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## Tax and Time: On the Use and Misuse of Legal Imagination

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## Introduction

Time. Its texture, nature, and qualities have long perplexed and preoccupied scientists and philosophers alike. Indeed, as Paul Horwich put it in the preface to his book *Asymmetries in Time: Problems in the Philosophy of Science*: “Time is generally thought to be one of the more mysterious ingredients in the universe. Perhaps some of the reason for this is that *understanding* is often a matter of finding analogies. But time is unique; there’s nothing else remotely like it.”<sup>1</sup>

In the scientific realm, Albert Einstein famously upended preexisting notions of time and space when he published his theory of special relativity in the early twentieth century. Horwich’s warnings notwithstanding, Einstein later wrote a book explaining his complex theories for a nonexpert audience.<sup>2</sup> While hardly beach reading,<sup>3</sup> *Relativity: The Special and General Theory* endeavored to unravel some of the mysteries of time for the general reader, including the idea of the “relativity of simultaneity.” Einstein illustrated this seemingly paradoxical notion using a simple example, explaining that a passenger traveling in a train would not perceive simultaneous lightning strikes at opposite ends of the railway line as having occurred simultaneously because

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<sup>1</sup> PAUL HORWICH, *ASYMMETRIES IN TIME: PROBLEMS IN THE PHILOSOPHY OF SCIENCE*, at xi (1987).

<sup>2</sup> ALBERT EINSTEIN, *RELATIVITY: THE SPECIAL AND GENERAL THEORY*, at v (Robert W. Lawson trans., 1920).

<sup>3</sup> *See id.*

the passenger would be traveling toward one of the lightning strikes and away from the other while the light from the strikes was traveling toward the train.<sup>4</sup>

Before and after publication of Einstein’s theory of relativity, continental philosophy—which is notoriously less accessible reading than *Relativity: The Special and General Theory*—likewise engaged with questions of time and temporality. In fact, in the introduction to *Time and Philosophy: A History of Continental Thought*, John McCumber described continental philosophy in all its “boisterous diversity” as “the philosophical resonance of time itself.”<sup>5</sup> McCumber continued:

For time is the slipperiest of topics, and one of its aspects—the future—is by definition unknowable, an inscrutable source of unimagined surprise. New ways of understanding it are thus inevitable. Moreover, if a single method, or even family of methods, for understanding the future could be settled on, continental philosophy would have discovered a truth or truths held for all time, and would itself become traditional. The proliferation of different ways of conceiving not only the future, but also the past and present, is thus part and parcel of continental philosophy’s temporalized approach.<sup>6</sup>

For most of us, however, the passage of time doesn’t seem slippery or mysterious. It just seems normal and natural, calling for no great introspection such as that engaged in by Einstein or continental philosophers. We take time for granted as we live our lives. We set off to, and

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<sup>4</sup> *Id.* at 30–33.

<sup>5</sup> JOHN MCCUMBER, *TIME AND PHILOSOPHY: A HISTORY OF CONTINENTAL THOUGHT* 11 (2011).

<sup>6</sup> *Id.* at 11–12.

later return home from, work, school, or errands each day. As we proceed through our routines, the sun reliably rises and sets each day, and as the days accumulate, one season, year, or even stage of life passes to the next, occupying no more than the background of our life stories. This is not to say that we are wholly oblivious to the passage of time, because our perception and experience of time do occasionally vary and thus become noticeable to us. For example, time can seem to move at different speeds in different situations—whether excruciatingly slowly, remarkably quickly, or perhaps even not at all, as so many of us were reminded when confined to our homes during the COVID-19 pandemic in 2020 and 2021.<sup>7</sup> Or, we might occasionally find ourselves lost in reverie regarding real or imagined times past, present, or future.<sup>8</sup> Nonetheless, we tend to take time as a given in our daily lives and operate within and through time without giving it much thought.

When we do give thought to time, whether in life or in law, we generally perceive it as linear; that is, we think of time as moving from the past through the present and into the future—such as the progression from morning to evening; from one day or week to the next; and, over the course of our lifespans, from birth to death—with no possibility of reversing this flow. Just consider how we talk about time: we characterize it as *flowing*, *passing*, *going by*, or even *flying by*.<sup>9</sup> As anthropologist Carol Greenhouse has put it:

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<sup>7</sup> Alan Yuhas, *What Day Is It? No Rhythm and Deepening Blues*, N.Y. TIMES, Apr. 15, 2020, at A4.

<sup>8</sup> *E.g.*, MARCEL PROUST, *DU CÔTÉ DE CHEZ SWANN* (1913).

<sup>9</sup> *See* HORWICH, *supra* note 1, at 33–36.

“We” moderns are supposed to know that time is “really” linear and infinitely so. We are supposed to know that time is about motion, change, mortality, and progress. We are supposed to know that linear time rationalized the periodicity of cyclical time and lifted the veils of timelessness from the now-visible face of human experience, and that the clock is the essential technology of modern life. But “we” have also devised a strategy for resisting linear time: we imagine that there exist people not preoccupied with change; we are supposed to know that some of *them* are happier, more sociable, more provincial, more attuned to nature and less skeptical of their rituals. If we are romantics, we imagine ourselves experiencing this liberation in love, faith, or travel to exotic places. If we are *post*-moderns, though, we also know that we are not supposed to think this. The difficulty of developing intellectual strategies for dismantling the privileges of linear time cross-culturally and, even more so, in the examination of more familiar cultural terrain, is compounded by such contemporary Western engagements with the idea of time.<sup>10</sup>

But as we will explore in the pages of this book, there is no need to fall in love, to embrace religion, to vacation on a tropical island, or even to embrace a postmodernist perspective in order to liberate ourselves from the linear representation of time that ostensibly rules our daily lives and our laws. To witness and experience the plasticity of time, we need look

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<sup>10</sup> Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1633–34 (1989) (footnotes omitted); see David M. Engel, *Law, Time, and Community*, 21 LAW & SOC’Y REV. 605, 606–07 (1987).

no further than the tax system. You might be asking yourself: “Tax? What is so important about tax law that merits a book considering the relationship between time and tax law? Why should we care about how time is used in tax law?” The answer to these questions is simple: tax law is simultaneously omnipresent in our lives, the essential lifeblood of the society that we share together, and a tangible expression of what and whom society values. Itself a powerful presence in our lives, time intertwines with tax law in a myriad of ways—some easily seen, others unnoticed, but all eminently pliable and capable of remodeling. These interactions between time and tax law can affect how the burden of funding public goods is distributed and serve to shape the messages that the tax system sends about what and whom society values. How we choose to manage—and, often to creatively manipulate—these interactions between time and tax law thus implicates fundamental questions of social justice that should concern—and be brought to the attention of—all members of society.

### The Importance of Examining Tax Time

Unlike many other areas of law, tax law touches each of our lives on a daily basis.<sup>11</sup> To take the United States (where I live) as an example: Americans interact with the tax system as they go

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<sup>11</sup> If, as Carol Greenhouse suggests, law exists in an “all-times,” *see infra* text accompanying note 87, tax law combines this “all-times” with an existence in “all-space” due to its ubiquitous, hovering presence all around us—a presence for US citizens and residents that exists without borders. I.R.C. § 2031(a); Treas. Reg. §§ 1.1-1(b) (as amended in 2008), 25.2501-1(a)(1) (as amended in 2020); *see* MARIANA VALVERDE, CHRONOTOPES OF LAW: JURISDICTION, SCALE AND GOVERNANCE (2015). But, as explored in chapter 2, space, like time, is open to manipulation in tax law.

about their routines each day, whether they realize it or not. When they run errands (in virtual or real life), they often pay sales taxes on the goods or services they purchase.<sup>12</sup> When they work, they create income and/or payroll tax liabilities—a fact that is driven home each pay period by withholding that their employers subtract from their wages and pay over to the government (or, for the self-employed, through quarterly payments of estimated taxes to the government).<sup>13</sup> When they fill up the gas tank in their car, they pay excise taxes.<sup>14</sup> When they find a place to live, they pay property taxes (directly or indirectly) on the roof over their heads.<sup>15</sup> Even births and deaths can trigger tax consequences; for instance, they can claim a newborn child as a dependent for income tax purposes and can trigger estate or inheritance tax obligations when they pass away.<sup>16</sup>

Without all of the taxes that are paid every day, we wouldn't have police to protect us, public transportation or highways to drive on, schools to send our children to, courts to settle our disputes, or any of the other physical and social structures that government provides to facilitate

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<sup>12</sup> JANELLE CAMMENGA, TAX FOUND., FISCAL FACT NO. 686, STATE AND LOCAL SALES TAX RATES, 2020 (2020). The US Supreme Court has now eased the way for states to tax sales made over the internet. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

<sup>13</sup> I.R.C. §§ 1, 1401, 3101, 3102, 3402, 6654.

