

## Political Fact Checking in the Tax Context

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# Ohio Northern University Law Review

## Lead Articles

### Political Fact Checking in the Tax Context

BRET N. BOGENSCHNEIDER, PHD, JD, LL.M.\*

“If you’ve ever found yourself engaged in a futile, one-sided argument with a politician on your TV screen, you’re hardly alone in your frustration.”<sup>1</sup>

#### INTRODUCTION

The origin and nature of facts has become an increasingly prominent topic in American journalism and political discourse.<sup>2</sup> Fact checking functions in part as the evaluation of truth claims by politicians,<sup>3</sup> and has been shown to prompt politicians to make more fact-based claims.<sup>4</sup> The purposes of fact checking has been stated as follows: “The purpose [of fact checking] is to discover and publish whether a claim is accurate or not. This is based on various information sources, such as scientific studies, experts and official

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1. Mark Hemingway, *Lies, Damned Lies, and ‘Fact Checking’*, WASH. EXAMINER (Dec. 19, 2011, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/lies-damned-lies-and-fact-checking>.

2. Lucas Graves, *Anatomy of a Fact Check: Objective Practice and the Contested Epistemology of Fact Checking*, 10 COMM., CULTURE & CRITIQUE 518, 518-19 (2017) [hereinafter Graves, *Anatomy of a Fact Check*]; Cary Spivak, *The Fact-Checking Explosion*, 32 AM. JOURNALISM. REV. 38, 39-40 (2010).

3. Sakari Nieminen & Valtteri Sankari, *Checking PolitiFact’s Fact-Checks*, 22 JOURNALISM STUD. 358, 370-71 (2021).

4. See Karen Bogenschneider & Bret N. Bogenschneider, *Empirical Evidence From State Legislators: How, When, and Who Uses Research in Policymaking*, 26 PSYCHOL. PUB. POL’Y & L. 413, 421 (2020).

statistics. Usually, fact-checkers are interested in claims made by politicians and other influential actors.”<sup>5</sup>

In tax policy discourse, facts are presented as supposedly objective ideas given in support of a respective tax policy position.<sup>6</sup> Yet, such supposed “facts” are often disagreed upon even when based on the same underlying data.<sup>7</sup> Nearly all matters within tax discourse can be reasonably disagreed upon depending on the context,<sup>8</sup> including even the applicable tax rates,<sup>9</sup> which are numeric but still can be described as either statutory or effective and accordingly either as high or low.<sup>10</sup> As an illustration, a prior scholarly debate on fact checking centered on Mitt Romney’s less than flattering description of an Obama tax policy proposal.<sup>11</sup> Even in that simplistic case, both The Fact Checker and PolitiFact obtained data from the Tax Policy

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5. See Nieminen & Sankari, *supra* note 3, at 358 (“Fact-checking means evaluating the truthfulness of claims presented in public.”).

6. The leading search result for fact checking a tax policy claim is by the Tax Foundation relating to a claim by former President Obama.

It seems the President has decided to join along with Warren Buffett in decrying the fact that his (considerable) income is (unfairly) taxed at a lower rate than most middle-class Americans. In a recent speech, he suggested that his effective tax rate was lower than someone earning \$50,000. It’s a potentially compelling talking point – that is, if it were true. . . . President Obama’s claim that he pays a lower tax rate than a teacher making \$50,000 a year isn’t true. A single taxpayer with \$50,000 of income would have paid 11.9 percent in federal income taxes for 2010, while the Obamas paid more than twice that rate — 25.3 percent (and higher rates than that in 2009 and 2008).

Richard Morrison, *Fact Checking the President’s Tax Claims*, TAX FOUND. (Sept. 28, 2011), <https://taxfoundation.org/fact-checking-presidents-tax-claims>.

7. See Brian J. Gaines et al., *Same Facts, Different Interpretations: Partisan Motivation and Opinion on Iraq*, 69 J. POL. 957 (2007).

8. See, e.g., Howard Gleckman, *The Profound Philosophical Disagreement Over The Refundable Child Tax Credit*, TAX POL’Y CTR. (Jan. 28, 2022), <https://www.taxpolicycenter.org/taxvox/profound-philosophical-disagreement-over-refundable-child-tax-credit>.

9. See Brian Falter, *Why Corporate Tax Reform is So Messy*, POLITICO, <https://www.politico.com/story/2017/09/06/corporate-tax-reform-trump-242373> (last updated Sept. 6, 2017, 12:53 PM) (“Talking about effective tax rate and tax rates in general is a choose-your-own adventure deal,” said Kyle Pomerleau, an economist at the conservative-leaning Tax Foundation. “People will choose which rates line up with their world view.”).

10. Compare Robert Bellafiore, *How Do Transfers and Progressive Taxes Affect the Distribution of Income?*, TAX FOUND. (Mar. 12, 2019), <https://taxfoundation.org/average-federal-tax-rates-income-group/#:~:text=For%20example%2C%20those%20in%20the%20lowest%20quintile%20paid,had%20an%20even%20higher%20rate%20of%2033.3%20percent> (“The result of all federal taxes and transfers is a redistribution of income from high- to low-income households.”), with Jesse Eisinger et al., *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021, 5:00 AM), <https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax>.

11. Molly Moorhead, *Mitt Romney Would Cut Millionaires’ Taxes, Obama Says*, POLITIFACT, (Aug. 3, 2012), <https://www.politifact.com/factchecks/2012/aug/03/barack-obama/obama-romney-would-cut-millionaires-taxes/>.

Center website,<sup>12</sup> but were still unable to reach a definitive conclusion as to its accuracy.<sup>13</sup>

The thesis of this article is that the objectivity norm of journalism<sup>14</sup> is difficult to apply in the tax context because nearly all supposed “facts” relate to an underlying and often undisclosed causal theory.<sup>15</sup> Political discussants usually hold countervailing ideas of causation in respect of tax policy; that is, nearly all facts that journalists might set out to check turn out to be relative to an ideology, thus rendering such facts subjective to the ideology applied within the respective paradigm.<sup>16</sup> Accordingly, fact checking by journalists does not necessarily reveal objective truths about taxation and at times may serve as a type of rhetoric designed to sway public opinion on tax policy matters.<sup>17</sup> Furthermore, the particular methods of journalistic communication, such as clarity and conciseness, may not be well-suited to context dependent fields such as taxation.<sup>18</sup> Fact checking within tax policy may then be thought of as elusive but nonetheless still potentially helpful.<sup>19</sup> As Amazeen wrote: “It is precisely because facts are complex and often not self-evident that *more* fact-checking, rather than less, is necessary.”<sup>20</sup> If tax policy is thought to be a particularly complex area then perhaps more fact checking is necessary in this area of political debate.<sup>21</sup>

As explained in detail throughout this article, the trouble is that journalistic fact checking methodology entails neither a consistently applied epistemology, nor a scientific one, for the evaluation of causal claims.<sup>22</sup> In the context of fact-checking matters of taxation and tax policy, this often has the effect of suggesting that there are right or wrong answers in tax somewhere out there over the rainbow, and then to say one politician or another has made a true or false claim without mentioning the rainbow.<sup>23</sup> The

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12. Michelle A. Amazeen, *Revisiting the Epistemology of Fact-Checking*, 27 CRITICAL REV. 1, 14 (2015) [hereinafter Amazeen, *Revisiting the Epistemology*].

