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We Are What We Tax

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SYMPOSIUM
WE ARE WHAT WE TAX
FOREWORD

Mary Louise Fellows, Grace Heinecke** & Linda Sugin****

INTRODUCTION

On November 12 and 13, 2015, the *Fordham Law Review* hosted a symposium entitled *We Are What We Tax*. We invited scholars with a wide array of expertise inside and outside of the tax arena to consider how tax laws have shaped public and private institutions, cultural norms and hierarchies, and societal values. The symposium has two distinct aims.

The first is to explore the effect on the body politic of tax systems that give reality to things that might not otherwise exist and make invisible that which is beyond taxation. Academics and policymakers (elected and nonelected alike) generally have a narrow economic and instrumentalist conception of tax laws. For them, taxes are a tool at the ready to address both fiscal and nonfiscal problems. In contrast, this collection of articles treats tax as a constitutive and a creative component of a nation's cultures, values, and institutions.

The far-reaching conception of tax law advanced in this symposium means that all legal areas of study and all disciplines outside the law have the potential to provide indispensable insights into a tax system and its impact on those subject to it. Therefore, the second aim of the symposium is to include the perspectives of nontax and nonlaw scholars. We asked each tax scholar to suggest a topic that would address the role tax laws play in defining, explaining, and forming society. With a tax scholar's thesis in hand and in collaboration with that contributor, we identified a nontax scholar who had an interest in either coauthoring or presenting a paper on a related topic. The symposium demonstrates that economics, history,

* Everett Fraser Professor of Law, Emerita, University of Minnesota Law School. In addition to their articles published here, we are grateful to all the symposium participants for two days of rich, interdisciplinary, and thought-provoking discussion. We also want to thank the Volume 84 Board of the *Fordham Law Review* for their unwavering dedication in preparing the symposium for publication. This foreword provides an overview of the symposium entitled *We Are What We Tax* held at Fordham University School of Law.

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sociology, and many areas of legal scholarship outside of tax have much to add to the debates taking place among tax scholars and policymakers.

We hope these contributions prompt tax scholars to engage in more robust analysis as they consider and reconsider well-known tax approaches and issues and that nontax scholars begin to appreciate how tax law implicates their seemingly unrelated fields. The contributors' reconception of tax laws as affected by and reflected in a nation's cultural values and social institutions challenges traditional approaches that treat taxes as an overlay on existing economic arrangements. Their articles most importantly demonstrate that the premise that *We Are What We Tax* fundamentally changes conventional understandings of tax systems and their significance in the lives of those who live under those tax systems.

We have organized the articles into the following four categories: (1) how and why tax progressivity gets undermined, (2) how reality gets translated into a tax system, (3) how tax expenditures realign the functions of the public and private sectors, and (4) how a self-assessment tax system has produced a crisis in the legal profession. This organization demonstrates the breadth of the topics considered in this symposium as it enhances understanding of related theses. Significantly, it also reveals how the articles interconnect with each other through the frequently recurring themes of economic inequality, fairness, and social justice.

I. HOW AND WHY TAX PROGRESSIVITY GETS UNDERMINED

Contributors Goldburn P. Maynard Jr.¹ and Timothy K. Kuhner² explore the unremitting sympathy for tax policies promoted on the promise of economic growth and the relentless opposition to a progressive tax that holds the promise of restraining inequality. Maynard, relying on cognitive psychology, explains—in the context of the attacks on the United States's wealth transfer taxes—why narratives about the “capable, smart, and hardworking” entrepreneur, however misleading, “trump science,” “become entrenched,” and lead to support and defense of the “social status quo,” including the “dominance of the wealthy in society, irrespective of the perceiver's own group membership.”³ Kuhner's far-reaching discussion of liberal and social democracies situates progressive taxation measures within neoliberalism.⁴ He details how, since the 1970s, “neoliberalism [has] brought about the “economization” of political life’ for the purpose of ‘capital enhancement.’”⁵ He looks to campaign finance rules in both presidential democracies and party finance rules more common to parliamentary systems of governance to show how “market interests and

1. See generally Goldburn P. Maynard Jr., *Perpetuating Inequality by Taxing Wealth*, 84 FORDHAM L. REV. 2429 (2016).

2. See generally Timothy K. Kuhner, *The Corruption of Liberal and Social Democracies*, 84 FORDHAM L. REV. 2453 (2016).

3. Maynard Jr., *supra* note 1, at 2448.

4. See generally Kuhner, *supra* note 2.

5. *Id.* at 2455–56 (quoting WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 17, 22 (2015)).

