

Article

Tax Without Cash

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INTRODUCTION

In 1999, the Commonwealth of Massachusetts enacted a striking approach to property tax remittance: rather than paying with cash, taxpayers could pay their taxes by contributing hours of labor to their local government.¹ Acceptable property tax payments included painting fire hydrants, shelving public library books, and answering phones for city hall.² These in-kind remittances remain available today.³ And while remitting labor in lieu of cash to satisfy one's property tax has some additional limitations in Massachusetts,⁴ the approach to tax remittance nevertheless poses a broad tax policy question largely unexplored by our tax scholarship: Within a modern cash economy, in what circumstances should taxpayers be allowed to satisfy their tax liabilities by contributing services or noncash property directly to their government?

1. MASS. GEN. LAWS ch. 59, § 5K (2019). Curious tax minds will be interested to know that the Service has taken the position that these abatements are includible as income to the taxpayer. See I.R.S. Chief Couns. Mem. 27,003 (July 5, 2002). For additional discussion, see *infra* Part I.C.3.

2. Robert Bliss, *Seniors Who Volunteer Can Work Off Some of Their Property Tax Bills*, MASS. DEP'T REVENUE: OPENDOR (Oct. 30, 2009), <http://blog.mass.gov/revenue/current-affairs-2/seniors-who-volunteer-can-work-off-some-of-their-property-tax-bills> [<https://perma.cc/2XUP-W54E>].

3. For more details on the thousands of taxpayers who continue to remit property taxes in the form of labor, see *infra* Part I.C.1.

4. Eligibility requirements include residence in a Massachusetts municipality that approves the remittance in labor, being at least sixty-years-old, and receiving abatement no greater than state minimum wage and below a dollar cap. Ch. 59, § 5K. For an example of the additional requirements imposed by a participating municipality, see Age Strong Comm'n, *Senior Citizen Property Tax Work-Off Application: Fiscal Year 2022 (July 1, 2021 to June 30, 2022)*, CITY OF BOS. (Feb. 1, 2021), https://www.boston.gov/sites/default/files/file/2021/02/Final%20Revision%20PTWOP%20FY22%20Updated%20feb1%20%281%29_0.pdf [<https://perma.cc/S5D7-2AL8>].

It will not be surprising to many readers that in “premonetary” economies tax liabilities were paid in kind—all transactions were already occurring without cash.⁵ What *is* surprising—and one of the contributions of this Article—is that in-kind tax paying spans long beyond the advent of cash taxes and indeed remains in practice today in a variety of settings.⁶ For example, a common practice for building public roads in the United States was to assess taxes in labor, which occurred not only prior to a modern cash economy but was widely used during the nineteenth and twentieth centuries.⁷ And the levy power, which allows seizure of noncash property by tax authorities, is a form of in-kind remittance still in use as a backstop to nearly all forms of modern taxation.⁸

Despite the broad variety of in-kind tax remittances in use today, tax scholarship has consistently relied on a cash-tax premise that tacitly presumes modern tax remittances are exclusively paid in cash.⁹ The lack of attention to in-kind tax remittances is also the case in the field of public finance.¹⁰ In the rare instances where noncash tax remittance is discussed within the context of modern cash economies,

5. See, e.g., Adam S. Chodorow, *Agricultural Tithing and (Flat) Tax Complexity*, 68 U. PITT. L. REV. 267, 277–92 (2006) (discussing agricultural, in-kind taxes in biblical times); Mats Olsson, *Manorial Economy and Corvée Labour in Southern Sweden 1650–1850*, 59 ECON. HIST. REV. 481, 481 (2006) (discussing peasant labor as a form of taxation).

6. See, e.g., Anne-Marie Rhodes, *The Medium of Payment: An Option in Estate Tax Reform*, 57 NOTRE DAME LAW. 285, 299–302 (1981) (examining in-kind taxation in France); ch. 59, § 5K (authorizing eligible seniors to lessen tax liabilities through in-kind community work).

7. See MAXWELL GORDON LAY, *WAYS OF THE WORLD* 101 (1992). For additional details on this practice, see *infra* Part I.C.4.

8. This variety of in-kind remittance is discussed *infra* Part I.C.3.

9. This presumption is usually unstated. Rather than explicit claims that cash taxes are necessarily superior, a discussion of noncash tax remittance is simply absent alongside the repeated use of cash-tax examples. See, e.g., Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 519 (1952) (debating the merits of progressive versus proportional tax models in providing cash-based welfare payments); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669–74 (1994) (noting in-kind welfare payments without discussion of in-kind tax remittance). The choice of cash-tax examples is consistent with much of the economics literature which states values in cash terms to simplify the discussion.

10. See Casey B. Mulligan, *In-Kind Taxes, Behavior, and Comparative Advantage* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21586, 2015) (first citing JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* (3d ed. 2000); and then citing HARVEY S. ROSEN, *PUBLIC FINANCE* (6th ed. 2001)) (“Although public finance deals extensively with the question of cash versus in-kind transfers, in-kind taxes are almost completely neglected. For example, neither of the public finance textbooks by Stiglitz (2000) and Rosen (2001) mentions in-kind taxes in general, or labor conscription in particular.”).

scholarship has been limited to discrete policy proposals rather than noting the broader implications of in-kind remittance for tax scholarship generally.¹¹ Indeed, even scholarship focused on the challenge of taxing noncash bases presumes tax payment will be remitted in cash.¹² The cash-tax premise obscures the many varieties of in-kind tax paying deployed in the United States, also averting a serious debate over the merits and risks of such in-kind tax paying.¹³

One explanation for the presumption that modern taxes are paid in cash is that the benefits of cash are well known. Cash avoids the serendipity required of barter, where exchanges can only occur when a producer is willing to accept exactly the goods a buyer has.¹⁴ Cash also solves informational problems that could make transactions more expensive. Because it is difficult for nonexperts to ascertain something's value, money is a cheap shared good for doing that.¹⁵ Collection of taxes in cash also has clear benefits. A currency becomes legitimate when the state accepts that currency as payment for taxes.¹⁶ Cash taxes also provide an additional policy lever for adjusting currency values and managing inflation.¹⁷ And taxes received in cash are

The occasional exception to this claim by Mulligan is the economics literature on conscription. *See generally* LARRY A. SJAASTAD & RONALD W. HANSEN, *THE CONSCRIPTION TAX: AN EMPIRICAL ANALYSIS* (1970) (discussing governmental power to coerce military service via the "conscription tax" power and costs associated with collecting the conscription tax).

11. *See* Henry Ordower, *Charitable Contributions of Services: Charitable Gift Planning for Non-Itemizers*, 67 *TAX LAW* 517, 537–42 (2014) (discussing the tax efficiency of contributing services to charity by nonitemizers); Herwig J. Schlunk, *The Cashless Corporate Tax*, 55 *TAX L. REV.* 1, 1 (2001) (proposing to replace the current corporate income tax with a tax that requires corporations to remit shares to the government); Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation*, *BROOKINGS PAPERS ON ECON. ACTIVITY*, Fall 2019, at 480–85 (including in-kind remittance and valuation of noncash assets as a design option for a U.S. wealth tax).

12. Andrew T. Hayashi, *The Quiet Costs of Taxation: Cash Taxes and Noncash Bases*, 71 *TAX L. REV.* 781, 786–88 (2018) (noting the reduced consumption of taxpayers in addition to other liquidity costs). Unlike Hayashi's excellent inquiry on cash taxes on noncash bases, this Article describes *noncash* taxes on either cash or noncash bases.

13. For a discussion of the implications of cash-tax remittance for choice of tax base conclusions, see *infra* Part II.B. For a discussion of the implications of cash-tax remittance for tax administration conclusions, see *infra* Part II.A.

14. *See* 1 ADAM SMITH, *THE WEALTH OF NATIONS* 18 (Richard D. Irwin, Inc. 1963) (1776).

15. Armen A. Alchian, *Why Money?*, 9 *J. MONEY, CREDIT & BANKING* 133, 139 (1977) ("It is . . . the costliness of information about the attributes of goods available for exchange that induces the use of money in an exchange economy.").

16. MORGAN RICKS, *THE MONEY PROBLEM* 147–48 (2016).

17. STEVEN A. BANK, KIRK J. STARK & JOSEPH J. THORNDIKE, *WAR AND TAXES* 169 (2008).

fungible, giving states additional flexibility for how resources received will then be used.

But none of the known benefits of cash taxes can be assumed to be arguments for the *exclusive* use of cash remittance. To note that cash has benefits is not the same as claiming that all other forms of exchange should be banned. And indeed, we see many commercial exchanges in the private sector where private actors appear to prefer noncash transactions, or blended transactions that include some cash and some noncash components. For example, it is routine for executives of Fortune 500 companies to receive the bulk of their compensation for contributed labor in the form of securities, often an unvested future interest in those securities.¹⁸ In finance, trade volume for commodity swaps and swaps of contractual obligations approaches a trillion dollars in notional value in a single month.¹⁹ And in many large corporate mergers, securities are exchanged rather than sold for cash.²⁰ In all three instances, sophisticated actors prefer *not* using cash exclusively.

Acknowledging the value of in-kind contributions to government is consistent with other areas of our tax code, which generally includes the value of in-kind contributions when between private parties, such as gifts of real property²¹ or contributions of labor in exchange for a partnership interest.²² Tax scholarship on transfers to citizens *from* government also generally recognizes both cash and noncash payments, sometimes even collapsing the two into a shared category.²³ It

18. See Michael Kesner, Ed Sim & Tara Tays, *Trends in Executive Compensation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 17, 2019), <https://corpgov.law.harvard.edu/2019/09/17/trends-in-executive-compensation> [<https://perma.cc/G2RY-YX2R>] (“As a rule of thumb, the base salary constitutes 30% of total compensation, the annual incentive another 20%, the benefits about 10% and long-term incentives or the wealth creation portion of the compensation about 40%.”). Multiple factors explain this preference, including alignment of incentives between principals and agents as well as the cheaper availability of equity for liquidity-constrained firms.

19. See *Weekly Swaps Report*, COMMODITY FUTURES TRADING COMM’N (Nov. 20, 2020), <https://www.cftc.gov/MarketReports/SwapsReports/TransactionVolume/index.htm> [<https://perma.cc/VP4A-BX2Q>].

20. These common transactions are covered by our tax-free reorganization rules under I.R.C. § 368.

21. See I.R.C. § 2501.

22. See Treas. Reg. § 1.721-1(b)(1).

23. See, e.g., LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 14–15 (2002) (discussing the value that taxpayers receive by living in a society that has such benefits as a currency of exchange and enforcement of contracts, and other “in-kind benefits such as roads, schools, and police, not to mention the entire legal system that defines and protects everyone’s property rights”); EDWARD D. KLEINBARD, *WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY* (2014) (discussing the importance of a fiscal systems approach to understanding tax justice

is now time for tax scholarship to reckon with noncash transfers from citizens to government.

Deeper scrutiny of tax paying in noncash form reveals both exciting and worrisome possibilities. On the one hand, in-kind tax paying has the potential to reduce the compliance burdens of tax paying by removing liquidity barriers,²⁴ create new opportunities to bolster civic features of tax paying similar to other noncash contributions to government (such as jury duty)²⁵ and expand the population of eligible tax filers by pulling in taxpayers who otherwise may not file (including firms reporting losses).²⁶ By expanding our definition of tax paying to include in-kind contributions to government, we also expand opportunities to develop a more sustainable revenue base.²⁷ On the other hand, in-kind tax paying raises the threat of returning us to some of history's most harrowing chapters: compelled labor; tyranny.²⁸ A government that regularly seizes land and demands manual labor is, to many, a government run amok. This Article will confront this dilemma.

This Article is not a call to replace all cash taxes with in-kind taxes. Rather, it merely relaxes the cash-tax premise to consider a tax system beyond cash-tax exclusivity. By doing so, this Article makes three contributions. First, it improves our definition of tax paying by identifying the wide variety of in-kind remittances that already occur

by looking at transfers to citizens outside of tax policy, including in-kind transfers).

24. See JEAN-JACQUES ROUSSEAU, *THE PLAN FOR PERPETUAL PEACE, ON THE GOVERNMENT OF POLAND, AND OTHER WRITINGS ON HISTORY AND POLITICS* 216 (Christopher Kelly ed., Christopher Kelly & Judith Bush trans., 2005) ("I will never argue enough that what makes the *taille* and all taxes onerous to the cultivator, is that they are pecuniary, and that he is first obliged to sell in order to be able to pay.").

25. See Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129, 1132 (2018) (discussing "patriotic philanthropy" opportunities to reduce tax liabilities).

26. In-kind tax paying could also serve as a platform for a federal jobs guarantee, allowing taxpayers to access refundable tax credits through contributed labor. See Lynn D. Lu, *From Stigma to Dignity? Transforming Workfare with Universal Basic Income and a Federal Job Guarantee*, 72 S.C. L. REV. 703, 731 (2021) (advocating for taxpayer-funded job guarantees in education and caregiving work).

27. See, e.g., Aileen McHarg, *Crown Estate Devolution*, 20 EDINBURGH L. REV. 388, 390 (2016) (providing an example of in-kind taxation generating a long-term tax revenue stream in the United Kingdom).

28. See Lucero Herrera, Tia Koonse, Melanie Sonsteng-Person & Noah Zatz, *Work, Pay, or Go to Jail: Court-Ordered Community Service in Los Angeles*, UCLA LAB. CTR. & UCLA SCH. OF L. 5 (Oct. 2019), https://www.labor.ucla.edu/wp-content/uploads/2019/10/UCLA_CommunityServiceReport_Final_1016.pdf [<https://perma.cc/9YCY-UGR4>] (critiquing court-ordered "community service" as a modern form of forced labor). Since taxation carries the authority of state law and is backed by the threat of state punishment, hypothetical noncompliance with in-kind taxation raises similar specters.

in our current tax system, offering a taxonomy for how to understand in-kind remittances within a modern economy that relies primarily on cash taxes. Second, it refutes the tacit presumption that in-kind remittances of tax obligations are not viable, thus expanding the tax tools available to local, state, and federal governments. Third, it confronts the substantial dangers of in-kind tax paying, using these risks to propose new principles for limiting the design and administration of in-kind tax paying. While there are tradeoffs to pursuing such a broad project that cuts across federal, state, and local tax policies, also drawing from historical and comparative examples, the core questions remain narrow: What is in-kind tax paying? Is it viable? Under what circumstances is it desirable?

Part I documents how in-kind tax paying spans beyond premonetary economies and remains an ongoing feature of our current tax system in the United States. Section I.A provides a more in-depth definition of in-kind tax paying. Section I.B offers a brief history of the early roots of in-kind tax paying. Section I.C provides a taxonomy of in-kind tax paying within a modern cash economy. The descriptive work in Section I.C on the range and variety of in-kind remittance of tax liability is one of the substantial contributions of this Article.²⁹ The original taxonomy provided by this Section organizes in-kind tax paying into taxes assessed in cash and paid in labor, taxes assessed in cash and paid in noncash property, and taxes assessed in kind and paid in kind.

Part II discusses the lessons and risks of in-kind tax paying. Section II.A describes the administrability lessons of in-kind tax paying. Principally, it emphasizes the viability of in-kind remittance. Section II.B then discusses the implications of removing the cash-tax premise for choice of tax base considerations, including the desirability of lump sum taxation. The ambition of this Section is not to resolve debates over the ideal selection of a tax base. Rather, this Section demonstrates how acknowledging the viability and prevalence of in-kind remittance alters fundamental tax policy principles.³⁰ Section II.C describes how in-kind tax paying expands the civic features of tax paying, including improvements to transparency, accountability, and taxpayer solidarity. Section II.D discusses the risks of in-kind tax paying. In-kind tax paying may reduce taxpayer rights due to limited takings

29. To this Author's knowledge, no such project documenting the range of in-kind tax paying under current law and offering a typology has previously been published.

30. One can imagine implications for optimal levels of progressivity and the use of tax expenditures, to name just a few additional core tax policy debates—but this Section is modest in scope. Its purpose is to illustrate Part I's description of in-kind tax paying as a topic of deep significance to tax policy design and tax policy evaluation.

protections when government policies are deemed to be taxes. The civic duty exception to the Thirteenth Amendment also weakens protections against compelled labor by the state.

After critically evaluating the case for in-kind tax paying, Part III concludes with a consideration of new approaches to tax paying in noncash form that include guardrails against the primary risks raised by the in-kind tax paying identified in Part II. Permitting in-kind remittance only when taxpayers elect to pay in kind could be a necessary taxpayer protection, especially when combined with cash assessments.³¹ Nonnatural persons who are tax filers, such as trusts and corporations, may also be especially well suited for in-kind tax paying given the reduced risk to individual freedom.³² For example, initial public offerings above a certain capitalization threshold could be required to issue a specified number of nonvoting shares into a public trust. The expanded use of in-kind tax paying could take many forms.

I. THE VARIETIES OF IN-KIND TAX PAYING

This Part discusses the varieties of in-kind tax paying. Identifying such forms of tax paying is principally a question of remittance—has the taxpayer remitted taxes in the form of cash or something else? All varieties of in-kind tax paying include remittance in kind to government in order to reduce a tax liability, but these broad varieties are further divided along additional features. In three varieties, the tax liability is *assessed in cash*, but remittance is in kind.³³ In one variety, *assessment is in kind* in addition to remittance in kind.³⁴ Additional variations include the extent to which the in-kind remittance is elective, whether the in-kind remittance is in noncash property or services, and whether the in-kind remittance is to the same entity that has assessed the tax or to a different subunit of government.

A. DEFINING IN-KIND TAX PAYING

This Article defines “in-kind tax paying” as a contribution of services or noncash property to government that reduces a contributor’s tax liability. Noncash property includes real property. Noncash property also includes intangible personal property, such as intellectual

31. Elective in-kind remittance is in tension with universal service requirements where payment in cash in lieu of service would be undesirable. The distinction is principally about whether assessment is in kind, rather than whether remittance is in kind.

32. The opinion that firms should not have the same rights as individuals is of course not shared by all in the academy, nor by our courts. *See, e.g., Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342–43 (2010).

33. *See infra* Part I.C.1–3.

34. *See infra* Part I.C.4.

property and securities, and tangible personal property, such as oyster shells. Hence, remitting real property to government to reduce the contributor's tax liability is a form of in-kind tax paying.

In order for a contribution to meet this definition of in-kind tax paying, the contribution must be directly to the state, rather than to a private party. For example, current law allows charitable deductions for in-kind contributions to qualified tax-exempt organizations, including federal, state, and local governments.³⁵ Contributions to a subdivision of the federal government that reduced the contributor's tax liability would constitute a form of in-kind tax paying.³⁶ Contributions to a private foundation would not. This distinction between contributions to government versus contributions to private entities also arises with tax credits for services. A hypothetical childcare tax credit available to guardians who provide childcare services to their dependents would not be a direct contribution to the state.³⁷ Hence, this would not be a form of in-kind tax paying. Removing contributions to private parties from the definition of in-kind tax paying is crucial from the standpoint of distinguishing taxes from other regulatory actions. For example, compliance with a zoning restriction is not a remittance to government, and zoning is generally understood as a regulation rather than a tax.³⁸ This Article is principally concerned with taxes and is thus focused on remittances made to the state.³⁹

In order for a remittance to be a form of in-kind tax paying, the remittance must also reduce a tax liability. This reduction can be tax

35. I.R.C. § 170.

36. For a discussion of the preassessment nature of charitable contributions and the fact that they are not dollar-for-dollar reductions, see *infra* Part I.C.2. A contribution that reduces a federal income tax liability does not fall within the quid pro quo rules for state and local tax cap deductions, which are concerned with the use of charitable contributions in exchange for tax credits. See Contributions in Exchange for State or Local Tax Credits, Prop. Treas. Regs. §§ 1.170A-1, -13, 1.642(c)-3, 83 Fed. Reg. 43,563, 43,571 (Aug. 27, 2018).

