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by Karl A. Frieden

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In this article, Frieden rebuts the central thesis of the roundtables of Dan Bucks, Peter Enrich, Michael Mazerov, and Darien Shanske that business does not pay its fair share of state and local taxes. The author does so by using their own criteria for measuring "fair share" based on deviations from optimal or neutral tax design to show that business "overpayments" of sales and excise taxes on business inputs and property taxes on business property are 15 times or more greater than the roundtable members' assertion of business "underpayments" of state corporate income tax.

Introduction[1]

In a series of roundtable discussions published in *Tax Notes State* over the last five years, four state and local tax experts have established themselves as the leading progressive voices on SALT policy. The individuals — Dan Bucks, Peter Enrich, Michael Mazerov, and Darien Shanske (hereinafter BEMS[2]) — are knowledgeable, creative, and passionate advocates. Their clearly enunciated perspective that business should pay more in state and local taxes is impactful among public officials and state legislators.

To date, BEMS have participated in 23 roundtables (with an occasional guest pundit). The discussions cover a range of topics, including tax transparency, digital taxation, progressive income taxation, sales tax base broadening, multistate incentives, and adjudication. However, the focus of most of the roundtables is on state and local taxes paid by business.[3]

[1]The author would like to thank Doug Lindholm, Marilyn Wethekam, Bob Cline, Bob DeBoer, Joe Donovan, Mark Haveman, Andrew Phillips, and Steve Wlodychak for their review of all or part of the article, and for their helpful comments and suggestions. The author is solely responsible for the content of the article.

[2]"BEMS" is based on the first initial of each participant's last name. The roundtable is facilitated by *Tax Notes State* Senior Editor Doug Sheppard.

[3]Dan R. Bucks et al., "MultiState Series More Collegial, but Still Wrong About Combined Reporting," *Tax Notes State*, Jan. 29, 2024, p. 383; Bucks et al., "Weak Corporate Tax Reform Critiques Suggest Serious Debate Isn't Intended," *Tax Notes State*, Oct. 23, 2023, p. 287; Bucks et al., "If It Ain't Broke, Break It: A Reckless Plan for State Tax Adjudication," *Tax Notes State*, July 3, 2023, p. 33; Bucks et al., "It Takes Two: Why ESG Should Be Considered in the Context of State Tax Policy," *Tax Notes State*, Apr. 17, 2023, p. 217; Bucks et al., "The GAO Remote Sales Tax Report and the Federal Role in State Taxation," *Tax Notes State*, Jan. 16, 2023, p. 253; Bucks et al., "The MTC's Role Is Not to Advance Mindless Consistency," *Tax Notes State*, Sept. 12, 2022, p. 1183; Bucks et al., "Arizona Politicians, Court to Voters: Drop Dead," *Tax Notes State*, June 13, 2022, p. 1115; Bucks et al., "Deferred Corporate Tax Relief: Bad Policy Based on Unsupported Assertions," *Tax Notes State*, May 16, 2022, p. 655; Bucks et al., "Critical Reflections on COST's Sales Tax Study," *Tax Notes State*, Feb. 21, 2022, p. 859; Bucks et al., "Kicking the Buckets: Responding to Bad Arguments Against Combined Reporting, Part 2," *Tax Notes State*, Nov. 15, 2021, p. 707; Bucks et al., "Compared to What? Responding to Bad Arguments Against Combined Reporting, Part 1," *Tax Notes State*, Oct. 4, 2021, p. 21; Bucks et al., "Will ProPublica Income Tax Revelations Spur Change?" *Tax Notes State*, July 19, 2021, p. 245; Bucks et al., "The Maryland and New York Approaches to Taxing the Data Economy," *Tax Notes State*, Apr. 12, 2021, p. 147; Bucks et al., "Is It Time to Tax the Digital Economy?" *Tax Notes State*, Jan. 4, 2021, p. 29; Bucks et al., "The Careless Retroactive Provisions of the CARES Act," *Tax Notes State*, Sept. 28, 2020, p. 1335; Bucks et al., "Pragmatism Not 'Punishment': Why Some Should Pay More in a COVID-19 World," *Tax Notes State*, July 27, 2020, p. 379; Bucks et al., "Would a Multistate Incentives Compact Work?" *Tax Notes State*, Apr. 27, 2020, p. 487; Bucks et al., "Corporate Disclosure Is Essential," *Tax Notes State*, Feb. 17, 2020, p. 553; Bucks et al., "Shoring Up State Corporate Income Taxes," *Tax Notes State*, Dec. 2, 2019, p. 709; Bucks et al., "Public Law 86-272: Still Bad Policy After 60 Years," *Tax Notes State*, Oct. 7, 2019, p. 13; Bucks et al., "The Anti-Deference Fallacy," *Tax Notes State*, Sept. 2, 2019, p. 913; Bucks et al., "The Specious Arguments Against Progressive Income Taxation," *Tax Notes State*, July 22, 2019, p. 295; Bucks et al., "Taxing GILTI Is Good, but Worldwide Combination Is Great," *Tax Notes State*, June 17, 2019, p. 1001.

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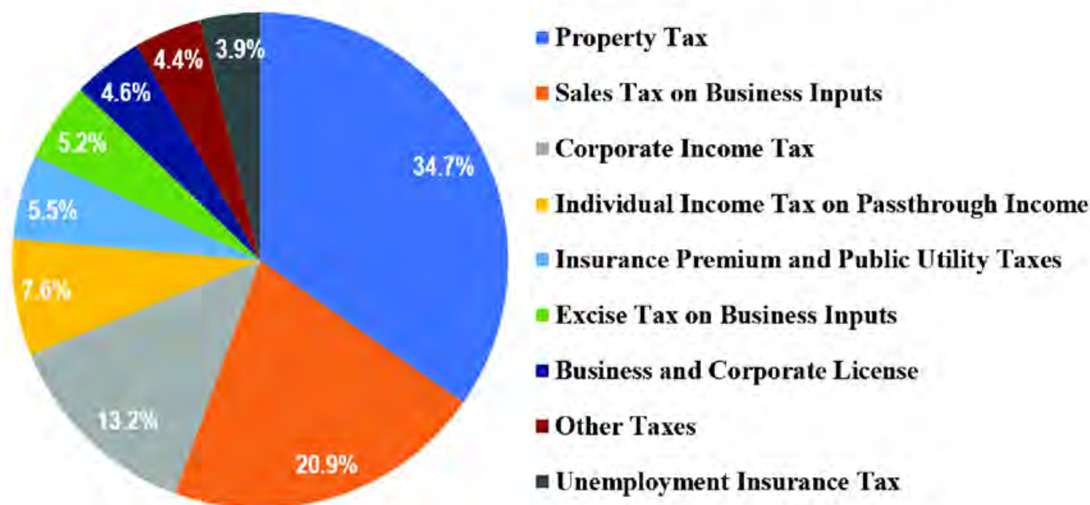

The runaway favorite topic among various business taxes is the state corporate income tax, with about two-thirds of the roundtables fully or partially focused on this tax type. The corporate income tax is the fulcrum for BEMS's overall perspective that business does not adequately contribute to the costs of state and local government. BEMS's critique is based on three propositions. First, that business does not pay its "fair share" of state and local taxes, with a particular emphasis on the corporate income tax as a microcosm of the whole. Second, that this underpayment of state and local taxes is the result of flaws in the design of tax statutes that favor businesses. Third, that these structural deficiencies reflect inordinate business political influence over state legislative and administrative processes.

This article takes a deeper dive into the "fair share" debate, but not by repeating or supplementing past arguments over BEMS's corporate income tax perspective.[4] Rather, I pose three central questions:

- Does BEMS's structural design (and political influence) explanation for the business "underpayment" of corporate income tax apply equally to other key state and local taxes imposed on businesses?
- Is there a quantifiable business "overpayment" of other state and local taxes compared with what business would

[4] I have cowritten numerous articles taking the view that international profit shifting by multinationals is a complex issue that generally should be addressed through harmonized solutions at the global and national levels and not unilateral responses at the subnational level; and that many of the proposed solutions to profit shifting at the state level work differently than they do at the national level (global intangible low-taxed income), are overly broad (worldwide combined reporting), or are likely unconstitutional (taxing foreign-source income without foreign factor representation). *See generally* Karl A. Frieden and Fredrick J. Nicely, "Minnesota's New Approach to Taxing Foreign Income Is Unfair and Unwise," *Tax Notes State*, Aug. 21, 2023, p. 577; Frieden and Barbara M. Angus, "Convergence and Divergence of Global and U.S. Tax Policies," *Tax Notes State*, Aug. 30, 2021, p. 937; Frieden and Erica S. Kinney, "Eureka Not! California CIT Reform Is Ill-Conceived, Punitive, and Mistimed," *Tax Notes State*, May 24, 2021, p. 795; Frieden and Joseph X. Donovan, "Where in the World Is Factor Representation for Foreign-Source Income?" *State Tax Notes*, Apr. 15, 2019, p. 199; Donovan et al., "State Taxation of GILTI: Policy and Constitutional Ramifications," *State Tax Notes*, Oct. 22, 2018, p. 315; Frieden and Ferdinand Hogroian, "State Tax Haven Legislation: A Misguided Approach to a Global Issue," State Tax Research Institute (STRI) (Feb. 2016). *See also* Douglas L. Lindholm and Marilyn A. Wethekam, "Mandatory Worldwide Combined Reporting: Elegant in Theory but Harmful in Implementation," STRI (Mar. 2024).

