CAPITAL TAXATION IN THE MIDDLE OF HISTORY

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This Article frames the problem of capital taxation as a dilemma of the middle of history. At the "beginning of history"—before any wealth inequality has emerged and before individuals have made any saving choices—the much-cited Atkinson-Stiglitz theorem teaches that the optimal capital tax is zero. At the "end of history"—after individuals have made all of their saving choices—the optimal capital tax is generally agreed to be 100%, since a capital tax today cannot distort decisions made in the past. Neither result tells us how to proceed in the "middle of history"—after significant wealth inequality has emerged but while the shadow of the future still looms large. Yet absent an imminent apocalypse, the "middle of history" is the temporal reality with which our tax policies must contend.

The central question for capital taxation in the middle of history is how governments today can respond to accumulated inequalities while credibly committing to future tax trajectories. This Article focuses on three factors—institutions, inequality, and ideas—that mediate the relationship between past and present policy and expectations of future policy. Exploring these three mediating factors in deep detail can enrich our positive understanding of capital taxation's real-world effects while refining our normative views about optimal capital tax design. Economic reasoning proves useful to this inquiry, but the Article also emphasizes the importance of integrating perspectives from history, political science, sociology, and—not least—law into a holistic account of capital taxation and credible commitment.

The analytical payoffs from such an approach are far-reaching. For example, a middle-of-history perspective complicates the conventional wisdom regarding the relationship between capital taxation and investment incentives: Capital tax cuts—which are typically thought to incentivize investment—may have the reverse effect when they undermine public confidence in the political stability of a low-capital-tax regime. Beyond the implications for tax, a middle-of-history perspective can yield lessons for—and derive lessons from—fields ranging from criminal justice to intellectual property, which face credible commitment problems comparable to tax's dilemma. The challenge of sustaining credible commitment

 For helpful comments on earlier drafts, the author thanks Bruce Ackerman, Ian Ayres, Tom Brennan, Rick Brooks, Eric Brunstad, Adam Cox, Blake Emerson, William Eskridge, Brian Galle, Colin Heath, Eric Hemel, Christine Jolls, Amy Kapczynski, Louis Kaplow, Alvin Klevorick, Zachary Liscow, Yair Listokin, Jonathan Macey, Daniel Markovits, Nicholas Parrillo, Eric Posner, Robert Post, Judith Resnik, Roberta Romano, Steve Shavell, Holger Spamann, Emily Stolzenberg, Roberto Tallarita, John Fabian Witt, Taisu Zhang, Eric Zolt, and participants in the American Law and Economics Association Annual Meeting at University of Michigan Law School, the Harvard Law School Seminar in Law and Economics, the NYU School of Law Summer Faculty Workshop, the Oxford University Centre for Business Taxation Annual Academic Symposium, the Villanova University Charles Widger School of Law Faculty Workshop, and the Yale Law School Faculty Workshop. For excellent editing, the author thanks Nina Russell and the staff of the *New York University Law Review*.

when policymakers' incentives are time inconsistent is not just a problem of capital taxation in the middle of history but a more general problem of law in the middle of history.

INTRODUCTION 1555
I. MODELS OF OPTIMAL CAPITAL TAXATION 1565
A. *Atkinson-Stiglitz (1976) and the Beginning of History* 1565
B. *Fischer (1980) and the End of History* 1569
C. *Optimal Capital Taxation in the Middle of History* 1571
II. SOURCES AND LIMITS OF CREDIBLE COMMITMENT 1574
A. *Institutions* 1574
1. *Institutions of Tax Administration* 1575
2. *Institutions Affecting Legibility* 1577
3. *Constitutional Law* 1579
4. *Legislative Institutions* 1587
5. *Savings Institutions* 1590
B. *Inequality* 1591
C. *Ideas* 1597
1. *Ideas About Institutions* 1598
2. *Ideas About Inequality* 1602
D. *The Role of Reputation* 1607
E. *Summary* 1612
III. IMPLICATIONS 1613
A. *Capital Taxation in the Middle of American History* 1613
B. *One-Time Capital Levies and Value-Added Taxation* 1619
C. *Optimal Tax Theory in the Middle of History* 1623
D. *Law in the Middle of History* 1626
1. *Criminal Law* 1627
2. *Intellectual Property* 1631
CONCLUSION 1634

INTRODUCTION

A central question in tax policy is how to treat capital. A polity's capital tax structure has significant implications for economic growth, social stability, and wealth inequality. A long literature in economics approaches the question of capital taxation from the perspective of a benevolent social planner that seeks to maximize overall welfare. The

optimal (i.e., welfare-maximizing) tax schedule serves as a yardstick against which to evaluate real-world tax systems and, potentially, as a lodestar for reform.

The optimal capital tax literature has produced two especially stark and contrasting results. First, and most famously, Anthony Atkinson and Joseph Stiglitz posit in a 1976 article that the optimal capital tax is zero.[1] Atkinson and Stiglitz arrive at this result by way of a simple two-period model in which individuals work in Period One and live off their savings in Period Two. Given standard assumptions about individual utility functions, Atkinson and Stiglitz show that the benevolent planner—setting a tax schedule at the outset of Period One—can maximize social welfare by combining a positive labor income tax with a zero rate of capital taxation. This result, sometimes known as the "Atkinson-Stiglitz theorem,"[2] has achieved "landmark" status in optimal tax theory,[3] and the 1976 paper from which it emerged is—by one count—the second-most-cited article in the optimal tax literature of all time.[4]

Second, Stanley Fischer—writing four years after Atkinson and Stiglitz—revisits the two-period model of capital taxation and reaches a result diametrically opposite to Atkinson and Stiglitz's original conclusion.[5] Instead of approaching the issue from the perspective of a planner in Period One, Fischer asks: What combination of labor income and capital taxes would the benevolent planner choose at the end of Period Two? Fischer shows that the Period Two planner can maximize

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[1] *See* A.B. Atkinson & J.E. Stiglitz, *The Design of Tax Structure: Direct Versus Indirect Taxation*, 6 J. Pub. Econ. 55, 69 (1976). Capital taxation encompasses capital income taxes (e.g., taxes on interest, dividends, capital gains, and business profits to the extent that they are attributable to capital as an input) as well as one-time capital levies, annual or periodic wealth taxes, and wealth transfer taxes (e.g., gift, estate, and inheritance taxes).

[2] *See, e.g.*, Peter Diamond & Johannes Spinnewijn, *Capital Income Taxes with Heterogeneous Discount Rates*, 3 Am. Econ. J.: Econ. Pol'y 52, 52–53 (2011).

[3] *See, e.g.*, Robin Boadway & Pierre Pestieau, *Indirect Taxation and Redistribution: The Scope of the Atkinson-Stiglitz Theorem*, *in* Economics for an Imperfect World: Essays in Honor of Joseph E. Stiglitz 387, 399 (Richard Arnott, Bruce Greenwald, Ravi Kanbur & Barry Nalebuff eds., 2003) (the Atkinson-Stiglitz theorem "represented a landmark in optimal tax theory"); Edward D. Kleinbard, *Capital Taxation in an Age of Inequality*, 90 S. Cal. L. Rev. 593, 596 (2017) (describing Atkinson and Stiglitz's 1976 contribution as "a landmark paper").

[4] *See* Liliana Barbu, Diana Marieta Mihaiu, Radu-Alexandru Șerban & Alin Opreana, *Knowledge Mapping of Optimal Taxation Studies: A Bibliometric Analysis and Network Visualization*, 14 Sustainability art. no. 1043 1, 17 tbl.4 (2022). Only James Mirrlees's field-defining article from five years earlier generates more citations, and Mirrlees's article—which focuses on labor income taxation—explicitly brackets the question of capital taxation. *See* J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 Rev. Econ. Stud. 175, 175 (1971).

[5] *See* Stanley Fischer, *Dynamic Inconsistency, Cooperation and the Benevolent Dissembling Government*, 2 J. Econ. Dynamics & Control 93 (1980).

social welfare by raising all revenue from capital taxation.[6] Indeed, an implication of Fischer's model is that the benevolent planner will want to levy a capital tax of 100% in Period Two, seizing and redistributing all accumulated savings.[7]

The striking divergence between these two results is a reflection of two different temporal perspectives. Atkinson and Stiglitz approach the question of capital taxation from the *beginning of history*—before any wealth inequality has emerged and before individuals have made any savings choices. From a beginning-of-history perspective, a capital tax is double distortionary.[8] Most straightforwardly, capital taxation distorts the choice between consumption and saving because it reduces the return to the latter. More subtly, capital taxation distorts the choice between labor and leisure because the capital tax reduces the amount of future consumption that individuals can finance out of their current wages, thus making labor relatively less attractive.

Fischer, for his part, considers the choice facing the benevolent planner at the *end of history*—after individuals have made all of their saving decisions. In the absence of a time machine, a capital tax that is not levied until Period Two cannot distort decisions that already were made in Period One. To be sure, as Fischer recognizes, the benevolent social planner will want individuals in Period One to believe that the Period Two capital tax will be zero.[9] But as Fischer emphasizes, a zero-capital-tax policy is time inconsistent: Once Period Two rolls around and all Period One decisions are sunk, the benevolent planner will want

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[6] *See id.* at 97–98.

[7] *See infra* note 42 and accompanying text. Fischer's contribution is not as widely cited as Atkinson and Stiglitz's: as of this writing, Google Scholar catalogued 606 references to Fischer's paper versus 2,631 to Atkinson and Stiglitz's. However, the central idea in Fischer's article—that a 100% capital tax is optimal from the perspective of a backward-looking planner, though extraordinarily distortionary when anticipated—is now well understood by practitioners of optimal tax theory. For example, Stiglitz himself—in a recent article—calls this idea "the standard paradox of capital taxation." Joseph E. Stiglitz, *Pareto Efficient Taxation and Expenditures: Pre- and Re-Distribution*, 162 J. PUB. ECON. 101, 115 (2018). This Article highlights Fischer's contribution because it appears to be the earliest and clearest statement of the contrast between Period One and Period Two incentives in the vast literature analyzing capital taxation through a two-period model.

[8] The use of the phrase "double distortionary" does not imply that fewer distortions are always better—indeed, in many settings, two small distortions will be better than one larger distortion. For an application of this idea in the intellectual property context, see Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 MICH. L. REV. 985 (1999). The problem with capital taxation in the Atkinson-Stiglitz model is that it involves the same labor-leisure distortion as a labor income tax that raises an equivalent sum, plus an additional consumption-saving distortion.

[9] *See* Fischer, *supra* note 5, at 100–01.

to use capital taxation as a nondistortionary instrument for raising revenue and redistributing from the haves to the have-nots.[10]

Of course, we do not live at the beginning of history, and hopefully we are not at the end of history either. The relevant question for tax policy in the here and now is how to treat capital in the "middle of history." Unlike the planner in Period One of the Atkinson-Stiglitz model, we live in a society with substantial wealth inequality arising from past labor-leisure and consumption-saving choices—as well as from inheritance, luck, and historic injustice. But unlike the planner in Period Two of Fischer's model, we face a future. The decisions we make about capital taxation today are likely to influence expectations about capital taxation going forward. And those expectations, in turn, will affect labor-leisure and consumption-saving choices—choices that ultimately matter for economic growth and social welfare.

In theory, the benevolent social planner in the middle of history might bridge the Period One and Period Two perspectives by imposing a one-time capital levy and then promising never to do it again. As Barry Eichengreen notes, "[i]f governments could make a credible commitment not to repeat it, a one-time levy would be unambiguously beneficial," since it would allow for substantial revenue-raising and redistribution without discouraging labor or saving.[11] Several countries considered capital levies to pay down national debts after the world wars, and Japan successfully implemented a one-time capital tax with a top rate of 90% in 1946–1947.[12] Tax theorists typically assume, though, that absent unusual circumstances such as those that obtained in postwar Japan, governments lack the commitment technology necessary to promise convincingly that capital levies truly will be one-time affairs.[13] This is one of the reasons why a 1999 proposal by a New York businessman to wipe away the federal debt in a fell swoop with a one-time capital levy of 14.25% on the top percentile of households by net worth went nowhere.[14]

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[10] *Id.*

[11] Barry Eichengreen, *The Capital Levy in Theory and Practice*, *in* PUBLIC DEBT MANAGEMENT: THEORY AND HISTORY 191, 192 (Rudiger Dornbusch & Mario Draghi eds., 1990).

[12] For a first-hand account of the implementation of the Japanese tax, see Henry Shavell, *Postwar Taxation in Japan*, 56 J. POL. ECON. 124, 132 (1948).

[13] *See, e.g.*, Kevin Roberts, *The Theoretical Limits to Redistribution*, 51 REV. ECON. STUD. 177, 192–93 (1984); Eichengreen, *supra* note 11, at 194; J.A. Mirrlees, *What Taxes Should There Be?* 3 (Mar. 2000) (conference paper, IDEI Conference, University of Toulouse), https://idei.fr/sites/default/files/medias/doc/conf/annual/paper_2000.pdf [https://perma.cc/4T3Z-VMV5].

[14] The businessman was named Donald Trump, who was then mulling a run for the Reform Party's presidential nomination. *See* Phil Hirschkorn, *Trump Proposes Massive One-Time*

Yet the problem of credible commitment is not limited to situations in which the government actually imposes an ostensibly one-time capital levy. It is endemic to capital tax policy in the middle of history. A government may expropriate[15] wealth in the future whether or not it imposes any capital tax today. Moreover, current-period policy has an ambiguous effect on fears among savers that the government will seize some or all of their wealth later on. While an ostensibly nonrecurrent capital levy may stoke suspicions of repetition, low capital taxes today—insofar as they entrench historic injustice and allow wealth inequality to widen—potentially raise political pressure for large-scale redistribution and thus cause the shadow of expropriation to loom even larger.

This Article frames the problem of capital taxation as a dilemma of the middle of history. That framing draws attention to the tangled relationship between past and present experience and future expectations. Prior and current capital tax policies affect expectations about future policies, but the relationship between experience and expectations is not always linear. The Article focuses on three factors—institutions, inequality, and ideas—that mediate the relationship between experience and expectations. Exploring these three mediating factors in deep detail can enrich our positive understanding of capital taxation's real-world effects while refining our normative views about optimal capital tax policy. Economic reasoning proves useful to this inquiry, but the Article also emphasizes the importance of integrating perspectives from history, political science, sociology, and—not least—law into a holistic account of capital taxation and credible commitment.[16]

Start with *institutions*, defined broadly as "the humanly devised constraints that structure political, economic, and social interaction."[17]

Tax on the Rich, CNN (Nov. 9, 1999, 6:24 PM), https://www.cnn.com/ALLPOLITICS/stories/1999/11/09/trump.rich/index.html [https://perma.cc/EQ8P-4AUF].

15 Louis Kaplow, *Capital Levies and the Transition to a Consumption Tax*, *in* INSTITUTIONAL FOUNDATIONS OF PUBLIC FINANCE 112, 114 (Alan J. Auerbach & Daniel N. Shaviro eds., 2008). This Article will use the term "expropriation" in a purely non-normative sense to refer to sudden and significant increases in the level of capital taxation. The term is not intended to reflect a view on the merits of one-time capital taxes. Welfarist theory would support a one-time tax of up to 100% on wealth above a modest threshold if the government could credibly commit not to do it again.

16 To be sure, the middle-of-history dilemma is, in a sense, a dilemma for the planner at the beginning of history too, because the planner at the beginning of history who sets the capital tax at zero will need to convince individuals that it won't expropriate their savings down the road. The dilemma is distinctive to the "middle of history"—the period after significant wealth inequality has emerged but before the end of time—insofar as the middle of history is the juncture at which the planner has both an incentive to tax capital and an incentive to convince individuals that future capital taxes won't be confiscatory. By contrast, the planner at the beginning of history has no incentive to tax capital because there is not yet any wealth inequality to redress.

17 Douglass C. North, *Institutions*, 5 J. ECON. PERSPS. 97, 97 (1991).

The central insight of Fischer's 1980 paper is that when Period Two arrives, the government will want to tax capital at the maximum possible rate, regardless of what the government promised it would do in Period One. Implicit in Fischer's model is the assumption that the government *can* tax capital at whatever rate it chooses in Period Two. However, the institutions of capital taxation are difficult to construct from scratch. Effective capital taxation requires not only a sophisticated administrative apparatus but also a set of non-tax legal institutions that render private holdings "legible" to the state.[18] Optimal tax models that off-handedly assume the existence of these institutions call to mind the old saw about the economist on a desert island with no tools and a can of food who simply assumes a can opener.[19]

But whereas a can opener is an unambiguously good thing when one is in the middle of the ocean with only a can of food, well-developed institutions of capital taxation are less obviously salutary for a polity in the middle of history without access to other commitment technologies. The shadow of expropriation looms larger when the government already has the tools available to implement a capital levy. Well-developed institutions of capital taxation thus can exacerbate the credible commitment problem. An important question for policymakers in the middle of history is whether to invest in the institutions of capital taxation or, alternatively, to dismantle them. The answer to that question will depend on the rest of the institutional environment—and, more specifically, the extent to which other institutions can sustain credible commitment even when the tools of capital taxation lie close at hand.

Some economists have suggested that polities might seek to overcome the credible commitment problem in capital taxation by enshrining a non-expropriation commitment into constitutional text. For example, Finn Kydland and Edward Prescott—in a canonical paper that helped to win both of them the Nobel prize in economics—write: "A majority group, say, the workers, who control the policy might rationally choose to have a constitution which limits their power, say, to expropriate the wealth of the capitalist class."[20] Yet assuming that a constitution can generate credible commitment is, to some extent, like assuming a can opener. Even when constitutions are by their own terms difficult to amend, their provisions can be reinterpreted or

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18 On the relationship between "legibility" and tax capacity, see generally JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998); and David A. Weisbach & Daniel J. Hemel, *The Legal Envelope Theorem*, 102 B.U. L. REV. 449 (2022).

19 *See* KENNETH E. BOULDING, ECONOMICS AS A SCIENCE 101 (1970).

20 Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 486 (1977).

simply ignored.[21] Parchment paper on its own cannot prevent future policymakers from implementing a capital levy. It can, at most, introduce a friction, the force of which is highly contingent upon the surrounding legal and political culture.

Legislative procedures provide another possible source of soft commitment. Legislative vetogates—including committees, party leadership, and supermajority rules—can stall or kill changes to present law even when those changes enjoy support from chamber majorities. Cumbersome floor procedures also raise the opportunity cost of legislative change: When floor time is scarce, enacting any legislation requires not only the support of a legislative majority and relevant veto players but also a choice by chamber leaders to allocate floor time to that item rather than to competing policy priorities. And by slowing down the adoption of capital tax increases, legislative procedures give capital owners more time to pursue avoidance strategies in anticipation of a coming capital tax hike.

But legislative procedures are—at most—encumbrances rather than straitjackets: The various legislative vetogates can do only so much to hold back reform when support for higher capital taxes is deep and broad. And the efficacy of legislative procedures as a commitment technology presumes that the puzzle of constitutional commitment has been at least partially solved. After all, what—other than a parchment-paper promise ("Congress shall have the [p]ower [t]o lay and collect [t]axes . . ."[22])—stops the executive from implementing a capital levy without legislative authorization?

Here, inequality enters the picture. As Emmanuel Farhi and coauthors observe, legislative procedures bolster the credibility of capital tax policy not by blocking reform altogether but by raising its costs.[23] Lawmakers will choose to bear the costs of capital tax reform only if the benefits outweigh the costs. And the benefits of a one-time capital levy depend pivotally on the existing distribution of wealth. In a relatively egalitarian society, the benefits of a one-time capital levy are limited because the difference in the marginal utility of consumption between high-net-worth and low-net-worth individuals is small. In a society with an extremely skewed distribution of wealth, the benefits of a one-time capital levy followed by a redistribution of resources from rich to poor are large. Thus, the credibility of capital tax policy depends

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[21] For a nuanced discussion of the credible commitment problem in constitutional law, see generally Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

[22] U.S. CONST. art. I, § 8, cl. 1.

[23] *See* Emmanuel Farhi, Christopher Sleet, Iván Werning & Sevin Yeltekin, *Non-Linear Capital Taxation Without Commitment*, 79 REV. ECON. STUD. 1469 (2012).

not only on the institutions that constrain reform but also on the overall level of wealth inequality. As inequality increases, a policy of low capital taxation becomes increasingly unstable.[24]

One implication of Farhi and coauthors' observation is that under certain circumstances, the relationship between current capital tax rates and expected capital tax rates may be inverse. High-income earners and high-net-worth individuals may view the combination of low capital tax rates and rising inequality as politically unsustainable, and they may make labor and saving decisions under the assumption that accumulated capital will be taxed at high rates in later periods. In those cases, higher capital taxes may reduce the *shadow tax of inequality*—the current labor and saving disincentives of an anticipated future capital levy.[25] In those cases, equality versus efficiency—what Arthur Okun famously described as "the big tradeoff" in economic policy[26]—may not be a tradeoff at all. Capital taxation potentially promotes efficiency when it moderates inequality and thus bolsters the credibility of the government's commitment not to expropriate wealth down the road.[27]

Yet while wealth inequality may undermine the credibility of a low-capital-tax policy, the relationship between inequality and redistribution is not straightforward. For one thing, high levels of inequality may enable economic elites to capture political institutions and thwart redistributive reforms.[28] For another, the effect of inequality on capital taxation depends critically on a third mediating factor: *ideas*.

Ideas shape the credibility of capital tax policy by regulating the power of formal institutions. In the United States, for example, the *idea of constitutionalism* motivates compliance with constitutional commands and judicial orders.[29] Ideational commitments bring parchment-paper promises to life. Ideas also modulate individual and societal responses to inequality. For example, individuals may be

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[24] *See id.* at 1470–71 (discussing the correlation between societal inequality and tax policy credibility).

[25] The phrase "shadow tax of inequality" is original to this Article, though the notion that inequality creates a disincentive for labor and saving is not. Indeed, the very idea of the shadow tax presumes that individuals are aware of the possibility that higher material inequality may trigger a capital tax response.

[26] Arthur M. Okun, Equality and Efficiency: The Big Tradeoff (1975).

[27] Alternatively, one might say that the equality-efficiency tradeoff remains—but in reverse: Zero or low levels of capital taxation potentially lead to more equality and lower efficiency precisely because they backfire and produce greater redistribution in the long run.

[28] *See* Daron Acemoglu & James A. Robinson, *Persistence of Power, Elites, and Institutions*, 98 Am. Econ. Rev. 267, 283 (2008) (describing the phenomenon of "captured democracy," where democratic political institutions are "captured by the elite, which is able to impose its favorite economic institutions").

[29] For a trenchant critique of the idea of constitutionalism, see Martin Loughlin, Against Constitutionalism (2022).

more willing to accept an unequal distribution of wealth when they believe that hard work rather than luck determines economic success. At the same time, rising inequality—especially when it persists across generations—may undermine the idea that economic outcomes reflect just deserts. Ideas and inequality are therefore interdependent: Ideas about the legitimacy of the existing distribution may muffle responses to inequality and thereby allow the wealth gap to grow, but a growing gap between rich and poor also may place ideas about the legitimacy of the wealth distribution under pressure.

The following Parts explore the economic, political, legal, and social dimensions of capital taxation in the middle of history. Part I introduces the Atkinson-Stiglitz framework and explains why the Atkinson-Stiglitz argument is often interpreted as suggesting that capital should not be taxed. It then explains—building on Fischer's model—why a policy of zero capital taxation is time inconsistent. Part I goes on to survey the approaches that other optimal tax theorists have taken to the time inconsistency problem. It concludes that the optimal capital tax in the middle of history will be highly contingent upon the available commitment technology. A policy of zero capital taxation ceases to be optimal under completely credible commitment *and* under a complete absence of credible commitment.

Part II seeks to understand the factors that can facilitate or frustrate credible commitment in the capital tax arena, focusing on the trifecta of institutions, inequality, and ideas. While the main analysis is broadly applicable to countries at various stages of economic development and democratization, Part II devotes special attention to the experience of the United States, which has been uniquely successful in facilitating the accumulation of private capital. Yet despite—or more precisely, because of—its track record, the United States arguably stands at risk of becoming a victim of its own success: The same factors that have sustained the United States' credible commitment to low capital taxation also may impair its ability to manage increases in economic inequality. Institutional features that stand in the way of relatively light levels of capital taxation can have the perverse effect of intensifying the threat of heavy capital levies.