ideologies” have hijacked state power and how the neoliberal agenda of “privatization, deregulation, and physical austerity” has led to high levels of economic inequality and political disempowerment.⁶

Symposium contributor Victor Fleischer, investigating the effect of various tax policies that lower the rate of tax on entrepreneurial income, considers some of the same issues that Maynard raises.⁷ Fleischer at the outset notes the absence of “empirical evidence to support a claim that taxes have a significant effect on entrepreneurship,” “job creation,” and “economic growth.”⁸ He posits that “[e]ntrepreneurship has long been recognized as a kind of ideology—with both positive and negative connotations” and that the “prevalence of ideology over evidence is hardly a new problem.”⁹ Fleischer goes on to argue that just as policymakers do not subject “constitutional rights like freedom of religion, freedom of speech, or democratic governance” to a “cost-benefit analysis,” they similarly treat “the effect of [low] taxes on entrepreneurship as a matter of faith, not reason.”¹⁰ He warns, however, that “how one thinks about economic freedom” should not “dictate how one thinks about taxes,” because it “confuses how we should think about risk, inequality, and merit in an entrepreneurial economy.”¹¹ He concludes that “[t]he strongest argument that entrepreneurship holds a special place in our legal system is one grounded in institutional economics.”¹² Fleischer urges policymakers to shift their focus from low taxes on entrepreneurship to issues of social mobility and the wider range of institutions necessary to support an entrepreneurial economy.¹³ With the tax code put to the side, he ultimately envisions an “economy that maximizes opportunities.”¹⁴

Symposium participants David Clingingsmith and Scott Shane, in response to Fleischer, directly address the relationship between increases in individual tax rates for high-income taxpayers and productivity by looking to the nexus between changes in tax rates and entrepreneurship.¹⁵ They present an extensive review and critique of both U.S. and non-U.S. empirical studies regarding the effect of changes in individual tax rates on entrepreneurship. Clingingsmith and Shane reveal the intractable theoretical and practical issues embedded in the studies and conclude that the extant studies do not provide significant support for either the claim that higher rates deter, or that lower rates spur, entrepreneurship. Like Fleischer, but for different reasons, Clingingsmith and Shane advise against

6. *Id.* at 2460 (quoting Claus Offe, *The European Model of “Social” Capitalism: Can It Survive European Integration?*, 11 J. POL. PHIL. 437, 447 (2003)).

7. See Victor Fleischer, *Job Creationism*, 84 FORDHAM L. REV. 2477 (2016).

8. *Id.* at 2479.

9. *Id.* at 2485–86.

10. *Id.* at 2486.

11. *Id.*

12. *Id.* at 2488.

13. See generally *id.*

14. *Id.* at 2489.

15. David Clingingsmith & Scott Shane, *How Individual Income Tax Policy Affects Entrepreneurship*, 84 FORDHAM L. REV. 2495 (2016).

using tax rates to encourage entrepreneurial activity. Given that the “population of entrepreneurs whose activities create substantial employment and productivity growth is small,” they argue that governments should not use “the blunt instrument of [reducing] individual income tax rates,” but instead should “address[] this population directly through targeted policies.”¹⁶

Contributors Ajay K. Mehrotra and Julia C. Ott address incursions on progressivity under the U.S. tax law by exploring “the origins and early development of our current capital gains tax preference.”¹⁷ The primary purpose of their article is to explain “[h]ow . . . this preference persisted for nearly one hundred years through numerous permutations of federal economic policy and countless changes to the federal income tax code.”¹⁸ They demonstrate “that the preference is not a timeless or transhistorical concept, but rather a historically contingent one—a concept that has been shaped not purely by economic logic, but rather by political compromise and social experience.”¹⁹ Their examination of “particular critical junctures in the path-dependent development of the [capital gains] preference” demonstrates “how the preference has endured because of changing political and social conditions.”²⁰ Mehrotra and Ott also “shed light on broader historiographical questions about the rise and fall of different guiding principles of [the] American political economy.”²¹ They “challenge the conventional historical wisdom that Keynesian economic thinking dominated the post-World War II period only to give way to the emergence of neoliberalism in the 1970s and afterward.”²² By providing evidence “that it is not simply wealthy and elite American taxpayers and their representatives who have supported this tax law,” they explain the “provision’s persistence” as resulting not only from “seemingly inexorable economic reasoning,” but also from “political forces and institutional inertia.”²³ Their work does more than further “our present understanding of the capital gains tax preference.”²⁴ It also echoes some of the same issues raised by the other four contributors when it addresses our current structural conceptions “of risk, wealth, and opportunity.”²⁵ Moreover, Mehrotra and Ott’s investigation of a specific tax rule in the furtherance of the symposium’s theme that *We Are What We Tax* uncovers “bigger questions about the causes and consequences of epistemic shifts and economic transformations.”²⁶

16. *Id.* at 2516.