37. Surely the state may have an interest in this type of activity, but that interest is distinct from contributions directly to the state, such as contributing labor to a public daycare center.

38. See *infra* Part II.D.2.

39. The lack of remittance to government also positions "cross-subsidies" outside the definition of in-kind tax paying. See John Brooks, Brian Galle & Brendan Maher, *Cross-Subsidies: Government's Hidden Pocketbook*, 106 GEO. L.J. 1229, 1231 (2018) ("A cross-subsidy arises when two similar consumers of a good pay different prices—or, equivalently, when two consumers impose different costs on a service provider but are charged the same price—and the excess funds from one are used to make up the shortfall for the other. Cross-subsidies, in other words, are a way of paying for public goods out of the pockets of consumers (or other private actors) rather than taxpayers."). With cross-subsidies, a key feature is that there is no remittance at all. With in-kind tax paying, there is a remittance to the state.

liabilities assessed in cash or noncash amounts. Sometimes this remittance also occurs preassessment.⁴⁰ In some instances, in-kind tax paying is also elective. A tax assessed in cash may provide a taxpayer with the option of remitting in cash or services, for example.⁴¹ A tax assessed in kind may allow a taxpayer to remit cash instead.⁴² In other instances, a tax assessed in kind must be remitted in kind.⁴³ Gifts can be forms of in-kind tax paying in instances where the donee is the government assessing a tax and the gift reduces the tax liability of the donor.⁴⁴ In-kind tax paying encompasses this variety, as illustrated further in Part I.C.

In-kind tax paying does not encompass remittances made with cash equivalents, such as check, money order, or credit card.⁴⁵ When the Taxpayer Relief Act of 1997 amended I.R.C. § 6311(a) with the provision “[i]t shall be lawful for the Secretary to receive for internal revenue taxes . . . any commercially acceptable means that the Secretary deems appropriate to the extent and under the conditions provided in regulations prescribed by the Secretary,” commercially acceptable means were not interpreted to mean noncash property or services.⁴⁶ Rather, as interpreted by the IRS, “the purpose of the amendment was primarily to address credit and debit card payments.”⁴⁷ The broad consensus regarding the interpretation of § 6311(a) is not the last word on in-kind remittance, however. As this Article demonstrates in Part II.C, many varieties of in-kind tax paying nevertheless occur in the United States.

40. This is the case with in-kind contributions to government under I.R.C. § 170 that reduce a tax liability but are remitted before that liability is assessed. Many cash remittances also occur preassessment, such as payroll withholding for income tax liability.

41. See *infra* Part I.C.1.

42. See *infra* Part I.C.4.

43. See *infra* Part I.C.4.

44. This variety of in-kind taxpaying has been referred to as “patriotic philanthropy,” though the term encompasses both contributions made in cash and in kind. Lemos & Charles, *supra* note 25, at 1132.

45. In 1999, Treasury issued temporary regulations to allow for credit card payment of taxes. Treas. Reg. § 301.6311-2T (1999). Treasury subsequently made the temporary regulations permanent. Treas. Reg. § 301.6311-2 (as amended in 2002).

46. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1205, 111 Stat. 788, 995 (1997). The Joint Committee’s account of the 1997 Act states that “commercially acceptable means” include “electronic funds transfers, including those arising from credit cards, debit cards, and charge cards.” STAFF OF THE JOINT COMM. ON TAX’N, 105TH CONG., GEN. EXPLANATION OF TAX LEGIS. ENACTED IN 1997, at 339–40 (Comm. Print 1997).

47. I.R.S. Chief Couns. Mem. 137071-13, at 3 (Jan. 9, 2014). It remains to be tested whether in-kind remittances could be viewed as commercially acceptable, such as contributed labor, though the legislative history does not appear to support such a position.

In-kind tax paying does not encompass criminal penalties, such as community service. Sentencing and its attendant forms of penance that may include service to the state are not a contribution that reduces an assessed tax liability. This is consistent with the general understanding that a criminal sentence is not a tax, and thus the activities to reduce the sentence are not in-kind tax paying. This distinguishes compelled volunteer work required for wrongdoing in current law and past forms of convict leasing from in-kind tax paying.⁴⁸

B. EARLY ROOTS OF IN-KIND TAX PAYING

Governments have long preceded the wide availability of cash, and so too public revenue systems preceded cash. It is thus not surprising that in eras where many taxpayers did not use cash, remittance of taxes to government was in kind. Nevertheless, a brief discussion of these early revenue systems is a relevant precursor to the varieties of in-kind tax paying that are the focus of the later portion of this Part.

The earliest forms of in-kind tax paying appear in religious texts. Tithing obligations to religious leaders were both assessed in kind and remitted in kind, with a portion of a taxpayer's field reserved for the common good.⁴⁹ This practice extended beyond Judaism and was systematized by Christian churches in the eleventh century.⁵⁰ In-kind tithing was also incorporated into the political system of feudalism, where serfs contributed hours of work on a lord's field and a portion of the yield on the serf's own field.⁵¹ The practice of remitting tithes in

48. See, e.g., Herrera et al., *supra* note 28, at 5 (“[C]ommunity service is imposed as both a way to work off court debt and a separate component of a criminal sentence.”).

49. *Deuteronomy* 14:22–29 (“Every year you shall set apart a tithe of all the yield of your seed that is brought in yearly from the field . . . Every third year you shall bring out the full tithe of your produce for that year, and store it within your towns; the Levites, because they have no allotment or inheritance with you, as well as the resident aliens, the orphans, and the widows in your towns, may come and eat their fill, and so that the Lord your God may bless you in all the work that you undertake.”). For a thoughtful discussion of the administrability of this regime, see Chodorow, *supra* note 5, at 277–92.

50. Adam S. Chodorow, *Biblical Tax Systems and the Case for Progressive Taxation*, 23 J.L. & RELIGION 51, 65–68 (2007).

51. Olsson, *supra* note 5, at 481 (“[P]easants’ most important contribution to the landlords became, in most cases, their *corvée* labour, and their uncertain tenure rights were illustrated with great clarity in the continuing evictions, which were accelerated in the nineteenth century with the aim of expanding the demesne.”).

kind continued amongst churches throughout the American colonies in the seventeenth century.⁵²

While in-kind tax paying preceded cash taxes, the two varieties also overlapped.⁵³ As cash became more common, some nevertheless argued for retaining in-kind taxes, such as the *corvée* requiring male citizens to build public works. Hired by Poland in the late eighteenth century to advise on their new constitution, Jean-Jacques Rousseau advised retaining in-kind taxation over cash taxes:

I would like one always to tax men's arms more than their purse; to have roads, Bridges, public buildings, service of the Prince and of the State be done by statutory labor and not at all at the price of money. This sort of tax is at bottom the least onerous and above all the one that can be least abused: for money disappears upon leaving the hands that pay it, but everyone sees what men are employed for, and one cannot overburden them at pure loss. I know that this method is impracticable where luxury, commerce, and the arts reign: but nothing is as easy among a simple people who have good morals, and nothing is more useful for preserving them this way: this is an additional reason for preferring it.⁵⁴

According to Rousseau, the advantages of in-kind tax paying were many, including improved transparency as to the use of taxpayer contributions. In-kind taxes could also exist alongside cash taxes, depending on the appropriateness of the base. Rousseau was also attentive to the issues of liquidity when governments tax noncash bases, arguing “for I will never repeat enough that what makes the *taille* and all taxes onerous to the cultivator, is that they are pecuniary, and that he is first obliged to sell in order to be able to pay.”⁵⁵ In-kind remittance did not require forced liquidations of crop yield or land to meet tax liabilities. According to Rousseau, these in-kind remittances would be elective, and taxpayers “would pay it from their purse only if they preferred it that way.”⁵⁶

In the United States, cash taxes rivaled in-kind remittance in the Early Republic as a way to create demand for U.S. currency.⁵⁷ By requiring taxes to be paid in U.S. currency, taxpayers then had to acquire such currency. The onerous duty of pecuniary taxes noted by Rousseau was an appealing feature for a new nation.⁵⁸ The rise of cash

52. See SAMUEL D. BRUNSON, *GOD AND THE IRS* 38–40 (2018).

53. See, e.g., Jane Frecknall Hughes & Lynne Oats, *King John's Tax Innovations – Extortion, Resistance, and the Establishment of the Principle of Taxation by Consent*, 34 *ACCT. HISTORIANS J.* 75, 81–82 (2007) (listing examples of cash-based medieval taxes).

54. ROUSSEAU, *supra* note 24, at 214.

55. *Id.* at 216. The *taille* was a direct tax on land in France.

56. *Id.*

57. See SMITH, *supra* note 14, at 253 (discussing the payment of American colonies' taxes in cash).

58. Gabriel Ardant, *Financial Policy and Economic Infrastructure of Modern States*

transactions also simplified the administrative task of cash-tax collection, since money prices could be used for valuation purposes.⁵⁹ Cash taxes were also an important monetary policy instrument for managing inflation, especially during periods of war.⁶⁰ And cash collection simplified the role of taxes in the state-building task of military spending—soldiers and equipment could be bought in addition to being conscripted.⁶¹ The rise of cash taxes did not wholly replace in-kind remittance, however. Both varieties of remittance continue to exist simultaneously.⁶²

The history of in-kind remittance is not limited to regular assessments but also includes extraordinary measures of singular remittance of property that then produce future revenue streams. The 1760 assignment by King George III of Crown lands' profits to Parliament was intended to produce revenue beyond the initial remittance that could fund government thereafter.⁶³ The remittance created "in effect, a publicly-owned property business, the revenues from which accrue to the U.K. Treasury."⁶⁴ This historic transfer points to the value of in-kind tax paying wherein the contributed property continues to produce public revenue even if the initial assessment is only once rather

and Nations, in THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 166 (Charles Tilly ed., 1975).

59. Isaac William Martin, Ajay K. Mehrotra & Monica Prasad, *The Thunder of History: The Origins and Development of the New Fiscal Sociology*, in *THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE* 4, 7 (Isaac William Martin, Ajay K. Mehrotra & Monica Prasad, eds., 2009) ("Economic development increased wealth, making a greater surplus available to tax. The increase of trade made it possible for the first time to levy taxes on trade rather than on the produce of land. And development also provided a convenient way to measure the tax base—in the form of money prices.").

60. BANK ET AL., *supra* note 17, at 169 ("Given the historical record, one might even go so far as to suggest that preventing inflation has been the core concern of wartime tax policy in U.S. history."). The authors then go on to note that the Federal Reserve has now assumed this role of controlling inflation, thus freeing Congress to pursue new wars in the twenty-first century without needing to raise taxes. *Id.* While not stated by the authors, the lack of reliance on taxation as a tool for managing inflation implies in-kind remittance would not undermine this former goal of tax policy.

61. Martin et al., *supra* note 59, at 4, 10–11.

62. See *infra* Part I.C. The shift from barter economies to cash alleged by Adam Smith has also come into question. See Boudewijn de Bruin, Lisa Herzog, Martin O'Neill & Joakim Sandberg, *Philosophy of Money and Finance*, *STAN. ENCYCLOPEDIA PHIL.* (Nov. 14, 2018), <https://plato.stanford.edu/entries/money-finance> [<https://perma.cc/2SJA-PHYH>]; see also Ilana E. Strauss, *The Myth of the Barter Economy*, *ATLANTIC* (Feb. 26, 2016), <https://www.theatlantic.com/business/archive/2016/02/barter-society-myth/471051> [<https://perma.cc/8HET-TFLT>].

63. McHarg, *supra* note 27, at 390 (discussing enhancements in the Crown Estate's value).

64. *Id.* at 388.

than periodic. Unlike other early forms of in-kind tax paying, the assets are not immediately liquidated, and the state assumes a position of trustee. Notably, the Crown Estate is not just a historical vestige of in-kind tax paying but continues to provide revenue to Parliament and also continues to grow in size through escheat and inheritance tax remittance.⁶⁵

C. IN-KIND TAX PAYING WITHIN A CASH ECONOMY

This Section provides a typology of the varieties of in-kind tax paying that exist within a modern cash economy. All of the varieties included here are also drawn from periods of modern income tax administration.⁶⁶ Indeed, many are in use today. One of the primary contributions of this Article is to catalog these forms of in-kind tax paying, calling attention to a form of tax remittance generally assumed to be out of use. The varieties of in-kind tax paying span local, state, and federal government, and are available across multiple tax bases, including head taxes, income taxes, and property taxes.

1. Assessment in Cash, Elective Remittance in Services

Contemporary uses of in-kind tax paying mostly occur when a tax assessment is denominated in dollars but remittance is permitted in kind.⁶⁷ This Subsection examines the elective remittance of services to government in order to reduce a tax liability assessed in cash. This variety of in-kind tax paying in the form of services is used in many state

65. *Frequently Asked Questions, THE CROWN ESTATE*, <https://www.thecrownestate.co.uk/en-gb/resources/faqs> [<https://perma.cc/9TD9-KVKE>]. For inheritance tax remittance, see *Pay Your Inheritance Tax Bill*, GOV.UK, <https://www.gov.uk/paying-inheritance-tax/by-transferring-national-heritage-property> [<https://perma.cc/V2Q6-T77W>]. The existence of a monarchy does somewhat complicate the definition of in-kind tax paying in that the contributor was not satisfying a tax debt because the contributor is sovereign and thus cannot owe taxes. But there was a public demand for revenue, and that demand was met by the remittance. The Crown Estate arrangement could also easily be reproduced in legal regimes where the contributor is not sovereign. Other countries that have accepted in-kind remittances to satisfy tax liabilities include France and Mexico. See Rhodes, *supra* note 6, at 299–302 (examining in-kind taxation in France); George Guttman, *Using Artwork and National Patrimony Items to Pay Taxes*, 131 TAX NOTES 1381, 1382 (2011) (examining in-kind taxation in France); Julia M. Bogdanovich, Comment, *Devising an Artful Tax: An Appraisal of Payment-In-Kind Income Taxes in Mexico and the United Kingdom*, 164 U. PA. L. REV. 983, 988–98 (2016) (examining in-kind taxation in Mexico).

66. The Sixteenth Amendment to the U.S. Constitution was ratified in 1913. Joint Resolution Proposing an Amendment to the Constitution of the United States, 37 Stat. 1785 (1913).

67. This Article refers to these dollar-denominated tax liabilities as being assessed “in cash.”

and local tax systems. In some instances, the federal Earned Income Tax Credit can also be a form of in-kind tax paying.

Massachusetts first enacted its so-called “Property Tax Work-Off Program” in 1999.⁶⁸ The program allows localities to administer their own in-kind remittance schemas within specific limitations, including minimum age of the taxpayer and total number of hours worked. The relevant provisions of the state statute are as follows:

[A]ny city or town . . . may establish a program to allow persons over the age of 60 to volunteer to provide services to such city or town. In exchange for such volunteer services, the city or town shall reduce the real property tax obligations of such person over the age of 60 on his tax bills and any reduction so provided shall be in addition to any exemption or abatement to which any such person is otherwise entitled and no such person shall receive a rate of, or be credited with, more than the current minimum wage of the commonwealth per hour for services provided pursuant to such reduction nor shall the reduction of the real property tax bill exceed \$1,500 in a given tax year.⁶⁹

The statute also allows for a designated surrogate to perform the labor if the taxpayer is disabled.⁷⁰ Because tasks are assigned locally there is wide variation in what work seniors are asked to remit, but some examples include painting fire hydrants, shelving public library books, and answering phones for city hall.⁷¹

The in-kind tax paying program has been so popular in Massachusetts that the legislature regularly increases the dollar value of the labor permitted to be remitted in satisfaction of property taxes. The State increased this amount from \$500 in 1999⁷² to \$750 in 2002,⁷³ to \$1,000 in 2009,⁷⁴ and to \$1,500 in 2016.⁷⁵ By its fifth year, over 2,400 Massachusetts seniors paid a portion of their property taxes in kind through the program, valued at \$1.3 million.⁷⁶ By its sixth year, 129 of Massachusetts’s 351 cities and towns had adopted a form of the in-kind tax paying program authorized by the State.⁷⁷ The Property Tax Work-Off Program is now in its twenty-second year.⁷⁸

68. Act of July 1, 1999, ch. 127, 1999 Mass. Acts 337.

69. MASS. GEN. LAWS ch. 59, § 5K (2019).

70. *Id.*

71. Bliss, *supra* note 2.

72. H. 4900, 181st Gen. Ct., Reg. Sess. (Mass. 1999).

73. H. 5300, 182d Gen. Ct., Reg. Sess. (Mass. 2002).

74. H. 4129, 186th Gen. Ct., Reg. Sess. (Mass. 2009).

75. H. 4565, 189th Gen. Ct., Reg. Sess. (Mass. 2016).

76. A. JOSEPH DE NUCCI, COMMONWEALTH OF MASS., THE STATE AUDITOR’S REPORT ON THE LOCAL FINANCIAL IMPACT OF PROPERTY TAX EXEMPTIONS FOR SENIOR CITIZENS 6 (discussing property tax relief for senior citizen homeowners).

77. HELGA NIESZ, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH., 2006-R-0702, LOCAL OPTION PROPERTY TAX REDUCTIONS FOR SENIOR VOLUNTEERS IN MASSACHUSETTS (2006).

78. See H. 4900, 181st Gen. Ct., Reg. Sess. (Mass. 1999) (enacting the Property Tax Work-Off Program).

Because the state statute merely authorizes localities to adopt their own in-kind tax paying mechanisms, the eligibility requirements and application process vary by jurisdiction. For example, Boston has added means testing, so that in-kind tax paying in labor to reduce property tax liability is only available to those seniors with gross income below \$40,000 if single or \$55,000 if married.⁷⁹ There are also residency requirements related to the number of years on the property and whether the property is the taxpayer's primary residence.⁸⁰

It is worth noting that a concern for the liquidity of seniors being taxed on an illiquid asset cannot entirely explain the popularity of this program, as many alternative policy tools were available to the Massachusetts legislature for addressing potential liquidity issues for seniors facing property tax liability.⁸¹ For example, seniors could be exempt from property tax, a tax credit could be made available for a portion of property tax liability, or property tax increase limitations could be applied. Indeed, according to Massachusetts's own state auditor, five different forms of property tax abatement exist for low-income seniors in Massachusetts, including the Property Tax Work-Off Program.⁸² The "Circuit Breaker Tax Credit," offering seniors a refundable credit for property taxes owed as well as rent owed above a certain proportion of income, was even passed in the same year as the in-kind tax paying legislation.⁸³ Despite these alternatives, the Property Tax Work-Off Program has endured. Unlike other property tax "relief" for seniors in Massachusetts, there is no reimbursement by the State to the locality for foregone property tax revenue under the Property Tax Work-Off Program because localities are deemed to be receiving

79. Age Strong Comm'n, CITY OF BOS., *supra* note 4, at 3.

80. *Id.* (requiring at least three years of property ownership and principal residency in Boston for program eligibility).

81. See DENUCCI, *supra* note 76, at 2-3.

82. *Id.* (describing the five tax abatement programs for low-income seniors in Massachusetts).

