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The Social Meaning of the Tax Cuts and Jobs Act

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ABSTRACT. This Essay exposes the moral messages implicit in the Tax Cuts and Jobs Act (TCJA). It argues that the legislation reflects values that were not openly debated or discussed in the legislative process, but are crucial to the distributional effects of the law. The TCJA reduces progressivity and increases deficits because it favors traditional families, prefers capital to labor income, treats people as detached from each other, makes charity the narrow concern of the rich, and privileges the acquisition of assets. Fairness in taxation depends on explicitly identifying social values that produce economic justice and purposely designing the law to achieve fairness.

INTRODUCTION

A nation's tax law reflects its values, and tax reform is an important moment to examine how the tax law defines national priorities. The changes Congress made to the Internal Revenue Code in the 2017 Tax Cuts and Jobs Act (TCJA)[1] reveal ideals beyond those Congress explicitly identified and defended in the legislative process. While scholarly discussion of the proposed legislation focused primarily on efficiency concerns,[2] a wide range of social policies became embedded in the economic structure the tax law creates. Whether policy makers consciously created social policy based on these values is less important. Identifying these values, though, is crucial, as the resultant policies will affect all Americans in myriad ways.

1. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

2. *See, e.g.*, Alan D. Viard, *Economic Effects of the Corporate Tax Rate Reduction*, 158 TAX NOTES 1393, 1400 n.17 (2018) (focusing on the efficiency gains of the corporate rate cut); *see also* JANE G. GRAVELLE, CONG. RESEARCH SERV., R44823, THE "BETTER WAY" HOUSE TAX PLAN: AN ECONOMIC ANALYSIS 2, 6-7 (2017), https://fas.org/sgp/crs/misc/R44823.pdf [https://perma.cc/BGW9-GEYZ] (discussing efficiency as an objective of tax reform in terms of the allocation of capital and the equal treatment of investment).

This Essay discusses five American priorities and values revealed by the TCJA:

1. The traditional family is best;
2. Individuals have greater entitlement to their capital than to their labor;
3. People are autonomous individuals;
4. Charity is for the rich; and
5. Physical things are important.

The TCJA's distributional effects dovetail with these values. As has been widely reported, the legislation substantially reduces the tax obligation of the most affluent Americans and reduces taxes only slightly and temporarily for the least affluent.[3] Reducing the progressivity of the tax system and diminishing total revenue collected is consistent with implementing these five priorities and values. First, traditional families with a single working spouse and a stay-at-home spouse are disproportionately prosperous, so subsidizing that family model reduces progressivity. Second, access to capital increases with affluence, so a greater entitlement to investment income favors taxpayers who enjoy that affluence. Third, valuing individual autonomy is consistent with robust individual property rights, and less consistent with high levels of taxation for shared community purposes. Fourth, favoring the charitable giving of the rich allows them tax reductions not available to others, and sends the message that philanthropy substitutes for tax paid. Fifth, prioritizing physical assets favors individuals are able to invest in such assets and underrates the important value that workers contribute to prosperity.

Critics of the legislation concerned about the law's reallocation of tax burdens down the income scale[4] and its projected budgetary deficits[5] must focus more on

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3. *See* William Gale, Surachai Khitatrakun & Aaron Krupkin, *Winners and Losers After Paying for the Tax Cuts and Jobs Act*, TAX POL'Y CTR. 11 (Dec. 8, 2017), https://www.taxpolicycenter.org/sites/default/files/publication/150211/winners_and_losers_after_paying_for_the_tax_cuts_and_jobs_act_12.8.pdf [https://perma.cc/JK34-KWEK].

4. *See, e.g.*, David Cole, *Taxing the Poor*, N.Y. REV. BOOKS, (May 10, 2018) https://www.nybooks.com/articles/2018/05/10/taxing-the-poor [https://perma.cc/A7YY-HACD] (arguing that the TCJA will hasten the collapse of the middle class and thus destroy American constitutional government); *see also* Patrick Driessen, *Tracing the TCJA's Radical Regressivity*, 158 TAX NOTES 1069, 1069 (2018) (offering a closer look at the distributional analyses used during the congressional deliberation of the TCJA and how such presentations resulted in one of the "most distributionally lopsided, broad U.S. legislative enactments ever").

5. *See, e.g.*, Edward Kleinbard, *Senators Picked Americans' Pockets via Degraded Tax Policy Process*, HILL (Dec. 4, 2017, 10:00 AM), http://thehill.com/opinion/finance/363096-senators-picked these embedded priorities. The distributional effects flow from these principles, not vice versa. The ultimate fairness of the tax system depends on deliberately creating a substructure that reflects equality, community, and dignity as core tax policy values. Only after lawmakers engage in this fundamental examination will tax reform lead to distributive justice.

This Essay proceeds by examining how each of these five values is reflected in the TCJA. For some of the provisions discussed, there are well-known efficiency justifications for the legislation. I aim here to emphasize that efficiency is a value. It deserves no definitive influence on policy and is appropriately weighed against other values in assessing proposed legislation. While I disagree with some of the underlying values reflected in the TCJA, this Essay is not intended to convince the reader that particular values are best. Instead, its goal is to reveal the embedded beliefs that did not receive attention in the process of adopting the new law. Only by explicitly considering the social meaning embedded in the tax law will policy makers be able to purposely strive for justice in taxation.

I. THE "TRADITIONAL FAMILY" IS BEST

The TCJA made several changes to the way that families are taxed. The tax law has long favored families with two parents, one breadwinner, and children living in the same home; the TCJA further increased the relative benefits to these "traditional" families. The traditional family, in this paradigm, is increasingly affluent and white,[6] and the tax law normalizes this paradigm further. The TCJA increases the tax benefits for traditional families by changing the rate structure, stigmatizing head-of-household filing, and modifying the rules concerning tax benefits for children. It also reinforces the norm of the traditional family by changing the tax treatment of alimony payments. After the TCJA, alimony payments are subject to more tax than they were before, making it more expensive for divorcing spouses. The new rule effectively imposes a new tax on divorce. I examine each of these measures below.

-americans-pockets-via-degraded-tax-process [https://perma.cc/7CHT-QU5P] ("[W]hatever virtues the [TCJA] might have are completely swamped by its trillion-dollar plus impact on government deficits.").

6. *Parenting in America: Outlook, Worries, Aspirations Are Strongly Linked to Financial Situation*, PEW RES. CTR. 1, 6-7 (Dec. 17, 2015), http://assets.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf [https://perma.cc/U2BW-TATS] (stating that 72% of white children live with two married parents in contrast to 31% of black children, and that only 10% of children living with two married parents live below the poverty line, compared with 31% of children living in single-parent households).

A. Rates

The rate structure is somewhat complex in its operation because there are different rate schedules for different types of filers.[7] Married people file a single joint return on which they aggregate their income and pay tax on the combined amount. Unmarried individuals file as single taxpayers, or heads of household, depending on whether they have dependent children.[8] Every filing status has the same graduated rates, but the "rate breaks" differ.

"Rate breaks" are the dollar amounts where higher marginal rates begin. In a graduated rate system, all taxpayers enjoy the benefit of lower rates on their first dollars of income; their highest rate is only applied to their last dollars earned. A taxpayer's "marginal rate" is the rate on her last dollars earned (i.e., at the margin). All taxpayers are subject to the same graduated rates, but because the rate breaks differ, single taxpayers start to pay tax at higher rates at lower income levels than do married taxpayers. For example, in 2018, single individuals begin paying tax at 22% on earnings in excess of $38,700, while married filers pay tax at 22% on earnings in excess of $77,400.[9] The breaks are lowest for single people, higher for heads of household, and highest for married taxpayers filing jointly.[10] Because married couples file jointly, the law effectively splits their total income between them. But since married people only require a single household, the rate breaks for joint filers are not always double what they are for single filers. At the highest incomes, the breaks for married and single filers become closer. To wit, the 37% bracket begins at $500,000 for single filers and $600,000 for joint filers.[11] At that level of income, the rate structure assumes that married couples can afford to pay more tax than two single people who each earn half the total income.[12]

7. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a), 131 Stat. 2054, 2054-58 (2017) (amending I.R.C. § 1 by changing the rate tables for each filing type).

8. *See* I.R.C. § 2(b) (2018) (defining "head of household" as an individual who is not married at the close of the taxable year, is not a surviving spouse, and maintains a household for either a qualifying child of the individual or the individual's parents).

9. Rev. Proc. 2018-18, 2018-10 I.R.B. 392, 394-400 (providing tax rate tables).

10. *See* Tax Cuts and Jobs Act § 11001(a). The 22% rate break does not go into effect until a married couple filing jointly earns at least $77,400, whereas the same rate break triggers when a head of household earns $51,800, and the single filer makes $38,700.

11. *See id.* A head of household must also earn $500,000 before qualifying for the 37% bracket.

