

# FRAMING MIDDLE-CLASS INSECURITY: TAX AND THE IDEOLOGY OF UNEQUAL ECONOMIC GROWTH

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## INTRODUCTION

Tax law has helped make struggle, risk, and sacrifice the new normal for the American middle class. This change in middle-class status results not only from tax policies, but also from ideas about tax that cultivate acquiescence in unequal austerity.<sup>1</sup>

As Lisa Philipps shows in the context of Canada, recent income tax policies encourage middle-class citizens to rely more on their own private family wealth and personal human capital—and less on collective public protection—to secure middle-class expectations of access to health care, education, income security, family, retirement, and economic opportunity.<sup>2</sup> Yet, as Philipps explains, those tax policies of self-reliance clash with a reality in which middle-class earnings and savings are increasingly precarious, if not substantially out of reach. That reality of middle-class vulnerability is even more pronounced in the United States, with more limited public support for health care, retirement, and higher education.

This insecurity has grown even as middle-class American households generally have taken greater responsibility for economic gain by increasing work productivity, upgrading educational attainment, and working more hours.<sup>3</sup> From 1971 to 2015, U.S. household income overall has shifted upward from middle-income to upper-tier households, leaving the middle

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1. See generally STEVE FRASER, *THE AGE OF ACQUIESCENCE: THE LIFE AND DEATH OF AMERICAN RESISTANCE TO ORGANIZED WEALTH AND POWER* (2015) (comparing current passivity with previous eras of mass political mobilization).

2. See generally Lisa Philipps, *Registered Savings Plans and the Making of Middle-Class Canada: Toward a Performative Theory of Tax Policy*, 84 *FORDHAM L. REV.* 2677 (2016).

3. See LAWRENCE MISHEL, *ECON. POLICY INST., VAST MAJORITY OF WAGE EARNERS ARE WORKING HARDER, AND FOR NOT MUCH MORE: TRENDS IN U.S. WORK HOURS AND WAGES OVER 1979–2007*, at 1 (2013), <http://www.epi.org/files/2013/ib348-trends-us-work-hours-wages-1979-2007.pdf> [<https://perma.cc/9MK9-8H4B>].

class both smaller in size and squeezed economically.<sup>4</sup> In 2013, upper-income families had seven times the wealth of middle-income families, compared to three times the wealth of middle income families in 1983.<sup>5</sup> The upper 10 percent have received an increasing share of gains from business cycles since the 1980s compared to the bottom 90 percent of households and *all* of the gains from growth during the 2000 to 2008 business cycle.<sup>6</sup>

How we think about tax shapes how we think about this new redivision of the economic “pie.” Tax policies championing security through individual savings do not simply promote the ideal of personal economic responsibility for economic loss and insecurity. More insidiously, these policies convey the message that good middle-class citizenship is about accepting low expectations of personal economic success. The prevailing scholarly and popular tax discourse helps rationalize increased middle-class risk and sacrifice as an economic fact beyond politics.

This discourse largely presumes that middle-class economic power and prosperity does not come from democratic solidarity and collective protection. Instead, it echoes a neoliberal vision that embraces government support as a foundation of economic success, but insists that success depends on redirecting government support away from ordinary workers, families, and consumers toward protecting concentrated private market wealth as the primary engine of economic prosperity. That vision identifies middle-class status with incapacity, insecurity, and dependency in a new and naturally unequal economic order.

A more accurate understanding of the role of tax in the political economy can help challenge this neoliberal reconstruction of the middle class. Government taxing and spending is fundamental, not supplemental, to the seemingly private market order. Tax policy inevitably operates to lead, not just to follow or distort, the “normal” production and distribution of economic power. Tax policy, in a democratic government, can and should be a means for ordinary citizens to participate in constructive collective control over economic production for their benefit.

This Article first explains how the prevailing discourse frames federal tax support for the middle class as either consumption or redistribution, both of which appear to be essentially unproductive and potentially destructive. Second, this Article examines the expansion of state and local tax support for elite private capital. In contrast to tax support favoring the middle class, this upper-class support is accepted widely as necessary for productive economic development. Operating below the radar of prominent tax

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4. For instance, 49 percent of U.S. aggregate income went to upper-income households in 2014, up from 29 percent in 1970. PEW RESEARCH CTR., *THE AMERICAN MIDDLE CLASS IS LOSING GROUND: NO LONGER THE MAJORITY AND FALLING BEHIND FINANCIALLY* 4 (2015).

5. *Id.* at 8.

6. Pavlina Tcherneva, *What's Wrong with David Leonhardt's NYT Piece on Inequality?*, NEW ECON. PERSP. (Feb. 19, 2015), <http://neweconomicperspectives.org/2015/02/whats-wrong-with-david-leonhardts-nyt-piece-on-inequality.html> [https://perma.cc/L3G5-5TTJ].

debates, this state and local tax policy reveals more starkly and perversely how prevailing views of tax rationalize inequality and austerity. This Article concludes by defending the core regulatory and productive function of the democratic tax system, grounded in the legitimate collective power of middle- and lower-income households to make the economy more responsible to their interests.

### I. TAX AS FRUGAL SPENDING OR PROFLIGATE TAKING?

The message of middle-class subordination emerges from a conceptual framework of tax that appears to reflect benign common sense. That frame presents two primary functions for tax policy.<sup>7</sup> First and foremost, taxes raise revenue to finance public spending. This goal typically is analyzed in terms of efficiency: the extent to which taxes raise the maximum revenue at the least cost.<sup>8</sup> Tax scholars widely discuss tax efficiency as a question of objective analysis of the degree to which a given tax “distorts” what are assumed to otherwise be normal resource-maximizing market decisions.<sup>9</sup> Second, taxes can redistribute resources from some private interests to others.<sup>10</sup> This distributive goal is assumed to be a matter of contested subjective political and moral judgments about fairness.<sup>11</sup>

Beneath its innocuous surface, this foundational division nonetheless operates to rationalize and normalize the rising inequality and austerity for the middle class. It presumptively locates economic productivity in a distinct and underlying private sector, with government taxing and spending essentially cast as derivative and dependent on gain largely generated elsewhere. In this frame, middle-class taxpaying serves one of two primary purposes: either consumption of government commodities or forced charity. As discussed below, each of these alternatives casts tax support favoring the middle class as suspect, so that this tax support appears unreasonable unless sharply limited.

#### A. Middle Class Submission in Tax “Consumption”

As taxpaying consumers of public goods and services, middle-class citizens can appear rational and responsible to the extent they curtail their demands on the government to match their willingness to cover the costs

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7. See Dennis J. Ventry, Jr., *Equity Versus Efficiency and the U.S. Tax System in Historical Perspective*, in *TAX JUSTICE: THE ONGOING DEBATE* 25, 25–70 (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002) (analyzing the shift from emphasis on distributional equity to the goal of efficiency).

8. See Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 *TAX L. REV.* 229, 229 (2011).

9. See *id.* at 233 (advocating for a more complex and complete approach).

10. See Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics*, 98 *CORNELL L. REV.* 523, 525, 535–36 (2013) (describing taxation as a system of zero-sum transfers in contrast to the ideal of a market bargain producing mutual gain).

11. See *id.* at 529–30 (explaining that conventional economic analysis claims to eschew the contested questions of redistribution implicated in tax law).

by paying more taxes.<sup>12</sup> In this view, taxes—like market prices—should help discipline middle-class citizens by inducing them to make inevitably tough tradeoffs among competing government spending priorities to maximize resources assumed to be naturally and necessarily scarce.<sup>13</sup> In this presumed consumer role, rational middle-class taxpayers should also weigh their personal gains from government spending against the possible personal gain from substituting private spending or savings for the cost of the taxes needed to “buy” public goods or services.