<sup>14</sup> Janelle Cammenga, *State Gasoline Tax Rates as of July 2020*, TAX FOUND. (July 29, 2020), <https://taxfoundation.org>.

<sup>15</sup> *Property Taxes*, URB. INST., <https://www.urban.org> (last visited Nov. 30, 2020).

<sup>16</sup> *E.g.*, I.R.C. §§ 152, 2001; 72 PA. STAT. AND CONS. STAT. ANN. § 9116 (Westlaw through 2020 Reg. Sess. Act 95).

our lives together and to ensure that society runs as smoothly as possible. Moreover, taxes are not only ubiquitous and necessary to fund the provision of public goods but also serve an important expressive function.<sup>17</sup> Each member of society does not contribute equally to funding public goods, because so-called head taxes are seen as neither a popular nor a fair way of distributing the tax burden. Instead, in crafting a tax system that allows for differing contributions to the common good based on ability to pay, a society expresses its collective notion of what a fair distribution of the tax burden looks like. Whether those who have reaped greater benefit from the socioeconomic structures that government has created are called upon to contribute more—or less—than those who have been left out or left behind speaks volumes about a society. Moreover, the choices made regarding precisely what, whom, and how to tax say things about what and whom a society values. Placing a tax imprimatur on someone or something is no empty statement; after all, tax encouragement or approval comes in the form of tangible financial benefits (e.g., tax exemptions, deductions, or credits). Conversely, tax discouragement or disapproval results in a heavier exaction that is experienced through the sting of a tax penalty.

Unsurprisingly, then, how a country uses time in its tax laws sends important messages about its political, social, and cultural context. We will discover through our exploration of “tax time” that, far from linear or even romantic, time in tax law is really what we make of it—and what has been made of it, particularly in the United States, resembles more the fantastical

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<sup>17</sup> For an in-depth exploration of this question, see ANTHONY C. INFANTI, *OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES* (2018).



creations of literary fiction than it does run-of-the-mill legal fictions.<sup>18</sup> As with literature, studying manipulations of time in and through US tax law helps to reveal the character of Americans as a people, by shining a light both on their good intentions in imagining a more just world and on the more sinister side of the tax imagination that uses time to entrench and exacerbate existing inequalities in US society.

But in the limited space of these pages, we will not be able to examine the relationship between time and all of the different taxes that exist in the United States. Rather, the primary focus in here will be on examining select aspects of the relationship between time and the income tax, as it “raises particularly interesting issues because income is a concept defined by reference to time.”<sup>19</sup> Furthermore, the income tax is perhaps the most salient of taxes in the United States as well as the source of more than half of all US federal tax revenue—not to mention a significant source of revenue in other countries too.<sup>20</sup>

The remainder of this introduction begins our study of tax time by first discussing some of the obvious ways in which time surfaces in US federal income tax law—from the need to

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<sup>18</sup> See, e.g., Tessa Davis, *Tax and Social Context: Legal Fictions Within Tax*, 4 SAVANNAH L. REV. 31 (2017); Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1 (2010).

<sup>19</sup> Joanna Wheeler, *Double Tax Relief and Time*, in *TIME AND TAX: ISSUES IN INTERNATIONAL, EU, AND CONSTITUTIONAL LAW* 27, 27 (Werner Haslehner et al. eds., 2019).

<sup>20</sup> ORG. FOR ECON. COOP. & DEV., *REVENUE STATISTICS: 1965–2018*, at 67 tbl.3.8, 68 tbl.3.9 (2019); *Policy Basics: Where Do Federal Tax Revenues Come From?*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org> (last updated Aug. 6, 2020).

determine the appropriate period for reporting tax to establishing methods of accounting for allocating income and expenses among reporting periods to more esoteric questions about the “time value of money.” Having acknowledged the practical timing questions that face taxpayers, their advisers, and the Internal Revenue Service, this introduction then makes clear that the focus of this book is *not* on revisiting this well-trodden ground. Instead, this book opens tax law to a burgeoning area of research that explores the deeper and more complicated connections between law and time. A brief survey of US contributions to this line of research is provided to give the reader a sense of the types of interesting and thought-provoking questions already being examined outside the tax area—from how law constructs time to questioning the linear representation of time to revealing the multiplicity of ways in which time can be seen as operating through and within law.

The final section of this introduction then lays out the basic idea underpinning this book and sketches out how that idea will be explored in the coming chapters. Put simply, the basic thesis of this book is that *time can be seen as surfacing in tax law in important ways that are untethered from conventional notions of time and that are more akin to creative acts of legal imagination*. Upending taken-for-granted linear notions of time, we will explore how, through tax law, it is possible to travel back in time by rewriting the past and then to act upon that rewritten past in the tax present and future as if it had actually occurred. We will consider how time is converted into a currency in tax law—a currency that taxpayers can use to purchase valuable benefits and one that is regularly dispensed by government as a reward. And showing that we do not (and should not) always take time for granted, we will examine how taxpayers sometimes react to exercises of the tax imagination, fearing the ways in which the imaginative power of tax time might be used against them. As a US tax academic, my main focus is on

exploring the intersection of tax and time in US law; however, given my interest in comparative tax law,<sup>21</sup> throughout these chapters we will also consider examples from other countries when those examples might enrich the discussion by reinforcing a point or by providing an interesting contrast to the US approach to dealing with tax time.

As a self-identified critical tax scholar—that is to say, as someone who is concerned with the operation of our tax laws on marginalized groups and in working to advance tax and social justice—I also consider throughout this book the broader, normative questions raised by these examples of the tax imagination at work. After all, as Emily Grabham and Siân Beynon-Jones have observed, “analyzing the ‘making’ of legal temporalities, if anything, only intensifies our accountability and responsibility to act in and on the world in ways that work toward social justice.”<sup>22</sup> With this admonition in mind, once freed from the bonds of convention and empowered to imagine a world that is simultaneously within and beyond time, I ask to what end this imaginative power has been brought to bear. Has the power to reimagine time been used to serve ends of justice or injustice? Having created a socially constructed notion of time that directly affects the doling out of tax benefits and the imposition of tax burdens, what do the choices made in deploying the tax imagination say about society—about what and whom society values and, conversely, about what and whom society ignores or devalues? With a heightened awareness of the unbounded nature of tax time, I argue that a systematic examination needs to be

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<sup>21</sup> See, e.g., INFANTI, *supra* note 17, chs. 3–4.

<sup>22</sup> Emily Grabham & Siân M. Beynon-Jones, *Introduction* to LAW AND TIME 1, 21 (Siân M. Beynon-Jones & Emily Grabham eds., 2018).

undertaken to assess and reimagine how society engages with and deploys time in and through tax law.

With these questions in mind and a basic sense of where the analysis is headed, we are now ready to embark on our journey into the imaginative realm of tax time.

### Timing Issues in Tax Law

Time pervades tax law just as it pervades our lives. In the basic federal income tax course that I teach every fall, an entire chapter of the textbook is devoted to questions of timing.<sup>23</sup> And when I was working on my Master of Laws (LLM) degree in taxation many years ago, an entire course was devoted to timing issues in the income tax.<sup>24</sup> When taught to students in these courses—and even when discussed in policy circles or in the academic tax literature—the questions of timing that merit consideration are practical in focus and take the legally and culturally prevalent linear representation of time as a given. In other words, time is simply seen as part of the natural background against which tax law operates.<sup>25</sup> And mimicking nature, the choices that have been made in adapting US tax law to linear time often create their own rhythms and patterns akin to the cyclical time that we experience in the repetitive passage from day to night or from one season to the next as we proceed through our lives.

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<sup>23</sup> JOEL S. NEWMAN ET AL., FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 271–93 (7th ed. 2019).

<sup>24</sup> *Course Descriptions: Timing Issues and the Income Tax*, NYU LAW, <http://www.law.nyu.edu> (last visited Nov. 30, 2020).

<sup>25</sup> See Grabham & Beynon-Jones, *supra* note 22, at 1.

## Reporting Period

At their most basic level, these timing questions involve the *when* of income taxation. Once it has been decided who will be subject to tax, what income will be taxed, and how that income will be taxed, it must be determined *when* income taxation will occur. Should taxpayers report their income on a transactional basis or at periodic intervals? And if income is to be reported periodically, what interval should be chosen? Should income be reported every day, every year, once a decade, once in a lifetime—or at some other interval? With April 15 etched in the American consciousness as “tax day”—an annual ritual that has come to mark the cyclical passage of time from one tax “season” to the next—it likely comes as no surprise that the United States has settled on an annual reporting period.<sup>26</sup>

Of course, tax law being what it is, there are exceptions to this annual accounting framework that aim to mitigate some of the hardships of having a system too rigidly tied to linear time.<sup>27</sup> These exceptions are designed to make the income tax fairer from the taxpayer’s perspective, the government’s perspective, or sometimes both. An example of each type of exception follows.