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pay with a more optimal or neutral tax design?

- How do BEMS address tax design outcomes that neither favor business nor reflect disproportionate business influence over state tax legislation?

To answer these questions, I compare the statutory design of the relatively smaller state corporate income tax (constituting about one-eighth (13.2 percent) of all state and local taxes on business) with the design of the relatively larger sales and excise taxes on business inputs (constituting about one-quarter (26.1 percent) of business taxes) and the property tax on business property (constituting about one-third (34.7 percent) of business taxes) (see Figure 1).[5] These taxes together make up about three-quarters of all state and local taxes on businesses. While there is substantial literature on each of these taxes, no comparative analysis explores and quantifies from a structural design perspective whether they favor or disfavor businesses individually and as a whole.

Part 1 provides an overview of BEMS's core analysis that business does not pay its fair share of corporate income taxes and their estimate of how much state tax revenue is lost each year from profit shifting. Importantly, BEMS do not advocate for higher tax rates, but rather argue that additional revenue will come from fixing a flawed corporate income tax design with structural tax reform. The crux of BEMS's perspective is that the corporate income tax is representative of all state and local taxes and reflects an overall failure of business to pay its fair share.

Part 2 focuses on the sales and use tax on business inputs. There are few state tax issues for which there is more widespread agreement than on the optimal design of the sales tax. There is a near-universal belief among sales tax experts that a well-designed retail sales tax should exempt all or most business-to-business (B2B) transactions. Contrary to BEMS's overarching thesis, the deviation of actual sales taxes from an ideal sales tax design disfavors business, causing payment by business of far more in sales taxes than under an optimally designed system. Indeed, the quantified lower end of estimates of "overpayment" of sales tax on business inputs exceeds even BEMS's most extreme estimate of "underpayment" of corporate income taxes by eightfold or more. BEMS's response is a combination of reluctantly acknowledging the principle that the sales tax base should not include business inputs, rationalizing why that's not so important or harmful, and then concluding with a full-throated endorsement of the taxation of even more (digital) business inputs.

Part 3 analyzes the property tax on business property. This tax accounts for the largest share of taxes (about one-third) imposed on business at the state and local level, and yet it receives the least attention from a policy perspective. Upon examination, the property tax design in most states and localities does indeed favor an interest group, but it's residential homeowners and not businesses. Through a combination of homestead exemptions and credits, split-roll statutory tax rates, and a differential tax base on personal property, the property tax in most jurisdictions is heavily skewed to favor homeowners and disfavor businesses. The most recent comprehensive nationwide study quantifying and comparing the effective tax rates (taxes divided by property market value) of industrial, commercial, and apartment rental property with homeowner property determined that the three large business property categories have ETRs ranging from 44 to 90 percent higher than homeowner property.[6] BEMS's response to this second significant refutation of their core contention that the design of state and local taxes favors business is almost total silence, with an occasional suggestion that business intangible property should be included in the property tax base, further exacerbating the gap between the relative ETRs.

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[5] EY, STRI, and Council On State Taxation, "Total State and Local Business Taxes: State-by-State Estimates for Fiscal Year 2022," at 3 (Dec. 29, 2023). The design flaws of the excise taxes on business inputs (making up 5.2 percent of all state and local business taxes) closely parallel those of the sales taxes on business inputs (making up 20.9 percent of all state and local business taxes) for a combined "business inputs" total of 26.1 percent of all state and local taxes. However, given the centrality and larger scope of sales taxes on business inputs, that tax type is the focus of Part 2, with the excise taxes on business inputs added to the discussion in Part 4.

[6] Lincoln Institute of Land Policy and Minnesota Center for Fiscal Excellence (Lincoln-MCFE), "50-State Property Tax Comparison Study: For Taxes Paid in 2022," at 3-4 (Aug. 2023).

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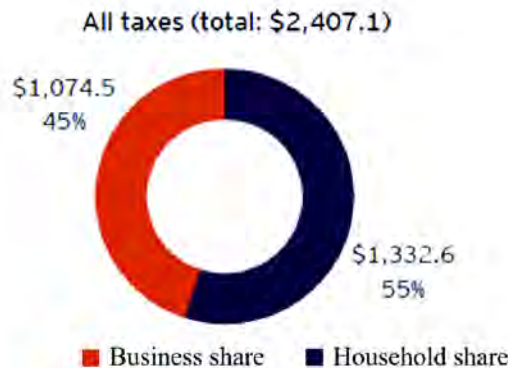
Figure 2.
Total Business and Household Share of State and Local Taxes
State and Local Taxes ($ Billions) on Business and Households as a Share of Total State and Local Tax Collections, FY22



Source: Total State and Local Business Taxes: State-by-State Estimates for Fiscal Year 2022, study prepared by EY for STRI and COST (December 2023).

In Part 4, I discuss the aggregate amount of state and local taxes imposed on business. It is well established that business pays over two-fifths of all state and local taxes (see Figure 2), and has done so within a narrow fluctuation range for the last four decades.[7] This is a reflection of both how many state and local taxes other than the corporate income tax are imposed on business and a confirmation of how several of the larger of these taxes are designed in a way that disfavors business. What is BEMS's response to the surprisingly high total share of state and local taxes paid by business? For the most part they completely refrain from discussing the overall business tax burden — even though the foundation of their fair-share argument is that their corporate income tax paradigm applies more broadly to total state and local taxes on business. Worse yet, in the few instances when the topic is discussed in the roundtables, they grossly understate the actual aggregate level of state and local taxes on business by about half, asserting without any documentation that the level is under 25 percent and shrinking.[8]

BEMS's disregard or rationalization of design elements in the sales, excise, and property taxes that disfavor business is clear evidence of the blinders they wear in the debate on whether business pays its fair share of state and local taxes. Indeed, they fail to acknowledge that:

- their critique of the corporate income tax is not representative of other state and local taxes;
- the design of the other largest state and local business taxes neither favors business nor suggests any omnipotent business power over state tax legislation or administration; and
- using their own criteria for measuring "fair share" based on optimal or neutral tax designs, business overpayments of sales and excise taxes on business inputs and property taxes on business property are 15 to 21 times greater than even the highest (and questionable) estimates by BEMS of underpayments of corporate income tax.[9]

[7] *See* Figure 6. The source data is from: COST, "Total State and Local Business Taxes: Nationally 1980-2004 and by State 2000-2004," at 15 (Apr. 12, 2005) (by EY, specifically Robert Cline, Tom Neubig, and Andrew Phillips, with William Fox (for 1980-2004 data)); and from the annual EY, COST, and STRI, "Total State and Local Business Taxes: State-by-State Estimates" (for fiscal 2005 to 2022).

[8] *See* discussion in Part 4.

[9] For the calculation of the 15 to 21 times or greater ratio of business tax "overpayments" to "underpayments," based on optimal or neutral tax designs, see Part 4 and *infra* note 102.

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The inevitable conclusion is that BEMS are only interested in business paying its fair share of state and local taxes when an optimal or neutral tax design leads to more, and not less, business taxes. BEMS certainly can (and will) continue to assert that a higher level of state and local taxes is needed to adequately fund government programs and that business and other taxpayers should pay more taxes. But they should do so without using as a starting point the fallacy that this outcome is warranted because business does not currently pay its fair share of aggregate state and local taxes.

Part 1: BEMS's Analysis of the Flawed Design of The Corporate Income Tax

In BEMS's roundtables, the primary topic relating to the state and local taxation of business is the corporate income tax. BEMS's analysis has three key propositions:

- business does not pay its fair share of state and local taxes;
- the underpayment of taxes is based on flaws in the tax design that favor business; and
- these structural deficiencies reflect business political influence on state legislatures and their ability to manipulate the tax reporting system.

While the cornerstone of BEMS's critique is the corporate income tax, they repeatedly make clear their belief that these propositions apply to state and local business taxes as a whole.