Part III draws out implications of the analysis for taxation as well as non-tax areas of law. One implication for tax is to dislodge the zero-capital-tax result from its benchmark position in tax theory. In the middle of history, a policy of zero capital taxation is optimal only under knife-edge assumptions about the government's capacity for credible commitment. The Article's analysis lays bare those assumptions and thereby reveals the fragility of the canonical zero-capital-tax prescription. The Article's analysis also suggests a possible solution to a puzzle posed by Louis

Kaplow[30]: How have most countries managed to implement value-added taxes (VATs)—which typically entail an implicit one-time capital levy—without triggering fears of further wealth grabs? As we shall see, the administrative and legal institutions needed to support a VAT are very different from the institutions that would be needed for any other type of capital levy. Thus, the introduction of a VAT does not reduce the marginal cost of a later capital levy, while it potentially does reduce the marginal benefit (because the VAT can redistribute substantially on its own). The case of VATs also underscores the fact that what "counts" as a capital levy depends upon the ideational environment. This insight travels beyond the VAT context: Under certain circumstances, the ideational environment permits the economic equivalent of capital levies by recharacterizing those actions as sui generis.

The implications for non-tax law fall into two general categories. First, the analysis highlights ways in which other areas of law affect the credibility of capital tax policy. For example, property law, trust law, corporate law, and securities and banking regulations all determine the legibility of ownership arrangements and thus the feasibility of targeted capital taxes. Campaign finance regulations condition the influence of money in politics and thus the ability of capital owners to fend off redistributive tax reforms. Understanding the contours of the credible commitment problem in tax law can inform the design of—and can sharpen critiques of—these non-tax legal institutions.

Second, the analysis draws attention to instances in which other areas of law—ranging from criminal law to intellectual property—encounter commitment problems with structures that are analogous to capital taxation's middle-of-history dilemma. For example, just as a one-time capital tax is ex-post optimal in Fischer's model, a one-time cancellation of patent rights may be welfare-enhancing if the government can credibly commit not to do it again: Patent cancellations reduce the deadweight loss of monopoly pricing—and if the policies are believed to be one-offs, they will not affect innovation incentives going forward. The problem with a one-time cancellation of patent rights—like the problem with a one-time capital levy—is that notwithstanding the government's assurances, the public may expect repetition. But with intellectual property as with capital taxation, the relationship between present policy and expectations of future policy is nuanced. Just as a zero-capital-tax policy amid mounting inequality may raise expectations of a future capital levy and thus discourage present-period savings, a regime of very long patent terms may undermine the credibility of

30 *See* Kaplow, *supra* note 15, at 140.

intellectual property protection and thus discourage present-period innovation. More generally, intellectual property and other areas serve as reminders that the middle-of-history dilemma is not at all limited to tax. Tax policymakers in the middle of history can glean insights not just by projecting forward and rewinding backward in time but also by looking laterally to other fields that are concurrently confronting similar challenges.

I
Models of Optimal Capital Taxation

Part I introduces two influential contributions to the optimal capital taxation literature: Atkinson and Stiglitz (1976) and Fischer (1980). These two seminal articles apply superficially similar frameworks: In both, a benevolent planner has two available tax instruments (a labor income tax and a capital tax), and the planner chooses policies for two periods (Period One and Period Two). But whereas Atkinson and Stiglitz approach the planner's problem from a forward-looking perspective, asking what policy the planner would choose if it could credibly commit at the outset to a tax schedule that will bind in Periods One and Two, Fischer derives the optimal tax schedule through a process of backward induction, asking first what policy the planner would choose in Period Two and then using that to predict behavioral responses in Period One. After summarizing the Atkinson and Stiglitz model in the Fischer framework, Part I considers how other contributions to optimal tax theory have approached the problem of the time inconsistency of capital tax policy.

A. Atkinson-Stiglitz (1976) and the Beginning of History

We begin at the beginning of history—and, specifically, with the classic Atkinson-Stiglitz framework. The benchmark result emerging from Atkinson and Stiglitz's analysis is that the benevolent social planner—starting from the beginning of history and establishing tax policy for all time—would set the capital tax to be zero.

This stark result can be illustrated through a two-period model in which all agents[31] work in the first period and consume in both periods. The natural lottery sorts agents into two categories: "high-θ" and

[31] The text refers to "agents" rather than "individuals" because the same model can be applied to the problem of inheritance taxation when Period One and Period Two refer to different generations of the same family. *See, e.g.*, Emmanuel Farhi & Iván Werning, *Progressive Estate Taxation*, 125 Q.J. Econ. 635, 636, 644 (2010); Thomas Piketty & Emmanuel Saez, *A Theory of Optimal Inheritance Taxation*, 81 Econometrica 1851, 1865–66, 1882 (2013).

"low-θ." The Greek letter θ represents the ease with which agents can transform labor effort (which the agents are assumed to dislike) into wages (which the agents value for the consumption that they facilitate). In Period One, high-θ agents face a binary choice between (a) a high wage level with high effort and (b) a low wage level with low effort. Low-θ agents have no choice at all—they are consigned to a low wage level. Agents save some of their Period One wages to fund Period Two consumption. The government can observe agents' wages and savings but not their underlying θ or effort.

The social planner seeks to redistribute as much as possible from high-θ agents to low-θ agents, subject to a side constraint that rules out conscription. The redistributive objective might be justified on utilitarian grounds (i.e., because of diminishing marginal utility of consumption) or based on the maximin principle.[32] The side constraint may arise for ethical reasons (e.g., a commitment to individual autonomy) or practical reasons (e.g., the difficulty of forcing agents to supply high labor effort). The social planner can choose to impose a labor income tax, a capital tax, or both. Tax revenues are used to fund cash transfers to low-wage agents. The side constraint implies that the optimal tax system must be incentive compatible: High-θ agents must be motivated to choose the high-wage job, or else everyone will take the low-wage job and the tax system will accomplish no redistribution. Thus, for example, a 100% labor income tax would be ruled out, because a 100% labor income tax would induce high-θ types to "mimic" low-θ types by choosing low-wage jobs.

We can begin by imagining that the social planner uses only a labor income tax on high-wage agents to finance the cash transfer. The planner sets the tax such that high-θ types are indifferent (or infinitesimally shy of indifferent) between choosing a high-wage job with high effort and a low-wage job with low effort. Any further increase in the labor income tax will induce high-θ types to mimic, thus violating incentive compatibility.

Now imagine that on top of the maximum incentive-compatible labor income tax, the social planner adds an additional capital tax on high-wage agents (i.e., a tax on savings or on income generated by savings). Within this framework, the capital tax produces two effects. First, the tax reduces the present value of the two-period bundle

[32] *See* JOHN RAWLS, A THEORY OF JUSTICE: REVISED EDITION 132–33 (1999) (defining the "maximin rule" as the rule that selects the policy alternative that maximizes the utility of the worst-off individuals). The summary of the Atkinson-Stiglitz theorem here broadly tracks the exposition in J.A. Ordover & E.S. Phelps, *The Concept of Optimal Taxation in the Overlapping-Generations Model of Capital and Wealth*, 12 J. PUB. ECON. 1, 17–19 (1979).

of consumption that high-θ types can fund out of their high wages. Because high-θ types were previously indifferent between high-wage and low-wage jobs under the optimal labor income tax, any diminution in the value of the consumption bundle that high-θ types can fund out of their high wages will induce high-θ types to mimic. To preserve incentive compatibility, the additional capital tax must be offset by a reduction in the labor income tax that restores the present value of the consumption bundle offered to high-wage agents. Up to this point, the additional capital tax and the offsetting reduction in the labor income tax are revenue neutral.

But the capital tax has a second effect: It induces high-θ/high-wage agents to reallocate some of their consumption from Period Two to Period One. This substitution effect arises because the capital tax makes consumption in Period Two more expensive relative to consumption in Period One. High-θ agents now have a temporally lopsided consumption bundle that differs from what they ideally would have chosen in a no-capital-tax world. The distortion to their intertemporal consumption bundle leaves high-θ agents worse off than under the optimal labor income tax. And again, starting from an optimal labor income tax, anything that makes it less attractive for high-θ types to choose high wages will induce them to mimic.

To restore incentive compatibility, the social planner must further reduce the labor income tax—in effect, compensating high-θ agents for the distortion of their intertemporal consumption bundle. Now, the combination of the additional capital tax and the corresponding reduction in the labor income tax have a net negative revenue effect. The reduction in revenue means that the cash transfer to low-wage types must decline. Thus, the additional capital tax on high-wage agents—after all the adjustments necessary to maintain incentive compatibility—makes low-θ/low-wage types worse off than under an optimal labor income tax. In this simplified setting, capital taxation not only reduces total utility but also violates the maximin principle.

Optimal tax theorists have added several qualifications to the zero-capital-tax result emerging from the benchmark model.[33] For example, the benchmark model assumes that all agents share the same utility functions and that the only way the government can glean information about an agent's θ is by observing her labor income. However, if agents have heterogeneous tastes and high-θ agents have a stronger taste for savings than low-θ agents, a positive capital tax may be optimal because an agent's savings reveal additional information about her θ beyond the

[33] *See, e.g.*, Emmanuel Saez, *The Desirability of Commodity Taxation Under Non-Linear Income Taxation and Heterogeneous Tastes*, 83 J. PUB. ECON. 217, 226 (2002).

information revealed by her labor income.[34] The benchmark model also assumes that agents work only in the first period. However, if agents potentially work in multiple periods, a positive capital tax on passive investment assets may serve to deter high-θ types from saving a larger portion of their high wages from Period One and then enjoying an early retirement.[35]

Although factors such as heterogeneous preferences and the negative labor supply effects of excess savings may cause the optimal capital tax to deviate from zero, these deviations tend to be—in the scheme of things—rather small. For example, Mikhail Golosov and coauthors estimate that the optimal capital income tax rate in the United States—accounting for heterogeneous savings preferences—is 2% on average and 4.5% on high earners given standard assumptions about the elasticity of capital supply.[36] In other work, Golosov and fellow economist Aleh Tsyvinski calculate an optimal "savings wedge"—roughly equivalent to the optimal capital income tax—of 2% or less when accounting for the negative labor supply effects of excess savings.[37] To put these estimates in perspective, a 2% capital income tax corresponds to an annual wealth tax of approximately 0.1% given the current risk-free rate of return.[38]

The key takeaway from this discussion of the Atkinson-Stiglitz theorem, then, is not that the optimal capital tax is necessarily zero once all the possible qualifications to the Atkinson-Stiglitz result are thrown in. The Atkinson-Stiglitz result serves as a reference point rather than an ultimate analytic conclusion, as both Atkinson and Stiglitz recognized.[39] Yet it is a reference point that anchors estimates of the optimal capital tax rate from the perspective of the Period One planner. From that

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34 *See id.* at 226–28.

35 *See* Mikhail Golosov & Aleh Tsyvinski, *Optimal Taxation with Endogenous Insurance Markets*, 122 Q.J. Econ. 487, 504–11 (2007).

36 *See* Mikhail Golosov, Maxim Troshkin, Aleh Tsyvinski & Matthew Weinzierl, *Preference Heterogeneity and Optimal Capital Income Taxation*, 97 J. Pub. Econ. 160, 171–72 tbl.4 (2013).

37 Golosov & Tsyvinski, *supra* note 35, at 517.

38 The risk-free rate of return is typically derived from the nominal yield on U.S. Treasury securities—approximately 5% as of this writing. *See Daily Treasury Par Yield Curve Rates*, U.S. Dep't of the Treas., https://home.treasury.gov/resource-center/data-chart-center/interest-rates/TextView?type=daily_treasury_yield_curve&field_tdr_date_value_month=202405 [https://perma.cc/8QSZ-W43W]. For a clear explanation of the proposition that an accrual-based capital income tax falls only on the risk-free return, see David A. Weisbach, *The (Non)Taxation of Risk*, 58 Tax L. Rev. 1, 8–21 (2004). A capital income tax of t_i when the pre-tax rate of return is r corresponds to an end-of-year wealth tax t_k equal to $(t_i{*}r)/(1 + r)$.

39 *See* Anthony Atkinson & Agnar Sandmo, *Welfare Implications of the Taxation of Savings*, 90 Econ. J. 529, 530 (1980); Joseph E. Stiglitz, Seminar Presentation: The Optimal Tax on Capital Is Greater Than Zero, INET Session in Honor of Tony Atkinson, Columbia University (Sept. 19, 2017).

perspective, the optimal capital tax rate—if not precisely zero—is a far cry from the 100% capital tax that will emerge from our end-of-history analysis.[40]

B. Fischer (1980) and the End of History

Whereas Atkinson and Stiglitz approach the optimal capital taxation question from the perspective of the benevolent social planner in Period One, Stanley Fischer approaches the question from the perspective of the benevolent social planner in Period Two.[41] Fischer observes that in Period Two, after Period One labor-leisure and consumption-saving choices already have been made, capital taxation is no longer double distortionary. Rather, it is entirely nondistortionary. The benevolent social planner can simply seize all capital and give everyone an equal share, and since the seizure does not happen until Period Two, it cannot change behavior in Period One. When the benevolent social planner can change its tax policy in Period Two, a 100% capital tax maximizes total utility and satisfies the maximin principle.[42]

To be sure, as Fischer observes, if agents in Period One are rational and foresighted, they ought to anticipate that the benevolent social planner will want to seize all capital in Period Two.[43] Recall that in the discussion of the Atkinson-Stiglitz model above, we saw that low-θ/low-wage types are worse off under an announced policy of positive

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[40] Even the much higher capital income tax rates suggested by some other economists correspond to annual wealth tax rates in the low single digits. For example, Emmanuel Saez and Stefanie Stantcheva estimate that the optimal capital income tax rate in the United States is upwards of 40% once heterogeneous savings preferences are factored in. Emmanuel Saez & Stefanie Stantcheva, *A Simpler Theory of Optimal Capital Taxation*, 162 J. Pub. Econ. 120, 132 fig.5(b) (2018). A 40% capital *income* tax with a 5% rate of return corresponds to an annual wealth tax of less than 2%—higher than in Golosov et al., *supra* note 36, but still a tiny fraction of the 100% rate that emerges from the end-of-history analysis in the next Section.

[41] *See* Fischer, *supra* note 5. Somewhat surprisingly, Fischer's paper never mentions Atkinson and Stiglitz's now-classic article from four years earlier. Fischer and Stiglitz would later intersect—and clash—when Fischer was first deputy managing director of the International Monetary Fund and Stiglitz was chief economist of the World Bank (a post that Fischer previously occupied). On the enmity between Fischer and Stiglitz, see Joseph E. Stiglitz, Globalization and Its Discontents 19–20, 207–08 (2002) and Kenneth S. Rogoff, *An Open Letter to Joseph Stiglitz*, Int'l Monetary Fund (July 2, 2022).

[42] As a technical matter, Fischer's paper uses a Ramsey-type model with a single representative agent and a fixed revenue target. The result is that the benevolent social planner in Period Two would want to set the capital tax at whatever level is sufficient to satisfy the revenue target, which may be less than 100%. The description in body text nests Fischer's insight within a Mirrleesian framework, which prioritizes redistribution rather than revenue raising. *See* J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 Rev. Econ. Stud. 175 (1971).

[43] *See* Fischer, *supra* note 5, at 99.

capital taxation than under a regime of optimal labor income taxation with a zero capital tax, since the latter enables a larger cash transfer. An anticipated 100% capital tax is particularly harmful to low-θ/low-wage agents: It raises no revenue itself (because no one chooses to save), and it dramatically reduces the amount of revenue that the government can extract from high-θ types via a labor income tax in Period One.

The benevolent social planner in Period One would therefore want to foreshadow a policy of zero capital taxation in Period Two. But a zero capital tax is time inconsistent: When Period Two rolls around, the benevolent social planner will want to raise the capital tax to 100%. And as Fischer emphasizes, it is *better* for society if the government imposes a 100% capital tax in Period Two than if it maintains the promised policy of zero capital taxation, since any benefits of the zero-capital-tax promise already would have been reaped in Period One.[44] Fischer refers to this as the phenomenon of the "benevolent dissembling government": Society is "better off" when the government reneges on its commitments than when it honors them, though society would be even better if the government could fool individuals in Period One into believing that these commitments were more than hollow promises.[45]

What should real-world policymakers do with Fischer's conclusion? Fischer's paper does not answer that question. "Inconsistency pays if it has no longer run consequences," Fischer observes,[46] but he leaves it to others to determine whether—if ever—inconsistency can be consequence-free. "The consequences of occasional (optimal) deviation from planned policy paths, or policy rules, may be desirable, but that remains a question for further investigation," Fischer writes in his article's final sentence.[47]

Fischer's last line leaves optimal tax theorists with a daunting challenge. For optimal tax theory to realize its aspirations of illuminating and potentially guiding real-world tax policy, it must wrestle with the middle-of-history problem: what to do once significant wealth inequality has emerged but—unlike Fischer's Period Two planner—the shadow of the future still looms large? The easy answer might be to say that policymakers in the middle of history should eschew one-time capital taxes because any such tax will spark fears of repetition. But as Fischer's analysis emphasizes, the expectation of future capital taxation can arise regardless of present period policy. A policy of zero capital taxation

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44 *See id.* at 100–01.
45 *Id.* at 101.
46 *Id.* at 106.
47 *Id.*

today sacrifices the welfare gains from backward-looking redistribution without necessarily allaying fears of future expropriation.

Fischer—having posed this challenge—shifted his own sights back to monetary policy, the field in which he made his most famous contributions.[48] He later served as governor of the Bank of Israel and then vice chair of the U.S. Federal Reserve.[49] Meanwhile, Fischer left it to tax theorists to grapple with the puzzle that his provocative analysis generated: Given the optimality of low capital taxes at the outset and high capital taxes at the end of time, how should policymakers set capital tax rates during the long span between these two temporal extremes? As we shall see, tax theorists have struggled with that puzzle ever since.

C. Optimal Capital Taxation in the Middle of History

How might optimal tax theorists gain analytical traction on the question of capital taxation in the middle of history? One possibility is to assume completely credible commitment. In that case, if the social planner places determinative weight on the welfare of the worst off, the optimal policy would be L-shaped: a 100% capital tax today that wipes all existing wealth inequality away, followed by a commitment to low capital taxation going forward. (The going-forward tax would be zero if the benchmark Atkinson-Stiglitz result applies without modification, or it might deviate slightly from zero based on the qualifications to the benchmark result discussed in Section I.A.) James Mirrlees, the father of modern optimal tax theory, dismissed this idea as implausible, writing that a one-time capital levy is generally "an idea to play with, not a serious proposal."[50] The Japanese capital levy of 1946–1947 presents a striking counterexample: The postwar government under Allied occupation imposed a tax of 90% on the largest estates, and the denouement was not an evaporation of the capital supply but—to the contrary—an economic miracle. Barry Eichengreen describes the Japanese experience as a "singular success" and an "exception that

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[48] Fischer's "most famous" paper—according to a *New York Times* profile—is Stanley Fischer, *Long-Term Contracts, Rational Expectations, and the Optimal Money Supply Rule*, 85 J. Pol. Econ. 191 (1977). *See* Binyamin Appelbaum, *Young Stanley Fischer and the Keynesian Counterrevolution*, N.Y. Times: Economix (Dec. 12, 2013, 6:25 AM), https://archive.nytimes.com/economix.blogs.nytimes.com/2013/12/12/young-stanley-fischer-and-the-keynesian-counterrevolution [https://perma.cc/DQ6K-6NHP]. His most cited work—according to Google Scholar—is Stanley Fischer, *The Role of Macroeconomic Factors in Growth*, 32 J. Monetary Econ. 485 (1993).

[49] *See* Binyamin Appelbaum, *Stanley Fischer, Fed's No. 2 Official, Is Stepping Down*, N.Y. Times (Sept. 6, 2017), https://www.nytimes.com/2017/09/06/business/economy/fed-stanley-fischer.html [https://perma.cc/7C69-SLJ3].

[50] Mirrlees, *supra* note 13, at 3.

proves the rule"[51]—though, as we shall see below, it is not entirely clear whether the Japanese experience is as singular as Eichengreen assumes or what rule the episode proves.

Another possibility is to assume the complete absence of credible commitment—to assume, in other words, that what we do and say today has absolutely no bearing on actual or expected capital tax policy in the future. In that case, the optimal policy from the perspective of the worst off would again be a 100% capital tax today. If agents are going to make labor-leisure and consumption-saving choices with the expectation of future expropriation regardless of what policy we adopt in the present, why forgo the substantial immediate welfare benefits of wealth redistribution in the here and now?

More frequently, optimal tax theorists approaching the question of capital taxation from a middle-of-history perspective assume that the government's ability to commit to future policies lies in between the extremes of complete credibility and complete lack of credibility. For example, Christophe Chamley—in an influential 1986 article[52]—assumes that the government can commit to any future path of capital *income* tax rates but cannot commit to an L-shaped wealth tax pathway. In his framework, the social planner chooses a 100% tax on capital income at the outset and a downward-sloping schedule of tax rates after that, culminating in a zero capital income tax in the long run. The capital income tax remains positive for several periods after the first because a 100% capital *income* tax—unlike a 100% wealth tax—will not achieve instant equality.[53] Chamley notes that it would be "obviously efficient" for the government to adopt a one-time 100% wealth tax, but his framework explicitly precludes that possibility.[54]

Other theorists assume that the government can credibly commit to a single set of capital tax rates for all time, implicitly ruling out both an L-shaped pathway and the downward-sloping trajectory envisioned by Chamley. Emmanuel Saez and Stefanie Stantcheva justify this "steady state" assumption on normative grounds. They write that a capital tax policy that takes advantage of sunk decisions about labor and saving

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51 Eichengreen, *supra* note 11, at 194, 214.

52 *See* Christophe Chamley, *Optimal Taxation of Capital Income in General Equilibrium with Infinite Lives*, 54 Econometrica 607 (1986).

53 Recall that a 100% capital income tax is roughly equivalent to a wealth tax equal to the nominal risk-free rate of return on capital. *See* Saez & Stantcheva, *supra* note 40.

54 Chamley, *supra* note 52, at 614. Chamley's paper forms one half of the well-known "Chamley-Judd result" of zero capital taxation in the long run. For the other half, see Kenneth L. Judd, *Redistributive Taxation in a Simple Foresight Model*, 28 J. Pub. Econ. 59 (1985). For an interpretation and critique, see Ludwig Straub & Iván Werning, *Positive Long-Run Capital Taxation: Chamley-Judd Revisited*, 110 Am. Econ. Rev. 86 (2020).

"does not seem very appealing from a normative perspective."[55] The authors add: "If nothing else, this will create a commitment problem for the government as it will always look appealing to unexpectedly increase taxes on existing capital temporarily."[56] Saez and Stantcheva then seek a formula for a capital tax rate schedule that is time-invariant and does not count any gains or losses generated by transition dynamics as a benefit.

Saez and Stantcheva's argument in support of the steady-state assumption is puzzling. The authors are, of course, right that the possibility of a sudden capital tax increase creates a commitment problem. But as Fischer emphasizes, that possibility exists regardless of what the capital tax structure looks like today. Simply excluding transitional gains or losses from an optimal tax model does not make the problem of credible commitment go away.[57] Moreover, the authors fail to explain why a one-time capital tax is normatively unattractive. Again, from a welfarist perspective, a one-time capital tax—if credibly one-time—is ideal because it achieves redistributive benefits without any efficiency loss.[58] Although one might argue against a one-time capital tax on non-welfarist normative grounds, Saez and Stantcheva never explain what non-welfarist normative theory motivates their reasoning.[59]

The analysis in the next Part approaches the middle-of-history problem without imposing artificial constraints on possible capital taxation pathways. Constraints on capital taxation are—to a large extent—endogenous to the tax system itself. When analysts assume that the government can commit to a downward-sloping schedule of capital income tax rates—or that the government can commit to a

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55 *See* Saez & Stantcheva, *supra* note 40, at 134.

56 *Id.*

57 Saez and Stantcheva add: "Normatively, one would like to not set the optimal capital tax based on transitional dynamics, as this tends to lead to a (potentially much) higher tax rate given that capital is sluggish to adjust." *Id.* In other words, the fact that the government can impose a high one-time capital tax without causing the capital supply to immediately evaporate is—in the authors' view—a reason *not* to do so.

58 Interestingly, one of the authors would go on—just three years later—to propose a one-time tax on billionaires' unrealized gains. *See* Emmanuel Saez & Gabriel Zucman, *How to Get $1 Trillion from 1000 Billionaires: Tax Their Gains Now*, Berkeley Econometrics Lab'y (Apr. 14, 2021), https://eml.berkeley.edu/~saez/SZ21-billionaire-tax.pdf [https://perma.cc/ZT9S-B4MG].

59 Economist Martin Feldstein, writing four decades earlier, argued that "such a tax may be criticized as an unjust taking of private property" even though it "increases the value of the general utilitarian criterion function." Martin Feldstein, *On the Theory of Tax Reform*, 6 J. Pub. Econ. 77, 97 (1976). Feldstein's avowedly non-welfarist argument against a one-time capital levy is similar to some of the non-welfarist arguments we will encounter in Part IV against one-time policy changes in criminal law, immigration policy, and intellectual property.

single steady-state tax schedule for all time—they shunt aside what is arguably the most important question for capital tax theory and policy: How, if at all, can governments make their capital tax commitments credible?