13. *Id.*

14. See Michael Schudson, *The Objectivity Norm in American Journalism*, 2 JOURNALISM 149, 149-50 (2001); Brent Cunningham, *Re-thinking Objectivity*, 42 COLUM. JOURNALISM REV. 24, 26 (2003).

15. See KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY*, 38-39 (Routledge Classics 2002).

16. LOUIS EISENSTEIN, *THE IDEOLOGIES OF TAXATION* 12 (Harv. U. Press 2010).

17. See Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCH., PUB. POL’Y, & L. 106 (2006).

18. Graves, *Anatomy of a Fact Check*, *supra* note 2, at 520.

19. Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 17; Graves, *Anatomy of a Fact Check*, *supra* note 2, at 520.

20. Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 3 (emphasis in original).

21. *See id.*

22. Joseph E. Uscinski & Ryden W. Butler, *The Epistemology of Fact Checking*, 25 CRITICAL REV. 162, 168-69 (2013) [hereinafter Uscinski & Butler]; Joseph E. Uscinski, *The Epistemology of Fact Checking (Is Still Naïve): Rejoinder to Amazeen*, 27 CRITICAL REV. 243, 248-49 (2015) [hereinafter Uscinski, *Rejoinder to Amazeen*].

23. Gaines et al., *supra* note 7, at 957. At times, it may be possible to say that a claim is false even when viewed from the paradigm in which it arose. This would be a situation where fact-checking might

fact checking might be better approached by disclosing or evaluating the ideological theory to which the politician has applied in making the claim.<sup>24</sup> Notably, this evaluation of competing theories using evidence was the first modern description of science given by Karl Popper – the recommendation of this article is really to say that journalists should push fact checking methods toward the epistemologies of science.<sup>25</sup>

Fact checking conducted without a defined epistemology may also risk some unraveling of science or scientific methods. The potential for backward progress by journalists through the crowding out of science has caused justifiable concern among scholars who prefer for journalism to proceed in a structured manner to the fullest extent possible.<sup>26</sup> If scientific methods have been applied to a given issue to regulate the journalistic analysis, yet when applied are not uncovered during the “fact checking” process, the journalistic analysis may operate in competition with scientific inquiry. Amazeen’s recommendation might then be revised toward epistemological quality rather than quantity in fact checking if there is a risk arising from such flawed methods, with the recommendation to then read as follows: “It is precisely because facts are complex and often not self-evident that *more [epistemology in] fact-checking . . . is necessary.*”<sup>27</sup>

Demonstrably false hypotheses regarding tax policy, such as the Laffer Curve,<sup>28</sup> are occasionally resurrected by journalists in the process of fact checking long after having been abandoned in scientific discourse.<sup>29</sup> As

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be very helpful. For example, if a politician claimed: “Tax rates are higher on the wealthy in New York than London or Frankfurt,” the fact-checker could gather the tax rates from those jurisdictions and see if that were true based simply on the statutory rate).

24. As an illustration, a fact checking journalist might refer to the underlying theory and say:

Under Mitt Romney’s view, tax cuts for the wealthy always lead to some degree of economic growth, so the lost revenue from a tax cut might be offset by the larger economy resulting from the tax cut. If you believe tax cuts always cause economic growth, then Romney’s claim is true. Tax scholars and other social scientists disagree however on this causal relation advanced by Romney and there is currently very little empirical evidence that tax cuts for the wealthy have resulted in economic growth in the past when this has been tried. If you do not think tax cuts cause economic growth, then lost revenue from a tax cut may not be offset by the larger economy, and Romney’s claim is false.

*See generally* Moorhead, *supra* note 11.

25. POPPER, *supra* note 15, at 438.

26. Graves, *Anatomy of a Fact Check*, *supra* note 2, at 520, 530.

27. Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 3 (alteration in original) (emphasis added).

28. *See* Victor A. Canto et al., *Tax Rates, Factor Employment, and Market Production*, in THE SUPPLY-SIDE EFFECTS OF ECONOMIC POLICY 20-21 (1981); Alan S. Blinder, *Thoughts on the Laffer Curve*, in THE SUPPLY-SIDE EFFECTS OF ECONOMIC POLICY 86, 91 (1981).

29. *See* Jane G. Gravelle, *International Corporate Tax Rate Comparisons and Policy Implications*, CONG. RSCH. SERV. 16 (Jan. 6, 2014), <https://sgp.fas.org/crs/misc/R41743.pdf> [hereinafter Gravelle, *Comparisons*]; Jane G. Gravelle & Donald J. Marples, *Tax Rates and Economic Growth*, CONG. RSCH. SERV. 8 (Jan. 2, 2014), <https://sgp.fas.org/crs/misc/R42111.pdf>.

perhaps the prime example, tax scholars are generally aware that the Laffer Curve idea that tax cuts might yield higher tax receipts was advanced by President Reagan in various debates and policy proposals in the 1980's.<sup>30</sup> Research was undertaken to determine if the idea was possible and it was determined not to be supported by *any* evidence.<sup>31</sup> Some tax scholars think the U.S. economy is not on the point of the curve where Laffer proposed while others think that there is no such curve.<sup>32</sup> However, persons born after these events, including some journalists, may have never heard of the Laffer Curve and think the proposal is novel and possibly true, thus worthy of a fact check. It seems fair to say that fact checking can potentially crowd out expert views and occasionally result in the re-introduction of misinformation in the tax context.<sup>33</sup> The reintroduction of ideas known to be false may involve what is referred to as “motivated reasoning” in the social sciences and explains why scholars are concerned about the epistemology, namely the methods, that journalists use in fact checking, specifically with respect to tax policy.<sup>34</sup>

The number of organizations engaged in fact checking has expanded in recent years, and now ranges from internet websites,<sup>35</sup> to newspapers,<sup>36</sup> and to various policy organizations and think tanks,<sup>37</sup> thus yielding a multitude of competing factual results. If facts could be objectively determined in some way, then fact-finding could at times be seen as akin to judicial findings of facts in a legal dispute, thus endowing the fact checker organization as the finder-of-fact in the role of a judge or jury in legal contexts. Journalists and media organizations are thought by some scholars to hold a monopoly power over truth claims in political discourse and, as such, could potentially influence the results of an election by favoring one politician's claims over another.<sup>38</sup>

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30. See generally Ronald Reagan and the Laffer Curve, PRESIDENTIAL HIST. GEEKS (May 31, 2012, 12:16 AM), <https://potus-geeks.livejournal.com/226929.html> (“Reagan was inspired by the work of an economist named Arthur Laffer . . . who had developed something called the Laffer Curve.”).

31. Blinder, *supra* note 28 at 86-87, 91.

32. Laurence H. Meyer, *Foreword* to THE SUPPLY-SIDE EFFECTS OF ECONOMIC POLICY vii-viii (1981).

33. See generally Arthur Laffer, *The Laffer Curve: Past, Present, and Future*, HERITAGE FOUND. (June 1, 2004), <https://www.heritage.org/taxes/report/the-laffer-curve-past-present-and-future>.