12. Under the TCJA, only the highest income taxpayers are subject to this convergence. Prior to 2018, this type of convergence started at much lower incomes. For example, two unmarried taxpayers who each earned $150,000 in 2017 would have paid less tax than a married couple with the same total income. Single taxpayers would have paid $34,981.75 each, for a total of $69,963.50, while married filers would have paid $74,217. *See* Rev. Proc. 2016-55, 2016-45 I.R.B 707, 709 (providing 2017 tax rate tables).

Whether married people pay more or less than they would as single filers depends on the allocation of income earned between them. Where one spouse earns all the income, the couple benefits from splitting their income; they receive a "marriage bonus" compared to what they would pay if they each paid tax as single filers.[13] Where the spouses each earn half of the total joint income, they sometimes pay a "marriage penalty" compared to what they would have paid as single filers.[14]

The law could eliminate marriage penalties by doubling the rate break for married filers compared to single filers. But reducing marriage penalties simultaneously increases marriage bonuses. Under prior law, only lower-income taxpayers were protected from marriage penalties[15] and guaranteed marriage bonuses in the rate structure, because the rate breaks doubled below the 25% marginal rate, covering single taxpayers earning up to $38,700 and joint filers earning up to $77,400.[16] That structure makes a lot of sense for lower-income taxpayers. At the bottom of the income spectrum, reducing the secondary earner's disincentive to work is an important policy that increases the real disposable income of low-income families. In addition, the earned income tax credit, which is available only to low-income taxpayers, contains a severe marriage penalty that other provisions in the Code might ameliorate.[17]

At higher income levels, increasing marriage bonuses may not be worth the lost revenue. But the TCJA increased marriage bonuses by doubling the rate

13. For example, in 2017, a couple with $400,000 in joint income (earned by either spouse) would have paid $102,800 in tax. If they were single and earned all $400,000, they would have paid $114,725. They received a marriage bonus from the rate structure. On the other hand, if they were single and each earned $200,000, they would have each paid $45,860, or $91,720 total. They received a marriage penalty from the rate structure. To play with the numbers, see *2018 Tax Reform Calculator*, TAX FOUND. https://taxfoundation.org/2018-tax-reform-calculator [https://perma.cc/LAS2-JULQ]. This illustration uses 2017 numbers because, as discussed in the text, the TCJA minimizes marriage penalties and expands marriage bonuses. In 2018, only the highest income taxpayers with equally divided earnings are potentially subject to marriage penalties. Most married taxpayers—at all income levels—are much more likely to enjoy marriage bonuses.

14. This was much more likely under prior law, when the rate breaks were not double for married filers. *See generally* Wendy C. Gerzog, *The Marriage Penalty The Working Couple's Dilemma*, 47 FORDHAM L. REV. 27 (1978) (explaining the concept of a marriage penalty).

15. *See* I.R.C. § 1(f)(8) (2018) (eliminating the marriage penalty in the 15% bracket starting in the 2004 taxable year).

16. *See* Rev. Proc. 2017-58, 2017-45 I.R.B. 489, 491 (showing tax tables with inflation adjustments for 2018 based on pre-TCJA law with rate breaks that do not double above the 15% marginal rate).

17. *See* I.R.C. §32(b)(2)(B)(i) (increasing the phaseout amount of adjusted gross income for purposes of qualifying for the Earned Income Tax Credit by only $5,000 if filing jointly).

breaks for married filers earning up to $400,000.[18] Unlike prior law, which limited the marriage benefit to lower and middle-income families,[19] the TCJA creates a clear subsidy for affluent traditional families. High-income earners can best afford to support stay-at-home spouses, and the marriage bonus incentivizes those spouses to remain out of the market. Stay-at-home spouses perform important untaxed work in the household that dual-worker couples must pay for out of after-tax dollars. Under the new law, these families are doubly benefitted by both the rate structure and the non-taxation of spousal work performed in the home.

B. Heads of Household Filers

The TCJA disfavors nontraditional families by imposing new burdens on taxpayers filing as heads of household—a filing status generally used by single mothers with children.[20] On average, heads of households earn substantially less income than joint filers.[21] The TCJA imposes a new obligation on tax preparers to investigate taxpayers' eligibility to file as a head of household.[22] Preparers are subject to a $500 penalty for each failure to exercise due diligence in making that determination.[23] Consequently, the new law requires preparers to disproportionately police single mothers, which operates in contrast to the general expectation that taxpayers will honestly report their tax-relevant information to preparers and the government.

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18. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a), 131 Stat. 2054, 2055 (2017); Rev. Proc. 2018-18, 2018-10 I.R.B. 392, 394-400 (providing tax rate tables for the TCJA with rate breaks that double for joint filers compared to unmarried taxpayers with up to $400,000 in joint income).

19. *See supra* text at note 16.

20. *See*, *American Families and Living Arrangements: 2017*, U.S. CENSUS BUREAU tbl. FG10 (2017), https://www.census.gov/data/tables/2017/demo/families/cps-2017.html (showing that out of approximately 12 million single-parent families with children under the age of 18, nearly 9.5 million, or more than 80%, were headed by single mothers).

21. In the 2015 tax season, 30.5% of married filing jointly taxpayers had an adjusted gross income (AGI) of $50,000 or less, whereas 59.6% of head of households had an AGI of $50,000 or less. *See All Returns: Adjusted Gross Income, Exemptions, Deductions, and Tax Items, Tax Year 2015*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-soi/15in12ms.xls [https://perma.cc/7EKU-5TQT] (last visited June 24, 2018).

22. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a), 131 Stat. 2054, 2058 (2017) ("Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with due diligence requirements imposed by the Secretary by regulations with respect to determining—(1) eligibility to file as a head of household (as defined in section 2(b)) on the return, or (2) eligibility for, or the amount of, the credit allowable by section 24, 25A(a)(1), or 32, shall pay a penalty of $500 for each such failure.").

23. See id.

The new law makes heads of households objects of suspicion, despite the lack of evidence that unmarried adults with children are more likely to cheat on their taxes than others. Why single out individuals who are claiming that they support children? The law evinces no parallel suspicion of joint filers with children—in other words, the traditional family. It does not require that paid preparers investigate small businesses that may be hiding cash, even though a disproportionate amount of tax evasion occurs in those businesses.[24] The new rule for tax preparers is simply a way to stigmatize unmarried adults with children, and make it harder for them to claim tax benefits. In contrast with the traditional family, a single adult with children is not considered normal under the tax law.

As a practical matter, paid preparers serving low-income communities will now be more likely to err on the side of treating mothers as single taxpayers, rather than heads of household, and consequently requiring them to pay more tax than they legally owe. The presumption that unmarried individuals with children are more likely to cheat on their taxes by claiming imaginary children feeds the worst stereotypes of the poor. Potential head-of-household filers are the new "welfare queens"—perpetuating the historic demonization of poor women.[25] And unfortunately, many low-income taxpayers must use paid preparers because they lack access to other advice about preparing their returns, and because the earned income tax credit is too complex for many low-income taxpayers to navigate by themselves.[26] There is a history of paid preparers scamming low-income taxpayers to increase their own fees,[27] so Congress's decision

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24. *See Tax Gap Estimates for Tax Years 2008-2010*, INTERNAL REVENUE SERV. 4 (2016), https://www.irs.gov/pub/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf [https://perma.cc/5JWQ-XGQL] (reporting that out of the $264 billion individual income tax gap (i.e., tax not collected) in the tax years 2008-2010, $125 billion came from business income).

25. *See generally* Rachel Black & Aleta Sprague, *The Rise and Reign of the Welfare Queen*, NEW AM. (Sept. 22, 2016), https://www.newamerica.org/weekly/edition-135/rise-and-reign-welfare-queen [https://perma.cc/3YED-UAK7] (tracing the origin of the term "welfare queen" to a Reagan campaign speech made in 1976 and noting the term's background in a "long and deeply racialized history of suspicion of and resentment toward families receiving welfare in the United States").

26. *See Briefing Book: A Citizen's Guide to the Fascinating (Though Often Complex) Elements of the Federal Tax System*, TAX POL'Y CTR. 189 https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc-briefing-book_0.pdf [https://perma.cc/SW5M-YQ6N].

27. *See* Campbell Robertson, *Tax Preparers Targeting Poor with High Fees*, N.Y. TIMES (Apr. 7, 2014), https://www.nytimes.com/2014/04/08/us/tax-season-brings-big-refunds-and-preparers-clamoring-for-a-slice.html [https://perma.cc/2SNQ-PZM9]; *see generally* Maggie R. Jones, *Tax Preparers, Refund Anticipation Products, and EITC Noncompliance* (U.S. Census Bureau, CARRA Working Paper No. 2017-10, 2017), https://www.census.gov/content/dam/Census/library/working-papers/2017/adrm/carra-wp-2017-10.pdf [https://perma.cc/BU8T-SGJB].

to encourage preparers to act against the interest of their low-income clients is particularly troubling.

