Rethinking Economics for Tax Law and Political Economy

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I. INTRODUCTION

In their article *Taxation and Law and Political Economy*,[1] Jeremy Bearer-Friend and co-authors make an important contribution to LPE by grappling with the relationship between economic incentives and the LPE goals of democracy, equality, and attention to power.[2] Reviewing the emerging LPE approach, the authors identify two diverging strands: an "exclusive" LPE approach that rejects the influential "law-and-economics" focus on efficiency and a "pluralist" strand that would contextualize and qualify this law-and-economics by emphasizing political and normative commitments to democracy and equality.[3] Siding with the pluralist direction for LPE and tax, the authors explain that LPE should be informed by well-established economic principles.[4]

In this response, I argue instead that an LPE approach to tax law underscores the fundamental problems with the "law-and-economics" analysis that predominantly guides tax policy. Taxation functions to constitute and govern the modern economy (and the state as well), not to transfer ("redistribute") resources produced through independent economic processes. If the economics guiding tax law defines societal "welfare" in terms apart from the democratic

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[1] Jeremy Bearer-Friend, Ari Glogower, Ariel Jurow Kleiman & Clinton G. Wallace, *Taxation and Law and Political Economy,* 83 OHIO ST. L. J. 471, 471 (2022).

[2] *Id.*

[3] *Id.* at 486–92.

[4] *Id.* at 508, 518–22.

qualities and (in)equalities of public and private power, then tax law will stack the political economy against equality, democracy, and justice, and perhaps even humanity's survival.

That does not mean LPE should be conceived as a move away from economic rationality to a murkier realm of political and moral preferences. Instead, an LPE approach should incorporate a more rigorous economics open to deeper analysis of premises and alternatives as the basis for democracy and justice. Sound economic analysis requires turning to the plural traditions and innovative contemporary versions of heterodox economic theory and method that are more, not less, "economic" for engaging with the inherently political, legal, and social nature of economic activity and ordering. I co-founded an LPE organization, the Association for the Promotion of Political Economy and Law (APPEAL), in part to bring this richer understanding of economics to law,[5] and these comments are informed by the many scholars who have participated in that group, although this piece represents solely my own views.

II. FRAMING THE ECONOMY'S POWER

This push for an LPE economics grows out of urgent existential concerns as well as academic discussions. Consider the climate crisis, and its relationship to the economy. We face a "new normal" of increasingly devastating fires, floods, storms, pollution, drought, and disease, exacerbating other inequalities and insecurities, with the further prospect of immense future harm for today's young people.[6] It is high time to ask fundamental questions about the economy's productive force and function, who decides, based on what interests, assumptions, and processes.

The standard "law-and-economics" thinking, grounded in a neoliberal version of neoclassical economics, generally defines productive value as the outcomes of whatever powers and processes count as depoliticized market forces. In this model, the market impartially reveals and maximizes productive value by aggregating individualized gain-seeking behavior under the particular institutional constraints, privileges, and structures the theory identifies as a market freed from substantive political power.[7] That framework allows some scope for deliberate public action modifying the market's presumed general resource-maximizing power to address concerns about democracy, fairness, and a just transition from a fossil fuel economy.[8] But that presumption of market

[5] *See* Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297, 302–03 & n.17 (2016) (discussing the group's work integrating heterodox economics and law).

[6] *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY (H.-O. Pörtner et al. eds., 2022).

[7] *See* Martha T. McCluskey, *Defining the Economic Pie, Not Dividing or Maximizing It*, 5 CRITICAL ANALYSIS L. 77, 85 (2018) (critiquing efficiency).

[8] *Id.* at 87.

efficiency means any market modification rationally deserves careful scrutiny and narrow targeting to accommodate the existing market's ordering powers.[9]

A. *Reclaiming Power and Knowledge from a Market-Mystified Politics*

Explaining his opposition to tax incentives for electric vehicle charging infrastructure, Senator Joe Manchin explained, "I remember Henry Ford inventing the Model T, but I sure as hell didn't remember the US government building filling stations. . . . The market did that."[10] As one example of his objections to his party's proposed comprehensive climate legislation, this comment represents some of the logic that has impeded strong U.S. government action to mitigate climate catastrophe.[11]

Responding from a pluralist LPE perspective, tax scholars might reasonably explain that a contextual understanding of climate issues justifies departing from such market-centric thinking, given the market's failure to accurately "internalize" or fairly distribute the costs to the climate of reliance on fossil fuel transportation. In addition, this contextual approach could note the market's distortions due to the fossil fuel industry's massive funding of politicians (like Manchin)[12] who protect the industry's many subsidies and privileges despite majoritarian political support for energy transition.[13] The LPE analysis might go further to question the implication that filling stations represent a market free of government involvement, noting (for instance) that gas industry campaigns against state emissions standards helped defeat earlier generations of innovation and demand for electric cars,[14] or that gas companies continue to spend millions lobbying against U.S. electric vehicle incentives.[15] Or, it might explain that filling stations benefit from extensive federal and state spending and tax support

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[9] *See id.* at 88–95.

[10] Oliver Milman, *Manchin 'Very Reluctant' on Electric Cars in Ominous Sign for Biden's Climate Fight*, THE GUARDIAN (Mar. 15, 2022), https://www.theguardian.com/environment/2022/mar/15/manchin-reluctant-electric-cars-biden-climate-crisis-fight [https://perma.cc/YA9D-ZMTF] (quoting Manchin).