To aid taxpayers, Congress enacted the deduction for net operating losses early in the history of the income tax.<sup>28</sup> Generally, net operating losses can now be carried forward indefinitely (before 2018, net operating losses were generally carried back two taxable years and

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<sup>26</sup> I.R.C. § 441.

<sup>27</sup> *See generally* *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359 (1931).

<sup>28</sup> BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES & GIFTS* ¶ 25.10.1, Westlaw (database updated 2020).

forward twenty taxable years).<sup>29</sup> As the United States Supreme Court has explained, this deduction aims to benefit taxpayers by “ameliorat[ing] the unduly drastic consequences of taxing income strictly on an annual basis. [The deduction was] designed to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year.”<sup>30</sup> In this way, the deduction operates in linear time but extends the periodicity of the income tax. Before 2018, the net operating loss deduction extended the income tax’s periodicity over a finite segment of linear time that included both the past and future. Now, the deduction extends that periodicity only into the future but over a potentially lengthier segment of linear time (i.e., the life of an individual or the virtual life of an entity).<sup>31</sup>

A second exception to the annual accounting framework is the so-called *Arrowsmith* doctrine, which stems from a case “holding that taxpayers who reported capital gain on the complete liquidation of a closely held corporation could not deduct from ordinary income their subsequent payment of corporate obligations that had been neglected at the time of

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<sup>29</sup> Compare I.R.C. § 172, *with id.* (prior to amendment by the Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13302, 131 Stat. 2054, 2121–23 (2017)).

<sup>30</sup> *Libson Shops, Inc. v. Koehler*, 353 U.S. 382, 386 (1957); see BITTKER & LOKKEN, *supra* note 28, ¶ 25.10.1.

<sup>31</sup> The net operating loss deduction primarily applies to taxpayers engaged in business. BITTKER & LOKKEN, *supra* note 28, ¶ 25.10.1. For an exploration of taxing individuals more generally based on a longer time horizon, see Lee Anne Fennell & Kirk J. Stark, *Taxation over Time*, 59 TAX L. REV. 1 (2005).

liquidation.”<sup>32</sup> This exception protects the government by preventing taxpayers from reporting gain on a transaction as capital gain taxed at preferential rates in one year and then, in a later taxable year, reporting a related payment as an ordinary deduction that is freed from the limitations imposed on capital losses and, therefore, can be used to offset income taxed at higher rates.

Yet a third example of an exception to the annual accounting framework is the “tax benefit rule,” which can protect either or both the taxpayer and the government. The tax benefit rule protects the government by taxing recoveries of amounts previously deducted (e.g., refunded state or local income taxes) when the earlier deduction produced a tax benefit.<sup>33</sup> By increasing income in the year of the recovery, the tax benefit rule makes the government roughly whole for the revenue lost due to the (now, seemingly inappropriate) deduction in the earlier year. Conversely, the rule protects the taxpayer by shielding the recovery from taxation if the earlier deduction produced no tax benefit. Again quoting the Supreme Court: “The basic purpose of the tax benefit rule is to achieve rough transactional parity in tax ... and to protect the Government and the taxpayer from the adverse effects of reporting a transaction on the basis of assumptions that an event in a subsequent year proves to have been erroneous.”<sup>34</sup>

Despite requiring the taxpayer or the government to take a peek at an earlier return, both the *Arrowsmith* doctrine and the tax benefit rule continue to operate strictly within the annual accounting framework and thus within linear time. In other words, neither the *Arrowsmith*

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<sup>32</sup> BITTKER & LOKKEN, *supra* note 28, ¶ 47.9.6; *see* *Arrowsmith v. Comm’r*, 344 U.S. 6 (1952).

<sup>33</sup> *See* I.R.C. § 111.

<sup>34</sup> *Hillsboro Nat’l Bank v. Comm’r*, 460 U.S. 370, 383 (1983).

doctrine nor the tax benefit rule permits the taxpayer to go back in time and reopen or amend an earlier return. Instead, both simply require a look back at past events to determine the appropriate reporting of an amount on the current year's tax return.<sup>35</sup>

#### Accounting Methods

Once the appropriate period for reporting income and paying tax to the government have been established, questions arise about how to determine during which year an item of income or deduction should be reported. The basic methods of accounting are (1) the cash receipts and disbursements method and (2) the accrual method.<sup>36</sup> The cash method is commonly used by individual taxpayers, and it requires income to be reported in the year when received and allows deductions to be taken when payments are made.<sup>37</sup> The accrual method is used more commonly by businesses; in fact, some business are prohibited from using the cash method and are thus effectively required to use the accrual method.<sup>38</sup> Under the accrual method, income is reported in “the taxable year when all the events have occurred that fix the right to receive the income and the amount of the income can be determined with reasonable accuracy,” and deductions are generally allowed “in the taxable year in which all the events have occurred that establish the fact of the liability [and] the amount of the liability can be determined with reasonable

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<sup>35</sup> See *Arrowsmith*, 344 U.S. at 10 (Jackson, J., dissenting); *Alice Phelan Sullivan Corp. v. United States*, 180 Ct. Cl. 659, 665 (1967).

<sup>36</sup> I.R.C. § 446(c).

<sup>37</sup> Treas. Reg. § 1.446-1(c)(1)(i) (as amended in 2011).

<sup>38</sup> I.R.C. § 448.



accuracy.”<sup>39</sup> Accordingly, reporting of income and deductions under the accrual method need not track when income is received or expenses are paid, as happens under the cash method.

To maintain the integrity of these two methods of accounting, concepts from one method are sometimes incorporated into the other. Thus, to prevent those on the cash method from simply turning their back on income in order to receive it in a later year (when, for instance, the taxpayer might expect to be in a lower tax bracket or to have more deductions), the Internal Revenue Service (IRS) has created a rule under which “[i]ncome although not actually reduced to a taxpayer’s possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given.”<sup>40</sup> And to prevent accrual method taxpayers from manipulating the “all events” test for accruing deductions, Congress adopted an “economic performance” requirement in 1984 that in a variety of situations (e.g., payment of tort claims, jackpots and prizes, and taxes) effectively puts accrual method taxpayers on the cash method by deferring deductions until expenses are actually paid.<sup>41</sup>

Of course, these general methods and their complexities do not address all the questions taxpayers might have regarding when to report income or deductions. Indeed, the regulations specify that the “term ‘method of accounting’ includes not only the overall method of accounting

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<sup>39</sup> Treas. Reg. § 1.446-1(c)(1)(ii)(A).

<sup>40</sup> *Id.* § 1.451-2(a) (as amended in 1979).

<sup>41</sup> I.R.C. § 461(h)(2)(C), (D); Treas. Reg. § 1.461-4(g) (as amended in 2004); *see* H.R. REP. NO. 98-861, at 871 (1984) (Conf. Rep.); BITTKER & LOKKEN, *supra* note 28, ¶ 105.6.4.

of the taxpayer but also the accounting treatment of any item.”<sup>42</sup> The regulations go on to provide that, apart from the cash and accrual methods of accounting, the “methods of accounting for special items include the accounting treatment prescribed for research and experimental expenditures, soil and water conservation expenditures, depreciation, net operating losses, etc.”<sup>43</sup> In addition, the IRS is empowered to require larger businesses to use inventories where necessary “clearly to determine the income of any taxpayer,” raising timing issues regarding whether the items of inventory sold each year are determined on a first-in, first-out basis or a last-in, first-out basis (there are known in the trade as “FIFO” and “LIFO”).<sup>44</sup> Furthermore, the IRS has been granted a more general and wide-ranging power to dictate a taxpayer’s method of accounting if the method that the taxpayer has adopted “does not clearly reflect income.”<sup>45</sup>

Rules regarding the timing of income inclusion and of reporting deductions can also crop up implicitly, as they do in the requirement that gains and losses from property transactions must be reported upon the occurrence of a “realization” event (i.e., a sale or other disposition of property).<sup>46</sup> This rule largely places timing in the hands of the taxpayer and serves as a key source of tax planning and, as explored in chapter 4, tax avoidance.<sup>47</sup> In fact, “loss harvesting” is

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<sup>42</sup> Treas. Reg. § 1.446-1(a)(1).

<sup>43</sup> *Id.*

<sup>44</sup> I.R.C. § 471(a); *see id.* § 472; Treas. Reg. § 1.471-2(d) (as amended in 1973); BITTKER & LOKKEN, *supra* note 28, ¶ 107.5.1.

<sup>45</sup> I.R.C. § 446(b).

<sup>46</sup> I.R.C. § 1001(a); *see Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554 (1992).

<sup>47</sup> *See* Edward J. McCaffery, *Taxing Wealth Seriously*, 70 TAX L. REV. 305 (2017).

such a common tax planning strategy that it is often included among the end-of-year tax tips offered to newspaper readers around the country each December.<sup>48</sup> But the common denominator of all of these accounting rules is the attempt to determine the appropriate period within linear time for reporting an item on the tax return.