17. Ajay K. Mehrotra & Julia C. Ott, *The Curious Beginnings of the Capital Gains Tax Preference*, 84 FORDHAM L. REV. 2517, 2522 (2016).

18. *Id.* at 2520.

19. *Id.* at 2521.

20. *Id.*

21. *Id.* at 2522.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 2521.

26. *Id.* at 2523.

In the United States, at least in more recent decades, even a moderately high progressive tax system remains a fiercely contested issue and seemingly beyond reach. For purposes of the theme of this symposium—*We Are What We Tax*—all six of these contributors provide strong evidence that the promotion of economic growth as a justification for low tax rates on the wealthy corresponds to and reinforces U.S. taxpayers’ perceived “legitimacy of the established hierarchy.”²⁷ Further, the contributors’ analyses of progressivity versus economic growth raise two other issues: Has U.S. tax policy diminished the cultural aspiration for economic equality? If not, can and should economic inequality be checked through government spending—as opposed to tax—policies?²⁸

II. HOW REALITY GETS TRANSLATED INTO A TAX SYSTEM

Contributor Tsilly Dagan uses the theme of the symposium as an opportunity to investigate the consequences of a tax system that necessarily “entails[] comparisons of people and their behavior[,] the assessment of individual attributes[,] as well as] interpersonal interactions and social institutions[,] and the translation of all of these” into the “systemic phenomenon” she calls the “currency of taxation.”²⁹ She addresses identity-related aspects of a measurement of income designed to distinguish that which encompasses the “domain of tax” and that which “lies beyond its perimeters.”³⁰ Dagan argues that “[i]n determining what does and does not count for tax purposes, the currency of taxation takes a stand about who we are (and who we should be).”³¹ As she says, it establishes a “‘normative taxpayer,’ thereby also impacting what we consider normal and what we consider unique.”³² It also “creates material incentives for certain resources, behaviors, and relationships, which are constitutive of human identity and thus actively support[s]” those very aspects of human identity.³³ Even more central to her identity-related concerns is that “the conversion of reality into the currency of taxation may, in itself, raise identity-related issues,” because of “the commodifying nature of the currency of taxation” and “the involvement of the government in the process.”³⁴ She selects four tax issues to illustrate the currency of taxation and its effects: (1) the deductibility of “commuting expenses,” which “spotlights the underlying assumptions regarding ‘normal’ aspects of an individual’s identity”; (2) the distinction made between “gifts and barter,” which “draws attention to tax’s role in shaping interpersonal interactions”; (3) the tax treatment of the “Israeli *kibbutz*,” which “exemplifies the interaction between tax and our constitutive communities”; and (4)

27. Maynard Jr., *supra* note 1, at 2449.

28. *See id.* at 2451 (arguing that repeal of the estate tax could be used as a “bargaining chip in broader budget negotiations”).

29. Tsilly Dagan, *The Currency of Taxation*, 84 *FORDHAM L. REV.* 2537, 2537 (2016).

30. *Id.* at 2538.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

“personal-based international taxation,” which “demonstrates tax’s effect on the political institutions to which we belong.”³⁵ Through a consideration of issues relating to deductions (commuting expenses), income inclusion (gift/barter distinction), incorporated communities (*kibbutz*), and the reach of a tax system’s jurisdiction (international taxation), Dagan argues “that the seemingly technical ways in which tax operates have some crucial effects on taxpayers’ identities, our communities, and political institutions.”³⁶ Further, she shows that the “canonical understanding” that the income tax is “an instrument for achieving the (at times conflicting) objectives of maximizing social welfare and promoting distributive justice” ignores the effects that the tax “may have on our personal and collective identities” and fails to appreciate that the conversion of human actions and interactions into the currency of taxation “is neither neutral nor technical in nature; rather, it involves considerable normative choices.”³⁷