[11] *See id.*

[12] *See* Karen Kirk, *Fossil Fuel Political Giving Outdistances Renewables 13 to One*, YALE CLIMATE CONNECTIONS (Jan. 6, 2020), https://yaleclimateconnections.org/2020/01/fossil-fuel-political-giving-outdistances-renewables-13-to-one/ [https://perma.cc/V6V4-CDZK].

[13] *See* PEW RSCH. CTR., AMERICANS LARGELY FAVOR U.S. TAKING STEPS TO BECOME CARBON NEUTRAL BY 2050, AT 4 (2022) (finding that 69% favor transition to renewable energy, though only 31% favor eliminating fossil fuels completely).

[14] *See* WHO KILLED THE ELECTRIC CAR (Electric Entertainment 2006) (reporting early 1990s campaign by auto industry and fossil fuel producers to overturn California mandate for zero-emissions cars).

[15] Gavin Bade, *The Oil Industry vs. The Electric Car*, POLITICO (Sept. 16, 2019), https://www.politico.com/story/2019/09/16/oil-industry-electric-car-1729429 [https://perma.cc/AF6M-KK8X]; Christine Otterly, *How California Oil Industry Ganged Up to Try and Kill Electric Vehicles (Again)*, RENEWECONOMY (Apr. 8, 2016), https://reneweconomy.com.au/who-killed-the-electric-car-again-99472/.

for the extensive costs of remediating widespread community contamination from decaying underground gas storage tanks.[16]

But in the well-worn market-centric response to such arguments, this evidence of market failures, unfairness, and distortions does not tell us why should we believe any proposed government correction will be any better. Answering that question may become even harder if LPE opens our eyes further to the influence of unequal, unfair, and destructive market power on the institutions central to democracy and justice.

Even with some faith in government capacity for market "correction," the familiar "law and economics" analysis of incentives casts long shadows of doubt on any particular government strategy for reshaping economic behavior. For example, a 2021 commentary by a market-centric economist listed the many plausible "unintended consequences" of subsidizing electric vehicle charging infrastructure.[17] Will tax support for chargers take scarce resources from more effective or equitable decarbonization investments? Will this "artificial" support for electric vehicles increase demand for electricity generation dependent on fossil fuels? Can proponents provide evidence proving that more accessible or affordable charging stations will really encourage people to replace gas-powered vehicles? Wouldn't it be more efficient to internalize the environmental costs of gas-powered transportation through taxes raising the price of gas so that consumers can choose alternatives without government "intervention"?

These questions represent the apparent "inescapable logic" that ex ante incentive effects can affect the ex post outcomes desired by LPE proponents.[18] As the authors emphasize, the success of proposals to expand fiscal support for LPE goals like equality, environmental quality, and anti-subordination will depend on producing the material, human, physical, and informational resources for those goals.[19] That means tax analysis should consider not just the immediate

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[16] *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNDERGROUND STORAGE TANK PROGRAM 4, 6 (2009), https://www.epa.gov/sites/default/files/2014-03/documents/25annrpt-screen.pdf [https://perma.cc/NF84-ELN7] (reporting federal spending of $130 million over six years, funded by a federal gas tax allocation, for an average filling station clean-up cost of $125,000); UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Leaking Underground Storage Tank (LUST) Trust Fund*, https://www.epa.gov/ust/leaking-underground-storage-tank-lust-trust-fund [https://perma.cc/3P63-ZK24] (describing tax financing); Joseph Koncelik, *Applications Released for $20 Million Dollar Abandoned Gas Station Grant Fund,* OHIO ENV'T L. BLOG (Mar. 4, 2016), https://www.ohioenvironmentallawblog.com/2016/03/brownfields-transactions/applications-released-for-20-million-dollar-abandoned-gas-station-grant-fund/ [https://perma.cc/L8NQ-77AL] (noting Ohio state funding for tank cleanup).

[17] David Rapson, *Is it Time to Go 'All In' on Electric Vehicles?*, ECONOFACT (July 13, 2021), https://econofact.org/is-it-time-to-go-all-in-on-electric-vehicles [https://perma.cc/4J9H-8ZP5].

[18] *See* Bearer-Friend, Glogower, Kleiman & Wallace, *supra* note 1, at 519 (affirming tax scholarship's attention to efficiency, with caveats).

[19] *Id.* at 521.

distributive outcomes of any policy, but also the downstream changes in economic activity over time as actors respond to the differential costs, gains, ripple effects inevitably resulting from any tax change.[20] For many such changes, these effects cannot be directly or fully understood in terms of subordination or unjust coercion.[21]

But if, as the authors suggest, LPE requires a delicate, fine-tuned balancing of deliberate policies for change with deference to presumed market efficiency, LPE will limit its potential for orienting law toward democracy, justice, and a livable planet.[22] Reflecting in 1991 on two hundred years of backlash against progress toward democracy and equality, economist Albert O. Hirschman identified three classic polemical postures and maneuvers used to obstruct meaningful evaluation of political economic change.[23] The perversity argument holds that whatever the change and its lofty intentions, "[e]verything backfires"[24]; the futility argument holds that basic structures of society or power cannot be changed[25]; and the jeopardy argument holds that any significant change in the political economic order will imperil highly prized previous changes or achievements.[26] Hirschman warned that these "rhetorics of intransigence" induce a superficial, self-serving smartness in policy analysis that undermines the collective deliberation, understanding, and action vital to political economic well-being.[27]

This warning bears attention in LPE analysis of tax policy and beyond. To alleviate climate catastrophe, for example, any specific legal action (like tax-subsidized electric vehicle infrastructure) might indeed induce backlash, be inadequate in itself, and potentially unsettle some existing assets.[28] But an LPE vision depends on turning attention to the ways specific law and policy reforms can operate ex ante to reduce that backlash, make broader change newly feasible, and enhance our most important existing resources.[29] By focusing on

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20 *See id.* at 519.