II
Sources and Limits of Credible Commitment

Clearly, the relationship between current policy and expectations for future policy is a matter of first-order importance for capital taxation.[60] Less clear is what form that relationship takes. As a rough and ready heuristic, we often assume that history repeats. But not always. If a coworker told us she went barhopping last Saturday night, we might be unsurprised if she said she was going barhopping again this Saturday night—we might have categorized our coworker as the "barhopping type." If a coworker told us she was getting married last Saturday, we might be quite surprised if she said she was getting married again this Saturday—we probably didn't categorize our coworker as the "marrying type." The relationship between experience and expectations is mediated by a range of factors—in the barhopping and marriage examples, social norms as well as legal and perhaps religious rules.

In the case of capital taxation, these mediating factors can be grouped into three broad categories: institutions, inequality, and ideas. This Part examines each of these factors in depth. It concludes by considering the role of reputation, which can function as an indicator of institutions and ideas, a product of institutions, or an idea in itself.

A. Institutions

The economist Douglass North famously distinguished between "institutions" and "organizations": Institutions are "the rules of the game in a society,"[61] whereas organizations are "groups of individuals bound together by a common objective function."[62] A more expansive understanding of "institutions" would encompass both "the rules of

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[60] As economists Robert Barro and Varadarajan Chari write in a new working paper on optimal capital taxation: "A priority for future research is to understand better the sources of restrictions/commitments that influence choices of policymakers." Robert J. Barro & Varadarajan V. Chari, *Taxation of Capital: Capital Levies and Commitment* 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32306, 2024), https://www.nber.org/system/files/working_papers/w32306/w32306.pdf [https://perma.cc/9SH6-R7P4]. The present Article pursues the line of research that Barro and Chari rightly recognize as a priority.

[61] Douglass C. North, Institutions, Institutional Change and Economic Performance 3 (1990).

[62] Douglass C. North, *The Contribution of the New Institutional Economics to an Understanding of the Transition Problem*, *in* Wider Perspectives on Global Development

the game" and the formal and informal organizations, be they cultural, economic, legal, political, or social. The broader definition is more consistent with common usage: We typically think of the U.S. Supreme Court, New York University, and the Catholic Church as "institutions," even though they are also—of course—"organizations." This Section adopts the more capacious conception and explores how a wide range of institutions shape the nexus between experience and expectations in capital taxation.

1. Institutions of Tax Administration

Perhaps the most obvious institutional requisite of capital taxation is a tax authority capable of assessing and collecting what taxpayers owe. Without a competent tax administrator, capital taxation will likely fail to achieve redistributive objectives because the rich will be able to hide their wealth or otherwise shirk their legal tax liabilities. While institutional strength may enhance the credibility of public policy in other contexts,[63] strong institutions of tax administration potentially undermine the credibility of low capital taxes by making it practically possible for the state to implement a capital levy.[64] The weakness of tax authorities in some lower-income countries thus might be understood as a mechanism for credibly committing to not expropriate capital when other institutional constraints are lacking.

To be sure, even where a highly capable tax authority does not yet exist, a state still could create one. Although today's advanced economies generally "took centuries to develop and implement sound tax administrative practices,"[65] institution building sometimes occurred on a much faster timeframe. Legal historian Nicholas Parrillo presents a particularly striking example from the early American Republic.[66] In

1, 1 (Anthony F. Shorrocks ed., 2005). *See also* DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 59–60, 62 (2005).

[63] *See, e.g.*, Lisa L. Martin, *Credibility, Costs, and Institutions: Cooperation on Economic Sanctions*, 45 WORLD POL. 406, 413 (1993) (stating that the lack of an "infrastructure of strong institutions" in the international context "makes credible commitments more difficult to establish").

[64] In a similar vein, Barry Weingast observes that "[a] government strong enough to protect property rights and enforce contracts is also strong enough to confiscate the wealth of its citizens." Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 1 (1995). Thus, state capacity has ambiguous implications for the security of capital.

[65] Richard M. Bird & Eric M. Zolt, *Tax Policy in Emerging Countries*, 26 ENV'T. & PLAN. C: GOV'T & POL'Y 73, 83 (2008).

[66] Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

1798, amid escalating tensions with France, the U.S. Congress enacted an ostensibly one-time federal property tax to pay for the ramp-up of the young nation's army and navy. To implement the levy, Congress created a new tax authority from scratch—"the largest administrative endeavor of the federal government near in time to the adoption of the Constitution and outside the military."[67] The tax was far from expropriative: The maximum tax rate on the most expensive dwelling houses was just 1% of the house's value.[68] But the experience of 1798 illustrates that even a young nation with a then-small central government can create a workable system of capital taxation where none previously existed.

From a credible commitment perspective, perhaps the most interesting aspect of the 1798 tax is what happened afterwards. The tax was by its terms a one-time affair, and in 1802, Congress abolished all the offices for administering internal taxes.[69] But after war with Britain broke out in 1812, Congress resurrected federal property taxation—first with a one-time tax to raise $3 million in the summer of 1813, and again with an ostensibly permanent annual tax of $6 million per year starting in 1815 (which was repealed a year later).[70] While the later taxes were not identical to the 1798 tax, they shared several administrative features.[71] For example, when Congress enacted the 1815 tax, it "reinstituted federal boards in each state with broad rulemaking power to allocate the intrastate tax burden, very similar to the 1798 tax."[72] Even when the administrative apparatus of the 1798 tax no longer existed, memories of the dismantled institutional infrastructure still lingered. Having levied a federal capital tax once before, it was easier for the United States to do so again. And when Congress once again enacted a federal property tax to help pay for the Civil War in 1861, "lawmakers rapidly adopted the direct-tax act of 1815 as a model for how to do the administration."[73]

The story of the disestablishment and reestablishment of an internal tax authority in the early United States illustrates one way in which administrative institutions can connect tax policy in the past and present with tax policy in the future. Building the administrative

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67 *Id.* at 1306.

68 Frank W. Garmon, Jr., *Population Density and the Accuracy of the Land Valuations in the 1798 Federal Direct Tax*, 53 HIST. METHODS 1, 2 (2020).

69 *See* Parrillo, *supra* note 66, at 1438–39. Congress provided for the federal boards that administered the 1798 direct tax to continue operating until all past-due taxes were collected.

70 As part of the 1816 repeal legislation, Congress imposed a final $3 million levy. *See id.* at 1440.

71 *See id.* at 1441–52.

72 *Id.* at 1449.

73 *Id.* at 1454.

institutions of capital taxation entails a substantial fixed cost. Once that fixed cost has been sunk, capital taxation is likely to become a more attractive instrument. Implementation of a capital tax in Period One thus affects rational expectations regarding capital taxation in Period Two. Even when a polity formally dismantles the administrative infrastructure of capital taxation, institutional muscle memory will—at least for a time—persist.

2. Institutions Affecting Legibility

While the existence of a competent tax authority is probably a necessary condition for effective capital taxation, it is not a sufficient condition. The tax authority's task may be aided or hindered by institutions of property law, trust law, and corporate and securities law, among others. These non-tax institutions affect what the political scientist James C. Scott calls "legibility"[74]: the extent to which wealth holdings are susceptible to observation, attribution, and valuation.

For example, according to Scott's account, landholding arrangements in many parts of early modern Europe were highly complex. Holdings were often noncontiguous, and entitlements shifted seasonally, with some areas oscillating between private and communal ownership over the course of the year.[75] These arrangements were functional for agricultural communities, but they frustrated the monarchy's efforts to collect land taxes. European states ultimately imposed freehold tenure systems (i.e., systems in which title to property is not time limited) in part so that they could extract revenue from their populations more efficiently.[76] By reforming property law to increase legibility, European states facilitated a form of capital taxation.

In advanced industrialized economies in which land constitutes a smaller share of total wealth, areas of law beyond real property affect the legibility of capital holdings. For example, complex trusts with only contingent beneficiaries make it harder for tax authorities to attribute assets to specific individuals.[77] This may not be a problem if the capital tax is uniform—in which case the tax authority doesn't necessarily need to know who owns what—but it creates potential complications

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74 *See* SCOTT, *supra* note 18, at 44.

75 *Id.* at 37–40.

76 *See id.* at 48.

77 *See* Carla Spivack, *Due Process, State Taxation of Trusts and the Myth of the Powerless Beneficiary: A Response to Bridget Crawford and Michelle Simon*, 67 UCLA L. REV. DISCOURSE 46, 55–60 (2019) (tracing the history of tax avoidance via trusts, and explaining how trusts are used to avoid attribution of assets to individuals for tax purposes today).

for progressive capital taxation.[78] Complex ownership arrangements also make it more difficult for tax authorities to value particular assets. For example, Ronald Gilson and David Schizer observe that venture capital-funded startups often use convertible preferred equity to hide the value of common stock from tax authorities.[79] In these examples, illegibility is a byproduct of the design of non-tax legal institutions: By allowing trusts to have only contingent beneficiaries, and by allowing corporations to issue multiple classes of stock, state law renders capital holdings more opaque.

Corporate law and securities regulation bear particularly significant implications for legibility at the high end of the wealth distribution, where business interests constitute the lion's share of assets.[80] It is generally easy for tax authorities to value publicly traded stock based on up-to-the-minute and difficult-to-manipulate prices on exchanges, but interests in privately held corporations and partnerships pose greater valuation challenges.[81] Laws that impose heavier burdens on public corporations than on private enterprises—for example, disclosure mandates that apply to public companies only, or rules that make publicly traded corporations more vulnerable to costly shareholder class actions—may push more enterprises to go private or stay private, thus reducing legibility.

David Weisbach and I have argued that in order to facilitate tax collection, non-tax legal rules should generally deviate away from "simple efficiency"—where simple efficiency refers to the maximization of non-tax benefits net of non-tax costs—and in the direction of legibility.[82] Reflection on the credible commitment problem complicates the pro-legibility conclusion, at least as it applies to capital taxation. Legibility is a mixed blessing. On the one hand, when the government chooses to use capital taxation as a revenue-raising or redistributive instrument, legibility is a helpful complement because it allows the government to value assets accurately and to attribute those assets

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[78] *See* Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation*, Brookings Papers on Econ. Activity 437, 484 (Fall 2019).

[79] *See* Ronald J. Gilson & David M. Schizer, *Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock*, 116 Harv. L. Rev. 874, 901 (2003).

[80] Corporate stock, partnership interests, and other noncorporate business assets constituted more than three-fifths of the value of estates of $50 million or more in the United States in 2021. *See* Internal Revenue Serv., Stats. of Income Div. Estate Tax Returns Study tbl.1 (2022), https://www.irs.gov/pub/irs-soi/21es01fy.xlsx [https://perma.cc/JKM7-RBMJ].

[81] *See, e.g.*, Wojciech Kopczuk, Comment to Accompany Saez & Zucman's *Progressive Wealth Taxation*, Brookings Papers on Econ. Activity 512, 519 (Fall 2019) (arguing that the challenge of valuing private businesses and other hard-to-measure assets contributed to the "dramatic failure of wealth taxes" in Europe).

[82] Weisbach & Hemel, *supra* note 18, at 453.

to particular individuals. On the other hand, legibility weakens the credibility of the commitment not to expropriate.[83] The desirability of legibility thus depends upon the availability of alternative commitment technologies as well as the government's capital tax plans.

3. Constitutional Law

Constitutions are—as Kydland and Prescott note[84]—another commitment technology that polities potentially can use to bolster the credibility of their tax plans. In their treatise on comparative tax law, Victor Thuronyi, Kim Brooks, and Borbala Kolozs identify several types of constitutional limitations on taxation[85]:

1. Constitutional provisions that require taxes to be imposed by statute as opposed to administrative regulation or executive fiat—what the authors describe as the "principle of legality";[86]
2. Constitutional provisions that impose rules of legislative procedure specific to taxation—for example, the U.S. Constitution's Origination Clause (article I, section 7, clause 1), which requires that tax legislation must originate in the House of Representatives;[87]
3. Constitutional provisions that "impose specific limitations on the types of taxes that may be enacted";[88]
4. Constitutional provisions that "allocate taxing power among the national and regional governments" in a federal system;[89] and
5. General constitutional provisions—such as due process and equal protection guarantees—that potentially apply to exercises of the taxing power.[90]

Douglass North and Barry Weingast's study of political institutions in seventeenth century England emphasizes the first type of limitation: the requirement that taxes be imposed through legislative enactment.[91] The 1689 Declaration of Right—part of the settlement that ended the Glorious Revolution—specifically prohibited the Crown from raising

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[83] Bisin and Rampini offer the example of Switzerland's bank secrecy laws and Italy's liberalization of capital controls. The authors suggest that the ability of Italian investors to hide assets in secret Swiss bank accounts addresses a credible commitment problem because it effectively places large amounts of Italian-owned capital out of the Italian government's reach. *See* Alberto Bisin & Adriano A. Rampini, *Markets as Beneficial Constraints on the Government*, 90 J. Pub. Econ. 601, 604 n.6 (2006).

[84] *See* Kydland & Prescott, *supra* note 20, at 486.

[85] *See* Victor Thuronyi, Kim Brooks & Borbala Kolozs, Comparative Tax Law 59–85 (2d ed. 2016).

[86] *See id.* at 60.

[87] *See id.* at 61.

[88] *Id.*

[89] *Id.* at 62.

[90] *See id.* at 63.

[91] *See* Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. Econ. Hist. 803, 829 (1989).

revenue "by pretence of prerogative."[92] The prohibition on taxation by prerogative effectively reestablished Parliament's "exclusive authority to raise new taxes."[93] According to North and Weingast, this institutional development meant that wealth holders—who dominated Parliament—could veto any tax measure.

The closest U.S. constitutional analogue to the English Declaration of Right's prohibition on taxation by prerogative is the Taxing Clause, which provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises."[94] As with the Parliament of early modern England, Congress's members are drawn largely from the wealth-holding class: The median net worth of congressmembers was over $1 million in 2018,[95] more than eight times the median net worth of all U.S. households.[96] By vesting the taxing power in Congress, the U.S. Constitution arguably accomplishes a result similar to the Declaration of Right: It endows wealth holders with the power to block any capital tax measure.

To be sure, the post-Glorious Revolution Parliament and the U.S. Congress differ dramatically in important respects: Most significantly, the right to elect members of Congress's lower chamber is not limited to property holders, and seats in Congress's upper chamber are not reserved for hereditary lords. Moreover, the stakes of executive versus legislative control over taxation appear to be much lower in the United States than in late seventeenth century England. Because of Crown immunity from taxation, the King and Parliament had distinct interests with respect to revenue matters. By contrast, U.S. presidents tend to be drawn from a similar socioeconomic milieu as members of Congress (indeed, a majority of U.S. presidents previously served in Congress). Today, moreover, even if a president comes to power without significant personal wealth, the near guarantee of a lucrative post-presidency means that the Oval Office occupant is almost sure to join the capital-owning class at the end of her term.[97] Whether the taxing power is wielded by

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92 1 Classics of American Political & Constitutional Thought: Origins Through the Civil War 73 (Scott J. Hammond, Kevin R. Hardwick & Howard L. Lubert eds., 2017).

93 North & Weingast, *supra* note 91, at 816.

94 U.S. Const. art. I, § 8, cl. 1.

95 *See* Karl Evers-Hillstrom, *Majority of Lawmakers in 116th Congress Are Millionaires*, Open Secrets (Apr. 23, 2020), https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires [https://perma.cc/GGN4-U82U].

96 *See* Neil Bennett, Donald Hays & Briana Sullivan, *The Wealth of Households: 2019*, *in* U.S. Census Bureau 2022, at 2 (Current Population Reports, P70BR-180, 2022).

97 *See* Daniel J. Hemel, *Self-Coup and the Constitution*, 37 Const. Comment. 315, 337–38 (2022) (discussing the economics of the post-presidency).

Congress or by the executive,[98] it generally lies in the hands of officials drawn from near the top of the wealth distribution.

Potentially more significant to the credibility of capital tax policy in the United States are the direct tax provisions, which require that "direct taxes" must be apportioned among the states on the basis of population.[99] These provisions illustrate the second, third, and fourth types of tax limitations listed by Thuronyi, Brooks, and Kolozs.[100] The direct tax clauses are *procedural* insofar as they require Congress to follow a particular process when enacting covered taxes (i.e., allocating revenue shares to states on a per-capita basis). They are *substantive* insofar as they limit the types of taxes that Congress can—as a practical matter—impose. And they play a *federalism* function insofar as they effectively allocate the authority to impose direct taxes to the states. As a result, the direct tax clauses provide an unusually rich case study of constitutional commitment technology in action.

As a historical matter, the direct tax clauses are linked to the infamous "three-fifths compromise," which specified that slaves would count as three-fifths of a person for purposes of representation in the House of Representatives and apportionment of direct taxes. For that reason, the direct tax clauses are often understood as part of a North-South bargain over bondage. Notably, though, the initial proposal to tie direct taxes to representation came from one of the few outspoken abolitionists among the Founding Fathers: Gouverneur Morris.[101] As Howard Ohline observes, Morris—the scion of a wealthy landowning family from what is now the Bronx who later moved to Philadelphia and represented Pennsylvania at the Convention—was interested not in protecting slavery, but in protecting property.[102]

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98 On the ability of presidents to influence tax policy through regulation, see Daniel J. Hemel, *The President's Power to Tax*, 102 Cornell L. Rev. 633 (2017).

99 U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4. For example, if California constitutes 12% of the U.S. population, then 12% of the revenue from any "direct tax" must come from California.

100 Dozens of U.S. state constitutions also include provisions that establish specific legislative procedures for taxes (e.g., supermajority requirements) and limit the types of taxes that states can impose. For a compilation of these state-specific provisions, see Jerome Hellerstein & Walter Hellerstein, State Taxation (Thomson Reuters Tax & Accounting 2022).

101 On Morris and slavery, see generally J. Jackson Barlow, *Nationalizing "the Curse of Heaven": Gouverneur Morris on the Constitution and the Slave Power*, 21 Geo. J. L. & Pub. Pol'y 25 (2023).

102 Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution*, 28 Wm. & Mary Q. 563, 574–75 (1971). Indeed, under Morris's initial proposal, both taxation and representation would have been linked in part to a state's wealth—a strategy for political entrenchment of the capital owning class, though one that a majority of the delegates rejected.

Left unspecified in the Constitution was what the category of "direct taxes" embraced. Morris drew a distinction between "direct taxes" and "indirect taxes on exports & imports & on consumption."[103] Yet as Bruce Ackerman observes, "[n]obody asked Morris whether this offhand enumeration was illustrative or exhaustive."[104] According to James Madison's notes from the Convention, Rufus King of Massachusetts pressed his fellow delegates at one point to explain "the precise meaning of *direct* taxation," but no one answered.[105]

For the first century after the ratification of the Constitution, the Supreme Court never struck down a federal tax on the ground that it was a direct tax requiring apportionment. On the five occasions when Congress imposed taxes on land, improvements, dwelling houses, and slaves (1798, 1813, 1815, 1816, and 1861),[106] it apportioned those taxes among the states based on population. Federal taxes on carriages, on income, and on inheritances were not apportioned, and the Supreme Court rejected arguments that those taxes were "direct."[107] But in the 1895 case *Pollock v. Farmers' Land & Trust Co.*, a conservative Supreme Court held—contrary to its earlier income tax precedents—that taxes on income from real and personal property were direct taxes subject to the apportionment requirement, thus invalidating the unapportioned income tax enacted by Congress the prior year.[108]

Pollock was a deeply unpopular decision, and it resulted in the ratification in 1913 of the Sixteenth Amendment, which effectively abrogated the Court's holding that income taxes are direct taxes. That amendment provides that "[t]he Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any

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103 2 The Records of the Federal Convention of 1787, at 350 (Max Farrand ed., 1911) [hereinafter Records].

104 Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 10 (1999).

105 Records, *supra* note 103, at 350.

106 For a discussion of these taxes, see *supra* Section II.A.1.

107 *See* Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (holding that a tax on carriages is not a direct tax); Pac. Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433, 446 (1868) (holding that a tax on the income of an insurance company is not a direct tax); Collector v. Hubbard, 79 U.S. (12 Wall.) 1, 18 (1871) (holding that a shareholder-level tax on the income of a corporation is not a direct tax); Scholey v. Rew, 90 U.S. (23 Wall.) 331, 347–48 (1874) (holding that a tax on property disposed of at death is not a direct tax); Springer v. United States, 102 U.S. 586, 602 (1880) (holding that an individual income tax is not a direct tax).

108 Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895). The complainant in *Pollock* challenged the application of the federal income tax to income from real estate. The *Pollock* Court held that since a tax on real estate is a direct tax, a tax on income from real estate must be a direct tax too. *See id.* at 581 (stating that "[a]n annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate").

census or enumeration."[109] Importantly, the Sixteenth Amendment did not explicitly do away with the apportionment requirement for "direct" taxes other than income taxes. Some scholars therefore argue that the Constitution's rump requirement of apportionment would apply to a federal wealth tax, since a wealth tax is not an income tax licensed by the Sixteenth Amendment.[110] The matter is hardly free from doubt,[111] but in the 2024 case *Moore v. United States*, four Justices appeared to endorse the view that a federal wealth tax would have to be apportioned,[112] and the five-Justice majority in *Moore* did not dispute that claim.[113]

Assuming, at least arguendo, that a federal wealth tax would be classified as a direct tax, the apportionment requirement constrains capital taxation in two ways. First, because apportionment is so cumbersome, the direct tax clauses create a friction that makes wealth taxation a less attractive fiscal instrument. Second, because the distribution of wealth across the U.S. states is highly unequal, the direct tax clauses impose a very low cap on the maximum feasible wealth tax rate under an apportioned regime. Rebecca Kysar and I have estimated that an apportioned federal wealth tax with an exemption of $5 million per household would entail a rate in West Virginia that is twenty times higher than the tax rate in Connecticut (before accounting for migration effects), since the total amount of wealth over a $5 million household exemption is—on a per capita basis—twenty times higher in Connecticut than in West Virginia.[114] Even if the wealth tax in West Virginia were 100% on net worth over $5 million, it could be no higher than 5% in Connecticut. Such a dramatic rate differential would likely

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109 U.S. CONST. amend. XVI.

110 *See* Erik M. Jensen, *An Unapportioned Wealth Tax Has Constitutional Problems*, 39 ABA TAX TIMES 10 (2019).

111 For arguments that an unapportioned federal wealth tax would be constitutional, see Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998); Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111 (2018); Ari D. Glogower, David Gamage & Kitty Richards, *Why a Federal Wealth Tax Is Constitutional*, ROOSEVELT INST. (2021) https://rooseveltinstitute.org/wp-content/uploads/2021/02/RI_Wealth-Tax-Constitutionality-Brief-202102-2.pdf [https://perma.cc/75ZX-4FY8]; and John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75 (2022).

112 *See* Moore v. United States, 144 S. Ct. 1680, 1700 (2024) (Barrett, J., concurring in the judgment) (stating—in a concurrence joined by Justice Alito—that "'direct' taxes—like property taxes—must be apportioned among the States"); *id.* at 1721 (Thomas, J., dissenting) (stating—in a dissent joined by Justice Gorsuch—that "taxes on property continued to be classified as direct taxes" after ratification of the Sixteenth Amendment).

113 *See id.* at 1689 n.2 (majority opinion) (expressly reserving the question of whether a federal wealth tax would be a direct tax requiring apportionment).

114 *See* Daniel Hemel & Rebecca Kysar, *The Big Problem with Wealth Taxes*, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html [https://perma.cc/G6WK-W8EE].

induce some high-net-worth households in poorer states like West Virginia to migrate to richer states like Connecticut, in which case the Connecticut rate would have to be cut further to satisfy apportionment.

These vast interstate wealth disparities suggest that apportionment would be a dealbreaker—or close to it—for a wealth tax. But that does not mean that the Constitution generates a credible commitment that the federal government won't ever tax wealth. First, a future court might adopt a narrow construction of "direct taxes." In the face of a broad-based social movement favoring wealth taxation, the justices may circumscribe the apportionment requirement so that wealth taxes lie outside its restrictions. Second, although formally amending the Constitution is challenging, it is not out of the question—as the experience of the Sixteenth Amendment underscores. And third, as James Madison acknowledged at the outset of America's republican experiment, the Constitution's parchment-paper proscriptions are not self-enforcing.[115] Even a crystal-clear textual command—"no wealth taxes allowed"—could be ignored by the courts, while a judicial decision striking down a wealth tax could be disregarded by the legislature and the executive.