83. MASS. GEN. LAWS ch. 62, § 6(k) (1999); DENUCCI, *supra* note 76, at 3 ("Also in 1999, the Legislature established the Circuit Breaker program to offer eligible homeowners and renters age 65 and over a state income tax credit, or refund if no taxes are owed. The eligibility criteria and the maximum allowed annual credits are indexed to inflation. For 2004, a maximum credit of \$820 is available, with income limits set at \$44,000/single and \$66,000/married; assessed value of the property may not exceed \$441,000. The benefit for a given individual is the amount by which property taxes plus one half of water and sewer payments exceed 10% of the taxpayer's income—up to the maximum annual allowance. Renters may qualify if 25% of rent payments exceed 10% of income—up to the maximum annual limit. As a state-level program, Circuit Breaker is available without regard to the city or town in which a taxpayer resides, and does not impact local revenues.").

equivalent value in labor from seniors and thus do not need reimbursement.⁸⁴ In essence, the State considers the taxes to have been remitted in labor.⁸⁵

The Internal Revenue Service treats the dollar value of tax abatement under the Property Tax Work-Off Program as income to the taxpayer.⁸⁶ After reviewing multiple arguments for its exclusion, the Service determined the tax reduction is neither a gift under § 102 because there is a quid pro quo of labor in exchange for reduced property taxes, nor is the remitted labor in exchange for reduction in property taxes eligible for the exclusions under § 108 because the reduced property tax liability is not a discharge of indebtedness.⁸⁷

Massachusetts is not the only state that has pursued the remittance of labor to government by seniors in order to reduce property tax liability. Local governments in California, Colorado, Minnesota, New York, and Virginia also have pursued similar programs.⁸⁸

Another popular approach to reducing state and local tax liabilities through contributed services to government occurs in labor contributions to firefighting departments. States that allow such remittance include New York,⁸⁹ Connecticut,⁹⁰ and Pennsylvania.⁹¹ Firefighting as a form of remittance also has deep historical roots, going back to at least the nineteenth century.⁹² The tax abatement is typically less than the cost of employing staff, allowing government to create an incentive for contributed services using its taxing power

84. See NIESZ, *supra* note 77 (“The state does not reimburse the towns for the reduction, since the participants are providing services in exchange.”).

85. *Id.*

86. I.R.S. Gen. Couns. Mem. 27,003, at 3 (July 5, 2002).

87. *Id.*

88. *Id.* at 2 n.2; see also COLO. REV. STAT. ANN. §§ 39-3.7-101-102 (West 2017); OR. REV. STAT. ANN. § 310.800 (West 2017).

89. N.Y. REAL PROP. TAX LAW § 466-C (Consol. 2019).

90. S.B. 419, 2018 Leg., Reg. Sess. (Conn. 2018).

91. See Jan Murphy, *Pa. House Passes Bills to Address Firefighter Shortage by Offering Property Tax Credits, College Loan Forgiveness and More*, PENNLIVE (Oct. 23, 2019), <https://www.pennlive.com/news/2019/10/pa-house-passes-bills-to-address-firefighter-shortage-by-offering-property-tax-credits-college-loan-forgiveness-and-more.html> [<https://perma.cc/4YW9-YTZZ>] (describing proposed bills including one awarding property tax credits to individuals who serve as a volunteer firefighter in Pennsylvania).

92. *Town of Tekoa v. Reilly*, 91 P. 769, 769 (Wash. 1907) (citing WASH. GEN. CODE § 636(7) (1890)) (“The city council of such city shall have power . . . [t]o impose on and collect from every male inhabitant between the ages of twenty-one and fifty years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city: Provided, That any member of a volunteer fire company in such city shall be exempt from such tax.”).

without paying full price for the labor.⁹³ Due to a 2007 amendment to the Internal Revenue Code, remittance of firefighting services in exchange for reduced taxes receives different federal income tax treatment than remittance of labor by seniors in exchange for reduced property taxes.⁹⁴ For volunteer firefighters, the dollar value of the credit is excludable from income.⁹⁵

The approach of elective remittance in services to government in order to reduce cash-tax liability is also not limited to the property tax base and its attendant liquidity rationale. In Delaware, those who remit labor to local firefighting departments receive a reduction in their income tax liability instead of their property tax liability.⁹⁶ The choice of income tax rather than property tax may be one of legislative convenience—the credit can be statewide rather than enacted municipality by municipality.⁹⁷ The state also has greater resources to finance such an expenditure. The application of the tax reduction to a different tax base implies that liquidity concerns are not the sole motivation for in-kind tax paying. Instead, the rationale appears to be one of efficiency—it is cheaper to offer a tax credit for firefighting services rather than a wage.⁹⁸ While in the case of the Property Tax Work-Off Program the concern is for senior taxpayers with a valuable asset but limited liquidity, here the concern is about financial outlays that the municipality cannot afford. The in-kind tax paying is driven by a demand for public provision without adequate funds to provide, whether through increased taxes or through borrowing.

93. See Murphy, *supra* note 91 (explaining that the Pennsylvania legislature was considering implementing a tax credit program for volunteer firefighters to combat the shortage of firefighters in Pennsylvania instead of hiring firefighters).

94. See Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, § 5(a), 121 Stat. 1805 (2007) (revising the Internal Revenue Code so the gross income of a member of a qualified volunteer emergency response organization does not include qualified state and local tax benefits in exchange for their service).

95. See I.R.C. § 139B (codifying the exemption of state and local tax benefits from the gross income of a member of a qualified emergency response organization's gross income). It could be argued that this also creates a negative inference that further supports the IRS position that property tax work-off programs are includible.

96. See *Personal Income Tax FAQs*, DEL., <https://revenue.delaware.gov/frequently-asked-questions/personal-income-tax-faqs> [<https://perma.cc/9MXJ-F89V>] (“The law allows a credit up to \$400 against the income tax liability of Delaware residents who are active firefighters, or members of fire company auxiliaries or rescue squads.”).

97. *E.g.*, Murphy, *supra* note 91 (explaining that the Pennsylvania state legislature would be implementing the income tax credit rather than municipalities).

98. See *supra* note 93 and accompanying text.

At the federal level, reductions in tax liability for contributions of services to government are mostly incidental rather than core features of the tax policy. For example, the Earned Income Tax Credit is available to otherwise qualifying individuals whose employer is the federal government.⁹⁹ In this instance, taxpayers have their income tax liability reduced by virtue of the amount of earnings they receive from working for the federal government.¹⁰⁰ The eligibility criteria for the credit, however, are not explicitly limited to federal employees, and government employees comprise a small portion of credit recipients.¹⁰¹ Nevertheless, Congress did anticipate the application of the credit to those contributing labor to the federal government, as § 32 includes specific provisions for military personnel.¹⁰² This incidental form of in-kind tax paying of services in exchange for reduced tax liability also entails payment of a wage in addition to the tax reduction, something distinct from other varieties where the sole exchange is services for tax reduction.¹⁰³

2. Assessment in Cash, Elective Remittance in Noncash Property

Tax assessments made in cash can also be reduced through the remittance to government of noncash property. This occurs at both the federal and state level. This Subsection discusses the *elective* remittance in noncash property—that is, remittance where cash is an option alongside remittance in noncash property. Some of the transfers described here entail a dollar-for-dollar reduction in tax liability by the transferee, while others only reduce tax liability by a portion of the amount transferred. In all instances, the in-kind remittance is at the discretion of the taxpayer.

The most common form of this variety of in-kind tax paying is a charitable contribution of noncash property to government that produces a reduction in tax liability for the contributor.¹⁰⁴ In 2017, over

99. See I.R.C. § 32 (allowing a tax credit for low-income taxpayers regardless of their employer).

100. See *id.*

101. See *id.*

102. See I.R.C. § 32(c)(4) (“[T]he principal place of abode of a member of the Armed Forces of the United States shall be treated as in the United States during any period during which such member is stationed outside the United States while serving on extended active duty with the Armed Forces of the United States.”).

103. Cf. sources cited *supra* notes 69, 88–91.

104. I.R.C. § 170 (including food inventory, scientific research property, and personal property other than cash as charitable contributions). New limitations on the exchange of charitable contributions to state entities for purposes of circumventing the limitations on state and local tax deductions for federal income tax purposes have not limited the availability of the charitable deduction for contributions to federal en-

eight million taxpayers made noncash contributions to charity for which they claimed an income tax deduction, with over 1.7 million individuals giving noncash property to public benefit organizations.¹⁰⁵ Unfortunately, the statistics reported by the Statistics of Income Division of the IRS (SOI) do not include corporate donors of noncash property, so the amount of contributions by this type of taxpayer is not public.¹⁰⁶ Assessing the full scope of this form of in-kind tax paying is further complicated by private foundations that raise funds for government entities, such as “friends of” organizations raising funds for government entities by accepting in-kind donations.¹⁰⁷ These are private 501(c)(3) organizations who then give to the government as an intermediary. Hence, the reported contributions by the initial donor will not appear in SOI tabulations as a contribution of noncash property to government.

Despite the measurement challenges of this variety of in-kind tax paying and the subsequent uncertainty over its full scope, there remains no doubt that transfers to government of noncash property to reduce tax liability are a permitted practice.¹⁰⁸ Indeed, the federal income tax has allowed a deduction for charitable contributions since

ties nor for contributions that do not produce a tax credit. *See* Contributions in Exchange for State or Local Tax Credits, Prop. Treas. Regs. §§ 1.170A-1, -13, 1.642(c)-3, 83 Fed. Reg. 43,563, 43,565 (Aug. 27, 2018) (“[I]f a taxpayer makes a payment or transfers property to or for the use of an entity described in section 170(c), and the taxpayer receives or expects to receive a state or local tax credit in return for such payment, the tax credit constitutes a return benefit, or *quid pro quo*, to the taxpayer and reduces the taxpayer’s charitable contribution deduction [under section 170(a)].”).

105. *See* Christopher Williams & Janette Wilson, *Individual Noncash Charitable Contributions Tax Year 2017*, IRS: STAT. OF INCOME BULL. 63 fig.G (Fall 2019), <https://www.irs.gov/pub/irs-soi/soi-a-incc-id1908.pdf> [<https://perma.cc/F6HR-2KVP>]. Unfortunately, the Statistics of Income Division (SOI) does not separately report on contributions to government, but rather lumps these contributions within a broader “public benefit” category. *Id.*

106. *See id.* Corporations must report noncash charitable contributions above \$5,000 in fair market value on Form 8283, so this figure is knowable to the IRS even though not publicly reported. INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 8283, at 1 (2021), <https://www.irs.gov/pub/irs-pdf/i8283.pdf> [<https://perma.cc/N63H-W463>]. This lack of reporting was confirmed by direct correspondence with SOI. Email from Emily Gross, Pub. Affs. Specialist, Stat. of Income Div., to Author (Feb. 7, 2020) (on file with Author) (“Our corporations section does not capture any information from the 8283.”).

107. *See* Lemos & Charles, *supra* note 25, at 1162–63 (noting the difficulty in assessing the exact impact of these kinds of private gifts and describing to whom the numerous government programs and organizations “friends of” groups give private gifts).

108. A more novel claim is to view the charitable deduction as a form of remittance when the taxpayer’s property is transferred to the same government that assessed a tax. While this is the economic equivalent of a remittance with a steep exchange rate,

1917.¹⁰⁹ The deduction was then quickly expanded to allow corporations to also claim the deduction.¹¹⁰

It would be a mistake to assume that the reduction of tax liability enjoyed by taxpayers who make in-kind transfers to government is merely an incidental feature of the charitable deduction not originally intended by Congress. One need not even refer to the legislative history to know that contributions to government were an anticipated transaction that would reduce a taxpayer's income tax liability. The Code provision creating the charitable deduction itself explicitly lists government as the very first type of donee eligible for receiving contributions that produce a charitable deduction for the donor:

(c) Charitable contribution defined For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.¹¹¹

This same Code provision that allows for transfers to government also allows for transfers in kind.¹¹² Indeed, no specification is made that the contribution be in cash at all, following the convention of the Code to look beyond whether a transfer is in cash to instead whether the transfer conveys economic value.¹¹³ The Code does not limit a deduction from federal income tax liability to those contributions that are made to the federal government, however.¹¹⁴ In this way, the provision encompasses a broader set of transactions than just in-kind tax paying, but there is no uncertainty that it applies to taxpayers seeking to reduce tax liability by making noncash contributions to a government that has imposed a tax liability on that individual.

tax scholars have generally distinguished the charitable deduction from a remittance because with a charitable deduction taxpayers receive a reduced benefit only as valuable as their marginal tax rate. See e.g., Martin Feldstein & Amy Taylor, *The Income Tax and Charitable Contributions*, 44 *ECONOMETRICA* 1201, 1201–22 (Nov. 1976).

109. War Revenue Act of 1917, Pub. L. No. 65-50, 40 Stat. 300 (1917).

110. John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 *WAKE FOREST L. REV.* 657, 678 (2001).

111. I.R.C. § 170(c)(1).

112. *Id.*; see also Treas. Reg. § 1.170A-1(c) (discussing the value of contributions in kind). The IRS has defined "contributions" as "voluntary transfer[s] of money or property . . ." Rev. Rul. 83-104, 1983-2 C.B. 46, 47 (emphasis added).

113. Students of federal income tax will be well familiar with the notion that income is not limited to cash. See I.R.C. § 61(a) ("[G]ross income means all income from whatever source derived . . .").

114. See I.R.C. § 170(c)(2)-(5) (specifying that contributions made to certain non-governmental entities may still be deductible).

This variety of in-kind tax paying is available to both individuals and corporate taxpayers, though additional limitations apply to corporate taxpayers. Individuals may deduct up to 50% of the contribution base remitted to government.¹¹⁵ Corporate taxpayers are limited to 10%.¹¹⁶ Due to these limitations, taxpayers generally cannot wipe out their entire income tax liability through in-kind transfers to government of noncash property under § 170.¹¹⁷

The types of noncash property permitted to be given to government in order to reduce tax liability are not limited to easily liquidated assets and cash equivalents, such as marketable securities. Art,¹¹⁸ electronics,¹¹⁹ and intellectual property¹²⁰ are all acceptable forms of noncash property used to reduce tax liability.¹²¹ In-kind remittance can even be more complex than transfers in fee simple, such as a future interest in tangible personal property or a conservation easement.¹²²

Some categories of in-kind transfers have additional limitations, such as food inventory.¹²³ The values of contributed services are not deductible, though the out-of-pocket expenses for providing the service can be deducted.¹²⁴ Conservation easements, by contrast, receive more-favorable tax treatment than other forms of in-kind transfers and are now under scrutiny for new restrictions.¹²⁵

115. *Id.* § 170(b)(1)(A).

116. *Id.* § 170(c)(2)(A).

117. *Id.* § 170(b) (imposing limitations on the total amount of charitable deductions a taxpayer may take in any taxable year).

118. INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 561, DETERMINING THE VALUE OF DONATED PROPERTY 4 (2020) (providing guidance on the valuation of donated art for the purposes of the § 170 charitable deduction).

119. *Id.* at 9 (doing the same for donated electronics).

120. *E.g., id.* at 5 (doing the same for donated patents).

121. I.R.C. § 170 (establishing no blanket restrictions on deductions for any single type of property).

122. *Id.* § 170(a)(3); *see, e.g.*, INTERNAL REVENUE SERV., OMB BULL. NO. 1545-090, PARTIAL INTERESTS AND RESTRICTED USE PROPERTY, PART II, FORM 8283 (2019).

123. *Id.* § 170(e)(3)(C).

124. Treas. Reg. § 1.170A-1(g). Some have proposed expanding the charitable deduction to allow deductions for contributed services by individuals, a proposal that presumably includes contributions of services to government. David Lazarus, *You Can Deduct Charitable Donations, Why No Tax Benefit for Volunteering?*, L.A. TIMES (Jan 24, 2020), <https://www.latimes.com/business/story/2020-01-24/volunteering-charity-tax-deduction> (last visited Nov. 4, 2021). Some are skeptical of this proposal. Daniel Hemel (@DanielJHemel) TWITTER (Jan. 24, 2020, 1:23 PM), <https://twitter.com/DanielJHemel/status/1220774120553451520> [<https://perma.cc/KPC6-WJTV>] ("It seems to be that if our goal is to increase civic engagement, a tax benefit for volunteering ranks around #942 on the list of policies we'd want to pursue.").

125. *See* I.R.C. § 170(h) (codifying the qualified conservation contribution); I.R.S.

The availability of in-kind remittance to government is not limited to the federal income tax. Our federal transfer taxes, the estate and gift tax, also allow contributions of noncash property to government to reduce transfer tax liability.¹²⁶ Like the Code provisions related to charitable deductions from the income tax, the estate and gift tax provisions are explicit about government as an eligible recipient for donations in order to claim the deduction.¹²⁷ Unlike the income tax, however, the deduction is not limited to only a certain portion of the taxable base. Taxpayers can satisfy their entire estate tax or gift tax liability by remitting in-kind property to government.¹²⁸

Contributions of noncash property to the federal government generally require additional statutory authorization in order to facilitate this form of in-kind tax paying. For example, the Custom and Border Protection Donations Acceptance Program, created by the Trade Facilitation and Trade Enforcement Act of 2015, permits Customs and Border Protection (CBP) to receive private donations outside of the appropriations process.¹²⁹ Regulations for this donation program were finalized in 2017.¹³⁰ The program appears to be quite popular, given the many CBP donations since 2015.¹³¹ For example, Procter & Gamble donated testing equipment for authenticating imported goods.¹³²

CBP is just one of many federal entities permitted to receive private donations. The National Park Service can accept in-kind contributions.¹³³ The General Service Administration is authorized to accept gifts.¹³⁴ The Bureau of the Fiscal Service may accept gifts of intangible

Notice 2017-10, 2017-4 I.R.B. 544 (advising taxpayers of potential heightened IRS enforcement regarding conservation easements).

126. I.R.C. §§ 2055, 2522.

127. *Id.* §§ 2055(a)(1), 2522(a)(1).

128. *See id.* § 2055 (providing no limit for how much estate tax liability may be reduced by donations to the government); *id.* § 2522 (providing no limit for how much gift tax liability may be reduced by donations to the government).

129. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 308(d), 130 Stat. 122, 153 (2016) (codified at 19 U.S.C. § 4347).

130. Trademarks, Tradenames, and Copyrights, 19 C.F.R. pt. 133 (2017).

131. *Donations Acceptance Program—Announcements*, U.S. CUSTOMS & BORDER PROT. (Sept. 1, 2018), <https://www.cbp.gov/border-security/ports-entry/resource-opt-strategy/public-private-partnerships/donation-acceptance-program> [<https://perma.cc/KQ59-SXNH>] (announcing the numerous donations received since 2015).

132. *See id.*

133. 54 U.S.C. § 101101.

134. *Donations Program*, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/about-us/regions/welcome-to-the-greater-southwest-region-7/donations-program> [<https://perma.cc/8U4D-4V5P>].

personal property to reduce debt held by the public.¹³⁵ Like assets collected by Treasury through levies, these intangibles are to be immediately sold rather than held by government.¹³⁶ These private donation programs are generally seen as an addition to tax contributions, rather than competing with them, and are supported also by politicians generally opposed to increased taxes, such as former Chairman of the Senate Finance Committee Orrin Hatch.¹³⁷ In-kind remittances have also been accepted by the U.S. government through private legislation for estates.¹³⁸

At the state level, Ohio temporarily expanded remittance options to allow remittance in securities rather than cash.¹³⁹ More specifically, Ohio allowed corporate taxpayers to remit taxes with bitcoin for a ten-month period across tax years 2018 and 2019.¹⁴⁰ The first corporate taxpayer to remit bitcoins in order to reduce tax liability was Overstock.com, the online retailer.¹⁴¹ Ten other companies also remitted bitcoin before a new Ohio Treasurer suspended the program.¹⁴² Ohio had originally planned to allow individuals to also pay income taxes using bitcoin after piloting with businesses.¹⁴³

The bitcoin approach to noncash remittance helps illustrate the spectrum of in-kind tax paying from near cash equivalents to nonliquid assets and services. In the case of Ohio, this remittance program is closer to allowing remittance with a non-U.S. currency, like yen—though here it is a virtual currency not issued by a nation

135. 31 U.S.C. § 3113; *see also Gift Contributions to Reduce Debt Held by the Public*, TREASURYDIRECT, <https://www.treasurydirect.gov/govt/reports/pd/gift/gift.htm> [<https://perma.cc/B2N7-6KNQ>].

136. 31 U.S.C. § 3113(a)(1)(C).