21 *See id.* at 520.

22 *See id.*

23 ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 1–8 (1991).

24 *Id.* at 12, 18–42.

25 *Id.* at 43–80.

26 *Id.* at 84–123.

27 *Id.* at 36, 165–70; *see generally* Martha T. McCluskey, *How the 'Unintended Consequences' Story Promotes Unjust Intent and Impact* 22 BERKELEY LA RAZA L.J. 21 (2012) (explaining that this concept makes structural injustice appear beyond law's power to remedy).

28 *See* HIRSCHMAN, *supra* note 23, at 165–70.

29 *See id.* at 39 (advising more attention to positive unintended consequences); Nicole Dewandre, *Rethinking the Human Condition in a Hyperconnected Era: Why Freedom Is Not About Sovereignty, but About Beginnings*, *in* THE ONLIFE MANIFESTO: BEING HUMAN IN A HYPERCONNECTED ERA, 195, 198–201 (Luciano Floridi ed., 2015) (discussing Hannah Arendt's warning that instrumentalist fictions of predictability and control avoid moral responsibility for taking action toward inevitably messy new possibilities).

developing and advancing such "non-reformist" reforms, as legal scholar Amna Akbar explains, legal analysis joined with activist movements can expand the horizons of what is politically and economically practical and possible.[30]

B. *Rethinking Economics for LPE*

The conventional "law and economics" analysis familiar within U.S. tax scholarship itself excludes economic approaches that ground economic incentives in contingent and contested institutions. A 2022 law and economics textbook by economists Sarah Klammer and Eric Scorsone integrates institutional economics with legal realism to illuminate the market as a changing legal-economic nexus that cannot impartially maximize societal value.[31] In their LPE lens, economic incentives are the product of value-laden policy choices and structures of authority that cannot be reasonably reduced to pre-political individualized preferences or intractable "laws" of behavior under generalized conditions of scarcity.[32]

This approach recognizes that the effectiveness of any proposed policy change for advancing a desired outcome, such as reducing household fossil fuel usage, will depend on an evolving set of interrelated institutions.[33] The decarbonization effects of electric vehicle tax incentives will be constrained by "upstream" physical infrastructure, such as electricity generation facilities, wiring capacity, and electricity pricing structures, all of which potentially will change in response to downstream interest in energy transition along with other changing upstream conditions such as gas prices and global supply chains. Individual responses to electric vehicle tax incentives will also depend on interacting upstream social and economic factors such as household access to credit, jobs, health, housing, and family arrangements sufficient to secure cost-savings from investing in transportation changes.[34] The effectiveness of any policy change will also be shaped over the longer run by an evolutionary process in which individuals and groups develop and react to shifting ideologies and interpretations.[35] That process will be heavily influenced by path dependent institutions governing public information, culture, and state power, such as media platforms, education systems, corporate law, campaign finance, and think tanks.[36]

In this dynamic process, institutions typically do not equally or impartially distribute benefits or burdens, nor do they equally value or impartially respond

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30 Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103–04 (2020).

31 *See* SARAH S. KLAMMER & ERIC A. SCORSONE, THE LEGAL FOUNDATIONS OF MICRO-INSTITUTIONAL PERFORMANCE: A HETERODOX LAW AND ECONOMICS APPROACH 3 (2022).

32 *Id.* at 17.

33 *See id.* at 18–21.

34 *See id.*

35 *See id.*

36 *See id.*

to the interests, preferences, and well-being of every individual, now or in future generations. Nor could they, because each institution (e.g. corporations, banks, social media platforms, labor and housing markets, global trade agreements) is constituted and governed by an evolving set of substantive legal rights and powers[37] that necessarily distribute those opportunities and burdens in ways that will structurally constrain or enable further development of unequal market power, even when not facially unjust or oppressive.

Through this lens, Klammer and Scorsone explain that economic efficiency determinations necessarily incorporate prior moral judgments about whose interests count.[38] Efficiency is inherently a function of a particular set of contested substantive legal or political rights or constraints, so that it always depends on covertly taking sides in an essentially distributive contest over the legitimacy of a specific substantive legal "background."[39] That contest is typically the very point that the efficiency criterion purports to formally and neutrally resolve.[40] Rather than balancing efficiency with equity, then, LPE should embrace an analysis that openly evaluates the contested moral, political, empirical, and epistemological choices and assumptions embedded in any claim of economic welfare.[41]

III. AN LPE ECONOMICS FOR TAX POLICY

What would a shift to an LPE economics mean for tax in particular? The authors argue that an LPE approach to tax policy should balance "redistributive" goals with the insights of optimal tax theory, which holds that in general, tax policy should aim to neutrally reflect rather than re-order the decentralized individualized choices presumed to result from the neoclassical market's purported resource-maximizing incentives.[42] Even though optimal tax theory focuses on minimizing presumed "distortions" to an artificial prior market,[43] the authors argue that contemporary modifications make it useful for moving beyond a simplistic market-centric tax analysis.[44] For example, taxation can operate to correct market failures such as negative externalities, race or gender discrimination, or the effects of widespread inequality on overall economic

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[37] *See* KLAMMER & SCORSONE, *supra* note 31, at 37–54 (applying the legal realist framework of Wesley N. Hohfeld).

[38] *Id.* at 18.

[39] *Id.* at 17–18.

[40] Warren J. Samuels, *Normative Premises in Regulatory Theory*, *in* LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE 137 (Warren J. Samuels & A. Allan Schmid eds. 1981).