None of this is to suggest that constitutional limitations on capital taxation lack any bite. Looking beyond the United States, courts in other countries sometimes have invalidated wealth taxes and other capital taxes on constitutional grounds, and other governmental actors have respected those decisions. For example, Germany's Federal Constitutional Court struck down a net wealth tax in 1995 on the ground that undervaluation of real estate relative to other assets violated the guarantee of equality.[116] At the time, the center-right parties in control of the Bundestag (Parliament) opposed wealth taxation, but to abolish the wealth tax on their own, they would have needed the approval of the Bundesrat (the Federal Council), which was dominated by pro-wealth tax Social Democrats. Thus, the Constitutional Court's decision accomplished what the center-right parties could not have done on their own. Since the constitutional violation identified by the court arose

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115 *See* THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

116 BVerfGE, 2 BvL 37/91, June 22, 1995; *see also* Henry Ordower, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 FLA. TAX REV. 259, 327 (2006); THURONYI, BROOKS & KOLOZS, *supra* note 85, at 70–71. The court also suggested that a vaguely worded provision in the country's Basic Law barred the government from taxing more than around 50% of the yield on property, though it later backed away from that "half-division principle." Andreas von Arnauld & Klaus W. Zimmermann, *Regulating Government ('s Share): The Fifty-Percent Rule of the Federal Constitutional Court in Germany* 15–21 (Helmut-Schmidt-Universität, Diskussionspapier No. 100, Mar. 2010), https://www.econstor.eu/bitstream/10419/38736/1/622639900.pdf [https://perma.cc/83LL-DMLT].

from a flaw in the design of the wealth tax—not an inherent infirmity in all forms of wealth taxation—the flaw theoretically could be fixed via legislation. To that end, the Social Democrats on the Bundesrat passed a bill to reinstate the wealth tax following the court's ruling (remedying the valuation problem that had brought down the wealth tax in the first instance), but that legislation predictably failed in the Bundestag. Thus, the Constitutional Court's decision had the effect of dismantling the wealth tax—but only because of the particular partisan and ideological configuration of Germany's legislative bodies at that moment.[117]

In addition to the types of constitutional tax limitations enumerated by Thuronyi, Brooks, and Kolozs, constitutional provisions with no direct application to taxation may shape the credibility of capital tax policy by empowering or disempowering certain interest groups. For example, in its 1976 decision in *Buckley v. Valeo*, the Supreme Court held that the First Amendment's free speech clause prohibits restrictions on personal campaign expenditures.[118] As a result, wealthy candidates can draw upon their own substantial resources in their quest for elected office. According to one estimate, three-fifths of House and Senate campaigns from 1983 through 2018 were self-funded in part or in whole, and among those campaigns, own-source contributions accounted for 34% of all funds.[119] In this way, the Supreme Court's First Amendment jurisprudence—like the 1689 English Declaration of Right—enhances the power of wealth holders to block capital taxes. The Court's *Citizens United* decision,[120] which prohibits the government from restricting independent expenditures on political campaigns, arguably plays a

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117 *See* Ruben Rehr, *Financing COVID-19 Costs in Germany: Is a Wealth Tax a Sensible Approach?* 6 (Wealth Tax Commission, Background Paper No. 131, 2020) (describing the "gridlock" between the pro-wealth-tax Social Democrats in the Bundesrat and the anti-wealth-tax coalition in the Bundestag following the Constitutional Court's decision). In addition to the German example discussed in text, the Austrian Constitutional High Court invalidated the country's inheritance tax regime on the ground that—as in the case of the German wealth tax—the Austrian tax violated the constitutional principle of equality due to the undervaluation of real estate relative to other assets. *See* Markus Christoph Stefaner, *Austrian Inheritance Tax Unconstitutional, Court Says*, 46 Tax Notes Int'l 21 (Mar. 27, 2007). Although the Social Democratic Party of Austria—like the Social Democrats in Germany—sought to restore the tax via legislation, the Austrian Social Democrats lacked an outright majority in parliament, and their coalition partners, the center-right People's Party, opposed the tax. As in Germany, the legislative effort to resuscitate the tax ultimately fell short. *See* Michael Baggesen Klitgaard & Thomas Paster, *How Governments Respond to Business Demands for Tax Cuts: A Study of Corporate and Inheritance Tax Reforms in Austria and Sweden*, 44 Scand. Pol. Stud. 91, 101 (2021).

118 Buckley v. Valeo, 424 U.S. 1, 54 (1976).

119 *See* Alexei V. Ovtchinniko & Philip Valta, *Self-Funding of Political Campaigns*, 69 Mgmt. Sci. 2425, 2430 tbl.1 (2023).

120 *See* Citizens United v. FEC, 558 U.S. 310 (2010).

similar function—magnifying the influence of money in politics and thereby limiting the political feasibility of high capital taxes.[121]

Term lengths for chief executives also may play a role in the credibility of capital tax policy. Torsten Persson and Guido Tabellini analyze a two-period economy similar to the Atkinson-Stiglitz model but add the condition that the president elected at the beginning of Period One will continue to serve through the end of Period Two.[122] The authors observe that "[b]y electing a 'more conservative' president (a president who is relatively more endowed with capital)," voters can pre-commit to a lower capital tax rate in Period Two.[123] A similar analysis potentially applies to legislators: In their model, the elected representative is always more "to the right" than the median voter in her district.[124] For example, in Mexico, where the President and the Senate are elected to six-year terms (and where Senate elections are not staggered as they are in the United States), voters can effectively commit to capital tax policies six years out by electing a President and Senators who have strong personal interests in low capital tax rates. Yet as the authors further note, longer term lengths involve a tradeoff between policy credibility and political accountability: "The commitment capacity of representative democracy . . . would be stronger the farther apart were the statutory election dates. However, having elections farther apart might be disadvantageous in that it would limit the voters' ability to get rid of non-performing incumbents . . . ."[125] More generally, the sorts of institutional innovations that might bolster the credibility of capital tax policy are rarely costless.

Summing up: Kydland and Prescott's suggestion that constitutional law can bolster the credibility of capital tax policy derives some support from the historical record. But whereas Kydland and Prescott imagined that constitutions would codify *substantive* policy commitments (e.g., a prohibition on expropriation), the success of constitutional law

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121 The effect of *Citizens United* on the political economy of capital taxation is theoretically ambiguous because the decision also opened the door to unlimited independent expenditures by labor unions, which tend to support higher capital taxes. However, according to one estimate, unions have accounted for 5% or less of all independent expenditures in post-*Citizens United* elections. *See* Pat Akey, Tania Babina, Greg Buchak & Ana-Maria Tenekedjieva, *The Impact of Money in Politics on Labor and Capital: Evidence from* Citizens United v. FEC 9 n.15 (Nat'l Bureau of Econ. Research, Working Paper No. 31481, July 2023).

122 *See* Torsten Persson & Guido Tabellini, *Representative Democracy and Capital Taxation*, 55 J. PUB. ECON. 53, 64 (1994).

123 *See id.* at 65.

124 The authors also note the identity of the median voter in legislative elections "depends on how the voters are allocated to different districts." *See id.* at 65–66. So, for example, district lines could be drawn such that the median voter tends to have above-median wealth (e.g., if the poor are "packed" into particular districts while rich and middle-class voters are spread out more broadly).

125 *Id.* at 68.

as a commitment technology arguably stems more from structural provisions—that is, from provisions that effectively enable wealth holders to veto capital tax reforms. To be sure, this observation still leaves open the question of why structural provisions tend to be more durable than substantive ones.[126] For now, the key point is that in order to evaluate the effect of a polity's constitution on the credibility of its capital tax policy, one must look not only to the constitution's specific limits on taxation but—more broadly—to the ways in which the constitution structures the relationship between material wealth and political power.

4. Legislative Institutions

The previous Section emphasized *constitutional* sources of credible commitment, but a host of "subconstitutional" rules of legislative procedure also affect the durability of capital tax policy. These subconstitutional rules rigidify existing policy by requiring legislation to navigate an "awesome obstacle course" in order to become law.[127] William Eskridge enumerates nine "vetogates" where different actors have opportunities to kill a bill: the relevant House subject-matter committee, the House Rules Committee, the House floor, the relevant Senate subject-matter committee, a Senate unanimous consent agreement, a potential Senate filibuster, a conference committee, conference bill consideration by both chambers, and presentment to the President.[128] Although some of these vetogates are constitutional in origin, the vast majority of bills die at subconstitutional choke points.

One of these vetogates—the Senate filibuster—has proven to be an especially high hurdle for non-tax legislation in recent years. For tax legislation, however, the budget reconciliation process provides an end run around the filibuster. The filibuster takes advantage of Senate rules requiring sixty votes to end debate, but the Congressional Budget Act limits debate on reconciliation measures to twenty hours. After that, the bill and amendments to it are automatically put to a simple majority vote.[129]

Budget reconciliation is designed to help Congress keep the federal government's fiscal house in order, but the cost of greater

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126 For one account, see Levinson, *supra* note 21.

127 William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. Econ. & Org. 756, 759 (2015).

128 *Id.* at 758–59.

129 On the mechanics of the reconciliation process and the relationship to the filibuster, see Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. Davis L. Rev. 261, 297–99 (2013).

flexibility is, of course, a lesser capacity to commit to long-term tax plans. And wherever one thinks the balance between flexibility and credibility should be set, some elements of the budget reconciliation rules are simply perverse. In particular, the budget reconciliation rules allow legislation to increase the deficit over a finite budget window—typically set at ten years—as long as the reconciliation package is deficit-neutral or deficit-reducing beyond the window. Thus, Congress can use the budget reconciliation process to enact temporal tax schedules shaped like a backwards letter L ("⅃")—a lower rate for several years followed by a tax increase after that. By contrast, if Congress sought to pre-program the forward-L-shaped schedule recommended by optimal tax theory (i.e., a higher rate in the short term followed by a lower rate in the long term), it would have to contend with the reconciliation rule that precludes deficit increases beyond the budget window. Probably unwittingly, Congress has established for itself an incentive structure that nudges it toward doing the exact opposite of what optimal tax theory would urge.

Although the incentives generated by the budget reconciliation rules are—from an optimal tax perspective—perverse, they are also relatively low-powered. If constitutional commitments are etched on parchment paper, legislative procedures are inked on loose leaf. At least at the U.S. federal level, legislative chambers can change their own rules—including the supermajority requirement for breaking a filibuster—by simple majority vote. And while the budget reconciliation rules are technically statutory, they derive their force from the existence of the Senate filibuster in the background. That background condition is one that any fifty senators plus the vice president can change at any moment.

Moreover, even though the budget reconciliation process plows a legislative fast track for certain tax and spending bills, the fast track still is subject to speed limits. To pass a bill via budget reconciliation, the House and Senate each must pass a concurrent budget resolution with instructions to subject-matter committees, who then report legislation back to the full chamber. Each Senate floor vote opens the door to dozens of amendments, resulting in marathon sessions known as "vote-a-ramas" in which the minority party typically seeks to force "inconvenient or embarrassing show votes that might come back to haunt members of the majority during a reelection campaign."[130] The

130 Ed Kilgore, *'Vote-a-Rama' Is the Price Democrats Must Pay to Avoid the Filibuster*, N.Y. Mag.: Intelligencer (Feb. 4, 2021), https://nymag.com/intelligencer/2021/02/vote-a-rama-is-the-price-dems-pay-to-avoid-the-filibuster.html [https://perma.cc/RL3A-VCWA].

entire process typically takes—soup to nuts—at least a month and sometimes more than a year.[131]

The costs and length of budget reconciliation have two important implications for the credibility of capital tax policy. First, the higher the costs of legislative action, the larger the benefits must be for capital tax reform to be worth lawmakers' while. (We will return to this point in the discussion of inequality in Section II.B.) Second, a drawn-out legislative process gives the owners of mobile capital a window of opportunity in which to move their assets abroad. Thus, legislative procedures that simply slow the process of capital tax reform still bolster the credibility of a low capital tax policy—at least when capital is highly mobile—because the combination of legislative frictions and capital mobility make it difficult for a government to successfully implement a sudden capital levy.[132] This last point aligns with the political scientist Carles Boix's observation that economic elites are less likely to resist democratization when "asset specificity" (i.e., the difference between an asset's productivity at home versus abroad) is low.[133] Wealth holders—understanding that policy changes in a representative democracy rarely occur in an instant—are less fearful of expropriation by a new democratic majority when they expect that they will have time to move their wealth abroad before it can be seized.[134]

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131 *See* MEGAN S. LYNCH, CONG. RSCH. SERV., RL30458, THE BUDGET RECONCILIATION PROCESS: TIMING OF LEGISLATIVE ACTION 10–12 (2016).

132 V.V. Chari makes a related point that delays in implementing policies can serve as a "particularly easy form of partial commitment" because they preclude the possibility of a truly instantaneous capital levy. *See* V.V. Chari, *Time Inconsistency and Policy Design*, 12 FED. RES. BANK OF MINNEAPOLIS Q. REV. 17, 23 (1998). Note that the benefits of delay are also relevant to the analysis of administrative institutions in Section II.A.1: Insofar as the administrative institutions of capital taxation take time to set up, the absence of those institutions serves as a source of delay. Moreover, as Chari observes, the ratification process for constitutional amendments is an additional and potentially helpful cause of delay. *Id.* at 23–24.

133 *See* CARLES BOIX, DEMOCRACY AND REDISTRIBUTION 21–25 (2003).

134 Beyond the time it takes to move legislation through the bicameralism and presentment process, the U.S. system bakes in additional delay through its system of presidential nominations and its long interregnum between the general election and the inauguration. Given the drawn-out U.S. presidential primary and caucus timeline, wealth holders would have notice of a pro-capital-levy candidate's rising popularity in the January or February preceding that candidate's potential nomination. And even if wealth holders underestimated a pro-capital-levy candidate's likelihood of winning the November general election, the two-and-a-half-month interregnum between the general election and the presidential inauguration would provide additional time to hide assets or move them offshore. To be sure, a long interregnum has other costs—including, as we saw in December 2020 and January 2021—the risk that an outgoing President will use the period to plot a self-coup to retain power. *See* Hemel, *supra* note 97, at 336, 352–53. On the possibility of shortening the presidential interregnum period without amending the Constitution, see Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 CONST. COMMENT. 183, 184 (1995).

5. *Savings Institutions*

So far the discussion has treated preferences regarding capital taxation as exogenous to legal and political institutions. Thus, for example, the Declaration of Right affected the credibility of capital tax policy in late seventeenth century England because it assigned the taxing power to a legislature composed of property owners and hereditary lords—the fact that property owners and hereditary lords opposed high capital taxes was presumed. Institutions also can affect the credibility of capital tax policy by shaping the interests of social groups. As economists Florian Scheuer and Alexander Wolitzky argue, capital tax policy will "be politically sustainable if and only if it maintains the support of a coalition of citizens that is large enough to block reform in the future."[135] Policymakers can potentially create such a coalition by transforming a critical mass of middle-class voters into wealth holders who benefit from the status quo.

Two sets of institutions are potentially relevant in this regard: (1) public institutions that insure middle-class workers against old age and disability (e.g., Social Security), and (2) institutions that facilitate and incentivize private savings for middle-class workers (e.g., tax-preferred defined contribution plans). Neoclassical life-cycle theory predicts that generous social insurance schemes will crowd out private savings,[136] so a robust public pension system may lead to lower levels of household financial-asset ownership. Tax-preferred defined contribution schemes—such as the workplace-based 401(k) plans that have proliferated in the United States since the early 1980s—push in the opposite direction by incentivizing private saving.[137] Thus, a system of relatively meager public pensions and high-powered incentives for private saving can potentially expand the capital-owning class.

Observational data supports a link between financial asset ownership and attitudes toward capital taxation. For example, Richard Nadler reports results from a survey showing that among U.S. adults who directly or indirectly own stock, 66% supported a capital gains tax cut

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135 Florian Scheuer & Alexander Wolitzky, *Capital Taxation Under Political Constraints*, 106 Am. Econ. Rev. 2304, 2304 (2016).

136 *See, e.g.*, Martin Feldstein, *Social Security, Induced Retirement, and Aggregate Capital Accumulation*, 82 J. Pol. Econ. 905, 906–10 (1974). For a review of the mixed empirical evidence, see Sita Slavov, Devon Gorry, Aspen Gorry & Frank N. Caliendo, *Social Security and Saving: An Update*, 47 Pub. Fin. Rev. 312 (2019).

137 The empirical literature on the overall private-savings effects of 401(k) plans is also mixed. For a well-executed study showing that 401(k) plan eligibility increases accumulation of financial assets, see Alexander M. Gelber, *How Do 401(k)s Affect Saving? Evidence from Changes in 401(k) Eligibility*, 3 Am. Econ. J.: Econ. Pol'y 103 (2011).

(versus 46% of non-stock owners).[138] Establishing a causal link between stock ownership and public opinion is more difficult, as stock ownership is influenced by a range of other factors that may independently affect attitudes toward taxation. Possibly the best evidence for a causal link comes from finance scholars Markku Kaustia, Samuli Knüpfer, and Sami Torstila, who study the effects of "demutualizations" of some of Finland's regional telecommunications firms in the 1990s.[139] When those firms demutualized, their customers received publicly listed shares of stock. From this natural experiment, the authors estimate that "a 10-percentage-point increase in the share-ownership rate increases the right-of-center vote share by 2.5–3.4 percentage points."[140] Almost all of that increase was captured by the National Coalition Party, which pledged to cut capital taxes.[141] The authors suggest that one channel for this effect may relate to changes in media consumption: "New shareholders have an incentive to learn about stock markets and the economy," which leads them to "pay more attention to financial media," and heavy consumers of financial media appear likelier to adopt pro-free market, anti-capital tax views.[142]

Whether or not the Finnish demutualization experience translates to the U.S. context, the findings from Finland illustrate a point with transnational applicability: Institutions (the focus of this Section) and ideas (the focus of Section II.C) are mutually constitutive. Legal, political, and (in the Finnish example) economic institutions influence ideas, which—in turn—affect the durability of legal, political, and economic institutions.[143] Low capital taxes—insofar as they encourage private savings and thereby expand the size of the capital-owning class—may prove to be politically self-entrenching, though as we shall see shortly, low capital taxes also may prove to be self-defeating when they enable an unsustainable rise in inequality.

B. Inequality

In the economics literature, the classic treatment of inequality and the political dynamics of redistribution is a much-cited—though also much-critiqued—1981 article by economists Allan Meltzer and Scott

138 *See* Richard Nadler, *The Rise of Worker Capitalism*, 359 Pol'y Analysis 1, 20 (1999).
139 *See* Markku Kaustia, Samuli Knüpfer & Sami Torstila, *Stock Ownership and Political Behavior: Evidence from Demutualizations*, 62 Mgmt. Sci. 945 (2016).
140 *Id.* at 955.
141 *See id.* at 946 n.6.
142 *Id.* at 946, 960.
143 *Id.* at 962.

Richard.[144] The authors' analysis remains a keystone for the study of the relationship between economic inequality and redistributive taxation, and while their model involves a labor income tax with no saving, its conclusions can be translated—with modifications—to the wealth tax context.

In the Meltzer-Richard model, the government imposes a linear tax on labor income to finance a demogrant (i.e., an equal lump-sum transfer to each individual).[145] Although the authors describe the demogrant as taking the form of cash,[146] one could also imagine the demogrant as the bundle of public and private goods that the government provides to all members of a society. The government operates under a balanced-budget constraint,[147] so the demogrant must be equal to the total amount of revenue divided by the population. The tax rate is chosen by the decisive voter, whom Meltzer and Richard assume to be the median income-earner in a majoritarian democracy with universal suffrage.[148] The decisive voter, who in the model is fully informed and purely self-interested, chooses her preferred tax rate based on two variables: (1) the distance between the mean pre-tax income and her own pre-tax income (which is equal to the median), and (2) the distortionary cost of labor income taxation.[149]

To understand the intuition behind the model, consider first the case where the decisive voter is a non-worker with a pre-tax income of zero. Her preferred tax rate will be the revenue-maximizing rate (i.e., the peak of the proverbial Laffer curve). All she cares about is maximizing the value of the demogrant. Next, consider the case where the decisive voter is the mean income-earner. Her preferred tax rate will be zero: She gains nothing from redistribution (because for her, taxes paid are equal to the demogrant received), and she is strictly worse off when the tax distorts her labor-leisure choice. In virtually all societies, the median income is less than the mean (i.e., the distribution of labor income is right-skewed), so the decisive voter's preferred tax rate will fall in between these two extremes.

Obviously, the Meltzer-Richard model is an oversimplification: Like all good social-scientific models, it abstracts from reality. Policy outcomes in a democracy do not perfectly track the preferences of the median voter—as we saw in Section II.A, legal and political institutions

144 *See* Allan H. Meltzer & Scott F. Richard, *A Rational Theory of the Size of Government*, 89 J. Pol. Econ. 914 (1981).

145 *See id.* at 917 n.5.

146 *See id.* at 917.

147 *See id.* at 919.

148 *Id.* at 920.

149 *Id.*

often endow minorities (and in particular, economic elites) with veto power over reforms. The median voter, moreover, is unlikely to be fully informed or perfectly self-interested (points to which we will return in Section II.C). And of course, modern governments have access to revenue-raising instruments other than linear labor income taxes. The relevant questions for our purposes are (1) whether the Meltzer-Richard model tells us something useful about the relationship between inequality and redistribution, and (2) if so, whether the model can be translated—with modifications—to the context of capital taxation in the middle of history.

Starting with the first question: The empirical evidence for the Meltzer-Richard hypothesis is sometimes described as "mixed."[150] A more precise way to summarize the empirical literature is as follows: Pre-tax income inequality does not explain differences in redistribution across countries,[151] but it does appear to correlate positively with the amount of redistribution within countries across time.[152] As sociologist Lane Kenworthy and political scientist Jonas Pontusson summarize: "[T]here are important cross-national differences in 'tastes for equality' or beliefs about the proper role of government that cannot be explained in terms of the effects of income distribution on the policy preferences of the median voter," but "the logic of the Meltzer-Richard model captures a dynamic that liberal democracies have in common."[153] For example, Swedes tend to favor more redistribution than Brits for reasons that the Meltzer-Richard model cannot explain (e.g., cultural factors), but in both countries, an increase in market inequality appears to translate to an increase in redistribution.

What—if anything—can the Meltzer-Richard model tell us about the political economy of capital (as opposed to labor income) taxation?

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[150] *See, e.g.*, Christian Bredemeier, *Imperfect Information and the Meltzer-Richard Hypothesis*, 159 PUB. CHOICE 561, 562 (2014); Marina Agranov & Thomas R. Palfrey, *Equilibrium Tax Rates and Income Redistribution: A Laboratory Study*, 130 J. PUB. ECON. 45, 46 (2015).

[151] *See, e.g.*, Roberto Perotti, *Growth, Income Distribution, and Democracy: What the Data Say*, 1 J. ECON. GROWTH 149, 170 (1996) (finding no statistically significant relationship between the middle-class share of pre-tax income—a proxy for the mean-median differential—and the average marginal tax rate in cross-country regressions); Karl Ove Moene & Michael Wallerstein, *Earnings Inequality and Welfare Spending: A Disaggregated Analysis*, 55 WORLD POL. 485, 487 (2003) (finding "little or no relationship between earnings inequality and expenditures as a share of GDP for pensions, health care, family benefits, and means-tested policies" in cross-country regressions).

[152] *See* Branko Milanovic, *The Median-Voter Hypothesis, Income Inequality, and Income Redistribution: An Empirical Test with the Required Data*, 16 EUR. J. POL. ECON. 367 (2000); Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, 3 PERSP. ON POL. 449 (2005).

[153] Kenworthy & Pontusson, *supra* note 152, at 459.

We can begin by considering the conditions under which the decisive voter will favor a one-time linear wealth tax, with revenues used to fund an increase in the demogrant (or equivalently, an increase in the bundle of public and publicly provided private goods). The benefit to the decisive voter will depend upon the difference between mean wealth and her wealth. The costs are somewhat more difficult to specify. In the Meltzer-Richard model, the cost of labor income taxation is the distortion to labor-leisure choices, but recall that in Fischer's analysis, the one-time capital levy was nondistortionary. More realistically, the costs of a capital levy—even a capital levy that is universally believed to be one-time—will include (a) the administrative costs of setting up a new capital tax infrastructure, (b) the opportunity cost of the legislative floor time devoted to capital tax reform (which may come at the expense of other policies that the median voter also values), and (c) the costs of capital flight in the run-up to the levy's enactment and implementation (which may jeopardize the decisive voter's livelihood or restrict her access to credit).