34. Nathan Walter & Nikita A. Salovich, *Unchecked vs. Uncheckable: How Opinion-Based Claims Can Impede Corrections of Misinformation*, 24 MASS COMM. & SOC'Y. 500, 503-04 (2021).

35. See *Our Process*, FACTCHECK.ORG, <https://www.factcheck.org/our-process/> (last updated Aug. 12, 2020).

36. See generally Linda Qiu, *Fact-Checking Health Claims About the Inflation Reduction Act*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/us/politics/fact-check-health-claims-inflation-reduction-act.html>.

37. *Compare About Us*, TAX POL'Y CTR, <https://www.taxpolicycenter.org/about> (last visited Oct. 1, 2022), with *About Heritage: Mission*, HERITAGE FOUND., <https://www.heritage.org/about-heritage/mission> (last visited Oct. 1, 2022).

38. Uscinski, *Rejoinder to Amazeen*, *supra* note 22, at 249.

The point of scholarly concern is that it is not at all certain that the finders-of-fact have the ability to accurately determine facts in the tax context.<sup>39</sup> Uscinski refers to this potential of an increasingly misinformed democratic electorate as a “dark place”:

If we take the claims put forth in Amazeen’s article at face value, we end up in a dark place: media organizations that have assumed a monopoly over determining the truth, with the power to sway elections, but that don’t use consistent, scientific, or rigorous methods when asserting who the “liars” are.<sup>40</sup>

The despair reflected in Uscinski’s comments seems to indicate both bona fide concerns about flaws in journalistic methods and also the potential for a wider dissemination of bad information via modern technology.<sup>41</sup> Yet, journalists have seemingly always decried dubious claims by politicians during elections.<sup>42</sup> Here, the new “dark place concern” is potentially linked to the rise in the internet and cable television which yields more egalitarian sources of misinformation premised on flawed fact checking methods or results.<sup>43</sup>

Other fact-checkers have set out to evaluate claims on a rating scale,<sup>44</sup> rather than to evaluate the claim as formally right or wrong in a specific context.<sup>45</sup> Even such an approach might not resolve many tax policy claims. For example, a typical journalistic claim in tax policy is that taxes on the wealthy are relatively high in the United States.<sup>46</sup> A rating scale approach might rate this as partially true, if other countries such as Singapore have lower statutory tax rates, resulting perhaps in a six rating on a ten-point rating scale. However, as measured on an effective tax rate basis, taxes on the wealthy might also be seen as relatively low in comparison to other taxpayers.<sup>47</sup> Furthermore, the actual amount of taxes paid in dollar terms

39. *Id.*

40. *Id.*

41. See James H. Kuklinski et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 791, 794 (2000).

42. Nieminen & Sankari, *supra* note 3, at 359.

43. Andrew M. Guess et al., *Exposure to Untrustworthy Websites in the 2016 US Election*, 4 NATURE HUM. BEHAV. 472, 476 (2020).

44. See Angie Drobnic Holan, *The Principles of the Truth-O-Meter: PolitiFact’s Methodology for Independent Fact-Checking*, POLITIFACT, <https://www.politifact.com/article/2018/feb/12/principles-truth-o-meter-politifact-methodology-i/> (last updated Apr. 18, 2022).

45. See Michelle Amazeen et al., *Correcting Political and Consumer Misperceptions: The Effectiveness and Effects of Rating Scale Versus Contextual Correction Formats*, 95 JOURNALISM & MASS COMM. Q. 28 (2018) [hereinafter Amazeen et al., *Correcting Misperceptions*].

46. See, e.g., Ben Johnson, *Fact Check: Do The Rich Really Pay No Taxes?*, DAILY WIRE (June 10, 2021), <https://www.dailywire.com/news/fact-check-do-the-rich-really-pay-no-taxes>.

47. This article asserts the extraordinary and novel tax policy argument that taxes on lower income persons should be raised to equal the taxes on the wealthy. See David Callahan, *Are Taxes on the Rich*

might also be measured over time and used to evaluate the relative change on that basis.<sup>48</sup> The rating assigned by the fact-checking organization thus involved a *subjective* evaluation of the competing ideas within tax policy in order to arrive at the numerical score in the rating system.<sup>49</sup> The numerical score or rating is designed to present an *objective* criterion to evaluate the claim yet it is not so.<sup>50</sup> The rating scale is simply not applicable to evaluate the truth of claims from competing paradigms, and is neither objective nor subjective when viewed from the other perspective or paradigm, where the figures given in the other system do not count in this system.<sup>51</sup> The six-point rating scale would accordingly be invalid, or alternately such a middle rating such as a six might be interpreted as comprising a simple acknowledgement of the existence of perhaps many different ways to see a matter of tax policy.

Yet, the direction of change in epistemological quality within journalistic practices appears to be favorable.<sup>52</sup> The methods of fact checking purport to represent perhaps even baby steps *toward* a more defined epistemology.<sup>53</sup> So, fact checking can be seen as a good thing – in other words, we want journalists to try to determine facts even if they sometimes get it wrong. Many journalism scholars seem to favor improved methods within fact checking even where that may be extremely difficult, such as in respect to taxes.<sup>54</sup> A push among journalists toward epistemology is also significant to philosophy, as Richard Rorty once criticized as the uncovering of truths by discourse within the democracy.<sup>55</sup> In philosophical terms, the push towards any methodology of fact checking by journalists, technically speaking no matter how flawed, represents foremost an admission of the importance of epistemology beyond mere discourse in democracy.<sup>56</sup>

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*Too High?*, DÉMOS (Mar. 4, 2013), <https://www.demos.org/blog/are-taxes-rich-too-high> (“The big problem today is that not the rich are overtaxed, but that everyone else is undertaxed.”).

48. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 175 n.4 (Harv. U. Press 2014).

49. Amazeen et al., *Correcting Misperceptions*, *supra* note 45, at 29; see Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 6.

50. See Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 8.

51. Amazeen et al., *Correcting Misperceptions*, *supra* note 45, at 42, 44.

52. See Andrew Tompkins, *Fact-Checking Under Challenging Conditions: Problems With Technology, Resources, Conflict, and Repression*, DW AKADEMIE (July 17, 2020), <https://www.dw.com/en/fact-checking-under-challenging-conditions-problems-with-technology-resources-conflict-and-repression/a-54012616>.

53. See Uscinski & Butler, *supra* note 22, at 162.

54. See Tompkins, *supra* note 52.

55. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 134 (1979); see also Gaines et al., *supra* note 7, at 957; Étienne Brown, *Propaganda, Misinformation, and the Epistemic Value of Democracy*, 30 *CRITICAL REV.* 194, 196 (2019).

56. For further background to this philosophical question see Jürgen Habermas, *Richard Rorty's Pragmatic Turn*, in RORTY AND HIS CRITICS 31, 49 (Blackwell Publishing 2000).