[41] *See* McCluskey, *supra* note 7, at 83–84 (arguing that regulatory decisions should openly evaluate the unstated qualitative standards in quantitative analysis of aggregate welfare).

[42] Bearer-Friend, Glogower, Kleiman & Wallace, *supra* note 1, at 518–22.

[43] *See id.* at 509.

[44] *Id.* at 521–22.

productivity.[45] Combining LPE-targeted market adjustments with a general principle of tax neutrality toward market results appears to support LPE values of individualized free choice, diversity, and fairness over hierarchy and coercion, while also advancing societal welfare overall.

The problem is that this framing division between undistorted market welfare-maximizing and tax "redistribution" undermines both especially important analysis of incentive effects and also the underlying normative positions driving these effects. Even if qualified, the premise of an antecedent market cuts against an LPE vision of tax.[46]

A. *Taxation as Market-Making, not Market-Distorting*

Rather than depicting taxes as externally imposed changes in market prices presumed to reflect and calibrate individual values, an LPE economics should consider taxation in institutional context. Along with other political institutions, taxation functions to produce and regulate the public credit medium – money – that drives market exchange.[47] Through a centralized authority capable of generating broad long term credibility and commitment, money provides the infrastructure[48] of liquidity on which market exchange depends.

Contrary to the neoclassical convention assumed in optimal tax theory, money does not – and cannot – neutrally facilitate a process of independent individual value judgments.[49] As legal scholar Christine Desan explains, "The market is not a forum for the expression of pre-existing preferences. Rather, the process by which communities make money and put it into circulation *as credit* shapes the way economic decisions occur."[50] Money inherently enters circulation unequally, through legal and political structures distributing and regulating access to government-backed liquidity that limits or expands individuals' relative power to bargain for what they value in market exchanges.[51] Those interests and individuals with favored access to this state-privileged form of liquidity will hold an asset that others want, making them more desirable trading partners and generally giving them more and better market options.[52] Those with less favorable access to this credit will face higher

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45 *See id.* at 513–14.

46 *See* Christine Desan, *The Key to Value: The Debate over Commensurability in Neoclassical and Credit Approaches to Money*, 83 L. & CONTEMP. PROBLEMS 1, 7 (2020) (noting the profound normative stakes of the neoclassical idea of a market constituted by individual choice).

47 *See id.* at 2–3; 21 (explaining that exchange is enabled by the creation of a monetary unit providing a widely relevant substantive unit of value).

48 *See id.* at 22.

49 *See id.* at 12–13.

50 *Id.* at 3.

51 *Id.* at 16–17.

52 Desan, *supra* note 46, at 17; *see also* KATHARINA PISTOR, CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 77–79 (2019) (explaining that governments

transaction costs and tougher tradeoffs as market actors, constraining their ability to secure what they value.

In short, the particular political and legal design of money sets in motion ex ante conditions that pervasively shape economic incentives, governing production and distribution with enormous future political, economic and social consequences. By depicting the economy as a "market" of individualized formally equal actors, the familiar "law and economics" view obscures the particular institutional power of finance and capital.

Many modern governments, including the U.S., rely on a historically contingent, circuitous method for providing and governing this access to money.[53] In addition to directly spending money for particular people and projects, the U.S. is one of many governments that in effect franchise private banks to extend publicly supported liquidity as credit-generators, based on their judgments about private profitability.[54] These banks, along with other "sub-franchised" private financial credit-generating firms, produce and distribute liquidity through legal privileges granted by government charter, backstopped by the monetary powers of a central bank.[55]

These features of money design systematically structure market exchange to favor members of the public who invest in financial assets over those who do not.[56] Moreover, this privatized distribution of public capital is not well designed to incentivize individual financial firms and their executives to rationally evaluate the long term societal productivity of particular investment choices, given their legal license and economic incentives to focus exclusively on self-interested, readily monetized gain. Instead, faced with inevitable uncertainty and complexity of factors affecting future investment value, financial firms are likely to focus on externalizing the harmful consequences of their liquidity allocation decisions, using a range of legal, economic, and political strategies to hide, hedge, exit, offload, or otherwise socialize long-term investment risks while sheltering and concentrating short-term liquid gains (as the 2008 financial crisis demonstrated).[57] Many of these consequences are

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tend to stabilize capitalist financial systems through "deeply hierarchical" legal protections for liquidity, thereby fostering massive unequal concentrations of wealth).

53 *See* Desan, *supra* note 46, at 19–20.

54 Robert C. Hockett & Saule T. Omarova, *The Finance Franchise,* 102 CORNELL L. REV. 1143, 1149, 1155–56 (2017); *see also* MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION 5, 223 (2016) (analyzing banks as "licensed money creation firms").

55 *See* Hockett & Omarova, *supra* note 54, at 1161–75 (detailing the different forms in which public credit powers support the private financial system); *see also* NATHAN TANKUS, THE NEW MONETARY POLICY: REIMAGINING DEMAND MANAGEMENT AND PRICE STABILITY IN THE 21ST CENTURY 10–11, 13–14, 17 (Michael Brennan ed., 2022), https://files.modernmoney.network/M3F000001.pdf [https://perma.cc/GRT3-QWXK] (explaining this public distribution of liquidity gets obscured).

56 Desan, *supra* note 46, at 19.

57 *See* TANKUS, *supra* note 55, at 17 (explaining the ineffectiveness of regulatory controls on banks' destructive long term investments if they can readily sell off toxic loans

difficult if not impossible to reverse or remedy ex post (such as the ubiquity of hazardous waste from gas filling stations, the enormous health and economic harm from leaded gasoline, or the loss of biodiversity from pollution, climate change, and habitat devastation).