Bruce G. Carruthers’s article, written in conjunction with Dagan’s, considers how public revenue systems can “serve as an instrument of cultural expression.”³⁸ Unique to this collection of articles, Carruthers primarily examines sin taxes. His work has a particular saliency to the symposium’s theme of *We Are What We Tax* and Dagan’s work because it investigates taxes that, by their very nature, explicitly reflect a government’s normative choices. “Just as personal income taxes recognize and give quantitative measure to various human attributes, resources, and interactions, excise taxes are also a precise numerical measure to stigmatized consumption . . . of market-based goods and services.”³⁹ An excise tax on what government deems undesirable consumption “can . . . serve as an instrument of cultural expression”⁴⁰ in that “taxation of stigmatized activity shares the stigma with the tax revenues, while at the same time mitigating that stigma because the problematic activity is now directly and publicly burdened with a tax.”⁴¹ Carruthers also considers how “budgetary earmarks can further mitigate the stigma by ensuring that at least some sin tax revenues support valuable and praiseworthy public policies.”⁴² Carruthers and Dagan both recognize that “[t]hrough its system of taxation,” a government “renders the private economy legible[] [and] recognizes some of its moral features.”⁴³

Contributor Sloan Speck, in his examination of the tax classification of business entities, confronts the difficulties a tax system faces when translating the legal, financial, and social realities of various forms of

35. *Id.* at 2539.

36. *Id.*

37. *Id.*; *id.* at 2546, 2545.

38. Bruce G. Carruthers, *The Semantics of Sin Tax: Politics, Morality, and Fiscal Imposition*, 84 FORDHAM L. REV. 2565, 2569 (2016).

39. *Id.* at 2571.

40. *Id.* at 2569.

41. *Id.* at 2574.

42. *Id.*

43. *Id.* at 2579.

business entities into an income tax system.⁴⁴ Taking into account changes in law, financial markets, business practices, and globalization, he challenges commentators and the U.S. Department of the Treasury for their reliance on “efficiency considerations” as the “guiding principle in determining an entity’s tax classification.”⁴⁵ He argues that, “while important, efficiency considerations should not function as the sole arbiter of the boundary between corporate and conduit tax treatment.”⁴⁶ To do so ignores the fact that “classical corporate taxation is, in many ways, deeply embedded within a larger network of legal and social meanings.”⁴⁷ Moreover, the “intuitive appeal” of “efficiency” may “mask significant empirical uncertainties about behavioral responses, especially if policymakers possess limited information, have difficulty reversing inapposite decisions, or face other constraints.”⁴⁸ For Speck, incongruities between social understandings and the “correct” policy from an efficiency perspective signal places where tax law may be “misaligned with other areas of law.”⁴⁹ In these instances, Speck advocates consideration of “social understandings” as “a way to resolve policy questions . . . where economic factors, such as incidence or net efficiency consequences, are uncertain or unclear.”⁵⁰

Whereas conventional tax analysis concerns itself with how much or how little a tax system or set of tax rules might affect economic activity, these three articles demonstrate the limitations of so narrow an approach to tax policy matters. The contributors make clear that the translation of reality into an operational tax creates, changes, and distorts that reality. They also put policymakers on notice to appreciate that technical components of a tax system, regardless of the nature of that tax, inevitably implicate normative choices and social understandings.

III. HOW TAX EXPENDITURES REALIGN THE FUNCTIONS OF THE PUBLIC AND PRIVATE SECTORS

A governmental body can accomplish its policy goals by appropriating funds directly to those in the private sector. Alternatively, it can accomplish those same goals by providing tax relief to private persons or entities. This tax relief is conventionally referred to as a tax expenditure to denote that it operates as the equivalent of a direct governmental subsidy.⁵¹

44. Sloan G. Speck, *The Social Boundaries of Corporate Taxation*, 84 *FORDHAM L. REV.* 2583 (2016).

45. *Id.* at 2584.

46. *Id.*

47. *Id.*

48. *Id.* at 2584–85.

49. *Id.* at 2596.

