graduated tax rates.

Exemptions and tax preferences are the defining elements of a tax

69. Id. at 5-6.
70. See § 1 of Income Tax Act 58 of 1962; see also R.C. WILLIAMS, INCOME TAX AND CAPITAL GAINS TAX IN SOUTH AFRICA, LAW AND PRACTICE 28 (3d ed. 2001).
71. Until the adoption of residence based tax in 2000, South Africa taxed only income “arising in South Africa.” Through the years, the limitation of source-based tax was chipped away at by expanding the definition of source beyond its borders. § 1 of Income Tax Act 58 of 1962; see also WILLIAMS, supra note 70, at 28.
73. See WILLIAMS, supra note 70, at 28.
75. Id. at 9-12.
76. Portfolio and Select Committee on Finance, supra note 28, at 3.
system and are critical to the comparative study of tax law. Exemptions and preferences strongly indicate whether the ideals of equity and distribution are being achieved by a particular system because they are the sources of the vast majority of direct tax transfers.

In general, income tax in the democratic world is largely levied on wages and other forms of service income. This is because significant taxation of the income from capital remains illusory due to the inundation of exemptions and preferences on capital income.

Though income taxation of service income is a highly effective form of tax, it too has exemptions and preferences. Essentially there are three defining elements of the service income preference system: (1) tax preferences for deferred compensation arrangements; (2) tax preferences for private health and other insurance; and (3) various other fringe benefits representing significant elements of personal consumption. These transfer payments can represent enormous vertical and significant horizontal equity problems since they are unavailable to many in our society and they are often conferred disproportionately to higher income brackets.

The issue of the taxation of the income from capital is directly related to the issue of the taxation of business income. Business income has elements of both capital and non-wage service income. The elements of capital income taxation critical to the analysis of the system’s democratic value structure are: inclusion of interest and dividend income, deduction of interest payments, depreciation or capital cost recovery in excess of economic depreciation, exclusion or undertaxation of capital gains, the deductibility of current versus capital expenditures, the timing of income and deduction, including the important concept of realization and deemed realizations (death, gift, changes in use inconsistent with prior treatment), and deduction of net operating losses.

Several of the previous items are clear tax transfers to privileged taxpayers. These include depreciation or credits in excess of economic wear and tear, the undertaxation of capital gains, the deduction of capital expenditures, and the realization requirement for the gain on property.77

77. An example of the centrality of these preferences is the case of the recent 2001 and 2003 tax cuts in the United States. The law increased the deduction for the capital cost of most tangible (nonreal) depreciable property for all taxpayers up to fifty percent. I.R.C. § 168(K)(4) (2000). The law also increased the 100% deduction for the cost of depreciable property up to $102,000 for small businesses. The tax law also reduced the maximum tax rate on capital gains for most property to fifteen percent. I.R.C. § 1(h)(1)(C) (2000). This should be compared with the highest marginal rate on ordinary income of thirty-five percent. IRB Tax Forms & Instructions, 26 C.F.R. § 601.602 (2003). In addition, ordinary dividends on corporate shares are taxed at the highest capital rate of fifteen percent. I.R.C. § 1(h)(11) (2000). The distributional effects of these preferences overwhelmingly favor upper-bracket taxpayers. See generally Gale et
The other comparators ostensibly deal with equitable and practical assessment of tax liability, like the deductibility of interest and net operating losses, and timing rules.

Widespread manipulation and use of all of these income factors to offset other income generated by the taxpayer produces countless arbitrage points with substantial tax avoidance potential for upper-bracket taxpayers. The preferences result in substantial revenue loss, substantial loss in horizontal equity, and substantial decline in tax liabilities and thus a substantial loss of vertical equity in particular at the extremes. 78

VI. The Move to Capital Gains Taxation in South Africa

A. Legal Transplants

The government of South Africa carefully considered the experience of other countries in deciding how to reform its own system. 79 Indeed, it was the widespread adoption of capital gains taxation both in developed and developing countries that was cited as a strong reason for adoption of capital gains taxation. 80