Proposition 1: Business Does Not Pay Its Fair Share of State and Local Taxes

First, BEMS's roundtables consistently remind readers of their view that business does not pay its fair share of taxes.[10] According to Bucks:

> But we know that the way many large companies report their income is not legitimate: They're engaged in aggressive international profit shifting that results in underpaying a *fair share* of taxes — both to the federal government and to the states. And it's a problem that needs to be solved.[11]

In advocating for ballot initiatives to mandate corporate tax disclosure, Mazerov notes:

> The polling shows that regardless of the political affiliation of the people asked, the public is very skeptical that corporations are paying their *fair share* of income taxes. The business community, I think, greatly fears what would happen if corporate disclosure were enacted, and you can count on it putting a huge amount of money in opposition to any ballot measure that actually qualified.[12]

Enrich cites approvingly a poll showing that over three-quarters of Massachusetts respondents think that large, national/international companies doing business in Massachusetts are paying either a little or much less than their fair share. Enrich makes clear he is speaking about all state and local taxes, and not just the corporate income tax:

> But for large businesses, there's a clear public sense here that they are not paying their *fair share*. The other thing that keeps coming back in my mind is the long-term trends in how much of *state and local taxes are paid by businesses*, as opposed to by individuals. . . . And I think all of the indicators I have seen over the last 25 years suggest that it's [the business share of state and local taxes] continued to drop fairly steadily through that period of time.[13]

[10] The BEMS quotations in this article are from the 23 *Tax Notes State* roundtables, unless specifically indicated otherwise. For the citation to the roundtables, see *supra* note 3. References to the need for business to pay its "fair share" of state and local taxes appear over one dozen times in the roundtables. *Id.*

[11] Bucks et al., "Weak Corporate Tax Reform Critiques Suggest Serious Debate Isn't Intended," *supra* note 3, at 290 (emphasis added). Bucks also has made clear his "fair share" concept extends to the whole state tax system: "Under the still-prevalent view that the only responsibility of a corporation is to maximize benefits to its shareholders, there is little or no sense of responsibility to contribute to the public through the tax system. . . . And if you're looking at the design of a tax system, it is absolutely essential to ensure that substantial parties who benefit significantly from public services contribute a *fair share* to the support of those services" (emphasis added). Bucks et al., "Compared to What? Responding to Bad Arguments Against Combined Reporting, Part 1," *supra* note 3, at 25-26.

[12] Bucks et al., "Corporate Disclosure Is Essential," *supra* note 3, at 557 (emphasis added).

[13] Bucks et al., "Shoring Up State Corporate Income Taxes," *supra* note 3, at 711 (emphasis added). Shanske also applies the "fair share" concept broadly to all state and local taxes: *see* Bucks et al., "Corporate Disclosure Is Essential," *supra* note 3, at 554.

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I will show in Part 4 that Enrich misstates the overall business share of state and local taxes, which has in fact remained stable in the low to mid-40s in percentage terms for more than 40 years (compared with Enrich's unsubstantiated assertion that it was 25 percent in the 1990s and has declined since then).[14] But the important point here is that he conflates BEMS's critique of the corporate income tax with the overall state and local taxes paid by business, suggesting that both are reflective of business not paying its fair share.

Proposition 2: The Underpayment of Taxes Is Attributable to Tax Design Flaws That Favor Businesses

Second, BEMS's perspective on the failure of businesses to pay their fair share of taxes is generally based not on the need for higher tax rates or on "ability to pay" concepts, but on structural flaws in the design of corporate income taxes that favor business in all 45 states (and the District of Columbia) that impose a corporate income tax.

BEMS identify two overarching (and related) design flaws in the corporate income tax: (1) for separate reporting states, the absence of water's-edge combined reporting results in a failure to accurately capture the amount and share of income earned in a multistate environment; and (2) for states with water's-edge combined reporting, the absence of mandatory worldwide combined reporting (or at least the inclusion of global intangible low-taxed income or other categories of foreign-source income) results in the failure to accurately capture and apportion income earned by multinational businesses.[15]

For BEMS, state corporate tax systems that do not sufficiently include out-of-state or foreign-source income in the corporate income tax base allow extensive profit shifting, resulting in lost state tax revenue. According to Enrich, responding to critics of combined reporting, "what really is going on is that businesses for many years have been using non-combined systems — separate accounting systems — as a way to *distort* where profits are earned. . . . one of the main reasons that states have turned to combined reporting is to undercut the efforts of sophisticated business planners to *disguise* where their profits are earned."[16] Commenting in a later roundtable on the effort to redesign corporate income taxes, Enrich references "what's beginning to look like a serious campaign to fix a serious *flaw* in the way we tax very large corporations."[17]

Shanske, in an article he coauthored, similarly described the corporate income tax structural design flaw as follows:

> The most critical *weakness* of the modern corporate income tax is its *vulnerability* to profit shifting, through which corporate taxpayers can engage in tax planning to report profits in foreign tax havens or low-tax jurisdictions.[18]

In one roundtable, Shanske emphasized fixing these structural problems as a foundational principle: "the core argument for combined reporting is a *principled* one: It is the *better way to try to tax* an interjurisdictional enterprise."[19]

Finally, Mazerov emphasized in expansive language that the key issue in BEMS's corporate tax reform is not higher tax rates, but fixing structural flaws:

> There was also a discussion in our corporate colleagues' piece, a sense of puzzlement, as to why what to them seemed to be the obvious solution if tax increases are necessary — just to simply raise the rates on the existing base — wasn't the first priority for people like us. But all of us — as we've made clear in all our discussions up to now — really do

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[14] Bucks et al., "Shoring Up State Corporate Income Taxes," *supra* note 3, at 711 (for Enrich's assertion); EY, COST, and STRI, *supra* note 7 (for the actual 40-year data).

[15] Bucks et al., "GILTI is Good, but Worldwide Combination Is Great," *supra* note 3; Bucks et al., "MultiState Series Kinder and Gentler, but Still Wrong About Combined Reporting," *supra* note 3.

[16] Bucks et al., "Compared to What? Responding to Bad Arguments Against Combined Reporting, Part 1," *supra* note 3, at 24 (emphasis added).

[17] Bucks et al., "Weak Corporate Tax Reform Critiques Suggest Serious Debate Isn't Intended," *supra* note 3, at 289 (emphasis added).

[18] Shanske and David Gamage, "Why States Can Tax the GILTI," *State Tax Notes*, Mar. 18, 2019, p. 967 (emphasis added).

[19] Bucks et al., "Kicking the Buckets: Responding to Bad Arguments Against Combined Reporting, Part 2," *supra* note 3, at 709 (emphasis added).

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> believe that there are terrible *structural economic and equity problems in current tax systems*. We want to see them *fixed*, and we know that times of crisis — whether we're talking about reforming policing or reforming tax systems — open up opportunities to make *fundamental structural reforms* in public policy.[20]

Proposition 3: The Flawed Design of SALT Is Traceable to Business's Political Influence and Ability to Manipulate the Tax System

The final part of BEMS's three-part critique of state and local business taxes is that the legislative and administrative outcomes that favor business are not accidental or inadvertent, but the result of undue business influence over state politics and the ability of large corporations to manipulate tax rules in their favor.

In terms of business's political influence, Bucks spoke expansively in language that applies to all state and local taxes:

> We are closer to an oligarchy than we admit here in the United States, and that's a serious problem. One of the benefits that the corporate structures get from our political systems at the state and federal level is the *substantial dominance of the results of the political process*.[21]

Enrich commented that the best solution (in his opinion) to fix the flawed corporate income tax design — worldwide combined reporting — is stymied by business's political power. In making his critique, he also makes it clear that his analysis has broader state tax implications:

> I would just add that I think we have to recognize that the very large multinational corporations that *exert such immense political power here in the United States and in state capitals* are able to exert very much the same pressure globally. And it's not surprising that the cleanest, simplest, most straightforward solution to these problems is one that they have managed to keep from taking center stage yet.[22]

Mazerov chimed in during another roundtable, similarly extending his analysis to all business taxes:

> And basically, the business community has been in cahoots with those political interests because they're getting benefits that they want: *lower corporate income and other business taxes*. The business community potentially *has far more influence over the direction of tax policy* than any of the people on this call do.[23]

BEMS's Estimate of State Revenue Losses From Flawed Corporate Income Tax Design

BEMS's critique of the structural flaw in the corporate income tax is, in part, widely shared in the rest of the world. There is a global consensus that international profit shifting by multinational businesses is a serious problem assignable to structural deficiencies in national corporate income taxes. This consensus is the driving force behind the OECD/G20's pillar 2 global minimum tax (GMT).[24] However, the global accord applies to harmonized central government solutions, not to unilateral subnational (state) solutions. There is no similar consensus about the impact of global profit shifting at the state level (particularly after

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[20] Bucks et al., "Pragmatism Not 'Punishment': Why Some Should Pay More in a COVID-19 World," *supra* note 3, at 386-387 (emphasis added).

[21] Bucks et al., "Shoring Up State Corporate Income Taxes," *supra* note 3, at 714 (emphasis added).

[22] Bucks et al., "Weak Corporate Tax Reform Critiques Suggest Serious Debate Isn't Intended," *supra* note 3, at 296 (emphasis added).