50. *Id.*

51. In the context of the U.S. federal income tax, Stanley S. Surrey introduced the idea of tax expenditure analysis in 1967. See Stanley S. Surrey, *The United States Income Tax System—The Need for Full Accounting*, in *TAX POLICY AND TAX REFORM: 1961–1969*, at 575, 575–85 (William F. Hellmuth & Oliver Oldman eds., 1973). For further elaboration of tax expenditures by Surrey, see STANLEY S. SURREY, *PATHWAYS TO TAX REFORM* (1973); STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985). For examples of

Contributors Linda Sugin⁵² and Rob Atkinson,⁵³ in their discussion of the U.S. tax law's treatment of charities and donations to them, move well beyond the efficiency-type criticisms typically lodged against tax expenditures. Contributors Lisa Philipps,⁵⁴ in her discussion of the Canadian law's tax incentives for personal saving, and Martha T. McCluskey,⁵⁵ in her discussion of state tax incentives to business, do the same. Presupposing *We Are What We Tax*, all four of these contributors unmask the power of tax expenditures to realign the functions of the public and private sectors. They further show how the realignment serves the wealthy, threatens the security of the less wealthy, and produces class identities.

Sugin, as she pays close attention to the rhetoric surrounding the law of charity—including U.S. tax treatment of charities—rejects and then reformulates traditional understandings of charitable institutions, charitable donations, and the related tax exemptions and deductions. Relying on case law, legislative history going back to England's Statute of Charitable Uses, and current tax approaches, she shows how the legal discourse focuses on the public nature, public interest, and public functions that the contributions support and the organizations serve.⁵⁶ Sugin challenges this public construction of the tax law of charity. She identifies how the tax law affirms the “private creation, private governance, and private funding of exempt organizations.”⁵⁷ She further demonstrates how the tax law of charity rejects a notion of tax in which “individuals are not entitled to their entire pre-tax income because part of that income is the return to social cooperation that must be shared with others.”⁵⁸ Instead, she persuasively argues that the tax law embraces the “appropriation conception” of the income tax in which “individuals are [morally] entitled to their pre-tax income and that society has no presumptive right to any part of it, despite its essential role in the creation of all income.”⁵⁹ She uses a number of examples to support this aspect of her thesis, such as generous tax benefits

more recent considerations of tax expenditure analysis primarily focusing on the U.S. federal income tax, see J. Clifton Fleming, Jr. & Robert J. Peroni, *Can Tax Expenditure Analysis Be Divorced from a Normative Tax Base?: A Critique of the “New Paradigm” and Its Denouement*, 30 VA. TAX REV. 135 (2010); Edward D. Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U.L. REV. 1 (2010).

52. See Linda Sugin, *Rhetoric and Reality in the Tax Law of Charity*, 84 FORDHAM L. REV. 2607 (2016).

53. See Rob Atkinson, *Liberalism, Philanthropy, and Praxis: Realigning the Philanthropy of the Republic and the Social Teaching of the Church*, 84 FORDHAM L. REV. 2633 (2016).

54. See 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).

55. See Martha T. McCluskey, *Framing Middle-Class Insecurity: Tax and the Ideology of Unequal Economic Growth*, 84 FORDHAM L. REV. 2699 (2016).

56. Sugin, *supra* note 52, at 2608 (referring to Charitable Uses Act 1601, 43 Eliz. 4 (Eng.)).

57. *Id.* at 2614.

58. *Id.* at 2617.

59. *Id.*

for donation of appreciated assets,⁶⁰ tax deductible donations to foundations or funds that donors “continue to control,”⁶¹ and case law and legislation designed to “enforce donor’s gift restrictions” and “expectations,” which, in effect, “treat donors as equivalent to owners.”⁶²

As Sugin emphasizes, “It is not a problem that charity is private. It is a problem that charity is private *and* coated with a public rhetoric,” because the “combination creates a bias against taxation” and the contraction of “the scope of government.”⁶³ From that understanding of the effect of the rhetoric surrounding the law of charity, she extends her thesis in two critical ways. One is to argue that “[a]nyone who turns to charity for distribution cannot really be committed to distributive justice because the law of charity—which is fundamentally private—is not designed to make charities effective in distributing.”⁶⁴ This part of her analysis relies on John Rawls’s theory of justice to maintain that “[j]ust distribution is possible, but only if government is willing to use the coercive power of taxation to address inequality.”⁶⁵ The second is to put forward a framework for how to determine the proper sphere for charitable institutions. Starting from the perspective that it is “better to ask what government is not suited to do,” she embraces a role for charity to “challenge and check government” and support “[m]ovements for social change, the arts, and religion.”⁶⁶ She reasons that once “government fully funds its responsibilities,” the need to embrace the “rhetoric of publicness” vanishes and the “disparate values and goals” of private institutions can thrive without the government, through the tax law and otherwise, imposing an unwarranted level of scrutiny.⁶⁷

Atkinson, who looks to a broad range of philosophers—including, but not limited to, Ayn Rand, Thomas Aquinas, and John Stuart Mill—further examines the question raised by Sugin concerning “the liberal state’s proper philanthropic role” and its justified place in our legal and fiscal systems.⁶⁸ He shows how philanthropy simultaneously includes both private and public aspects: “[P]hilanthropy is the work not only of private parties, alone and in private philanthropic organizations, but also of an activist state, a philanthropic republic.”⁶⁹ He sees philanthropy as resolving the tension between too much state control and too little state control and serving as common ground to holders of moral views across the political spectrum.⁷⁰ While he acknowledges a distrust of democracy, he concludes that “it is better for the work of philanthropy to be done by the state than for that

60. *Id.* at 2618.