## I. FACTS IN THE TAX CONTEXT

The field of taxation serves as a ready case study for problems in the epistemology of fact checking. A litany of organizations currently originate and uncover supposed tax facts, including various websites such as the Tax Policy Center<sup>57</sup> and the Tax Foundation,<sup>58</sup> which are often cited by journalists.<sup>59</sup> Many of the given facts are numeric, such as tax rates or other statistics, which are taken to be observable realities or truths in deference to Kelvin's Dictum.<sup>60</sup> However, extrapolations are often taken from the data to reach conclusions reflecting the correspondence theory of truth.<sup>61</sup> This correspondence understanding of truth applies the philosophical terminology that can be understood in lay terms as finger pointing, for example, a person pointing a finger at a goose and proclaiming: "Hey there is a goose over there!" Truth or falsity is determined simply then by whether other people look and see a goose in the indicated direction. In the tax context, the correspondence theory is applied where the politician points a finger and proclaims: "Hey there is high taxes over there!"<sup>62</sup> Epistemological problems often arise in the political arena even with such basic methods.<sup>63</sup>

A correspondence theory of truth has been referenced nonetheless as a possible epistemology of fact checking.<sup>64</sup> Such a theory was proposed at least partly in response to scholarly critiques of fact checking of opinion statements, future events, and other matters not in the nature of facts.<sup>65</sup> Although fact originators often publish a description of their respective processes to address these concerns, methods may be idiosyncratic, resulting in the potential for disagreements when applying the correspondence theory of truth.<sup>66</sup> A disagreement over facts thus yields competing truth claims that

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57. The Tax Policy Center is rated as left leaning in its fact check results. *Tax Pol'y Center*, MEDIA BIAS FACT CHECK, <https://mediabiasfactcheck.com/tax-policy-center/> (last updated Nov. 10, 2021). ("Overall, we rate the Tax Policy Center least biased in research and left-center biased as a whole, based on a blog that favors left-leaning policy issues. This source is also high in factual reporting.")

58. The Tax Foundation is rated as right leaning in its fact check results. *Tax Found.*, MEDIA BIAS FACT CHECK, <https://mediabiasfactcheck.com/tax-foundation/> (last updated Oct. 8, 2022) ("Overall, we rate the Tax Foundation Right-Center biased based on advocating for Libertarian economic policy. We also rate them Mostly Factual in reporting due to a few half-true claims, despite proper sourcing and neutral wording.")

59. The Tax Foundation even publishes a list of "facts" for citation by journalists. See *Tax Facts for Journalists (and Taxpayers)*, TAX FOUND. (Apr. 11, 2012), <https://taxfoundation.org/press-release/tax-facts-journalists-and-taxpayers/>.

60. William Thomson, *Electrical Units of Measurement*, in POPULAR LECTURES AND ADDRESSES 73 (London, MacMillan and Co. 1889).

61. Graves, *Anatomy of a Fact Check*, *supra* note 2, at 520.

62. *Id.*

63. *Id.*

64. *Id.* at 520.

65. See Uscinski & Butler, *supra* note 22, at 168-70.

66. See, e.g., DR. BRET N. BOGENSCHNEIDER, HOW AMERICA WAS TRICKED ON TAX POLICY: SECRETS AND UNDISCLOSED PRACTICES 63 (2020) [hereinafter BOGENSCHNEIDER, SECRETS].

can be debated by politicians in parallel tracks.<sup>67</sup> A correspondence approach to journalistic fact checking might be seen as appealing to identify specific facts where it is possible to independently verify<sup>68</sup>— typically in the context of finance “verification” means to count something, such as tax dollars.<sup>69</sup> Where the fact checker claims to do something independently this is usually to count something where both competing perspectives and paradigms agree the item should be counted.<sup>70</sup> For example, both Republicans and Democrats would want to know the amount of tax dollars collected under current law even if they have different ideas of what the law ought to be.<sup>71</sup>

Yet, despite its potential, the correspondence idea of truth simply does not seem to function very well in the tax context.<sup>72</sup> The same Federal tax data often engenders situations where even a simple number, such as a tax rate taken from a tax statute, may be reasonably seen as in dispute.<sup>73</sup> That is to say, we often cannot agree on counting methods to determine how much tax has been collected where one organization uses a cash method, and another uses a special method to first count cash, and then make subtractions for future benefits that might be received, or additions for taxes paid by corporations on behalf of shareholders – indeed, this is how the Congressional Budget Office actually calculates tax rates.<sup>74</sup>

Merpert referenced four of these types of categories comprised of factual claims that are candidates for fact checking by a correspondence or similar method: (1) historical data, (2) comparisons, (3) legality, and (4) statistical.<sup>75</sup> Illustrations can be presented, however, wherein each of these categories the correspondence theory may not suffice as a workable epistemology in the tax context. In respect of historical tax data, an epistemological problem relates to cherry-picking favorable tax data to support a policy position.<sup>76</sup> Since most people do not have a working knowledge of the tax system in current or previous eras, the non-comparative historical references would be of marginal value in political discourse where the tax rate was high or low and

67. See Uscinski & Butler, *supra* note 22, at 163.

68. See Alfred Hermida, *Tweets and Truth: Journalism as a Discipline of Collaborative Verification*, 6 JOURNALISM PRAC. 659, 661 (2012).

69. See BOGENSCHNEIDER, SECRETS, *supra* note 66, at 104-06.

70. See Graves, *Anatomy of a Fact Check*, *supra* note 2, at 522-23.

71. See BOGENSCHNEIDER, SECRETS, *supra* note 66, at 10.

72. *Id.* at 161; Graves, *Anatomy of a Fact Check*, *supra* note 2, at 520.

73. See *id.* at 14-15.

74. BOGENSCHNEIDER, SECRETS, *supra* note 66, at 104-05, 109 (“Hence, where a philosopher or politician proposes that a tax policy is ‘just’ or ‘fair’ by applying a cash-basis method of accounting for one group of taxpayers, and an accrual-basis method of accounting for another group of taxpayers, the supposedly ‘philosophical’ conclusions are a type of rhetoric or political gamesmanship generally comprising a means to fool the innocent and take their money.”).

75. A. Merpert et al., *Is That Even Checkable? An Experimental Study in Identifying Checkable Statements in Political Discourse*, 35 COMM. RES. REP. 48, 49 (2018).