C. Children

The TCJA simplifies the tax treatment of families with children by repealing dependency exemptions for children[28] and increasing the child credit in two ways: first, by increasing the credit amount to $2,000 per child,[29] and second, by making it available to high-income taxpayers who previously were phased out.[30] The phase-out range now begins at $400,000 of income for joint filers, and $200,000 for others.[31] Because high-income families are better able to afford a stay-at-home parent, the increased income threshold is a benefit for those families. Under prior law, the value of dependency exemptions depended on a taxpayer's marginal rate, but phased out altogether for high-income taxpayers.[32] The interaction of the changes affecting families is hard to generalize—some families will enjoy net benefits from the cumulative changes and others will suffer from greater tax liabilities.

More importantly, the benefit traditional families enjoy from this legislative change is partly a product of what Congress chose *not* to do. Tax benefits for children have long taken two forms: one for children generally,[33] and the other specifically for childcare.[34] The dependent-care credit is designed for working parents, and alleviates the tax burden on parents who must pay for care with

28. Pursuant to the TCJA, all personal exemptions are reduced to zero through 2025. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11041(a), 131 Stat. 2054, 2082 (2017) (suspending deductions for personal exemptions).

29. *See* Tax Cuts and Jobs Act § 11022(a) § (amending I.R.C. § 24 (h)(2) (2012) by increasing the credit amount from $1,000 to $2,000).

30. *See id.* (adding the new phaseout range at I.R.C. § 24(h)(3) and thus rendering I.R.C. § 24 (b)(2) moot for the years 2018 through 2025: the previous phaseout amount was $110,000 for joint returns, $75,000 for nonmarried individuals, and $55,00 for married individuals filing separately).

31. See id.

32. *See* I.R.C. §§ 68(b), 151(d)(3) (2018) (reducing the exemption amount by the "applicable percentage" of two percentage points for each $2,500 "by which the taxpayer's adjusted gross income for the taxable year exceeds" $300,000 for a married couple filing jointly, $275,000 for a head of household, and $250,000 for a single taxpayer).

33. Child Tax Credit, I.R.C. § 24 (2018).

34. Expenses for Household and Dependent Care Services Necessary for Gainful Employment, I.R.C. § 21 (2018).

after-tax dollars.[35] Tax benefits for childcare benefit only working parents.[36] Unfortunately, because the credit is nonrefundable, it is unavailable to many parents who most need help affording quality care.[37] Nonrefundable credits offset tax owed, but do not authorize the government to make payments, creating a crucial distinction between individuals with income tax liability and those without. [38] Because low-income taxpayers pay more payroll taxes than income taxes, [39] it is arbitrary that tax credits are only allowed against income tax liability. All credits would be refundable under a fairer tax law.[40]

Instead of doubling the child credit, Congress could have used those resources to make the childcare credit refundable (and larger) so that low-income parents would receive a benefit. Tax benefits for expenses incurred in providing childcare promotes horizontal equity between taxpayers who pay for care and taxpayers who provide the care themselves, generally by a stay-at-home spouse. By choosing to increase the credit that is available to all taxpayers, including those who do not pay for child care, the TCJA privileges families with a stay-at-home parent—who enjoy tax benefits without offsetting tax costs.

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35. *See* S. REP. NO. 94-938, at 132 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 3438, 3565 (changing the structure of dependent care expenses from an itemized deduction to a tax credit because "the committee believes that such expenses should be viewed as a cost of earning income for which all working taxpayers may take a claim").

36. *See* I.RC. §§ 21(a)(1)-(b)(2) (stating that the credit is only applicable toward "employment-related expenses . . . incurred to enable the taxpayers to be gainfully employed").

37. *See* Margot L. Crandall-Hollick, Cong. Research Serv., R44993, Child and Dependent Care Tax Benefits: How They Work and Who Receives Them 1 (2017), https://fas.org/sgp/crs/misc/R44993.pdf [https://perma.cc/D47N-TD3J].

38. *See* Margot L. Crandall-Hollick & Gene Falk, Cong. Research Serv., IN10816, Tax Reform: The Child Credit and the Child Care Credit (2017), https://fas.org/sgp/crs/misc/IN10816.pdf [https://perma.cc/Z5XB-X9P6] ("Since the child care credit is not refundable, it can only reduce the federal income tax liability of families that would otherwise owe taxes.").

39. *See* Howard Gleckman, *For Most Households, It's About the Payroll Tax, Not the Income Tax*, TAX POL'Y CTR.: TAXVOX (Apr. 2, 2015), https://www.taxpolicycenter.org/taxvox/most-households-its-about-payroll-tax-not-income-tax [https://perma.cc/Q6LS-DZD5] ("For two-thirds of households, the levy that matters is the payroll tax . . . . [I]ncome tax payments don't begin to exceed payroll taxes until household incomes reach six figures . . . .").

40. *See* Lily L. Batchelder et al., *Assessing President Trump's Child Care Proposals*, 70 NAT'L TAX J. 759, 778 (2017).

D. Alimony

The tax treatment of alimony has traditionally allowed the payer a deduction[41] and required that the recipient include the amount in income.[42] The TCJA changed the scheme so that neither party includes nor deducts alimony payments, effectively taxing the person who pays the alimony, rather than the one who receives it.[43] Although largely conjectural at this point, family-law experts predict that the divorce rate will spike in 2018, as the TCJA provision repealing the deduction for alimony payments does not go into effect until December 31, 2018.[44] Family law groups have also reported seeing a "real impact" of repealing the alimony deduction, with mounting pressure on couples to finalize divorces before the new tax changes come into effect.[45]

Since recipients of alimony are necessarily poorer than those who pay it, the new rule taxes alimony at the higher rate. For example, if W is taxed at a 10% marginal rate, and H is taxed at a 30% marginal rate, $100 earnings by H will be subject to $30 in tax, leaving him $70 to pay as alimony. Under prior law, the alimony would have been deductible to H, leaving him $100 to pay to W, who would have to pay $10 tax on that amount, leaving her $90 to spend. That $20 tax difference is why the revenue projections for the Act show that the change will substantially increase the revenue collected on alimony payments.[46]

Because the government will be taxing alimony more heavily than it did before, divorced couples will have less money between them after tax. In this way, the TCJA provides an incentive to stay married. Divorced spouses receive no

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41. *See* I.R.C. §§ 62(a)(10), 215 (2012) (repealed 2017) (allowing for the deduction of alimony payments to be included in adjusted gross income).

42. *See Id.* § 61(a)(8) (amended 2017) (including alimony and separate maintenance payments in the general definition of gross income).

43. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051(a)-(b), 131 Stat. 2054, 2089-91 (2017) (striking I.R.C. § 215; repealing the deduction for alimony payments; and repealing provisions providing for inclusion of alimony in gross income).

44. *See* Jonathan Curry, *Alimony and Trust Tax Changes Make 2018 'Year of Divorce'*, 159 TAX NOTES 717 (Apr. 30, 2018), https://www.taxnotes.com/tax-notes/tax-cuts-and-jobs-act/alimony-and-trust-tax-changes-make-2018-year-divorce/2018/04/30/2808x [https://perma.cc/M9KP-HRWW].

45. *Id.*

46. *See Estimated Budget Effects of the Conference Agreement for H.R. 1, "The Tax Cuts and Jobs Act,"* JOINT COMMITTEE ON TAX'N 3 (2017), https://www.jct.gov/publications.html?func=startdown&id=5053 [https://perma.cc/8TGM-539T] (estimating $6.9 billion revenue over the 10-year window); *see also* George D. Karibjanian, Richard S. Franklin & Lester B. Law, *Married Taxpayers: INSIGHT: Alimony, Prenuptial Agreements, and Trusts under the 2017 Tax Act—Part 1*, 101 DAILY TAX REP. 13 (May 24, 2018) (demonstrating that a $60,000 alimony payment will generate nearly twice as much, or $20,000 more, in "combined income tax consequences" under the new alimony rule).

benefit from the substantial marriage bonuses in the new law, and will have a higher burden on alimony payments. So, the TCJA favors the traditional family in which spouses remain married by simply taxing them less.

Alimony recipients will no longer pay tax, but they are unlikely to be better off. While it is possible that the poorer alimony recipient will have more money to spend now that her alimony is not being taxed to her (making her better off), the alimony payer will have less money to spend on alimony because his higher tax burden makes him worse off. If family law decisions—whether made by courts or agreement of the parties—ignore taxes, then alimony recipients may get a windfall from the law's change. But rational people pay attention to taxes; taxes are effective nudges because people do change their behavior in response to them.[47]

Divorce lawyers should advise their clients to reduce the amount of alimony to take account of the tax change. That adjustment should be greater than the tax the recipient spouse would have paid under the old law because the payer spouse is subject to a higher rate of tax. Because the change in taxation of alimony increases the total tax burden on alimony payments, we can expect both parties to be worse off under the new law.