137. Brian Palmer, *Uncle Sam Wants You . . . or at Least Your Spare Change*, SLATE (Apr. 19, 2011), <https://slate.com/news-and-politics/2011/04/orrin-hatch-says-you-can-send-a-few-extra-bucks-along-with-your-tax-return-is-that-true.html> [<https://perma.cc/F2ST-MXBR>] (“Utah Sen. Orrin Hatch says wealthy Americans who think their tax bill is too low should send a voluntary donation to the federal government.”).

138. Examples include the Josiah K. Lilly Estate, the LeVere Redfield Estate, and the Dorothy Meserve Kunhardt Estate. *See Rhodes, supra* note 6; Guttman, *supra* note 65.

139. Kari Paul, *Some Americans Already Pay Their Taxes in Bitcoin*, MARKETWATCH (Jan. 9, 2019), <https://www.marketwatch.com/story/believe-it-or-not-some-americans-already-pay-their-bitcoin-in-taxes-2019-01-07> [<https://perma.cc/6P2Z-4MZ3>] (explaining how Ohio expanded their remittance option to allow remittance of the cryptocurrency bitcoin).

140. *Id.*

141. *Id.*

142. Julie Carr Smyth, *Ohio's Bitcoin Tax Program Was Illegal, State Attorney General Says*, WOSU PUB. MEDIA (Nov. 13, 2019), <https://news.wosu.org/news/2019-11-13/ohios-bitcoin-tax-program-was-illegal-state-attorney-general-says> [<https://perma.cc/Y7FD-5H3J>].

143. Paul, *supra* note 139.

state.¹⁴⁴ Like the example of the charitable deduction, the assessment is in cash and taxpayers have the option of paying in property.¹⁴⁵ Unlike the charitable deduction, however, the entire value of a bitcoin remittance is applied to an outstanding tax liability, while the charitable deduction for federal income taxes allows only a proportion to be applied to one's tax liability.¹⁴⁶ The remittance of bitcoin was also facilitated by the same division of the Ohio government that collects cash taxes,¹⁴⁷ while charitable contributions of noncash property can be to subdivisions of government not directed to oversee tax collection generally.¹⁴⁸

3. Assessment in Cash, Semi-Elective Remittance in Noncash Property

Tax liabilities assessed in cash can also be reduced through semi-elective remittance of noncash property. This process is administered as a seizure of property for payment of tax debts.¹⁴⁹ Collections are viewed as semi-elective in that a taxpayer who has the ability to pay a tax liability but chooses not to out of tax protest is in turn opting into a collections regime of noncash property seizure.¹⁵⁰ A taxpayer who

144. For example, Overstock also accepts bitcoin from its customers as a permissible currency of exchange for purchasing products online. *Id.* The IRS, however, does not view bitcoin as equivalent to cash, and requires taxpayers to track their basis in the asset. *See id.* ("The Internal Revenue Service hasn't released a detailed policy on how to go about paying taxes using cryptocurrency, besides a ruling in 2014 stating that selling bitcoin is treated the same as selling property or any other capital asset. People must report each transaction in terms of whether it was a loss or a gain . . .").

145. *Id.* (explaining that the process works by the taxpayer paying the State with their bitcoin which is subsequently converted into cash by a third party on the State's behalf).

146. Compare I.R.C. § 170 (allowing a tax *deduction* for charitable contributions), with Paul, *supra* note 139 (describing Ohio's allowance for corporate taxpayers to pay their *ultimate* tax liability with bitcoin).

147. *See* Smyth, *supra* note 142 (noting that the program was run by Ohio's State Treasury).

148. *See* I.R.C. § 170(c)(1) (including certain contributions to any political subdivision of the United States within the definition of "charitable contribution"); *see also, e.g., supra* notes 133–36.

149. This form of remittance should not be confused with asset forfeiture under 31 U.S.C. § 9705. In the case of Treasury's Forfeiture Fund, assets are seized in the context of criminal activity. § 9705(a). In the case of a tax levy, assets are seized to reduce an assessed tax liability. I.R.C. § 6331. For additional information on the Treasury Executive Office for Asset Forfeiture, see *Treasury Executive Office for Asset Forfeiture (TEOAF)*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/treasury-executive-office-of-asset-forfeiture-teoaf> [<https://perma.cc/HS7P-AT7C>].

150. *See* I.R.C. § 6331 (noting that refusal to pay may trigger the possible levy of property).

does not have the ability to pay in cash, however, is forced to remit in noncash property.¹⁵¹ Those who opt into the in-kind remittance through collections will also face increased liability due to delinquency penalties for failure to pay, increasing the initial assessed tax liability.¹⁵² This increase in the tax liability due to penalties serves the same function as a discount in the value of in-kind remittances made through collections actions.

This variety of in-kind tax paying exists across all tax regimes that collect tax debts, including income, property, and consumption taxes.¹⁵³ This variety also occurs in local, state, and federal tax administration.¹⁵⁴ It is also a longstanding feature of tax administration. It has been exercised in the United States since the beginning of the Republic and consistently upheld by the Supreme Court.¹⁵⁵ Prior to 1998, tax debt collections also did not require judicial review, unlike other

151. By using the term “semi-elective” this Article does not seek to understate the substantial impact collections can have on those for whom collections are not elective. *See, e.g.*, Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 U.C. IRVINE L. REV. 847, 851 (2019) (“The City of Detroit has unconstitutionally assessed thousands of homes, leading to inflated property taxes, which homeowners . . . could not afford to pay, so the County confiscated the homes through tax foreclosure.”). The Article also does not include garnered wages within its definition of in-kind tax paying. While the initial action is to create a future interest in a taxpayer’s earnings, ultimately, the tax is collected in the form of cash. *See Garnishment*, U.S. DEP’T OF LABOR, <https://www.dol.gov/general/topic/wages/garnishments> [<https://perma.cc/GH3Z-ANGY>] (explaining the definition of garnishment). In this way it is akin to federal income tax liability paid in cash since income taxes themselves are a future interest in earnings. A taxpayer will not be in a position to elect which portion of a tax debt is satisfied through garnered wages and which portion is satisfied through in-kind remittances. I.R.C. § 6331 (indicating the government’s discretion in seizure).

152. I.R.C. § 6651(a).

153. *Id.* § 6331 (“If any person liable to pay any tax neglects or refuses to pay . . . it shall be lawful . . . to collect such tax . . . by levy . . .”).

154. *See, e.g., id.*; MASS. GEN. LAWS ch. 62C, § 53 (2020).

155. Act of Mar. 3, 1791, ch. 15, § 23, 1 Stat. 199, 204 (providing for levy “by distress and sale”), *cited in* *Phillips v. Comm’r*, 283 U.S. 589, 595 n.5 (1931) (“We do not lightly discard this alternative relief that Congress so clearly has provided for the Government.”); *see also* *United States v. Nat’l Bank of Com.*, 472 U.S. 713, 733 (1985); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350 (1977) (“[T]he existence of the levy power is an essential part of our . . . tax system . . .”). In a particularly fascinating period of in-kind tax paying, former Confederate farmers had substantial portions of land seized to pay tax debts during Reconstruction. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 375–76, 588–89 (updated ed. 2014).

forms of creditor actions.¹⁵⁶ Collections in kind can include a taxpayer's vehicle, real estate, or other personal property.¹⁵⁷

Taking the federal administration of tax collection as a primary example, if the IRS assesses a tax and gives notice without payment within ten days, it can attach a tax lien to property of the taxpayer.¹⁵⁸ Once this lien is placed, the IRS is then entitled to seize the property by levy.¹⁵⁹ The Treasury Department holds over 300 auctions per year to sell seized property.¹⁶⁰

Federal tax collection procedures are periodically revised by Congress in efforts to protect taxpayers against government abuses.¹⁶¹ Many due process rules that apply to other forms of state action also apply to the collection of unpaid taxes, including notice requirements and rights to have decisions reviewed and appealed in fair and impartial hearings.¹⁶² In addition to due process protections, certain categories of property cannot be seized. The IRS cannot seize a taxpayer's primary residence or primary vehicle used for employment.¹⁶³ Personal property, such as tools or furniture, also cannot be seized if the dollar values are below set thresholds.¹⁶⁴ These carveouts limit semi-elective in-kind remittance. In some respects, these taxpayer protections operate as zero brackets for a noncash tax rate schedule. By removing certain categories of assets from in-kind remittance, they approximate the portion of income exempt from federal income tax below an income threshold.¹⁶⁵

156. For a thoughtful discussion of the merits of this reform, see Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1147-49 (2004).

157. For additional examples, see, for example, *What Is a Levy?*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/what-is-a-levy> [<https://perma.cc/9R46-CTU5>].

158. I.R.C. § 6331.

159. *Id.*

160. *Treasury Auctions*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/services/treasury-auctions> [<https://perma.cc/NSC4-3XJH>].

161. See, e.g., STAFF OF JOINT COMM. ON TAX'N, 109TH CONG., IMPROVEMENTS IN TAX ADMINISTRATION AND TAXPAYER SAFEGUARDS 4 (Comm. Print 2006) (discussing a proposal altering payment methods).

162. See, e.g., Stephanie Hoffer, Goldburn Maynard, Elizabeth Fate, Damon Kellar, Drienne Sneed & Phillip DeSalvo, *To Pay or Delay: The Nominee's Dilemma Under Collection Due Process*, 82 TUL. L. REV. 781, 792-94 (2008) (outlining due process protections under different provisions of the Internal Revenue Code); see also INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. 1660, COLLECTION APPEAL RIGHTS 1 (2020) (describing the right of collection due process for lien and levy notices).

163. I.R.C. § 6334(a)(13)(B).

164. *Id.* § 6334(a)(2)-(3).

165. For further discussion of the availability of traditional tax rate brackets within an in-kind taxpaying regime, see *infra* Part II.

Once noncash property has been seized by the IRS in order to reduce a tax liability assessed in cash, the property is then sold through auction procedures governed by the Internal Revenue Code.¹⁶⁶ Auctions require notice to the taxpayer and to the public.¹⁶⁷ A minimum bid price is set,¹⁶⁸ and a taxpayer is given additional options for appealing auction results.¹⁶⁹ Special rules apply to perishable goods, which allow for immediate auction rather than typical notice period.¹⁷⁰ The cash received at auction reduces the tax liability owed.¹⁷¹ The IRS must return any excess to the taxpayer as a refund.¹⁷²

One distinguishing feature of this approach to in-kind tax paying compared to other varieties is the way that the state seeks to minimize its role as property owner after the remittance. The immediate priority of the state is to convert the property into cash, rather than, for example, remaining title holder in land and leasing it to others or using the land for state purposes.¹⁷³ This is also distinct from in-kind tax paying in the example of the charitable deduction, where an asset is held and used by government in the same form as received¹⁷⁴ or where remittance in labor positions the government as an overseer of that labor.¹⁷⁵ The initial assessment in cash does not entirely explain the conversion to cash, however. There, the noncash property donated to government in order to reduce a cash-tax liability is not immediately liquidated.¹⁷⁶ Here, while it is true that the state is coercing a remittance in-kind through collection of noncash property, it is then converting that in-kind contribution to cash in order to settle a cash debt. The fact of assessment in cash does not necessitate liquidation.

Notably, the in-kind remittance is not intended to improve the value of the acquired property as held by the state relative to the taxpayer. It is not that the property in the hands of the taxpayer is worth less than in the hands of the government or upon liquidation through a government-run auction. The remittance is in kind because the taxpayer was not willing or able to pay in cash. Indeed, the auction likely reduces value of the property given that the sale is not timed to any

166. I.R.C. § 6335.

167. *Id.* § 6335(b).

168. *Id.* § 6335(e)(1)(A)(i).

169. *See id.* § 6337(b) (providing postsale options for the sale of real estate).

170. *Id.* § 6336.

171. *Id.* § 6342(a).

172. *Id.* § 6342(b).

173. *Id.* § 6335(d) (mandating time of auction at no later than forty days after public notice).

174. *See discussion supra* Part I.C.2.

175. *See discussion supra* Part I.C.1, *infra* Part I.C.4.

176. *Compare* Part I.C.2, *with* Part I.C.1.

increase in demand or favorable business cycle or other timing consideration.¹⁷⁷ Instead, the timing is fixed.¹⁷⁸ This is distinct from forms of in-kind tax paying where the value of the property donated may actually be worth more in the hands of the government than in the hands of the taxpayer. For example, a taxpayer whose remitted land can then be used for a cross-border supply line the taxpayer would like to use. Here, the land becomes more lucrative to the donor if the government is willing to use the land for a purpose the donor would not otherwise have been able to achieve.

Ultimately, nearly all cash-tax regimes include a form of in-kind tax paying to the extent that they include collections procedures as a feature of enforcement. This is not inevitable, however, as cash taxes could be enforced exclusively through criminal penalties without civil collections procedures. Such an approach is not the case here in the United States, where the semi-elective remittance in kind via collections procedures operate at all levels of tax collection.¹⁷⁹ This approach to in-kind tax paying treats remittance in kind as a last resort, one to be pursued only after cash remittance has failed.¹⁸⁰

4. Assessment in Kind, Elective Remittance in Kind

The final varieties of in-kind tax paying included in this Part are taxes that are initially assessed in kind in addition to being remitted in kind. For example, a tax assessment by the government that requires a certain number of days of labor from the taxpayer or an assessment that requires remittance of a proportion of agricultural yield. In these varieties of in-kind tax paying where assessments and remittance are made in kind, taxpayers often have the option of remitting in cash.¹⁸¹ These assessments in kind can be applied to many different tax bases, including head tax bases and excise tax bases.¹⁸²

While assessments in kind are not always regarded as “taxes,” both state and federal courts in the matters *infra* directly consider the question of whether these assessments in kind are forms of taxation,

177. See I.R.C. § 6335(d) (placing a forty-day limit on the sale of goods).

178. *Id.*

179. See *supra* notes 153–54.

180. *E.g.*, I.R.C. § 6331 (“If any person liable to pay any tax neglects or refuses to pay the [tax] . . . it shall be lawful for the Secretary to collect such tax . . . by levy upon all property . . . belonging to such person . . .”).

181. *But cf.* *Leonard & Leonard v. Earle*, 297 U.S. 392, 395 (1929) (describing the government’s discretion in choosing oyster shells or cash to satisfy the obligation).

182. For the definition of an excise tax, see *Excise Tax*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/excise-tax> [<https://perma.cc/K7KA-RQMD>].

with multiple courts concluding that they are.¹⁸³ These provisions are also explicitly referred to as “taxes” by the legislatures that enacted them.¹⁸⁴ While the designation of in-kind assessments as taxes nevertheless remains a debatable proposition, this Article follows the conclusions of the multiple courts and legislatures referred to *supra*, including the conclusions of the U.S. Supreme Court, as a useful point of contrast to tax assessments that are dollar denominated.¹⁸⁵ In scholarship, the most consistent reference to in-kind assessments as “taxes” appears in the economics literature on conscription.¹⁸⁶

It may be surprising to many readers to discover that a common practice of state and local government in the United States was to assess taxes in labor, which occurred not only prior to a modern economy, but also during the nineteenth and twentieth centuries as a device to build public infrastructure.¹⁸⁷ Various referred to as “poll taxes,” “road duties,” and “road poll taxes,” the last of these in-kind assessments in the United States was repealed by the Texas legislature in 1995.¹⁸⁸ These assessments were exclusively applied to men and commonly included age restrictions, with both younger and older men exempt from the tax.¹⁸⁹

Provided below is the text of a representative poll tax statute from 1850. This excerpt is from California, but it has been selected for its similarity to many other poll taxes: “The Court of Sessions of each

183. See, e.g., *Proffit v. Anderson*, 20 S.E. 887, 887 (Va. 1894) (“The road law for Louisa county . . . requiring all able-bodied men between 16 and 60 years old to work the roads 2 days in each year, and conferring authority on the overseer of roads to impose a fine upon persons refusing so to work, and to collect it by levy as in case of taxes, and providing for the imprisonment of one so refusing, is void under Const. art. 10, § 5, which authorizes the general assembly to assess a capitation tax, not exceeding \$1 per annum on every male citizen over 21 years old, to be dedicated to the public schools, and confers on counties and corporations the power to impose a capitation tax, not exceeding 50 cents, for all purposes.”). *But see, e.g., Pohl v. Chi., Milwaukee & St. Paul Ry.*, 160 P. 515, 516–17 (Mont. 1916) (explaining the poll tax at issue as a use of the State’s police power).

184. See MD. CODE, PUB.–GEN., art. 72 § 91 (1927).

185. See *Leonard & Leonard*, 279 U.S. at 396 (discussing the Maryland law requiring 10% of oyster shells to be turned over to the State government). Additional categories of in-kind remittance designated as taxes were discussed in the prior Subsections of this Section. See discussion *supra* Part I.C.1–3.

186. See, e.g., Timothy J. Perri, *The Economics of US Civil War Conscription*, 10 AM. L. & ECON. REV. 424, 436–37 (2008) (noting that a goal of conscription was to shift tax burdens).

187. *E.g.*, Act of Apr. 11, 1850, ch. 74, § 2, 1850 Cal. Stat. 250, 251 (repealed 1855).

188. TEX. REV. CIV. STAT. ANN. art. 1146, § 2 (West 1993), *repealed by* Act of Sept. 1, 1995, ch. 165, § 24(a), 1995 Tex. Gen. Laws 1025, 1870.

189. See, e.g., § 2, 1850 Cal. Stat. at 251 (limiting its application to men between eighteen and forty-five years of age).

and every County of this state, shall have power to levy a poll tax for road purposes, on all able-bodied men in their counties between the ages of eighteen and forty-five years, not exceeding five days' labor in each year."¹⁹⁰ As is clear from the statute, the liability was assessed in labor rather than cash, so that the requirement was certain days of work per month or year. This is distinct from assessing tax in dollars and then allowing payment in services.¹⁹¹ The tax base here is a form of capitation.

The reliance on assessed labor to finance public works was not limited to western territories like California, Oklahoma, and Utah.¹⁹² The statutory language used in Oklahoma is nearly identical to road poll taxes in Maryland,¹⁹³ Ohio,¹⁹⁴ and Kansas.¹⁹⁵ Indeed, at least thirty-nine states had a form of this in-kind assessment, including states that were late to join the Union, such as Hawai'i,¹⁹⁶ and states

190. *Id.*

191. *Cf.* discussion *supra* Part I.C.1.

192. *See* Salt Lake City v. Wilson, 148 P. 1104, 1106 (Utah 1915) (regarding the constitutionality of a poll tax initially enacted prior to Utah's statehood); WILSON'S REV. & ANN. STAT. OKLA. § 6090 (repealed 1915) (outlining a requirement for road labor in early twentieth century Oklahoma).

193. Short v. State, 31 A. 322, 322 (Md. 1895) ("By the Public Local Laws for Dorchester county, all able-bodied male residents of the county, above 20 and under 50 years of age, are compelled to labor two days at least in every year in repairing the roads of said county, with the privilege, however, of furnishing a substitute, or of paying to the road supervisor 75 cents for each day such person may be summoned to labor, the money thus paid to be expended in repairing the roads.").

194. Act of May 13, 1886, § 1, 1886 Ohio Laws 152, 152-53 (repealed 1894) ("All male persons between the ages of twenty-one and fifty-five years, able to perform or to cause to be performed the labor herein required, except every honorably discharged soldier who served in the army of the United States during actual war, pensioners of the United States government, acting and contributing members of companies, troops and batteries of the Ohio national guard during their membership, and any person who is a member of any fire engine, hook and ladder, hose, or other company, for the extinguishment of fire or the protection of property at fires, under the control of the corporate authorities of any municipal corporation, and who receives no pay for such services during the time he may continue an acting member of such company, shall be liable, annually, to perform two days' labor on the highways, under the direction of the road supervisor of the road district in which he resides.").