### Time Value of Money

As Lawrence Lokken observed in the first few lines of his treatise-length law review article on the subject, “heightened sensitivity to the importance of interest and the time value of money” coupled with rising tax shelter activity in the 1970s and 1980s led to a complex web of tax rules dealing with disguised payments of interest.<sup>49</sup> Among them are the “original issue discount” rules that recharacterize discount on the issuance of debt as interest and require that interest to be accrued ratably over the debt instrument’s term.<sup>50</sup> Other rules similarly recharacterize amounts as interest when debt is issued in the context of a sale or exchange of property.<sup>51</sup> Yet another set of

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<sup>48</sup> E.g., Matthew Frankel, *Time to Enact a Tax Strategy*, USA TODAY, Dec. 28, 2017, at 4B; Melissa Sotudeh, *Tax-Smart Strategies to Help Boost Your Savings*, OREGONIAN, Dec. 25, 2016, at C2; Russ Wiles, *5 Really Last-Minute Tax Tips*, ARIZ. REPUBLIC, Dec. 30, 2016, at A15.

<sup>49</sup> Lawrence Lokken, *The Time Value of Money Rules*, 42 TAX L. REV. 1, 9 (1986); see Peter C. Canellos & Edward D. Kleinbard, *The Miracle of Compound Interest: Interest Deferral and Discount After 1982*, 38 TAX L. REV. 565 (1983); Daniel I. Halperin, *Interest in Disguise: Taxing the “Time Value of Money,”* 95 YALE L.J. 506, 509–10 (1986); see also Mary Louise Fellows, *A Comprehensive Attack on Tax Deferral*, 88 MICH. L. REV. 722, 725 n.11 (1990).

<sup>50</sup> I.R.C. §§ 1272–1273, 1275.

<sup>51</sup> *Id.* §§ 483, 1274.

rules imputes interest (both for income and, where relevant, gift tax purposes) on: (1) below-market loans between employers and employees or corporations and shareholders, (2) gift loans (i.e., “where the forgoing of interest is in the nature of a gift”), and (3) tax-avoidance loans.<sup>52</sup> Of course, there are also rules that aim to prevent taxpayers from manipulating the use of interest deductions to artificially depress their income.<sup>53</sup>

In addition to addressing the appropriate taxation of disguised interest, “time value of money” operates as a broader rubric that likewise encompasses taxpayers’ appreciation that they can benefit from accelerating deductions (i.e., tax savings) and deferring income (i.e., tax burdens). As Mary Louise Fellows has put it: “‘Time value of money’ is a shorthand reference to the simple principle that a person prefers a dollar today over one tomorrow, because, by investing today’s dollar, that person tomorrow will have not only the dollar but also an investment return on it.”<sup>54</sup> In an earlier (and different) time and context, these time-value-of-money considerations were downplayed as relatively unimportant.<sup>55</sup> Indeed, the noted economist Henry Simons famously referred to “the argument that income must be allocated to the right

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<sup>52</sup> *Id.* § 7872.

<sup>53</sup> *E.g., id.* § 163(d), (j) (before and after amendment by the Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13301, 131 Stat. 2054, 2117–21 (2017)); *see Estate of Yaeger v. Comm’r*, 889 F.2d 29, 33 (1989); Marie Sapirie, *Questions as the Interest Deduction Limitation Takes Shape*, 159 TAX NOTES 1415 (2018).

<sup>54</sup> Fellows, *supra* note 49, at 725–26.

<sup>55</sup> Daniel Shaviro, *The Forgotten Henry Simons*, 41 FLA. ST. U. L. REV. 1, 31–32, 33–34 (2013); *see Fellows, supra* note 49, at 726.

period, in order to eliminate the ‘interest saving’ from deferral, ‘this mosquito argument,’ at which he had ‘several times swatted ... [and] must now swat once more, [albeit] not to kill the pest.’”<sup>56</sup> Underpinning Simons’s view was his avowed skepticism regarding the possibility that income might “be allocated precisely among short time-intervals”<sup>57</sup> and his concomitant favoring of multiyear income averaging over a strict (and manipulable) annual accounting system.<sup>58</sup>

Taxpayers and their advisers, however, have become acutely aware of (and have actively exploited) the opportunities to minimize taxation that are available when the tax system is viewed through a time-value-of-money lens—and Congress and the IRS have fought back against these attempts to reap unwarranted and unintended tax benefits.<sup>59</sup> For instance, exploitation of time-value-of-money considerations lay at the heart of the individual tax shelters that bedeviled Congress and the IRS in the 1970s and 1980s.<sup>60</sup> For a far longer period—which still continues, despite recent changes to the law—time-value-of-money considerations have been at the core of multifaceted gamesmanship with the US international tax regime, which has

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<sup>56</sup> Shaviro, *supra* note 55, at 31 (quoting HENRY C. SIMONS, FEDERAL TAX REFORM 127 (1950) [hereinafter SIMONS, TAX REFORM]); *see also* HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 162, 168–69, 208 & n.1 (1938).

<sup>57</sup> SIMONS, TAX REFORM, *supra* note 56, at 127; *see id.* at 59–60.

<sup>58</sup> *Id.* at 29, 31, 40–44; *see id.* at 49–52, 78–83, 140–41.

<sup>59</sup> *E.g.*, *Ford Motor Co. v. Comm’r*, 71 F.3d 209 (6th Cir. 1995); *see supra* note 41 and accompanying text.

<sup>60</sup> *See* Theodore S. Sims, *Debt, Accelerated Depreciation, and the Tale of a Teakettle: Tax Shelter Abuse Reconsidered*, 42 UCLA L. REV. 263 (1994).

involved the use of corporate entities to shift profits offshore and then keep them offshore to defer US taxation.<sup>61</sup>

As was the case with the accounting methods discussed earlier, the common denominator of all of these time-value-of-money schemes is their heavy reliance on the linear representation of time. Whether taxpayers are attempting to convert interest into another form of (presumably more lightly taxed) income or to accelerate deductions or defer income, the background against which these schemes operate is the linear distinction between, and juxtaposition of, the past, present, and future.

#### Amending Returns

Yet, even within a tax system ostensibly wedded to linear time, we can glimpse the legal imagination chafing at the restrictions imposed by time's arrow. For instance, after filing an original income tax return, a taxpayer may amend that return "to modify, supplement, or supplant the taxpayer's original return [or] to claim a refund."<sup>62</sup> The Internal Revenue Code (Code) neither specifically authorizes nor requires taxpayers to amend an erroneous return; rather, as the Supreme Court has observed, "an amended return is a creature of administrative

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<sup>61</sup> See CHARLES H. GUSTAFSON ET AL., *TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS* 485–93 (4th ed. 2011); *Early Impressions of the New Tax Law: Hearing Before the S. Comm. on Fin.*, 115th Cong. (2018) (statement of Rebecca M. Kysar, Professor of Law, Brooklyn Law School).

<sup>62</sup> BITTKER & LOKKEN, *supra* note 28, ¶ 111.1.8.

origin and grace.”<sup>63</sup> Regulations encourage—but do not require—the filing of an amended return when a taxpayer discovers a mistake in the original return.<sup>64</sup> Because amended returns are a creature of the administrative imagination, the IRS is not bound to accept them and has the discretion to reject them.<sup>65</sup>

Through amended returns, the IRS seems to provide taxpayers with a vehicle for traveling back in time to correct past mistakes and clean up the historical record. However, the mechanism for amending the return actually constrains taxpayers’ ability to travel through time, illustrating the influence of linear time over even this limited exercise of the tax imagination. In the United States, individuals are generally required to file Form 1040 by April 15 each year.<sup>66</sup> Once a Form 1040 is filed, a taxpayer wishing to amend that return does not submit a new Form 1040. Instead, the taxpayer completes a different form—Form 1040-X—that includes both the original *and* the corrected information along with an indication of the net change in what was originally reported.<sup>67</sup> In this way, the taxpayer is not really permitted to travel back in time but is afforded the more limited power to write in the margins of history. In fact, the IRS makes this

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<sup>63</sup> *Badaracco v. Comm’r*, 464 U.S. 386, 393 (1984); *see Klinghamer v. Brodrick*, 242 F.2d 563, 564 (10th Cir. 1957); BITTKER & LOKKEN, *supra* note 28, ¶ 111.1.8; *cf.* I.R.C. § 6013(b).

<sup>64</sup> Treas. Reg. §§ 1.451-1(a), 1.461-1(a)(3) (as amended in 1999); *see* BITTKER & LOKKEN, *supra* note 28, ¶ 111.1.8.

<sup>65</sup> BITTKER & LOKKEN, *supra* note 28, ¶ 111.1.8.