Moreover, by channeling power over publicly backed credit through private, for-profit firms, this money design generates a well-endowed creditor constituency geared toward exerting self-interested political pressure on tax policy.[58] For example, in 2021, banks funded millions of dollars in lobbying and public relations campaigns to oppose the Biden administration's proposed bank reporting requirement targeting potential tax cheating by individuals with high non-wage incomes.[59]

Viewed in this larger institutional context, taxation does not "redistribute" money independently generated by pre-tax individualized resource-maximizing choices. Technically speaking, taxes "call back" or cancel a unit of a government authorized credit, creating a public obligation that (to some extent) ties people to that particularly privileged unit of credit and expands its power to mediate private exchange and production.[60] Although various contingent political and legal structures often tie public spending to tax revenue, currency-controlling governments with substantial political economic power need not directly or strictly rely on taxes to support public spending on a "dollar-for-dollar" basis.[61] Dependence on taxation as the primary means to protect currency value while expanding government spending can be severely destabilizing under some political economic conditions, given that quantitative

in the short run); JENNIFER TAUB, OTHER PEOPLE'S HOUSES: HOW DECADES OF BAILOUTS, CAPTIVE REGULATORS, AND TOXIC BANKERS MADE HOME MORTGAGES A THRILLING BUSINESS 228–249 (2014) (discussing the chains of securitization and other financial innovations that enabled banks to gain by offloading toxic mortgages causing the 2008 financial crisis); PISTOR, *supra* note 52, at 79–107 (explaining that capitalist law "codes" the sale of debt in ways that insulate the financial industry from the costly effects of its investment decisions).

58 *See* Desan, *supra* note 46, at 19.

59 Judd Legum & Tesnim Zekeria, *Banks Engaged in Multi-Million Dollar Lobbying Effort to Protect Wealthy Tax Cheats*, POPULAR INFORMATION (independent journalism newsletter) (Oct. 21, 2021), https://popular.info/p/banks-engaged-in-multi-million-dollar [https://perma.cc/3GMV-E69P].

60 *See* Desan, *supra* note 46, at 18.

61 The important questions of the nature and meaning of currency control and the conditions and methods for substantially decoupling public spending from taxation without harm to monetary stability are beyond the scope of this comment. *See, e.g.*, TANKUS, *supra* note 55, at 19–36 (discussing non-fiscal "pay-fors" and regulation in lieu of taxation); MARK PAUL, ANDERS FREMSTAD & J.W. MASON, ROOSEVELT INSTITUTE, DECARBONIZING THE U.S. ECONOMY: PATHWAYS TOWARD A GREEN NEW DEAL 59–64 (2019) (emphasizing that real resources, not public funds, are the underlying scarcity problem); GERALD A. EPSTEIN, WHAT'S WRONG WITH MODERN MONEY THEORY? A POLICY CRITIQUE 91–94 (2019) (warning that relying on non-tax methods of maintaining monetary stability while increasing U.S. public spending may raise international financial risks and other long term political economic costs).

accounting measures of public "deficits" at any given time are partial, inherently political,[62] and often highly misleading indications of an economy's present and future productive qualities. For example, if political resistance to tax increases and ideological opposition to public deficit spending combine to constrain public investment in climate stability, public health, or in effective regulation of the financial system, superficial numerical "balanced budget" goals can mask costly and destabilizing deficits in the collective material and human resources needed to maintain basic economic functions and political legitimacy in the face of reasonably foreseeable risks.[63]

This thicker understanding of taxation guided U.S. macroeconomic policy during World War II.[64] Beardsley Ruml, Chair of the New York Federal Reserve Bank from 1941 to 1946 and architect of the U.S. pay-as-you-go income tax system, famously summarized this understanding in an American Bar Association speech titled *Taxes for Revenue are Obsolete*.[65] Instead, Ruml explained, the prime consideration of tax policy should be the inevitable social and economic consequences of taxes, including the distribution of wealth and the "character of American life."[66] Further, U.S. policy during World War II successfully integrated taxation with a number of non-tax policy tools to control inflation while greatly expanding public spending along with income equality and private productivity.[67]

By stepping outside the fiction of an antecedent market, an LPE reframing of tax can affirm and clarify the LPE goal of enhancing democracy. The depoliticized market modeled by "law and economics" and optimal tax theory does not omit consideration of democracy, but instead makes democracy appear normatively and politically suspect and second-rate. The neoclassical economic frame grounds legitimate power and political freedom primarily in individualized choice, modeled as a free market where value and power are

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[62] TANKUS, *supra* note 55, at 33–34 (proposing changes in federal budgetary processes and measures); David Dayen, *Congress's Biggest Obstacle*, AM. PROSPECT (Jan. 28, 2020), https://prospect.org/politics/congress-biggest-obstacle-congressional-budget-office/ [https://perma.cc/9SQR-DQL2] (analyzing the outsized political power and misleading economics of the Congressional Budget Office).

[63] STEPHANIE KELTON, THE DEFICIT MYTH: MODERN MONETARY THEORY AND THE BIRTH OF THE PEOPLE'S ECONOMY 191–228 (2020) (contrasting political concern about possible risks from fiscal deficits with the known harms of deficits in valuable real economic resources such as good jobs, household savings, health care, education, physical infrastructure, climate stability, and democracy).

[64] TANKUS, *supra* note 55, at 6.

[65] Beardsley Ruml, *Taxes for Revenue are Obsolete,* 8 AM. AFFS. 35 (1946).