195. Act of Mar. 7, 1874, ch. 108, § 18, 1874 Kan. Sess. Laws 164, 172 (repealed 1911) ("All male persons between twenty-one and forty-five years of age, who have resided thirty days in this state, who are capable of performing labor on public highways, and who are not a township charge, shall be liable each year to perform two days' work of eight hours each on the public roads, under the direction of the road overseer within whose district they may respectively reside, or furnish a substitute to do the same, or pay the sum of one dollar and fifty cents per day to said road overseer, who shall receipt for the same, and expend it in repairs on the public roads within his district . . .").

196. Act of June 16, 1853, § 3, 1853 Haw. Sess. Laws 37, 37 (repealed) ("Every male

that were original to it, including Virginia,¹⁹⁷ Massachusetts,¹⁹⁸ and Vermont.¹⁹⁹ In Ohio, the assessment and remittance in labor also allowed for the requirement that taxpayers bring their horses as well, should they be needed.²⁰⁰

While the term “poll tax” generally conjures images of Jim Crow, it would be a mistake to collapse these many local and state in-kind assessments with the deliberate use of taxes to restrict voting access to African Americans after Reconstruction.²⁰¹ Road duty poll taxes long preceded ratification of the Fifteenth Amendment.²⁰² And while

inhabitant of the kingdom between the ages of sixteen and fifty years, shall be, and is hereby declared to be liable to the road labor-tax.”).

197. Act of Feb. 29, 1892, § 6, 1892 Va. Acts 686, 687 (“All male persons in each district, or whose domicile is therein, though such person be absent therefrom, whether out of the state or not, who are able-bodied and between the age of sixteen and sixty years, and who have not been or may hereafter be exempted by the court, shall be compelled to work on the roads a period of time aggregating two days of ten hours each in each year when warned by the overseer of the precinct to which they belong, except persons who have lost an arm or a leg, or who reside in an incorporated town which keeps its streets in order.”), *invalidated by* Proffit v. Anderson, 20 S.E. 887, 887 (Va. 1894).

198. ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 55 (2006).

199. Act of Nov. 14, 1803, ch. 98, § 2, Vt. Acts & Laws, 124, 125–26 (repealed) (“That the selectman of the several towns in this state, in making up their annual highway tax, shall ascertain the number of polls in their respective towns, between the age of twenty-one and sixty years, and shall assess the tax of such towns at the rate of four days’ work to each poll . . .”).

200. Act of Apr. 16, 1906, § 10, 1906 Ohio Laws 327, 330 (repealed) (“[T]he street commissioner or road superintendent may, if necessary for the improvement of the road, require any person owning the same to furnish a team of horses, mules, or oxen, and wagon, cart, plow, or scraper, to be employed and used on the roads under the direction of the street commissioner or road superintendent.”); *see also* Noble v. Clark, 23 Ohio Cir. Dec. 149, 149–50 (1908) (“[Ohio’s road tax] allow[s] road superintendents to require persons summoned for labor upon the highways to bring teams of horses, if they have them.”).

201. AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929*, at 55–56 (2013) (“Poll taxes, of course, were not new; they had existed throughout American history as a head or capitation tax, with occasional connections to suffrage. In the 1890s, however, Southern Democrats, seeking to consolidate their political and social authority and secure white supremacy, transformed the meaning of a poll tax into a levy that became directly linked to the franchise—one that had to be paid in order to vote. Mississippi led the way in 1890 with a two-dollar poll tax and other voting restrictions that technically adhered to the U.S. Constitution’s Fifteenth Amendment, but effectively eliminated African Americans and poor whites from state and local politics. Other Southern states soon followed suit, as tax laws continued to be used as political tools to maintain social and political power.”).

202. For additional discussion of poll taxes as a category of tax base rather than an invocation of the polling booth, see *infra* Part II.B. Both “poll tax” and “poll booth” have as their root in the middle English word “poll,” meaning head. *See Poll*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (defining “poll” as “the top or back of the

any tax could be, and often was, weaponized to disenfranchise African Americans prior to ratification of the Twenty-Fourth Amendment, these road duties were not originally rooted in that purpose. From the Northeast to the Southeast, from the Cape to the Pacific, poll taxes assessed in labor were used to build public roads since the beginning of the Republic.²⁰³ This practice was not purely a relic of the Confederacy nor New England church tithing, as it spanned across many geographic regions of the United States.²⁰⁴ Indeed, one court reviewing the constitutionality of these taxes considers counsel's citation to Blackstone stating that in-kind assessment in labor to build roads is a tax practice as old as common law itself.²⁰⁵ And though it does seem that the eligibility requirements for being liable to the tax overlap with regional requirements for eligibility to vote, they are not exact matches. For example, older men could still vote even though they were not liable for the road duty.²⁰⁶

While poll tax assessments were in labor, a fee structure was typically provided for those who did not wish to remit labor.²⁰⁷ These fees

head”).

203. See LAY, *supra* note 7, at 102 (explaining that the American colonies naturally followed the English use of the *corvée* system).

204. See *supra* notes 190–200 and accompanying text.

205. Short v. State, 80 Brantly 392, 395 (Md. 1895) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *338, *357) (“The system itself seems to be almost as old as the common law.”); see also BLACKSTONE, *supra*, at *358 (“[Parish surveyors] are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials, or repairing the highways: all persons keeping draughts, (of three horses, &c.,) or occupying lands, being obliged to send a team for every draught, and for every 50*l.* a year which they keep or occupy: persons keeping less than a draught, or occupying less than 50*l.* a year, to contribute in a less proportion; and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a labourer.”).

206. A separate provision, typically in an amended state constitution, made non-payment of tax a cause for disenfranchisement post-Fifteenth Amendment. J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 35 (1999) (discussing use of the tactic in Georgia); see also RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 124–25 (2004) (touching on disenfranchisement via several constitutional reforms in southern states).

207. In Nevada, road duties were assessed in cash with the option of contributing two days labor in lieu of cash. Act of Mar. 5, 1873, § 9, 1873 Nev. Stat. 130, 132 (“Each able-bodied male resident of any road district of this State, over twenty-one and under sixty years of age (uncivilized American Indians excepted), and not exempt by law, shall pay an annual road tax, for the use and benefit of said road district, of four dollars . . . ; *provided*, if any person liable to pay road tax, as herein provided, will perform, or cause to be performed, two days['] work . . . such labor shall be received in full satisfaction of said four dollars.”), *invalidated by* Hassett v. Walls, 9 Nev. 387, 392–94 (1874).

essentially operated as a wage rate.²⁰⁸ The assessments were generally annual, ranging from two to four days of labor, and enforced locally by supervisors or overseers responsible for local governance generally or road construction specifically.²⁰⁹ In some cases, failure to remit labor or cash would then lead to collections.²¹⁰ Tax debt collection could also occur if the labor was not performed in a satisfactory way.²¹¹ In other instances, failure to remit in labor or cash could lead to criminal liability.²¹²

Poll taxes were appealing as a means to build public infrastructure because they did not require borrowing.²¹³ Those regions without will or access to credit could instead rely on remitted labor.²¹⁴ In this way, in-kind assessment enables a jurisdiction to replace its lenders with its citizens.²¹⁵ Taxpayers also serve as a substitute for civil

208. In the case of the draft, economists have also noted that this rate serves as a price ceiling. *See, e.g.*, Mulligan, *supra* note 10, at 1 (noting that in-kind taxes are administered with a price ceiling). Some economists also refer to these commutations as a “ransom.” *Id.* at 9 n.11.

209. *See supra* notes 193–95, 199 and accompanying text.

210. *See, e.g.*, WILSON’S REV. & ANN. STAT. OKLA. 1903 § 6092 (repealed 1915) (“[T]he road overseer shall certify all such delinquent road taxes to the county clerk, who shall place the same on the tax roll for collection, subject to the same penalties and to be collected in like manner as other taxes are by law collected, and the same when collected shall be paid to the road district from which collected, and be expended in improving the roads and highways therein.”).

211. *See, e.g., id.* (“[I]f any person shall appear at the proper time and place as directed by the overseer and neglect or refuse to do a reasonable day’s work according to his ability . . . all such delinquent road taxes . . . shall [be] place[d] . . . on the tax roll for collection . . .”).

212. *E.g., id.* § 6109 (“Any person liable to perform road work as required in this Act who having been duly notified to perform such work shall fail or refuse to comply with such notice and perform such work or furnish a substitute therefor as required in this Act, shall be deemed guilty of a misdemeanor and punished by confinement in the county jail for a period of ten days, or by a fine of not less than ten dollars nor more than twenty-five dollars, or by both such fine and imprisonment . . .”); *State v. Rayburn*, 101 P. 1029, 1030 (Okla. Crim. App. 1909) (“[S]ection 6092 expressly provides that if a person liable for the performance of the work provided to be done under section 6090 fails to either perform the work, furnish a substitute, or pay the \$1 per day after being notified as the law requires, he can be prosecuted criminally under section 6109, or the tax may be collected under the provisions of section 6092 the same as other taxes, if the same is properly certified by the overseer to the county clerk.”).

213. *See Policy Basics: State and Local Borrowing*, CTR. ON BUDGET & POL’Y PRIORITIES 2 (Jan. 16, 2018), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-sfpdebt-1-15-15.pdf> [<https://perma.cc/7ZMB-ZX3R>] (“How much a state or locality borrows should reflect local infrastructure needs, the current cost of debt, and expected revenue growth.”).

214. *See supra* notes 193–95, 199 and accompanying text.

215. In commentary about conscription, critics of the draft note this does not reduce the aggregate cost of the public outlay but rather simply shifts the full costs on

servants in this arrangement. And the choice of remitted labor was appealing to regions without sufficient economic activity to support cash taxes.²¹⁶ So long as there was a population to provide the labor, there was a sufficient tax base to support public works.

State courts were not consistent in regarding in-kind assessments as taxes. As taxpayers began challenging the assessments in the late nineteenth century, many relied on state constitutions setting limits on local taxing authority to argue that the fees due for failure to perform exceeded the constitutional cap on tax rates.²¹⁷ In the words of the Supreme Court of Nevada, "Taxation may be levied in money, service, or in kind; it is no less a tax."²¹⁸ Those courts that concurred with plaintiff taxpayers that the in-kind assessments were taxes would then declare the assessment unconstitutional. This occurred in Nevada in 1874 and Virginia in 1894.²¹⁹ Those courts that did not view the in-kind assessments as taxes generally permitted the assessments as an extension of the state's police powers.²²⁰ State courts upheld in-kind assessments requiring road work in Ohio in 1894,²²¹ Maryland in

those who remit rather than spreading the cost across a broader base. *See Perri, supra* note 186, at 425 ("[T]wentieth-century conscription . . . involved shifting the tax burden to individual draftees.").

216. *See LAY, supra* note 7, at 102 (noting the use of the *corvée* system in the newly formed American colonies).

217. *See, e.g., Proffit v. Anderson*, 20 S.E. 887, 887–88 (Va. 1894) (explaining that a \$1 fine for failure to work on the roads exceeded the \$0.50 cap from the state constitution).

218. *Hassett v. Walls*, 9 Nev. 387 (1874).

219. *Id.* at 394; *Proffit*, 20 S.E. at 888.

220. *See, e.g., Pohl v. Chi., Milwaukee & St. Paul Ry.*, 160 P. 515, 516–17 (Mont. 1916) (explaining the poll tax at issue as a use of the State's police power).

221. *Dennis v. Simon*, 36 N.E. 832, 833 (Ohio 1894) ("Section 4717 of the Revised Statutes, which provides that certain persons, therein named, shall be liable, annually, to perform two days' labor on the highways, under the direction of the road supervisor of the road district in which any such person resides, is not in conflict with the constitution of Ohio, and is a valid enactment. That section does not, in our opinion, infringe the article and section of the constitution by which the general assembly is forbidden to levy a poll tax for county or state purposes, nor is it in violation of the section of the bill of rights which provides that there shall be no involuntary servitude in this state.").

1895,²²² North Carolina in 1906,²²³ Oklahoma in 1909,²²⁴ Utah in 1915,²²⁵ and Illinois in 1916.²²⁶

Where state constitutional challenges in court did not yield consistent outcomes across states, legislatures stepped in to repeal the road poll taxes that remained. The provisions that were not held unconstitutional were eventually repealed. For example, Alabama repealed its road poll taxes in 1913.²²⁷ This timing is itself a helpful reminder not to conflate road duties with Jim Crow, as full enfranchisement for black voters was not a legislative priority in Alabama in 1913 despite repeal of the road poll tax by the legislature.²²⁸

The matter of in-kind assessments was also taken up by the U.S. Supreme Court.²²⁹ In the 1920s in Maryland, oyster firms were obligated to remit a proportion of shucked oyster shells to the State to be

222. *See Short v. State*, 31 A. 322, 323–24 (Md. 1895) (“And there is no ground on which [the law] can be assailed as being repugnant to any of the provisions of the state or federal constitutions.”).

223. *State v. Wheeler*, 53 S.E. 358 (N.C. 1906) (“If the system of working the public roads in any locality is not satisfactory to the majority of its people, relief or change of method must be sought of the lawmaking department.”); *see also* PETER WALLENSTEIN, *BLUE LAWS AND BLACK CODES: CONFLICT, COURTS, AND CHANGE IN TWENTIETH-CENTURY VIRGINIA* 23 (2004) (discussing the case).

224. *State v. Rayburn*, 101 P. 1029, 1034 (Okla. Crim. App. 1909) (“[W]e find that the overpowering weight of authority holds in favor of the proposition that the provisions of said section do not constitute a poll tax, and that the provisions of said statute rest upon the same principle that military and jury duty rests; and that the right to impose such burden is justified on the further theory that it is compensated for in the advantages derived from both the benefits of government and the benefits directly or indirectly from the proper application of either the service or the money paid in lieu thereof.”).

225. *See Salt Lake City v. Wilson*, 148 P. 1104, 1107 (Utah 1915) (declining the chance to follow the only other case found to hold road poll taxes unconstitutional).

226. *Pohl v. Chi., Milwaukee & St. Paul Ry.*, 160 P. 515, 516–17 (Mont. 1916) (“The statute now under consideration is nothing more nor less than a police regulation designed to carry into effect the will of the people expressed in the constitutional provision quoted above. It is analogous to a so-called road poll tax exacted for the maintenance of the public highways, and the authorities are practically unanimous in holding that such an exaction is not a tax as the term is used in the Constitution and in revenue measures generally. It is not subject to the uniformity rule or to other restrictions which hedge about measures relating to taxation.”).

227. LAY, *supra* note 7. *But see* WALLENSTEIN, *supra* note 223, at 18 (reporting that the practice extended until 1930s).

228. In many southern states, the transition away from road duties assessed in kind was replaced with convict leasing, a racially targeted regime that extended many of the defining features of enslaved labor post-Emancipation. Northern states were more likely to use cash taxes to then pay for road labor. *See* WALLENSTEIN, *supra* note 223, at 18–19.

229. *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929).

used for Chesapeake restoration.²³⁰ Like poll taxes, assessment was in kind, though the assessment could only be paid in cash on a case-by-case basis if the assessor decided it was permissible. Maryland state law at the time held as follows:

[T]he licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money.²³¹

Taxpayers brought suit, arguing that the assessment in shells was an unconstitutional taking.²³²

The Supreme Court rejected the idea that this was a taking. To the Court, the taxing power was not hemmed in by requiring the remittance to be in kind rather than in cash:

[W]e think nothing in the Federal Constitution prevents the State from demanding that he give up the same [percent] of such shells. The result to him is not materially different [than if paid in cash]. From the packer's standpoint empty shells are but ordinary articles of commerce, desirable because convertible into money. Their value is not large and the part taken by the State will be so used as greatly to advantage the business of packing. The purpose in view is highly beneficent and the means adopted are neither arbitrary nor oppressive. The Federal Constitution may not be successfully invoked by selfish packers who seek to escape an entirely reasonable contribution and thereby to thwart a great conservation measure generally approved.²³³

Remittance in oyster shells was not materially different than the cash equivalent of these oyster shells. And the use of the shells by the State for conservation efforts was itself rationally motivated.

II. THE LESSONS OF IN-KIND TAX PAYING

The previous Part illustrated how in-kind transfers from taxpayers to government in order to reduce a tax liability occur at the local, state, and federal levels, and across income, property, excise, and transfer tax bases. Taken together, these practices undo the legitimacy of a tacit presumption that, within a modern cash economy, taxes are only remitted in cash. This Part will now draw from the broad uses of

230. MD. CODE, PUB.-GEN., art. 72 § 91 (1927).

231. *Id.*

232. *Leonard & Leonard*, 279 U.S. at 396 (“Their main insistence is that exaction of 10% of the empty shells, or equivalent market value at the election of the Commission, would be a taking of their property for public use without compensation.”).

233. *Id.*

in-kind tax paying documented above to discuss the relative merits of in-kind remittance and the accompanying concerns with the practice.

At the outset of this Part, it should be noted that the analysis here is not an attempt to replace cash taxes with in-kind remittance. Rather, the inquiry here is about remittance pluralism as an alternative to cash-tax exclusivity: Should cash remittance be the *only* available form of tax paying? This question is motivated both by the implications of in-kind remittance for tax scholarship, as noted in the discussion of choice of tax base *infra*, and also by the fact that many jurisdictions are already relying on in-kind tax paying in a variety of forms.²³⁴

This Part offers four lessons from the varieties of in-kind tax paying identified above. First, any presumption that remittance of taxes in kind is not a viable form of tax paying within a cash economy is simply inaccurate. We know in-kind tax paying is viable because it is already happening. This is not to say there are not administrability concerns—and viability is surely distinct from desirability—but categorical rejections of in-kind remittance on administrability grounds become unpersuasive after reviewing the many lessons discussed in this Part.²³⁵ Second, in-kind tax paying has substantial implications for choice of tax base considerations, including the desirability of lump sum taxation. Third, in-kind tax paying foregrounds the civic features of tax paying that are often left out of conventional equity, efficiency, and administrability tax policy analysis.²³⁶ In-kind tax paying can improve transparency of the tax system and engender greater solidarity amongst taxpayers, but it can also increase the risk of corruption and create disproportionate political voice inconsistent with democratic principles. Fourth, the most worrisome forms of in-kind tax paying appear to be instances where remittance in kind is not elective. Should contributions of labor and noncash property be folded into a taxpayer's tax liability, taxpayers have weaker protections vis-à-vis the state.

234. See *supra* Part I.

235. For example, a proposal to use in-kind remittance for a wealth tax was categorized as “daunting” and quickly rejected as “dubious.” Wojciech Kopczuk, *Comments and Discussion: Comment by Wojciech Kopczuk*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2019, at 519–20 (commenting on and discussing Saez & Zucman, *supra* note 11).

236. But see Clint Wallace, *The Democracy Criterion for Taxation* (Aug. 2, 2021) (unpublished manuscript) (on file with the Minnesota Law Review) (seeking to expand considerations of democratic values when evaluating tax policy).

A. ADMINISTRABILITY LESSONS

1. Valuation

Distinct valuation challenges arise for both remitted services and remitted noncash property. These challenges are surmountable. Indeed, one clear lesson from the Massachusetts experiment in in-kind tax paying through its property work-off program is that valuation of services is relatively simple. In Massachusetts, the State already sets a minimum wage rate and the in-kind tax paying program then simply cross-references this rate for its own valuation of contributed labor.²³⁷ This approach in turn has potentially appealing distributional implications for those in favor of progressivity. A flat wage rate for remitted services subsidizes discouraged workers who have been unable to get paid by the labor market at that rate and it discounts those who command a higher wage rate.²³⁸ If a government did not want to set a flat rate, the valuation for contributed services could be based on the wage schedule for employees who also perform comparable tasks. The federal government already has wage schedules for this type of valuation challenge,²³⁹ though the procedure for awarding access to different wage rates would also need to be considered. A flat rate for valuing all contributed labor would avoid this problem.

Valuing noncash property remitted through in-kind tax paying is also surmountable from an administrability perspective. Indeed, the Internal Revenue Code already has mechanisms for valuing noncash property. For example, a variety of rules already cover the valuation

237. MASS. GEN. LAWS ch. 59, § 5K (2019) (“[N]o [eligible volunteer] shall receive a rate of, or be credited with, more than the current minimum wage of the commonwealth per hour for services provided . . .”).