So far, we have followed the Meltzer-Richard model's assumptions that the relevant tax is linear and that the decisive voter is the median voter. Importantly, those two assumptions are also institutionally contingent. A capital tax can be nonlinear—for example, a wealth tax can incorporate a large exemption amount, and it can apply progressive rates to taxpayers in higher wealth brackets—in which case the decisive voter with median wealth may stand to benefit more from the tax's enactment. But as noted in Section II.A.2, progressive wealth taxation requires the tax authority to attribute assets to individual owners, and legal institutions such as trusts can thwart those attribution efforts. Meanwhile, the assumption that the decisive voter is the median voter depends upon political institutions. For example, a supermajority requirement for wealth taxes (which—as we saw in Section II.A.3—is arguably implied by the Constitution's direct tax clauses) may mean that the decisive voter is an individual with significantly above-median wealth. In the United States, any group of thirteen states can block a constitutional amendment by refusing to ratify it, and median household net worth in the thirteenth wealthiest U.S. state in 2021 was 51% higher than the median nationwide.[154]

154 *See* U.S. Census Bureau, *Survey of Income and Program Participation, Survey Year 2022, Public Use Data, Wealth and Asset Ownership for Households, by Type of Asset and States: 2021* (2023), https://www2.census.gov/programs-surveys/demo/tables/wealth/2021/wealth-asset-ownership/State_Wealth_tables_dy2021.xlsx [https://perma.cc/7XTZ-B2MC].

Thus, while the Meltzer-Richard model is far from a perfect representation of the political economy of wealth taxation, the model helps to forge a link between wealth inequality and the institutional analysis in Section II.A. Institutions can raise the cost to the decisive voter of a one-time capital levy and can even alter the decisive voter's identity. Yet as wealth inequality widens, the balance between benefits and costs may begin to tip in the direction of the former, even for voters with wealth substantially above the median (but still below the mean), and even when the administrative and legal infrastructure pushes capital taxes toward linearity. The credibility of capital tax policy thus depends upon a combination of institutions and inequality: Higher wealth inequality makes low capital taxes less sustainable, though the precise relationship between inequality and the credibility of capital tax policy will depend upon the institutional landscape.

Empirical support for the relationship between wealth inequality and the credibility of capital tax policy comes from the "new growth" literature.[155] The seminal contributions to that literature highlight the negative correlation between wealth inequality and economic growth. For example, economists Alberto Alesina and Dani Rodrik find that across forty-nine countries, higher inequality in land ownership circa 1960 is associated with lower per-capita growth from 1960 to 1985.[156] Alesina and Rodrik interpret their findings through the lens of the Meltzer-Richard model: "For growth to be as high as possible, we need the median voter to own as much capital as possible . . . . When a large segment of the electorate is cut off from the expanding and income-generating assets of the economy, it is more likely to be willing to tax income from these assets and to undercut growth."[157] Although Alesina and Rodrik emphasize the effect of wealth inequality on *income* taxes, their argument can apply more broadly than that: A right-skewed distribution of capital increases the median voter's propensity to support wealth redistribution through a range of means. Even if the government never adopts a capital levy, the heightened *risk* of a capital levy in a highly unequal society can depress labor, saving, investment, and economic growth.[158]

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155 For a review, see Philippe Aghion, Eve Caroli & Cecilia García-Peñalosa, *Inequality and Economic Growth: The Perspective of the New Growth Theories*, 37 J. Econ. Literature 1615 (1999).

156 *See* Alberto Alesina & Dani Rodrik, *Distributive Politics and Economic Growth*, 109 Q.J. Econ. 465, 482 (1994).

157 *Id.* at 477–78.

158 Interestingly—and somewhat curiously—Alesina and Rodrik do not connect their results to the credibility of capital tax policy, writing that "we rule out expropriation of capital . . . to avoid dealing with time-inconsistency problems in capital taxation, which are

Emmanuel Farhi, Chris Sleet, Ivan Werning, and Sevin Yelketin explicitly connect the Alesina-Rodrik result to the credibility of capital tax policy.[159] Starting with a two-period economy similar to the Atkinson-Stiglitz-style model in Section I.A, Farhi and his coauthors observe that the incentive to redistribute resources from high-θ types to low-θ types in Period Two is stronger when the gap between the Period Two consumption of high-θ and low-θ types is wider. They further observe that tax policy can narrow that gap by taxing the capital of high-θ types and subsidizing saving for low-θ types. "Progressive taxation of capital emerges to reduce wealth inequality by discouraging accumulation among the rich and encouraging it among the poor."[160]

Importantly, the progressive capital taxes chosen by the benevolent planner in Farhi and coauthors' model do not go so far as to *equalize* the Period Two consumption of high-θ types and low-θ types (i.e., to eliminate any difference between rich and poor). Rather, the authors posit that the optimal tax schedule will reduce the gap between the Period Two consumption of high-θ and low-θ types so that the gap is narrow enough that the societal benefits of redistribution are outweighed by the societal costs of reform. Those costs, they suggest, may include the opportunity cost of time-consuming legislative procedures,[161] though the analysis could extend—for example—to administrative costs or the costs of pre-enactment capital flight.

In Farhi and coauthors' model, the government alleviates the threat of expropriation through a strictly progressive capital tax, but as Scheuer and Wolitzky observe, strict progressivity is not the only possible outcome.[162] Scheuer and Wolitzky's argument envisions three θ types: high-θ (the rich), medium-θ (the middle class), and low-θ (the poor). The rich and middle class are assumed to be sufficiently numerous that they can—in tandem—block a reform. By adopting policies in Period One that reduce the Period Two wealth of high-θ types and increase the Period Two wealth of medium-θ types, the government can ensure that a capital levy won't win majority support in Period Two. This leads to a U-shaped capital tax schedule, with capital subsidies for the middle class (but not the poor, whose votes are not essential to the anti-reform coalition) and capital taxes on the rich.

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not our focus." They add: "The reason why expropriation is not more common in the real world is clearly outside the scope of the model." *Id.* at 469. In fact, their model arguably helps to explain how societies resolve the time-inconsistency problem.

159 *See* Farhi et al., *supra* note 23, at 1474 (citing Alesina & Rodrik, *supra* note 156).

160 *Id.* at 1471.

161 *See id.* at 1476.

162 *See* Scheuer & Wolitzky, *supra* note 135.

Scheuer and Wolitzky further observe that the U-shaped capital tax structure that emerges from their model bears some resemblance to actual U.S. policy. As they note:

> [P]olicies like tax-favored retirement savings programs (where the tax subsidy is increasing in the marginal income tax rate up to a cap), the mortgage interest deduction (which subsidizes the accumulation of housing wealth), and savings subsidies for college education, tend to be targeted more directly at middle-class voters than at the very poor.[163]

Meanwhile, the United States imposes very high effective capital taxes on some low-income households. For example, some state Medicaid programs impose asset limits on eligibility for the elderly and disabled that operate like wealth taxes on potential beneficiaries. And at the federal level, the earned income tax credit applies only to individuals with investment income of $11,600 or less in 2024, which effectively operates as a tax rate of up to 783,000% on a person's 11,601st dollar of capital income (as the maximum credit in 2024 is $7,830).[164] The net effect is a system with positive capital tax rates at both ends of the income distribution but what is effectively a zero rate on capital for many middle-class households.

To sum up: The credibility problem for capital taxation in the middle of history is, in a significant respect, a problem of wealth inequality. Wealth inequality is what motivates the benevolent social planner to expropriate capital in Period Two of Fischer's model, and wealth inequality is what motivates the decisive voter to support heavy capital taxation in the modified Meltzer-Richard model. Policies that reduce wealth inequality can bolster the credibility of capital tax policy and can encourage both labor effort and investment. However, the relationship between wealth inequality and the credibility of capital tax policy is nuanced. That relationship depends upon the administrative and legal institutions that structure the menu of available tax policy options as well as the political institutions that determine *who decides* capital tax policy. Finally, as the next Section will emphasize, the relationship between wealth inequality and the credibility of capital tax policy may be amplified or muted by a third critical factor: ideas.

C. Ideas

The ideas that shape the credibility of capital tax policy include both *ideas about institutions* and *ideas about inequality.* Ideas about

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163 *Id.* at 2322.

164 I.R.C. § 32(i); Rev. Proc. 2023-34 § 3.06.

institutions—for example, ideas about constitutionalism and judicial review—regulate the relationship between parchment-paper promises and real-world outcomes. Ideas about inequality—for example, ideas about the legitimacy of lopsided wealth distributions—play an important part in determining whether material inequality can endure. These ideas might be described as "ideologies," though the myriad meanings of that term potentially limit its analytical utility. The key point for present purposes is that the trajectory of capital taxation depends not only upon institutions and inequality, but on the beliefs and attitudes that members of a society hold toward institutions and inequality.

1. Ideas About Institutions

In Section II.A.3, we considered the possibility that constitutions could constrain capital taxation by imposing outright prohibitions on particular types of taxes or setting supermajority thresholds for certain capital tax reforms. But we also recognized that constitutions cannot produce these outcomes on their own. Constitutions exert influence because—and only to the extent that—other actors obey their terms. In this respect, constitutionalism depends upon the idea of constitutionalism: the belief among members of a society—especially, though not exclusively, the individuals who control powerful political institutions—that constitutional mandates merit respect and compliance.

This idea of constitutionalism is often linked to the institution of judicial review, though a judicially enforced constitution is just one variety of constitutionalism. In theory, and sometimes in practice, political communities may treat constitutional mandates as binding even in the absence of any judicial enforcement mechanism.[165] What every effective constitution does require, though, is the support of a critical mass. That critical mass need not necessarily amount to a numerical majority, as historically the ranks of constitutional regimes have included slave societies and apartheid states. But the pro-constitutional faction

[165] For example, the Constitution of the Netherlands explicitly prohibits judicial review of the constitutionality of acts of Parliament. *See* Gw. [Constitution] art. 120. But Dutch political actors enforce constitutional guarantees through other means (e.g., by withholding support for a coalition government if they think their potential partners are insufficiently protective of constitutional rights). *See* Sarah Jacob & Diederik Baazil, *Wilders-Led Dutch Government Is at Risk Over Constitutional Concern*, Bloomberg News (Feb. 12, 2024, 10:28 AM), https://www.bloomberg.com/news/articles/2024-02-12/wilders-led-dutch-government-at-risk-over-constitutional-concern [https://perma.cc/AM35-GWCM]. For an argument that Dutch constitutionalism ought to serve as a model for constitutional reform in the United States, see Mark Tushnet, *Abolishing Judicial Review*, 27 Const. Comment. 581, 581–84 (2011).

must be large enough that—for example—a president or a legislature cannot successfully implement policies that are widely understood to contravene constitutional commands (whether because the bureaucracy would refuse to carry out those policies or because the public would engage in civil disobedience). In a sense, all constitutionalism—or at least, all effective constitutionalism—is popular constitutionalism because effective constitutions depend upon the backing of a broader public.

In the United States, constitutionalism is sometimes described as a "civil religion."[166] As Duncan Kennedy puts it, "[t]he religion analogy sometimes indicates that people 'reverence' the Constitution (perhaps as an emanation of the democratic deity The People) much as they reverence the Bible as God's word in mainstream religion . . . ."[167] According to this view, constitutional commands carry a normative force that cannot be reduced to "rationalistic" terms. Quasi-religious symbols (such as the priestly robes donned by Supreme Court justices) and credal affirmations (such as the Naturalization Oath of Allegiance, in which new citizens declare that they will "support," "defend," and "bear true faith" to the U.S. Constitution) reinforce popular reverence of the nation's founding document.

The "civil religion" analogy is a potent one, but its implications are somewhat ambiguous. For one thing, the Constitution's "civil religion" status does not necessarily mean that adherents will abide by its commands word for word, just as many Christians, Hindus, Jews, Muslims, and practitioners of other faiths selectively choose which of their religion's rules to follow. For another, the religion analogy raises the question of whether America's constitutional faith will suffer from the same secularizing shifts that have thinned the ranks of America's largest denominations in recent years.[168]

Unfortunately for our purposes, the strength of Americans' commitment to constitutionalism is not well-measured longitudinally. The available data tends to focus on Americans' attitudes toward judicial supremacy, not their attitudes toward the Constitution itself. However,

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166 *See, e.g.*, Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 123 (1980).

167 Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 NOVA L. REV. 909, 909 (1995) ("The conclusion that seems most obviously to follow from the [religion] analogy might be something like: 'one should not be too rationalistic in trying to understand what the Constitution is all about . . . .'").

168 *See* Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RSCH. CTR. (Dec. 14, 2021), https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated [https://perma.cc/T97T-XY3V] (documenting decline in religious affiliation and practice).

judicial supremacy is neither a necessary nor sufficient condition for a constitution to constrain policy. It is not a necessary condition because—again—the executive, the legislature, and the broader public may consider constitutional commands to be constraints on action even in the absence of judicial interpretation and enforcement. And it is not a sufficient condition because a court may be "supreme" (in the sense that other actors acquiesce to its pronouncements) even while the court ignores the constitution in its decision-making.

With that caveat, we can nonetheless glean some insights into the strength of the *idea of judicial supremacy* from public opinion surveys. Probably the best source of data on Americans' attitudes toward judicial supremacy comes from the Annenberg Public Policy Center, which periodically polls Americans on Supreme Court jurisdiction stripping.[169] Specifically, the Annenberg survey asks respondents whether they agree with the following statement: "When Congress disagrees with the Supreme Court's decisions, Congress should pass legislation saying the Supreme Court can no longer rule on that issue or topic."[170] Unlike the many surveys that measure diffuse attitudes toward the Court (e.g., job approval and confidence ratings), the Annenberg survey sheds light on the Court's "sociological legitimacy"—the extent to which individuals believe that the Court's claim of legal authority merits acquiescence from other actors.[171]

When Annenberg first asked the jurisdiction stripping question in 2007, only a small minority of respondents agreed with the surveyed statement (22% of Democrats, 20% of Republicans, and 21% of independents). In the most recent iteration (August 2022), by contrast, a majority of Democrats agreed with the surveyed statement (51%, versus 21% of Republicans and 38% of independents). Perhaps unsurprisingly, the most dramatic change in Democrats' attitudes toward jurisdiction stripping occurred between the August 2021 and August 2022 survey waves[172]—an interval that coincided with the Court's controversial decision in *Dobbs v. Jackson Women's Health Organization*,[173] which jettisoned a half-century of precedent and held that the Constitution does not protect the right to an abortion. One natural interpretation of this swing is that the Court's

169 *See* Annenberg Pub. Pol'y Ctr., 2022 Judicial Branch Survey 10 (Oct. 2022), https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/2022/10/Appendix_APPC_SCOTUS_Oct_2022.pdf [https://perma.cc/6R6W-M9B3] (reporting results from 2007 through 2022).

170 *Id.*

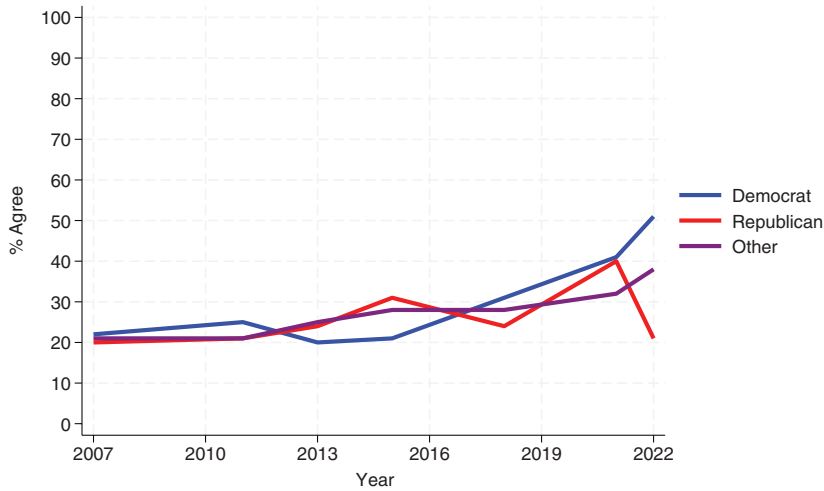
171 *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787, 1790–91 (2005) (defining "sociological legitimacy" and distinguishing it from "moral legitimacy" and "legal legitimacy").

172 *See* Annenberg Pub. Pol'y Ctr., *supra* note 169, at 10.

173 597 U.S. 215 (2022).

rulings on controversial issues such as reproductive rights affect popular attitudes toward judicial supremacy more broadly. Thus, the extent to which the Court can enforce—for example—constitutional constraints on capital taxation may be linked to its decisions on matters far afield from tax. The link is both institutional and ideational: The Court's de facto power in tax depends—at least in part—on popular beliefs and attitudes toward judicial supremacy, and those popular beliefs and attitudes depend—at least in part—on the Court's general jurisprudence.

FIGURE 1. SUPPORT FOR JURISDICTION STRIPPING IN THE UNITED STATES, 2007–2022



Note: Y-axis variable ("%Agree") reflects percentage of respondents who somewhat or strongly agreed with the following statement: "When Congress disagrees with the Supreme Court's decisions, Congress should pass legislation saying the Supreme Court can no longer rule on that issue or topic." "Other" category includes respondents answering "Independent," "Other," and "None." **Source:** Annenberg Public Policy Center, Judicial Branch Survey.

To be clear, the claim here is not that the Supreme Court has lost its ability to enforce constitutional constraints on capital taxation because of the *Dobbs* decision. A majority of Americans (and a large minority of Democrats) continue to oppose jurisdiction stripping in the Annenberg survey: Overall, 38% of respondents agreed with the surveyed statement, while 58% disagreed.[174] Moreover, a hypothetical question on a public opinion survey can provide—at most—vaguely suggestive evidence as to how Americans would react to a real-world interbranch clash. The

174 *See* ANNENBERG PUB. POL'Y CTR., *supra* note 169, at 10.

more modest, but also timeless, claim is that constitutional constraints on capital taxation derive much of their force from popular beliefs and attitudes toward constitutionalism and judicial supremacy—beliefs and attitudes that themselves depend upon an array of constitutional issue linkages.

2. Ideas About Inequality

The Meltzer-Richard model that formed the foundation of our analysis of inequality in Section II.B assumed that individuals formed their ideas about tax policy based on their relative positions in the current income and wealth distributions. That was a useful assumption for a first-cut analysis but—of course—an unrealistic one. Ideas about inequality and tax policy may reflect—among other factors—beliefs about the relative importance of luck and hard work in explaining income and wealth differences, beliefs about the prospect of upward mobility, beliefs about the efficacy of "predistribution" versus redistribution in achieving more equal outcomes, and attitudes toward racial and ethnic minorities.

Starting with the role of luck and hard work: Alberto Alesina, Edward Glaeser, and Bruce Sacerdote document a positive and robust correlation across countries between the belief that luck determines income and the share of GDP devoted to social spending. For example, Americans are much less likely than Europeans to say that "luck" rather than "hard work" accounts for economic success, and government expenditures on social programs constitute a smaller share of GDP in the United States than in the EU.[175] Alesina and coauthors argue that these two facts are linked: "Americans redistribute less than Europeans . . . because"—among other reasons—"Americans believe that they live in an open and fair society and that if someone is poor it is his or her own fault."[176]

Even if Alesina and coauthors are correct that transatlantic differences in beliefs about luck and effort explain part of the divergence between the American and European welfare states, that explanation still leaves us to wonder why Americans and Europeans developed such contrasting views about economic success. One familiar explanation—associated with mid-century political scientist Louis Hartz[177]—posits that the absence of a feudal tradition in the United

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[175] *See* Alberto Alesina, Edward Glaeser & Bruce Sacerdote, *Why Doesn't the United States Have a European-Style Welfare State?*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 187, 244 fig.6 (2001).

[176] *Id.* at 247.

[177] *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 5–6 (1955) (arguing that America, because it

States fostered a Lockean-liberal belief in the legitimacy of private property and stymied the emergence of class consciousness. Another way to frame the Hartz view is that the relative economic equality of nineteenth century America explains the tolerance for inequality in twentieth and twenty-first century America. If that is the case (which is itself far from clear[178]), then the relationship between inequality and ideas about inequality may be cyclical: Tolerance for inequality allows the rich-poor gap to rigidify, which—in turn—undermines tolerance for inequality and motivates redistributive reforms.

The argument of Alesina and his coauthors—which focuses on beliefs about the relative roles of luck and hard work—is related to, but distinct from, a second claim about the relationship between ideas and attitudes toward inequality: the "prospect of upward mobility" (POUM) hypothesis. Louis Putterman offers one version of the POUM hypothesis: "If one's perceived likelihood of having any given level of wealth equals the proportion of the population at that wealth level, then one's expected wealth equals the average wealth."[179] In other words, if individuals in Period One expect their wealth in Period Two to equal the Period Two mean, then they should approach Period Two capital tax policy from the perspective of the Period Two mean wealth holder. And recall that when taxation is distortionary, the individual with mean wealth will be rendered worse off by redistribution. Weighing in the other direction, risk aversion may cause individuals to place more weight on future states in which their wealth is low. But if the distortionary cost of redistribution is sufficiently high relative to the offsetting effect of risk aversion—and if the discount rate is sufficiently low—then the median voter may rationally oppose redistribution out of pure self-interest even though her current wealth falls well below the current mean (because, again, she expects her future wealth to be equal to the future mean).[180]

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began as a "nonfeudal society," therefore "stays with Locke" and is "as indifferent to the challenge of socialism in the later era as it was unfamiliar with the heritage of feudalism in an earlier one").

178 As Eric Foner notes, Hartz's account, summed up by the aphorism "[n]o feudalism, no socialism," fits poorly with the history of the slaveholding South, which was characterized by an "aristocratic social order and disfranchised laboring class"—characteristics that, according to Hartz's logic, should have led to a popular distaste for inequality. *See* Eric Foner, *Why Is There No Socialism in the United States?*, 17 Hist. Workshop 57, 61–63 (1984).

179 Louis Putterman, Why Have the Rabble not Redistributed the Wealth? On the Stability of Democracy and Unequal Property, in Property Relations, Incentives, and Welfare 359, 370 (John E. Roemer ed., 1997).

180 Roland Benabou and Efe Ok offer another version of the POUM hypothesis that depends upon the concavity of the relationship between current income and future income. In their model, a majority of individuals may rationally have expected incomes *above* the mean, in which case opposition to redistribution could arise even when taxes are nondistortionary.

So stated, the POUM hypothesis does *not* depend upon a "Lake Wobegon effect," where a majority of individuals believe that they will be above average.[181] (Rather, it depends upon a majority of individuals believing that they will be exactly average.) Yet as Roland Benabou and Efe Ok note, the POUM hypothesis *does* presume a belief in policy persistence. Otherwise, today's poor—even if they expect to be tomorrow's rich—would rationally *favor* current redistribution, both because they stand to benefit in the near term and because a more egalitarian distribution of wealth would reduce the risk that they might become the targets of expropriative taxes later on. For this reason, the POUM hypothesis cannot fully explain the credibility of a low-capital-tax policy, since the POUM hypothesis itself depends upon the credibility of a low-capital-tax policy.

Third, the relationship between inequality and tax policy depends not just upon *ideas about inequality* but also upon *ideas about policy*. Moreover, ideas about inequality do not translate straightforwardly into beliefs about tax-and-transfer policy.[182] For example, since the 1980s, the General Social Survey (GSS) has found that an overwhelming majority of Americans believe that "[d]ifferences in income in America are too large"—with 73% of respondents agreeing with that statement in 2021.[183] Yet a much smaller share of Americans—54%—say that "the government ought to reduce the income differences between rich and

See Roland Benabou & Efe A. Ok, *Social Mobility and the Demand for Redistribution: The POUM Hypothesis*, 116 Q.J. Econ. 447 (2001).

181 The reference is to the fictional town in the long-running public radio show "A Prairie Home Companion," where "all the women are strong, all the men are good-looking, and all the children are above average." To be sure, perceptions of economic status and mobility in the United States still may be subject to a Lake Wobegon effect. For example, a TIME/CNN poll during the 2000 presidential campaign found that 19% of individuals believed that they were already in the top percentile of income earners, and a further 20% believed that they would eventually land in the top percentile. This fact was sometimes cited as a reason why then-Vice President Al Gore failed to gain traction when he criticized his rival George W. Bush's tax plans for favoring the top 1%. *See* Nancy Gibbs & Michael Duffy, *Bush and Gore: Two Men, Two Visions*, TIME (Oct. 28, 2000), https://content.time.com/time/nation/article/0,8599,58922,00.html [https://perma.cc/DBF5-X2DC]; *see also* David Brooks, Opinion, *The Triumph of Hope Over Self-Interest*, N.Y. Times (Jan. 12, 2003), https://www.nytimes.com/2003/01/12/opinion/the-triumph-of-hope-over-self-interest.html [https://perma.cc/9JBT-427D].

182 *See* Leslie McCall, The Undeserving Rich: American Beliefs About Inequality, Opportunity, and Redistribution (2013); *see also* Leslie McCall & Lane Kenworthy, *Americans' Social Policy Preferences in the Era of Rising Inequality*, 7 Persp. on Pol. 459, 464, 467 (2009) (observing that as income inequality rose from the late 1970s into the early 2000s, support for inequality reduction increased, but support for direct income transfers to the poor did not).