It is generally accepted that laws, like peoples, migrate across the globe. 81 The study of foreign laws adoption is known as the study of legal transplants. 82 The voluntary borrowing of foreign law by legislative enactment, known as reception, is the most extensively used legal transplant technique. 83 The popularity of reception in tax law is illustrated dramatically by the widespread adoption of the value added tax since its first implementation in the middle of the twentieth century. 84

Before a government borrows a foreign solution, it should consider the adaptability of the transplant to the local culture. Professor Watson

al., supra note 4.
78. See Finance Portfolio Committee, supra note 72, at 3.
79. Portfolio and Select Committee on Finance, supra note 28, at 3-11.
80. See id. at 3.
82. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 20 (1974).
83. Orucu, supra note 81, at 12.
84. The value added tax was first adopted in France in 1954. See GUIDES TO EUROPEAN TAXATION Vol. IV, VALUE ADDED TAXATION IN EUROPE, Preface 1 (1993). The tax is now universally applied in the European Union and has steadily spread to other countries throughout the world. See Sijbren Cnossen, Introduction, Table 1.4 EC, at 29, in TAX COORDINATION IN THE EUROPEAN COMMUNITY (S. Cnossen, ed., Kluer 1987); INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION, ANNUAL REPORT 1992, at 11, 21, 27, 41, 62 (1993).
insists that legal transplants are only possible if the two countries share a common legal tradition.\textsuperscript{85} Certainly, any transplant requires considerable adaptation to the local social and economic context,\textsuperscript{86} and it may be difficult to successfully adapt a foreign solution. In tax, however, transplants are not only common from a country in one legal family to another, but they also have been quite successful.\textsuperscript{87}

One obvious reason that tax transplants have succeeded is that the development of tax as the cornerstone of the modern state is largely a recent, western development. Nations seeking to adapt to the modern technological world need the revenue modern tax structures can provide. Enormous prestige is associated with the public law of the Western democracies. In the case of value added tax, the adoption of modern techniques of record keeping and accounting are likely sufficient to explain its adaptability to different legal traditions.

Income tax law's adaptability cannot be so easily explained. Even when one gets beyond the difficulties that developing economies have in implementing income tax, for example, the income tax is often a tax solely on the wages of government and large corporations' workers.\textsuperscript{88} Moreover, modern income tax is identified with the particular power structure of democratic society.

Not only is progressive income taxation ideologically inconsistent with undemocratic or unrepublican forms of government, but for income taxation to be successful it must be popularly imposed and accepted. First, many of the aspects of income taxation are voluntarily- or self-administered. Second, income tax, in contrast to the value added tax, is visible to the taxpayer. These difficulties, however, may be attractive to aspiring democracies. In addition, income taxation has clear strengths. Income tax is cheaper for governments to administer, especially where it is self-assessed. Value added tax is costly in part because of the considerable administrative oversight of taxpayers. Finally, income tax developed from democratic principles of fairness, including the concept that tax should be imposed on the basis of ability to pay; value added tax is undemocratic because it is based on consumption and is quite regressive.

When considering a foreign solution, a nation must be aware of the

\textsuperscript{85} See \textsc{Watson}, supra note 82, at 7.


\textsuperscript{87} See supra note 84 and accompanying text.

rationale for the tax rules. Law is the expression of the political and economic beliefs of society, thus, to adopt a foreign solution is to adopt its purpose. When considering foreign solutions in income tax law, legislators can consciously propose to give legal effect to the social change wrought by democratic institutions or promote such social change.

Income tax law, nevertheless, must be sown in the earth of its new location and adapted to local conditions and mores. What allows income tax law to be easily transplanted is its essential nature as a concept, not a rule-based scheme. South Africa did not adopt a system of rules from the codes of the United States or the United Kingdom, though it studied these with great care. Instead, South Africa adopted the concept of capital gains in its own legislative design, thus allowing the law to develop in light of its own jurisprudence.

B. Adopting the Law

The importance of the approach to comparative tax law that does not simply focus on rules and doctrine but understands tax law as ideology, legislation and law-in-action, is poignantly illustrated by South Africa's adoption of capital gains tax. What can be seen in the South African experience is the government's use of income taxation to accomplish democratic goals.