More importantly, the change in the alimony rules sends a message about financial responsibility within families.[48] In contrast with the new law, the prior rule taxing alimony to the recipient created a framework of entitlement, even for women who depended on continuing financial support from their ex-husbands. Taxing alimony to the recipient is consistent with treating alimony as an earned amount, since earnings are always taxed to the earner.[49] If we think about marriage as a partnership in which both spouses contribute inputs to produce shared returns, then the amounts earned in the market by one spouse are appropriately conceptualized as belonging jointly by both spouses. In an entitlement framework, both spouses contribute valuable services, and they share the benefits equally, without privileging market returns over nonmarket returns. The joint filing system reflects this conceptualization, as do the rules for property division

47. *See* Cass R. Sunstein, *Nudging: A Very Short Guide*, 37 J. CONSUMER POL'Y 583, 583, 585 (2014). For more information on nudging, see, generally, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

48. This message is particularly important given the rarity of alimony payments. *See* Beth Pinsker, *Breadwinning Women Are Driving Alimony Reform*, TIME: Money (Nov. 17, 2015), http://time.com/money/4116161/alimony-reform-spousal-support [https://perma.cc/9KYG-NJU9] (stating that according to the 2010 Census, there are 400,000 alimony recipients made per year, 3% of which are male; "[u]nlike child support, which is common when [a] divorcing couple has kids, alimony awards have always been very rare, going from about 25% of cases in the 1960s to about 10% today").

49. *See* Helvering v. Horst, 311 U.S. 112, 119 (1940) ("The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it . . . .").

in divorce.[50] Prior law for alimony was also consistent with ownership rights for both spouses because divorcing spouses who received alimony included that alimony in income, like they would any other amount that they earned. The old rule signaled that alimony recipients *deserved* the alimony they received.

The new law changes that conceptualization by emphasizing the payor's ownership and entitlement to the funds and treating the transfer from the payor to the ex-spouse like child support or a gift for tax purposes. This framework empowers market earners and weakens claims that nonmarket earners may have on family resources. In this story, alimony-receiving women are like dependent children who need to be supported, rather than equal partners in a community venture that produces both monetary and nonmonetary benefits for its members. By treating amounts paid as alimony the same as amounts paid to support one's children—whether those children consume in the parent's household or not[51]—the new law implies that ex-spouses are still financially dependent members of the market earner's household.

In returning to the common law regarding alimony, we also return to an outdated notion about family economic power and responsibility. It is the responsibility of parents to support their children—parents have all the economic power in that relationship. The new alimony rule puts ex-husbands in the parent role, which suggests that it is the responsibility of former spouses to continue their spousal support after the marriage ends. Like child support, this approach concentrates power in the hands of the market earner, even though the non-market worker contributes substantial value to the family. In this way, the TCJA entrenches the power structure of the single-earner family, but does nothing to improve the financial well-being of dependent spouses. Because these are tax rules, they can change the price of paying alimony, but they cannot change the rules about when it is paid or how much former spouses receive pre-tax. Normalizing the dependent spouse in the tax law, as the TCJA does, does nothing to guarantee her financial support in property or family law.

Alimony rules are a poor way to encourage behavior in marriages because the timing is off. Presumably, spouses who will eventually receive alimony do not, at the time they are deciding whether to work in the market, think they will need it. They are simply not thinking about the consequences of divorce at that time. If they had anticipated the need for alimony, they would likely have developed

50. I.R.C. § 1041 (2018) treats property division between spouses as a non-recognition event so that each spouse owns the property with a carryover basis from the marriage.

51. The tax treatment of child support does not depend on which parent buys the food and clothing for the children. Child support has never been deductible and is treated as taxable consumption to the earner parent. *Tax Information for Non-Custodial Parents*, INTERNAL REVENUE SERV. (2011), https://www.irs.gov/pub/irs-pdf/p4449.pdf [https://perma.cc/GA6F-HM8B].

more marketable skills or married another partner, making alimony unnecessary. The Internal Revenue Code has long encouraged secondary earners to be dependent on primary earners for financial support, while performing untaxed household work, rather than earning wages.[52] The new alimony rules do not incentivize behavior throughout the marriage in the same way that the exclusion for imputed income and marriage bonuses incentivize secondary earners to stay out of the market.

The important incentive effects connected to the tax rules for alimony, then, must coincide with decisions about alimony. By the time of divorce, the secondary earner is financially dependent. At that time, the new law removes any incentive for primary earners to pay amounts as alimony, rather than child support, since the tax treatment of alimony and child support are now the same. The payment of child support in place of alimony might benefit children, but at a potential cost to their mothers. Even more important, as discussed above, the TCJA increases the after-tax cost of alimony payments, so we can expect that the amount and frequency of alimony will diminish under the new law. The TCJA's economic effects are likely to contribute to the greater impoverishment of divorced women. Its expressive effects are likely to contribute to their social disempowerment.

II. INDIVIDUALS HAVE GREATER ENTITLEMENT TO THEIR CAPITAL THAN TO THEIR LABOR

The primary goal of the TCJA was to cut the rate of tax on corporate income,[53] and many tax policy experts—across the political spectrum—agreed that the U.S income tax rate was too high by global standards.[54] Corporate income is potentially taxed twice—at the corporate level (when earned) and at the shareholder level (when paid out as dividends). The double-tax regime can impose

52. *See generally* Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745 (2005) (discussing the non-taxation of imputed income, and the stacking of secondary earner income that imposes high rates on the first dollars of income).

53. *See, e.g.*, Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 12001, 131 Stat. 2054, 2092-94 (2017) (repealing the tax for corporations under the alternative minimum tax); *see also id.* § 13001 (changing the corporate tax rate to 21% of taxable income).

54. *See* Danielle Kurtzleben, *FACT CHECK: Does the U.S. Have the Highest Corporate Tax Rate in the World?*, NAT'L PUB. RADIO (Aug. 7, 2017, 10:09 AM), https://www.npr.org/2017/08/07/541797699/fact-check-does-the-u-s-have-the-highest-corporate-tax-rate-in-the-world [https://perma.cc/GAE3-Q523]. President Obama was committed to lowering the corporate rate. *See* Zachary Goldfarb, *Obama Proposes Lowering Corporate Tax Rate to 28 Percent*, WASH. POST (Feb. 22, 2012), https://www.washingtonpost.com/business/economy/obama-to-propose-lowering-corporate-tax-rate-to-28-percent/2012/02/22/gIQA1sjdSR_story.html [https://perma.cc/W3QB-ZA9Q].

higher effective rates on corporate income than noncorporate income. But the rationale for reducing corporate rates does not extend beyond corporations.

Nevertheless, the TCJA also substantially reduced the tax imposed on income from noncorporate businesses, such as partnerships and other pass-through entities that tax income only to the owners and not to the entity.[55] Consequently, the overall effect of the law is to reduce the tax burden across all holders of capital—people who earn money through investments. The TCJA exacerbated a distinction that already existed in the tax law. Capital income has long been subject to preferential rates[56] and exempt from the payroll tax,[57] but now it is even more preferred, regardless of the form.

A tax preference can be justified on fairness grounds if the taxpayer has a greater moral claim to some income than other income, or if the tax would impose greater harm in some cases than in others. For example, an income tax might include the increase in value of a taxpayer's home over the course of a year.[58] But a just tax system might exclude that value if it required taxpayers to sell their homes and move their families. The greater an individual's moral claim to something, the less legitimate it is for the government to take it through coercion. Income taxation can be justified because individuals do not have moral claims to all of their pre-tax income.[59]

Proponents of the preference for capital income do not justify it on these terms. They argue that lower taxes on capital income incentivize more capital investment. That may be true, but it also may not be.[60] In any case, that argument changes the subject because it is an efficiency argument, not an argument about social meaning and justice. Efficiency may be an important social value, but where efficiency and fairness are in tension, policymakers should be explicit

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55. Tax Cuts and Jobs Act, Pub. L. No. 115-97, §§ 11011-12, 131 Stat. 2054, 2063-72 (2017) ("Deduction for Qualified Business Income of Pass-Thru Entities").

56. I.R.C. §1(h) (2018).

57. The payroll tax is levied only on wage income. Two-thirds of taxpayers pay more payroll tax than income tax. *See* Roberton C. Williams, *Most Americans Pay More Payroll Tax than Income Tax,* TAX POL'Y CTR.: TAXVOX (Sept. 6, 2016), https://www.taxpolicycenter.org/taxvox/most-americans-pay-more-payroll-tax-income-tax [https://perma.cc/9J6V-SZ87].

58. The theoretical definition of income includes all accessions to wealth. U.S. law includes a realization requirement that limits the inclusion to accessions that are liquidated. *See* Ilan Benshalom & Kendra Stead, *Realization and Progressivity*, 3 COLUM. J. TAX L. 43, 50-51 (2011).

59. *See generally* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 15 (2002) (questioning the "'everyday' libertarianism" of the pre-tax income framework); *id.* at 31-37.