183 NORC at the Univ. of Chi., GSS Data Explorer (2024), https://gssdataexplorer.norc.org/variables/vfilter [https://perma.cc/ML5D-9W2E] (variable "incgap").

poor" through measures such as "raising the taxes of wealthy families" and "giving assistance to the poor."[184]

The double-digit percentage-point gap between the share of Americans who object to income inequality and the share of Americans who believe that the government should redistribute from rich to poor through taxes and transfers is longstanding, dating at least as far back as the mid-to-late 1980s. The persistence of this gap reminds us that the connection between dissatisfaction with inequality and support for redistribution is not automatic. The connection is contingent upon the ideational environment—and in particular, the prominence of the idea of redistribution. As Adam Przeworski argues, the idea of redistribution is not universal: Its origins in modern history date back to seventeenth century England, where its scope was limited to land.[185] Even today, the connection between dissatisfaction with inequality and support for redistribution appears to be tenuous in the minds of many Americans.[186]

One alternative to the idea of redistribution as a remedy for inequality is the idea of equal opportunity—the notion that society should promote upward mobility among the poor through training rather than transfers. According to McCall and Kenworthy's analysis of GSS data, Americans have become increasingly concerned about rising inequality since the 1980s, but this concern has translated into greater support for government spending on education—not into greater for higher taxes and larger transfers.[187] Indeed, the superiority of education over redistribution as a remedy for economic inequality is so deeply rooted in American social thought that many Americans accept it as an article of faith—even according biblical status to the idea that "teaching a man to fish" is better than "giving a man a fish."[188]

Finally, no discussion about the ideational landscape of redistribution—particularly in the United States—would be complete without considering the *idea of race*. In cross-country regressions, Alesina, Glaeser, and Sacerdote find that "racial fractionalization"—the probability that two individuals randomly drawn from a country's

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184 *See id.* (variable "eqwith").

185 *See* Adam Przeworski, *Democracy, Redistribution, and Equality*, 6 Braz. Pol. Sci. Rev. 1, 10–11 (2012).

186 *See* McCall & Kenworthy, *supra* note 182, at 472–74.

187 *See id.* at 468.

188 *See* Elizabeth Spiers, Perspective, *Mike Pence and the GOP Are Waging the Real War on Christmas*, Wash. Post: PostEverything (Dec. 24, 2020, 1:25 PM), https://www.washingtonpost.com/outlook/2020/12/24/pence-gop-poor-rich [https://perma.cc/8WKX-ULGJ] (noting that, as a child in a religious community in the U.S. South, "I was often told by elders that the Bible tells us that it's better to teach a man to fish than to give a man a fish," though "[a]s it happens, the Bible says no such thing"). The proverb appears to be Chinese in origin. Int'l Thesaurus of Quotations 76 (Rhoda Thomas, ed., 1970).

population will belong to different racial groups—has a large and negative effect on social spending as a share of GDP.[189] Analyzing GSS data, Erzo Luttmer finds that support for redistribution is strongly predicted by the racial composition of welfare recipients in an individual's Census tract: Non-Black respondents are less likely to support redistribution when a larger share of welfare recipients in their area are Black.[190] Summarizing these and similar findings, Woojin Lee and John Roemer posit the existence of an "anti-solidarity effect": Racially motivated voters oppose redistribution when they believe that redistribution redounds to the benefit of disfavored racial minorities.[191]

While the link between racial attitudes and support for redistribution appears to be strong, the implications for capital taxation are not crystal-clear. Studies of race and redistribution typically focus on support for welfare programs as the outcome variable. However, individuals who oppose welfare spending targeted at low-income populations may have different views about capital taxes that fund universal programs. Suggestively, Martin Gilens finds that among white Americans, support for spending programs aimed broadly at the elderly (e.g., Social Security and Medicare) and support for spending on public schools are both uncorrelated with racial attitudes, while support for means-tested programs (e.g., Food Stamps) is highly correlated with views about race.[192] Thus, while racial attitudes are important in explaining American public opinion with respect to welfare, racial attitudes may have a smaller effect on support for policies that would levy high capital taxes to finance universal spending programs.

To be sure, even if racial attitudes do not affect views about capital taxation directly, they still may play a role in explaining the failure of redistributive capital tax reforms in the United States. As Lee and Roemer suggest, "[r]acially conservative citizens who *desire* redistribution, because they themselves are poor, may vote for the Republican Party, because it has the policy they prefer on the race issue, even though it also advocates less redistribution than these voters would like."[193] Racially conservative, redistributively liberal white voters face this either-or choice between the conservative Republican Party and the liberal Democratic Party because the United States' first-past-the-post

189 *See* Alesina, Glaeser & Sacerdote, *supra* note 175, at 231 tbl.9.

190 *See* Erzo F. P. Luttmer, *Group Loyalty and the Taste for Redistribution*, 109 J. POL. ECON. 6, 15 & tbl.2 (2001).

191 *See* Woojin Lee & John E. Roemer, *Racism and Redistribution in the United States: A Solution to the Problem of American Exceptionalism*, 90 J. POL. ECON. 1027, 1028 (2006).

192 *See* Martin Gilens, *Racial Attitudes and Opposition to Welfare*, 57 J. POL. 994, 1008, 1009 fig.2 (1995) (analyzing data from the 1988 National Election Study).

193 Lee & Roemer, *supra* note 191, at 1028.

election system suppresses the emergence of a third party that might cater more specifically to their views. According to this account, ideas and institutions interact to sustain economic inequality even when a majority of the population supports redistributive reforms.

Summing up: Ideas operate alongside—and sometimes in conjunction with—institutions and inequality in explaining the credibility of capital tax policy. Ideas about the fairness of the wealth distribution or about prospects for upward mobility may attenuate the relationship between inequality and redistributive taxation. Moreover, the very idea of redistribution as a response to inequality is arguably contingent upon history and culture. Lastly, the idea of race—and more specifically, the in-group loyalty and intergroup animus that the idea of race engenders—may react with political institutions to prevent the emergence of a pro-redistribution coalition.

D. The Role of Reputation

Up to this point, our analysis has said nothing about the role of reputation. Reputational concerns often figure prominently in debates over capital levies,[194] and reputation plays an important role in many models of dynamic capital taxation.[195] In these rationalist models, "reputation" is typically defined as the belief that "past behavior can be used to predict future behavior."[196] C.C. von Weizsäcker refers to this belief as the "extrapolation principle"—the notion that observers can extrapolate from an actor's behavior at Time One to predict that actor's behavior at Time Two and thereafter.[197]

Given that our puzzle is to explain the persistence of policies, the invocation of reputation runs a risk of circularity. Our motivating puzzle is why—and under what conditions—capital tax policy at Time One predicts capital tax policy at Time Two and thereafter. To answer that "actions at Time One predict actions at Time Two and thereafter" is, of course, to beg the question. Yet there are at least three possible accounts that can rescue the notion of reputation from the circularity critique:

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194 *See, e.g.*, Eichengreen, *supra* note 11, at 201–02 (noting that opponents of a capital levy in post-World War I Britain emphasized potential negative reputational effects).

195 *See, e.g.*, Nancy L. Stokey, *Reputation and Time Consistency*, 79 Am. Econ. Rev. 134, 136–39 (1989); V.V. Chari & Patrick J. Kehoe, *Sustainable Plans*, 98 J. Pol. Econ. 783, 799–800 (1990); Marco Celentani & Wolfgang Pesendorfer, *Reputation in Dynamic Games*, 70 J. Econ. Theory 108, 115, 121 (1996); Jess Benhabib & Aldo Rustichini, *Optimal Taxes Without Commitment*, 77 J. Econ. Theory 231, 235, 246 (1997).

196 Rachel Brewster, *Unpacking the State's Reputation*, 50 Harv. Int'l L.J. 231, 235 n.4 (2009).

197 C.C. von Weizsäcker, *A Welfare Analysis of Barriers to Entry*, 11 Bell J. Econ. 399, 412 (1980).

one in which reputation operates as an indicator of institutions and ideas; a second in which reputation emerges as a product of institutions; and a third in which reputation is an idea in itself.

Starting with the first (reputation as indicator): One possibility is that capital tax policy is shaped by the factors analyzed in Sections II.A through II.C—institutions, inequality, and ideas—but that these three factors are imperfectly observable. Individuals may view a state's behavior in one period as an indicator of the extent to which institutions and ideas will constrain capital taxation in later periods. For example, if the United States enacted a one-time wealth tax today, individuals might infer that institutional constraints on capital taxation (e.g., the direct tax clauses in the U.S. Constitution) and ideational constraints on capital taxation (e.g., the popularity of the view that wealth inequality reflects "just deserts" rather than luck) are weaker than they previously believed. But while this reputation-as-indicator account might work for the institutional and ideational factors, it works less well for inequality. A one-time capital tax could lead individuals to update their views about institutional and ideational constraints in one direction (i.e., to infer that these constraints are weaker than previously believed), but it also should lead individuals to update their perceptions of inequality in the other direction (i.e., to conclude that the wealth distribution is *more* egalitarian than before, and thus that the incentive to impose another capital levy is weaker than it previously was). After all, a one-time capital tax is almost always inequality-reducing, and a 100% capital tax would eliminate wealth inequality altogether, at least in the near term. Thus, the plausibility of this first reputational account—reputation as indicator—depends upon the relative influence of institutions, inequality, and ideas on capital tax policy. The reputation-as-indicator account works best if the first and third factors are more significant than the second.

A second response to the circularity critique situates *reputation as a product of institutions* rather than an indicator of institutional strength. According to this account, reputation reflects a trigger strategy followed by individuals in the private sector in repeated interactions with a government.[198] In Period One, individuals make their labor and saving choices, and then the government sets its tax policies. In subsequent periods, the sequence repeats. The government resembles the benevolent social planner in Fischer's 1980 model: It seeks to maximize welfare but lacks the ability to commit to a particular policy. Thus in each period, the government may be tempted to enact a

198 *See, e.g.*, Stokey, *supra* note 195, at 136–39; Chari & Kehoe, *supra* note 195, at 784.

one-time capital tax in order to raise revenue and redistribute wealth without distortion.

In trigger-strategy models, the cooperative outcome is typically defined as the outcome that would obtain if the government could credibly commit to the optimal tax policy. The cooperative outcome involves high levels of labor and investment on the private-sector side and low or zero capital taxes in the long run on the government side. If the government continues to "cooperate" (i.e., to maintain low capital taxes), individuals continue to supply high levels of labor and investment. If the government "defects" (i.e., abruptly raises capital taxes), individuals defect for some number of subsequent rounds (i.e., supply low levels of labor and investment consistent with the expectation of expropriation).

The trigger strategy solves the credible commitment problem on the government side by giving the government a strong incentive not to defect: Any deviation from a low-capital-tax policy will be punished by an immediate withdrawal of labor effort and investment. However, the trigger-strategy explanation shifts the puzzle of credible commitment to the private-sector side. In the immediate aftermath of a large capital levy, the short-term risk of another capital levy is low because there is not much private-sector wealth left to seize; thus the potential gains from redistribution are smaller than the costs of legislative enactment and administrative implementation. Why, then, would any individual choose low levels of labor and investment (consistent with the expectation of high capital taxes in the next period) when she could raise her utility by choosing higher levels of labor and investment (consistent with the expectation of low capital taxes in the next period)?

This puzzle parallels Jon Elster's critique of functional Marxism, in which Elster questioned why individual capitalists would act to further the interests of the capitalist class as a whole rather than their individual self-interest.[199] As Elster asks, why don't individual capitalists free-ride off the efforts of other capitalists?[200] The same question applies to trigger-strategy models of reputation and capital taxation. It is not enough to say that the trigger strategy is rational for the private sector as a whole. A convincing trigger-strategy account requires an explanation of why the strategy is rational at the micro-level for the individuals, households, and firms that constitute the private sector.

One possible answer to the free-riding question is that the individuals, households, and firms that constitute the private sector

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199 *See* Jon Elster, *Marxism, Functionalism and Game Theory: The Case for Methodological Individualism*, 11 Theory & Soc'y 453, 467 (1982).

200 *Id.*

may coordinate their behavior through formal or informal institutions. Operating through these institutions, private-sector actors may organize a "capital strike" (i.e., a withdrawal of investment) in the event the government defects, and they may punish strike-breakers who fail to follow through on the trigger strategy.[201] These institutions may include—among others—business leagues (e.g., the Chamber of Commerce), interlocking corporate directorates, and social clubs.[202] Coordination may take the form of explicit agreements or unspoken but widely shared understandings.

Outside of Ayn Rand novels, capital strikes are "highly unusual" events.[203] President Franklin Roosevelt famously suspected that capital owners instigated the 1937 recession by striking against his redistributive New Deal policies, but "the existence of a capital strike was never proven."[204] According to some accounts, business owners carried out capital strikes against the policies of the socialist Chilean President Salvador Allende in the early 1970s and against the left-wing agenda of French President François Mitterrand in the early 1980s.[205] But as David Vogel emphasizes, the power of a capital strike "is fundamentally limited by the fact that it cannot be employed without also hurting capitalists themselves."[206]

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201 *See* Chari & Kehoe, *supra* note 195, at 799–800 (discussing the possibility that private-sector agents might police each other).

202 *See* Kevin A. Young, Tarun Banerjee & Michael Schwartz, *Capital Strikes as a Corporate Political Strategy: The Structural Power of Business in the Obama Era*, 46 POL. & SOC'Y 3, 7 (2018).

203 Thomas Frank, *To Galt's Gulch They Go*, THE BAFFLER no. 22 (Apr. 2013), https://thebaffler.com/salvos/to-galts-gulch-they-go [https://perma.cc/97CX-R43H] ("A 'capital strike,' according to the [narrow] 1938 understanding of the phrase, is a highly unusual event[.]"). A capital strike is, however, a significant plot point in the romance novel-cum-hypercapitalist manifesto *Atlas Shrugged*. *See* AYN RAND, ATLAS SHRUGGED (1957).

204 2 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR 1900–1970, at 234 (2002) ("Although the existence of a capital strike was never proven, Roosevelt used that concern to start another fight with the financiers."). *See also* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 56 (1995) ("Roosevelt himself, angered and frustrated by the latest downturn in the economy's fortunes, seemed at times privately to sympathize with [the capital strike theory]. He once went so far as to order the FBI . . . to look into the possibility of a criminal conspiracy. But Roosevelt never expressed such suspicions publicly.").

205 *See, e.g.*, TOM MALLESON, AGAINST INEQUALITY: THE PRACTICAL AND ETHICAL CASE FOR ABOLISHING THE SUPERRICH 112 (2023); René Rojas, *The End of Progressive Neoliberalism*, 4 CATALYST 141, 197 n.68 (2020).

206 David Vogel, *Political Science and the Study of Corporate Power: A Dissent from the New Conventional Wisdom*, 17 BRIT. J. POL. SCI. 385, 394 (1987). Conceivably, capital owners might be able to mitigate the negative effect of a capital strike on their own personal wealth by taking short positions in other firms. I thank Ian Ayres for suggesting this point. *Cf.* Ian Ayres & Joe Bankman, *Substitutes for Insider Trading*, 54 STAN. L. REV. 235, 281 n.141 (2001) ("As a theoretical matter, it is illuminating to consider an 'Atlas Shrugged' scenario in which

Concededly, the rarity of real-world capital strikes does not disprove the trigger-strategy theory of reputation. Indeed, in trigger-strategy models, a capital strike never occurs because mutual cooperation is an equilibrium solution: The government is incentivized not to impose high taxes on capital, and thus the trigger is never pulled. But although the plausibility of the trigger-strategy theory does not depend upon the frequent occurrence of capital strikes, it does depend upon the institutional environment—and in particular, the organizational and social networks of capital owners. As Tasha Fairfield observes, capital strikes "require collective action" and are therefore "more likely to arise when cohesion among the relevant economic elites is strong."[207]

A third and final account of reputation as a source of credible commitment locates reputation in the world of ideas. According to this account of *reputation as idea*, individuals come to believe in the extrapolation principle because it works well in many fields of life: Past conduct often does predict future conduct. Once this idea takes root in a social context, "extrapolation is self-stabilizing, because it provides an incentive for those others to live up to these expectations."[208] So long as a critical mass continues to believe in the idea of reputation, individuals as well as states will continue to have an incentive to act as though others will extrapolate from their current behavior to predict their future behavior.

In this third account, "reputation has an emergent or intersubjective quality that makes it a 'social fact' rather than just a collection of individual beliefs."[209] In other words, reputation matters not just because individuals apply the extrapolation principle but also because individuals expect others to apply the extrapolation principle. Moreover, if a critical mass ceases to believe in the extrapolation principle, reputation will lose its motivating force. In this respect, reputation is like the fairy Tinker Bell in the children's story *Peter Pan*.[210] "According to the laws of Barrie's tale, fairies cannot exist unless we believe in them," and "if we believe in them at first, but come to doubt them later, they will die."[211]

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a firm (say, Microsoft) destroyed all of its productive capacity on a particular day but profited immensely by selling another firm's stock short.").

207 Tasha Fairfield, Private Wealth and Public Revenue in Latin America: Business Power and Tax Politics 51 (2015).

208 von Weizsäcker, *supra* note 197, at 412.

209 J.C. Sharman, *Rationalist and Constructivist Perspectives on Reputation*, 55 Pol. Stud. 20, 26 (2007).

210 *See* J.M. Barrie, Peter and Wendy (1911).

211 Cameron Stewart, *The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law*, 4 Macquarie L.J. 135, 135 (2004).

The Tinker Bell analogy underscores the fragility of reputation as a constraint on capital taxation. While von Weizsäcker argues that the extrapolation principle is "deeply rooted in the structure of human behavior,"[212] it is not applied universally. As the marriage example at the outset of Part II illustrates, we do not always expect behavior to remain constant from one period to the next: Sometimes, the fact that an actor behaves a particular way in one period causes others to expect that the actor will behave differently in the next period. For another example, if we see a friend eating an ice cream cone at 3 p.m., we typically do not expect to see the friend eating another ice cream cone at 4 p.m. Usually, a single cone will sate one's appetite for ice cream for the next several hours. One could imagine the same logic applying to capital taxation: The fact that a polity has imposed a large one-off capital tax might lead us to believe that the polity has sated its appetite for wealth redistribution for the next several years or decades.

To be sure, other inferences are possible too, including those implied by the reputation-as-indicator account (i.e., that the enactment of a capital tax indicates that the institutional and ideational constraints on future capital taxes are weak). The key point for present purposes is that insofar as reputation is an idea, its force is contingent upon the assumptions and understandings shared by actors in a particular context. Reputation as an idea serves to deter polities from imposing one-time capital taxes only to the extent that other actors believe that the enactment of a capital tax implies its repetition. This intersubjective quality of reputation will become important to the analysis in Part III as we strive to understand how many countries have imposed a version of a one-time wealth tax without raising fears of further capital levies.

E. Summary

To recapitulate the discussion so far: We saw in Part I that Atkinson and Stiglitz's zero-capital-tax prescription requires credible commitment, but the sources of credible commitment are unspecified in that canonical contribution. We also saw that some economists have dealt with the credibility challenge by imposing arbitrary limits on the menu of tax policies[213] or by assuming—without further explanation—that institutions such as constitutions have supernatural powers to constrain capital taxation.[214] Unsatisfied with those accounts, we drilled down deeply throughout this Part into the factors that potentially shape

212 C.C. von Weizsäcker, Barriers to Entry: A Theoretical Treatment 72 (1980).
213 *See supra* text accompanying notes 52–54.
214 *See supra* text accompanying notes 20–21.

and constrain capital taxation over time: institutions, inequality, and ideas. We came to understand that these three factors are not separate sources of credible commitment but interrelated ones: Ideas undergird the power of institutions—particularly legal and political institutions—and determine how individuals react to material inequality. We also saw that reputation can operate as an indicator of institutions and ideas, as a product of institutions, and as an idea in itself that can persist in an intersubjective equilibrium.

With this theoretical framework in hand, we can now begin to answer several practical questions. For example, how has the United States succeeded in sustaining a commitment to low capital taxation throughout its history? How durable does that commitment remain? Can countries ever credibly commit to L-shaped capital tax trajectories? If so, under what conditions? We can also begin to consider the implications of the credible commitment challenge for the academic field of optimal tax theory. And we can elucidate the connections between capital tax's middle-of-history problem and similar predicaments in other areas of law.

III
Implications

A. Capital Taxation in the Middle of American History

We begin our survey of implications in the contemporary United States. The U.S. focus is partly parochial (the United States is home to the author and to a plurality of active tax scholars), but it also reflects the United States' success in promoting private capital investment. The United States ranks first in the world in total private capital stock.[215] It also has maintained—at least in its recent history—modest levels of capital taxation: According to one estimate of capital tax rates across countries (accounting for corporate income taxes, wealth taxes, property taxes, and the portion of personal income taxes that reflect the return on capital inputs), the effective capital tax (expressed as a percentage of capital income) was 27% in the United States in 2018, below the rich-country average, which now hovers above 30%.[216] Especially when one

[215] *See* IMF Investment and Capital Stock Dataset 1960–2019, Int'l Monetary Fund (2021), https://infrastructuregovern.imf.org/content/dam/PIMA/Knowledge-Hub/dataset/IMFInvestmentandCapitalStockDataset2021.xlsx [https://perma.cc/4EQW-URXS] (estimating country-by-country private capital stock based on private investment flows).

[216] *See* Pierre Bachas, Matthew H. Fisher-Post, Anders Jensen & Gabriel Zucman, *Capital Taxation, Development, and Globalization, Evidence from a Macro-Historical Database* 14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29818, 2024), https://www.nber.org/papers/w29819 [https://perma.cc/89M7-RLK6]. For U.S.-specific estimates, see Pierre Bachas, Matthew H. Fisher-Post, Anders Jensen & Gabriel Zucman, *Globalization and Factor Income*

considers that a 27% capital *income* tax equates to an annual wealth tax of just a fraction of a percentage point,[217] the United States appears to have achieved a relatively low-capital-tax, high-investment equilibrium.

It was not always this way. In its earliest years, the United States was, in legal historian Daniel Hulsebosch's phrasing, a "confiscation nation."[218] During the American Revolution and the Articles of Confederation era, the former colonies executed "a massive program of state expropriation that transferred millions of acres of land, thousands of enslaved people, and countless household and agricultural goods away from loyalists, who were excluded by law from membership in the revolutionary polity."[219] The new United States sought to characterize confiscation as a one-time affair, and the 1783 Treaty of Paris with Great Britain—ratified the following year by the Congress of the Confederation—promised that "there shall be no future Confiscations" against the pro-British loyalists. Even though the United States' political institutions were still in a nascent phase, capital owners appear to have taken Congress for its word.[220]

The Founding-era confiscation of loyalist landowners paled in scale to the much larger expropriation project carried out by the United States over several centuries: the seizure of Native American land.[221] The fact that this massive expropriation was not interpreted by non-Native capital owners as a defection from the cooperative solution highlights, again, the intersubjective nature of reputation. Sometimes expropriation counts as defection, causing capital owners to update their

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Taxation, https://globaltaxation.world [https://perma.cc/KE8B-RNJY] (follow "Download Data" link).

217 *See supra* notes 38 and 40. Based on the formula $t_k = (t_i * r)/(1 + r)$, a 27% capital income tax equates to an 0.135% annual wealth tax when $r = 5\%$.

218 *See* Daniel J. Hulsebosch, *Confiscation Nation: Settler Postcolonialism and the Property Paradox*, 33 YALE J.L. & HUMAN. 227, 227 (2022) (reviewing CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA (2021)).

219 *Id.* at 231.

220 The United States also agreed as part of the treaty that the Congress of the Confederation would "earnestly" recommend to the states that they provide restitution to the victims of the confiscations. *See* Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 838 (2006). Several state courts would go on to limit or nullify state confiscation laws in one of the earliest examples of American judicial review. *See id.* at 848–49 (discussing the New Jersey Supreme Court's refusal to enforce a state statute permitting the seizure of goods moving across enemy lines because the statute provided defendants with a jury of only six members rather than the traditional twelve); *id.* at 849–50 (discussing the North Carolina Supreme Court's nullification of a state statute that protected purchasers of confiscated properties from lawsuits by Loyalists—again, because the statute claimed to abrogate common law jury trial rights).

221 For comprehensive histories, see generally STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); and LINDSAY G. ROBERTSON, CONQUEST BY LAND: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005), detailing expropriation by the United States.

beliefs about the government's type and perhaps triggering a capital strike. Sometimes, an expropriating government gets a free pass from non-expropriated capital owners. The fallout from the expropriation of Native American land points to another way in which the idea of race molds beliefs about taxation and redistribution. In Section II.C, we saw that racial attitudes may cause low-income non-Blacks to vote against their economic self-interest on matters of redistribution. Here, the racial othering of Native Americans allowed the government to seize their land without triggering fears of further levies among non-Native capital owners. The "twin expropriation projects"[222] of eighteenth and nineteenth century America demonstrate that the credibility of U.S. capital tax policy cannot be attributed to an unblemished track record.