The government started with an ideology of more equitable and efficient taxation. It then implemented the concept of capital gains taxation and adapted it to the tax culture of South Africa. In doing so, the legislature made some improvements on the structure that other countries should consider. Next, the legislature anticipated the conflict between democratic tax reform and its reception by the courts and the other interpreters thus recognizing the reality of the law-in-action. Its precise and detailed legislative drafting style was intended to control the discretion of the judiciary.

C. Discovering Values

To say that the meaning of a statute can be derived from its aim and purpose merely shifts the inquiry to discovering those values. Democratic theories of law provide that the inquiry start first with those sources related to the democratic process, that is the inherent teleology

89. See Ewald, supra note 12, at 2143-44.
90. See Barker, supra note 1, at 867-869.
91. See discussion infra notes 124-28 and accompanying text.
92. See discussion infra notes 137-41 and accompanying text.
derived from the statute’s scope and structure,\textsuperscript{93} and second, with the legislative history, where available.\textsuperscript{94} South Africa follows the traditional approach to the use of legislative history that was found in the United Kingdom before Pepper v. Hart.\textsuperscript{95} The general rule is that the basic sources of legislative history, government and minister’s statements explaining the act, parliamentary debates, and marginal notes to the act cannot be used to interpret the act in South Africa.\textsuperscript{96} An important exception is that legislative history can be used to determine the specific problem that the legislation was intended to remedy.\textsuperscript{97}

In addition, there may be fundamental principles to which all law is subject. These can be found in the constitution or outside the constitution. Such notions include the rule of law, equality before the law, and fairness.\textsuperscript{98} Tax law in South Africa is now subject to the principles of equality and equity expressly or impliedly found in the Constitution, which is the supreme law of the Republic.\textsuperscript{99}

Finally, tax law may be held captive to the requirement of consistency with private law or civil law forms, that is, the terms must have the same meaning for tax even though such meaning might conflict with the meaning tax’s purposes might suggest. This is a tendency in civil law countries.\textsuperscript{100} In the United States, the clear trend is to give a uniform meaning to private law forms seeing that otherwise the meaning could be different in each of the fifty states. For example, terms like “sale” and “gift” have been given a uniform meaning by the courts.\textsuperscript{101}

\textbf{D. Making Values Law}

The top down theory of law as seen by the legal positivists is an appropriate starting point for analyzing the transplant of capital gains taxation in South Africa.\textsuperscript{102} The wisdom of the South African legislature was to begin this process with its ideological goals.

\textsuperscript{93} \textit{Id.} at 859.

\textsuperscript{94} The use and treatment of legislative history is rare outside of the United States. The United Kingdom has a limited approach to the use of legislative history. \textit{See Pepper v. Hart}, [1993] 1 All E.R. 42, 47 (Eng.); \textit{see generally} Barker, \textit{supra} note 1, at 828.

\textsuperscript{95} \textit{See Pepper}, 1 All E.R. at 47.

\textsuperscript{96} \textit{See Williams, supra} note 70, at 10.


\textsuperscript{98} \textit{See} the discussion of the jurisprudence of the German Constitutional Court which has considered the constitutionality of tax legislation on the basis of its compatibility with principles of equality and due process in A. Radler, \textit{Germany}, in \textit{Ault, supra} note 21, at 61-62.

\textsuperscript{99} S. Afr. Const. (Act 108 of 1996), § 2; \textit{see also} Williams, \textit{supra} note 70, at 11.

\textsuperscript{100} \textit{See} Thuronyi, \textit{supra} note 27, at 125-6.


\textsuperscript{102} \textit{See} Orucu, \textit{supra} note 81, at 253.
As outlined in the legislative history, capital gains taxation produces more equity in the income tax by broadening the tax base.\textsuperscript{103} It also promotes redistribution by taxing more effectively high income individuals, thus "markedly improving the vertical equity of the income tax system.\ldots\"\textsuperscript{104} Observing the experience of the United States and Canada, it was noted that the top one percent of taxpayers were responsible for over sixty percent of the capital gains.\textsuperscript{105} This observation led to the suggestions that "[t]he high inequality [of wealth] in South Africa\ldots makes it absolutely necessary to include capital gains.\"\textsuperscript{106}

The South African legislature also recognized that capital gains tax "serves as a backstop to the income tax system" to prevent some tax avoidance opportunities.\textsuperscript{107} In order to appreciate the importance of capital gains taxation to the integrity of the income tax system and to understand why capital gains taxation is one of the most "essential elements" in comparative tax, one must briefly examine the history and theory of capital gains taxation from a world perspective.