60. *See* JANE G. GRAVELLE & DONALD J. MARPLES, CONG. RESEARCH SERV., R42111, TAX RATES AND ECONOMIC GROWTH 7, 9 (Jan. 2, 2014), https://fas.org/sgp/crs/misc/R42111.pdf [https://perma.cc/W6SH-ZU3E] ("A review of statistical evidence suggests that both labor supply and savings and investment are relatively insensitive to tax rates.").

about favoring one or the other. Policymakers should not reflexively prioritize efficiency over other public values, particularly in regulating economic entitlements.

Since all income is made possible by myriad forces, both public and private, an individual is only entitled to some of the income she creates. A lawyer earns income based on her own personal talent and effort, but also because government creates institutions that make her talents and efforts meaningful to others. Business income is the product of capital, labor, and social institutions, and taxation is necessary to distribute the products of social cooperation among all the people who deserve it.[61] The TCJA's tax reduction on business income strengthens the ownership claim of capital holders to that income. But this claim is based on a mistaken understanding of the social cooperation necessary to create value.

Determining who deserves a share of income is a decision made politically, but it is a fundamental question of fairness. Taxation is a tool of distributive justice because taxes can correct distributional injustices in the market. While markets can be helpful in determining desert,[62] they are not designed to allocate resources according to a moral principle. Markets are designed to increase efficiency, not justice.[63] Laws must supplement markets to achieve justice. Income taxation is a feature of just societies because people do not have unfettered rights to every dollar of pretax income they earn.[64]

For example, if free markets systematically undercompensated workers for their contribution to the social product, the law might tax-prefer their earnings compared to other types of income. Such a law could give workers a greater moral claim to their pretax income by granting them dominion and control over a greater percentage of their pre-tax income. The same is true for investors. In instituting a preference for a broad range of investment income, the TCJA reflects the notion that investors have a stronger claim to their earnings than do others. Elevating capital holders to a preferred place by taxing their income less heavily than the income of workers implies greater moral rights to that income.

61. *See* Linda Sugin, *Rhetoric and Reality in the Tax Law of Charity*, 84 FORDHAM L. REV. 2607, 2617 (2016) ("A fair shares framework sees the tax system as a mechanism for dividing the returns to social cooperation among members of society.").

62. Some political philosophers have recognized that markets may have a circumscribed role in distributive justice. *See* Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981) (starting with an auction model to build a theory of distributive justice using insurance concepts and taxation).

63. Elizabeth Anderson explains why markets must be limited if individuals are to enjoy freedom and autonomy. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 141-167 (1993).

64. Property is conventional. This is Murphy and Nagel's main point. *See* MURPHY & NAGEL, *supra* note 59, at 8 ("If there is a dominant theme that runs through our discussion, it is this: Private property is a legal convention, defined in part by the tax system.").

A lower, preferential rate of tax on capital income suggests that market returns to capital holders are a closer approximation of what capital holders deserve; the heavier tax on labor suggests that their market returns are excessive by comparison.

As income inequality has increased, capital holders have enjoyed a greater share of overall market returns.[65] Because capital is more mobile than labor, globalization has allowed capital to seek out greater returns, imposing pressure on labor. The weakening of labor's power, including the decline in unions,[66] has left labor earners unable to push back in the market. The market has already shifted a substantial share of the social product to holders of capital, so the tax law's more burdensome treatment of income from work exacerbates a market dynamic already in effect.

Given the philosophical substructure of the tax law, a policy that implies greater moral entitlement to capital returns than labor returns is odd. One principle underlying much economic policy reflected in the tax law is that individuals own their labor.[67] The theoretical entitlement to earnings on capital stems from the ownership of labor, since capital must have been derived from labor at some point. Libertarian arguments make the strongest moral claims to capital income, but those claims are based on historical principles of entitlement that start with a person's right to own his labor and base the right to investment income on that

65. *See* Thomas L. Hungerford, Cong. Research Serv., R42131, Changes in the Distribution of Income Among Tax Filers Between 1996 and 2006: The Role of Labor Income, Capital Income, and Tax Policy 14 (2011), https://fas.org/sgp/crs/misc/R42131.pdf [https://perma.cc/HLM7-5ZJ6] ("Changes in income from capital gains and dividends were the single largest contributor to rising income inequality between 1996 and 2006.").

66. *See* Justin Fox, *What Unions No Longer Do*, HARV. BUS. REV. (Sept. 1, 2014), https://hbr.org/2014/09/what-unions-no-longer-do [https://perma.cc/W73N-GPTU] ("Forty years ago, about [a] quarter of American workers belonged to unions . . . . Now union membership is down to 11.2% of the U.S. workforce, and it's increasingly concentrated in the public sector — only 6.7% of private-sector workers were union members in 2013."). Government policy—not just the market—contributed to the decline in unions. *See* Elizabeth Tandy Shermer, *The Right to Work Really Means the Right to Work for Less*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/04/24/the-right-to-work-really-means-the-right-to-work-for-less/ [https://perma.cc/TE8U-P8B7] (discussing the development of right to work laws that undermine unions).

67. *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (John Boyle ed., 1773) (1689) (describing the labor theory of property).

history.[68] In prior work, I have been critical of this analysis.[69] Nevertheless, the regime in the TCJA turns it on its head: If the taxation of capital gains cannot be justified in a libertarian framework, then the taxation of labor returns is even less legitimate. The TCJA gets it backwards by taxing labor income much more heavily than it taxes capital income.

III. PEOPLE ARE AUTONOMOUS INDIVIDUALS

It has been recognized that the tax law assumes people are autonomous, and I have previously argued that it is important for the tax law to respect individual autonomy.[70] The TCJA takes that conception further than prior law by discouraging interdependence among individuals in employment relationships and local communities. The TCJA discourages employer-employee relationships, compared to independent contractor status. It also rejects the interdependence of communities by conceptualizing state and local taxes as equivalent to private consumption expenditures.

The employer-employee context and the local-government context raise different policy concerns that inform the desirability of interdependence.[71] In the employment relationship, interdependence has traditionally implied health insurance and retirement benefits, so that interdependence has been necessary for the financial and personal security of workers. In a society (unlike the United States) with government-provided health insurance and generous public retirement benefits, employer-employee interdependence would be neither necessary nor desirable. Employee dependence on employer-specific benefits discourages job mobility and entrepreneurship. But weakening the bond between employers and employees is troublesome if it strips individuals of security and leaves them vulnerable.

In the local community context, increasing atomization may increase the likelihood that localities offer different packages of goods and services that individuals want. That is desirable if efficiency is the goal *and* everyone can afford a decent package. If people cannot afford the precise package they want, then treating taxpayers as though they are simply buying consumer goods is unlikely

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68. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 170 (1974) (beginning with taxation as slavery based on labor earnings and then extending the analysis to capital earnings based on a theory of historical entitlement).

69. Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 TAX L. REV. 229, 256-57 (2011) (comparing John Rawls and Robert Nozick and arguing that liberty derives from equal respect for people, not property rights).

70. *See id.* at 237 (treating autonomy as a central value in a just tax system).

71. Spousal dependence also raises unique issues. *See supra* text accompanying notes 50-52.

to improve overall welfare. In a welfarist framework, the distribution of benefits to those who can afford them least creates the greatest welfare gains. Interdependence in communities allows small welfare losses to some members of the community to be outweighed by large gains to others. Discouraging community interdependence threatens to leave the most needy without adequate public goods and services.

A. *Independent Contractors*

The new law creates incentives to operate as an independent contractor, or sole proprietor, rather than as an employee. Independent contractors are eligible for the new lower rate of tax for pass-through businesses[72] and they are also allowed to deduct all their expenses in operating the business.[73] By contrast, if characterized as an employee, the same person must pay a higher rate of tax and is not allowed to deduct employee business expenses under the new law.[74] The preference for independent contractors reinforces the notion that individuals are autonomous and independent of one another. An employer-employee relationship implies substantial reciprocal obligation.

This is an important shift in the message of the tax law, and is actually quite perplexing, given other provisions favoring employer-employee interdependence that remain in the Internal Revenue Code. The tax law has long favored the employer-employee relationship as the source for employee consumption expenditures. Many employee expenses that incur tax when made directly by employees have long been tax-free if provided directly by employers.[75] The TCJA did not change the preexisting preference for employee dependence on employer-provided benefits—the tax savings for employer-provided education,

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72. Tax Cuts and Jobs Act, Pub. L. No. 115-97, §§ 11011-12, 131 Stat. 2054, 2063-72 (2017) ("Deduction for Qualified Business Income of Pass-Thru Entities").

73. *See* Tax Cuts and Jobs Act § 11011(a) (defining qualified items of income, gain, deduction, and loss as anything "effectively connected with the conduct of a trade or business within the United States").

74. The TCJA suspended through 2025 the deduction for miscellaneous itemized expenses, including the trade or business expenses of employees that had long been carved out of I.R.C. §62(a)(2)(A), but allowed below the line. *See* Tax Cuts and Jobs Act § 11045.