238. While it is tempting to assume that those who could get a higher wage rate in the private sector than the one offered by an in-kind tax paying program would choose not to remit in kind, this has not been the case in Massachusetts. In the jurisdictions without income caps on in-kind remittance, such as Barnstable, Massachusetts, there is more demand for in-kind remittance than available slots. See Dep’t of Hum. Res., *Senior Citizen Tax Work-Off Abatement Application*, THE TOWN OF BARNSTABLE 2, <https://www.town.barnstable.ma.us/Departments/Assessing/Abatements/Senior-Tax-Work-off-Abatement-Application.pdf> [<https://perma.cc/4SFJ-FYX2>] (limiting in-kind remittance opportunities by lottery and disallowing consecutive years of in-kind remittance due to high demand). Boston addressed this issue by imposing income limits on who could remit in kind. See Age Strong Comm’n, CITY OF BOS., *supra* note 4, at 3 (imposing an income limit of \$40,000 for single filers and \$55,000 for married filers). There are nevertheless efficiency costs to a worker opting to accept a lower wage from government rather than higher wage from private sector.

239. See 2020 General Schedule (GS) Locality Pay Tables, U.S. OFF. OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2020/general-schedule> [<https://perma.cc/P9NG-3XUB>].

of noncash property donated by taxpayers claiming the charitable deduction.²⁴⁰ These rules cover a wide array of property, including household goods, vehicles, and artwork, and also intangible assets, such as donated patents, interests in a business that is not publicly traded, and remainder interests.²⁴¹ These valuation exercises are also common in the administration of estate and gift taxes.²⁴²

While the Service has had challenges with the valuation of non-cash contributions in the context of charitable donations, in-kind remittance to government would be less vulnerable to abuse. With most charitable contributions, the transactions are between private parties who have a mutual interest in an inflated valuation. The charity may receive a larger donation if it goes along with the taxpayer's scheme of overinflating the value of the contributed property. This has been the case with conservation easements, the value of which can be overstated by more than 1,200%.²⁴³ This issue has also arisen with the valuation of donated automobiles.²⁴⁴ If one party is the government, however, then agreement over valuation does not involve a potential coconspirator. Here, the recipient would not be motivated to overstate value in the same way as a donee, though of course the taxpayer would still seek a high valuation.²⁴⁵

The valuation procedures used for levied property may also serve as a model for expanded use of in-kind tax paying. The value of levied property is determined by its auction price, and only upon sale is this value then applied to the outstanding tax liability, less administrative costs.²⁴⁶ Under this approach, a taxpayer who elects into in-kind remittance cannot simply deceive the tax collector as to the value of the property because the value will be set by market participants at auction. Auctions also resolves potential concerns with the state as custodian of property since the property is only held briefly. IRS auctions

240. INTERNAL REVENUE SERV., *supra* note 118.

241. *Id.*

242. See I.R.C. §§ 2001, 2501.

243. See, e.g., TOT Property Holdings, LLC v. Comm'r, No. 5600-17, 2019 WL 11880554, at *3 (T.C. Nov. 22, 2019) (stating that the Service valued an easement at \$496,000 while the taxpayer claimed a charitable deduction of \$6.9 million).

244. See TREAS. INSPECT. GEN. TAX ADMIN., REF. NO. 2009-30-16, PROCEDURES TO ADDRESS NONCOMPLIANCE WITH THE REPORTING REQUIREMENTS FOR CONTRIBUTIONS OF MOTOR VEHICLES CONTINUE TO BE INADEQUATE (2009).

245. As the new owner of the property, the government would also be in a superior position to determine the value of the property, rather than in third-party charitable transfers where the state has less direct access to information about the property unless it pursues an examination of the return. Hence, government possession of the property may also deter overvaluation by taxpayers.

246. These procedures are discussed in more detail *supra* Part.I.C.3.

could also be modeled after the Federal Communications Commission spectrum auctions wherein there are multiple rounds of bidding for the same item in order to achieve maximum sale price.²⁴⁷ This approach is a practical extension of the auction theory research that received the 2020 Nobel Prize in Economics.²⁴⁸

The challenge of determining “just compensation” in cases of eminent domain is relevant to the valuation issues that could arise with in-kind tax paying, but it is not a precise analog. With eminent domain, a substantial area of concern stems not from determining fair market value, for which there are a variety of techniques,²⁴⁹ but from what Fennell terms the “uncompensated increment,” comprised principally of the subjective value of the property and “the autonomy of choosing for oneself when to sell.”²⁵⁰ When a taxpayer chooses to remit in kind rather than in cash, there is no uncompensated increment because the subjective value was already incorporated into the taxpayer’s decision to remit in kind and taxpayer autonomy has also been retained.

In-kind tax paying also has the potential to make valuation disputes *less* costly to the IRS. By matching the form of remittance to the base being taxed, there is less of a justification for taxpayer allegations of incorrect valuation. This approach has been recommended in the context of a new wealth tax.²⁵¹ Not all forms of in-kind remittance provide such a benefit of course. For example, in the case of the property tax work-off program, assessment is on real property and remittance is in labor.²⁵² But in-kind tax paying can help reduce valuation disputes where the base being taxed is the same as the form of remittance.

247. This process is referred to by the Federal Communications Commission as a “Simultaneous Multiple Round (SMR) Auction.” See Debbie Smith, *Spectrum Auction Process and Integrated Spectrum Auction System*, FED. COMM’N COMM’N 3, <https://wireless.fcc.gov/auctions/72/resources/BiddingProcedures.pdf> [<https://perma.cc/GMX2-M4GB>].

248. Simon Johnson, *U.S. Auction Theory Pioneers Win Nobel Economics Prize*, REUTERS, Oct. 12, 2020, <https://www.reuters.com/article/nobel-prize-economics-int-idUSKBN26X1JK> [<https://perma.cc/WE3Q-QNQZ>].

249. There are three main techniques used to determine fair market value when providing just compensation: the sales comparison approach, the cost approach, and the income approach. See Dale Orthner, *Toward a More “Just” Compensation in Eminent Domain*, 38 MCGEORGE L. REV. 429, 451–52 (2007). These techniques should be familiar to tax scholars who study estate tax valuation or transfer pricing.

250. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962–67.

251. Saez & Zucman, *supra* note 11, at 33 (“More ambitiously, in case of disagreement about valuation for large private businesses between the IRS and the owners, owners should pay in stock and the government can then create the missing valuation market when selling back the stock.”).

252. MASS. GEN. LAWS ch. 59, § 5K (2019) (“In exchange for . . . volunteer services,

Another design choice that could address valuation challenges with in-kind tax paying would be to exclude categories of in-kind remittances too difficult to accurately value. This is partially the justification for not allowing labor to be contributed by individuals for purposes of claiming the charitable deduction, though abuse of the provision through fraudulent documentation of services is also a concern. When the recipient of remitted services is the government rather than a tax indifferent party, the risk of fraudulent documentation becomes less severe. And excluding categories of hard-to-value assets is distinct from banning in-kind remittance altogether.

2. Realization

In-kind remittance has the potential to relax the Internal Revenue Code's reliance on the realization requirement. Under current law, income tax is only applied to the gain in the value of property upon recognition and realization.²⁵³ The realization requirement is generally regarded as a design choice of administrative convenience that produces more problems than it solves. As Yariv Brauner noted nearly two decades ago, "[R]ealization has been downgraded to an administrative convenience or, as some may say, a necessary evil."²⁵⁴ Realization is generally understood as a requirement that ideally would be unnecessary.²⁵⁵ While replacing the realization requirement with other regimes, such as mark-to-market, are regularly proposed, alternatives to the realization requirement themselves raise many complexities and so are not per se preferable.²⁵⁶

In-kind remittance could fill this gap. Remittance in kind could create a symmetry between a tax base and tax remittance. If the base includes noncash items, the remittance could also be in the form of that base. This would address the liquidity concerns of taxes on non-cash bases without narrowing the taxable base. Noncash taxes would

the city or town shall reduce the real property tax obligations of [eligible volunteers] on [their] tax bills.").

253. See I.R.C. § 1001.

254. Yariv Brauner, *A Good Old Habit, or Just an Old One? Preferential Tax Treatment for Reorganizations*, 2004 BYU L. REV. 1, 7 n.23 (citing David M. Schizer, *Realization as Subsidy*, 73 N.Y.U. L. REV. 1549, 1552 (1998)). While Schizer ultimately concludes that realization has some advantages as a subsidy, whether these advantages outweigh the substantial disadvantages, also noted by Schizer, remains unclear. Schizer, *supra*, at 1609–25.

255. See, e.g., Brauner, *supra* note 254, at 3.

256. See, e.g., Lily Batchelder & David Kamin, *Taxing the Rich: Issues and Options* 14–18 (Sept. 11, 2019), <https://papers.ssrn.com/abstract=3452274> [<https://perma.cc/B2HY-HCVX>] (discussing a mark-to-market regime and its advantages and potential challenges).

remove the welfare costs identified by Hayashi when “paying tax on one kind of consumption in the form of another kind of consumption.”²⁵⁷ These quiet costs of taxation were also noted by Rousseau two centuries earlier: “[F]or I will never repeat enough that what makes . . . all taxes onerous to the cultivator, is that they are pecuniary, and that he is first obliged to sell in order to be able to pay.”²⁵⁸ In-kind remittance avoids these costs.

Even if the realization requirement were retained, in-kind remittance of property remains administrable. Our Code already offers a variety of options for dealing with the potential realization that occurs when noncash property is remitted to satisfy a tax liability. In the case of capital assets remitted to a government entity in order to claim the charitable deduction, long-term capital gains are generally allowed to escape capital gains tax, while short-term capital gain property faces additional tax.²⁵⁹ In the case of property seized through levy, the cash value of the auctioned property is first applied against the tax liability created by any built-in gains realized before then being applied to the tax debt that was the initial cause for the levy.²⁶⁰ An expanded in-kind remittance regime would need to provide rules for the realization (or nonrealization) that would occur upon remittance of noncash property to satisfy a tax obligation, but this is merely a design choice rather than a design barrier.

3. Compliance

In-kind remittance in services raises unique compliance concerns, including the risk of compelled labor and the challenge of supervising the quality of contributed labor. These challenges are worthy of consideration but not dispositive of in-kind remittance viability.

On the issue of compelled labor, providing an option to remit in labor is categorically distinct from *requiring* remitted labor. Elective in-kind remittance in labor expands the options available to taxpayers, rather than forcing in-kind remittance. This is the case in Massachusetts, where it is voluntary whether to remit in labor rather than cash, so a taxpayer would never be forced to work for the State.²⁶¹ And

257. Hayashi, *supra* note 12, at 822.

258. ROUSSEAU, *supra* note 24, at 216.

259. I.R.C. § 170(e). For a thoughtful discussion of the desirability of this design feature, see Roger Colinvaux & Ray Madoff, *Charitable Tax Reform for the 21st Century*, 164 TAX NOTES 1867 (2019).

260. I.R.C. § 6342.

261. MASS. GEN. LAWS ch. 59, § 5K (2019) (“[Localities] may establish a program to allow persons over the age of 60 to volunteer to provide services to such city or town. In exchange for such volunteer services, the city or town shall reduce the real property tax obligations of such person.” (emphasis added)). These potential risks are further

if taxpayers were to elect to remit in labor but then change their mind or become unable to do so, then the government recipient would not report the contribution and the tax liability would not be reduced. If the taxpayer then claimed reduction without contemporaneous reporting by the government recipient, this would register as underpayment and even automated underreporter enforcement mechanisms would catch it.²⁶² Here, the consequence of not remitting labor would not be compelled labor, but only a reinstated dollar-denominated tax liability, plus potential delinquency penalties. Such tax liabilities already exist in a tax regime with cash-tax exclusivity.²⁶³

Tax compliance becomes more difficult when assessing the *quality* of remitted services. Indeed, one of the explanations for the transition away from road duties to build and repair public roads is that poll tax work was of lower quality than paid labor.²⁶⁴ The draft has also been criticized on these grounds.²⁶⁵ This is also cited as a justification for the judiciary's reluctance with specific performance in contract disputes, since quality is hard to enforce and may produce incessant follow-up litigation.²⁶⁶ Elective remittance in kind resolves this issue somewhat by making the contribution of labor into an opt-in regime. Another approach to this challenge may be to narrow the categories of work that could be remitted so that evaluation of quality would not be subject to potentially arbitrary discretion. For example, the companies Amazon Mechanical Turk and TaskRabbit employ individuals for what are often "micro-tasks" where the evaluation is simply whether the task was completed or not, rather than quality of the performance.²⁶⁷ A decennial Census taker who simply tracked the number of contacts with individuals might be an example of this low-skilled task. In Massachusetts's property tax work off program, some taxpayers perform clerical work while others are matched to jobs that align with the taxpayers' interests.²⁶⁸ It is also worth noting that govern-

elaborated *infra* Part II.D.

262. *E.g.*, MASS. GEN. LAWS ch. 62C, § 35A (2020) (establishing penalties for underpayment of taxes).

263. *See, e.g., id.*

264. *See* LAY, *supra* note 7.

265. Walter Y. Oi, *The Virtue of an All-Volunteer Force*, 26 REGULATION 10, 10–12 (2003).

266. *See* IAN AYRES & GREGORY KASS, STUDIES IN CONTRACT LAW 1107–10 (2017).

267. *See* Adrienne Raphel, *TaskRabbit Redux*, NEW YORKER (July 22, 2014), <https://www.newyorker.com/business/currency/taskrabbit-redux> [<https://perma.cc/E2AY-2GTM>].

268. *See supra* Part I.C.1.

ments already face supervision costs for employees. In-kind remittance of services would consolidate those overhead costs with other tax compliance costs.

B. CHOICE OF TAX BASE LESSONS

Acknowledging the viability of noncash remittance of taxes also enables us to revisit canonical tax debates—choice of tax base, optimal levels of progressivity—from a new position. In-kind tax paying has the potential to both reorder the terms of those debates and perhaps alter one's conclusion. Of course, these debates are longstanding in part because there is no consensus on the underlying values that motivate differing conclusions. The introduction of in-kind tax paying as a viable means of tax paying, then, does not seek to irrefutably resolve these debates (nor should it attempt to), but it does change how we approach them. The primary purpose of this Section is to illustrate the implications of in-kind tax paying for choice of tax base considerations.

Choice of tax base remains one of the most central questions in tax scholarship. The national attention to the wealth tax is only one recent example.²⁶⁹ Various options for tax bases include consumption taxes, income taxes, property taxes (including wealth taxes), and transfer taxes (including gift, estate, and inheritance taxes).²⁷⁰ Some argue for one single tax base, while others espouse tax eclecticism, where multiple tax bases should be relied on simultaneously.²⁷¹ While some proponents have managed to hold onto the same position for decades, none could credibly claim to have settled the debate. Were the current fiscal system in the United States to be given the role of tie breaker, then tax eclecticism has clearly won the tax base debate—our system of fiscal federalism relies on all manner of tax bases and often does so concurrently for a single taxpayer.

269. See Taylor Nicole Rogers, *Bloomberg's 'Tax on the Very Rich' Isn't Actually a Wealth Tax Like the Ones Warren and Sanders Have Proposed. Here's How They Compare.*, BUS. INSIDER (Feb. 22, 2020), <https://www.businessinsider.com/wealth-tax-bernie-sanders-elizabeth-warren-difference-explained-chart-2019-10> [<https://perma.cc/2UTS-7RVM>].

270. See, e.g., Jonathan Choi, *The Most-Cited Tax Articles of All Time*, YALE J. ON REGUL.: NOTICE & COMMENT (May 11, 2019), <https://www.yalejreg.com/nc/most-cited-tax-articles> [<https://perma.cc/52P2-NEN6>] (showing the top five cited tax articles of all time, each of which touches on choice of tax base).

271. On optimal tax, see LOUIS KAPLOW, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* (2008). On eclecticism, see Chris William Sanchirico, *Tax Eclecticism*, 64 *TAX. L. REV.* 149 (2011).

Inclusion of in-kind tax paying as an acceptable form of remittance has immediate implications for choice of tax base considerations. This is most evident with the case of lump sum taxation. Lump sum taxes are variously referred to as “head taxes,” “poll taxes” or “capitation.”²⁷² These taxes assess a fixed amount of tax from all of a designated group, most typically citizens. The poll tax was used in both New England colonies and southern colonies.²⁷³ In early iterations, public employees and schoolteachers were exempt from the poll tax.²⁷⁴ More than a relic that preceded income taxes, Margaret Thatcher’s government imposed a short-lived poll tax in 1990.²⁷⁵ In each of these historical instances, poll taxes were one of many taxes used to raise revenue, rather than the sole source of revenue.

In discussions of relative merits of various tax bases, a lump sum tax is consistently cited as the “holy grail” of efficient tax design.²⁷⁶ Because the lump sum amount is the same on all citizens regardless of their other choices, a lump sum tax assessment is not altered by a taxpayer’s behavior.²⁷⁷ The tax is thus nondistortionary and there is no associated deadweight loss. Lump sum taxes are also viewed as desirable from the standpoint of administrability; the opportunities for evasion are solely expatriation²⁷⁸ or death. The limited opportunities for abuse or evasion also contribute to the efficiency of the tax.

Criticisms of lump sum taxation typically focus on feasibility and equity.²⁷⁹ To the extent a government has indigent citizens, how would collection occur? There are also regressivity concerns that are common to all forms of flat taxes, including head taxes. Regressivity has been cited as the motivation for the end of the use of head taxes in

272. See AARON WILDAVSKY, *On the Balance of Budgetary Cultures*, in BUDGETING AND GOVERNING 285 (Brendon Swedlow ed., 2001); LEE S. FRIEDMAN, *THE MICROECONOMICS OF PUBLIC POLICY ANALYSIS* 496 (2002).

273. See Robin L. Einhorn, *Liberty, Democracy and Capacity: Lessons from the Early American Tax Regimes*, in *THE NEW FISCAL SOCIOLOGY*, *supra* note 59, at 155, 158.

274. WILDAVSKY, *supra* note 272.

275. FRIEDMAN, *supra* note 272.

276. See, e.g., *id.* at 494–99; KAPLOW, *supra* note 271, at 96.

277. FRIEDMAN, *supra* note 272. Friedman’s definition of lump sum taxes is somewhat circular because it claims that lump sum taxes are nondistortionary, but he then only gives examples that include distortions. *Id.*

278. *Id.* at 496 (“[I]ndividuals can still immigrate or emigrate [to avoid a lump sum tax.]”).

279. E.g., *id.* (“In short, there may not be any socially acceptable way of creating a lump-sum poll tax.”).

the colonial period²⁸⁰ and the protest movement that ended the “community share” tax Thatcher supported.²⁸¹

In-kind tax paying casts doubt on both the feasibility and administrability critiques of lump sum taxation. From a feasibility standpoint, the proportion of taxpayers who not only have no liquidity but also no means of contributing labor is a much smaller share of a polity, even an impoverished one.²⁸² Labor would be available as a means of tax paying to nearly all taxpayers, including those of various abilities, provided sufficient accommodation. Accommodation includes allowing labor tailored to the physical abilities of the taxpayer and also allowing surrogates for those who cannot contribute in forms made available to taxpayers.²⁸³

The regressivity critique of lump sum taxation might also shift in light of in-kind tax paying. If remittance in labor is permitted for lump sum taxes, then a flat rate of compensation serves to reward those who earn less than the statutory rate while discounting the value of the labor of those who otherwise would earn more. The remittance could also be refundable for those who contribute more in labor than the tax that is due, serving as a form of job guarantee through the tax system. By contrast, requiring remittance in cash for taxes on noncash bases can impose a discriminatory burden by forcing those who do not wish to liquidate their assets to seek cash compensation through a discriminatory wage or credit market. It is well established that the labor market does not equitably allow all workers to convert their labor into cash at the same rates, even workers with the same skill level and job, due to factors such as gender and race.²⁸⁴ In-kind remittance

280. See WILDAVSKY, *supra* note 272 (“Because it placed particular hardship on the poor, the poll tax was later abandoned.”).