What are capital gains? In a very general way, capital gains are non-recurring gains from the disposition of properties that do not form part of the normal stream of income from employment, business, or investment. Are capitals gains income? The answer is that our views on this question have changed over time.

The first truly comprehensive income tax law was enacted in 1799 in the United Kingdom.\textsuperscript{108} Though it taxed the total income of its residents, it did not tax capital gains.\textsuperscript{109} The word income, which suggests inflows of items of value, does not indicate on its face that the gains from the sale of capital assets should be excluded, and there was no specific language in the statute to that effect.\textsuperscript{110} Economic theory at the time, however, held that income was the flow of value or uses from things.\textsuperscript{111} According to the judicial view of the time, income for tax purposes was a periodic, recurring flow of values that came from a durable source separate from the flow.\textsuperscript{112} Thus, the realized gain in the value of the property was not an income

\begin{footnotes}
103. Portfolio and Select Committee on Finance, supra note 28, at 1.
104. \textit{Id.} at 11-12.
105. \textit{Id.} at 11.
106. \textit{Id.}
107. \textit{Id.} at 1.
109. \textit{Id.} at 29.
110. \textit{See} 3 \textsc{Stephen Dowell}, \textsc{A History of Taxation and Taxes in England} 92-93 (citing Income Tax Act, 39 Geo. 3, ch. 13 (Eng. 1799)).
112. \textit{Id.} at 21-25.
\end{footnotes}
amount severable from that capital. The primary notion was that income is what is left after capital has been preserved. Increments in the value of capital were still capital. For example, land is still capital whether it increases in value or is turned into money.

The English view dominated until the United States began taxing income. From the beginning, it was assumed that income included capital gains. America held this view even though economic theory had not yet reached a consensus on the relationship between capital gains and income. The American view was based on the simple pragmatism that wealth was no longer determined by land ownership, but was instead represented by money. Thus, an increase in one’s store of money was income even when the increase was from a gain in the value of one’s capital accrued over several years.

The modern economic view today still reflects the general principle that capital is separate from income. Modern theory, however, has made the distinction between income and capital less equivocal. It links income to consumption. Income is that which is available for consumption while maintaining capital. The difference is that capital today means original capital in money value; realized appreciation is available for consumption leaving original capital intact. In modern income tax systems, original capital is represented by the concept of base cost.

The previous description of United Kingdom law is very familiar to South Africans. Though South Africa did not adopt a schedular system, South Africa did adopt a concept of income from particular sources and, until recently, when it adopted residence-based, worldwide taxation, those sources had to be found in South Africa. In addition, until the enactment of legislation in 2000, South Africa did not tax capital gain. This was due to the explicit wording of the Act, first found in the 1917 legislation, and is still in the statute today, that excluded from gross income “receipts and accruals of a capital nature.”

The committee report to the new South African legislation indicated that capital gain should be treated like other income. “International best practice strongly suggests that capital gains ideally should ideally attract

113. For a history of the American experience, see Barker, supra note 1, at 837-840.
114. Id. at 844-46.
115. See generally HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938).
117. § 1 of Income Tax Act 58 of 1962 (S.Afr.). This remains the definition today because capital gains are taxed under a separate regime. Id. at Schedule 8. The legislative history to the capital gains provision made it clear, at least in the opinion of the Ministry, that capital gains were income. Portfolio and Select Committee on Finance, supra note 28, at 3, 11.
the full income tax as other forms of income as the continued preferential treatment of capital gains will perpetuate avoidance and decline in tax morality by the low income taxpayer who cannot afford the use of tax advisors.\footnote{118} Yet the compromised legislation provided that only twenty-five percent of the net capital gain realized by individuals is included in taxable income, resulting in effective rates of zero to ten percent, where the normal rates range from eighteen percent (zero percent after rebates) to forty percent.\footnote{119} For other taxpayers, like companies, fifty percent of capital gain is included, the effective rate is therefore cut in half.\footnote{120}

Differential tax rates are a defining element in taxation because they directly diminish vertical and horizontal equity. Moreover, echoing the thoughts of the South African legislative history, whenever tax law differentiates between kinds of income or activities, treating some more favorably than others, the potential tax savings encourage tax planning and manipulation.\footnote{121} Even though South Africa now taxes capital gains, the relative weight of taxation is low as compared with the normal tax on income. Preferential taxation of capital gain has and will lead to statutory and jurisprudential complexity in the attempt to secure the appropriate classification.