75. When purchased directly by employers, employees need not include in taxable compensation the value of employment-related goods and consumption. But employees are not permitted a deduction when they purchase the same goods and services out of their own after-tax income. *See* I.R.C. § 62(a)(2)(A) (2018) (including reimbursed expenses of employees as part of definition of adjusted gross income, so long as the expenses qualified under part VI—i.e., the itemized deductions for individuals and corporations).

child care, retirement savings, and health insurance remain in the law post-TCJA, beside the new law's incentive to sever the employer-employee bond.[76]

Confusing matters further, the TCJA makes employee business expenses nondeductible, even though employees can exclude those amounts when their employers pay for them.[77] For example, an employee who buys her own work tools must now pay for them with after-tax income, and is no longer allowed a deduction. But an employee does not need to include the value of tools that an employer buys for her,[78] and nor does she need to pay tax on amounts she spends on tools that are reimbursed by her employer.[79] Consequently, it continues to be advantageous to be an employee in this respect.

Whether an individual is better off as an employee or an independent contractor depends on both the rate of tax applied to the income and the items that must be included in the tax base. Under the new law, the determination will be different for workers in different businesses—employees with few excluded benefits will prefer to become independent contractors to get the lower rate. But employees with lots of excluded benefits may prefer the higher rate on the smaller base. Beyond the individual tax calculus, independent contractors may be worse off than employees to the extent that they have an incentive to compete against one another, rather than collaborate for better pay or conditions.

Confusing matters further, the new law carves out certain professions, including doctors, lawyers, accountants, and artists, from the reduced pass-through rate—for no apparent reason.[80] Encouraging some employees to become independent contractors could have an important effect on the nature of business relationships apart from taxation. Whether the law should encourage interdependence between employers and employees, or independence by service providers is a difficult policy question, but Congress should be more purposeful about the project.

76. *See, e.g.*, I.R.C. § 106 (health insurance); § 119 (meals & housing); § 127 (education); § 129 (dependent care); § 401(retirement savings).

77. See id. § 62(a)(2)(A) .

78. The exclusion for "working condition" fringe benefits was unchanged in the law. *See id.* § 132(a)(3).

79. *See id.* § 62(a)(2).

80. *See* Daniel Shaviro, *Evaluating the New US Pass-Through Rules*, 1 BRITISH TAX REV. 49, 51 (2018) ("The likes of real estate, oil and gas, manufacturing, and retailing are apparently 'good,' while the likes of medicine, law, accounting, consulting, the arts, professional sports, and corporate management are apparently less good, but one cannot quite tell why."). Shaviro ultimately attributed the classification to a "sociological divide between the business and educated classes." *Id.* at 58.

B. State and Local Tax Deduction

Diminution of the deduction for state and local taxes[81] was one of the most contested provisions in the new law.[82] Critics have correctly recognized the provision as a way for Republicans in Congress—who passed the TCJA without a single Democratic vote—to punish blue states and raise taxes primarily on affluent Democrats.[83] So perhaps there is no identifiable value hidden in the amendment to the deduction.

But a deeper analysis of the change reveals a potential shift in thinking about what state and local taxes do. It is possible to conceptualize state and local taxes as collective returns to communities, which should be shared by members of those communities. Institutions of government foster pretax income at every level, so state and local taxes, like federal taxes, can be understood as market-correcting tools that direct returns to communities, rather than individuals.[84] In this understanding, state and local taxes are the distribution of social returns, so taxpayers are not individually entitled to those amounts.

This interpretation challenges inclusion in the federal tax base, providing a theoretical justification for the deduction. Because individuals do not enjoy dominion and control, the federal government should not consider those tax payments to be gross income of the individual taxpayers. Amounts paid in tax to states and localities do not constitute an accession to the personal wealth of the individuals who pay them. State and local taxes are collected under legal coercion, and are never really part of the private resources of state residents. Our ability to pay federal tax, in this conception, is affected by how much other tax we pay, as well as how much we earn. A federal tax deduction is necessary to account for the diminution in resources that state taxpayers have.

This conception of state and local taxes says nothing about whether individuals should have to include the benefits they receive from government in taxable income, but including benefits is not wholly consistent with the ability-to-pay

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81. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11042(a), 131 Stat. 2054, 2085-86 (2017) (reducing the aggregate amount of state and local taxes to be taken into account to $10,000, or $5,000 in the case of a married individual filing a separate return).

82. *See* Dylan Matthews, *The State and Local Tax Deduction, Explained*, VOX (Nov. 2, 2017, 11:25 AM), https://www.vox.com/policy-and-politics/2017/10/30/16557554/the-state-and-local-tax-deduction-explained [https://perma.cc/AC6V-WYLL].

83. *See* Michael J. Graetz, *Foreword—The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy*, 128 YALE L.J.F. 315, 319-22 (2018).

84. *See* Sugin, *supra* note 61, at 2617 ("[I]ndividuals 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.").

norm underlying income taxation. To the extent that governments provide benefits to individuals, the tax system could require inclusion. Individuals could be taxed on the value of the public education they receive, the clean water they drink, and the military protection they enjoy. Under current law, where government benefits are provided in cash, they are sometimes included in gross income and subject to tax.[85] Generally, however, such benefits are ignored for tax purposes. The valuation challenges in including all government benefits in taxable income would be substantial, and benefits taxation is an independent theory for tax design that has never received substantial traction.[86]

The TCJA treats state and local taxes just like private consumption. That model assumes that people pay taxes to *buy* services like schools and roads.[87] Since expenditures for living expenses and luxuries are not deductible under federal law,[88] state and local taxes should not be deductible if they are equivalent expenditures. If individuals receive valuable consumption in return for their taxes, then those taxes should not be deductible for purposes of measuring ability to pay other taxes. Where state and local taxes are simple consumption expenses, they resemble other nondeductible items. Taxpayers who do not value schools or roads are free to move to other jurisdictions that offer the package of taxes and services that they prefer.[89]

At the local level, this conception of taxes is plausible. But the larger the taxing jurisdiction, the less compelling this private-consumption story becomes. At the state level, surely, taxes do not translate into the equivalent of fees for services provided to individuals. This approach to state and local taxes rejects the notion of a shared community with public goods that cannot be valued for individuals. It assumes that states and localities have no role to play in distributing common resources.

85. *See* I.R.C. § 86 (2018) (taxing some social security benefits).

86. John Stuart Mill wrote of benefits taxation: "If there were any justice, therefore, in the theory of justice now under consideration, those who are least capable of helping or defending themselves, being those to whom the protection of government is the most indispensable, ought to pay the greatest share of its price: the reverse of the true idea of distributive justice, which consists not in imitating but in redressing the inequalities and wrongs of nature." JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 485 (Longmans, Green & Co. ed., 1904) (1848).

87. *See* Michael Leachman & Iris J. Law, *Eliminating State and Local Tax Deduction to Pay for Tax Cuts for Wealthy a Bad Deal for Most Americans*, CTR. BUDGET & POL'Y PRIORITIES (Oct. 19, 2017) https://www.cbpp.org/sites/default/files/atoms/files/10-19-17sfp.pdf [https://perma.cc/8TG4-8735].

88. *See* I.R.C. § 262 (listing personal, living, and family expenses under Title IX – Items Not Deductible).

89. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLITICAL ECON. 416, 420 (1956).

It is ironic that Republicans are the ones sending this message about state and local taxes, because they have traditionally argued more vehemently than Democrats in favor of state sovereignty.[90] The conception of state and local taxes as paying for private consumption reduces the power and function of the states in a federal system. Under the TCJA, the federal government becomes the sole protector of the public interest and the sole provider of public goods, with states and localities serving up private consumption according to market demands. The likely effect is a decline in public goods like infrastructure, education, and health care financed by the states.

IV. CHARITY IS FOR THE RICH

Philanthropy requires resources, so it is nothing new that the wealthy are the most important donors to charity. Recent research shows that even before the TCJA, charitable contributions were concentrated in a diminishing slice of the population.[91] Nevertheless, the tax law has historically supported charitable giving of a broader segment of taxpayers by allowing a charitable deduction for all itemizers. In addition, the Code has long limited the tax benefits attributable to charitable giving so that even the most generous philanthropists could not avoid paying taxes entirely.[92] While these rules have allowed considerable plutocratic power and government subsidy to donations by the rich, the TCJA enables this bias substantially more by reducing the number of itemizers and increasing the level of allowable deductions. The TCJA does not fundamentally change the Code's approach to charitable giving, but it exacerbates (and normalizes) the elitism that has long underlied the law.[93] This is troubling given other changes

90. *See* John Stoehr, *Forfeiting Federalism*, U.S. NEWS & WORLD REP. (Dec. 6, 2017, 10:30 AM), https://www.usnews.com/opinion/thomas-jefferson-street/articles/2017-12-06/gop-tax-plan-to-end-state-and-local-tax-deductions-undermines-federalism [https://perma.cc/G2CJ-9JTM] (stating the then-proposed tax bill would be a "violation of the states' rights the Republicans say they alone represent" by "'federaliz[ing]' revenue that would have remained in states under the current system").