[23] Bucks et al., "Critical Reflections on COST's Sales Tax Study," *supra* note 3, at 868 (emphasis added). Moreover, in BEMS's critique, business political power in the tax legislative arena is supplemented by business tax planning and avoidance techniques. Shanske, in an article he coauthored highlighting profit-shifting states: "Corporate income taxes . . . have been increasingly plagued by taxpayers' use of tax-avoidance mechanisms for shifting profits to tax havens and to other (low-tax) foreign jurisdictions. This is perhaps the central problem of modern tax administration." Shanske and Gamage, "Why States Should Tax the GILTI," *State Tax Notes*, Mar. 4, 2019, p. 751.

[24] Felix Hugger et al., "The Global Minimum Tax and the Taxation of MNE Profit," OECD Taxation Working Paper No. 68, at 8-21 (Jan. 9, 2024); *see also* Hugger, Ana González Cabral, and Pierce O'Reilly, "Effective Tax Rates of MNEs: New Evidence on Global Low-Taxed Profit," OECD Taxation Working Paper No. 67 (Nov. 21, 2023).

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taking into account the GMT) or whether (or how) the problem should be separately addressed at the state level.[25]

So what is BEMS's estimate of the state tax revenue loss from structural design flaws in the corporate income tax? For the most part, BEMS rely on the estimates made by a liberal tax policy organization, the Institute on Taxation and Economic Policy (ITEP).[26] ITEP, in its most recent analysis in 2019, estimated that states lost about $17 billion a year in corporate income tax revenue because of profit shifting. The estimate reflects the impact of states not adopting the two BEMS-recommended changes to corporate income tax reporting. For the 14 states that still maintain separate reporting regimes, ITEP estimated about $3 billion in annual revenue increases if all these states adopt water's-edge combined reporting. For all the states (other than Alaska for oil and gas companies) that have not yet adopted mandatory worldwide combined reporting, ITEP estimated an annual revenue gain of about $14 billion if they do. Since most states impose water's-edge combined reporting and none of the states impose mandatory worldwide combined reporting for all taxpayers, the second structural deficiency is the much bigger one from an estimated lost revenue perspective.[27]

The ITEP estimates are significantly overstated, in particular because they do not take into account several necessary variables that, if included, would result in sizable reductions. First, the estimates do not provide for foreign factor representation as they incorporate foreign-source income into presumed tax bases without adjusting the denominator of the apportionment formulas to include the factors (such as foreign sales) that contribute to the production of the income. Second, the estimates also don't factor in foreign-source income already in a state's corporate income tax base, so for those states already taxing a portion of GILTI or foreign dividends, double counting of foreign-source revenue results.[28] Making both of these adjustments would materially reduce any anticipated increase in net taxable income in a state.

Most importantly, the ITEP estimates are already obsolete because they were made before the OECD/G20's pillar 2 GMT reform took effect in many countries in 2024. According to the definitive OECD taxation working paper (released January 2024), because the new global tax reform reduces the incentives to shift profits, the GMT will reduce global profit shifting by nearly half.[29] Furthermore, with both advanced nations and low-tax nations adopting the GMT, the percentage of profits in low-tax jurisdictions (those with tax rates below 15 percent) will fall by two-thirds.[30] Based solely on the new pillar 2 developments (and not including any adjustments for factor representation or income already included in the tax base), the ITEP estimate of the impact of profit shifting at the state level may be overstated by as much as one-half or even two-thirds.

[25] Indeed, to the extent a global consensus exists regarding subnational (state) income taxes, it is that such taxes should be limited in scope and not tax foreign income. Of the 48 OECD or G20 nations (other than the United States), representing (together with the United States) nearly 90 percent of global domestic product, only eight other countries have subnational corporate income taxes, and among those only Korea is taxing foreign-source income at the subnational level (at a low 2.5 percent rate). PwC, "Survey of Subnational Corporate Income Taxes in Major World Economies: Treatment of Foreign Source Income," study prepared for the STRI (Nov. 2019). Hugger et al., *supra* note 24.

[26] For the ITEP study, see Richard Phillips and Nathan Proctor, "A Simple Fix for a $17 Billion Loophole: How States Can Reclaim Revenue Lost to Tax Havens," Institute on Taxation and Economic Policy (Jan. 17, 2019). BEMS frequently cite the ITEP study (or similar numeric estimates) approvingly. *See* Bucks et al., "Weak Corporate Tax Reform Critiques Suggest Serious Debate Isn't Intended," *supra* note 3, at n.7; Shanske, Reuven S. Avi-Yonah, and Gamage, "Reforming State Corporate Income Taxes Can Yield Billions," *Tax Notes State*, June 8, 2020, p. 1212; Shanske, "How the States Can Tax Shifted Corporate Profits: An Application of Strategic Conformity," 94 *S. Cal. L. Rev.* 251, at 252 (2021); Shanske and Bucks's presentation to the New Hampshire Commission on Worldwide Combined Reporting for Unitary Business under the Business Profits Tax (Sept. 25, 2023). See also the reliance of Don Griswold, Mazerov's colleague at the Center on Budget and Policy Priorities, on the ITEP estimate in his series of articles on the virtues of combined reporting: Don Griswold, "Innovation Principles for Multistate CIT Planning — Part 1," *Tax Notes State*, May 16, 2022, p. 729.

[27] Phillips and Proctor, *supra* note 26, at 14-16.

[28] For the ITEP method, see *id.* at 17-18. On the requirement to include foreign factor representation when taxing foreign-source income, see Frieden and Donovan, "Where in the World Is Factor Representation for Foreign-Source Income?" *supra* note 4. For another critique of the ITEP method, see Jared Walczak, "The Faulty Revenue Estimate Behind Minnesota's Consideration of Worldwide Combined Reporting," Tax Foundation (May 2023). For a survey of states that tax foreign-source income (typically without full foreign factor representation), see Frieden and Angus, *supra* note 4, at 966; and Frieden and Nicely, *supra* note 4.

[29] Hugger et al., *supra* note 24.

[30] *Id. See also* Hugger, Cabral, and O'Reilly, *supra* note 24.

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The ITEP study, however problematic, represents BEMS's outermost estimates of the lost state tax revenue attributable to structural flaws in the corporate income tax. Whether BEMS or ITEP will acknowledge the changing global landscape that is driving sharp downward revisions to profit shifting and revenue loss projections remains to be seen. As previously mentioned, the goal in this article is not to replicate the well-trodden debate over the merits of BEMS's state corporate income tax critique and proposed solutions. Accordingly, for purposes of making comparisons between the scale of business tax underpayments of corporate income tax and overpayments of sales and excise tax on business inputs and property tax on business property based on structural design optimality, I will use (without endorsing) the ITEP estimate of $17 billion a year as BEMS's benchmark for corporate income tax underpayments.[31]

Part 2: How the Flawed Design in the Sales Tax Disfavors Business

In Part 1, I laid out the framework for BEMS's argument that business does not pay its fair share of state and local taxes. The argument focuses on the corporate income tax as emblematic of all state and local taxes, and asserts that flaws in the design of business taxes, attributable to disproportionate corporate political and administrative influence, result in business paying less than its fair share of all state and local taxes.

The Structural Flaw in the Sales Tax Relating to The Taxation of Business Inputs

I turn now to the issue of whether BEMS's analysis applies to the sales and use tax on business inputs — the second-biggest state and local tax paid by business. Is business not paying its fair share, based on a design flaw in the sales and use tax — as influenced and manipulated by disproportionate business sway over the political and tax administrative systems?

There is no great suspense to the answer — it's a resounding no. BEMS's corporate income tax script is actually flipped on its head with a clear-cut structural design flaw in the sales and use tax resulting in a large business overpayment of sales tax on B2B purchases.

Few state tax issues garner more widespread agreement among tax authorities and public finance economists than on the optimal design of the sales tax. There is nearly universal belief among sales tax experts that a well-designed retail sales tax should exempt all or most B2B transactions for reasons of fairness and economic efficiency.[32] Academic support for excluding business inputs from the sales tax base dates back to the earliest decades of general sales tax enactments (Carl Shoup, Clinton Oster, John Due, and John Mikesell) and continues uninterrupted in more recent decades (Charles McLure, Walter Hellerstein, and Richard Pomp).[33]

The leading writers on sales tax theory make clear the problem lies not with tax rates or aggregate tax burden, but with tax design. Due, the author of the best-known treatise on sales taxes, commented in 1957:

> Structurally, the taxes suffer from certain *defects*. Substantial multiple taxation arises out of the failure to exclude all producers' goods; while complete exclusion is

[31] The use of the ITEP estimate, even if overstated and outdated, also provides ample room for including in the "underpayment" portion of the comparative analysis other state corporate income tax revenue-raising ideas occasionally proposed by BEMS or similarly minded advocates. *See* Shanske, Gamage, and Avi-Yonah, *supra* note 26. Some of these ideas are subsets of worldwide combined reporting (GILTI); are outdated (repatriation); or implicate revenue and economic development trade-offs (suspension of some corporate tax credits and deductions).