<sup>66</sup> I.R.C. § 6072(a).

<sup>67</sup> I.R.S. 1040 and 1040-SR Instructions: Tax Year 2019, at 76–77 (2020); I.R.S. Form 1040-X (2020).

very point in the context of providing a “tip” to taxpayers about how most easily to complete Form 1040-X: “Many find the easiest way to figure the entries for Form 1040-X is to first make the changes in the margin of the return they are amending.”<sup>68</sup> Accordingly, an amended return is less a rewriting of the past and more an admission of past error in the here and now.

The Supreme Court underscored the limited nature of an amended return’s power to rewrite the past when it squarely rejected taxpayers’ suggestions that the filing of a fraudulent original return should be cured through the filing of an honest amended return.<sup>69</sup> The only situation in which an amended return may supersede a mistaken original is when the amended return is filed before the due date for the original return (e.g., before the April 15 deadline for individual returns).<sup>70</sup> In that situation, it seems that the past is not yet past; that is, it has not yet been indelibly written and is capable of erasure and correction—but only until the point when the filing deadline is reached along time’s arrow.

Despite itself being a product of imagination, the amended return—much like the other aspects of tax time described earlier—is both influenced and confined by the rigid strictures of linear time. But this peek at the tax imagination at work foreshadows much more powerful—and often more hidden—displays of creativity that will be explored in coming chapters as we delve more deeply into the relationship between time and tax law.

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<sup>68</sup> I.R.S. Instructions for Form 1040-X, at 4 (2020).

<sup>69</sup> *Badaracco v. Comm’r*, 464 U.S. 386 (1984).

<sup>70</sup> BITTKER & LOKKEN, *supra* note 28, ¶ 111.1.8.



## The Deeper Relationship Between Law and Time

All of these various timing aspects of taxation are undeniably important because they continuously raise issues for taxpayers and policymakers to address, both in the United States<sup>71</sup> and in other countries.<sup>72</sup> Nevertheless, the purpose of this book is not to add yet another set of footprints to this well-trodden ground. Rather, picking up on the glimpse of the tax imagination witnessed in the discussion of amended returns, this book strikes off on a different path by contributing to a growing body of research that has moved beyond examining the practical, surface-level relationship between law and time<sup>73</sup> and progressed toward a focus on the deeper, more complicated connections between them.

Contributions to this line of research from the United States have, among other things, contested how time is taken as a given, questioned the linear representation of time that

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<sup>71</sup> See, e.g., David Hasen, *A Partnership Mark-to-Market Tax Election*, 71 TAX LAW. 93 (2017); Henry Ordower, *The Expatriation Tax, Deferrals, Mark to Market, the Macomber Conundrum and Doubtful Constitutionality*, 15 PITT. TAX REV. 1 (2017); Daniel Shaviro, *The More It Changes, the More It Stays the Same? Automatic Indexing and Current Policy*, in THE TIMING OF LAWMAKING 64 (Frank Fagan & Saul Levmore eds., 2017).

<sup>72</sup> See, e.g., DAVID G. DUFF ET AL., CANADIAN INCOME TAX LAW 469–87, 757–939 (6th ed. 2018); TIME AND TAX, *supra* note 19; Jacques Buisson, *La portée de la loi fiscale dans le temps*, 2002 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 786; Olivier Fouquet & Philippe Durand, *Le temps fiscal*, REVUE ADMINISTRATIVE, 2000, numéro spécial 1, at 45; Patrick Serlooten, *Le temps et le droit fiscal*, 1997 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL ET DE DROIT ÉCONOMIQUE 177.

predominates in US law and culture, revealed the multiplicity of ways in which time can be conceptualized and in which it can operate in and through law, and even considered the ways in which law structures time in the United States. In the coming chapters, this book will likewise cast doubt on the conventional acceptance of linear time that was so clearly on display in the preceding discussion of timing issues in tax law. To lay the groundwork for these efforts to shake the unquestioning acceptance of time as “natural” or a “given” when constructing, interpreting, and applying tax laws, the following sections sketch how this same work has been done by US researchers outside the realm of tax law. Before proceeding, it is worth noting that US scholars are not the only ones who have explored the deeper relationships between law and time;<sup>74</sup> however, for the sake of brevity and focus, the US line of research in this area will be spotlighted here.

#### Time and Lawmaking

A portion of this line of research exploring the deeper relationships between law and time outside of the tax context focuses on the relationship between time and lawmaking and

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<sup>73</sup> See, e.g., Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663 (2001); Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55 (2009).

<sup>74</sup> E.g., LAW AND TIME, *supra* note 22; FRANÇOIS OST, *LE TEMPS DU DROIT* (1999); BENJAMIN J. RICHARDSON, *TIME AND ENVIRONMENTAL LAW: TELLING NATURE’S TIME* (2017); TEMPORAL BOUNDARIES OF LAW AND POLITICS: TIME OUT OF JOINT (Luigi Corrias & Lyana Francot eds., 2018); TIME, LAW, AND CHANGE: AN INTERDISCIPLINARY STUDY (Sofia Ranchordás & Yaniv Roznai eds., 2020); Christian Djeflal, *International Law and Time: A Reflection of the Temporal Attitudes of International Lawyers Through Three Paradigms*, 2014 NETH. Y.B. INT’L L. 93.

demonstrates just how varied—and nonlinear—the temporalities of lawmaking can be. For instance, approaching the subject from a political science perspective, Bruce Peabody has used examples of constitutional and statutory interpretation to demonstrate how “it is intellectually productive to think of the present as having an impact on the past—in ways that go beyond mere (re)interpretation.”<sup>75</sup> Put more directly, Peabody claimed to show how “the hands of the present grasp and transform the past.”<sup>76</sup>

In an interesting example of this phenomenon, Peabody examined the debate over former president Bill Clinton’s eligibility to serve as vice president.<sup>77</sup> According to the Twenty-Second Amendment to the US Constitution, “No person shall be elected to the office of the President more than twice . . . .”<sup>78</sup> On its face, this amendment seems to prevent Clinton only from being elected president and not from being elected vice president.<sup>79</sup> Yet, Peabody pointed to arguments made by those questioning Clinton’s eligibility for the vice presidency who asserted that the Twenty-Second Amendment must be read in conjunction with the Twelfth Amendment, which provides that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”<sup>80</sup> These critics argued that Clinton’s ineligibility for

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<sup>75</sup> Bruce G. Peabody, *Reversing Time’s Arrow: Law’s Reordering of Chronology, Causality, and History*, 40 AKRON L. REV. 587, 618 (2007); *see id.* at 600–10.

<sup>76</sup> *Id.* at 589.

<sup>77</sup> *Id.* at 603–04.

<sup>78</sup> U.S. CONST. amend. XXII, § 1.

<sup>79</sup> Peabody, *supra* note 75, at 603.

<sup>80</sup> U.S. CONST. amend. XII.

election as president (because he had already served two terms) rendered him ineligible for election as vice president.<sup>81</sup> Peabody contended that this argument

serves to illustrate the extent to which some legal arguments implicitly assume that contemporary legal structures can transform the original content and significance of past law. Whatever the Twelfth Amendment's eligibility restrictions meant when it was formally approved in 1804, they presumably did not include the terms of the Twenty-Second Amendment—ratified almost 150 years later. Nevertheless, arguments that Clinton is ineligible to serve as vice president seem based on an assumption that the ratification of the Twenty-Second Amendment altered the basic, initial terms of the Twelfth Amendment's eligibility provisions; the claim is not that the Twenty-Second Amendment simply legally amended or supplemented the existing language of the Twelfth Amendment, but that it helped to define the very parameters and authority of the earlier provision.<sup>82</sup>

Overall, Peabody maintained that “the American legal system’s common law foundations, as well as its formality and commitment to serving as both a constitutive and aspirational endeavor, make it especially conducive to meaningful reversals of the traditional path of ‘time’s arrow.’”<sup>83</sup>

Considering lawmaking through the courts, anthropologist Carol Greenhouse has attempted to shake linear time from its privileged position through an exploration of time’s

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<sup>81</sup> Peabody, *supra* note 75, at 604.

<sup>82</sup> *Id.* (footnotes omitted).

<sup>83</sup> *Id.* at 589.

varying implications in the succession of United States Supreme Court justices.<sup>84</sup> For Greenhouse, “[j]udicial succession is particularly relevant ... in that it is precisely in succession that multiple temporalities—of the law, personal lifetimes, and public lives—and their indeterminacies must be worked out.”<sup>85</sup> As Greenhouse observed, Supreme Court vacancies are usually related to the justices’ personal lifetimes—that is, they are caused by a justice’s death or decline—and these lifetimes have distinct beginning and ending points as well as a linear direction.<sup>86</sup> But the finite, linear time frame of individual justices’ lifetimes contrasts with the temporality of law, which the justices are supposed to embody, because law exists in “a form of timelessness, or, more accurately, *all-times*, a form of time which stipulates time as social, but not with geometric metaphors.”<sup>87</sup> Further complicating matters is the question of how and when an individual *becomes* a Supreme Court justice:

The special temporal symbolism of the law requires a special “kind” of person, one who will find the law, not make it; know the law, but not preach it; be a representative of the national community, but have no causes of his or her own. These three temporal charters are by no means easily reconciled. Their reconciliation is possible only with the deft management of essential temporal symbols, that is, by downplaying or suppressing altogether aspects of a judicial

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<sup>84</sup> Greenhouse, *supra* note 10.