[66] *Id.* at 36 (summarizing "what taxes are really for": stabilizing the dollar; distributing wealth and income; implementing substantive policy through targeted subsidies; giving political visibility to costs of public investments).

[67] TANKUS, *supra* note 55, at 6–7; *see generally* Yeva Nersisyan & L. Randall Wray, *How to Pay for the Green New Deal* (Levy Econ. Inst., Working Paper No. 931, 2019) (applying these strategies to finance comprehensive investments in decarbonizing and democratizing the economy).

driven by reciprocal, autonomous private exchanges.[68] In this market-centric frame, public power is most legitimate and presumptively beneficial when it neutrally coordinates and supports this imagined apolitical market order.[69] Even if balanced or qualified, that underlying framing of markets as the foundation of legitimate power and value sets up tax policies favoring democracy as presumptively suspect distortions to be carefully limited and scrutinized.

In contrast, an LPE tax lens can clarify that taxation operates as part of the collective political governance of money's power to unequally constrain or enhance individual market choices. The potentially emancipatory and productive power of modern economies depends not primarily on deference to autonomous self-interested individuals but rather on collective action creating and sustaining obligations to a political economic whole capable of generating and sustaining mutual support rather than exploitation and destruction.[70] In this view, the ideal of tax neutrality might focus not on minimizing market distortions but instead on using tax policy to equalize and democratize access to the public medium of money.

Moreover, an LPE tax lens can clarify that taxation, by selectively withdrawing money from private circulation, operates as a vital tool for expanding private productivity and inducing investment.[71] Beyond simplified neoclassical conceptions, economic theory has extensively analyzed the ways in which liquidity drives economic destruction as well as production, for example by fueling speculation, stagnation, fraud, and volatility.[72] John Maynard Keynes, for example, warned that liquidity can provide a dangerous illusion of economic growth from short term or individualized monetized gains, while masking systemic harm to the largely illiquid real resources that are fundamental

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68 Desan, *supra* note 46, at 21.

69 *See id*. (describing the neoclassical vision of state as neutral auctioneer naming value as an abstract numerical unit).

70 *See id.* at 22 (reframing democracy as a deliberative process whereby a group "sustains itself by structuring its growth and character by managing resources, distributing benefits, and spreading costs"); SCOTT FERGUSON, DECLARATIONS OF DEPENDENCE: MONEY, AESTHETICS, AND THE POLITICS OF CARE 77–78 (2018) (arguing that Desan's legal history of money offers a political ontology that places collective coordination for mutual care at the center of political economic power and productive value); Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341, 342 (2019) (reframing politics, law, and economy to replace the mythical autonomous liberal individual with the universally vulnerable human subject, inherently dependent on collective action through institutions).

71 *See* Martha T. McCluskey, *Framing Middle-Class Insecurity: Tax and the Ideology of Unequal Economic Growth*, 84 FORDHAM L. REV. 2699, 2700–08, 2718 (2016) (critiquing the logic and politics of tax as a means for public consumption or private redistribution, and instead emphasizing tax as a means to govern and direct economic productivity).

72 *See* James Crotty & Gerald A. Epstein, *The Last Refuge of Scoundrels: Keynes-Minsky Perspectives on the Uses and Abuses of the 'Liquidity Defense,' in* BANKING, MONETARY POLICY, AND THE POLITICAL ECONOMY OF FINANCIAL REGULATION: ESSAYS IN THE TRADITION OF JANE D'ARISTA 319, 321–30, 335–40 (Gerald A. Epstein, Tom Schlesinger & Matías Vernengo eds. 2014) (explaining the theoretical incoherence and harmful policy effects of the neoclassical premise that liquidity increases efficiency).

to economic productivity and human and environmental flourishing,[73] such as physical infrastructure or intangible qualities of social and political solidarity and trust. As one strategy for regulating liquidity's destructive power, Keynes advocated using taxation to increase the transaction costs of buying or selling financial assets to instead direct investments in longer term production in "real" non-financial economic activity.[74] Although today Keynes is often identified with fiscal policies for moderating market cycles, Keynes' understanding of this fundamental mismatch between financialized capital and productive value led him to conclude that democratic governments should go beyond regulating and taxing finance to actively governing capital investment decisions, in effect socializing a substantial share of finance while leaving actual economic production under private control.[75]

B. *Taxing to Value Democracy and the Planet*

Considering the climate emergency, the current system for governing money enables publicly franchised financial institutions to allocate credit on a preferential basis to the fossil fuel sector of the economy, based on existing, narrow market measures of that sector's (short-term) profitability.[76] For example, in the six years since the Paris climate agreement, the world's 60 largest private banks have invested $4.6 trillion dollars in the fossil fuel industry, locking in place a physical and political infrastructure that will ex ante constrain future political economic options for climate mitigation and just transition.[77] Four U.S. banks dominate global fossil fuel financing, providing one quarter of this global investment in what can reasonably be considered the mass destruction of human and environmental value.[78] Further, a significant portion of this liquidity goes toward fossil fuel industry investments in expanding their anti-democratic legal, political, academic, and media power to impede transition to a climate-compatible energy infrastructure.[79] These

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[73] *Id.* at 322–23.

[74] *Id.* at 341–42.

[75] *Id.* at 342–43; *see also* JAMES CROTTY, KEYNES AGAINST CAPITALISM: HIS ECONOMIC CASE FOR LIBERAL SOCIALISM 6–11 (2019) (summarizing the book's analysis of Keynes's conclusion that public and semi-public control over the majority of major capital investment decisions through a "Board of National Investment").