[32] Among the most criticized negative effects of widespread sales taxation of business inputs (and sales tax pyramiding) are the bias for integrated businesses (with fewer taxable stages); the unequal burden on different types of business (depending on the number of steps in the supply chain); the disincentive for capital investment (capital goods are included in the tax base); the unfavorable treatment of exports (in the absence of border adjustments); and the lack of transparency. *See* Frieden and Nicely, "Digital-Business Input Exemptions: Lessons From Sales Tax History," *Tax Notes State*, Jan. 29, 2024, p. 357; John F. Due, *Sales Taxation*, at 354-56 (1957); Richard D. Pomp, "Resisting the Siren Song of Gross Receipts Taxes: From the Middle Ages to Maryland's Tax on Digital Advertising," STRI, at section 5 (July 2022).

[33] Carl Shoup, "The Sales Tax," 34 *Colum. L. Rev.* 815-818 (May 1934); Clinton V. Oster, *State Retail Sales Taxation* at 137-139 (1957); Due, *supra* note 32, at 369-370; Due and John L. Mikesell, *Sales Taxation: State and Local Structure and Administration* at 15-16 (1994); Charles E. McLure Jr., "Rethinking State and Local Reliance on the Retail Sales Tax: Should We Fix the Sales Tax or Discard It?" 77 *BYU L. Rev.* 82-83, 92-93 (2000); Jerome R. Hellerstein, Walter Hellerstein, and John A. Swain, *State Taxation*, ch. 12, para. 12.01 and 12.06 (2016); Hellerstein and McLure, "John Due's Wisdom Only Ripens With Age," *Tax Notes State*, Mar. 15, 2021, p. 1161; Pomp, *supra* note 32, at 11, 27. *See also* Alan D. Viard, "Sales Taxation of Business Purchases: A Tax Policy Distortion," *Tax Notes Today State*, June 21, 2010; and Annette Nellen, "Now Is a Good Time to Start Fixing the Sales Tax Base," *Tax Notes State*, Sept. 7, 2020, p. 987.

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> impossible administratively, many states have been unwilling to provide as much exclusion as is feasible.[34]

Similarly, Walter Hellerstein, the coauthor of the leading treatise on state taxation, observes in his most recent edition: "The first *flaw* . . . is that the retail sales tax does not live up to the normative ideal of a tax on household consumption but, in fact, includes substantial business purchases within the tax base."[35]

According to Pomp, author of a leading casebook on state and local taxation:

> A *properly designed* retail sales tax should apply only to the end user, that is, the last person in the chain of production and distribution — the ultimate consumer. . . . Such a retail sales tax would reach all purchases for consumption and exempt all business inputs and investments, such as purchases for resale, like inventory.[36]

The criticism of a sales tax design that includes extensive taxation of business inputs is not limited to the retail sales tax — the U.S. states' form of a general consumption tax. Indeed, virtually all other advanced nations that enacted different types of sales and turnover taxes beginning after World War I eventually transitioned to a value-added tax in the mid-to-late 20th century. This design change from one form of a general consumption tax to another, unrivaled by any similarly sweeping tax structure reform in history, was done primarily to avoid the sales taxation of business inputs, at least to the extent their inclusion in the tax base resulted in the pyramiding of sales tax.[37]

The Quantification of the 'Overpayment' of Sales Tax by Business

Not only is there unanimity over the design flaw in the sales tax, but also reliable estimates of the costs incurred by business in overpayments of sales taxes on business inputs. For the last 20 years, on an annual basis, EY has produced a report quantifying all the state and local taxes paid by business, including sales taxes on business inputs. According to this report, in fiscal 2022, business paid about $225 billion a year in sales tax on business inputs.[38] The extensive sales taxation of business inputs results in a business share of total sales tax collections of about 42 percent (see Figure 3).[39] The design flaw in the sales tax is present in every state with a sales tax, with the bottom 10 states averaging a business share of 35 percent and the top 10 states averaging a business share of 52 percent of all sales taxes.[40]

[34]Due, *supra* note 32, at 312 (emphasis added).

[35]Hellerstein, Hellerstein, and Swain, *supra* note 33, at para. 12.06 at 1 (emphasis added). Sales taxes contain other design flaws as well, agreed upon by most experts. These include the too narrow sales tax base of business-to-consumer goods and services, and the administrative complexity of a system with decentralized sales tax administration in 45 states (plus the District of Columbia) and thousands of local taxing jurisdictions. But the sales taxation of B2B inputs is the key *business-related* design flaw recognized by most sales tax experts.

[36]Pomp, *supra* note 32, at 11 (emphasis added).

[37]A value-added tax uses a "default" mechanism, with a business input exemption built into the design of the tax. Under the VAT, all business inputs are taxed, but a refund or credit is allowed if the next stage of the supply chain is subject to VAT. This method generally ensures that the tax is applied at only one level. For a history of the global transition from turnover and sales taxes to VATs, see Philipp Genschel and Laura Seelkopf, *Global Taxation: How Modern Taxes Conquered the World*, ch. 9 (2022). For a history of the early U.S. state experimentation with business input exemptions for manufacturing, see Frieden and Nicely, *supra* note 32.

[38]The report is produced by EY on behalf of COST, and its research affiliate the STRI. All the data, research, and analysis in the report are provided by EY. *See* EY, COST, and the STRI, *supra* note 5, at 3.

[39]*Id.* at 5.

[40]Phillips and Muath Ibaid, "The Impact of Imposing Sales Tax on Business Inputs," at 8-9 (May 2019) (study prepared by EY for the STRI and COST).

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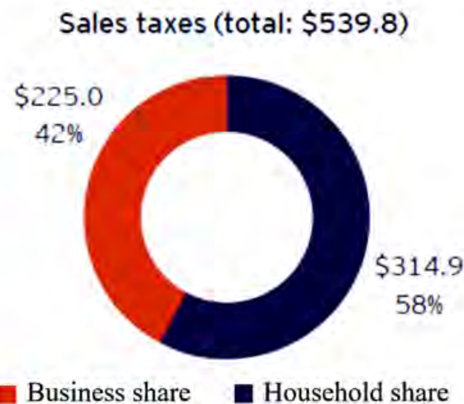
Figure 3.
Total Business and Household Share of State and Local Sales Taxes
State and Local Sales Taxes ($ Billions) on Business and Households as a Share of Total State and Local Sales Tax Collections, FY22



Source: Total State and Local Business Taxes: State-by-State Estimates for Fiscal Year 2022, study prepared by EY for STRI and COST (December 2023).

The business share of sales tax collections has been consistent over the last 20 years, averaging in the low 40th percentile.[41] Indeed, dating back to 1980, studies by EY and other researchers have similar findings, with the business share of all sales tax revenue remaining at about two-fifths or slightly higher.[42]

In terms of a fix for the sales tax design flaw, almost all sales tax experts recommend the exclusion of business inputs from the sales tax base. While they recognize that the underlying problem is the pyramiding of sales taxes, they also realize that in a retail sales tax, compared with a VAT, it is administratively impractical to require a business claiming an exemption to know if the sales tax is ultimately charged in a related series of transactions.[43]

McLure, another well-known sales tax expert, noted in 2000:

> The retail sales taxes imposed by the states suffer from several defects. . . . The ideal RST would apply only to purchases by households for purposes of consumption. It would *exempt all purchases by businesses, capital goods, goods for resale, fuels and utilities, office supplies or whatever*.[44]

But there is certainly another perspective, championed in other nations, that the sales tax design flaw is connected not to the inclusion of any business inputs in the sales tax base, but just to the "tax pyramiding" portion of business inputs (the sales subject to multiple rounds of tax). Of course, that analysis is appropriate in a country with a VAT, since the VAT is a multistage consumption tax specifically designed to exempt

[41] Frieden and Lindholm, "A Global Perspective on U.S. State Sales Tax Systems as a Revenue Source: Inefficient, Ineffective, and Obsolete," STRI, at 44-47 (Nov. 2021).

[42] *Id.* at n.20. *See also* Mikesell, "Applying Three Canons of Sound Tax Policy to Reforming State Sales Taxes," *State Tax Notes*, Sept. 24, 2012, p. 845 at n.5. The intractability of the sales taxation of business inputs problem sharply contrasts with the state corporate income tax "underpayments" problem because profit shifting is projected to decline precipitously with the 2024 introduction of pillar 2's GMT.

[43] Unlike the VAT, the sales tax depends on a "suspension" of tax and not a "default" method for avoiding pyramiding. The sales tax exemption for intermediate business inputs is essentially a proxy for avoiding pyramiding, since it is administratively impractical to isolate tax pyramiding in a multi-tier retail sales tax (without the use of tax credits). *See* Frieden and Nicely, *supra* note 32.