61. *Id.* at 2619.

62. *Id.*

63. *Id.* at 2620.

64. *Id.* at 2620–21.

65. *Id.* at 2626.

66. *Id.* at 2627.

67. *Id.* at 2627–28.

68. Atkinson, *supra* note 53, at 2633.

69. *Id.* at 2637 (citations omitted).

70. *See generally id.*

work to be left undone.”⁷¹ Atkinson extends the symposium’s theme of *We Are What We Tax* by setting out the “distinct economic functions of the modern liberal state,”⁷² grounding “an ethics of philanthropy . . . in both the Western Classics and the Abrahamist Scriptures,” showing how “this ethic can accommodate both religiously respectful agnostics . . . and morally rational theists,”⁷³ and establishing a framework to determine how philanthropic we as philanthropists “want our liberal state to be.”⁷⁴ His liberal state offers opportunity and guarantees individual freedom, accommodating philanthropy in the process.⁷⁵ Atkinson’s consideration of philanthropy, through an examination of the proper role of the state, enhances the force of Sugin’s thesis at the same time that it enriches the distributive justice questions raised throughout this symposium.

Philipps and McCluskey also address distributive justice and the proper allocation of responsibilities between the state and private actors. Looking at two quite different types of tax incentives in two quite different jurisdictions, they both conclude that tax policies have shifted economic risk from the state to the working and middle classes, leaving them more financially insecure with insufficient recourse to their government for relief. Both contributors demonstrate the inadequacy, ineffectiveness, and incompleteness of the government’s policy responses to economic insecurity and inequality. Both also interrogate how these responses negatively affect the identities of members of the working and middle classes and lower their expectations for financial security for themselves and their families.

Philipps’s study of the “rise of tax incentives for saving as a prominent feature of Canadian personal tax policy over the two decades from 1995 to 2015” demonstrates that the “presentation, design, and language of [what are referred to as] registered savings plans have shaped the content of middle-class identity, including the behaviors, expectations, and aspirations that condition membership in this identity group.”⁷⁶ Her approach, which builds on Judith Butler’s performative theory of gender, treats tax policy “as actively producing rather than simply reflecting preexisting understandings of the middle class.”⁷⁷ After outlining the influence of “consumption tax theory, fiscal federalism, and neoliberalism,” in the creation and expansion of tax-preferred registered savings plans, Philipps raises serious questions about the effectiveness of these tax expenditure provisions, highlighting the lack of evidence that household savings have increased or that economic insecurity has decreased.⁷⁸ Her point, though, is not only that the tax rules reflect bad public policy as government no longer

71. *Id.* at 2673.

72. *Id.* at 2641.

73. *Id.*

74. *Id.* at 2664.

75. *See id.* at 2633.

76. Philipps, *supra* note 54, at 2677–78.

77. *Id.* at 2678. With regard to her reliance on Judith Butler, see as an example JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (2006).

78. Philipps, *supra* note 54, at 2685.

takes responsibility for “leveling the playing field” and instead plays the role of “an investment partner who gets involved only in proportion to the private initiative of individual savers.”⁷⁹ Her analysis goes further to show how the registered savings plans “present an image of middle-class individuals exercising choice and agency, achieving financial goals through rational planning and self-discipline.”⁸⁰ As Philipps writes, the expectation of rewards in the “future enables tax law to posit an aspirational middle-class subject as an ideal that might not be experienced in the present but is always in the process of being realized.”⁸¹ She acknowledges that the registered savings plans have garnered “widespread acceptance.”⁸² She argues, however, that their popularity “is due in part . . . to the normative ideal of middle-class identity that [the registered savings plans] have helped to produce—one based on choice, agency, and the promise of future social mobility for oneself or one’s children through self-discipline and self-management.”⁸³ To have one of these registered savings plans confers “a form of cultural recognition that [goes] beyond its capacity to meet material needs.”⁸⁴ She concludes that these plans are likely to remain part of the Canadian tax law “not because they actually deliver the benefits they promise to most people but rather because they have been assimilated into Canadian middle-class identity.”⁸⁵