The institutions-inequality-ideas framework from Part II provides a more compelling account of the persistence of low capital taxes in the modern United States. Starting with the first factor—institutions—the analysis in Section II.A points to several ways in which the U.S. institutional environment sustains a credible commitment to low capital taxation:

- **Institutions of Tax Administration:** The United States does not have well-developed administrative infrastructure capable of carrying out a one-time capital levy. The Internal Revenue Service does not track year-to-year changes in household net worth, and while it does assign a value to illiquid assets in the limited context of federal estate taxation, the challenge of valuation has bedeviled federal tax authorities throughout the modern estate tax's century-long history. Scholars have proposed creative mechanisms to ease these valuation challenges,[223] but the administrative infrastructure needed to carry out a wealth tax would take time to build. That time lag would undermine one of the potential benefits of a one-time capital tax: the fact that it could be implemented suddenly and thus without generating any distortion.
- **Institutions Affecting Legibility:** The United States has long allowed individuals to establish complex trusts with no current beneficiaries and multiple contingent beneficiaries. As of 2014, there were nearly 1.5 million complex trusts filing federal fiduciary income tax returns, with total income of $90 billion

222 Hulsebosch, *supra* note 218, at 231.

223 *See, e.g.*, Brian Galle, David Gamage & Darien Shanske, *Solving the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth*, 72 Duke L.J. 1257, 1257 (2023) (proposing one such method, which involves the tax authority taking an equity-like interest in difficult-to-value assets).

and assets worth many multiples of that.[224] In the event that the United States enacted a wealth tax with an exemption amount or a graduated rate structure, these complex trusts would make it harder for tax authorities to attribute assets to individuals for purposes of applying exemptions or graduated rates.

- **Constitutional Law:** As noted above, the U.S. Constitution requires "direct taxes" to be apportioned among the states based on population—a phrase that a swing Justice and the Biden administration's top appellate advocate have interpreted to apply to wealth taxes.[225] It is highly likely that the current Court would strike down an unapportioned federal wealth tax, and apart from the prospect of judicial invalidation, it appears that the executive branch currently agrees that the best reading of the Constitution precludes federal wealth taxation without apportionment.

- **Legislative Institutions:** A new federal wealth tax would take weeks—likely months—of legislative time, during which capital owners would have opportunities to move assets abroad or render their holdings more opaque. Moreover, legislative institutions in the United States tend to reflect the disproportionate influence of capital owners—a function, in part, of federal campaign finance law. The bicameral legislative process would therefore hinder—if not altogether halt—any bill to impose a large one-time or recurrent capital levy.

- **Savings Institutions:** The United States' relatively weak public pension system and substantial incentives for private retirement savings promote widespread household ownership of financial assets. As of 2022, nearly three in five U.S. households (58%) own stock directly or through investment funds.[226] Meanwhile, nearly two-thirds of U.S. households (66%) own their homes[227]—encouraged by, among other factors, federally subsidized mortgage loans and federal

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224 *See* Internal Revenue Serv., Stats. of Income Div. Fiduciary Income Tax Returns Study tbl.2 (2015), https://www.irs.gov/pub/irs-soi/14fd02.xlsx [https://perma.cc/D2JV-USQC].

225 *See supra* note 113 and accompanying text.

226 *See* Hannah Miao, *More Americans Than Ever Own Stocks*, Wall St. J. (Dec. 18, 2023, 5:30 AM), https://www.wsj.com/finance/stocks/stocks-americans-own-most-ever-9f6fd963 [https://perma.cc/XYV7-6SGA].

227 Robert R. Callis, *Rate of Homeownership Higher Than Before Pandemic in All Regions*, U.S. Census Bureau (July 25, 2023), https://www.census.gov/library/stories/2023/07/younger-householders-drove-rebound-in-homeownership.html [https://perma.cc/6E7D-WJHH].

> income tax incentives for homeownership and home mortgage debt. U.S. savings institutions have fostered the emergence of a capital-owning supermajority, whose members are—as noted in Section II.A.5—likelier than non-capital owners to identify with the interests of wealth.

Notwithstanding these institutional constraints on capital taxation, the United States has been somewhat successful—through a combination of individual income taxes, corporate income taxes, and cash and near-cash transfers—in moderating the rise of economic inequality. According to Jerry Auten and David Splinter, the top percentile's share of pre-tax income rose by 4.4 percentage points from 1979 to 2019, but that group's share of after-tax-and-transfer income rose by only 1.4 percentage points.[228] Put another way, the tax-and-transfer system offset more than two-thirds of the increase in pre-tax income inequality over those four decades. Thomas Piketty, Emmanuel Saez, and Gabriel Zucman argue that pre-tax income inequality has grown by more than Auten and Splinter estimate and that taxes and transfers have had a smaller offsetting effect,[229] but Piketty, Saez, and Zucman still find that over the last four decades, after-tax inequality has grown at a slower pace, in percentage point terms, than pre-tax inequality.[230]

Finally, the ideational substrates of low capital taxation in the United States remain strong, if not as strong as they once were. As noted above, a majority of Americans continue to believe that Congress should yield to the Supreme Court when the justices strike down popular laws, though this majority has grown smaller over time. And a majority of Americans continue to believe that "hard work" is the "most important" factor in explaining economic success, though this share fell sharply from 72% in 2018 to 60% in 2022.[231] Perhaps even more tellingly, while the idea of redistribution is very much a feature of the landscape of American political thought circa 2024, the idea of a very large capital levy is not. Even the "tax on extreme wealth"

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228 *See* Gerald Auten & David Splinter, *Income Inequality in the United States: Using Tax Data to Measure Long-Term Trends*, 132 J. Pol. Econ. 2179, 2182 (2024).

229 *See* Thomas Piketty, Emmanuel Saez & Gabriel Zucman, Comment on Auten and Splinter 2–7 (2023) (unpublished manuscript), https://gabriel-zucman.eu/files/as-response-2023 [https://perma.cc/P5AM-SAKV] (disputing Auten and Splinter's methodological choices regarding the allocation of untaxed business income and untaxed non-business capital income).

230 *See* William G. Gale, John Sabelhaus & Samuel I. Thorpe, *Measuring Income Inequality: A Primer on the Debate*, Brookings Inst. (Dec. 21, 2023), https://www.brookings.edu/articles/measuring-income-inequality-a-primer-on-the-debate [https://perma.cc/NE7X-2AXH] (summarizing the inequality measurement debate).

231 *See* NORC at the Univ. of Chi., *supra* note 183 (variable "getahead").

proposed by Senator Bernie Sanders during his 2020 presidential bid topped out at 8% on wealth over $10 billion,[232] a far cry from the 90% wealth tax levied on the richest households in Japan in 1946–1947.[233]

For all these reasons, the credibility of the United States' commitment to low capital taxation appears to be solid, or mostly so. But when we look very closely, we can see signs of hairline fractures—though not complete fissures—in the bones of U.S. capital tax policy:

- **Institutions:** The rightward drift of the U.S. Supreme Court in recent years makes it more likely that the justices would strike down an unapportioned federal wealth tax, but that same rightward trend has accelerated a decline in the Court's popular standing—and in particular, the percentage of Americans who believe that Congress should effectively override unpopular Court decisions through jurisdiction stripping.[234]
- **Inequality:** According to Edward Wolff, the share of U.S. wealth held by the top 1% has increased only modestly over the last half-century (from 36% to 38%), but the ratio of mean-to-median wealth increased dramatically over that same period (from 3.7 to 7.2).[235] Importantly, the mean-to-median ratio—not the top 1% share—is the key determinant of taxes and transfers in the Meltzer-Richard model.
- **Ideas:** As noted, the idea of judicial supremacy has lost some of its sway in recent years, as has the idea that economic inequality reflects hard work rather than luck. Moreover, although the top wealth tax rates suggested by prominent progressive politicians remain low by the standards of historical capital levies, the reappearance of wealth taxation on the menu of plausible policy options suggests a significant shift in the ideational landscape of capital tax reform. As Larry Summers puts it, "[t]he fact that wealth taxes are under serious discussion widens the Overton window with respect to tax reform."[236] By stretching

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232 *Issues: Tax on Extreme Wealth*, Bernie Sanders, https://berniesanders.com/issues/tax-extreme-wealth [https://perma.cc/9VVP-X36M].

233 *See* Eichengreen, *supra* note 11, at 213.

234 *See supra* text accompanying notes 171–73.

235 Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2019: Median Wealth Rebounds . . . But Not Enough* 47–48 tbls.1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28383, 2021), https://www.nber.org/system/files/working_papers/w28383/w28383.pdf [https://perma.cc/4J6G-NPBJ].

236 Lawrence H. Summers, *Would a Wealth Tax Help Combat Inequality?*, *in* Combating Inequality: Rethinking Government's Role 130 (Olivier Blanchard & Dani Rodrik eds., 2021).

> the limits of policymakers' imaginations, the movement for a wealth tax may encourage the emergence of even more radical redistributive proposals such as a much larger capital levy.

The Overton window-widening that Summers mentions, however, also may have a countervailing and ultimately credibility-enhancing effect. By expanding the aperture of discussable capital tax reforms, the push for a wealth tax may smooth the political path for more modest measures such as lowering the estate tax exemption, taxing unrealized capital gains at death, and eliminating the rate differential between ordinary income and long-term capital gains. These more modest measures may curtail—and even reverse—the recent rise in wealth inequality in the United States. But importantly—and in contrast to a capital levy—more modest measures typically take time before they have an appreciable effect on the wealth distribution. Taxing unrealized gains at death and expanding the estate tax's reach will affect each family "dynasty" only once per generation. It may be wise for policymakers to implement these measures well before wealth inequality reaches a breaking point.

Thus, even if current levels of U.S. wealth inequality—with the top percentile controlling nearly two-fifths of household wealth and the mean-to-median net worth ratio exceeding 7-to-1—are still too low to galvanize mass support for large-scale redistribution, moderately progressive capital tax reforms still may play an important role in bolstering the credibility of U.S. policy. By adopting these measures today, Congress may reduce the probability—perceived or actual—of a much larger capital levy later on. Concededly, this suggestion is necessarily speculative. We do not know what degree of wealth inequality is sustainable in a democracy, and the threshold no doubt varies across countries and across time based on the institutional and ideational environment. Yet the analysis in this Article raises the possibility—though it does not establish definitively—that moderately progressive capital tax reforms may be efficiency-enhancing in the long run insofar as they alleviate pressure for more radical measures.

B. One-Time Capital Levies and Value-Added Taxation

The analysis in Part II also sheds light on a second question: Under what conditions can a government impose a large one-time capital levy and credibly commit not to do it again? The confiscation of loyalist property in the early United States and the Japanese capital levy of 1946–1947 suggest that the answer may relate to the perceived uniqueness of the situation: Americans in the post-Revolutionary period and Japanese in the immediate aftermath of World War II likely understood that their countries had just undergone a once-in-many-generations

transformation. The idea that "extraordinary times call for extraordinary measures"—measures that will not be repeated for the foreseeable future—becomes believable when individuals perceive their times to be truly extraordinary.[237] Oxfam and other organizations sought to leverage this phenomenon during the Covid-19 pandemic when they called for a "one-off emergency tax" on billionaire wealth to fund vaccines and unemployment benefits.[238] That effort ultimately failed—possibly because, among other reasons, most people did *not* perceive the pandemic to be a once-in-many-generations event (either because, as in much of middle America, their day-to-day lives were relatively unaffected after the spring of 2020 or because they understand that another pandemic is highly likely to strike again).

Eichengreen describes the post-World War II Japanese wealth tax as "the exception that proves the rule"—"the single example of a major, successful peacetime capital levy."[239] One can debate whether the Loyalist land confiscations in early America qualify as a second example: While they began in wartime, they continued long after General Cornwallis's surrender at Yorktown in 1781.[240] Yet as Louis Kaplow notes, there are in fact dozens of examples of successful peacetime capital levies in the form of value-added taxes.[241] Indeed, all advanced, industrialized countries other than the United States have implemented VATs.[242] In this respect, and contra Eichengreen,[243] Japan is not the singular "exception" to the rule of no peacetime capital levies. Rather, the United States is the exception insofar as it is the only high-income industrialized country that *hasn't* imposed a one-time capital levy via a VAT.

David Bradford offers a vivid illustration of the equivalence between a VAT and a one-time capital levy.[244] He asks us to imagine

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237 In the Japanese case, the fact that the capital levy was effectively imposed by the occupying Allied powers likely contributed to expectations of nonrecurrence after the occupation had ended.

238 Press Release, Oxfam, One-Off Emergency Tax on Billionaires' Pandemic Windfalls Could Fund COVID-19 Jabs for Entire World (Aug. 12, 2021), https://www.oxfam.org/en/press-releases/one-emergency-tax-billionaires-pandemic-windfalls-could-fund-covid-19-jabs-entire [https://perma.cc/KZ5R-A777].

239 Eichengreen, *supra* note 11, at 194.

240 *See, e.g.*, Robert S. Lambert, *The Confiscation of Loyalist Property in Georgia, 1782–86*, 20 Wm. & Mary Q. 80, 91–93 (1963) (calculating that from 1782 to 1786, Georgia confiscated 128,330 acres from 166 loyalist landowners).

241 Louis Kaplow, The Theory of Taxation and Public Finance 242–44 (2008).

242 *See* Ajay K. Mehrotra, *The Missing U.S. VAT: Economic Inequality, American Fiscal Exceptionalism, and the Historical U.S. Resistance to National Consumption Taxes*, 117 Nw. U. L. Rev. 151, 158 (2022).

243 Eichengreen, *supra* note 11, at 194.

244 David F. Bradford, *Transition to and Tax-Rate Flexibility in a Cash-Flow-Type Tax*, 12 Tax Pol'y & Econ. 151, 154–55 (1998).

"a retail store owner who buys a stock of canned tomato juice for $10,000 the day before the [value-added] tax goes into effect, with a rate, say, of 20 percent." Bradford continues: "If the tomato juice is sold the day after the introduction of the tax, for roughly $10,000 . . . , the owner of the inventory will get to keep only $8,000 after tax" (with 20% going to pay the VAT).[245] Alternatively, if prices rise to reflect the new VAT—as seems likely[246]—then the burden of the capital levy will be shifted to wealth holders writ large. For example, as of this writing, Elon Musk holds wealth of approximately $200 billion,[247] with which he can afford $200 billion of real consumption. If a comprehensive 20% VAT is implemented tomorrow, and if prices rise to reflect the new tax, then Musk will be able to afford only $160 billion of real consumption (with the remaining $40 billion, or 20%, going to pay the VAT). The effect on Musk's real wealth would be the same as under a 20% one-time capital levy.

How, then, have so many countries managed to implement a VAT—starting with France after World War II and spreading across most of the globe by the end of the twentieth century[248]—without stoking widespread fears of another one-time wealth tax? One answer is that the *institutions* of a VAT differ from the institutions of more explicit capital levies. The invoice credit method—used "almost universally" by VAT-adopting nations[249]—relies on a third-party enforcement mechanism in which each vendor provides evidence of its VAT payments to the next vendor along the supply chain. This mechanism is institutionally intricate, but it does not require tax administrators to assess the value of illiquid assets or to untangle various intertwisted ownership arrangements. Thus, the existence of a VAT does not substantially reduce the marginal cost of implementing a more direct capital levy, as the infrastructure of a VAT cannot be repurposed easily for other types of wealth taxation.

Moreover, while VATs are sometimes characterized as "regressive" because consumption usually constitutes a larger share of income for lower-income individuals than for higher-income individuals, a VAT that is used to fund new universal benefits will typically be

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245 *Id.*

246 *See* George R. Zodrow, John W. Diamond, Thomas S. Neubig, Robert J. Cline & Robert J. Carroll, *Price Effects of Implementing a VAT in the United States*, 103RD NAT'L TAX ASS'N ANN. CONF. ON TAX'N 54, 57 (2010).

247 THE WORLD'S REAL-TIME BILLIONAIRES, FORBES, https://www.forbes.com/real-time-billionaires [https://perma.cc/T96W-6YJY].

248 *See* LIAM P. EBRILL, MICHAEL KEEN & VICTORIA J. PERRY, INT'L MONETARY FUND, THE MODERN VAT 6 tbl.1.1 (2001).

249 ALAN SCHENK, VICTOR THURONYI & WEI CUI, VALUE ADDED TAX: A COMPARATIVE APPROACH 136 (2d ed. 2015).

inequality-reducing.[250] Since higher-income and higher-wealth individuals generally consume more in dollar terms than lower-income and lower-wealth individuals, VAT payments by the former group will generally exceed (and VAT payments by the latter group will generally be less than) the value of the new universal benefits that the VAT can fund. Insofar as economic inequality undermines the credibility of a low capital tax policy and a VAT reduces economic inequality, then a VAT can be credibility-enhancing.

Still, a complete account of VATs and credible commitment would need to leave some room for the role of ideas. VATs typically do not trigger fears of future capital levies because of a shared understanding that a VAT does not indicate that the implementing polity is the "expropriating type": VATs are viewed as responsible revenue-raising mechanisms rather than stealthy wealth taxes. (In truth, they are both of those things.) Granted, insofar as advocates emphasize the efficiency of the one-time capital levy implicit in the transition to a VAT, this non-transparency benefit of taxing wealth via a VAT may be lost. In this respect, the "magic" of a VAT may depend upon its promoters not revealing the trick.

On the other hand, if a VAT is widely understood to entail a one-time wealth tax, that understanding may, counterintuitively, increase the likelihood of the United States ultimately adopting a VAT. If support for a VAT begins to grow—and if the VAT is widely understood to entail a one-time wealth tax—then the prospect of a VAT may disincentivize labor and investment before enactment. At that point, policymakers may decide that if the shadow of a VAT will distort economic behavior anyway, it is better to implement a VAT now rather than leaving the VAT's revenue-raising and redistributive benefits on the table. This possibility offers a twist on Larry Summers's famous quip: The United States has not adopted a VAT because "'[l]iberals think it's regressive and conservatives think it's a money machine,'" but the United States will ultimately get a VAT "when liberals realize it is a money machine and conservatives realize that it is regressive."[251] It may be that the

250 *See* William Gale, *Raising Revenue with a Progressive Value-Added Tax*, *in* TACKLING THE TAX CODE: EFFICIENT AND EQUITABLE WAYS TO RAISE REVENUE 191, 217 tbl.5 (Jay Shambaugh & Ryan Nunn eds., 2020) (estimating that a 10% VAT implemented in the United States—with revenues distributed universally on a per-capita basis—would increase the after-tax income of tax units in the bottom quintile by 16.9% and reduce the after-tax income of tax units in the top quintile by 4.7%).

251 *See* Isabel V. Sawhill & Christopher Pulliam, *What If April 15th Was Just Another Spring Day? Making Taxes Simpler and Fairer*, BROOKINGS INST. (Apr. 8, 2019), https://www.brookings.edu/articles/what-if-april-15th-was-just-another-spring-day-making-taxes-simpler-and-fairer [https://perma.cc/U6RF-Z6DT] (quoting and paraphrasing Summers).

United States ultimately gets a VAT once liberals and conservatives both realize that it's a one-time capital levy and that we should therefore get it over with sooner rather than later.[252]

C. *Optimal Tax Theory in the Middle of History*

While the implications of this Article's analysis for tax policy are tentative and nuanced, the implications for optimal tax theory are more straightforward. First, the Article's analysis challenges the central position of the Atkinson-Stiglitz zero-capital-tax result in optimal tax theory. Second, the Article's analysis encourages an expansion of optimal tax theory's methodological toolkit.

To understand the zero-capital-tax result's enormous influence over optimal tax theory,[253] one must first appreciate the Atkinson-Stiglitz model's elegance. Atkinson and Stiglitz assume an extraordinarily simple utility function in which individual utility is simply the sum of consumption utility in Period One, consumption utility in Period Two, and the utility of leisure (or equivalently, the disutility of labor). Atkinson and Stiglitz's utility function is "separable" between consumption and leisure—in other words, the timing of consumption and the choice among consumption goods have no effect on the disutility of labor. The authors fairly characterize these assumptions as "a reasonable first approximation,"[254] and to the extent that the assumptions are violated, the effect could be to move the optimal rate above *or below* the zero-tax baseline. Unlike other models of capital taxation, the Atkinson-Stiglitz approach does not require any additional, difficult-to-verify claims about heterogeneous preferences[255] or bounded rationality.[256]

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252 Even after a VAT is implemented, subsequent rate increases will have additional levy-like effects. But because the VAT is a broad-based tax, rate increases typically generate significant resistance from the middle class. Perhaps as a result, no country maintains a VAT rate above 28%. *See VAT Tax by Country 2024*, World Population Rev., https://worldpopulationreview.com/country-rankings/vat-tax-by-country [https://perma.cc/H9B2-MWY5].

253 *See, e.g.*, John Burbidge, *Using Distance Functions to Derive Optimal Progressive Earnings Tax and Commodity Tax Structures* 13 (Dec. 11, 2018) (working paper) (on file with Univ. of Waterloo, Dep't of Econ.) ("[I]t is difficult to exaggerate the influence of the Atkinson-Stiglitz theorem on the modern research program in public economics."); Saez, *supra* note 33, at 218 (recognizing the Atkinson-Stiglitz result as "influential").

254 *See* Atkinson & Stiglitz, *supra* note 1, at 68.

255 *See, e.g.*, Saez, *supra* note 33, at 222.

256 *See* B. Douglas Bernheim & Dmitry Taubinsky, *Behavioral Public Economics*, *in* 1 Handbook of Behavioral Economics 381, 451–55 (2018) (observing that a negative capital tax—in other words, a capital subsidy—may be optimal to correct for negative internalities arising from poor self-control, but also noting that a positive capital tax may be optimal as form of "implicit insurance against the otherwise uninsurable risk of encountering environmental cues that trigger a spending binge").

The Atkinson-Stiglitz model is, in short, an exemplar of analytical parsimony.

Yet once one brings credible commitment into the picture, the Atkinson-Stiglitz model's elegance quickly dissipates. As emphasized in Section I.C, the Atkinson-Stiglitz zero-capital-tax result no longer holds in the middle of history when capital tax policy is either (a) completely credible or (b) completely non-credible. When the planner can credibly commit to a specific capital tax trajectory, then the optimal pathway is L-shaped: a 100% wealth tax today followed by a zero (or low) rate going forward. And in the complete absence of credible commitment, a 100% wealth tax is optimal once again—if private-sector agents already assume that wealth will be expropriated in the next period, then a wealth tax is highly redistributive without adding any incremental distortion. Moreover, if credibility lies somewhere between these two extremes (i.e., if the government has access to imperfect commitment technologies that create frictions for capital tax reforms), then it becomes important for the government to adopt capital tax policies that moderate—though not necessarily eliminate—wealth inequality.

Perhaps one can tell a "just so" story that preserves the zero-capital-tax result under conditions of partially credible commitment. The story might go like this: Once the government develops the administrative infrastructure of capital taxation—even in service of a relatively low capital tax—then it becomes easy for the government to implement further capital tax increases. In other words, once the fixed cost of establishing a capital tax infrastructure is sunk, the marginal cost of a further hike is minimal. Due to this change in the government's benefit-cost analysis, expectations of a capital levy soar. Thus the only way to credibly commit not to expropriate wealth is not to tax capital at all. One might call this the "slippery slope theory" of capital taxation, though with the gravitational force reversed, as here the capital tax rate slides upwards.

The strength of this slippery slope theory depends upon the fixed costs of establishing a capital tax infrastructure. If the administrative institutions of capital taxation are relatively cheap to build from scratch, then the credibility benefits of *not* having those institutions already in place are low. To rescue the zero-capital-tax result from the credible commitment critique, one thus needs to adopt specific assumptions about the institutional environment—assumptions that seem to be contravened by the real-world observation that some polities maintain capital tax infrastructures without sliding down (or up) the slippery slope.[257] Instead

[257] *See, e.g.*, Marius Brülhart, Jonathan Gruber, Matthias Krapf & Kurt Schmidheiny, *Behavioral Responses to Wealth Taxes: Evidence from Switzerland*, 14 Am. Econ. J.: Econ. Pol'y 111 (2022) (examining Switzerland's longstanding wealth-tax infrastructure).

of relying on parsimonious premises that represent a "reasonable first approximation" of reality, the Atkinson-Stiglitz model of capital taxation rests on assumptions that are both ad hoc and counterfactual. Moreover, the zero-capital-tax conclusion turns out to be highly sensitive to these precarious assumptions. If other institutional constraints on capital levies matter more than administrative frictions, it may be preferable to *build up* the infrastructure of capital taxation in order to support a tax regime that can rein in the rise of wealth inequality.