[44] McLure, *supra* note 33, at 83 (emphasis added).

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business inputs only if the subsequent sale in the supply chain is subject to tax.[45]

However, as an alternative measure of the business overpayment of sales tax, it is useful to quantify the tax pyramiding portion of taxable business inputs in the United States, particularly because this perspective is promoted by BEMS (see below). While estimates are not publicly available, a reasonable ballpark approximation of the tax pyramiding portion of taxable business inputs is attainable by reviewing studies from Canada — a country with a similar system of federalism as the United States but one that uniquely imposes both a national-level VAT (the goods and services tax in Canada) and provincial-level retail sales taxes that operate much like their U.S. state counterparts.

A Canadian study of the business share of GST revenue found that business purchases accounted for 17 percent of GST revenue while household purchases accounted for 83 percent.[46] Since a GST is a form of a VAT, this 17 percent share reflects business purchases by hospitals, financial institutions, and other organizations that pay GST on their purchases but do not get refunds of that amount because the medical and financial services they sell are not subject to GST and consequently do not result in any tax pyramiding. By contrast, another study of the business share of Canadian provincial retail sales tax determined that business purchases accounted for about 43 percent of provincial sales taxes — strikingly close to the business share of U.S. retail sales tax revenue of about 42 percent.[47] The 43 percent business share reflects the fact that business inputs in the Canadian provincial sales tax, as with the U.S. state sales tax, are generally included in the tax base regardless of whether the subsequent sales to households are subject to sales tax and thus "pyramided." Taken together, the Canadian experience suggests that about 60 percent of taxation of business inputs in the Canadian retail sales tax is related to the tax pyramiding portion (the difference between the provincial retail sales tax (43 percent) and GST (17 percent) shares of business inputs).

The estimate of pyramided business inputs constituting about 60 percent of all taxable business inputs certainly seems reasonable in the U.S. sales tax context given the well-documented B2B taxation (other than sale for resale of tangible personal property exemptions) in the retail, wholesale, service, and digital sectors, and the gaps even in the favored manufacturing sector.[48] When the 60 percent estimate of pyramided business inputs is applied to the fiscal 2022 total of U.S. sales tax on business inputs of $225 billion, the estimated dollar amount of sales tax on pyramided business inputs is $135 billion, meaning that these sales taxes are attributable to intermediate input transactions used in the production of taxable goods or services and should not be subject to sales tax under any optimal sales tax design.

With the estimates of business overpayment of sales taxes on business inputs, both overall and limited to the sales tax pyramiding portion, we have the basis for comparing the relative impact of the flawed designs of state sales and corporate income taxes. The sales tax overpayment on all business inputs ($225 billion) is 13 times greater than the corporate income tax underpayment ($17 billion — again using, but not endorsing, the ITEP estimate without any adjustments). The estimated sales tax overpayment on just the pyramided portion of business inputs ($135 billion) is still

[45] Even in a VAT system, there are many circumstances where no consumption tax is imposed at any stage of the supply chain. This includes exports (that are free of VAT at all stages, and subject to tax in the country of import), and other protected activities such as education where no consumption taxes are imposed in some countries for social welfare purposes.

[46] David Douglas Robertson, "Don't Tax Me When I Earn It, Tax Me When I Spend It: Why Cutting the GST Is the Wrong Choice for Canadians," at 3 (paper presented in Toronto, Ontario, Mar. 15, 2006). The data is provided by Statistics Canada and is based on the years 2000 to 2002. While the data is from the early 2000s, not much has changed in the Canadian GST since then. If anything, the business share of GST is likely to have decreased because of legislative changes in Canada. See discussion of the Canadian study in Frieden and Lindholm, *supra* note 41, at 43-45 and n.115. In a GST, a "default" mechanism ensures that tax pyramiding does not occur if future transactions are subject to the GST. However, there is still a residual amount of taxation on business inputs in situations in which the household consumption is exempt (*e.g.*, financial or healthcare services).

[47] Michael Smart and Richard M. Bird, "The Economic Incidence of Replacing a Retail Sales Tax With a Value-Added Tax: Evidence From Canadian Experience," 35 *Can. Pub. Pol'y* 86 (Mar. 2009).

[48] *See* Frieden and Nicely, *supra* note 32, at Parts 3 and 4.

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eight times greater than the purported corporate income tax underpayment.[49]

BEMS's Perspective on the Sales Tax on Business Inputs

So, let's look closely at BEMS's commentary on the sales tax on business inputs. Do they accept that when the same "optimal structural design" criteria are applied to both the sales tax and the corporate income tax, that the overpayment of sales taxes by business is one order of magnitude larger than the underpayment of corporate income taxes? To the contrary, BEMS's approach to the flawed sales tax design is characterized not by condemnation, but by a convoluted and contradictory mix of three elements:

- a grudging acknowledgment of the principle that an optimal sales tax design exempts all or most business inputs;
- a minimization and rationalization of the problem of taxing business inputs that sidesteps the logical conclusion that overpayments of sales tax by business are far larger than underpayments of corporate income tax; and
- worse still, an active support for taxing more business inputs through the expansion of the sales (or other gross receipts) tax base to include digital business inputs (digital advertising and data mining).

The consensus among tax experts that a well-designed sales tax exempts business inputs is so strong that even BEMS recognize the validity of this principle. Shanske, in an article he coauthored, observed:

> Of course, all consumption taxes raise significant design concerns. First, business inputs should generally remain untaxed. When business inputs are taxed, businesses raise retail prices to cover sales taxes paid on transactions during production, a concept often referred to as tax pyramiding (that is, a tax on a tax). This is especially problematic in the sales tax context in which there may be many levels involved in production processes.[50]

Similarly, Mazerov stated in one of the roundtables:

> I agree with our [Council On State Taxation] colleagues that we should aspire to a more rational sales tax system. . . . And I'm on record — I've written a report that they cited — saying that although I think the problems flowing from taxation of business inputs are exaggerated, we shouldn't make the problem worse when we start expanding the sales tax to services. . . . In short, in terms of what an ideal sales tax looks like, I do think that economic theory has something useful to say to guide us.[51]

Even Enrich, in critiquing a study on sales tax design, issued a half-hearted endorsement of the principle:

> The thing that I was most struck by in the report is that it makes a very familiar argument: If the retail sales tax is intended to be a tax on consumption, it is very poorly designed to serve that function. And that's unquestionably true.[52]

While tepidly recognizing the sales tax principle that all or most business inputs should be exempt, BEMS trip over themselves in their rush to minimize or rationalize the widespread inclusion of business inputs in the sales tax base. Among their myriad arguments are: the U.S. sales tax is so badly designed there's little to be gained by fixing it; the business inputs problem is not as bad as the business side is suggesting; it's appropriate that business should pay more in taxes; the administrative difficulties of exempting business inputs, especially for small businesses,

[49] For the ITEP estimates, see Phillips and Proctor, *supra* note 26. If the ITEP estimate is adjusted downward to reflect the impact of the GMT (and not any other state-specific adjustments), the differential between the "overpayment" of sales tax on business inputs and the "underpayment" of corporate income tax at least doubles to 26 to 1 (for all business inputs) and 16 to 1 (for pyramided business inputs).

[50] Gladriel Shobe et al., "Why States Should Consider Expanding Sales Taxes to Services, Part 1," *Tax Notes State*, Dec. 21, 2020, p. 1353. *See also* Shanske's February 22, 2023, testimony (at 1:22:30) to the California Assembly's Revenue and Taxation Committee relating to sales tax expenditures, concurring with the generally accepted academic view that taxing business inputs is a deviation from retail sales tax principles.

[51] Bucks et al., "Critical Reflections on COST's Sales Tax Study," *supra* note 3, at 863.

[52] *Id.* at 861.