<sup>85</sup> *Id.* at 1641.

<sup>86</sup> *Id.* at 1643.

<sup>87</sup> *Id.* at 1642.

“career” that entail *becoming*. It is in *becoming* a judge that any tensions between individuality and a judicial persona would be most evident.<sup>88</sup>

In a later book, *A Moment's Notice: Time Politics Across Cultures*,<sup>89</sup> Greenhouse continued her examination of *becoming* a Supreme Court justice as part of a larger project regarding the role of time (and particularly linear time) in ethnographic studies. Greenhouse described this larger project as challenging how, in anthropology, “linear time stands relatively unquestioned as self-evident, a social time but also ‘the time.’ Part of [her] experiment [was] to consider linear time as equally a social time, to demonstrate how reexoticizing linear time affects one’s approach to other time forms elsewhere.”<sup>90</sup> Greenhouse revisited Supreme Court succession as part of this project because it implicated “at least three essentially different forms of time”<sup>91</sup>: (1) the general perception of time as infinite, linear, and irreversible (what Greenhouse called “the time of biographies and national histories, among other things”); (2) the time of the law, which is without a fixed endpoint and is reversible (both in the sense that past precedent can control present decisions and in the sense that past precedent can be reversed); and (3) the finite life of the individual judge.<sup>92</sup> To explore the interaction of these different forms of

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<sup>88</sup> *Id.* at 1643–44.

<sup>89</sup> CAROL J. GREENHOUSE, *A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES* (1996).

<sup>90</sup> *Id.* at 214.

<sup>91</sup> *Id.* at 183.

<sup>92</sup> *Id.* at 183–85.

time, Greenhouse examined the role of autobiography in the confirmation hearings of Robert Bork and Clarence Thomas.<sup>93</sup>

In examining Bork's confirmation hearings, Greenhouse focused on Bork's "retraction problem" with some of his earlier writings and the resulting clash between, on the one hand, the senators who were placing Bork, his past experiences, and his future judicial decision-making on the Supreme Court in an implicitly linear time framework and, on the other hand, Bork, who initially resisted that framing. "While committee members seemed to expect to 'meet' Bork somewhere on a continuous time line between his past and his future, he came to them from a discontinuous past as an individual who had successfully fulfilled multiple professional roles and looked forward to the possibility of others."<sup>94</sup> Ultimately, Bork lost "control over his autobiographical narrative in the face of committee pressure to reconstitute his life story as a sequence of personal choices, rather than a series of professional commitments."<sup>95</sup> Greenhouse continued: "In successfully translating his self-presentation into conventional male autobiographical form, the committee reinterpreted his life story as one of successive engagements; his supporters and critics differed only as to their characterization of these engagements and his effectiveness in representing the interests they involved. The adversarial aspects of the hearings became, in this respect, a collaborative project to make Bork's life representative. In this way, the senators improvised a vocabulary that spoke directly through

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<sup>93</sup> *Id.* at 189–210.

<sup>94</sup> *Id.* at 190.

<sup>95</sup> *Id.* at 197.

Bork to the contests between a conservative executive branch and a relatively more liberal legislative branch.”<sup>96</sup>

In examining Clarence Thomas’s first set of confirmation hearings, Greenhouse considered how “his biography was repeatedly invoked to assert that his identity as an African American was proof of his ability to represent, through memory, African Americans’ struggles for civil rights and social justice in his future tenure on the Supreme Court.”<sup>97</sup> The senators who supported his nomination, as well as Thomas himself, used the linear framework of his biography “as a way of defining African American identity as an identity of discrimination, celebrating Thomas’s personal success, and expanding the conceptual frame around the substantive issues on which he might be challenged, to narrow and contain them.”<sup>98</sup>

Reflecting on both sets of confirmation hearings, Greenhouse asserted:

Because the temporal element was so explicit in them, the Bork and Thomas hearings are useful illustrations of the extent to which notions of judicial succession in the United States are highly charged with issues of individuality, nationhood, sacredness, and the nature of textuality, among other things. But there is more. The unprecedented relevance of nominees’ autobiographies must ... be understood in relation to the public and highly politicized construction of the United States as a diverse and increasingly culturally fragmented society. The individual autobiographies were constructed in the hearings in such a way as to

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<sup>96</sup> *Id.* at 198.

<sup>97</sup> *Id.* at 199.

<sup>98</sup> *Id.* at 205.



highlight particular issues and images associated, in Bork's case, with the intensely ideologized battles over reproductive choice in the middle to late 1980s leading up to the 1988 presidential election and, in Thomas's case, with the Bush administration's effort to confound liberal opposition by nominating an African American—and a conservative.<sup>99</sup>

Greenhouse closed both the case study in *A Moment's Notice* and her earlier essay with the following observation: “‘The law’ is cultural not only, or not first, in its patterned processes and outcomes, but in its constitution in multiple temporalities and their indeterminacies. Specifically, law, as an idea, carries cultural force because it engages these temporalities and their critical incongruities so directly.”<sup>100</sup> In the case study, she then elaborated on this observation by focusing on the differing temporalities of the nation and the individual in the larger context of the idea of justice that lies beyond time: “These incongruities are reinforced in the United States, where democratic rhetorics stress the capacity of public institutions to represent collective personal interests. The contemporary view of the United States as culturally divided adds to the premium and power of the symbols that fuse individual life stories to the linear time of the state.”<sup>101</sup>

Others concerned with the intersection between time and lawmaking have ruminated on the tensions between the increasingly harried (and hurried) pace of modern life and the traditionally staid and slow-moving pace of legal development through common law decision-

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<sup>99</sup> *Id.* at 208–09.

<sup>100</sup> *Id.* at 209–10; see Greenhouse, *supra* note 10, at 1650.

<sup>101</sup> GREENHOUSE, *supra* note 89, at 210.

making by judges.<sup>102</sup> Approaching the topic from the perspective of an active judge, Andrew Wistrich has explored the influence of both the past and future on the law—for example, how lawyers study past precedent to shape future conduct or to predict how a court might rule in a given situation.<sup>103</sup> But Wistrich mostly sketched what he saw as a general shift of lawmaking in the United States toward a predominantly future-oriented approach and mindset:

The overall trend is clear: in lawmaking of every sort, and in the relative proportions in which the methods of lawmaking are employed, the role of the past is waning, and the role of the future is waxing. The common law has been dethroned, and statutes, treaties, and regulations have been enthroned in its place. As a consequence, law today is surprisingly future-oriented, and it is rapidly becoming more so. Law's memory of past law still matters, of course, but the influence of the past in the lawmaking process is declining.<sup>104</sup>

Wistrich detected this shift not only in the means used for lawmaking (i.e., the rising use of statutes, treaties, and regulations as opposed to common law decision-making) but also in the method of common law decision-making itself (e.g., the erosion of the force of precedent, the ability of the Supreme Court to set its own agenda by choosing the cases that it will review, and

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<sup>102</sup> Brian M. Stewart, *Chronolawgy: A Study of Law and Temporal Perception*, 67 U. MIAMI L. REV. 303 (2012).

<sup>103</sup> Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 743, 749 (2012).

<sup>104</sup> *Id.* at 752; *see id.* at 777–96.

the rise of “institutional reform litigation” that turns judges into administrators).<sup>105</sup> Though aiming to be even-handed in his treatment of the relationship between time and lawmaking, it is hard not to detect in Wistrich’s prose an undercurrent of wistful longing for a time when things moved a bit more slowly and his own profession—judging—was on top of the lawmaking heap.<sup>106</sup>

### Instrumental Time

Other contributions to this line of research outside of the tax context have considered how time can be used as a tool to achieve a goal or even to inflict punishment. David Engel provides an example of the former approach, highlighting how time can be manipulated to achieve desired ends. Engel challenged the dominant linear framework of time and demonstrated how time can be used as a tool in advocating for (or resisting against) social change through his documentation of how different groups within a single county “constructed their versions of the community’s past, present, and future”—and the role of law and legal institutions in it—using different temporal perspectives.<sup>107</sup> The more conservative, traditional groups in the county embraced an iterative notion of time in which repeated cycles (in this case, of seasonal farming) reinforced community values, whereas more progressive groups advocating for change (in this case, those who supported the location of an industrial plant in the county) embraced a linear notion of time against which change could be measured.<sup>108</sup> These different temporal lenses “played

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<sup>105</sup> *Id.* at 763–77.