In the current economic context, most middle-class taxpayers probably realize that individual savings and earnings are unlikely to provide reliable personal or family prosperity and security. Yet this realization may tend to further discourage middle-class aspirations for “purchasing” expanded collective government support through higher taxes. The idea of taxpaying as consumption, for example, underlies warnings that maintaining current levels of social security retirement benefits likely will require either high payroll taxes on increasingly struggling younger middle-class workers, or government debt that will reduce the security and prosperity of younger generations due to some combination of greater taxes, reduced government services, and dampened private economic growth.<sup>14</sup> If government spending for the middle class depends on middle-class taxpaying, then more generous middle-class public support will appear largely unaffordable, or at least difficult to achieve without resorting to irresponsible and generally futile efforts to escape from paying the true costs of these gains. That is, the consumer view of tax largely presents the barriers to greater middle-class security as fixed and intractable economic constraints.

### *B. Middle Class Submission in Tax “Redistribution”*

Prevailing tax theory appears to soften and offset this gloomy message by presenting redistribution as the alternative by which fiscal policy may alleviate insecurity and inequality. Yet, under the surface, this seemingly neutral alternative also subtly points toward the conclusion that substantial gains for the middle class largely lie beyond the reach of reasonable tax policy. Constructed as “redistribution,” progressive tax policies favoring the middle class appear to be one-way involuntary transfers of resources

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12. See, e.g., Scott Horsley, *Balancing the Budget: The Problem Might Be You*, NPR (Feb. 16, 2011), <http://www.npr.org/2011/02/16/133783606/balancing-the-budget-the-problem-might-be-you> (criticizing ordinary voters for their political support for infrastructure spending without similar support for general tax increases) [<https://perma.cc/9YSX-39YP>].

13. See LAWRENCE ZELENAK, *LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 12* (2013) (discussing arguments that the pain of taxpaying induces citizens to carefully limit government spending); Eric M. Zolt, *Politics and Taxation: An Introduction*, 67 *TAX L. REV.* 453, 455 (2014) (discussing the “fiscal contract” model of taxpaying as a market-like exchange of tax revenue for government services according to taxpayer preferences).

14. See, e.g., Romina Boccia, *Social Security: \$39 Billion Deficit in 2014, Insolvent by 2035*, HERITAGE FOUND. (July 29, 2015), <http://www.heritage.org/research/reports/2015/07/social-security-39-billion-deficit-in-2014-insolvent-by-2035> [<https://perma.cc/2E3M-RDKN>].

from more economically capable taxpayers.<sup>15</sup> That conceptualization implicitly suggests that progressive tax policy primarily aimed at shifting resources to the middle class from the rich will tend to make middle-class security dependent on the unwilling support of more powerful others.

Even when that position of dependency appears normatively justified or politically popular, it means that middle-class gains from redistributive tax policies are likely to be relatively insecure and costly (in the long run) compared to any gains from efficient tax policies. If we assume progressive tax policies take private resources from wealthier taxpayers, we can expect that these more economically powerful taxpayers are likely to respond by diverting or decreasing their private spending and saving to accommodate, mitigate, or resist this loss. But if middle-class economic success largely depends on private earnings and savings, even when supplemented by government support, then middle-class prosperity may be threatened by any “redistribution” that disrupts or weakens the private economic activity of those who control the largest share of the private economy.<sup>16</sup>

It is true that this logic leaves open to debate and analysis the degree of economic risk or blowback to the middle class from any particular redistributive tax. Nonetheless, the conceptual lens of “redistribution” casts doubt on the wisdom of using tax policy to protect the middle class. That lens further suggests that middle-class citizens should not trust their own political interests or ideals of fairness as the basis for determining the proper scope and design of tax benefits for the middle class, but instead should defer to technical economic expertise.

In addition, the idea of redistributive taxation suggests that the presumed disruption of otherwise normal economic forces will extend beyond private productivity to government functioning. From the prevailing idea that taxes extract private resources to purchase government programs, it follows that harm to private economic productivity from “redistributive” taxes will also risk reducing tax revenue on which government spending seemingly depends, exacerbating the tough choices that already face middle-class tax “consumers.” Further, in contrast to theoretically consensual reciprocal economic exchanges, involuntary taxes aimed at helping the middle class at the expense of wealthier others will depend on enhanced government compulsion to achieve the intended result.<sup>17</sup>

Though, in theory, state and federal governments have plenty of force at their disposal, in practice, tax enforcement depends on complex administration operating under legal, political, and resource constraints. The current context of heightened inequality gives more reason for middle-

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15. See Raskolnikov, *supra* note 10, at 525, 535–36 (comparing tax “redistribution” to theft and insider trading).

16. See Jim Chen, *Progressive Taxation: An Aesthetic and Moral Defense*, 50 U. LOUISVILLE L. REV. 659, 672–73 (2012) (arguing for progressive taxation despite presumed negative economic incentive effects).

17. See Raskolnikov, *supra* note 10, at 541 (explaining economic arguments that taxation as a compulsory transfer tends to induce costly resistance offsetting at least some of the intended gains from the transfer).

class citizens to doubt that this bureaucratic machinery will compel the rich to hand over an increased share of resources without a hitch. Taxes characterized as redistributive will not only appear especially politically and economically controversial, but also will target those with the most to gain from (and the most to spend on) manipulating, contesting, and evading taxes.<sup>18</sup> In their role as rational “consumers” of government spending, as well as potential beneficiaries of tax redistribution, middle-class taxpayers are faced with the likelihood that the costs of administering and enforcing robust redistributive fiscal policies will come at the expense of fewer resources for other vital government goods and services. In fact, building on middle-class suspicions of upper-class tax avoidance, political leaders have cultivated popular opposition to progressive income taxation on the ground that progressivity causes complexity that leads the rich to exploit “loopholes” at the expense of the middle class.<sup>19</sup>

Further, those with extensive wealth at stake will have reason to resist downwardly redistributive taxes by investing in political efforts to undermine those policies, whether by cutting resources for tax enforcement, lobbying for offsetting tax favors, or directly funding politicians and public intellectuals who will discredit redistributive goals, tax progressivity, and federal government spending.<sup>20</sup> In an electoral context dependent on wealthy donors, successful tax initiatives aiding the middle class are likely to be packaged with even greater tax concessions for the wealthy (or new spending concessions affecting the middle class). For example, the 2001 to 2003 Bush Administration tax law changes giving “marriage penalty relief” to many middle-class taxpayers also included extensive tax reductions for the wealthy.<sup>21</sup>

Tax policies portrayed as redistributive, zero-sum transfers to the middle class also will appear likely to increase threats to economic security from *within* the middle class. Proposals for more government support for individual health insurance, education, home ownership, or retirement, for

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18. See Noam Scheiber & Patricia Cohen, *For the Wealthiest, a Private Tax System That Saves Them Billions*, N.Y. TIMES (Dec. 29, 2015), [http://www.nytimes.com/2015/12/30/business/economy/for-the-wealthiest-private-tax-system-saves-them-billions.html?\\_r=0](http://www.nytimes.com/2015/12/30/business/economy/for-the-wealthiest-private-tax-system-saves-them-billions.html?_r=0) (reporting how the very wealthiest Americans effectively use their private money and power to buy tax policy) [<https://perma.cc/EB72-W8C7>].

19. See, e.g., Stephanie Condon, *Carly Fiorina: What Does She Stand for?*, CBS NEWS (Sept. 11, 2015), <http://www.cbsnews.com/media/carly-fiorina-what-does-she-stand-for/4/> (reporting that the Republican former presidential candidate promotes the idea of a simple three-page federal income tax on the ground that the current “deductions and loopholes and complexities actually benefit the wealthy” not the middle class) [<https://perma.cc/Y4RT-BPHN>].