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may outweigh the gains; and a series of "whataboutisms," contending that until other state tax problems are solved, the business inputs problem should not be addressed.[53] Several of these arguments are incorporated into Enrich's conclusion about taxing business inputs:

> Shifting some of that taxation onto businesses probably is not a bad thing. And if we can't do a lot of other things to build a more robust overall revenue system, it probably makes sense to leave it that way and to write off the economists' theoretical objections as not particularly meaningful.[54]

There is one element of BEMS's analysis of the sales tax on business inputs that has some merit — their argument that the real design flaw is sales tax pyramiding, and not the taxation of all business inputs. According to Enrich:

> Taxing lots of purchases by businesses — and as you know, we've seen a number over and over again, that that's maybe 40 percent of retail sales tax revenues — may not be such a bad thing. Not all of it is passed through, because in many cases, the entity that is being taxed on the intermediate goods isn't being taxed on its ultimate sales.[55]

Shanske concurs: "And a final point, one that Peter raised, is that it's not so terrible to tax business inputs if you're not taxing the final service at the end."[56] As does Mazerov:

> I agree that the business community greatly exaggerates the pyramiding problem, because, as you point out, so much final consumption is sales tax exempt. We have a huge healthcare sector, for example, in which health services aren't being taxed, so what's the big deal from an economic standpoint if hospitals are paying sales taxes on their medical supplies. That said, it's a legitimate transparency issue, and I think as "good government" people we should care about it.[57]

In a retail sales tax (as contrasted with a VAT), it is administratively difficult to isolate just the portion of business inputs that results in tax pyramiding. This is why most sales tax experts recommend exempting all or most business inputs in a retail sales tax. But even if the policy focus is limited to the portion of taxable business inputs that are followed by taxable consumer sales (the tax-pyramided portion), the estimated total of business overpayment of sales tax on business inputs is roughly $135 billion. As noted previously, this tax-pyramided portion of business inputs is still eight times larger than the most outsized ITEP estimate of the corporate income tax underpayment attributable to profit shifting (and 16 or more times larger if forthcoming adjustments are made to the ITEP estimate for the impact of the pillar 2 GMT).[58]

After spotlighting the distinction between taxable business inputs and pyramided business inputs, however, BEMS act as if they are off the hook — and don't need to address the current problem any further. The closest they come to any action steps are comments by Mazerov and Shanske that business input exemptions should be considered in *future* sales tax (on services) base expansions.[59] Apparently for BEMS, the purported $17 billion in corporate tax underpayments is cause for scaling the ramparts,

[53]See comments of BEMS on business inputs: Bucks et al., "Critical Reflections on COST's Sales Tax Study," *supra* note 3.

[54]*Id.* at 861.

[55]*Id.*

[56]*Id.* at 862.

[57]*Id.* at 863.

[58]*See* discussion in Part 1, *supra*.

[59]Mazerov and Shanske, in the context of broadening the sales tax base to services, do generally recommend exempting services purchased by business. But these recommendations never extend to addressing or rectifying the current inclusion of several hundred billion dollars of tax on business inputs in the sales tax revenue base. *See* Mazerov, "Expanding Sales Taxation of Services: Options and Issues," Center on Budget and Policy Priorities, at 25-29 (July 2009); Mazerov quoted in Bucks et al., "Critical Reflections on COST's Sales Tax Study," *supra* note 3, at 863; Grace Stephenson Nielsen et al., "How States Should Now Consider Expanding Sales Taxes to Services, Part 2," *State Tax Notes*, Jan. 4, 2021, p. 45. Enrich expresses even less enthusiasm for addressing sales tax pyramiding. In the roundtable critiquing the COST study by Frieden and Lindholm (see *supra* note 41), Enrich said: "The part that I was really questioning is the extent of the focus on pyramiding. And I'm just no longer convinced that this is an issue that deserves the level of concern that it gets in the literature and in this report." Bucks et al., "Critical Reflections on COST's Sales Tax Study," *supra* note 3, at 864.

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while $135 billion in sales tax overpayments on pyramided business inputs is just white noise.[60]

BEMS's Support for Additional Business Inputs Taxation

The final indication that BEMS have a contradictory approach to design flaws that violate tax policy principles in the corporate income tax compared to the sales tax (whatever their relative dollar impact) is their vocal advocacy for an expansion of the sales or gross receipts tax base to include digital business inputs. In several roundtables, all four BEMS declare their unambiguous support for the enactment of digital services taxes or the expansion of existing sales tax bases to tax digital business inputs, including monetized B2B sales of digital advertising or nonmonetized data mining from consumers.[61] Both of these business inputs are used to enhance business-to-consumer (B2C) sales over digital platforms, or to facilitate additional digital advertising.[62]

In advocating for more, not less, taxation of business inputs, BEMS come up with all kinds of creative, even bizarre theories for why gross receipts taxes or sales taxes should be imposed on digital advertising or data mining. These include theories based on a "consumption gap"; a severance tax; a social regulatory tax; an excess profits tax; and a bartered transaction model. I have addressed (and critiqued) these theories in previous articles, so I won't repeat those arguments here.[63]

What is clear, however, is that BEMS's justifications for DSTs (or sales tax base expansion) are no more than a smoke screen for expanding the sales taxation of business inputs.[64] Shanske, in an article he coauthored, fully acknowledges that a DST that imposes an excise tax on digital advertising (as a proxy for barter transactions and data mining) is taxing business inputs and creating another layer of sales tax pyramiding:

> To be sure, digital ads are a business input and so there would be some pyramiding if the costs are shifted back to the advertising businesses. But our point is that as a tax only on one later stage of production, it should not cause great pyramiding and it is unfair to compare its economic effects to broad-based turnover taxes.[65]

Thus, Shanske excuses the inefficient pyramiding of a DST because it applies to only one additional level. Several problems, however, are implicated by this defense of "limited" pyramiding. First, the one extra layer of pyramiding he references — the DST imposed on digital advertising (or data mining) — is quite significant from a revenue perspective.[66] Second, and more important — Shanske's assertion that one additional level of pyramiding is relatively harmless ignores the excessive pyramiding/cascading of sales taxes that is already overwhelming state sales tax systems. A DST or sales tax on digital advertising or data mining

[60] One of Bucks's favorite put-downs of critics of the ITEP profit-shifting calculation is that there is a big problem, whether the estimate is on the low or high end. According to Bucks, "Well, in fact, most experts agree that profit shifting by multinational corporations to avoid taxes is either (a) an enormous problem or (b) a catastrophically enormous problem." Bucks et al., "Weak Corporate Tax Reform Critiques Suggest Serious Debate Isn't Intended," *supra* note 3, at 289. With the knowledge that Bucks was speaking of ITEP estimates at the high end of $17 billion a year, and at the low end, one-half or less of that amount, one ponders the adjectives he would need to describe the size of business sales tax overpayments at their low end of $135 billion (the estimated tax paid on pyramided business inputs) and at the high end of $225 billion (the tax paid on all taxable business inputs).

[61] For BEMS's support for DSTs or sales taxes on digital advertising and data mining, see Bucks et al., "The Maryland and New York Approaches to Taxing the Data Economy"; and Bucks et al., "Is It Time to Tax the Digital Economy?" *supra* note 3.

[62] On the similarities between DSTs and sales tax base expansion to digital advertising and data mining — and how they both constitute gross receipts taxes on business inputs — see Frieden and Lindholm, "State Digital Services Taxes: A Bad Idea Under Any Theory," *Tax Notes State*, Apr. 10, 2023, p. 89.

[63] *Id.*; *see also* Frieden and Stephanie T. Do, "State Adoption of European DSTs: Misguided and Unnecessary," *Tax Notes State*, May 10, 2021, p. 577.

[64] A study prepared for COST in 2005 (based on 2003 data) determined that business purchases accounted for 98 percent of all advertising and 84 percent of data processing services (roughly analogous to data mining). *See* Robert Cline et al., "Sales Taxation of Business Inputs: Existing Tax Distortions and the Consequences of Extending the Sales Tax to Business Services," COST, at 10 (Jan. 25, 2005).

[65] Young Ran Kim and Shanske, "State Digital Services Taxes: A Good and Permissible Idea (Despite What You May Have Heard)," 98 *Notre Dame L. Rev.* 741, at 801 (2022).

[66] Frieden and Lindholm, *supra* note 62, at 102-103.

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can't be viewed in isolation; its cumulative impact must be measured in conjunction with the existing retail sales tax on business inputs.[67]

BEMS's antithetical approach to an income tax design flaw (resulting in profit shifting) and a sales tax design flaw (resulting in sales tax pyramiding) is disappointing but not surprising. If BEMS were intellectually consistent, they would say:

> We believe the corporate income tax contains an important structural design defect that favors business, and causes it to underpay its fair share of income taxes. But we also believe the sales tax reflects a design flaw that disfavors business and results in business sales tax overpayments far in excess of income tax underpayments. Finally, we acknowledge that the profit-shifting problem is shrinking because of the emerging GMTs at the national and global level, while the problem of sales tax on business inputs fully continues without resolution, at least in the United States.

But they can't afford to apply the same analytical framework to state corporate income and sales taxes because it would expose the fallacy of their perspective that the corporate income tax is representative of, and not an aberration from, other state and local taxes on business.

Part 3: How the Design of the Property Tax System Favors Homeowners and Not Business

Now, let's turn the focus to property tax, the largest tax that business pays at the state and local level. Property tax constitutes 34.7 percent of all taxes business pays at the state and local level (see Figure 1), and yet it receives the least attention from a public policy perspective.

Once again, I will use the same criteria that BEMS apply to the state corporate income tax: (1) are there flaws in the tax design that unduly favor business, causing it to pay less than its fair share; and (2) are these structural elements the result of undue business influence over the political or tax administrative systems?