Almost as important as differential rates is the requirement of realization in taxation. The realization doctrine provides that the mere fluctuations in the market value of assets are not taxed until the gain or loss has been made certain by a disposition of the asset.\footnote{122} South Africa has spelled out the disposition requirement in great detail.\footnote{123} What makes South Africa’s legislation so progressive is that is has adopted the English doctrine of deemed dispositions and has carried it beyond the English practice to its logical conclusion.\footnote{124} South Africa treats a taxpayer who changes her status from a resident to a nonresident as having made a notional sale for value of all of her property located outside of South Africa.\footnote{125} It also treats the change in use of property (i.e., business use to personal use),\footnote{126} as a gratuitous disposition of that

\begin{itemize}
\item \footnote{118} Portfolio and Select Committee on Finance, \textit{supra} note 28, at 3.
\item \footnote{119} § 1 of Income Tax Act 58 of 1962; Schedule 8, § 10(a).
\item \footnote{120} \textit{id.} at Schedule 8, § 10(c).
\item \footnote{121} This fact was fully recognized by the legislature. \textit{See} Portfolio and Select Committee on Finance, \textit{supra} note 28, at 12, 13.
\item \footnote{122} For a thorough treatment of the concept of realization in the United Kingdom and the United States, \textit{see} Barker, \textit{supra} note 23, at 33-74.
\item \footnote{123} § 1 of Income Tax Act 58 of 1962; Schedule 8, §§ 11, 12, 38, 40.
\item \footnote{125} § 1 of Income Tax Act 58 of 1962; Schedule 8, § 12.
\item \footnote{126} \textit{id.}.
\end{itemize}
property,\textsuperscript{127} and transfer of property at death as a notional sale for value.\textsuperscript{128}

\textbf{E. Law in Action: The Interpreters}

The study of comparative law must also be the study of law-in-action. Law is not simply the positive law of the legislature, but is also the law of the statute as applied to the human condition by the law's interpreters. The law's interpreters not only include the professional class, that is judges, administrators, private counselors, and scholars, but also the private parties who must initially interpret by applying its commands to their individual circumstances.\textsuperscript{129}

"How law is perceived and used by subjects is as significant for the purposes of understanding as the motives, aims and decisions of those who control a legal system."\textsuperscript{130} The South African legislature, drawing its inspiration from its political purpose, designed its own system to implement the concept of capital gains. Though without doubt there are similarities between the act and American and English provisions, the legislators engaged in a process of selecting and purging\textsuperscript{131} to mold the concepts to the local setting. The legislature had the difficult task of fitting the new doctrine within the current structure of income taxation as developed by the legal method of jurists.

Central to all income taxation is the distinction between capital and income receipts or capital gains and ordinary income. The legislature noted the importance of this issue to the fundamental thrust of its legislation when it noted, "[a]ccording to the Commissioner, one in five

\begin{itemize}
  \item \textsuperscript{127} \textit{Id.} § 38.
  \item \textsuperscript{128} \textit{Id.} § 40.
  \item \textsuperscript{129} This conception of the importance of different actors to the formulation of law in action is broader than Rodolfo Sacco's concept of "legal formants" which he describes in the following terms: "The living law contains many different elements such as statutory rules, the formulations of scholars and the decisions of judges..." Rodolfo Sacco, \textit{Legal Formants: A Dynamic Approach to Comparative Law I}, 39 \textit{AM. J. COMP. L.} 1, 22 (1991).
  \item \textsuperscript{130} \textit{Twining, supra} note 12, at 134. Two examples demonstrate the power of the taxpayer-interpreters. In Italy, the income tax legislation makes a distinction between speculative gains which are taxable and nonspeculative gains which are not. Laura Castelluci, \textit{Italy, in Comparative Tax Systems: Europe, Canada and Japan} 217 (Joseph A. Pechman, ed. 1987). When the author taught there in 1986, it was common knowledge that no one reported speculative gains, and that the administration had yet to challenge that position.
  \item \textsuperscript{131} Pierre Legrand, \textit{Comparative Legal Studies and Commitment to Theory}, 58 \textit{MOD. L. REV.} 262, 269 (1995).
\end{itemize}
cases litigated by SARS [South Africa Treasury Service] involves the capital v. ordinary distinction.132