<sup>106</sup> *See, e.g., id.* at 821–24, 826.

<sup>107</sup> Engel, *supra* note 10, at 635–36.

<sup>108</sup> *Id.* at 610–11.

complementary roles in shaping the local culture and in marking out the temporal field in which ... events could be viewed and interpreted.”<sup>109</sup> Concretely demonstrating the socially constructed nature of time, Engel described how the conflict between these groups over whether an industrial plant should be located in the county brought to the fore “conflicting ideas about time and change,” with the more conservative group valuing stability and arguing “that change implied the erosion and loss of their traditional culture and values,” whereas the more progressive group wished to avoid stagnation and argued that failing to bring the plant to the community “implied a failure of vision and will and hence a cultural deterioration.”<sup>110</sup>

Illustrating a different way in which time can be used instrumentally, Jonathan Goldberg-Hiller and David Johnson have considered criminal punishment through a temporal lens.<sup>111</sup> In their essay “Time and Punishment,” Goldberg-Hiller and Johnson “describe[d] some of the ways that attention to time deepens our appreciation of the pain associated with punishment and ... offer[ed] new perspectives from which to understand and critique time’s role in the administration of justice.”<sup>112</sup> For example, they tapped into religion when considering the role that belief in an afterlife might play in different countries’ continued support for, or abandonment of, capital punishment.<sup>113</sup> They noted the irony in leveling the harshest

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<sup>109</sup> *Id.* at 635.

<sup>110</sup> *Id.* at 614.

<sup>111</sup> Jonathan Goldberg-Hiller & David T. Johnson, *Time and Punishment*, 31 QUINNIPIAC L. REV. 621 (2013).

<sup>112</sup> *Id.* at 622.

<sup>113</sup> *Id.* at 631–34.

punishments for premeditated murders when, “in one of the many contradictions of capital punishment, states kill in a manner that is far more premeditated than even the most precisely planned murder”—and do so in ways that use time to inflict additional punishment (e.g., by having a death sentence hang over the head of the convicted for decades in the United States or by having the precise date and time of execution kept from the convicted in Japan until just before the execution takes place).<sup>114</sup> And tapping into literature describing a day in a prisoner’s life in a Soviet labor camp and Supermax inmates’ experience of a day, Goldberg-Hiller and Johnson showed how “presumptions about just calculations of time often fail to account for the inner time of incarceration, in many cases producing an overabundance of pain.”<sup>115</sup>

#### Law’s Role in Constructing Time

Demonstrating that time is not simply a received, natural phenomenon but is shaped and molded by human hands, other contributions to this line of research outside the tax context have examined the “law of time”—that is, how law regulates the organization and use of time. In *A Time for Every Purpose*, Todd Rakoff explored how law has been used for such varied purposes as to standardize how to tell time (e.g., by “zone” and through daylight saving time); to carve out community and family time (e.g., through adoption of so-called blue laws that legally mandate rest on Sundays); and to limit hours of work (e.g., through enactment of the Fair Labor Standards Act and the embrace of the forty-hour work week).<sup>116</sup> As Rakoff explained:

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<sup>114</sup> *Id.* at 634–37.

<sup>115</sup> *Id.* at 643; *see id.* at 643–56.

<sup>116</sup> TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002); *see* Orly Lobel, *The Law of Social Time*, 76 *TEMPLE L. REV.* 357, 371–75 (2003) (book review)

Social time ... is not made up of undifferentiated minutes. Chunks of time are organized so that the efforts of many people can be coordinated with each other; so that groups can establish the rhythms that help maintain both their activities and the groups themselves; and so that different meanings can be assigned to periods of time for various culturally significant purposes. The specifics of any particular pattern are, of course, open to debate, but that there ought to be some such organization is beyond doubt. In particular, in a society such as ours in which we expect individuals to play many different social roles in a variety of social settings, it is desirable that there be many different organizations of time to support these various activities.<sup>117</sup>

Disjunctures between the various domains of organized time (e.g., between work time and family time or between a parent's work time and a child's school time) can lead to conflicts and problems that implicate "not only specific rules of law, but a whole additional set of mechanisms by which the law shapes our social uses of time."<sup>118</sup> According to Rakoff, it is important to recognize that "[a] central function of the law, especially in a society as wedded to the law as ours, is to help organize the society. As generations before us have tried to do, we, too,

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(raising questions regarding Rakoff's failure to recognize the role of power relations and inequality between individuals and groups in the regulation of time).

<sup>117</sup> RAKOFF, *supra* note 116, at 127.

<sup>118</sup> *Id.* at 128.

should use our power of creating law to help us shape a structure of time that will, in turn, help us to live fulfilled lives.”<sup>119</sup>

Earlier, in *American Indians, Time, and the Law*, Charles Wilkinson examined law’s ability to construct time from an entirely different perspective when he showed how law has been used to construct barriers against the passage of time, effectively holding time at bay to create space for the governments of Indian tribes to develop and change over time. Wilkinson described Indian law as a “time-warped field” in which “many of the basic rights of Indian tribes depend upon constructions of treaties, statutes, and executive orders promulgated during the nineteenth century or even eighteenth century.”<sup>120</sup> According to Wilkinson: “[E]xcept for the Reconstruction era civil rights statutes, Indian law has been the vehicle for the modern analysis of laws enacted during the nation’s first century of existence more frequently than any other body of law.”<sup>121</sup> These “old laws” aimed “to create a measured separatism”—Indian tribes were to be “largely free from interference by non-Indians or future state governments” but were to be subject to supervision by, and were to receive support from, the federal government.<sup>122</sup> Yet, as Wilkinson explained, it was not merely a matter of freezing time through “efforts to enforce solemn promises of another age.”<sup>123</sup> “The tribes ... have sought and obtained a substantial

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<sup>119</sup> *Id.* at 184.

<sup>120</sup> CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 13 (1987).

<sup>121</sup> *Id.* at 14.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 41.

measure of insulation from many of the negative effects of the passage of time. Concurrently, however, they have attempted to make time work in their favor by seeking to establish a vigorous, modern tribal sovereignty with actual powers far beyond those exercised at the time of the treaties and treaty substitutes.”<sup>124</sup> Wilkinson saw the Supreme Court’s “recognition of rules providing for insulation against time, a tribal right to change, and special Indian law canons of construction” as both “appropriate” and “necessary” to fostering the “principled growth of those organic governmental documents [i.e., the treaties and treaty substitutes entered into between the federal government and the tribes] in much the same way as the Constitution evolves.”<sup>125</sup> Law had thus constructed a seemingly paradoxical bulwark against the passage of time that actually allowed time to pass and change to occur.

### Tax Law and Time

This book extends this line of research on the complex relationships between law and time into the tax arena. Without purporting to be exhaustive in examining the relationship between tax and time, my aim in the coming chapters is to show how, after we move beyond obvious connections and shed the strictures of conventional notions of the relationship between tax and time, it becomes clear that, as James Boyd White has put it:

[T]he activities which make up the professional life of the lawyer and judge [and, in the tax context, of the legislator and others participating in the making and interpretation of tax law] constitute an enterprise of the imagination, an enterprise whose central performance is the claim of meaning against the odds: the

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<sup>124</sup> *Id.* at 53.

<sup>125</sup> *Id.* at 105.



translation of the imagination into reality by the power of language. Its art is accordingly a literary one, most obviously perhaps in the demand that one master the forces and limits of what we have called the legal language system—speaking, as it does, in a set of official voices, reducing people to institutional identities, insisting on repetition of inherited patterns of thought and speech (most frustratingly in its use of the rule) and reposing an impossible confidence in its fictional pretenses. The art of the lawyer is perhaps first of all the literary art that controls this language. To say as much, and to ask how that language can be controlled—what the lawyer can do with it—is to say that the lawyer is at heart a writer, one who lives by the power of his imagination.<sup>126</sup>

This power of the legal—and, more particularly, tax—imagination will be on display throughout the pages of this book. We will begin our journey through tax time in chapters 1 and 2, which together consider the venerable US tax law doctrine of “substance over form” and its

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<sup>126</sup> JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* 758 (1973). For a discussion of the current state and past contributions of the law and literature movement, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 149–66 (1995); Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, in *TEACHING LAW AND LITERATURE* 71 (Austin Sarat et al. eds., 2011); Richard Weisberg, *What Remains “Real” About the Law and Literature Movement: A Global Appraisal*, 66 *J. LEGAL EDUC.* 37 (2016). See also James Boyd White, *The Cultural Background of The Legal Imagination*, in *TEACHING LAW AND LITERATURE*, *supra*, at 29.

statutory incarnations from the perspective of time. In chapter 1, freed from the confines of linear time, we will witness how this doctrine is used to travel back in time to rewrite the course of past events and then to act upon that reimagined course of events as if it had actually occurred when determining past, present, and future tax consequences related to, or based on, those events. Illustrating that no single tax actor possesses a monopoly on the power to use the tax imagination to travel through time, we will examine judicial applications of the doctrine at the urging of the IRS as well as Congress's own attempts to legislate time travel through the enactment of statutory antiabuse rules. Although our primary focus will be on US federal tax law, chapter 1 also provides comparative context to show that the United States is not alone in its embrace of substance-over-form principles and the necessary rejection of a strict adherence to linear representations of time that those principles entail.