91. *See* Nicolas J. Duquette, Top Donors and the Rising Concentration of Giving in the United States, 1960-2012, at 1 (June 19, 2018) (unpublished manuscript), https://ssrn.com/abstract=3203135.

92. I.R.C.§ 170(b) (2018).

93. I have previously taken a nuanced approach to the plutocracy of the charitable deduction. *See* Linda Sugin, *Competitive Philanthropy: Charitable Naming Rights, Inequality and Social Norms*, 79 OHIO ST. L.J. 121, 139-40 (2018) (defending elite philanthropy). Since I have argued that government should be responsible for more public provision, the ideal role of philanthropy is narrower than its current function. *See* Sugin, *supra* note 61, at 2607 ("Charities have an important role in our heterogeneous society connected to fostering pluralism and diversity. They should not relieve the government of its more fundamental role in ensuring just institutions.").

wrought by the TCJA: tax cuts for the rich and bigger government deficits in the future. Concentrating philanthropy among the most elite is only tolerable if there is a sufficient level of taxation overall to guarantee public support of public priorities so that government leaves little need for private organizations to fill.

The TCJA simplified taxes for millions of Americans by substantially increasing the standard deduction (to $12,000 for single filers and $24,000 for joint filers).[94] The charitable deduction is only available to taxpayers who itemize, so only taxpayers whose total itemized deductions exceed the standard deduction will continue to itemize. The Tax Policy Center estimates that the TCJA will reduce the number of taxpayers claiming the charitable contribution deduction by 21 million.[95] While fewer taxpayers in the top 1% are projected to claim the deduction, fewer than half of former claimants below the 95th percentile will continue to take the deduction.[96]

The charitable deduction operates as a government subsidy to charities chosen by taxpayers. For example, an individual in the 35% rate bracket receives $35 in tax savings on a $100 gift to charity. When she makes that gift, it has the same effect as her paying $65 from her after-tax income and directing the government to pay the other $35.[97] Consequently, the charitable deduction has been compared to a government matching grant.[98] Individuals who can claim the charitable deduction are able to direct government subsidies to the charities of their choosing, while those who cannot claim the deduction must finance their charitable support without the government's help.[99]

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94. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11021(a), 131 Stat. 2054, 2085-86 (2017) (amending I.R.C. § 64(c) (2012)).

95. *See* Howard Gleckman, *21 Million Taxpayers Will Stop Taking the Charitable Deduction Under the TCJA*, TAX POL'Y CTR.: TAXVOX (Jan. 8, 2018), https://www.taxpolicycenter.org/taxvox/21-million-taxpayers-will-stop-taking-charitable-deduction-under-tcja [https://perma.cc/5VL5-UA2H]; *see also* MOLLY F. SHERLOCK, CONGR. RES. SERV., IN10820, TAX INCENTIVES FOR CHARITABLE GIVING IN THE TAX CUTS AND JOBS ACT (H.R. 1), at 1 (2017), https://fas.org/sgp/crs/misc/IN10820.pdf [https://perma.cc/ZE76-G6TF] (noting that the percentage of taxpayers itemizing deductions is estimated to decrease from 29% to 6% under the new tax law).

96. *See* Gleckman, *supra* note 95.

97. This is the core of tax expenditure analysis. *See* STANLEY SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 50-64 (1973). I have elsewhere been critical of the simpler version of tax expenditure analysis. *See* Linda Sugin, *Tax Expenditures, Reform, and Distributive Justice*, 3 COLUM. J. TAX L. 1, 23-25 (2011) ("[I]t is important to know whether a provision actually operates as a subsidy or as an incentive, and who is subsidized or incentivized . . . .").

98. See Paul R. McDaniel, Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction, 27 TAX L. REV. 377, 380 (1972).

99. The charitable deduction has been known to provide an upside-down subsidy. *See* SURREY, *supra* note 97, at 136.

Even before the TCJA was enacted, nonitemizers were ineligible for the charitable deduction.[100] Many of them gave to charity, and many will continue to do so despite the absence of federal subsidy. There are perennial proposals to extend the charitable deduction to nonitemizers or to convert the deduction into a refundable credit (which would be available to both itemizers and nonitemizers) in order to democratize the federal subsidy.[101] Economists disagree about the efficacy of the charitable deduction as an incentive to give to charity.[102] The TCJA is a natural experiment, and scholars will surely study the change in giving patterns for taxpayers who itemized prior to the TCJA but claim the standard deduction in the future. New standard deduction claimants may reduce their charitable giving. But even if they continue to give, the new law directs zero dollars of federal subsidy to the charities chosen by nonitemizers.

By subsidizing only charitable gifts made by the wealthy, the TCJA sends the message that charity is an important public priority for the rich, but not for others. This is problematic. First, it reinforces the notion that government need not provide the infrastructure necessary for equality and opportunity since the rich have a responsibility to provide private support for public goods. Relatedly, this message gives the rich the false and dangerous impression that their charitable giving is a reasonable substitute for paying taxes. Finally, the rich and the poor support different types of institutions, and privileging the giving of the rich undervalues the types of institutions supported by the poor.[103]

While reducing the number of taxpayers eligible to claim a deduction for charity, the TCJA also raised the limit on how much itemizing taxpayers may deduct, by raising the cap on deductibility from 50% to 60% of a donor's income.[104] The Code has long capped charitable deductions to ensure that even

100. *See* I.R.C. § 170 (2012) (listing charitable contribution reporting requirements under Part VI – Itemized Deductions for Individuals and Corporations).

101. *See generally Options for Changing the Tax Treatment of Charitable Giving*, CONG. BUDGET OFF. (2011), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/charitablecontributions.pdf [https://perma.cc/F3EL-BVB7] (reviewing the pros and cons of various redesigns).

102. *See* Lise Vesterlund, *Why Do People Give?*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 570 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) ("[I]t is still unclear how much changes in price affect charitable giving.").

103. The rich support education more than any other purpose, while the poor support religion most. *See* WHO BENEFITS FROM THE NONPROFIT SECTOR? 15 (Charles Clodfelter ed., Univ. of Chi. Press, 1992).

104. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11023(a), 131 Stat. 2054, 2074-75 (2017) (amending I.R.C. § 170(b)(1) (2012)): "In the case of any contribution of cash to an organization described in subparagraph (A), the total amount of such contributions which may be taken into account under subsection (a) for any taxable year . . . shall not exceed 60 percent of the taxpayer's contribution base for such year.").

very charitable taxpayers must pay some tax.[105] Before the change, taxpayers could deduct only half their income as charitable deductions, and now, they can deduct up to 60%. A cap on deductibility signals that charitable gifts are not a substitute for paying taxes; everyone must contribute a fair share to the expenses chosen by elected officials, and there is no private substitute for supporting those public purposes. Raising the cap undermines the message of compelled contribution to democratically determined priorities—it implies that amounts given to private institutions committed to public purposes resemble taxes paid to governments.[106] Of course, the change in the cap is moderate—from 50% to 60%, so the revenue effects will be small, but the fact that Congress made any change is revealing.

The 50% cap did not present a problem that Congress needed to solve, and the change will lose some revenue. The increase to 60% will only provide a benefit to a miniscule number of very wealthy taxpayers who can afford to give more than half their income to charity in any year. Hardly anyone faces the cap—the average itemizer contributes 2% of income to charity. The way to hit the cap is to make large gifts out of wealth rather than income; Warren Buffett has this problem.[107] The culture of philanthropy among the super-rich is sufficiently strong that the cap on deductions has not deterred the richest Americans from pledging to give away at least half their wealth.[108] The cap primarily functioned as a symbol that charitable giving does not satisfy one's civic obligation to contribute to the social structure,[109] and the TCJA undermines this symbol. Charity is private in its operation, control, and funding. Charitable decisions are made in a plutocratic way. There is nothing wrong with that, as long as it is clear that

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105. The charitable contribution deduction dates back to the War Income Tax Revenue Act of 1917 and was initially capped at 15% of a taxpayer's taxable net income. While Congress enacted an unlimited charitable contribution deduction for any taxpayer who donated more than 90% of her taxable income for that year and for eight of the preceding ten years, that provision was phased out in the Tax Reform Act of 1969 to prevent tax abuse. The legislative history for the Tax Reform Act of 1969 indicates that the unlimited charitable contribution deduction was eliminated because it "allowed a small number of high-income persons to pay little or no tax on their income," which members of Congress felt should not be allowed and instead stated that charity can remain "an equal partner with . . . income," but should not reduce an individual's tax base by more than one-half. H.R. REP. No. 91-413 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1645, 1698; *see* Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1061, 1064-65 (2003).

106. *See* Sugin, *supra* note 61, at 2618 (criticizing the equivalence of charitable giving and taxes paid).

107. *See* Sugin, *supra* note 93.

108. *See A Commitment to Philanthropy*, GIVING PLEDGE, https://givingpledge.org/ [https://perma.cc/B5TC-BQXV] ("The Giving Pledge is a commitment by the world's wealthiest individuals and families to dedicate the majority of their wealth to giving back.").