Legal method is the application of the techniques and values of the professional classes to the law as legislation. All legislation must take into consideration that legal method is a priori.133 Comparative analysis can have no hope of understanding law in action without recognizing the potential disconnect between the principles and purposes of the legislation and those of the judiciary. The principle of equality operates in the tension between democracy and the rule of law.134 On the one hand, democracy and majority rule presents the potential for the equality of the collective and economic equality through tax and redistribution of wealth. On the other hand, the judicial dimension of the rule of law represents the equal treatment of individuals based on certain fundamental rights.135 The latter translates concretely as the courts’ role to protect taxpayers.136

In tax, this conflict plays out in the traditional preference for literal over purposeful interpretation of tax statutes.137 South Africa has been deeply influenced by the United Kingdom, and has followed this tradition.138 The requirement of certainty achieved through literal interpretation was succinctly stated by an English court in 1921:

It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax.... Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.139

In such a context, the legislator can only react by trying to accomplish its purpose through very precise and detailed drafting. The flavor of the problem is suggested by the definition of “disposal” in the South African capital gains act, which begins by relating that “a disposal is any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset,”140 and then includes thirty-one specific instances of the definition.141 In contrast in

132. Portfolio and Select Committee on Finance, supra note 28, at 13.
133. Barker, supra note 1, at 878.
134. THE PRINCIPLE OF EQUALITY IN EUROPEAN TAXATION 2 (Gerard T.K. Mousen, ed. 1999).
135. Id. at 11.
136. Id. at 8.
137. See Barker, supra note 1, at 826-32, 850-59.
138. WILLIAMS, supra note 70, at 11.
139. See Cape Brandy Syndicate v. Inland Revenue Comm’rs, [1921] 1 K.B. 64, 71 (Eng. C.A. (1920)), aff’d, [1921] 2 K.B. 403 (Eng. C.A.). This case was cited as reflective of South African jurisprudence in WILLIAMS, supra note 70, at 11.
140. § 1 of Income Tax Act 58 of 1962; Schedule 8, § 11.
141. Id.
the United States, the act defines the taxable event as "the sale or other disposition of property." 142 The simplicity of the American statute and its considerable reliance on concepts as opposed to detailed rules is a product of a different tradition in the interpretation of tax statutes, a more liberal, purpose-based approach. 143

The promise of democratic economic reform contained in income tax law is closely tied to the role legal method plays in either limiting the scope of tax legislation through literal, conservative interpretation, or expanding the scope through purpose-based, liberal interpretation. The actual process of interpretation reflects different views society has of social life and the appropriate goals of a democratic society. There exist strongly advocated and contradictory ideological conceptions of the relation between the individual and the collective.

South Africa confronts these issues as a society in transition. The end of Apartheid witnessed a unique revolution; the legislature and the executive both were transformed by the new democratic forces. The judiciary, to the contrary, was left largely alone except for the addition of the new Constitutional Court and the addition of rules on the appointment under the new constitution of new judges. 144

South Africa in its new constitution has recognized the government's obligation to provide basic economic rights to its citizens. 145 The section on equality provides: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislation and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken." 146

One should certainly consider whether the reformed income and capital gains tax system is designed to remedy the discrimination of Apartheid South Africa. If so, does the new constitution promote reconsideration of the role that the rule of law plays in the protection of individual rights in the face of the mandate for economic rights? For tax this would mean interpreting statutes in keeping with a more sympathetic view of the aims and goals of the legislature, giving effect to these purposes through expansive interpretation.