McCluskey addresses some of the same issues raised by Philipps in her examination of the resources state and local governments accord private businesses. McCluskey observes that governmental jurisdictions have redirected their “support away from ordinary workers, families, and consumers toward protecting concentrated private market wealth as the primary engine of economic prosperity.”⁸⁶ She further contends that current policies, including tax policies, make the economic well-being of the middle class dependent “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.”⁸⁷ She describes 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.”⁸⁸ To support her arguments, she draws attention to an array of state and local policies aimed at providing a favorable business climate. Acknowledging the political and economic pressures on localities to offer these tax giveaways,⁸⁹ she

79. *Id.* at 2690.

80. *Id.* at 2686.

81. *Id.* at 2687.

82. *Id.* at 2697.

83. *Id.*

84. *Id.*

85. *Id.* at 2698.

86. McCluskey, *supra* note 55, at 2700.

87. *Id.* at 2708.

88. *Id.* at 2700.

89. *See id.* at 2711.

assembles substantial data to show that large multinational corporations, rather than local firms owned and operated by middle-class entrepreneurs, enjoy a substantial share of the tax subsidies. She also explains that the middle class, even with the hope of employment, however long or short lasting, ends up paying for “corporate welfare” through higher taxes, reduced public spending, and reductions in public employment—including layoffs and reductions in employee pensions and health insurance benefits.⁹⁰

In her last example of governmental jurisdictions shifting resources away from the middle class and toward private capital, McCluskey reveals the depth and breadth of the incursions on the middle class’s economic security. She describes a tax incentive program, launched in 2013 in New York, “making the state’s public higher education institutions ‘tax-free development zones.’”⁹¹ The program includes a ten-year exemption from many different state taxes, such as business taxes and local commuter taxes. For five years, it even exempts from state taxation the “personal income of all new employees,” with a less generous exemption extending another five years.⁹² As McCluskey starkly explains, the state has decided to leverage public universities—a public resource central to middle-class opportunity⁹³—in its efforts to attract qualifying “high-tech businesses and start-ups.”⁹⁴ She views this form of subsidy to private business as risky, because it raises the very real potential that market and political pressures will compromise academic freedom and independence. As important, the example she uses raises a warning about the incremental, and apparently unchecked, growth of tax expenditures for the benefit of private capital. Not only do the tax expenditures constrain government’s ability to provide public goods, they also effectively can facilitate private enterprise’s capture of existing public resources. McCluskey’s analysis of local and state tax policies leads her to conclude that “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.’”⁹⁵

Even as they embrace dissimilar methodologies across diverse subjects, each of these four contributors provides important insights into the appropriate allocation of responsibilities, as between public and private spheres, for the well-being of the polity. The contributors examine, in distinctive ways, how tax expenditures have introduced instability in the distinctions between public and private goods, public and private action, and public and private ownership. They also show that the instability of the public/private dyad in turn exacerbates economic inequality. As the contributors challenge the privatization of public resources and

90. *Id.* at 2712.

91. *Id.* at 2715.

92. *Id.*

93. *Id.* at 2715–16.

94. *Id.* at 2715.

95. *Id.* at 2720.

responsibilities, they persuasively demonstrate that governmental jurisdictions have inexorably relied on the rhetoric of the public good to adopt tax policies that disproportionately benefit the moneyed classes. Philipps and McCluskey additionally show that tax policies produce working-class and middle-class identities that enhance the interests of the wealthy.

IV. HOW A SELF-ASSESSMENT TAX SYSTEM HAS PRODUCED A CRISIS IN THE LEGAL PROFESSION

The contribution to the symposium by John S. Dzienkowski and Robert J. Peroni shifts focus away from the substantive aspects of tax systems and instead focuses on the practical operation of the tax law.⁹⁶ Their conviction that “[t]he United States faces a tax-avoidance crisis that seriously undermines the integrity and effectiveness of the federal income tax system” prompts their rigorous examination of the historical and current role of tax advisers, particularly the role of tax attorneys.⁹⁷ In keeping with the symposium’s theme of *We Are What We Tax*, their analysis establishes the significant negative impact the administration of the U.S. federal income tax has had on legal ethics and the legal profession itself.