281. FRIEDMAN, *supra* note 272.

282. Feasibility becomes more complicated were lump sum taxation to be the *only* form of taxation, given how high the rate would need to be in order to meet current government spending levels. Presuming tax eclecticism, however, removes this issue.

283. Most road duties included such provisions. See *supra* Part I.C.4. Jury duty requirements also include such accommodations.

284. See, e.g., Jasmine Tucker, *57 Cents on the Dollar Isn't Enough for Latinas*, NAT'L WOMEN'S L. CTR. 1 (Oct. 2021), <https://nwlc.org/wp-content/uploads/2020/10/2021-Equal-Pay-for-Latinas-v1.pdf> [<https://perma.cc/V9SZ-8DW5>] (“Economic gains in recent months are not being experienced evenly across groups by race and gender.”); *The Wage Gap: The Who, How, Why, and What To Do*, NAT'L WOMEN'S L. CTR. 1 (Sept. 2021), <https://nwlc.org/wp-content/uploads/2020/10/2021-who-what-why-wage-gap.pdf> [<https://perma.cc/24BJ-54AV>] (“Women in the U.S. who work full-time, year-round are typically paid only 83 cents for every dollar paid to their male counterparts.”). See generally *Race and Gender Wage Gaps*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/issue/race-gender-wage-gaps> [<https://perma.cc/K36V-D694>].

for an assessment on a noncash base avoids compounding this wage market inequality.

In-kind tax paying may also reduce the compliance costs of a property tax regime, such as a tax on land specifically or a tax on wealth more broadly. Similar to the previous discussion on the realization requirement,²⁸⁵ in-kind tax paying addresses the liquidity issues created by cash taxes on noncash bases. These liquidity issues may be especially acute for low-income taxpayers.²⁸⁶ Low-income taxpayers would not need to rely on credit markets or property sales in order to meet a tax obligation.²⁸⁷ Were in-kind remittance permitted for a wealth tax, such remittance could also serve to reduce valuation disputes rather than foment them, as the remitted property would be in the same form as the base being taxed.²⁸⁸

In-kind tax paying also has implications for the relative merits of an income tax against other potential tax bases. For example, imagine a worker who seeks to get full-time work, but can only ever get twenty hours a week of work. The work is sufficient to incur income beyond the zero bracket, so the worker must pay an income tax.²⁸⁹ Such a worker might prefer remitting their taxes in labor, which the worker has a surfeit of, rather than cash, which the worker has limited access to. In-kind tax paying can also shift the incentives for tax avoidance. For example, a corporate tax that required remittance in shares at time of incorporation, rather than cash over the life of the firm, might shift the incentives to avoid taxes, since the government would become just another shareholder to whom corporate managers owe the same fiduciary duties as any other shareholder.²⁹⁰ Motivations to maximize shareholder value would encompass the state's interests rather than compete with it.

285. See *supra* Part II.A.2.

286. Hayashi, *supra* note 12, at 823 ("It is likely that some of the factors that aggravate the costs of illiquidity particularly burden low-income taxpayers. Such taxpayers have less access to credit, may be less able to bear the legal compliance and maintenance costs necessary to rent their homes, and may be located in neighborhoods with more volatile home prices due to land speculation and gentrification.").

287. Of course, low-income brackets could also be made exempt from taxation altogether.

288. For example, a 2% wealth tax on holdings in a closely-held business with unclear market value, could be satisfied by remitting a 2% interest in the business. For more details on such an approach, see Saez & Zucman, *supra* note 11. As noted throughout this Article, remittance in kind does not entail government as indefinite custodian of private enterprise since property can be liquidated through auction or other means.

289. I.R.C. § 1 (imposing a tax on income above a certain threshold).

290. Schlunk, *supra* note 11.

The discussion here is clearly wide ranging and thus inevitably cursory. The conclusion, however, is neither qualified nor ambiguous: the relaxation of the cash-tax premise has deep implications for choice of tax base debates. This includes the viability of lump sum taxation and the desirability of income taxes relative to other forms of taxation.

C. DEMOCRACY LESSONS

Many of the lessons of in-kind tax paying emerge most clearly when in-kind tax paying is examined through the lens of democratic values. To the extent tax paying is understood as a civic act that shapes a taxpayer's relationship to her government and to her fellow taxpayers, in-kind tax paying stands in stark contrast to cash remittance of tax obligations.²⁹¹ This Section discusses the lessons of in-kind tax paying along the following dimensions: solidarity between taxpayers, transparency of government spending, and taxpayer control over government spending.

1. Solidarity

The identity of being a taxpayer is a powerful and celebrated one. This is true in present day American politics and historically. As Vanessa Williamson documents through both her own interview data and decades of historical survey data, "To be a taxpayer, Americans believe, is something to be proud of. It is evidence that one is a responsible, contributing, and upstanding member of society, a person worthy of respect in the community and representation in the government."²⁹² One extension of this phenomenon has been documented in the case of the Earned Income Tax Credit, where receipt of the benefit via the tax system does not produce shame or insecurity for the recipient in the way that other cash transfers have been shown to do.²⁹³ For many, tax paying is an identity that improves self-esteem and justifies political voice.

From individuals' identification with tax paying, taxpayers then also build relationships to other taxpayers. Their tax paying becomes an expressive act in the development of political community. As Walsh

291. Martin et al. summarize the civic features of tax paying as follows: "[T]axation establishes one of the most widely and persistently experienced relationships that individuals have with their government, and—through their government—with their society as a whole." Martin et al., *supra* note 59, at 3.

292. VANESSA S. WILLIAMSON, *READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES* xi (2017). For the additional survey data, interview data, and election results supporting this conclusion, see *id.* at 26–45.

293. Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 560–61 (2013).

eloquently states, “Taxes are the way we tangibly show our connection to strangers.”²⁹⁴ There is an expressive value of tax paying as a performance of civic duty.²⁹⁵ And these expressions of political community are more than symbolic. They are rooted in enforceable legal duties, for which noncompliance can have steep consequences. Unlike statements of community in the form of attendance at a social function or posts on social media, tax obligations tether taxpayers to a political community in material ways.²⁹⁶

These civic features of tax paying—the way tax paying shapes an individual’s political identity and also their bonds to other members of the community—are clear motivators for the Property Tax Write-Off Program in Massachusetts.²⁹⁷ One alternative to allowing in-kind remittance by cash-poor senior homeowners would be to simply exempt them from property tax liability if below a specific income threshold. But such an approach would bar senior property owners from the self-concept of being contributors to their local government and from their recognized membership in the taxpaying community. By allowing in-kind remittance, seniors get to stay within the taxpaying community rather than be accused of freeloading.²⁹⁸ Their contribution in kind also has greater salience to others in the political community. By giving in labor, their contributions are often seen by those relying on the public services these taxpayers provide.²⁹⁹ This is in contrast to putting a check in the mail or clicking on a direct deposit link—acts without much visibility to others.³⁰⁰

294. CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869-1973, at 4 (2018).

295. Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1818 (2000).

296. Martin et al., *supra* note 59, at 1 (“Taxes formalize our obligations to each other. . . . They signify who is a member of our political community, how wide we draw the circle of ‘we.’”). Of course, this circle of “we” also implies a circle of “them,” and taxpayer identity is also a strategy for positioning others as freeloaders.

297. *See supra* Part I.C.1.

298. Importantly, the in-kind remittance option exists alongside income-based tax relief in Massachusetts. In this way, the write-off program is an opt-in regime. *See supra* Part I.C.1.

299. Some have argued that the identity of being a taxpayer is not always tethered to material facts and that the category can be used more as a way to exclude, regardless of actual taxes being paid. Because claims to being a taxpayer empower entitlement to privilege, the category of taxpayer can become a tool of white supremacy rather than a factual descriptor. WALSH, *supra* note 294, at 3–4. This also occurs in the context of undocumented workers, who generally do pay taxes but are derided by many who presume they do not. *See* Francine J. Lipman, *The Illegal Tax*, 11 CONN. PUB. INT. L.J. 93, 95 (2011).

300. The confidentiality rules imposed by I.R.C. § 6103 also limit the publicity of tax contributions.

There are additional expressive functions of the Property Tax Write-Off Program beyond the appeal of including seniors within the political community of taxpayers and allowing them to enjoy the self-concept of being taxpayers. By setting a flat “compensation” rate for the labor remitted in exchange for a reduced property tax bill, the Property Tax Write-Off Program sends a message to Massachusetts taxpayers that the time of each member of the political community is of equivalent value. For example, a State Street banker who contributes an hour receives the same rate of tax reduction for that hour as a senior who could not command a similar wage rate. Just as tax brackets serve an expressive function by communicating that those with high income must contribute a greater share to the polity, in-kind remittance communicates to members of that polity that each of their labor is of equivalent value.³⁰¹ This expressive function would not exist were taxpayers all remitting in the form of cash.

Despite these advantages of in-kind remittance, the departure from remittance in fungible form may also undermine taxpayer solidarity. Some have argued that the pooling of cash resources through untraced cash remittances is actually what creates solidarity amongst taxpayers. “[W]hen we make use of roads,” write Martin et al., “we do not know from whose tax payments in particular we are benefiting. Taxation enmeshes us in the web of generalized reciprocity that constitutes modern society.”³⁰² In-kind tax paying might remove that anonymity, making public who did what, and by extension, who can claim credit for what. Hence, directly tracing one’s contributions to a state’s actions may undermine solidarity. The force of this argument depends on the extent to which taxpayers fail to see noncash remittance as also a form of pooled contributions through which they then share a common bond. While it is true that a nineteenth century Virginia poll taxpayer could point to the drainage ditch he dug as part of his tax duty to the State in a way that a driver who pays a highway toll cannot point to the inch of cement their toll helped repair, it seems unlikely that those who pay highway tolls feel greater communion with each other than those who have all dug drainage ditches together. Shared military service also proves a helpful illustration, as it would be insulting to claim that the solidarity amongst Iraq veterans who served together is equivalent, or even similar, to the solidarity amongst taxpayers whose income taxes financed that same invasion.

301. See generally Ari Glogower & David Kamin, *The Progressivity Ratchet*, 104 MINN. L. REV. 1499 (2020).

302. Martin et al., *supra* note 59, at 3.

2. Transparency

Government transparency is generally understood as a necessary condition of democracy.³⁰³ To the extent one believes a legitimate government must acquire the consent of the governed, a government's nondisclosure of its activities undermines the consent of the governed.³⁰⁴ Without transparency, citizens may not be provided with the material information necessary for their consent.³⁰⁵ In addition to consent, government transparency is also entwined with democratic principles of accountability.³⁰⁶ Citizens cannot hold their government accountable for its actions without knowing what those actions are.³⁰⁷ Both consent and accountability are particularly important in the context of taxation given the host of ways taxation can infringe on individual liberties.³⁰⁸ Thus, transparency in tax administration is acutely important for the legitimacy of democratic governance.³⁰⁹

In-kind remittance has the potential to make a government's use of a taxpayer's contribution more visible to the taxpayer. Since a defining characteristic of cash is its fungibility, a taxpayer who remits her taxes in cash does not generally know how that cash is spent.³¹⁰ By contrast, Massachusetts taxpayers who contribute labor through the Property Tax Work-Off Program know precisely how their contributions are being used to further the activity of their government.³¹¹ From the standpoint of transparency, the lack of fungibility of contributed services is an appealing feature of in-kind remittances. Indeed, the in-kind remittance of labor functions similarly to taxpayer receipt

303. See Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 46–47 (2019).

304. *Id.*

305. *Id.*

306. *Id.*

307. For a discussion on the relationship between transparency, democracy, and tax policy, see generally *id.*, which analyzes the implications of omitting race and ethnicity from published reports on aggregate tax data.

308. See generally Wolfgang Schön, *Taxation and Democracy*, 72 TAX L. REV. 235, 250–55 (2019).

309. As noted previously, Rousseau discusses this relationship between taxation, transparency, and democracy. See Rousseau, *supra* note 24, at 214; see also, Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1910–11 (2020) (describing counterintuitive relationship between tax limits and democratic accountability).

310. There are various degrees of transparency of course. Cash remittance to the Social Security Trust Fund does provide clarity over the general federal program funded by the contribution, though not the actual beneficiaries nor even the year in which the funds will be spent. Remittances of cash for income taxes are essentially untraceable.

311. MASS. GEN. LAWS ch. 59, § 5K (2019).

proposals where all taxpayers, upon remitting their taxes, would receive a breakdown of how contributed dollars are spent.³¹²

In-kind remittance in forms other than labor does not necessarily produce the same transparency. In the case of IRS collections, levied property is immediately auctioned.³¹³ Here, the liquidation of the property means the remittance provides no additional insight into how the government will use the provided resources than remitted cash. In the case of remitted noncash property that is not liquidated, such as charitable contributions to Customs and Border Protection or oyster shells for Chesapeake Bay restoration, the property may simply replace what the government would have otherwise purchased with remitted cash. The funds not expended are thus freed up to be spent elsewhere. Even with contributed labor, the transparency may be somewhat illusory to the extent that the contributed labor would otherwise have been purchased by the state using remitted cash, and thus an equivalent amount of cash remains available to the state.³¹⁴ Nevertheless, a taxpayer's *perception* of government transparency can contribute to taxpayer morale, even if that perception is misguided.

The perceived government transparency created by certain forms of in-kind remittance may also contribute to the popularity of a tax. To the extent the favorability of a tax is in part a function of the favorability of the state actions that the tax supports, in-kind remittance can collapse the distinction between the two attitudes.

3. Earmarking and Disproportionality

In addition to transparency and accountability, the legitimacy of a democracy is also measured by equal political voice across citizens.³¹⁵ This principle is often stated in simple terms: one person, one vote.³¹⁶ Tax policy can have a direct impact on this important pillar of democracy. For example, one of the most common critiques of

312. Cf. Taxpayer Receipt Act, H.R. 3855, 114th Cong. (2015). Such proposals have been hailed as a way to better connect citizens with their government. SUZANNE METTLER, *THE GOVERNMENT-CITIZEN DISCONNECT* 153 (2018) (“[By] learning how government has mattered in our families’ lives, we could begin to make its role more visible.”).

313. INTERNAL REVENUE SERV., *supra* note 118, at 4–5.

314. This is not the case with remitted firefighting services, where local government typically would not have sufficient funds to purchase these services on their own. The reduction in tax liability is an incentive to encourage contributions of labor that are of greater value than what is being returned in reduced tax liability.

315. See SEYLA BENHABIB, *DEMOCRACY AND DIFFERENCE* 69–74 (1996).

316. See, e.g., *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing— one person, one vote.”).

wealth inequality and the need for a tax policy response to this inequality is the unequal political influence created by wealth.³¹⁷ As individuals amass greater sums of wealth, their ability to capture government and squeeze out the voices of the broader public increases.³¹⁸ With this concern in mind, it is important to note that in-kind tax paying has the potential to give disproportionate political voice to taxpayers depending on their form of remittance. Such an unequal influence would undermine the fundamental one person, one vote principle of democracy.

The risks of disproportional political voice created by in-kind tax paying depend on the degree to which in-kind remittances are fungible. For example, were the oyster shells contributed to the Maryland taxing authority in *Leonard & Leonard v. Earle*³¹⁹ something that the government otherwise would have purchased with the remitted cash? If so, then the decision by the taxpayer to remit in oyster shells rather than cash has not impacted what the government then chose to do. But had the oyster shells tied the hands of Maryland government, forcing the State to use the in-kind remittances in a way it otherwise would not, then the taxpayer has been able to use in-kind tax paying to further direct the actions of the government outside electoral processes. One can easily see how this problem can expand as the volume of remittances increase. Those taxpayers making the greatest volume of nonfungible remittances would in turn have the greatest control over how the state conducted its business. Making in-kind remittance elective could further this inequity.

There is reason to suspect that many of the forms of in-kind remittance that currently exist in the United States produce disproportionate political voice. In the case of the Property Tax Work-Off Program, local governments offer to work with the taxpayer on an area of mutual interest to determine what labor will be contributed.³²⁰ If these discussions allow the taxpayer to, for example, guide the local

317. See, e.g., Jeremy Bearer-Friend, *Restoring Democracy Through Tax Policy*, ROOSEVELT INST.: THE GREAT DEMOCRACY INITIATIVE 11–12 (Dec. 1, 2018), https://rooseveltinstitute.org/wp-content/uploads/2021/08/GDI_Restoring-Democracy-Through-Tax-Policy_201812.pdf [<https://perma.cc/2NJJN-BLA5>] (“The harrowing accumulation of wealth in the pockets of the few, simultaneous with the decline in marginal tax rates on the income of billionaires, has been at the expense of the many . . .”).

318. *Id.*

319. 279 U.S. 392, 393–95 (1929).

320. Taxpayers are typically asked for the work preferences in the intake form. See, e.g., Letter from Molly Kean, Hum. Res. Dir., Town of Norwood, to Senior Tax Work-off Applicant (Dec. 19, 2019), <https://cms5.revize.com/revize/norwoodma/HumanResource/Senior%20Workoff/STWOP%20FY21%20Molly%20Kean%20letter.pdf> [

library to pursue a project that otherwise would not have been approved by the local budgeting authority or other relevant body empowered by voters to act on the public's behalf, the taxpayer has been able to end run a democratic appropriations process to see results they individually prefer.³²¹ In the case of Proctor & Gamble remitting testing equipment to CBP, the company has essentially pulled dollars from the public fiscal general fund and earmarked how their federal tax liability will be used.³²² A concern with disproportional political voice was one of the motivations behind the Anti-Deficiency Act limiting federal acceptance of services except in emergencies for loss of life or property.³²³ CBP relied on this Act as justification for their refusal to accept supplies for minors held in detention camps at U.S. border operated by CBP.³²⁴ In contrast, Proctor & Gamble's donation³²⁵ was pursuant to a separate statutory authority.³²⁵

As with the prior discussion of transparency, however, the reality of control is different from the feeling of control. And for taxpayers who remit in kind, the feeling of control over government by the taxpayer could be illusory if the government activity would have occurred regardless of whether the taxpayer contributed in labor or in cash that then paid for the state action to take place. The use of in-kind remittance to bypass typical budget procedures may also gain democratic legitimacy through the initial approval of in-kind remittance in general. To the extent nonfungible remittances are only approved as a result of statutory authorization, then equal political voice was relied on to approve the statute.

D. RISKS

In this Article's discussion of the varieties of in-kind tax paying, it examined assessments in cash with elective in-kind remittance, as well as assessment in kind. In this Section, the Article addresses the

321. Nancy Staudt previously identified this issue with the "Presidential Election Campaign" checkoff option on federal income tax form, Form 1040—citizens who do not file income tax forms, for example, do not have the opportunity to direct public funds while individuals who do file get to have their political interests heard (and acted upon). Nancy C. Staudt, *Taxation without Representation*, 55 TAX L. REV. 555, 572–73 (2002).

322. For additional discussion, see *supra* Part I.C.2.

323. 31 U.S.C. § 1342; see also *Antideficiency Act Resources*, U.S. GOV'T. ACCOUNTABILITY OFF., <https://www.gao.gov/legal/appropriations-law-decisions/resources> [<https://perma.cc/ZJ6N-TF3W>].

324. Catherine E. Shoichet, *Why Border Patrol Isn't Accepting Donations for Kids in Custody*, CNN (June 26, 2019), <https://www.cnn.com/2019/06/25/us/border-patrol-donations/index.html> [<https://perma.cc/35HB-3G6Z>].

325. See *supra* Part I.C.2.

particular challenges raised by in-kind assessments. One clear lesson of in-kind tax paying is that in-kind assessment is especially troubling in its potential for abuse. Assessment in kind, such as days of labor or proportion of real property, provide limited protections to taxpayers while expanding the taxing power. This is true of assessment in labor and assessment in noncash property and applies across multiple tax bases.