20. See generally James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71 (Daniel Carpenter & David A. Moss eds., 2014) (analyzing how industry influences public policy by using identity, status, and relationships to promote its interests and ideology).

21. See CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE 2001 AND 2003 TAX CUTS (2009) (explaining that a large share of the tax cuts from this legislation will go to the top 1 percent of households); Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109, 190–92 (2011) (contrasting the family tax reforms with the accompanying tax breaks for the wealthy).

example, raise middle-class concerns that their own hard-won resources will be tapped to benefit less resourceful others. For example, in response to President Obama's proposal to end some of the Bush Administration's tax breaks for those earning more than \$250,000, University of Chicago law professor Todd Henderson infamously blogged that this income level unfairly extended beyond the rich because his own dual-earner family struggled to maintain a middle-class lifestyle despite earning over that amount.<sup>22</sup> He withdrew his essay under harsh criticism contrasting most Americans' economic problems with his family's difficulty paying for private schools, retirement, a nanny, lawn care, and good housing.<sup>23</sup>

Nonetheless, Henderson's concern reflects the real challenges of depending on individual savings and earnings for family security and prosperity, even with income much higher and more secure than that available to the vast majority of the middle class. For example, in 2013, a *New York Times* columnist warned that \$1 million in family savings could well be insufficient to sustain retirement in a middle-class lifestyle through a ripe old age, especially in higher cost urban areas, even though 90 percent of Americans will save far less than that—and many will save nothing at all.<sup>24</sup> Without a substantial expansion of public social security benefits, almost half of all middle-class American workers will be poor or near poor during retirement, and even many high income workers will face a substantial drop in living standards.<sup>25</sup>

The possibility that insecurity and austerity extends far up the economic scale further fuels popular anxiety about the harmful economic impact of policies characterized as unproductive “redistributive” transfers. In an economy where exceptional personal discipline and entrepreneurship appears ever more necessary for success, “redistributive” tax policies compensating those falling short will, by definition, reward and induce unsuccessful economic behavior—perhaps including outright fraud and manipulation.<sup>26</sup> In the prevailing logic, to counter destructive incentive effects, “redistributive” programs reasonably should impose conditions and penalties aimed at controlling unproductive recipient behavior. For example, the Affordable Care Act's “individual mandate” to purchase health insurance was designed to counteract incentives for middle-class

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22. Ameet Sachdev, *Earnings of More than \$250,000 a Year, but Professor Laments Family Just Getting by*, CHICAGO TRIB. (Sept. 23, 2010), [http://articles.chicagotribune.com/2010-09-23/business/ct-biz-0924-rich-blog-20100923\\_1\\_law-professor-blog-taxes](http://articles.chicagotribune.com/2010-09-23/business/ct-biz-0924-rich-blog-20100923_1_law-professor-blog-taxes) [https://perma.cc/9RR8-92HR].

23. *Id.*

24. Jeff Sommer, *For Retirees, a Million-Dollar Illusion*, N.Y. TIMES (June 8, 2013), <http://www.nytimes.com/2013/06/09/your-money/why-many-retirees-could-outlive-a-1-million-nest-egg.html?pagewanted=all> [https://perma.cc/TX8P-3VJG].

25. Teresa Ghilarducci, *Our Ridiculous Approach to Retirement*, N.Y. TIMES (July 21, 2012), <http://www.nytimes.com/2012/07/22/opinion/sunday/our-ridiculous-approach-to-retirement.html> [https://perma.cc/Y2EM-H3MF].

26. See Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 805–07, 850–51 (2003) (analyzing economic moral hazard arguments against social welfare programs and showing how these rest on problematic moral judgments about unequal bargaining power).

consumers to game the system by waiting until illness before buying insurance.<sup>27</sup> That problem would have been solved by expanding the popular single-payer Medicare program, but instead, the public health coverage was designed to provide public income-based support for purchasing private insurance.<sup>28</sup> The resulting system of penalties and subsidies likely contributes to confusion and suspicion that participants will be exploited rather than protected by either government or private insurers or both.<sup>29</sup>

Even when the regulatory measures accompanying redistributive taxation are designed to change behavior through “carrots” rather than “sticks,” these also tend to reinforce a message of resignation to inevitable middle-class economic insecurity and decline. Tax subsidies for individual savings accounts for health or retirement, in theory, address concerns about the perverse effects of redistributive subsidies by narrowly rewarding behavior construed as productive and responsible. In practice, however, these “carrots” tend to appear elusive and unfairly regressive, directing benefits to a small group of relatively affluent taxpayers.<sup>30</sup>

A recent tax policy reform providing more substantial support to the middle class is structured to reward family status rather than individual market success. A package of laws enacted from 2001 to 2004,<sup>31</sup> and renewed by what was called the Middle Class Tax Relief & Job Creation Act of 2012,<sup>32</sup> reduced income tax rates for married middle-class couples, excluding the highest income levels and lower-income families. These reforms lower marital income tax rates compared to individual rates, thereby increasing the tax benefits available from marital income splitting in families with unequal spousal earnings, especially in more affluent

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27. The “individual mandate” refers to requirements in section 1501 of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified at 42 U.S.C. § 18091 and 26 U.S.C. § 5000A).

28. See Sarah van Gelder, *If the Health Care Mandate Is Struck Down, Single-Payer Becomes the Best Choice*, HUFFINGTON POST (Apr. 11, 2012), [http://www.huffingtonpost.com/sarah-van-gelder/single-payer-healthcare\\_b\\_1416387.html](http://www.huffingtonpost.com/sarah-van-gelder/single-payer-healthcare_b_1416387.html) (discussing the constitutional challenge to the health reform legislation, which was later upheld by the Supreme Court) [<https://perma.cc/WV2E-CX5V>].

29. See, e.g., KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL: JANUARY 2014, at 15 (2014) (reporting substantial negative perceptions among uninsured Americans).

30. See *The State of U.S. Retirement Security: Can the Middle Class Afford to Retire? Hearing Before the Subcomm. on Econ. Policy of the S. Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. 30 (2014) (statement of Monique Morrissey, Economist, Econ. Policy Inst.) (criticizing tax favored retirement accounts for subsidizing savings by high-income households rather than encouraging effective retirement savings).

31. See Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, 118 Stat. 1166 (extending the marriage penalty reforms of the Economic Growth Tax Relief Reconciliation Act of 2001 and the Jobs and Growth Tax Relief Reconciliation Act of 2003 through 2010); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (accelerating those marital tax changes); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 301, 115 Stat. 38, 3–54 (gradually expanding the 15 percent tax bracket and standard deduction for married taxpayers).

32. Pub. L. No. 112-96, 126 Stat. 156 (2012).

middle-class families.<sup>33</sup> This income-splitting device shelters married breadwinners' earnings from the higher rates that would apply if those earnings were taxed progressively on an individual basis, providing a bonus (compared to single earnings) to the classic breadwinning-homemaker marital family structure. In effect, the marriage bonus subsidizes "affluent unpaid husband care" because it operates as a selective standardized deduction for the costs of personal household services (like cooking, cleaning, child care, or social networking) only for families where a high-earning breadwinner has potential access to those services by informal exchange with a spouse relatively free from the demands of market earnings.<sup>34</sup> Though the marriage tax reforms eased previous tax penalties on dual-earning marital families, neither those families nor single earners have the same opportunity to shelter the substantial costs of services for sustaining middle-class breadwinning.<sup>35</sup>

The breadwinner-homemaker marital family structure that gets this special earnings shelter has become out of reach or precarious for most middle-class Americans facing stagnant, unsteady, or falling wages—or rising costs of housing, medical care, and education.<sup>36</sup> Moreover, these subsidies skew rewards toward the most affluent families in the targeted income range (with a disproportionate racial impact also).<sup>37</sup> Further, these subsidies reward and encourage the economic insecurity of middle-class homemaking spouses, whose family labor generally does not earn them equal legal rights to the breadwinners' earnings or savings.<sup>38</sup>

Though it may seem a relic of the past, this recently increased middle-class family status subsidy embraces a contemporary neoliberal logic. Reasonable middle-class citizens must seek security not through progressive taxing or spending (on programs such as public child care or health insurance), but rather in private relationships of economic dependence on discretionary gains from others, even though these relationships are fraught with instability and inequality from common middle-class life events like divorce, disability, career change, earnings insecurity, and persistent household debt.