They demonstrate that early debates were dominated by tax practitioners and scholars who approached the role of the tax adviser philosophically with a focus on the “voluntary, self-assessment tax system that was enacted through democratic processes and that presumably reflects the democratic values of American society.”⁹⁸ Dzienkowski and Peroni further explain that the “Cold War environment” and the recognition of the “need for the United States to be prepared for another major armed conflict” placed a check on the introduction of “parochial concerns of the legal profession” as tax practitioners addressed ethical standards.⁹⁹ Dzienkowski and Peroni recognize that the tax bar likely had an interest in elevating its “status” and “reducing the influence of litigators” in the “development of legal ethics codes.”¹⁰⁰ Nevertheless, among the various legal specialties, such as tax, banking, and securities—all of which developed in tandem with the growth of the regulatory state before and after World War II—they note that a “significant segment of [tax] professionals” were among the first to argue that “they owed duties to the system . . . as well as to their clients.”¹⁰¹

Over the years the American Bar Association (ABA) issued ethics opinions tightening the standards regarding tax advice provided to a client, and the Treasury, the Internal Revenue Service (IRS), and Congress federalized the regulation of professional conduct, including providing for penalties and a tax return disclosure system. As Dzienkowski and Peroni

96. See John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 *FORDHAM L. REV.* 2721 (2016).

97. *Id.* at 2721.

98. *Id.* at 2725.

99. *Id.* at 2726.

100. *Id.*

101. *Id.*

explain, these efforts were not sufficient to avoid “two major waves of tax shelter abuses”—one that “began in the 1960s . . . and lasted until the mid-1980s” and the other that “began in the late 1990s and continued into the 2000s.”¹⁰² With their description of the most recent wave of tax shelters, they demonstrate the dramatic change in tax lawyers’ professionalism. According to Dzienkowski and Peroni, this change can be attributed to “[s]tructural changes in the practices of professionals in the modern global economy,” exemplified by accounting firms’ failed efforts in the 1990s, thanks to the ABA, to provide multidisciplinary services in the United States.¹⁰³ Notwithstanding the general limitation on providing legal services to their clients, accounting firms could expand into and compete with attorneys in the tax area, because decades earlier the Treasury and IRS had authorized accountants to provide tax advice. Dzienkowski and Peroni also cite other aspects of the market pressures facing tax practitioners. In particular, they describe the economic stress on various departments in large law firms to produce revenue in the face of the Great Recession of the mid-2000s and the decision of many corporations to reduce their reliance on expensive outside counsel through expansions of their own legal departments.¹⁰⁴ Finally, in contrast to cultural attitudes and influences in other countries, Dzienkowski and Peroni look not only to the tax abusive conduct of the tax bar, corporations, and wealthy taxpayers, but also to Watergate and ensuing political scandals, unpopular wars, and partisan attacks on the tax system and the IRS. They conclude that over time the social norms necessary to sustain the U.S. self-assessment tax system have been undermined severely.¹⁰⁵

Dzienkowski and Peroni show that the forces leading to significant and substantial tax evasion have to do as much with the fraying of social norms as they do with the internal operation and administration of a tax system. They propose reform measures to counteract the economic stresses and incentives leading tax advisers to engage in aggressive tax avoidance activity. Of course, even Dzienkowski and Peroni would agree that a rife of other big and small changes in civil society is necessary before the hostility toward government, government regulation, and taxes subsides and the crisis in the professional conduct of tax advisers abates.

CONCLUSION

The contributors, through a range of specific topics, investigate how tax laws propagate a constrained understanding of ownership and productivity and establish class identities along a dignity spectrum in which those with accumulated wealth are deemed more worthy than others. They also challenge the conventional distinctions between labor and capital, individuals and community, and public and private. This foreword

102. *Id.* at 2729, 2730.

103. *Id.* at 2731.

104. *Id.* at 2732.

105. *See id.* at 2753.

highlights and underscores the impact and import of their work. Our hope, as organizers, is that this symposium, especially in light of the contributors' rich analyses, will stimulate studies of other income tax issues, such as the doctrine of realization; treatment of debt; tax accounting, especially the coordination of income and expenditures to earn that income; and the distinction between business and personal taxation. We would add to that list the issue of valuation, which plays an outsized role in a number of different tax systems, including income taxes, wealth transfer taxes, and property taxes. The work of the contributors, with their innovative and creative approaches to the theme of *We Are What We Tax*, has provided a strong foundation on which to build this new area of inquiry.