76. See BOGENSCHNEIDER, SECRETS, *supra* note 66, at 10-11.

economic growth did or did not occur.<sup>77</sup> As to comparisons and statistical data, in the period leading up to the passage of the Tax Cuts and Jobs Act of 2017,<sup>78</sup> corporate tax rates were simultaneously described as both high and low by different organizations.<sup>79</sup> The Council on Foreign Relations reported the statutory tax rate of 35% was relatively high compared to other nations and tax cuts were needed to spur corporate activity.<sup>80</sup> The Brookings Institution later determined that the tax predictions used to formulate the law had not come to fruition especially in relation to corporate taxes.<sup>81</sup>

The legality of tax avoidance planning reflects perhaps one of the most debated issues within tax scholarship: whether tax laws should be presumed to be objectively determinate with the same interpretation of the meaning of the words and whether taxpayers who avoid taxes are doing so legally or not.<sup>82</sup> Since most tax planning is designed to exploit the indeterminacy of interpretation, many tax practitioners presume that tax law is indeterminate.<sup>83</sup> Therefore, it would be possible for large corporations to avoid most or all taxes legally by exploiting the indeterminacy of laws.<sup>84</sup> Thus, in addition to problems with statistics and comparisons, in many cases legality in the tax context would not be objectively determinate.<sup>85</sup>

## II. PROBLEMS WITH FACT CHECKING IN THE TAX CONTEXT

Nearly all fact checking is subject to a critique taken from the philosophy of science that insofar as the fact checker must always adopt an underlying theory or paradigm to which the supposed “fact” relates.<sup>86</sup> In tax discourse, facts are given in reference to a causal theory and rarely in regard to

77. Merpert et al., *supra* note 75, at 49.

78. *See generally* H.R. REP. NO. 115-97 (2017).

79. *U.S. Corp. Tax Reform*, COUNCIL ON FOREIGN RELS., <https://web.archive.org/web/20181223000141/https://www.cfr.org/background/us-corporate-tax-reform> (last updated Nov. 3, 2017).

80. *See id.*

81. William G. Gale, *Did the 2017 Tax Cut—The Tax Cuts and Jobs Act—Pay for Itself?*, BROOKINGS INST. (Feb. 14, 2020), <https://www.brookings.edu/policy2020/votervital/did-the-2017-tax-cut-the-tax-cuts-and-jobs-act-pay-for-itself/>.

Before and after passage of the Tax Cuts and Jobs Act (TCJA), several prominent conservatives, including Republicans in the House and Senate, former Reagan economist Art Laffer, and members of the Trump administration, claimed that the act would either increase revenues or at least pay for itself. In principle, a tax cut could “pay for itself” if it spurred substantial economic growth—if tax revenues rose from the combination of higher wages and hours worked, greater investment returns, and larger corporate profits. The TCJA, however, is not that tax cut.

82. *See* Mark Burton, *Responsive Regulation and the Uncertainty of Tax Law - Time to Reconsider the Commissioner's Model of Cooperative Compliance?*, 5 *EJOURNAL TAX RES.* 71, 72 (2007).

83. *Id.* at 73.

84. *Id.* at 73, 82.

85. *Id.* at 73.

86. *See* Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 4.

independent observations despite what has been previously suggested in other scholarship on the epistemology of fact checking processes.<sup>87</sup> The critique represents a difference in the understanding of science that evolved between the seventeenth and twentieth centuries where fact checking has at times reverted back to the seventeenth-century approach.<sup>88</sup> The more modern view of science originating with Karl Popper is that facts arise from theory, and not vice versa.<sup>89</sup> Popper explained as follows:

[T]he theoretician must long before [experimentation] have done his work, or at least what is the most important part of his work: he must have formulated his question as sharply as possible. Thus it is he who shows the experimenter the way. But even the experimenter is not in the main engaged in making exact observations; his work, too, is largely of a theoretical kind. Theory dominates the experimental work from its initial planning up to the finishing touches in the laboratory.<sup>90</sup>

Illustrations of many epistemic problems can be readily identified in tax discourse, ranging from skepticism to relativism,<sup>91</sup> positive to realist, religious to secular.<sup>92</sup> Tax policy is accordingly a minefield for epistemology because of the idea that tax figures or numbers are given independent of theory.<sup>93</sup> The tax policy landscape is also littered with paradoxes, where empirical results conflict with theoretical predictions, such as the supposed migration of wealthy persons or corporations away from higher taxes appears to happen in reverse, where the wealthy migrate toward higher-tax jurisdictions and not away.<sup>94</sup> Even though the idea of mobile capital is widely held as universal truth in lay circles, there is little to no empirical evidence for it as nearly all large corporations operate in high-tax jurisdictions by choice.<sup>95</sup> Also widespread is the cherry-picking of supposed facts in support of a preferred tax policy, with perhaps the foremost illustration being the counting of only income tax receipts paid by the wealthy rather than income, wage and other taxes paid by working taxpayers.<sup>96</sup>

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87. *Id.* at 3.

88. *See* POPPER, *supra* note 15, at 3-4.

89. *Id.* at 1.

90. *Id.* at 90.

91. Jeffrey Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221, 228 (1995).

92. *See* POPPER, *supra* note 15, at 94.

93. *See* BOGENSCHNEIDER, *SECRETS*, *supra* note 66, at 4, 60.

94. *See id.* at 8-10, 34.

95. *Id.* at 17.

96. *Id.* at 10-11.

In the tax context, facts are usually not empirical observations where a journalist can point a finger to a number as an objective statement of fact and anyone else might be expected to agree.<sup>97</sup> The number itself will nearly always reflect interpretations of what the observer sets out to look for, or even what the originator of the number chose to count as an observation.<sup>98</sup> The process of fact checking may, at times, even reflect the concealment of a competing theory to which competing facts have been proposed.<sup>99</sup> Thus, fact checkers face additional unique epistemological problems in the tax context, several of which are detailed below.<sup>100</sup>

#### *A. Fact Checking of Non-Causal Ideology*

A prominent critique of the epistemology of fact checking by Uscinski and Butler challenged the ability to fact check a causal theory.<sup>101</sup> Of course, a causal prediction technically may not be fact checked, yet the critique is counterintuitive because it reverses the colloquial usage of terms.<sup>102</sup> In colloquial speech, scientific knowledge of causation is often referred to as factual. For example, the scientific theory of gravity is taken as fact and a journalist could indeed be expected to fact check a politician who denied the theory of gravity. A disagreement could even result in that simple context if the politician was referring to gravity in relation to general relativity, rather than gravity on the surface of the Earth.<sup>103</sup> In reality, the proposed demarcation between facts and causation drawn by Uscinski and Butler is not a significant epistemological issue because facts are used within causal paradigms.<sup>104</sup> Rather, the primary epistemological concern in fact checking is in respect of the supposed evaluation of non-facts by fact checking ideas that are completely non-causal, such as superstitious beliefs.<sup>105</sup> The fact checking of a superstitious belief would be, for example, if a journalist attempted to fact check a claim by a politician to have been chosen by God to lead.

A similar illustration of fact checking was developed by Graves in respect of a claim made by Glenn Beck: “[The Muslim Brotherhood] want[s] to declare war on Israel.”<sup>106</sup> Ultimately, PolitiFact adjudicated the claim false

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97. *Id.* at 4.

98. *See* Uscinski & Butler, *supra* note 22, at 177.

99. *See id.* at 167-68.

100. *See infra* Sections II.A-D.

101. Uscinski & Butler, *supra* note 22, at 169.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See* BOGENSCHNEIDER, *SECRETS*, *supra* note 66, at 32-33.