Policies construed as tax redistribution are likely to be narrowed not only to select groups within the middle class, but also to be curtailed on the theory that resources should be targeted to the neediest. Because redistributive taxes are assumed to be grounded in moral or social goals, not economic principle, these policies are likely to appear less legitimate the more they shift resources to the middle class rather than to the poor. For example, commentators have recently criticized federal loan support for

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33. See generally McCluskey, *supra* note 21 (criticizing marital income-splitting policies both before and after the reforms).

34. *Id.* at 202–09.

35. *Id.* at 117–24 (giving examples of different types of households).

36. *Id.* at 127–28.

37. *Id.* at 128–35 (summarizing findings of a number of scholars analyzing unequal effects).

38. *Id.* at 204–16 (explaining how more progressive individualized taxation could more fairly recognize homemaking services).

graduate or professional education on the ground that this public subsidy should only go to students likely to be especially needy or especially humble in their economic aspirations.<sup>39</sup>

In sum, whether as responsible personal savers, efficient consumers of government programs, or deserving beneficiaries of tax redistribution, prevailing ideas of tax policy discourage the middle class from drawing on public support as a reasonable solution to economic insecurity and inequality. Nonetheless, that does not mean current tax policy constructs private markets and personal responsibility as the key to success. Instead, tax policy helps deliver the broader neoliberal message that a new economic reality of harsh global competition means that prosperity depends on enhanced government support for unequal private wealth creation. Middle class economic well-being, in this view, necessarily depends not on hard-earned private rights to personal resources or public rights to social citizenship, but rather on discretionary, trickle-down spillovers from superior economic players.

## II. TAX AS TRIBUTE TO ELITE CAPITAL?

Compared to federal income taxes, recent major tax changes in state and local government tax policy have received less attention in both tax scholarship and popular politics. State and local taxation generally is regressive, with middle-class and low-income households paying a higher share of their income than upper-income households.<sup>40</sup>

Exacerbating this burden, over the last quarter century, increasingly lavish tax support and public financing for elite private business has become a defining feature of the American political economy.<sup>41</sup> Though a full picture of this fiscal landscape is obscured by secrecy, silence, and decentralized data, its general contours permeate popular politics and everyday life. Seen up close, the ray of hope for improved middle-class prospects from these fiscal policies appears to consist of paying escalating public tribute to elite private capital owners on the chance of receiving private favors in return.

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39. See Vinal Patel, *Grad-School Debt Is Said to Rise Rapidly and Deserve More Policy Attention*, CHRON. OF HIGHER EDUC. (Mar. 25, 2014), <http://chronicle.com/article/Grad-School-Debt-Is-Said-to/145539/> (quoting Jason Delisle's criticism of lumping graduate and undergraduate debt together) [<https://perma.cc/8XUZ-ZAFE>].

40. See INST. ON TAXATION & ECON. POLICY, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 1 (2015), <http://www.itep.org/pdf/whopaysreport.pdf> [<http://perma.cc/4EEL-EARX>].

41. For some of the groundbreaking reports on this development, see GREG LEROY, *THE GREAT AMERICAN JOBS SCAM: CORPORATE TAX DODGING AND THE MYTH OF JOB CREATION* (2005); GREG LEROY, *NO MORE CANDY STORE: STATES AND CITIES MAKING JOB SUBSIDIES ACCOUNTABLE* (1997); Donald L. Barlett & James B. Steele, *Corporate Welfare: A TIME Investigation Uncovers How Hundreds of Companies Get on the Dole—and Why It Costs Every Working American the Equivalent of Two Weeks Pay Every Year*, TIME MAG. (Nov. 9, 1998), <http://www.cnn.com/ALLPOLITICS/time/1998/11/02/corp.welfare.htm> [<https://perma.cc/A7YQ-TKV2>].

A. *Public Responsibility for Unequal Private Business Support*

Investigating these business incentive policies nationwide, a 2012 *New York Times* report calculated that state and local governments have been giving more than \$80 billion a year in tax and spending incentives for businesses, largely free of reciprocal obligations and often with little public oversight or information.<sup>42</sup> Special exemptions from income, sales, and property taxes for businesses make up the largest portion of these incentives.<sup>43</sup> These incentive policies are a phenomenon of the neoliberal era, emerging in the 1980s as local governments struggled with the decline of middle-class manufacturing jobs and then escalating in size and number through the 1990s and 2000s.<sup>44</sup>

The resulting subsidies have largely bypassed the small, local firms more likely to be owned and managed by middle-class Americans.<sup>45</sup> Major beneficiaries of these subsidies include many of the largest corporations in the world, such as Intel, Boeing, Microsoft, Google, Shell, IBM, Amazon, and many Fortune 500 firms.<sup>46</sup> Companies receiving over \$1 billion in cumulative incentives include Warren Buffett's Berkshire Hathaway group and Wal-Mart.<sup>47</sup>

A large portion of the business subsidies consist of high stakes gambles pinning local economic hopes on undiversified "trophy deals."<sup>48</sup> In the database produced by the *New York Times* investigation, from 2007 to 2012, forty-eight companies nationwide each received over \$100 million in incentives.<sup>49</sup>

Unlike private market investors, local governments not only tend to lack sophistication and diversification in their role as venture capitalists, but also generally forgo legal rights to significant ownership and control in

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42. Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES (Dec. 1, 2012), [http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html?pagewanted=all&_r=0) [<https://perma.cc/P8SY-KBDT>].

43. *See id.* (calculating \$18 billion in income tax breaks and \$52 billion in sales tax breaks out of the overall \$80 billion annual incentives).

44. *See* PHILIP MATTERA & KASIA TARCZYNSKA, MEGADEALS: THE LARGEST ECONOMIC DEVELOPMENT SUBSIDY PACKAGES EVER AWARDED BY STATE AND LOCAL GOVERNMENTS IN THE UNITED STATES 1–2, 7 (2013) (reporting the rise in number and size of subsidy awards over recent decades).

45. *See generally* GREG LEROY ET AL., GOOD JOBS FIRST, SHORTCHANGING SMALL BUSINESS: HOW BIG BUSINESSES DOMINATE STATE ECONOMIC DEVELOPMENT INCENTIVES (2015), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/shortchanging.pdf> (finding 90 percent of \$3.2 billion of subsidies going to big business in a study of fourteen states) [<https://perma.cc/CP9P-QCHG>].

46. *See* PHILIP MATTERA, GOOD JOBS FIRST, SUBSIDIZING THE CORPORATE ONE PERCENT: SUBSIDY TRACKER 2.0 REVEALS BIG-BUSINESS DOMINANCE OF STATE AND LOCAL DEVELOPMENT INCENTIVES 4 (2014), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/subsidizingthecorporateonepercent.pdf> [<https://perma.cc/55SV-QP6T>].

47. *See id.*

48. *See* MATTERA & TARCZYNSKA, *supra* note 44, at i (reporting that the number of state or local subsidy deals larger than \$75 million has doubled since 2008).