[76] *See* TANKUS, *supra* note 55, at 17 (challenging the premise private commercial financial actors do a better job of valuing resources and risks than the public sector).

[77] *See* RAINFOREST ACTION NETWORK ET AL., BANKING ON CLIMATE CHAOS: FOSSIL FUEL FINANCE REPORT 2022 3, 13 (2022), https://www.ran.org/wp-content/uploads/2022/03/BOCC_2022_vSPREAD-1.pdf [https://perma.cc/7ZD9-M2X3] (collaborative report endorsed by 505 organizations from 51 countries).

[78] *Id.* at 3 (naming JPMorgan Chase, Citi, Wells Fargo, and Bank of America).

[79] *See generally* Robert J. Brulle, *Advocating Inaction: A Historical Analysis of the Global Climate Coalition*, ENV'T POLS. (2022), https://doi.org/10.1080/09644016.2022.2058815 (showing that prominent organizations of fossil fuel interests amplified industries' political and cultural power to resist energy

investments reflect particular legal designs and leadership judgments, not inevitable or omniscient market forces. In 2021, for example, La Banque Postale, a major French financial institution, ended all investment in expanding fossil fuel extraction and committed to exiting the fossil fuel sector entirely by 2030.[80]

Tax subsidies amplify this fire hose of liquidity locking in fossil fuel dependence and mass destruction. Between 2019 and 2023, the U.S. has allocated over $11 billion in federal tax subsidies for fossil fuel development.[81] Taken out of political economic context, a standard analysis might conclude that this tax policy reflects a tough tradeoff between environmental goals and the social and economic goals of responding to consumer demand for affordable energy, particularly given the unequal effect of higher gas prices on lower income consumers and disadvantaged communities. Tax policy failures to adequately address the climate emergency similarly might appear to reflect legitimate dilemmas of democracy balancing economy over environment, or present over future consumption and material well-being.

By understanding that taxation functions to regulate the investment decisions that constrain consumption choices, we can reframe these tradeoffs. The perceived superior affordability and short-term efficiency of fossil fuel energy results from tax support designed to obscure and defer the societal costs of continued fossil fuel dependence by imperfectly keeping consumer prices low and perhaps more reliably keeping fossil fuel industry political contributions high.[82] A political economic analysis should evaluate the existing political economic tradeoffs that impede sufficient public and private investment in energy transition as failures to turn policy toward non-reformist reforms aimed

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transition through shared resources and messaging identifying fossil fuel with economic prosperity and blocking meaningful climate action).

[80] RAINFOREST ACTION NETWORK ET AL., *supra* note 77, at 5.

[81] *Key Elements of the U.S. Tax System*, TAX POL'Y CTR: BRIEFING BOOK, https://www.taxpolicycenter.org/briefing-book/what-tax-incentives-encourage-energy-production-fossil-fuels#:~:text=Tax%20subsidies%20for%20oil%2C%20gas,development%20costs%20(%242.7%20billion) [https://perma.cc/8SP4-FY3P]; *see also* Johannes Urpelainen & Elisha George, *Reforming Global Fossil Fuel Subsidies: How the U.S. Can Restart International Cooperation*, BROOKINGS (July 14, 2021), https://www.brookings.edu/research/reforming-global-fossil-fuel-subsidies-how-the-united-states-can-restart-international-cooperation/ [https://perma.cc/SXR7-5JDK] (reporting global fossil fuel consumptions subsidies of over $320 billion in 2019.

[82] *See* Lukas Ross, Alan Zibel & Chris Kuveke, *Big Oil's Wartime Bonus: How Big Oil Turns Windfall Profits into Wealth*, PUB. CITIZEN, https://www.citizen.org/article/big-oils-wartime-bonus/ [https://perma.cc/PBN4-S7US] (reporting over $45 billion in oil industry stock buybacks and dividends from 2021-2022 even while the industry lobbies for more subsidies to alleviate rising consumer prices); *Money to Congress*, OPEN SECRETS, https://www.opensecrets.org/industries/summary.php?ind=E01&recipdetail=S&sortorder=A&cycle=2022 [https://perma.cc/WLB8-C4XT] (database compiling Federal Election Commission data released July 26, 2022) (listing Joe Manchin as receiving the highest amount, $694,160).

at transforming the fossil fuel industry's power to hold other socioeconomic goals hostage.

For example, economist James Boyce proposes a climate policy aimed at increasing the price of fossil fuel while also creating broadly shared wealth.[83] As Boyce explains, current policy gives fossil fuel producers a property right to own and consume the atmosphere at no charge,[84] allowing them to profit from liquidating the planet's capacity to support economic and social well-being. Indeed, their tax subsidies and publicly backed private bank funding stream in effect mean the public is paying these firms to amass enormous privately governed financial gains that may go more to enriching executives and shareholders (and the politicians they fund) than to reducing consumer energy prices or to investing in future energy productivity.[85]

In this context, policies encouraging demand for alternative energy sources, like tax incentives for electric vehicles, will have less immediate effect than policies that directly discourage this amply subsidized supply of fossil fuel.[86] A carbon tax, however, not only exacerbates inequality and insecurity for a large number of households without access to affordable funding for investing in alternatives, but continues to allow fossil fuel companies to gain by passing on the costs of dependence on their destructive investment choices.[87] Instead, Boyce proposes a carbon "cap and dividend" approach that would auction off a limited quantity of public permits for the right to produce fossil fuels, decreasing this quantity over time, with the proceeds distributed as a public dividend to individual households to support their climate transition costs as the decreasing supply induces higher prices.[88] This could be structured as a taxable dividend payment to provide some revenue for energy transition to state and federal governments, or as a tax-free individual dividend, both of which Boyce calculates would likely distribute the greatest net benefits to moderate to low income households.[89]