106. *See* Graves, *Anatomy of a Fact Check*, *supra* note 2, at 524.

but after significant dispute.<sup>107</sup> The trouble is that the claim relates foremost to ideology, similar to the problem explained in the preceding paragraph, and is not a “fact” in the sense of a fact within a causal paradigm.<sup>108</sup> An appropriate response to Graves then is that PolitiFact appears to fact check claims that are not in the nature of facts.<sup>109</sup> PolitiFact found Beck’s claim to be false, or in other words, *not* a “fact”.<sup>110</sup> However, in epistemological terms, the ideological claim was really a “nothing” as it did not relate to any causal hypothesis and should not have been investigated at all.<sup>111</sup> The issue of evaluating mental states as “science” was debated within the philosophy of science throughout the eighteenth and nineteenth centuries. The epistemological problem was not addressed in regards to the Beck statement only because the nothing claim was found to be “false” so therefore found to be not true.<sup>112</sup> If the claim had been found to be true or confirmed, then the epistemological problem: what was set out to be checked was really a “nothing”, may have been evident even to journalists. Absent some epistemology that is able to distinguish superstition from modern science along the lines of Popper, fact checking runs the risk of formally reviving nineteenth-century Viennese debates over doctrinal skepticism that are beyond the scope of this paper.<sup>113</sup> For this reason, PolitiFact and other fact checking organizations may need to create a new category of non-verifiable claims that are not subject to fact checking. The category of non-verifiable claims may indeed include a substantial portion or perhaps even the majority of politicians’ statements. A possible vagueness critique of a politician could be that he or she simply does not make any factual claims or statements that can be checked for accuracy.

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107. Lucas Graves, *Glenn Beck Says Muslim Brotherhood Wants to Declare War on Israel*, POLITIFACT (Feb. 15, 2011), <https://www.politifact.com/factchecks/2011/feb/15/glenn-beck/glenn-beck-says-muslim-brotherhood-wants-declare-w/> [hereinafter Graves, *Muslim Brotherhood*].

108. *Id.*

109. See Graves, *Anatomy of a Fact Check*, *supra* note 2, at 524, 529.

110. As a matter of Popperian science, causal hypotheses are tested using evidence. It is the theory of causation which may be found to be false. Facts are criteria within the theory from which the hypothesis arises. The testing of the hypothesis may involve the measurement of the criteria within that theoretical paradigm. The colloquial or lay understanding of science differs from this approach where the accepted causal hypothesis, such as the theory of gravity, are themselves taken as facts. This leads to the oft-given assertion of confirming the hypothesis by testing. However, a base tenant of Popperian science is that hypotheses are always tentative so that there is no formal confirmation just consistent results for the time being until a better causal theory is created. In the illustration of the theory of gravity, Newtonian physics only works at the Earth’s surface, so the theory is not confirmed away from Earth. See POPPER, *supra* note 15, at 38-40; Graves, *Muslim Brotherhood*, *supra* note 107.

111. See Uscinski & Butler, *supra* note 22, at 166, 169.

112. See Graves, *Muslim Brotherhood*, *supra* note 107.

113. See generally POPPER, *supra* note 15.

*B. Resurrection of Dead Theories*

Much of the epistemological debate regarding fact checking, both for and against, seem to be an analysis of questions that were addressed by Popper and others a century ago in response to doctrinal skepticism.<sup>114</sup> Perhaps most significant, in the tax context, “facts” are rarely given independently of an underlying theory.<sup>115</sup> As an illustration, imagine that a journalist engaged in fact checking on tax policy finds the Laffer Curve theory and reasonably determines it to comprise a novel consensus of truth by checking a wide range of tax policy organization websites. This is indeed a plausible outcome for a journalist conducting a first review of the Laffer Curve not having encountered the idea before, as a comprehensive internet search could yield a number of advocacy organizations such as the Tax Foundation that cite to the Laffer Curve to support their assertion that tax cuts will yield higher tax receipts.<sup>116</sup> Assume further that the journalist is not aware of empirical evidence to the contrary. The fact checker could then develop and check “facts” related to the Laffer Curve, such as concluding that it is true that tax cuts will yield more tax revenue – an idea that nearly all tax experts believe to be false.<sup>117</sup> The journalist has in that case followed the journalistic methodology of fact checking to the letter and yet determined that false information is true by proceeding with the consensus approach. This problem occurs because the fact checker has not been trained in the field and is reviewing non-scientific sources that apply a consensus methodology only.<sup>118</sup>

A significant problem in fact checking is that some claims may be reasonably thought to comprise a consensus truth if there is no asterisk placed on the disproven theory, as required as a condition of science or scientific methods.<sup>119</sup> In a university context, for example, a professor presenting the Laffer Curve might be expected to add a qualifier such as, “we do not really know whether our society is on the point of the ‘curve’ where a reduction in tax rates might yield higher receipts” or “some scholars think that raising tax rates would yield higher tax receipts.” A reasonable conclusion then is that in some fields, particularly taxation, where disproven theories are continuously re-introduced into the political process, that fact checking could result in the re-introduction of disproven theories. Alternately, the fact checkers would need to be themselves checked by someone with technical

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114. See Graves, *Anatomy of a Fact Check*, *supra* note 2, at 520-21.

115. *But see id.* at 520.

116. See, e.g., Alex Durante, *Reviewing Recent Evidence of the Effect of Taxes on Economic Growth*, TAX FOUND. (May 21, 2021), <https://taxfoundation.org/reviewing-recent-evidence-effect-taxes-economic-growth/>.

117. See Gravelle, *Comparisons*, *supra* note 24, at 16.

118. See Graves, *Anatomy of a Fact Check*, *supra* note 2, at 522.

119. See generally *infra* Section II.C.

knowledge in the field once a hidden consensus view was thought to have been identified.<sup>120</sup> A process of checking with an expert seems to be a better description of the fact checking processes that many journalists currently apply in reporting on tax policy claims.<sup>121</sup> The fact checking methodology currently depends significantly on the ability of the journalist to determine who is an expert in the field of taxation and tax policy in order to check for consensus views.<sup>122</sup>

### *C. Limits of Bayesian Science*

In Bayesian science, the consensus views of scientists constitute science proper.<sup>123</sup> Fact checkers are broadly engaged in the checking of factual claims to correspond to these consensus views of scientists.<sup>124</sup> However, one limitation of Bayesian science is the situation where scientists disagree on the proper interpretation of data.<sup>125</sup> The fact checker then must evaluate dueling views of multiple persons labeled “scientists” to determine which interpretation should be considered in the nature of truth.<sup>126</sup> In that case, fact checkers take on the role of an actual scientist working in the field – to become familiar with the accumulated knowledge of mankind in that particular field, evaluate the data, and to communicate it to others.<sup>127</sup> Rigorous study of the academic literature on a given topic, typically as part of a PhD program, facilitates the ability of a person to identify and draw out legitimate and consensus views of scientists. As a result, the practical import of fact checking is that persons engaged in fact checking are essentially performing one of the primary roles of Bayesian scientists without actual training in the field of study.<sup>128</sup>

Furthermore, the views of tax experts may not, at the time of fact checking review, have coalesced into a consensus that might be identified and mediated to the public in Bayesian terms.<sup>129</sup> The Laffer Curve illustration is accordingly a significant challenge for Bayesians, including fact checkers acting in part as Bayesian scientists without formal training, because a wide group of adherents continue to advance an idea that has been checked and

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120. See Graves, *Anatomy of a Fact Check*, *supra* note 2, at 527.