49. Louise Story et al., *\$100 Million Club*, N.Y. TIMES (2012), <http://www.nytimes.com/interactive/2012/12/01/us/government-incentives.html#co-generalmotors> [<https://perma.cc/2HG3-M32C>].

exchange for these “investments.” The tax incentives often have been made without strong legal “clawback” provisions for enforcing promises, leaving governments with little or no power to control the number of jobs produced, the pay and conditions of employment, and how long the firm will stay in the area.<sup>50</sup> Subsidies are not typically conditioned on ongoing compliance with environmental, labor, or consumer laws. Local governments often lack good information about whether a given private firm would locate or expand in their area without any subsidy.<sup>51</sup> Similarly, local governments often lack resources to evaluate fully threats by firms to withdraw facilities and jobs to locations offering higher subsidies, and this asymmetry creates incentives for deception and corruption.<sup>52</sup> Many of the incentives do not support new economic growth but rather directly fund the relocation of existing businesses between states or within a state or city or even neighborhood.<sup>53</sup>

Despite these concerns, tax policies aimed at attracting business have persistent political appeal, rationalized on the theory that initial lost revenue will be offset by taxes from growth in jobs and spillover economic activity. But assuming that this expected development materializes, it is likely to put greater burdens on local government services and infrastructure (for example, water, sewer, garbage, roads, services, policing, and schools) disproportionately funded by other businesses and residents not granted special tax reductions. Those eroding services and infrastructure are precisely what small business leaders often identify as major barriers to the growth of middle-class enterprise.<sup>54</sup> Though entrepreneurship is often hailed as the new economy’s alternative to traditional employment for middle-class success, these tax policies may help larger firms crowd out innovative small businesses by using government support either directly to undercut small business competitors or to subject local small-business suppliers to tighter competition.

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50. See generally PHILIP MATTERA ET AL., GOOD JOBS FIRST, MONEY BACK GUARANTEES FOR TAXPAYERS: CLAWBACKS AND OTHER ENFORCEMENT SAFEGUARDS IN STATE ECONOMIC DEVELOPMENT SUBSIDY PROGRAMS (2012), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/moneyback.pdf> (finding serious deficiencies nationwide in state efforts to measure, require, and enforce performance) [<https://perma.cc/S5VD-RQGS>].

51. Indeed, extensive expert research has failed to substantiate claims of general economic benefit from these subsidies, though the harmful effect on government services is clearer. See Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. AM. PLAN. ASS’N 27, 32 (2004).

52. See Story et al., *supra* note 49 (portraying local officials as outmatched by multinational corporations in a “high-stakes bazaar”).

53. See generally GREG LEROY ET AL., GOOD JOBS FIRST, THE JOB-CREATION SHELL GAME: ENDING THE WASTEFUL PRACTICE OF SUBSIDIZING COMPANIES THAT MOVE JOBS FROM ONE STATE TO ANOTHER (2013), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/shellgame.pdf> [<https://perma.cc/9SHR-XPF6>].

54. See generally CAROLYN FRYBERGER ET AL., GOOD JOBS FIRST, IN SEARCH OF A LEVEL PLAYING FIELD: WHAT LEADERS OF SMALL BUSINESS ORGANIZATIONS THINK ABOUT ECONOMIC DEVELOPMENT INCENTIVES (2015), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/levelfieldreport.pdf> (surveying forty-one small business owners in twenty-five states on economic development subsidies) [<https://perma.cc/M7M2-P95B>].

Nonetheless, public subsidies for large multistate and multinational firms have become the norm, so that significant numbers of middle-class jobs and spillover economic gains now appear to depend on the heavily subsidized local facilities operated by large corporations. The fact that these earnings are relatively insecure and scarce can make voters and politicians even more willing to keep gambling for such elusive gains.

These tax development schemes generally are not the target of national commentary advocating rationalizing taxes through careful attention to incentive effects and net benefits. Though promoted as a crucial strategy for creating middle-class jobs, the general lack of evidence of results and the often shaky prospects for any lasting gain may be largely beside the point. Even if a particular incentive deal seems to have little chance of paying off, local support for bad deals may be rational (from the perspective of individualized local governments) because of the likelihood that refusing to give in to demands of existing or potential large local employers will result in highly visible short-term losses. In local economies where middle-class jobs are eroding and tax revenue is declining, the competition among state and local (and foreign) governments for business investment leaves individual governments with little bargaining power in a classic race to the bottom.

Unlike idealized market transactions, to a significant extent these tax deals operate as extortion: a one-way transfer paid by a weaker economic agent to induce a more powerful counterparty to refrain from imposing even greater unequal economic harm. On the more powerful side of the bargain, some corporate executives nonetheless express doubts about the long-term value of orienting business competition toward extracting ever-greater and more innovative (including corrupt) forms of public tax support.<sup>55</sup> Business leaders claim they are forced to play the game under their legal obligation to maximize short-term gains for shareholders.<sup>56</sup> For example, one leader of a local business group noted that his city's lavish but largely futile subsidy wars made him "sick."<sup>57</sup> Acknowledging the pressure driving his own participation, this business leader added, "It sounds like I'm talking myself out of a job, but there ought to be a law against what I am doing."<sup>58</sup>

### *B. Middle-Class Responsibility for Fiscal Austerity*

In this mass shakedown, middle-class and poor citizens generally end up financing business subsidies at the expense of their own economic opportunity and security. Many government services and benefits that are especially valuable for the middle class (such as education, infrastructure, and health) depend heavily on state and local funding subject to limits on

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55. See Story, *supra* note 42 (reporting the concerns of Hallmark executive Donald J. Hall).

56. See *id.* (reporting that officials at dozens of large corporations gave this reason for pursuing incentives).

57. *Id.* (quoting Sean O'Byrne, Vice President of the Downtown Council of Kansas City).

58. *Id.*

deficit spending. The 2008 financial crisis and resulting recession depressed state and local tax revenue, leading to policies of fiscal austerity in most state and local governments that have particularly harmed the middle class.

By 2015, for example, almost all states provided less support for higher education than they had in 2008, typically resulting in higher tuition and cuts in academic programs at a time when advanced education is especially important for economic opportunity.<sup>59</sup> Similarly, by 2015, the majority of states provided less funding for K–12 education per student than in 2007, producing an overall loss of jobs for teachers and other school employees.<sup>60</sup> Further, recent federal fiscal policy has exacerbated the pressures on states to cut education and health programs due to caps on discretionary spending that have reduced federal support for state and local government programs to the lowest levels since 1989.<sup>61</sup> State and local government spending cuts targeting public employees also have reduced middle-class jobs and income security.<sup>62</sup>

In contrast to popular and expert suspicion of “redistributive” public subsidies for middle-class or low-income citizens, however, prevailing ideas about tax subtly help differentiate and legitimize the upward transfers of “corporate welfare” benefits. Government support for workers and nonwealthy families is often characterized as “redistribution” imposed by government fiat based on contested ideas of fairness and equality to the detriment of overall economic gain. In contrast, these business subsidies tend to be portrayed as economic development harnessing market forces to produce overall growth.

That is, extravagant public support for large corporations (and often their billionaire executives) often has been constructed not as regressive “redistribution” but as the going market price necessary for successful participation in a harshly competitive global economy.<sup>63</sup> By offering

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59. MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. ON BUDGET & POLICY PRIORITIES, YEARS OF CUTS THREATEN TO PUT COLLEGE OUT OF REACH FOR MORE STUDENTS 1 (2015), <http://www.cbpp.org/sites/default/files/atoms/files/5-13-15sfp.pdf> (reporting that the average state was spending 20 percent less per student in 2014–15 than in 2007–08) [https://perma.cc/EC6W-QKWK].

60. MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1–2 (2016), <http://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf> [https://perma.cc/YG8C-G56L].

61. Michael Leachman, *Federal Support for Most State and Local Programs Headed to 50-Year Low*, CTR. ON BUDGET & POL’Y PRIORITIES: BLOG (Sept. 24, 2015, 2:00 PM), <http://www.cbpp.org/blog/federal-support-for-most-state-and-local-programs-headed-to-50-year-low> [https://perma.cc/Y6TQ-FMPS].