An example is drawing the difficult divide between capital receipts and income receipts, which remains a critical distinction due to the low rates on capital gains. Can the purpose of the legislature aid the judiciary

143. Barker, supra note 1, at 861-65.
146. Id. § 9(2).
in a close case? Though there is no real consensus in the world today as to why capital gains should be given preferential treatment, the South African legislature came to the reluctant decision to tax capital gains preferentially due primarily to the problem of bunching and inflation. A court's recognition of the underlying rationale for the legislative exception might help it resolve the difficult case.

So far, the style of legislative drafting and the judiciaries' patterns of legal reasoning in South Africa leave little room for such an advance. In considering this fundamental problem the legislature recognized that the distinction was the subject of countless cases that have produced a vague standard. It viewed the present distinction as making little economic sense. Its solution was to reform this distinction with future legislative guidelines. To date, guidelines have not been proposed.

VII. Conclusion

Can democratic reform truly be achieved? Not with the legislature and the courts at odds. The legislature is the democratically constituted agency that defines the law and its purpose. The courts, however, control the outcome through the power of legal method. Legal method must embrace the legislatively constituted purpose in order to make it a reality.

South Africa teaches us a lesson concerning this dynamic. The traditional method of the legislature in tax matters is a conservative one. This is due to the literalist approach of the judiciary to tax matters. The legislature responds by taking a cautious, literal approach of its own relying on the force of the written word. The judicial reaction is consequently a somewhat arbitrary adherence to rules and forms. South Africa's own experience with such legislation demonstrates that such adherence leads to manipulation and tax avoidance. Indeed, it has been

147. Portfolio and Select Committee on Finance, supra note 28, at 13.
148. In the United States, a capital asset is defined as all property with certain specific exceptions. I.R.C. § 1221 (2000). The United States Supreme Court has regularly interpreted this language in keeping with its understanding of Congress' intended scope for the preference. The Court has stated that the purpose behind the capital gains preference was "to relieve the taxpayer from ... excessive tax burdens on gains resulting from the return of capital investments, and to remove the deterrent effect of those burdens on such conversions." Burnet v. Harmel, 287 U.S. 103, 106 (1932). In several cases, the Court has limited the definition of property where it deemed preferential treatment was inappropriate. See, e.g., Hort v. Commissioner, 313 U.S. 28 (1941) (carve out of a term interest); Corn Products Refining Co. v. Commissioner, 350 U.S. 46 (1955) (commodity futures).
149. See Portfolio and Select Committee on Finance, supra note 28, at 12-13.
150. See id. at 13-14.
151. Id. at 14.
said that there is judicial sanction for such a result.\textsuperscript{152}

It would be far better to form a partnership between legislator and judge to develop the tax law in such a way to bring about the realization of democratic objectives.\textsuperscript{153} This partnership requires that each body be given the respect that its talents deserve, and, thus, on the one hand, the courts must acknowledge a latitude to legislative action to formulate policy for democratic objectives and, on the other hand, the legislature must acknowledge through legislation a latitude for judicial action to apply legislative policy in the resolution of concrete cases.

The insights gained from the study of comparative tax law help define the relationship between law and economic reality. Humankind's lot can be contrasted in terms of conflicting class interests in a democratic, capitalist society. Income tax is particularly suited to establishing the symbiosis between law and class interest. Yet, unlike the suggestion that "certain legal solutions actually accompany any instance of a given class structure, and that certain class structure actually correlates with the emergence of a given legal solution,"\textsuperscript{154} the comparative study of tax law affirms the conclusion that achieving a democratic policy of economic equality is the result of a struggle for its recognition which must be constantly advanced.\textsuperscript{155}

Thus, comparative tax law is critical to a more complete understanding of how democratic society grapples with the problems of economic equality. It can bring the poignant experiences of others to bear on one's own successes and shortcomings. It helps us see that achieving tax justice depends on first understanding the interplay of ideology, the defining elements of tax legislation, and law's interpreters, so that second, the people can require tax law to give their values meaning.

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\textsuperscript{153} For example, see the discussion of the role of legal method in the progressive development of the concept of income in the United States in Barker, supra note 1, at 856-59. See also Professor John Avery-Jones' advocacy of the use of more open-ended legislative drafting in the United Kingdom. John F. Avery Jones, Tax Law: Rules or Principles? 1996 Brit. Tax. Rev. 580 (1996).
\textsuperscript{155} See generally Barker, supra note 1, at 880.
\end{flushleft}