121. *Id.*

122. *Id.*

123. See John G. Bullock, *Partisan Bias and the Bayesian Ideal in the Study of Public Opinion*, 71 J. POL. 1109 (2009).

124. Graves, *Anatomy of a Fact Check*, *supra* note 2, at 527.

125. See generally *id.*

126. See Petter Bae Brandtzaeg et al., *How Journalists and Social Media Users Perceive Online Fact-Checking and Verification Services*, 12 JOURNALISM PRAC. 1109, 1122 (2018).

127. See Graves, *Anatomy of a Fact Check*, *supra* note 2, at 527.

128. *Id.*

129. See *id.*; Bullock, *supra* note 123, at 1110.



shown not to be true.<sup>130</sup> Of course, fact checking as an extension of Bayesian science has significant appeal in well-developed fields with relatively clear consensus views. A lack of evidence could also be identified by fact checkers as an indication of falsehood where the evidence is simply unavailable. The appeal of Bayesian science is thus mitigated in fields such as taxation where causal relations are in significant dispute.<sup>131</sup>

Although fact checking has proceeded largely in Bayesian terms, it could proceed also in Popperian terms where the fact checker could review a statement to see if it has been shown to be *false*.<sup>132</sup> In Popperian science, the outright falsification of a theory by evidence can be seen as a matter of degree but still may be applied as a means to introduce a new and different scientific theory.<sup>133</sup> A scientific process entails the substitution of the old idea represented by the Laffer Curve thought to be false by a new idea; here, the new idea would be that higher tax receipts would be obtained at reasonably higher tax rates.<sup>134</sup> The substitution is in effect what Popper referred to in his book as a process of scientific “discovery”, with emphasis on the word *discovery*.<sup>135</sup> Such a Popper falsity review does not necessarily require advanced knowledge of the field of study which a journalist might not be expected to possess.<sup>136</sup> Hence, Popperian science encourages and allows for the development of new scientific ideas.<sup>137</sup> The testing of theory by falsification accordingly has significant appeal as a fact-checking methodology in that many ideas about taxation could be immediately falsified with the introduction of evidence.<sup>138</sup>

#### *D. Post Truth Concerns*

Perhaps the most well-known instance of fact checking in recent times relates to the concept of epistemological “post truth”.<sup>139</sup> One example is, of course, President Trump’s claim that he could not reveal his tax returns because he was under IRS audit.<sup>140</sup> Such a claim is false from the paradigm

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130. See Gravelle, *Comparisons*, *supra* note 24, at 16.

131. Uscinski & Butler, *supra* note 22, at 168-69.

132. POPPER, *supra* note 15, at 90.

133. *See id.* at 278.

134. *Id.*; BOGENSCHNEIDER, *SECRETS*, *supra* note 66, at 32.

135. POPPER, *supra* note 15, at 32.

136. *See id.* at 7.

137. *Id.*

138. *See id.* at 274.

139. Pablo Capilla, *Post-Truth as a Mutation of Epistemology in Journalism*, 9 MEDIA & COMM. 313, 314 (2021).

140. Martin Pengelly, *Trump Made Up Audit Excuse for Not Releasing Tax Returns on Fly*, *Book Says*, GUARDIAN (Sep. 30, 2022), <https://www.theguardian.com/books/2022/sep/30/trump-audit-tax-returns-plane-chris-christie-maggie-haberman-book>.

of the professional tax community where there is no such rule.<sup>141</sup> From the perspective of epistemology proper, the claim is technically non-verifiable because it relates to a rabbit hole paradigm that Trump posited where he had been supposedly advised by his tax lawyer there was such a consideration or rule toward non-disclosure of tax returns whilst under audit.<sup>142</sup> If a tax lawyer had advised Trump of such a rule, that advisement would be legally privileged information unless Trump's statements constituted a waiver of the privilege. So, the reference is in theory completely uncheckable if the lawyer's privileged advice cannot be disclosed pursuant to the attorney-client privilege. The politician has effectively posited an alternate paradigm of truth by referencing something known not to be checkable.<sup>143</sup>

In a democracy, the more often a politician is revealed not to share an agreed paradigm with the voters, the less relatable and electable that person might appear to be. On the other hand, with respect to Trump's tax returns, various newspapers and other journalistic organizations strongly implied the returns might contain evidence of tax fraud or other criminal behavior.<sup>144</sup> For various reasons, this represents a potential "post truth" turn in fact checking as well by the journalists themselves.<sup>145</sup> As Capilla explained: "The [post truth] hypothesis is that, if the news media were to spread different types of reality, it would be impossible to establish a single epistemological justification, and doubts might even be cast about the very idea of verifying facts."<sup>146</sup>

One probable reason for Trump's refusal to disclose his tax returns was that such returns would have reported very little, possibly zero, taxable income; this could imply that Trump was not very good at business, one of the primary tenants of his campaign.<sup>147</sup> Any professional tax expert should have been able to identify that Trump was in the real estate business where tax liability can usually or often be avoided partially or entirely.<sup>148</sup>

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141. Kevin McCoy & David Jackson, *IRS: Trump Can Release Tax Returns, Regardless of Audit*, USA TODAY (Feb. 26, 2016, 3:29 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/02/26/donald-trump-internal-revenue-service-audits/80996086/>.

142. Pengelly, *supra* note 140.

143. See generally Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303 (2010).

144. See Elie Mystal, *Trump is Either a Tax Fraud or the World's Worst Businessman*, WASH. POST (Sept. 28, 2020, 10:43 AM), <https://www.washingtonpost.com/outlook/2020/09/28/trump-taxes-fraud-business-failure/>.

145. Capilla, *supra* note 139, at 314.

146. *Id.*

147. See Mystal, *supra* note 144.

148. Max Ehrenfreund, *How Donald Trump and Other Real-Estate Developers Pay Almost Nothing in Taxes*, WASH. POST (Oct. 4, 2016, 6:11 AM), <https://www.washingtonpost.com/news/wonk/wp/2016/10/04/how-donald-trump-and-other-real-estate-developers-pay-almost-nothing-in-taxes/> ("The average firm in real estate development pays just over 1 percent of its income in taxes, according to data compiled

Accordingly, journalists engaged in fact checking probably should have discovered this and expected the tax returns not to report significant amounts of taxable income. The Trump tax returns comprise a prime illustration of the counterintuitive nature of tax policy where extremely wealthy people often do not pay taxes.<sup>149</sup> The lack of agreement on a proper interpretation of data, such as the refusal to release a tax return, leads to a significant issue within fact checking - verifying interpretational results or perhaps even rating such claims on a scale of truthfulness.<sup>150</sup> The fact checking process nonetheless at times appears to be the favoring of one interpretive position over another.<sup>151</sup>

#### CONCLUSION

Whereas Karl Popper referred to a *Logic of Scientific Discovery*, the journalistic process of fact checking could instead be called a methodology for the discovery of lay ideas.<sup>152</sup> In epistemological terms, fact checking is the communication of ideas from one layperson to another.<sup>153</sup> At first blush, this may seem to be the triumph of Richard Rorty's view that discourse within a democracy preempts all epistemology.<sup>154</sup> Perhaps causal relations widely known in tax or similar circles are never really to be known by the democratic electorate. Lay knowledge of tax policy might then be known by trial and error only. This would mean that lay persons, or the democracy itself, simply learned from their mistakes over time rather than setting out to make causal predictions in the future, as scientists and other scholars normally set out to do. In this sense, science is actually knowing the results of experiments by means superior to trial and error.