62. See DAVID COOPER, MARY GABLE & ALGERNON AUSTIN, ECON. POLICY INST., THE PUBLIC-SECTOR JOBS CRISIS: WOMEN AND AFRICAN AMERICANS HIT HARDEST BY JOB LOSSES IN STATE AND LOCAL GOVERNMENTS (2012), <http://www.epi.org/files/2012/bp339-public-sector-jobs-crisis.pdf> (reporting that public employment cuts particularly affect women and African Americans) [https://perma.cc/DM8P-W65S].

63. See PHILIP MATTERA ET AL., GOOD JOBS FIRST, TAX BREAKS AND INEQUALITY: ENRICHING BILLIONAIRES AND LOW-ROAD EMPLOYERS IN THE NAME OF ECONOMIC DEVELOPMENT 12 (2014), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/taxbreaksandinequality.pdf> [https://perma.cc/CX4N-7FSD].

escalating subsidies despite the risk of destructive results and dubious gains, government leaders (and the voters who support them) can nonetheless appear to be hard-nosed and responsible leaders accommodating a new economic reality of scarce, concentrated, and highly mobile capital. But because the public incentive payments are not bargains granting a meaningfully enforced right to goods or services in return, this price operates more like a tax or tribute paid to the corporations out of dependence on their undemocratic and superior power.

### *C. Taxes Structured to Cultivate Subordinates, Not Citizens*

Some new state and local incentive policies go further to construct middle-class benefits as a resource to be tapped by government for the benefit and control of private capital. This section discusses two examples: first, channeling business subsidies directly through workers' wages; second, channeling business subsidies directly through public higher education.

#### 1. Employee Income Tax Diversion

First, a recent state tax innovation provides for corporations directly to extract economic development subsidies from middle-class earnings through diversions from workers' personal income taxes. A 2012 report by Good Jobs First (a group advocating for subsidy reform) showed that sixteen states provided for over 2700 companies to receive some or even all of the state personal income taxes withheld from their workers' paychecks (either by directly appropriating the taxes withheld or by receiving grants or tax credits keyed to the withheld wages).<sup>64</sup> A significant portion of these tax policies have been implemented since 2009,<sup>65</sup> with employers reaping a total of nearly \$700 million annually, directly from their workers' wages.<sup>66</sup> Major national corporations that have been given these direct benefits from wage taxes include Tyson Foods, Goldman Sachs, Procter & Gamble, Nissan, and Boeing.<sup>67</sup> In 2008, New Mexico used wage withholding as part of the \$130 million state funding package used to attract a solar energy panel manufacturing facility promoted by predictions it would create thousands of jobs.<sup>68</sup> After less than two years in operation, the German

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64. PHILIP MATTERA ET AL., GOOD JOBS FIRST, PAYING TAXES TO THE BOSS: HOW A GROWING NUMBER OF STATES SUBSIDIZE COMPANIES WITH THE WITHHOLDING TAXES OF THEIR WORKERS 12–16 (2012), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/taxestotheboss.pdf> (discussing five states with programs extracting 100 percent of workers' income tax withholdings and many others providing for diversion of over half of tax withholdings) [<https://perma.cc/UQR6-A9P6>].

65. *Id.* at 15–16.

66. *Id.* at 12.

67. *Id.* at 17–21.

68. *Id.* at 18.

corporate owner closed the plant, keeping about \$12 million in state government grants.<sup>69</sup>

These personal income diversion policies stem in part from the fact that large corporations have been so successful in minimizing taxes that state and local governments are running short on substantial opportunities for further exemption from state, property, and corporate income taxes.<sup>70</sup> Workers' personal income tax payments therefore have become additional resources tapped by governments to "buy"—or, more accurately, "donate to"—private capital controlled by others. In effect, these tax incentives require workers to finance their own (insecure) jobs out of their own wages (without ownership or control rights in return), taking the idea of tax incentives for "self-reliance" much further than the federal tax-favored savings accounts or earned income tax credits.

In addition, this tax design constructs public spending as an individualized direct transfer from private employees to private corporations, seemingly casting aside the role of government as a mediating public authority. This direct diversion of tax revenue seems to underscore a popular sense that middle-class citizens only superficially exercise democratic control over government fiscal policy, given the political influence of big money and external pressures from the tough global competition for economic development.

Moreover, this direct tax diversion further lowers expectations that tax incentives will produce lasting economic growth. Reductions in taxes for new private business development in theory carry at least the potential for some degree of offsetting personal tax revenue over the long term from the jobs created. In contrast, these subsidies are structured to preclude this indirect gain to public resources, especially because these personal income tax diversions are often in addition to other tax reductions.

Though individual workers may gain from the wages from subsidized jobs, with some possible spillover effects boosting sales and property taxes, their diverted income tax payments will mean income taxes on other middle-class workers and businesses are strained or increased to cover existing government programs. Faced with declining tax revenue, stagnant or declining middle-class income, and pressure to continue to attract capital with low taxes, governments are likely to respond with spending cuts especially affecting middle-class workers, including cuts in the public employment and public employee benefits that have been a major source of middle-class security and buying power in many communities.

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69. Rob Nikolewski, *New Mexico Takes Another Stab at a Big Solar Venture*, WATCHDOG.ORG (Apr. 3, 2015), <http://watchdog.org/209845/new-mexico-solar-city/> [https://perma.cc/HJH7-FF4R].

70. DAVID CAY JOHNSTON, *THE FINE PRINT: HOW BIG COMPANIES USE "PLAIN ENGLISH" TO ROB YOU BLIND* 236 (2012).

## 2. Higher Education As Business Tax Subsidy

A second innovation draws tax support for private economic development directly from public higher education. Governments have long promoted public higher education as a means to economic development, using government funding to support academic institutions, students, and faculty; to build research facilities; and to create an educated workforce that can then attract and benefit private businesses.<sup>71</sup> In the last several years, New York Governor Andrew Cuomo has taken this idea to a new level.

In 2013, the Governor launched a new tax incentive program called START-UP NY,<sup>72</sup> making the state's public higher education institutions "tax-free development zones" for qualifying new, expanding, or relocating high-tech businesses and start-ups (excluding professional services, hospitality and restaurant industries, retail and wholesale, and energy production and distribution).<sup>73</sup> For business operations in the tax-free campus zones, the program offers ten years of complete exemption from state business taxes, sales and use taxes, telecommunications excise taxes, local commuter taxes, and real estate leasing or transfer taxes.<sup>74</sup> In addition to these business tax benefits, the program exempts personal income of all new employees for these business operations from individual state taxation for the first five years, and then for an additional five years this personal income tax exemption is limited to \$200,000 in income for individuals or \$300,000 for taxpayers filing a joint return.<sup>75</sup>

Program publicity explains that by tying these tax-free zones to academic institutions, businesses will have access to research facilities and personnel (including low-cost or free labor from students and perhaps faculty).<sup>76</sup> In turn, the publicity claims that faculty will benefit from opportunities for research supporting the businesses, and students will benefit from

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71. See generally ELIZABETH POPP BERMAN, *CREATING THE MARKET UNIVERSITY: HOW ACADEMIC SCIENCE BECAME AN ECONOMIC ENGINE* (2012) (analyzing historical development of industry-university partnerships such as in biotechnology).

72. The full program name is "SUNY Tax-free Areas to Revitalize and Transform Upstate NY." See *A New Chapter for New York*, SUNY, <https://www.suny.edu/impact/business/start-up-ny/> (last visited Apr. 29, 2016) (promoting website for the program) [<https://perma.cc/F4JW-XRFR>].