109. *See supra* note 105 and accompanying text.

taxes are not conflated with gifts to charity.[110] The more the law allows charitable giving to substitute for taxes, the more it legitimates private control of public functions.

V. PHYSICAL ASSETS ARE IMPORTANT

The new law is evidence that congressional policymakers believe in the value of tangible things.[111] Even though studies have shown that happiness does not follow from buying things,[112] Americans continue to accumulate a lot of stuff. And the new tax law seems to agree that physical things are best. Despite the rhetoric about prioritizing jobs for workers,[113] the TCJA in fact encourages investment in long-lived assets more than investment in labor. The new law subsidizes the acquisition of long-lived assets by allowing their entire cost to be deducted in the year of acquisition.[114] To the contrary, there is no bonus deduction allowed for wages paid to workers.[115] If an employer hires people to perform services in its business, there is no subsidy because it cannot deduct the cost of paying the hirees in the future. The key to the subsidy for physical assets is the

110. This is the main argument in my previous article. *See* Sugin, *supra* note 61, at 2621.

111. *See, e.g.*, Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13202, 131 Stat. 2054, 2108-09 (2017) ("Modifications to Depreciation Limitations on Luxury Automobiles and Personal Use Property").

112. *See generally* Leaf Van Boven, *Experientialism, Materialism, and the Pursuit of Happiness*, 9 REV. GEN. PSYCHOL. 132 (2005) (extending findings from previous studies indicating that material acquisitions are negatively associated with happiness by noting current research that demonstrates that purchases made with the intent of acquiring life experiences make them happier than acquiring material possessions).

113. *See* Deirdre Walsh et al., *White House, GOP Celebrate Passing Sweeping Tax Bill*, CNN (Dec. 20, 2017, 5:37 PM), https://www.cnn.com/2017/12/20/politics/house-senate-trump-tax-bill/index.html [https://perma.cc/NH2F-7JNJ] ("'This is truly a case where the results will speak for themselves, starting very soon. Jobs, Jobs, Jobs!' the President tweeted.").

114. *See* Mihir A. Desai, *Tax Reform, Round One: Understanding the Real Consequences of the New Tax Law*, HARV. MAG. (May-June 2018), https://harvardmagazine.com/2018/05/mihir-desai-tax-reform [https://perma.cc/ZX9F-AH95] ("[E]xpensing allows the tax rate on new investment to become irrelevant. Under expensing, the firm gets tax relief at the time of investment and then later gives up profits—meaning the government is effectively functioning as a joint-venture partner with an ownership level that corresponds to the tax rate. As such, the pretax and post-tax rates of return are the same, ensuring no distortion to investment decisions.").

115. An equivalent treatment for labor would allow employers to currently deduct wages to be paid to employees in future years.

new law's "expensing" for long-lived physical assets.[116] Under income tax principles, the cost of long-lived assets should be deducted over time as they are used in the business;[117] "expensing" allows the entire cost to be deducted in the year of acquisition. As others have explained, "[t]he new law subsidizes rather than taxes capital investments. In other words, the tax act subsidizes firms that buy robots over firms that hire new workers."[118]

Standard tax policy analysis recognizes that deducting the entire cost of a long-lived asset in the year it is acquired is economically equivalent to exempting the future income from that asset from tax.[119] This happens because the deduction allowed in the year of acquisition when a capital asset is expensed is bigger than the actual cost to the taxpayer in that year, since the asset will be useful in the business over an extended period. For example, if a taxpayer buys a machine that lasts five years for $100, part of that $100 is a cost of doing business in years two through five, but expensing allows it all to be deducted in year one. The deduction in the year of acquisition reduces the investor's tax in year one, saving the investor taxes on other income equal to the cost ($100) multiplied by the taxpayer's tax rate (assume 30%), or $30. The tax savings in the year of acquisition can be conceptualized as a government co-investment in the asset—the government invests $30 out of the $100 cost of the asset. The investor's out-of-pocket investment is only $70. The government's investment is repaid in later years when taxes are owed on income generated from the asset.[120] While technically the investor makes a tax payment when the asset earns income, their rate of return is not diminished by tax.

116. *See* Tax Cuts and Job Act, § 13201 ("Temporary 100-Percent Expensing for Certain Business Assets").

117. This is depreciation. *See* I.R.C. § 167(a) (2018) (authorizing a deduction for a "reasonable allowance for the exhaustion, wear and tear" of capital assets).

118. Edward Kleinbard, *Tax Policy is a Bore, Until They Take Your Social Security and Medicare Away*, L.A. TIMES (Apr. 15, 2018, 4:05 AM), http://www.latimes.com/opinion/op-ed/la-oe-kleinbard-tax-health-20180415-story.html [https://perma.cc/E4TY-MVJF].

119. *See* Desai, *supra* note 114.

120. Consider this example: Assume the tax rate is a flat 30% and the rate of return is 10%. TP earns $100 in year one. He needs to pay $30 tax on the amount, leaving him $70 to spend. If he invests instead, he will be entitled to expense the investment, so he has a $100 deduction that allows him to invest $100 without any tax burden. A year later, the $100 grows to $110. If he liquidates that to spend, he will owe tax at 30% or $33, leaving him $77. If he had invested the original after-tax amount, $70 invested at 10% grows to $77 after a year; in an income tax, the $7 would be subject to a 30% tax, leaving the investor with $4.66, for a total of $74.66. In the expensed example, the taxpayer has $77 to spend. So, the amount available to spend with expensing the investment is the same as the amount available to spend if the investment income (the $7) is explicitly exempt from tax.

Deducting the full cost in the year of acquisition is the key to effectively exempting the income from tax. Any tax paid in later years can be understood as the government receiving a return on its earlier investment. It does not matter what the tax rate is, as long as the rate of the deduction in the year of acquisition is the same as the rate of the amounts that are later included in income subject to tax. It is as though the government invested 25%, 30%, or 50% of the cost of the asset, and is later entitled to the same 25%, 30%, or 50% of the asset's income.

The preference for things rather than people is reinforced by the TCJA's treatment of capital income compared to labor income. While labor has long been subject to more burdensome taxation than capital,[121] the TCJA exacerbates this inequality. The TCJA did not change the payroll tax, which is a tax imposed only on people who work. Instead, Congress reduced business taxes of all sorts—corporate and pass-through taxation,[122] as well as reducing the only tax the United States has on accumulations of wealth, the estate and gift tax.[123] All of these changes favor things over people, stuff over services, physical goods over experiences.

The real message of these provisions directly contradicts the rhetoric that its adopters spread about the law. The TCJA's proponents claimed that the law was about creating jobs and improving the well-being of workers. But the law instead favors machines and business owners. While it is possible to make an argument that investments in machines will require more people, or that more money for investors will trickle down to better wages for workers, there is nothing in the rules adopted in the TCJA that gives taxpayers incentives for the second order effects. It is just as likely that business owners will replace workers with machines.

CONCLUSION

When we consider the social meaning of the particular provisions analyzed in this Essay, it is not surprising that the distributional consequences of the law are regressive. Each of the provisions discussed favors the affluent: traditional

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121. *See* Linda Sugin, *Payroll Taxes, Mythology, and Fairness*, 51 HARV. J. ON LEGIS. 113, 113 (2014) (arguing that the tax burden on workers is too heavy, compared to the burden on capital holders).

122. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13001(a), 131 Stat. 2054, 2096 (2017) (setting the corporate tax rate at 21%, a reduction of between 4-14% depending on a corporation's income in excess of $50,000); *id.* § 11011 (adding deductions for qualified business income of pass-through entities).

123. *See* Tax Cuts and Jobs Act § 11061 (increasing the exemption cap for estate and gift tax exemptions—e.g., the basic exclusion amount for estates or gifts made after December 31, 2017 was increased from $5 million to $10 million).

families, capital holders, philanthropists, and businesses. The tax law contributes to the perpetuation of traditional power structures, so it is imperative that scholars uncover its unarticulated biases. If parts of the tax law are borne of prejudice and inequality, it is crucial that those values are apparent. People need the opportunity to openly object to the codification of prejudice in the tax law. Obscuring the implicit messages of the tax law stifles debate.

In this Essay, I have explored the implicit moral and political message in the TCJA. In some examples, it is likely that the TCJA's social meaning contradicts the stated intention of its drafters. In other examples, the Act likely reflects the unarticulated values of its framers. While I disagree with some of the values evidenced in the TCJA, my project here is not to debate them, but to expose them. Policymakers and citizens make a grave error when they treat the tax law as amorally technical or dispassionately economic.[124] Only by explicitly identifying values is it possible to start a discussion about them. Justice in taxation is not possible without a full and honest examination of the law's underlying principles.

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124. *See* Mary Louise Fellows, Grace Heinecke & Linda Sugin, *Foreword: We Are What We Tax*, 84 FORDHAM L. REV. 2413, 2418-19 (2016).