1. Limited Taxpayer Protections Against Compelled Labor

In-kind assessment in the form of contributed services could further expand federal and state taxing powers in alarming ways. Should taxes be assessed in labor, and remittance be required in labor, taxpayers may have limited protections against involuntary servitude.

Congress regularly leans on the taxing power to encourage behavior, and the boundary between encouragement and compulsion has grown increasingly thin. The constitutionality of the individual mandate under the Affordable Care Act is one version of this creep.³²⁶ Although the Court attempted to distinguish Congress's taxing power from the power to compel specific behavior other than payment in cash, the Court failed to cite its own precedent that taxes need not be in cash and that civic duties may be compelled.³²⁷

Neither state courts nor the U.S. Supreme Court have considered compelled civic duties to be a violation of the Thirteenth or Fourteenth Amendment, including those civic duties deemed to be taxes and those that were assessed in labor and remitted in labor. In a unanimous Supreme Court opinion, the Court provided that "to require work on the public roads has never been regarded as a deprivation of either liberty or property," upholding a road duty in Florida that was eventually repealed by the state legislature.³²⁸ Due process claims

326. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012) ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.").

327. *Id.* ("By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice."). For additional discussion of the growing reliance on the taxing power for non-revenue-raising purposes, see Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. LEG. 67 (2013).

328. *Butler v. Perry*, 240 U.S. 328, 333 (1916).

against taxes assessed and remitted in labor also consistently failed in state court challenges to poll taxes, including litigation in Oklahoma³²⁹ and Montana.³³⁰ Civic duties can also be compelled in the case of emergencies without violating the Thirteenth Amendment.³³¹ To the extent taxes are considered to be civic duties—a position that would be hard to refute—taxes assessed and remitted in labor may be constitutional.

The criminal justice system offers a sobering lesson in the consequences of Thirteenth Amendment carveouts. With an explicit exception to involuntary servitude for those convicted of a crime, prisoners have been subjected to a variety of coerced labor regimes in the United States, including the racially targeted convict leasing system in the South after Reconstruction.³³² As the U.S. prison system has expanded to record-setting proportions, the use of prison labor has continued.³³³ Current prison labor practices include below-minimum-wage work for large multinational firms, such as Jansport and Victoria's Secret, and life-threatening work fighting wildfires.³³⁴ While this work is nominally elective, the "choice" to work is offered within a context of literal duress.³³⁵ When the Central District of California revisited *Butler v. Perry's* articulation of the civic duty exception to the Thirteenth Amendment within the context of prison labor, compulsion by the

329. *State v. Rayburn*, 101 P. 1029, 1030 (Okla. Crim. App. 1909).

330. *Pohl v. Chi., Milwaukee & St. Paul Ry.*, 160 P. 515, 517 (Mont. 1916).

331. See Michael H. LeRoy, *Compulsory Labor in a National Emergency: Public Service or Involuntary Servitude? The Case of Crippled Ports*, 28 BERKELEY J. EMP. & LAB. L. 331, 361 (2007).

332. See U.S. CONST. amend. XIII; Alexander Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict is a Slave,"* 59 J.S. HIST. 85, 87–88 (1993).

333. The United States has the highest incarceration rate of any country in the world. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* xxvi (2020).

334. German Lopez, *California Is Using Prison Labor to Fight Its Record Wildfires*, VOX (Aug. 9, 2018), <https://www.vox.com/2018/8/9/17670494/california-prison-labor-mendocino-carr-ferguson-wildfires> [<https://perma.cc/M8X4-FLCP>]; Caroline Winter, *What Do Prisoners Make for Victoria Secret?*, MOTHER JONES (July 2008), <https://www.motherjones.com/politics/2008/07/what-do-prisoners-make-victorias-secret> [<https://perma.cc/J4YT-Q78N>].

335. Cynthia Young, *Punishing Labor: Why Labor Should Oppose the Prison Industrial Complex*, NEW LAB. F., Fall/Winter 2000, at 41, 42 ("Unable to earn fair wages, inmates are materially denied the right of citizens to enjoy the fruits of their labor; they are, in some respects, reduced to the state of virtual slaves, bound to work under duress until they are paroled from prison."); see also Kerry Ryan, *Employment Taxation of Prison Labor* 3–12 (unpublished manuscript) (on file with the Minnesota Law Review) (discussing current state of prison labor).

State rendered the prison labor permissible even though work was provided to a private third party.³³⁶

Failure to remit a tax assessed in labor could potentially lead to a feedback loop of compelled labor through incarceration. Generally, underpayment of tax liability is handled by civil courts, but there are companion criminal provisions. For example, tax fraud has civil penalties in the Code and is also designated as a felony.³³⁷ Of cases referred to DOJ's Criminal Tax Division by the IRS, taxpayers faced an incarceration rate of at least 75% for general fraud investigations in fiscal years 2014, 2015, and 2016.³³⁸ In a tax regime where the state requires remittance in the form of labor, failure to remit labor could lead to imprisonment, and prisoners could then be compelled to work.³³⁹

International law has also struggled to enforce the boundary between permissible civic duties compelled by the state and impermissible involuntary servitude. In Article 10 of the Forced Labor Convention of 1930, "[f]orced or compulsory labour exacted as a tax and forced or compulsory labour to which recourse is had for the execution of public works . . . shall be progressively abolished."³⁴⁰ But the remaining articles then go on to provide for all the permitted exceptions for forced labor, including labor from males eighteen to forty-

336. *Novoa v. GEO Grp., Inc.*, No. EDCV 17-2514, 2018 WL 3343494, *13 (C.D. Cal. June 21, 2018) ("Compelling inmates at federally operated facilities to engage in certain cost-defraying actions when these savings accrue to the government fits neatly within the bounds of the civic duty exception. These are duties which an individual may more clearly 'owe to the state' or be required by the state to perform.").

337. For civil penalty, see I.R.C. § 6663. For criminal penalty, see I.R.C. § 7202. § 7202 ("Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.").

338. *Statistical Data, General Fraud Investigations*, IRS, <https://web.archive.org/web/20190429113005/www.irs.gov/compliance/criminal-investigation/statistical-data-general-fraud-investigations> (reporting incarceration rates of 75.4%, 78.4%, and 76% respectively for fiscal years 2014, 2015, and 2016). It should be noted that one reason for the high incarceration may be that only the most severe cases are referred to DOJ by IRS. Prosecutions for tax fraud are also often coupled with other nontax crimes.

339. There are also potential immigration law implications. See Shayak Sarkar, *Tax Law's Migration*, 62 B.C. L. REV. 2209 (2021); see also Joshua D. Blank, *Collateral Compliance*, 162 U. PA. L. REV. 719, 788-89 (2014); Tessa Davis, *The Tax-Immigration Nexus*, 94 DENV. L. REV. 195, 197-99 (2017) (discussing the deportation implications of tax noncompliance in *Kawashima v. Holder*, 565 U.S. 478 (2012)).

340. Convention Concerning Forced or Compulsory Labour, art. 10, June 28, 1930, 39 U.N.T.S. 55.

five.³⁴¹ There are also substantial carveouts from what work is even to be deemed “forced labor” for purposes of the Convention, excluding the following forms of compelled labor:

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character; (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country; . . . (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.³⁴²

The division between what forms of compulsory labor are allowed appear to hinge on two criteria: first, whether there is a norm for the compulsion, including norms related to military service, and second, the extent to which those who are compelled have nevertheless consented via democratic procedures. Taxes assessed and remitted in the form of labor could satisfy these two conditions and thus avoid prohibitions in the Forced Labor Convention.

The lag between abolition of slavery and abolition of *corvée* labor is further evidence of the difficult line drawing between the two forms of compelled labor. Many governments continued to compel citizens to build public infrastructure long after ending slavery.³⁴³ This challenge is not merely historical. Some governments continue to require remittance in labor by their citizens, such as conscription in Eritrea for highway construction.³⁴⁴ Eritrea’s approach to public works is not an appealing vision for the future of U.S. tax policy.

Governments should ensure that any in-kind remittance in labor is elective in order to prevent any progress down the slippery slope of forced labor. While tax liabilities are by definition *not* elective, remittance in kind could be a choice available to all taxpayers, like past road duty taxes, or the choice could be limited to a subset of taxpayers depending on eligibility requirements, like the Massachusetts Property Tax Work-Off Program.³⁴⁵ Those taxpayers who elect not to remit in

341. *Id.*

342. *Id.* art. 2.

343. See, e.g., H. Knox Thames, *Forced Labor and Private Individual Liability in U.S. Courts*, 9 MICH. ST. U.-DCL J. INT’L L. 153, 169 (2000) (“The Dutch, the first to abolish the slave trade, relied on *corvée* labor in their colonies. The *corvée* concept exacted labor in exchange for taxes, and up to two-fifths of the laborers’ time was required on crops of Dutch choosing. This system lasted until 1919.”).

344. Matina Stevis-Gridneff, *How Forced Labor in Eritrea Is Linked to E.U.-Funded Projects*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/world/europe/conscription-eritrea-eu.html> [<https://perma.cc/4TV8-CT69>].

345. Bliss, *supra* note 2.

kind would face consequences only as severe those who decline to remit taxes in cash.³⁴⁶ Nevertheless, the marriage of the taxing power with the civic duty exception to involuntary servitude would raise constitutional questions that have not been fully tested by the Court, whose extant precedent offers cold comfort for those concerned about the growing reach of state power.

2. Limited Taxpayer Protections Against Levy of Noncash Property

As noted previously, in-kind tax paying is not limited to remitted services but also includes remittance of noncash property. In the case of noncash property, takings protections do not provide a blanket protection against requiring in-kind remittance.

Takings scholars have long noted that, while the boundary between a tax and a taking is fuzzy, the constitutional legitimacy of the taxing power is not in doubt.³⁴⁷ While some taxes can indeed be declared takings, the requirement that a tax liability be remitted in non-cash form is not a per se taking. As the Court has addressed and subsequently upheld:

If . . . the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered.³⁴⁸

Of course, to determine whether any specific tax is a taking entails a variety of additional considerations, including whether the liability is a general one or applied only to a specific individual and the government's use of the property acquired, but the fact that a remittance is required in noncash form does not make it a taking.³⁴⁹

346. The expanded availability of in-kind remittance might also change the political constraints on taxing the poor, though any predictions about future political choices are inherently speculative.

347. See, e.g., Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2183 (2004); see also Eric A. Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 192 (2002). But see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 314–24 (1985) (arguing that redistribution is not a legitimate purpose for state seizure of property).

348. *Leonard & Leonard v. Earle*, 279 U.S. 392, 397 (1929) (citing *Lane County v. Oregon*, 74 U.S. 71, 77 (1869)).

349. The *Eastern Enterprises v. Apfel* analysis that looks to fungibility is not adopted by later courts. Peñalver, *supra* note 347, at 2207–08. Peñalver does argue that nonfungible remittances should be subject to heightened scrutiny, but recognizes this would be a substantial narrowing of takings doctrine as currently applied. *Id.* at 2248; see also *Horne v. Dept. of Agric.*, 135 S.Ct. 2419, 2431–33 (2015) (revisiting *Leon-*

Given the limited takings protections, in-kind remittance could be further expanded in concerning ways. For example, agencies might be in a position to require in-kind tax paying for new Pigouvian taxes without authorizing legislation originating in the House.³⁵⁰ Meanwhile, safeguards against required in-kind remittance as a form of excessive fines are also unlikely to be available. Although fines deemed excessive violate the Fourteenth Amendment, this protection is derivative of Eighth Amendment protections against punishment.³⁵¹ To the extent required in-kind remittances of noncash property occur outside of criminal punishment or deterrence, it is unclear whether excessive fines doctrine could be used to argue against in-kind taxes. Taken together, these risks again point to the importance of making remittance in kind *elective*.³⁵²

III. THE FUTURE OF IN-KIND TAX PAYING

The many varieties of in-kind tax paying, as documented by this Article for the first time and marshalled together into a single analysis, illustrate why it would be unwise to adopt an absolute rule as to the desirability of in-kind remittance across all circumstances. The choice of tax base, for example, combined with a high tax rate, may convert in-kind tax paying from being desirable to being tyrannical, such as an income tax base with a low rate versus a poll tax base with a high rate. In the case of a poll tax with a high rate that allowed in-kind remittance in labor, the whole population could ultimately be subject to compelled labor under such a tax.³⁵³ Many factors, such as the mix of alternatives to in-kind remittance, including the availability of cash commutations, or the underlying economic distribution of taxpayers subject to the tax regime at question, could also shift one's conclusions

ard & Leonard and holding that a regulatory action seizing raisins required just compensation but not touching on what might have occurred should the personal property have been taken by a taxing agency rather than the Department of Agriculture).

350. See Eric A. Posner & Jonathan S. Masur, *Toward a Pigouvian State*, 164 PENN. L. REV. 93, 143–45 (2015); see also *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 223 (1989).

351. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

352. The availability of elective in-kind remittance may even reduce the troubling frequency of state seizure of private property to satisfy unpaid tax debts documented by Bernadette Atuahene. See Bernadette Atuahene, *Predatory Cities*, 108 CAL. L. REV. 107, 174–77 (2020). Had individuals been allowed to remit payments in labor, for example, tax debts may not have accumulated to the point of asset forfeiture. Of course, in-kind tax paying alone is not a sufficient solution to the systemic racism that creates taxpayer vulnerability to abuses of state power. For additional protections, see Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PA. L. REV. (forthcoming 2021).

353. This risk was described *supra* Part II.D.1.

about the desirability of in-kind tax paying. But by identifying the varieties of in-kind tax paying under present law, this Article contributes to the literature by challenging the pervasive reliance on the cash-tax premise. Taxes need not be paid in cash.

Despite the conditionality of in-kind tax paying as a preferred form of remittance, three design choices for administering in-kind remittance can guide any expanded reliance on in-kind tax paying. This Part draws from the lessons and risks of in-kind tax paying identified in Part II to discuss various extensions of in-kind tax paying beyond current practices.

First, in-kind tax paying raises fewer risks of abuse of state power when limited by a low cash threshold. A dollar cap on tax liability accepted in kind would minimize the risks of compelled labor or limited taxpayer protections against levied property.³⁵⁴ A low cash cap on in-kind remittance in labor serves to limit the extent to which any individual could be required to work by the state.³⁵⁵ To the extent one has democracy concerns about undue influence over government as a result of in-kind remittances that then create an expectation of returned favor, the cash cap also limits the extent of potentially corrupt influence. Worries about the avoidance of democratic budget and appropriation procedures fade when each contribution is so miniscule. If willing to accept that with most policy choices there are tradeoffs, then a cash cap limits the negative risks of corrupt influence while preserving the in-kind tax paying benefits of taxpayer solidarity, particularly for low-income taxpayers.³⁵⁶

Second, making in-kind remittance elective, with the option of cash payment, gives all taxpayers an alternative to labor or noncash property remittance. While a defining feature of a tax is generally that it is *not* elective, choice of remittance could expand taxpayer rights within the generally coercive requirements of taxation. Indeed, our Code is already littered with opportunities for various elections related to tax filing. Taxpayers may pay their tax liability early; may simply remit a deposit to reduce interest and then file a return later by filing an extension; may file via a return preparer, online, or on paper; may pay by check, or direct deposit, or credit card. In the case of in-kind tax paying at use today in the United States, most instances are also elective.

354. These risks were previously identified *supra* Part II.D.

355. In Massachusetts, this cap was set at \$1,500. MASS. GEN. LAWS ch. 59, § 5K (2019). At a \$15 rate of property tax reduction per hour, a taxpayer cannot perform more than 100 hours per year, or average more than two hours per week.

356. This solidarity was described *supra* Part II.C.1.

Elective in-kind tax paying, as opposed to requiring remittance in kind, has a number of appealing features. As with the cash cap, there are fewer risks of compelled labor or other abuses of state power when taxpayers have the option of paying in multiple forms. Nevertheless, there are of course limits to the taxpayer protections created by elective in-kind remittance to the extent in-kind remittance is in effect only a false choice. For example, a head tax assessment at such a high amount that many would have no option but to remit their taxes in the form of labor. In substance, such a form of in-kind remittance is not truly elective.

A more troubling risk of elective in-kind remittance is the concern that only low-income taxpayers or other marginalized classes opt for in-kind remittance. This undermines the potential benefits of solidarity created by in-kind remittance and raises new equity considerations. A dollar cap on in-kind remittance could help with these concerns. Here, the two principles of elective remittance and a low cap work together to make in-kind tax paying more appealing. Massachusetts pursued this combined approach in its Property Tax Work-Off Program.

Third, an expansion of the in-kind tax paying could be limited to nonnatural persons, such as corporations or trusts. Although none of the varieties of in-kind tax paying identified in Part I were limited to nonnatural persons, that does not mean such a tax would be without precedent. Our Internal Revenue Code already distinguishes between firms and individuals for various provisions. For example, in limiting the dollar amount of a charitable deduction under I.R.C. § 170, individuals may deduct up to 50% of adjusted gross income while corporations are limited to 10%.³⁵⁷ More familiar to most readers will be the application of a separate corporate income tax to corporations but not other types of firms or individuals.³⁵⁸

Because of the reduced risks to individual liberty, a commitment to the principle of limiting in-kind tax paying to nonnatural persons diminishes the importance of the first two principles described in this Part and could be pursued independently. For example, the federal government could require that all initial public offerings above a set market capitalization amount, such as fifty million dollars, be required

357. I.R.C. § 170(b)(1)-(2). Although the Code uses the term “contribution base” and not “adjusted gross income” in describing these percent limitations, I.R.C. § 170(b)(1)(H) defines contribution base as adjusted gross income less NOLs.

358. I.R.C. § 11. Full details about the operation of check-the-box elections are beyond the scope of this article.

to issue a proportion of nonvoting shares to a public trust.³⁵⁹ Intellectual property is also ripe for forms of in-kind tax paying, such as requiring all patents be available for public use in certain circumstances.³⁶⁰ The state could serve as a custodian for these property transfers, managing the assets via a board such as the Federal Reserve or the Pension Benefit Guarantee Corporation, or the property could be immediately auctioned, like our current levy system, with the proceeds being used immediately.

Ultimately, each potential extension of in-kind tax paying is worthy of independent consideration. Categorical dismissal, or simple ignorance, of in-kind tax paying removes viable options from the tax policy menu. Recognizing the viability of in-kind tax paying in turn may open new tax bases and revenue sources otherwise impractical under the cash-tax premise. The three principles discussed above—cash caps, elective in-kind remittance, and limitation to nonnatural persons—serve to advance that work.

CONCLUSION

This Article has considered the significance of noncash remittance of tax obligations. First it identified the scope of such remittances, defined as in-kind tax paying, under current law and in historical context. It has also shown how attention to noncash remittance of tax liability informs canonical tax debates over choice of tax base, optimal levels of progressivity, and the realization requirement. This Article then discussed the most worrisome features of in-kind tax paying, including the civic duty exception to the Thirteenth Amendment and the limited protections against takings when deemed to be taxes. The Article then provided three principles of in-kind tax paying, and their related potential extensions, that would avoid the most troubling features of in-kind tax paying. Taken together, this Article has demonstrated that tax paying should not be viewed exclusively in terms of cash remittance, but should recognize the historical practice, current practice, and future potential of paying taxes in kind.

359. For more details on this proposal, see Bearer-Friend, *supra* note 317.

360. For another example of in-kind tax paying as applied to intellectual property, see Martin Skladany, *Copyright Corvée: Inverting the Ancien Regime*, 34 EUR. INTELL. PROP. REV. 741, 742 (2012) (“[W]e can grant access to art by upending the regime’s corvée—by establishing a copyright corvée for a day, week, or month every year in which owners of copyrighted artwork would be obligated to give the public free access to their copyrighted works.”).