73. Press Release, N.Y. State Governor, Governor Cuomo Launches Start-Up NY Program at International Conference in New York City (Oct. 22, 2013), <https://www.governor.ny.gov/news/governor-cuomo-launches-start-ny-program-international-conference-new-york-city> [<https://perma.cc/76CN-45FD>].

74. 2013 N.Y. A.B. 8113, enacted June 24, 2013, as 2013 N.Y. Laws 68, creates the new Article 21 of the New York Economic Development Law (codified at N.Y. ECON. DEV. LAW §§ 430–440 (McKinney 2015), amending N.Y. TAX LAW §§ 39, 39-a, 40, 180, 181, 210, 606, 612, 803, 1119, 1340, 1405 (McKinney 2016)); N.Y. REAL PROP. TAX LAW § 420-a (McKinney 2016).

75. *Pay Zero Taxes for 10 Years? Yes, Really*, START-UP NY, <http://startup.ny.gov/tax-break-information> (last visited Apr. 29, 2016) [<https://perma.cc/CR3L-DJ78>].

76. *What Is START-UP New York?*, START-UP NY, <http://startup.ny.gov/> (last visited Apr. 29, 2016) [<https://perma.cc/5PBX-DJHT>].

opportunities for on-campus internships, jobs, and experiential learning.<sup>77</sup> The State University of New York (SUNY) highlights the program as an example of its leadership in “[I]everaging our position as New York’s premiere driver of economic activity” and “creating an entrepreneurial 21st century college campus.”<sup>78</sup>

State policy has combined these new generous subsidies for private businesses with new sacrifices from SUNY students, faculty, and staff. Under threats of major layoffs as part of the Governor’s plan to cut \$450 million from state workers, SUNY employee unions agreed to several years of wage freezes (followed by modest raises), increased health insurance costs, and “deficit reduction” involuntary furlough days.<sup>79</sup> The Governor’s higher education initiatives also have implemented five years of annual increases in student tuition, with additional increases in fees for some campuses. Though the tuition increases have been relatively modest, they hit at a time of recession straining many middle-class and low-income families, building on twenty years of SUNY tuition increases averaging 6.7 percent annually as state funding has declined.<sup>80</sup> Unlike the subsidized businesses on campus, SUNY workers and students and the private businesses that serve them on campus will continue to pay income, sales, and other taxes.

The first year of the START-UP NY program supported seventy-six new jobs in thirty businesses, only four of which moved from out of state.<sup>81</sup> Examples of businesses receiving the benefits included one relocating from the center of a small village to a local industrial park a mile away and another, already located next to a campus, which moved to a neighboring building to qualify.<sup>82</sup> Although businesses in the program do include a number of middle-class entrepreneurs, some of these may not benefit much from the tax incentives because their business ventures are unlikely to generate significant revenue or salaries in their initial years.<sup>83</sup>

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77. See, e.g., *START-UP New York: A New Chapter for New York, SUNY*, SUNY, <https://www.suny.edu/impact/business/start-up-ny/> (last visited Apr. 29, 2016) (highlighting benefits to students and faculty as well as to businesses) [<https://perma.cc/7XDE-RHWS>].

78. *Id.*

79. Thomas Kaplan, *State Employees’ Union Accepts Wage and Benefit Concessions*, N.Y. TIMES (Aug. 16, 2011), <http://www.nytimes.com/2011/08/16/nyregion/state-employees-union-accepts-wage-and-benefits-concessions.html> (reporting the contract agreement with CSEA, the union representing many SUNY staff) [<https://perma.cc/3DTA-WW2S>]; Rick Karlin, *UUP Members Vote ‘Yes’ on Contract*, ALBANY TIMES UNION: BLOG (June 4, 2013, 4:22 PM), <http://blog.timesunion.com/capitol/archives/188347/uup-members-vote-yes-on-labor-contract/> (reporting the contract agreement with UUP, the union representing SUNY faculty and professional staff) [<https://perma.cc/L44J-PVM5>].

80. Press Release, N.Y. State Governor, Governor Cuomo Signs NY SUNY 2020 Legislation (Aug. 9, 2011), <https://www.governor.ny.gov/news/governor-cuomo-signs-nysuny-2020-legislation> [<https://perma.cc/Z2HK-98ZC>].

81. Susanne Craig & Jesse McKinley, *Cuomo’s Job Creation Program Is Slow to Take Hold*, N.Y. TIMES (May 14, 2015), <http://www.nytimes.com/2015/05/15/nyregion/for-76-new-jobs-new-york-state-has-spent-tens-of-millions.html> [<https://perma.cc/3AXB-6WJD>].

82. See Mike Hendricks, *The Other Side of Start-Up NY*, ALBANY BUS. REV. (Jan. 30, 2015), <http://www.bizjournals.com/albany/print-edition/2015/01/30/the-other-side-of-start-up-ny.html> [<https://perma.cc/DMH9-W5BF>].

83. See Craig & McKinley, *supra* note 81.

Adding to concerns about the impact of uncertain economic development gains and lost tax revenue, the state spent over \$45 million in initial advertising for the program.<sup>84</sup> An investigation by the State Comptroller faulted this expensive marketing effort for its failure to identify goals or expected outcomes beyond broad and vague references to creating jobs.<sup>85</sup> In response, the Chief Executive Officer of the economic development corporation operating and marketing the program defended its success in terms of “changed perceptions,” such as showing businesses that the state “[has] its act together” and is “back in the game.”<sup>86</sup>

Indeed, this program is evidence that cultural, symbolic, and political change should be understood as the overarching purpose of tax incentive policies. New York’s tax-free campus development initiative appears tailored particularly to change perceptions of the purpose and place of public higher education and more deeply to change perceptions of responsible middle-class citizenship and democratic government.

These campus-based tax incentives represent a message that the new economy requires enhanced public support for private capital development combined with more personal responsibility for human development. Reflecting a broader shift in ideology of productivity and dependency, the SUNY-based tax incentive program positions the selected businesses as specially deserving of public support. In contrast, students, faculty, and other workers on campus (and the private campus businesses that serve them) are treated as especially dependent on the jobs and resources promised by outside entrepreneurs. As passengers on a more powerful and important economic engine driven by others, students, faculty, staff, and their service providers are expected to bear the increased costs and bumps of that ride as the market price of their position of relative unproductivity.

Consistent with general neoliberal ideology, which idealizes unequal and undemocratic government economic support, this is a vision where government takes on the role as business partner, but in a subordinate position without equal rights to control or to share in gains. The SUNY program’s message goes further than promoting economic revival through innovative business entrepreneurship or new technology. That mission is commonly advanced by direct public spending for academic programs, student scholarships, research and development, job training programs, or small business development programs. But by instead rewarding a small number of firms for affiliating with local academic institutions, and by giving academic leadership significant power to select, manage, and gain from those business subsidies, the program signals a step away from ideals of both academic independence and market independence.

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84. THOMAS P. DiNAPOLI, N.Y. STATE OFFICE OF THE STATE COMPTROLLER, *MARKETING SERVICE PERFORMANCE MONITORING: EMPIRE STATE DEVELOPMENT 10–11* (2015) (auditing this expenditure along with other economic development marketing expenditures).

85. *See id.* at 44 (commenting on the State Comptroller’s justifications for the advertising).

86. Craig & McKinley, *supra* note 81 (quoting Howard Zemsky, owner of a major Buffalo real estate development company and Chief Executive of Empire State Development Corporation).