Boyce's approach aims to change power over the upstream investment decisions and organized interests that constrain both individuals and governments. By claiming a public collective right to exclude fossil fuel suppliers from infringing on the atmosphere's human sustainability, while selling those suppliers increasingly scarce temporary usage rights, this policy proposal potentially induces those suppliers to compete against each other to increase funding for broad public investments in energy transition. Instead of nudging or eschewing economic incentives, it uses fiscal policy to reshape the

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[83] JAMES K. BOYCE, ECONOMICS FOR PEOPLE AND THE PLANET: INEQUALITY IN THE ERA OF CLIMATE CHANGE 39–48; 109–16, 140–41 (2019).

[84] *See id. at* 112.

[85] *See supra* note 82 (reporting the industry's lavish spending on dividends and stock buybacks and on Congressional campaigns).

[86] *See* BOYCE, *supra* note 83, at 109–110.

[87] *See id.* at 47 (discussing regressive impact).

[88] *Id.* at 113–16.

[89] *Id.* at 139–40.

institutions and ideologies that set current incentives against future socioeconomic stability and well-being.

A pro-democracy tax policy should affirm that public fiscal power for human well-being depends on improving the quality and equality of economic citizenship and governance, not on aggregating the largesse or preferences of individualized "taxpayers."[90] Boyce's proposal presents taxing and spending as a means to collectively re-orient economic production and the values driving it, rather than as a market-centric tradeoff between public and private consumption. Moreover, it designs fiscal policy as a means to change politics, using direct, tangible economic gains for a broad range of voters to build public trust in solidaristic democratic action.

As another example of the role of tax policy in shaping politics as well as markets, in 2020, New Mexico depended on fossil fuel industry tax revenue for one-third of its budget, reflecting the state's longstanding reliance on an extractive economy combined with rising organized political pressure to reduce other forms of taxation.[91] That political dependence on private extractive capital pressured the state's political leadership to renounce its plans for energy transition despite strong popular support and devastating local economic, human, and environmental impact from climate change.[92] In May 2022, that local impact included unprecedented wildfire damage triggering federal disaster relief, partly redistributing the resulting loss without addressing its root cause and escalating future likelihood.[93]

New Mexico's political economic binds result in part from federal tax policies incentivizing extractive industries and also from federal policies channeling control over federally-backed financing for economic production through private commercial actors while squeezing federal funds for economic and social development allocated to state legislatures. With more generous federal funding for state and local governments, states could ease their dependence on narrow and destructive industry interests and better expand their

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[90] *See* McCluskey, *supra* note 71, at 2718–20 (reframing taxing and spending to affirm democracy's power for producing economic well-being); Raúl Carrillo, *Reflections: Challenging Monetary Sanctions in the Era of Racial Taxation*, 4 UCLA CRIM. JUSTICE L. REV. 143, 150–53 (2020) (explaining that the legally incoherent idea of "taxpayer money" fosters a politics of racial taxation).

[91] *See* Lindsay Fendt, *Back to the Well,* SEARCHLIGHT N.M. (May 19, 2021), https://searchlightnm.org/fossil-fuels-fund-new-mexicos-politics-and-state-budget-thats-a-problem/ [https://perma.cc/89YM-V89K].

[92] *See id.*; *see also* Vijay Limaye & Noah Long, *2021 New Mexico Wildfires: When, Why, and How to Stay Safe*, NRDC (July 1, 2021), https://www.nrdc.org/experts/noah-long/2021-new-mexico-wildfires-when-why-and-how-stay-safe [https://perma.cc/8MLV-HPNM] (reporting substantial climate-related increases in wildfires with substantial impact on health from smoke pollution).

[93] *See* Jennifer Calfas, *With Wildfires Burning in New Mexico, Biden Approves Disaster Declaration*, WALL ST. J. (May 5, 2022), https://www.wsj.com/articles/with-wildfires-burning-in-new-mexico-biden-approves-disaster-declaration-11651767096 [https://perma.cc/WK54-HGGJ].

economic capacity for democracy and equality along with long term economic productivity and stability.

IV. CONCLUSION

The authors' insightful exploration of the relationship between economics and equity in tax theory and policy is a valuable resource for LPE scholars in all subject areas. As the authors argue, LPE cannot effectively advance democracy or social justice without taking into account the economic incentives that drive political economic power.[94] But these incentives derive from continually changing and contested political economic institutions, including tax policy itself, not from exogenous individual behavior that can be taken as meaningful evidence of freedom and value. The structural inequalities, injuries, and failures that LPE aims to correct pervasively operate through the economic incentives that a pluralist or balancing approach would tend to accommodate rather than transform.

Despite wide support in tax theory for progressive taxation and democracy, LPE ambitions for tax policy face daunting political obstacles.[95] Dependence on private control of the public power of money often limits political leaders from effectively using tax policy to qualify, govern, or "redistribute" that financial power in the interest of LPE values. By integrating tax policy with other fiscal, monetary, and legal tools for re-orienting and re-coding financial capital, an LPE approach to tax might go further to challenge that dependence. One important step toward LPE goals will be to reframe taxation from a market "intervention" or resource transfer to a vital tool for directing publicly-backed liquidity toward productive public and private investment in shared, sustainable human flourishing.

94 Bearer-Friend, Glogower, Kleiman & Wallace, *supra* note 1, at 488, 520.
95 *Id.* at 477, 522–24.