However, fact checking seems to be overall helpful for democratic processes, and not harmful as some scholars have worried.<sup>155</sup> This is because the wider dissemination of both correct and incorrect ideas about causation, such as in respect of tax policy, expands human knowledge with little downside from the dissemination of some wrong ideas however frustrating it

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by Aswath Damodaran, a professor at New York University. The average for all the industries in Damodaran's database is almost 11 percent.”)

149. *Id.*

150. See Amazeen et al., *Correcting Misperceptions*, *supra* note 45, at 31.

151. See Kelly Riddell, *Eight Examples Where 'Fact-Checking' Became Opinion Journalism*, WASH. TIMES (Sept. 26, 2016), <https://www.washingtontimes.com/news/2016/sep/26/eight-examples-where-fact-checking-became-opinion/>.

152. POPPER, *supra* note 15, at 32.

153. See Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 3, 4.

154. Riddell, *supra* note 151; Jennifer Jerit & Jason Barabas, *Bankrupt Rhetoric: How Misleading Information Affects Knowledge about Social Security*, 70 PUB. OPINION Q. 278, 296 (2006); see also Uscinski & Butler, *supra* note 22, at 169.

155. See Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 16.

may be to experts in the field.<sup>156</sup> Uscinski's excellent epistemological critique, may represent in part, a false nostalgia for a past time where epistemology formed the basis for political discourse for all inhabitants of a small village, and truths were known to all concerned.<sup>157</sup> An appropriate response to Uscinski is simply that, even if some ideas are incorrect or wrong in political discourse, that does not restrain scientific progress significantly because scientists themselves are not obliged to follow wrong ideas. The democracy seems to increasingly look to scientists for truth *even if the lay public does not know what that means*.<sup>158</sup> It is not necessary for scientific discovery and advancement that the laypersons comprising the democratic electorate know the definition of truth.<sup>159</sup> In the tax policy context, recent events indicate that disproven tax ideas have been rejected by policymakers around the world, and the international race to the bottom on corporate tax rates has been curtailed.<sup>160</sup>

In defense of fact checking processes, Graves has carefully documented and described the methods applied at PolitiFact, a leading fact checking organization.<sup>161</sup> The methods reveal that journalists most often intend to check facts fairly in an effort to reveal the truth.<sup>162</sup> However, the results of Graves' investigation reflect a near complete discretion for journalists to determine which fact claims are to be checked or not.<sup>163</sup> Disturbingly, Graves also notes confusion by the general public about misperceptions of the non-scientific processes applied in fact checking.<sup>164</sup> The general public often holds a colloquial view of science as the collation of facts.<sup>165</sup> This view would understand fact checking as checking for the correspondence of political claims to a codex of gathered facts – essentially the sixteenth-century view of science.<sup>166</sup> Fact checkers, including journalists, often apply a Bayesian version of science, as explained above, as they see that a codex does not exist and that checking with books is not a workable approach for many factual investigations.<sup>167</sup>

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156. See Uscinski & Butler, *supra* note 22, at 168-69.

157. *Id.* at 163.

158. See Uscinski, *Rejoinder to Amazeen*, *supra* note 22, at 249-50.

159. See *supra* Section II.C.

160. David Milliken et al., *G7 Finance Ministers Agree Global Minimum Tax of at Least 15%*, REUTERS (June 7, 2021, 3:28 PM), <https://www.reuters.com/business/g7-finance-ministers-agree-global-minimum-tax-least-15-2021-06-05/>.

161. See Graves, *Anatomy of a Fact Check*, *supra* note 2, at 523.

162. Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 17-18.

163. Graves, *Anatomy of a Fact Check*, *supra* note 2, at 524.

164. See *id.* at 520.

165. *Id.*

166. See *generally id.*

167. See *supra* Section II.C.

The potential for disingenuous checking of supposed facts is also a concern of significant import to fact checking processes, where a journalist may take a partisan position in the political process, thus creating a charge of partisan bias.<sup>168</sup> Such concerns over partisanship may be especially pronounced in the context of tax policy.<sup>169</sup> Contrary to the conclusion of Uscinski and Butler, tax facts exist within causal paradigms so fact checking does take place in respect of causation.<sup>170</sup> The most pervasive epistemological problem for fact checkers is the fact checking of non-facts, or nothings, such as superstitious beliefs.

Guarded optimism seems appropriate as journalism, broadly speaking, aids social science as it functions by analogy as a microphone.<sup>171</sup> Any reporting of science or facts relevant to causal relations, generally yields a net benefit to science, if at the very least it engenders curiosity among the lay public.<sup>172</sup> As an illustration, recently it was reported that the wealthiest persons in the United States do not pay much in taxes on the basis of leaked tax returns, reflecting no more than 3.4% effective tax rate.<sup>173</sup> That information is best viewed as a fact related to one or more causal theories of taxation likely to be relevant to political discourse.<sup>174</sup> In order to understand the significance of that information in political terms, and to communicate it to the public, journalists should be expected to follow the standard process of fact checking on Bayesian terms to reach a new consensus view.<sup>175</sup> As explained above, journalists would need then to distinguish the statutory tax rate of potentially 40.8% from the effective tax rate that is much less.<sup>176</sup> The new facts may result in some updating of beliefs, countering misperceptions that the wealthy pay more in taxes than the data indicates they actually do.<sup>177</sup> The good news is that the process of updating beliefs about taxation and tax policy based on new evidence constitutes rapid epistemological progress in historical terms, even if it feels slow.

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168. Uscinski & Butler, *supra* note 22, at 168-69.

169. See Graves, *Anatomy of a Fact Check*, *supra* note 2, at 527.

170. Uscinski & Butler, *supra* note 22, at 168, 170.

171. *But see* Brown, *supra* note 55, at 198.

172. Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 16.

173. See Eisenger et al., *supra* note 10.

174. See Uscinski & Butler, *supra* note 22, at 168.

175. Amazeen, *Revisiting the Epistemology*, *supra* note 12, at 8-9.

176. *History of Federal Income Tax Rates: 1913 – 2022*, BRADFORD TAX INST., [https://bradfordtaxinstitute.com/Free\\_Resources/Federal-Income-Tax-Rates.aspx](https://bradfordtaxinstitute.com/Free_Resources/Federal-Income-Tax-Rates.aspx) (last visited Oct. 1, 2022).

177. See Scott A. Hodge, *Testimony: Senate Budget Committee Hearing on the Progressivity of the U.S. Tax Code*, TAX FOUND. (Mar. 25, 2021), <https://taxfoundation.org/rich-pay-their-fair-share-of-taxes/>.