In a kind of clientele relationship between academic institutions, businesses, and state political leaders, the campus is charged with encouraging research and teaching that benefits the specific companies identified as its partners and with justifying the highly politicized program by aiding the company's success. For example, the Governor proposed to provide salary bonuses to state campus presidents and professors based on their success in attracting and generating profits for businesses in the program. However, that proposal was withdrawn after the legislature's Higher Education Committee Chair raised concerns about academic integrity and conflicts of interest.<sup>87</sup>

The program appears designed to promote a popular impression of political propaganda and cronyism more than substance, with marketing tailored more toward promoting the Governor than informing businesses of the intricate selection criteria and application process. The deeper and subtler public perception may be to confirm suspicions that economic success—in higher education as elsewhere—depends less on pursuing hard work, economic or societal value, and integrity and more on cultivating relationships likely to bestow favors in exchange for loyalty or docility. The cultural change produced by these programs, in other words, is less about producing viable economic growth and more about lowering middle-class expectations for benefiting from economic growth—or even from democratic political citizenship.

### III. CHALLENGING TAX IDEAS OF DEMOCRATIC POWERLESSNESS

To better challenge fiscal policies driving unequal austerity, we must change two underlying ideas: first, that productivity depends primarily on private capital and second, that current equal prosperity is limited by economics, not politics. Instead, the public power to tax and spend is a fundamental source of economic growth, fundamentally grounded in political citizenship not private transactions.

These ideas have been impeded by optimal tax theory,<sup>88</sup> which “balances the benefits of redistribution against the inevitable costs of tax-induced distortions to produce a welfare-maximizing regime.”<sup>89</sup> Though real tax policy bears little resemblance to this theory's ideal,<sup>90</sup> the theory nonetheless powerfully fuels scholarly and political acceptance of policies of inequality as sound economics, rather than as elitist interest and ideology.<sup>91</sup> But a more complete economics rejects the idea that tax “distorts” a naturally “welfare-maximizing,” pre-political economic order

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87. Will Brunelle, *Cuomo Ties Business Initiative to SUNY Funding*, POLITICO N.Y. (Mar. 4, 2015, 5:40 AM), <http://www.capitalnewyork.com/article/albany/2015/03/8563333/cuomo-ties-business-initiative-suny-funding> [<https://perma.cc/C3AT-DAVR>].

88. See Sugin, *supra* note 8 (analyzing this theory's ideas about fairness and justice).

89. Raskolnikov, *supra* note 10, at 526.

90. *Id.* (noting the real tax system has “little in common” with optimal tax theory).

91. See Edward J. McCaffery & James R. Hines, Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031, 1037 (2010) (noting the influence of the ideas of optimal tax theory even among liberals).

driven by free individual preferences, especially because that naturalized market vision omits an economic analysis of money.<sup>92</sup> Modern money theory explains that political and legal systems for creating, regulating, and distributing money are fundamental to economic prosperity and stability, necessarily shaping (not “distorting”) and facilitating private exchanges of goods and services.<sup>93</sup>

For governments with substantial control of their own currency—like the U.S. federal government—this macroeconomics of money shows that the primary purpose of taxation is not to raise revenue from private production for public spending.<sup>94</sup> Instead, with sovereign power over currency, public funds can be created “through keystrokes.”<sup>95</sup> Although inflation can potentially limit that power, that risk is far more confined, contextual, and uncertain than typically assumed by simplified neoclassical economics. Instead, the economic costs and benefits of public money creation depend on the contingent, complex value-laden questions of how that money is spent and invested and how effectively taxes and other forms of regulation help steer economic and political activity toward the productivity, stability, and legitimacy that will help maintain currency value. Taxation is primarily and properly regulatory, not revenue raising.<sup>96</sup>

With a more accurate understanding of the macroeconomics of tax, we can see nonwealthy citizens as economically deserving of fiscal policy skewed in their favor, not as beneficiaries of “redistribution” or as “consumers” who must struggle to “buy” these favors with their taxes.<sup>97</sup> Instead, nonwealthy democratic citizens are potentially collective producers and owners of overall economic well-being, equally capable of and entitled to use the productive power of government for their benefit. The inherently public and political power to produce and control currency means that government can stimulate, lead, and regulate economic production without being dependent primarily on satisfying the demands of private capital.

Using tax policies to benefit particular social goals and to advance equality is not “redistribution” that deviates from normal or normative private economic maximizing, but rather reflects the core power of taxation

92. For a leading resource on the economics of money, see L. RANDALL WRAY, *MODERN MONEY THEORY: A PRIMER ON MACROECONOMICS FOR SOVEREIGN MONETARY SYSTEMS* (2012). See also MODERN MONEY NETWORK, <http://www.modernmoneynetwork.org> (last visited Apr. 29, 2016) (providing resources integrating this economics with legal analysis) [<https://perma.cc/XG3N-SZRV>].

93. See CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* (2014) (analyzing the historical role of money in creating and directing markets).

94. L. Randall Wray, *MMP Blog #31: Functional Finance: Monetary and Fiscal Policy for Sovereign Currencies*, NEW ECON. PERSP.: BLOG (Jan. 8, 2012), <http://neweconomicperspectives.org/2012/01/mmp-blog-31-functional-finance-monetary.html> (giving an overview of the economic principles) [<https://perma.cc/W7FK-HUT7>].

95. *Id.*

96. L. Randall Wray, *A Meme for Money, Part 4: The Alternative Tax Meme*, NEW ECON. PERSP.: BLOG (Dec. 6, 2012), <http://neweconomicperspectives.org/2012/12/a-meme-for-money-part-4-the-alternative-tax-meme.html> [<https://perma.cc/2QDQ-AS6P>].

97. See *supra* Part I (discussing current tax ideas of the middle-class responsibility for limited consumption and redistribution).

to direct the economy toward particular, inevitably contested, visions of economic well-being. Similarly, disproportionate taxes on the wealthy do not risk “distorting” otherwise normal and natural production, but rather can redirect economic production toward broader, fairer, and more sustainable economic growth and more stable, legitimate, and fair politics (for example, controlling the oligarchic political power of extreme wealth). Further, tax incentives can better enhance middle-class security not by rewarding individualized earning and saving subject to control of private capital, but by recognizing the greater economic power and security that is possible when middle-class citizens act collectively through government. Repositioned as productive drivers of economic growth, ordinary workers and taxpayers can better claim legitimate authority to ensure ample government support for the infrastructure, health and education, social insurance, regulatory systems, and high-waged, environmentally sustainable jobs that will better enable and protect their private income and assets.<sup>98</sup>

State and local governments (like many nations) that lack the public fiscal power derived from sovereign currency can nonetheless develop legal institutions to reduce public dependency on mobile private capital. In the United States, the recent austerity, deindustrialization, and job losses facing state and local governments could be alleviated by federal spending creating capital for state and local governments to use for economic and social development. Along with providing an alternative supply of job-creating capital, state and local governments could better ensure broad public benefits from private capital through federal law restricting location-based corporate subsidies as discriminatory interstate trade barriers, as the European Union has done to a significant extent.<sup>99</sup>

#### CONCLUSION

The middle class’s dependency on elite private capital for economic development and security is caused by politics and ideology, not by natural or inevitable economic constraints. The collective fiscal and monetary power of the U.S. federal government is constituted by “we the people,” and it can be used to increase opportunity and security broadly if that policy is under democratic control of citizens. For that power to be realized, we need a different tax story that makes public support for the economic and social well-being of the vast majority of citizens the benchmark for reasonable and responsible tax policy, not a presumptively unproductive “distortion.”

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98. See, e.g., Raúl Carrillo, *Your Government Owes You a Job*, NATION (Apr. 23, 2014), <http://www.thenation.com/article/your-government-owes-you-job/> (explaining that the United States has economic power to use public spending for full employment) [<https://perma.cc/32ZY-Q3YF>].

99. For an insightful analysis of European approaches to regulating these economic development subsidies and possible alternatives for U.S. law reform, see Tracy A. Kaye, *The Gentle Art of Corporate Seduction: Tax Incentives in the United States and the European Union*, 57 KAN. L. REV. 93, 100–44 (2008).