Because this power to turn back time is deployed ostensibly to achieve greater justice and fairness in the application of the tax laws, it is important to question whether that is the end to which the power of the tax imagination is actually put to use. It is to this task that chapter 2 turns. The power to travel back in time and rewrite history—fettered only by one's own imagining of what “really” happened or what a “fair” application of the tax laws dictates—opens the door to arbitrary, unfair, or plainly discriminatory applications of substance-over-form principles. This possibility becomes concerning particularly when one moves beyond conventional applications of tax policy principles, such as those explored in chapter 1, that focus on economic considerations and measure tax equity solely by reference to taxpayers' income.<sup>127</sup> When one takes a broader view and recognizes the reality that taxpayers are more than merely the sum of

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<sup>127</sup> See Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191 (2008).

their financial transactions, it becomes clear that tax law, much like other areas of law, can have differential—and notably adverse—impacts based on race, ethnicity, socioeconomic class, gender and gender identity/expression, sexual orientation, disability, and immigration status.<sup>128</sup>

To illustrate this phenomenon at the intersection of tax and time, chapter 2 focuses on the element of choice in the doctrine of substance over form; that is to say, when tax actors choose to use the tax imagination to turn back time—and when not. As examples of situations in which a choice was made *not* to apply substance-over-form principles to correct manifest tax (and intertwined nontax) injustices perpetrated against disadvantaged groups, chapter 2 considers the IRS's refusal to recognize domestic partnerships and civil unions after the Supreme Court's marriage-equality decisions as well as its slow recognition of the incompatibility of racial discrimination with classification of an organization as a tax-exempt charity. Despite having rejected application of substance-over-form principles in both of these cases, the IRS nonetheless managed to engage the tax imagination in other creative ways that manipulated time for the benefit of those possessed of power and privilege based on their race and sexual orientation (not to mention other characteristics).

Moving from the fantastic to the mundane, chapters 3 and 4 give new meaning to the old adage “time is money.” These chapters consider the ways in which the power of the tax imagination is deployed to convert time into a form of currency—not using time to commodify labor in the usual sense of “time is money” but instead reifying time itself and turning it into a tradeable commodity. Each of these two chapters draws together and combines the two lines of tax policy analysis that were explored separately in chapters 1 and 2. In other words, they marry

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<sup>128</sup> See INFANTI, *supra* note 17, at 109–59.

the more conventional economic focus of “traditional” tax policy analysis with a more “critical” approach that considers the impact of commodifying time on members of disadvantaged groups (e.g., based on their race, ethnicity, gender, or sexual orientation).

Chapter 3 focuses on another key concept in tax law: capital cost recovery—the notion that investments in income-producing assets ought to be recovered over time, whether through depreciation, amortization, depletion, or some other mechanism. The general purpose of capital cost recovery is to obtain a better measure of a taxpayer’s income that ought to be subject to tax. But capital cost recovery can be manipulated easily in ways that turn time into money that the government can hand out to favored taxpayers. Demonstrating that this is not uniquely a US pastime, chapter 3 explores examples both from the United States—where there has been a shift away from recovering cost over time and toward the immediate expensing of investments—and from Spain—where early twenty-first century changes to the rules for amortizing goodwill on foreign stock acquisitions aimed to give Spanish companies a leg up in acquiring foreign enterprises. Naturally, when the government hands out money only to certain persons, especially when the payment is less than transparent, questions arise regarding who is receiving the money and whether the payments are being made to advance tax justice or to reward privilege.

In chapter 4, attention shifts to the ways in which taxpayers can use time to barter with the government in exchange for desired tax results. There are a number of instances in the Internal Revenue Code where time is treated as a commodity—that is, where a taxpayer will be afforded tax results that Congress might otherwise deny or be suspicious of due to the potential for abuse, so long as sufficient time has passed. In other words, if the taxpayer is willing to—and can afford to—give up a specified amount of time, then the taxpayer can have its desired tax benefits. Again, where transactions are taking place in less than transparent contexts, questions

naturally arise regarding who is afforded the special opportunity to shape their tax results in ways that they deem beneficial and whether this opportunity is being afforded for reasons that advance tax justice or reward privilege.

Chapter 5 approaches the power of the tax imagination from a different angle: from the perspective of those who fear its application to them. By way of example, chapter 5 considers the role of withholding as a mechanism for income tax collection. Withholding is essentially a matter of timing; it does not impact final tax liability but simply determines whether taxes are to be paid now (e.g., through withholding when wages are received) or later (e.g., when a tax return is filed after the end of the year). Reactions to two recent experiences with withholding are used as illustrations. First, the chapter describes the reaction in the United States to revisions made to withholding tables to implement the 2017 Tax Cuts and Jobs Act (the signature legislative achievement of the Trump administration that included tax cuts favoring corporations and wealthy individual taxpayers). There were early charges that these changes were politically motivated to gain an advantage in the 2018 midterm congressional elections. Later, during the spring 2019 tax filing season, the changes triggered a public backlash when widespread attention was drawn to the drop in the overall number and size of tax refunds. The chapter next underscores once again that issues of tax time are not unique to the United States by exploring the constellation of worries voiced by French politicians, taxpayers, and even the government itself arising out of the replacement of the country's long-standing delayed-payment regime for collecting income tax with a new withholding regime. The existence of these fears shows not only that the tax imagination can shape time to serve specific ends but also how readily we can recognize the existence of this power when it appears on the surface of the tax system. It should require only small steps—with this book hopefully being the first such step—for us to open our

collective eyes so that we might see and question other, less visible manipulations of tax time as well.

In the conclusion, the book closes by drawing together these examples of the tax imagination at work along with the broader discussions of whether we have been using our power to reimagine time in tax law to work toward greater tax and social justice (or not). Taking Carol Greenhouse's admonition that "time is cultural" in a different direction than she might have intended,<sup>129</sup> the conclusion likewise examines the cultural aspects of tax time.<sup>130</sup> It analyzes and considers what the choices that have been made in deploying the tax imagination say about society—about what and whom society values and, conversely, about what and whom society leaves out or does not value as highly. In light of these choices and the messages that they send, it is contended that a systematic examination and reimagination of how we engage with and deploy time in and through tax law is long overdue—and especially relevant at a moment of widespread soul-searching regarding the existence and dismantlement of structural inequalities, occasioned by a combination of the global COVID-19 pandemic and public anger at acts of violence by law enforcement against minorities in the United States and elsewhere.

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Through this book I hope to bring a fresh perspective to readers inside and outside tax academia who are interested in the relationship between law and time, as well as to those interested more generally in the operation and fairness of the tax laws—a group that should include all members of society. For readers interested in the relationship between law and time, this book places needed focus more squarely on statutes through its sustained examination of the intersection of

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<sup>129</sup> GREENHOUSE, *supra* note 89, at 1.

<sup>130</sup> *See* INFANTI, *supra* note 17.

time with complex tax legislation. This examination opens new frontiers in thinking about the relationship between law and time by demonstrating how, even within a single legal domain, time can simultaneously move in multiple directions and be converted into an inert (yet valuable) commodity. Throughout, this examination highlights the creative aspects of the use of time in tax law, exploring how Congress, the federal courts, the IRS, and even taxpayers and their tax advisers bend and shape time to achieve desired tax goals.

Of interest to a broader audience, this book continues my past work debunking the myth that tax is an arcane subject knowable only by an initiated few. My aim is to explain tax in a way that is accessible to nonexperts because everyone deserves to be educated about how the tax system operates. As the lifeblood of government and the foundation of society, a country's tax system embodies and conveys its values, expressing the nation's sense of self as a society. This book highlights these cultural aspects of taxation by shining a spotlight on the power and influence of time on tax law—and, conversely, of tax law on time—while bringing to the fore a simple notion: the way in which a country chooses to use time in its tax laws sends messages about its society and is thus deserving of attention from and questioning by *all* members of that society.

As we will explore in the coming pages, there is no need to fear the power to manipulate time in and through tax law. Instead, with greater awareness of the depth and breadth of that power, we should together take steps to harness that creativity to imagine—and then work toward—a more just society for all, rather than paying lip service to the idea of furthering justice while entrenching and exacerbating socioeconomic inequalities in and through tax law.