Beyond its consequences for the Atkinson-Stiglitz theorem specifically, the analysis in this Article also yields important methodological implications for optimal tax theory generally. Up until now, most work on optimal taxation has leveraged the tools of economics, employing structural and reduced-form models to derive optimal tax schedules. The primary role of legal scholars in the effort has been to translate these highly mathematical models into widely accessible prose and to derive concrete lessons for policy.[258] As the analysis here shows, economic models of capital taxation in the middle of history depend critically on the ability of legal, political, and social institutions and ideas to generate credible commitments. Conditional on those factors, the optimal capital tax rate may lie anywhere from 0% to 100%, and we need a fleshed-out institutional and ideational account to tell us where, at any particular moment, policy ought to land. Developing such an account requires scholars of optimal taxation to draw insights from history, political science, social psychology, sociology, and law—as this Article has sought to do. The role of lawyers in the development of those accounts is both to elucidate the law's *contents* (e.g., whether a wealth tax would be a "direct tax" requiring apportionment) and to specify the conditions under which legal institutions can maintain sociopolitical legitimacy. In this enterprise, legal scholars operate not only as translators but as key contributors. In short, the middle-of-history perspective moves law—and legal scholarship—from the periphery of optimal tax theory to the very center of the arena.[259]

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[258] *See, e.g.*, Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Income Tax over an Ideal Consumption Tax*, 58 STAN. L. REV. 1413, 1414 (2006) ("Our primary task here is to explain the intuition behind AS 1976 and explore its implications for the income tax versus consumption tax debate.").

[259] This Article focuses on the problem of time inconsistency in *capital* taxation, but other areas of tax also face credible commitment challenges. For example, in the labor income tax context, the government may be tempted to enact taxes in one year that depend upon earnings in a previous year because current-year taxes cannot distort past labor supply decisions. The Biden administration's student debt cancellation plan—though not framed as a tax—incorporated a backward-looking feature of this sort: Borrowers with adjusted gross income below $125,000 in tax years 2020 or 2021 (twice that for joint filers and heads of household) would have become eligible for $10,000 to $20,000 of student debt relief under a plan that

D. Law in the Middle of History

This Article has argued that the credible commitment dilemma is endemic to capital tax policy. But it is not unique to capital tax policy. Many other areas of law face problems of time inconsistency that are similar in structure to the predicament of capital taxation in the middle of history. Extending Part II's analytical framework to other fields of law can shed light on credible commitment challenges in those areas and can potentially generate new insights that apply back to tax.

A survey of all the areas of law that encounter credible commitment challenges would require a multi-volume treatise. In some of those areas—such as sovereign debt[260] and banking regulation[261]—extensive literatures already address (but do not resolve) the problem of time inconsistency. In other areas, the problem looms in the background but is not a primary subject of study.[262] This final Section highlights two of those areas—criminal

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was not announced until 2022. 87 Fed. Reg. 61512–61514 (Oct. 12, 2022). The eligibility cliff at $125,000 would have operated as a marginal tax rate of up to 2 million percent on an individual's 125,000th dollar of past-year income. The marginal tax rate would have applied to adjusted gross income arising from labor and capital, but the bulk of total income for taxpayers in the relevant range comes from salaries and wages. *See* INTERNAL REVENUE SERV., PUB. NO. 1304 (REV. 4–2024), INDIVIDUAL INCOME TAX RETURNS—2021, at 61 tbl.1.4 (2024). As it happened, the administration's plan was struck down by the Supreme Court on other grounds. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2363, 2375 (2023). Still, the retrospective tax implicit in the Biden plan raises interesting questions about the potential for backward-looking labor income taxation. On the one hand, a backward-looking labor income tax—if believed to be one-time—can be a highly efficient means of redistributing from high-θ individuals to low-θ individuals (where θ is defined, as in Section I.A, as an individual's unobservable earnings ability). On the other hand, the repeated use of backward-looking labor income taxes would eventually discourage labor effort and—due to the effects of uncertainty—might be even more distortionary than an explicit upfront tax. *See* Daniel J. Hemel, *Redistributive Regulations and Deadweight Loss*, 14 J. BENEFIT-COST ANAL. 407, 428 (2023).

260 For a sampling of the many monographs and articles on this subject, see, for example, ODETTE LIENAU, RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE (2014); MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES (2007); and Jeremy Bulow & Kenneth Rogoff, *Sovereign Debt: Is to Forgive to Forget?*, 79 AM. ECON. REV. 43 (1989).

261 For another sampling, see, for example, Mark Gradstein & Michael Kaganovich, *Legislative Restraints in Corporate Bailout Design*, 158 J. ECON. BEHAV. & ORG. (2019); Adriana Z. Robertson, *Blowing Hot Air: Regulatory Credibility and the Living Will Requirement*, 14 N.Y.U. J.L. & BUS. 447 (2018); and Khai Zhi Sim, *Bank Bailouts: Moral Hazard and Commitment*, 111 J. MATH. ECON. 102939 (2024).

262 For example, a small literature addresses the problem of credible commitment in immigration policy. *See, e.g.*, Nancy H. Chau, *Strategic Amnesty and Credible Immigration Reform*, 19 J. LAB. ECON. 604 (2001) [hereinafter Chau, *Strategic Amnesty*]; Nancy H. Chau, *Concessional Amnesty and the Politics of Immigration Reforms*, 15 ECON. & POL. 193 (2003); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 848 & n.138 (2007). Some of the conclusions from this literature resemble key takeaways from the capital taxation context. For example, just as a large wealth gap can undermine the credibility of a low capital tax policy, a large population of undocumented workers can undermine the credibility of immigration enforcement: A country's productive

law and intellectual property—and explains how a middle-of-history perspective might enrich legal scholarship in those fields while also generating new and potentially fruitful research questions.

1. Criminal Law

Criminal law's credible commitment challenge arises from the temporal discontinuity between crime and punishment. According to the neoclassical economic model of crime pioneered by Gary Becker, individuals commit criminal offenses only when the expected private benefits of criminal activity exceed the expected private costs of apprehension and punishment.[263] Because apprehension and punishment come after the crime is committed,[264] deterrence entails a time lag: The cost to individuals of committing crimes in Period One depends upon the probability and severity of punishment in Period Two and beyond. Punishments (with the exception of monetary fines) typically consume social resources, including but not limited to the billions of dollars spent each year on prison and other forms of supervision.[265] Put another way, society incurs costs in Period Two and beyond to raise the expected costs of crime for potential offenders in Period One.

This temporal discontinuity generates an incentive for the benevolent planner that resembles the planner's incentive to impose a capital levy in Period Two of Fischer's model: A one-time release of prisoners before the end of their terms will reduce the social costs of punishment, and if the planner can credibly commit not to repeat the release, it will have no effect on deterrence. Illustrating that the credible commitment problem in criminal law is more than theoretical, Italy repeatedly granted large-scale amnesties and pardons to address prison

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sectors may become so dependent on undocumented workers that any serious crackdown on firms that employ those workers would be economically ruinous. Chau, *Strategic Amnesty*, *supra*, at 625–27. Regularizing some or all of the existing undocumented-worker population may enhance the credibility of immigration law on a going-forward basis because it reduces the economic cost of enforcing employer sanctions. *See id.* at 625.

263 *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 172–79 (1968).

264 Philip Dick's novella *The Minority Report*, in which the "Precrime Agency of the Federal Westbloc Government" punishes offenders before they commit criminal acts, offers a science-fiction alternative to the typical temporal sequence. *See* Philip K. Dick, *The Minority Report*, *in* The Minority Report and Other Classic Stories 71, 80 (1987).

265 Becker calculated that in 1965, the United States spent approximately $1 billion on probation, parole, and institutionalization of offenders. *See* Becker, *supra* note 263, at 180. Today, the United States spends more than $80 billion a year on probation, parole, prisons, and jails, which reflects only a fraction of the total social cost of the criminal justice system. *See* Peter Wagner & Bernadette Rabuy, Prison Pol'y Initiative, Following the Money of Mass Incarceration (2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/4MHA-LECG].

overcrowding in the second half of the twentieth century: According to one count, "an amnesty or pardon occurred on average every three years" from the end of World War II until the 1990s.[266] France, too, has routinely released prisoners as part of "presidential amnesties" aimed at addressing prison overcrowding.[267]

How do countries address the credible commitment problem in criminal law? As with capital taxation, some countries rely on institutional mechanisms that restrict the ability of the legislature and executive to adopt one-off policies. For example, Italy amended its constitution in 1992 to require a two-thirds supermajority in parliament for another amnesty or pardon.[268] That institutional reform ended the pattern of parliamentary prisoner releases until August 2006, when the incarcerated population again exceeded the capacity of the country's prisons and the Italian parliament mustered the requisite supermajority to release more than one-third of all inmates.[269]

Notably, even when Italy amended its constitution to impose a supermajority requirement for legislative amnesty, Italy preserved its president's power to "grant pardons and commute punishments" on his own.[270] Although the president has not used that power to release prisoners en masse, the president has granted several high-profile pardons in recent decades—including, most famously in 2000, when President Carlo Azeglio Ciampi pardoned the gunman who shot Pope John Paul II.[271] The presidential pardon power in Italy has analogues in many common-law countries, where executives often wield plenary power to grant pardons and commute sentences.[272] In the United States, for example, the President does not have to overcome any legislative vetogates in order to set inmates free,[273] and more than twenty U.S. states also give their governors the unilateral power to grant clemency.[274]

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266 Paolo Buonanno & Steven Raphael, *Incarceration and Incapacitation: Evidence from the 2006 Italian Collective Pardon*, 103 Am. Econ. Rev. 2437, 2441 n.3 (2013).

267 *See* René Lévy, *Pardons and Amnesties as Policy Instruments in Contemporary France*, 36 Crime & Just. 551, 560 (2007).

268 *See* Buonanno & Raphael, *supra* note 266, at 2441.

269 *See id.* at 2438.

270 Art. 87 Costituzione [Cost.] (It.).

271 *See* Alessandra Stanley, *Italians Grant Pardon to Turk Who Shot Pope*, N.Y. Times (June 14, 2000), https://www.nytimes.com/2000/06/14/world/italians-grant-pardon-to-turk-who-shot-pope.html [https://perma.cc/V87B-QTMV].

272 *See* Andrew Novak, Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective 66–67 (2016) (noting that "[i]n a number of Commonwealth countries as well as the United States federal system, the constitutional clemency authority is an executive acting alone, with unfettered discretion to grant mercy or pardons, without the assistance of another minister or committee").

273 U.S. Const. art. II, § 2, cl. 1.

274 *See* Novak, *supra* note 272, at 67–68, 68 n.10.

So while institutional constraints on clemency are one way that countries can bolster the credibility of criminal law enforcement, many jurisdictions have chosen not to pursue that strategy and instead place few if any institutional barriers in the way of pardons and amnesties.

Another strategy—arguably the approach that some northern European nations have pursued—is to limit the size of the prison population by exercising restraint in sentencing. This moderation strategy can be viewed as the criminal law analogue to the moderate capital tax rates suggested by Farhi and coauthors[275]: Just as positive but non-confiscatory capital taxes may be able to keep inequality under control and thereby reduce the government's incentive to impose a one-time capital levy, judicious use of carceral sanctions may be able to keep the prison population low enough that the government is not tempted to declare a one-time inmate release. Finland, for example—which once had the highest rate of incarceration in Scandinavia and often resorted to amnesty or other "back-door" measures to address prison overcrowding—appears to have implemented this moderation strategy successfully: Over the last half-century, it has brought its incarceration rate in line with (indeed, slightly below) its Nordic neighbors and has not had to resort to a large-scale amnesty since 1967.[276]

Obviously, moderation has not been the dominant approach to sentencing in the United States, which has the world's highest incarceration rate.[277] In response to prison overcrowding, federal courts have—on numerous occasions—imposed caps on state prison populations that have resulted in prisoner releases reminiscent of the Italian, French, and Finnish amnesties noted above.[278] Most recently, California reduced its state prison population by tens of thousands of inmates in the aftermath of the Supreme Court's 2011 decision in *Brown v. Plata*, which upheld a lower court ruling that found that prison

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275 *See* Farhi et al., *supra* note 23.

276 *See* Tapio Lappi-Seppälä, *Nordic Sentencing*, 45 Crime & Just. 17, 18–19, 72 tbl.A1 (2016).

277 The United States has the world's highest incarceration rate, with 629 prisoners per 100,000 people in 2021 versus 73 per 100,000 in Sweden, 72 per 100,000 in Denmark, 56 per 100,000 in Norway, and 50 per 100,000 in Finland. *See* Helen Fair & Roy Walmsley, World Prison Population List 2, 11–12 tbl.4 (13th ed. 2021), https://www.prisonstudies.org/resources/world-prison-population-list-13th-edition [https://perma.cc/2DMP-XS6Z].

278 According to one count, approximately seventy prison overcrowding lawsuits were brought between 1965 and 1993, with plaintiffs achieving "at least partial victory" in all but six. *See* Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. Econ. 319, 325 (1996). Levitt notes that "[o]nly on rare occasions do judges mandate the release of prisoners to alleviate overcrowding." *Id.* The more frequent approach is to impose population caps or to prohibit the practice of "double celling," leaving prison administrators and state officials "with the freedom to determine the means through which compliance will be attained." *Id.*

conditions in California violated the Eighth Amendment prohibition on cruel and unusual punishment.[279] These Eighth Amendment prison overcrowding cases invert the relationship between constitutional law and credible commitment that we saw in Section I.A.3. There, as suggested by Kydland and Prescott, constitutional restrictions on capital taxation potentially served to bolster the credibility of capital tax policy.[280] Here, the constitutional restriction on cruel and unusual punishment potentially undermines the credibility of criminal enforcement because it casts doubt upon the legal sustainability of mass incarceration. To be clear, the suggestion here is not that the United States would be better off without the prohibition on cruel and unusual punishment. Rather, the suggestion is that the United States might be better off with a system of shorter but more credible sentences (or non-carceral alternatives to imprisonment) rather than long prison sentences that the government—in light of fiscal and constitutional constraints—cannot credibly commit to carry out.

A final potential source of credible commitment in criminal law arises from the realm of ideas—in particular, the idea of retribution, or "the desire of individuals to see wrongdoers punished."[281] In political communities where retributive ideas are sufficiently strong, the likelihood of a large-scale prisoner release may be very low because voters will punish elected officials who grant clemency en masse. Phrased differently, non-welfarist normative intuitions—when widely held—may facilitate credible commitments that a strictly welfarist social planner would be unable to sustain.[282] According to this view, retributivism plays a role in criminal law that is similar to the role of Lockean liberalism in capital taxation.

Of course, in the criminal law context, the welfare-enhancing effects of non-welfarist beliefs will depend upon whether the existing legal structure is one that we think should be sustained or dismantled.[283] If one rejects the carceral enterprise on normative grounds, then maintaining a credible commitment to incarceration by entrenching retributivist ideas is not desirable even if it might be feasible. Put

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279 *See* Brown v. Plata, 563 U.S. 493, 499–500, 545 (2011); *see also* Jody Sundt, Emily J. Salisbury & Mark G. Harmon, *Is Downsizing Prisons Dangerous? The Effect of California's Realignment Act on Public Safety*, 15 CRIMINOLOGY & PUB. POL'Y, Feb. 2016, at 1, 2, 4 (documenting the downsizing of California's prison population in *Plata*'s aftermath).

280 *See supra* text accompanying notes 84–90; Kydland & Prescott, *supra* note 20, at 486.

281 STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 537 (2004).

282 *See* Matthew J. Baker & Thomas J. Miceli, *Crime, Credible Enforcement, and Multiple Equilibria*, 68 INT'L REV. L. & ECON. 106030, at 3 (2021).

283 For a summary of the latter view, see, for example, Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 43–48 (2019).

another way, ideas can support commitments that are salutary but also commitments that are pathological. Crucially, a positive account of the conditions under which commitments are credible does not necessarily imply a normative endorsement of those outcomes.

2. *Intellectual Property*

In intellectual property law, as in capital taxation and criminal law, policymakers face a credible commitment problem arising from temporal discontinuity—in this case, the discontinuity between the timing of innovation (or the timing of creative works in the copyright context) and the timing of intellectual property rewards. Intellectual property law seeks to incentivize innovation and creativity in Period One with a promise of a patent or copyright in Period Two.[284] The reward in Period Two is costly for society to provide because of the deadweight loss of patent and copyright monopolies.[285] Policymakers therefore face an incentive in intellectual property that is analogous to the motivation for a one-time capital levy or a one-time prisoner release: A one-time cancellation of patents or copyrights would be welfare-enhancing because it would eliminate the deadweight loss of existing monopolies—and of course, a policy adopted today cannot disincentivize innovation and creativity that occurred in the past.

How, then, can polities credibly commit *not* to cancel patents or copyrights after patentees have already disclosed their inventions and creators have already published their works? Economic analysis of intellectual property has largely skirted the credible commitment question. Benjamin Roin writes that "[b]y providing innovators with intellectual property rights, the government limits its own ability to expropriate socially valuable innovations."[286] But a patent or a copyright—like a constitution—is a parchment paper promise. Why should we expect that promise to be honored? Meanwhile, Alberto Galasso—in his analysis of credible commitment and innovation rewards—states that "[t]he key assumption in our analysis will be that the planner . . . can credibly commit to reward innovators with patent rights."[287] That assumption begs the very question that we are trying to resolve.

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284 *See* Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents-Prizes Debate*, 92 Tex. L. Rev. 303, 308–10 & n.20, 333–34 (2013).

285 *See id.* at 314–15.

286 Benjamin N. Roin, *Intellectual Property Versus Prizes: Reframing the Debate*, 81 U. Chi. L. Rev. 999, 1071 (2014).

287 Alberto Galasso, *Rewards Versus Intellectual Property Rights When Commitment Is Limited*, 169 J. Econ. Behav. & Org. 397, 399 (2020).

A more persuasive account of credible commitment in intellectual property might focus on the trifecta of institutions, inequality, and ideas. The institutions that sustain a credible commitment to intellectual property protection in the United States include both constitutional rules and legislative procedures. Constitutionally, the Supreme Court has said that patents and copyrights both qualify as "property" for purposes of the Due Process Clause,[288] though what that means as a practical matter is far from clear: A one-time cancellation of intellectual property rights may be subject to no more stringent standard of scrutiny than the rational basis test.[289] Meanwhile, legislative changes to the intellectual property statutes are subject to the supermajority requirement imposed by the Senate filibuster. Again, the Senate's sixty-vote cloture threshold for legislation is not set in stone, but it has remained intact for nearly a half-century. International institutions also play a role in bolstering the credibility of intellectual property protection: The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), signed in 1994, commits countries to patent terms of at least twenty years[290] and copyright terms generally lasting fifty years.[291] Countries that fail to conform their domestic patent and copyright laws to TRIPS standards run the risk of retaliatory trade sanctions.[292]

The relationship between inequality and credible commitment is less straightforward in intellectual property than in tax, but geographic and demographic inequalities arguably undermine the sociopolitical legitimacy (and thus the time consistency) of intellectual property regimes. These inequalities are especially dramatic in the patent context. The volume of patenting varies wildly across U.S. states: The number of patents per capita is seventeen times higher in Massachusetts than in

288 *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999) (patents); Allen v. Cooper, 589 U.S. 248, 262 (2020) (copyrights).

289 Also unclear is whether patents and copyrights fall within the protection of the Fifth Amendment's Takings Clause. For an overview of the Takings Clause question in the patent context, see Jonathan S. Masur & Adam K. Mortara, *Patents, Property, and Prospectivity*, 71 Stan. L. Rev. 963, 989–93 (2019). For competing answers to the question of whether patents are property for Takings Clause purposes, compare Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. Rev. 689, 691 (2007) (yes), with Robin Feldman, *Patents as Property for the Takings*, 12 N.Y.U. J. Intell. Prop. & Ent. L. 198, 205 (2023) (no). On the application of the Takings Clause to copyrights, see generally Note, *Copyright Reform and the Takings Clause*, 128 Harv. L. Rev. 973 (2015).

290 *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 33, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 119.

291 *See id.* art. 12.

292 *See* Ryan Cardwell & Pascal L. Ghazalian, *The Effects of the TRIPS Agreement on International Protection of Intellectual Property Rights*, 26 Int'l Trade J. 19, 23 (2012).

Mississippi,[293] and more than 87% of U.S.-based patentees are male.[294] One might wonder whether those imbalances—and in particular, those geographic imbalances—are sustainable in the long run: Will consumers in Mississippi remain willing to pay monopoly rents to patentees in Massachusetts forever (and will Senators and Congressmembers from Mississippi and other low-patenting states abide by that geographic wealth transfer)?[295]

Finally, popular ideas about the rewards due to innovators and creators undergird the intellectual property regime. As Mark Lemley observes, "[p]atent law is built around . . . canonical tales" of "lone genius inventors"—for example, Samuel Morse and the telegraph, Alexander Graham Bell and the telephone, and Thomas Edison and the lightbulb—who solve hard problems through hard work rather than dumb luck.[296] Bestselling hagiographies of modern-day patentees such as Steve Jobs and Elon Musk reinforce this hardworking-genius narrative and thus serve to bolster patent law's credibility.[297] Survey data suggests that public support for both patent and copyright protection remains strong and that most Americans believe patentees and copyrights are "entitled" to intellectual property protection for "accomplishing something creative."[298] These ideas—as long as they remain prevalent—arguably matter more to the durability of the intellectual property regime than any formal institutional constraint on patent or copyright cancellation.

But ideas, like patents and copyrights, are "secur[e] for limited [t]imes."[299] As inequalities in the distribution of intellectual property

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293 Fed. Res. Bank of St. Louis, *The Distribution of Patents Across U.S. States*, FRED Blog (May 27, 2021), https://fredblog.stlouisfed.org/2021/05/the-distribution-of-patents-across-u-s-states [https://perma.cc/83KU-SGPS].

294 Colleen V. Chien & Lisa Larrimore Ouellette, *Improving Equity in Patent Inventorship*, 382 Science 1128, 1128 (2023).

295 On the relationship between IP and inequality, see generally Amy Kapczynski, *Five Hypotheses on Intellectual Property and Inequality* (N.Y. Univ. Sch. of L. IP Workshop, Jan. 25, 2017), https://www.law.nyu.edu/sites/default/files/upload_documents/Amy%20Kapczynski.pdf [https://perma.cc/9A9T-EC2U]. The analysis here suggests a sixth hypothesis: Gaping inequalities in the distribution of intellectual property's rewards will ultimately undermine the credibility of—and thus the innovation incentives generated by—intellectual property protection.

296 Mark A. Lemley, *The Myth of the Sole Inventor*, 110 Mich. L. Rev. 709, 710 (2012).

297 *See, e.g.*, Walter Isaacson, Steve Jobs (2011); Walter Isaacson, Elon Musk (2023).

298 *See* Gregory N. Mandel, *The Public Perception of Intellectal Property*, 66 Fla. L. Rev. 261, 280 fig.1 (2014) (finding that U.S. adults in a survey experiment support the awarding of damages for patent and copyright infringement by wide margins); *id.* at 287–88 & fig.5 (finding that most respondents say their views on intellectual property are based on wanting "to give people who accomplish something creative the intellectual property rights to which they are *entitled*").

299 U.S. Const. art. I, § 8, cl. 8.

rights persist—and especially if the deadweight loss of monopoly pricing mounts—then the ideas that sustain the intellectual property regime may begin to buckle. For example, the Sonny Bono Copyright Term Extension Act of 1998—which extended copyright protection in the United States by two decades (to the life of the author plus seventy years in the general case)[300]—placed additional pressure on the credibility of the copyright regime by ratcheting up the deadweight loss of existing copyright monopolies. At some point, stronger formal intellectual property protections may dilute incentives for innovation and creativity in much the same way that lower capital tax rates may discourage labor and investment: By rendering the regime less credible, they undercut the very goals they ostensibly serve.

Conclusion

Early in his second term, President Obama characterized economic inequality as "the defining challenge of our time."[301] The analysis in this Article illustrates that economic inequality is not only a challenge *of our* time but a challenge *of time*. Our temporal position in the middle of history makes inequality-reducing measures such as a one-time capital levy more fraught than if we were at history's end. Yet our position in the middle of history also intensifies the problem of economic inequality: Precisely because we have a future, we must be concerned about the ways in which our management of inequality today will affect the credibility of capital tax policy going forward.

This Article has argued that scholars of capital tax law and policy should embrace the middle-of-history perspective. Only by confronting the problem of credible commitment head-on can we make substantial progress toward a comprehensive positive or normative theory of capital taxation. The institutions-inequality-ideas framework set forth in this Article offers one analytical approach that can allow us to make meaningful headway—an approach with wide-ranging implications and applications. But the Article's larger and more important claim is that capital taxation's middle-of-history problem is inescapable. The laws of time are as immutable as the laws of capital taxation are fluid: Absent a world-ending event, the middle of history is where we will continue to live. And it is therefore the diachronic domain over which our theories of capital taxation—indeed, our theories of law—must operate.

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300 Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (1998) (codified at 17 U.S.C. § 302).

301 Press Release, White House, Remarks by the President on Economic Mobility (Dec. 4, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-president-economic-mobility [https://perma.cc/U73X-F6TH].