Property taxes are typically administered at the local level with extensive state oversight. There is a broad range of different property tax requirements across the country, reflecting variations in local and state provisions on tax rates, bases, and exemptions. The one consistent element in most taxing jurisdictions, however, is that the design of property taxes significantly favors residential homeowners and disfavors business.

Statutory Exemption and Tax Rate Provisions That Favor Homeowners and Disfavor Business

Property tax statutory provisions cover the gamut of homestead exemptions, property tax credits, split-roll or dual-rate classifications, assessment limits, "circuit breakers," and deferral of taxes — almost all designed to provide property tax relief to homeowners or impose greater burdens on businesses.

The most prevalent property tax relief provisions for homeowners are homestead exemptions and tax credits, which are available in 46 states and the District of Columbia.[68] This type of relief is called a "homestead" benefit because it typically applies only to primary residences, and not rental or investment property. A homestead exemption provides a reduction in the value of a home, either a fixed dollar amount or a percentage of property value, for purposes of calculating the property tax on assessed value. A homestead credit, similarly, reduces the property tax by a particular dollar amount for homeowners. In some states, every homeowner gets the tax exemption, while in other states the benefit may also depend on income level, property value, age, or some special status (for example, veterans or people with disabilities).[69]

Another common mechanism for providing preferential treatment to homeowners and an unfavorable outcome to business is a dual-rate classification system. Twenty-five states allow local governments to impose differential rates,

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[67] *Id.* at 103-104. *See also* Frieden, Nicely, and Priya D. Nair, "The Best and Worst of State Sales Tax Systems," COST, at 7-14 (Dec. 2022), and state-by-state charts (beginning on p. 41 of that report).

[68] Lincoln Institute of Land Policy, State-by-State Property Tax at a Glance, at 3-4 (Oct. 2023).

[69] Adam H. Langley and Joan Youngman, "Property Tax Relief for Homeowners," Lincoln Institute of Land Policy, at 35-38 (2021).

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almost always resulting in a lower tax rate on residential homeowner property and a higher rate on business property.[70] Different classification of residential and business property is achieved either by separate nominal tax rates or different assessment ratios — that is, using a higher percentage of market value to determine tax values for business property than for residential property.[71]

Two other common types of property tax relief for homeowners are circuit breakers and deferral. Circuit breakers are authorized in 31 states, and provide targeted property tax relief, typically to seniors or low-income homeowners, by capping the maximum amount of property tax charged.[72] A deferral program, used in 17 states, allows all or some homeowners to delay payment of property tax until some future event, such as when the home is transferred to another owner.[73]

Tax Base Provisions That Disfavor Business

In addition to the numerous homeowner relief provisions or differential rate structures that favor residential over business property, most states have tax base provisions that disadvantage businesses by broadening the business property tax base to include not just real property, but also personal property. In 36 states (and the District), some form of personal property such as machinery, equipment, and fixtures (and occasionally business inventory) is included in the property tax base for businesses. Only 14 states either fully exempt business personal property or include in the tax base only limited categories of (generally) centrally assessed property for utilities or railroads. By contrast, in most jurisdictions, the only personal property taxed to individuals is automobiles.[74]

The most common business personal property taxed in states are fixtures, including office furniture, equipment, display racks, tools for offices, stoves, refrigerators, air conditioners, and similar items for apartment buildings (taxable in 37 states and the District); machinery and equipment (taxable in 31 states and the District); and manufacturers' inventories, including raw material, unfinished products, and supplies (taxable in nine states).[75]

On a national basis, personal property taxes make up an estimated 5.4 percent of total property tax collections. Business pays about 85 percent of all personal property taxes, with only about 15 percent paid by households (primarily taxes on automobiles).[76] The property tax on business personal property has long been controversial, and efforts to reduce or eliminate the taxes are frequently considered by states.[77]

Property Tax Incentives That Favor Business

There is one notable exception to the pattern of property tax statutes designed to favor residential homeowners over business. Property tax incentives for business are often included in

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[70] Lincoln Institute of Land Policy, *supra* note 68, at 3.

[71] Langley and Youngman, *supra* note 69, at 19-21. "For example, a state may have a 100 percent assessment ratio for commercial property and a 70 percent ratio for residential property. . . . For example a city could have a 2.0 percent nominal tax rate for commercial property and a 1.0 percent nominal tax rate for residential property." *Id.* at 20.

[72] Lincoln Institute of Land Policy, *supra* note 68, at 3; Langley and Youngman, *supra* note 69, at 39-41. For example, a circuit breaker can provide a property tax credit for every dollar a property tax exceeds a certain percentage of income.

[73] Lincoln Institute of Land Policy, *supra* note 68, at 3-4. Another provision that typically benefits homeowners is assessment limits. Eighteen states have statutory provisions that restrict growth in property values through assessment limits. *Id.* About half of assessment limits benefit only residential homeowners and the other half benefit both homeowners and business. Assessment limits can also have uneven impacts among subsets of homeowners (for instance, depending on how long they have lived in their residences). There are also types of property tax relief, such as rate and levy limits, that are often applied to both residential and business property. Langley and Youngman, *supra* note 69, at 25-30.

[74] Walczak, "Personal Property De Minimis Exemptions Slash Compliance Burdens at Trivial Cost," Tax Foundation (Dec. 2023).

[75] Lincoln-MCFE, *supra* note 6, at 26-29, and Appendix Table 4g. In some of the states that tax personal property, the property tax system provides preferential treatment to personal property relative to real property (such as lower tax rates), but this is offset by the disproportionate inclusion of personal property in the business property tax base. *Id.* While business personal property as a share of total taxable property varies by business sector, the Lincoln-MCFE study estimates personal property makes up 50 to 60 percent of total personal and real property value for industry, 17 percent for commercial property, and about 5 percent for apartment buildings. *Id.* at 20, 25-26, 30, 48-49. *See also* Aaron Twait, "The Effects of State Personal Property Taxation on Effective Tax Rates for Commercial Property," Working Paper WP18AT1, Lincoln Institute of Land and Policy (Apr. 2018).

[76] Walczak, *supra* note 74, at 3-6. *See also* Joomi Kim, Phillips, and Cline, "Property Taxes on Business Capital: A Large and Growing Share of State and Local Business Taxes," *State Tax Notes*, Mar. 27, 2006, p. 949.

[77] Catherine Collins, "Property Tax Trends 2020-2021," Lincoln Institute of Land Policy (Apr. 6, 2021). Indeed, the personal property tax as a share of all property taxes has fallen about two-thirds since the 1950s. Walczak, *supra* note 74, at 3; Daphne A. Kenyon, Adam H. Langley, and Bethany P. Paquin, "Rethinking Property Tax Incentives for Business," Lincoln Institute of Land Policy, at 18-19 (2012).

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state and local government incentive programs along with other types of incentives (income and sales tax incentives; loans; grants; and infrastructure spending) aimed at attracting or retaining key industries and higher-paying industrial or knowledge-intensive jobs. The use of property tax (and other) incentives has increased over the last 50 years, particularly as states and localities compete to retain declining manufacturing employment or attract fast-growing technology companies.[78]

Property tax incentives make up only a modest share of overall state and local tax incentives — about one-quarter according to a 2017 study.[79] The dollar value of property tax incentives was an estimated $14 billion in 2018.[80] While property tax incentives provide a counterbalance to the exemptions, differential statutory rate, and narrower tax base that favor residential homeowners over business, the incentives are typically one-offs and relatively small compared with other statutory provisions that are skewed to favor homeowners and disfavor business.[81] Property tax incentives for businesses also differ from most preferential treatment accorded to residential homeowners because incentives typically require businesses to provide something in return for the tax break, such as a certain level of capital investment, job creation, or location in a specific enterprise zone.[82]

The ETR on Homeowner Property Is Generally Much Lower Than the ETR on Business Property

The most comprehensive study comparing homeowner and business property taxes across all 50 states is the annual "50-State Property Tax Comparison Study" issued jointly by the Lincoln Institute of Land Policy and the Minnesota Center for Fiscal Excellence (Lincoln-MCFE).[83] The study compares the ETRs in four categories: one category of nonbusiness property (residential homeowner property); and three categories of business property (apartment rental property, commercial property, and industrial property).[84] These four categories make up about four-fifths of the aggregate assessed value of all the property subject to property tax at the state and local level.[85]

The Lincoln-MCFE study sums up the primary state and local statutory provisions that provide preferential treatment for homeowners:

> Many cities have preferences built into their property tax systems that result in lower effective tax rates for certain classes of property, with these features usually designed to benefit homeowners. . . . There are four types of statutory preferences built into property tax systems that can lead to lower effective rates on homesteads than other property types: the assessment ratio, the nominal tax rate, exemptions and credits, and differences in assessment limits. In total 40 of the 53 cities [in their study] have statutory preferences that favor homesteads over commercial properties. Above that, 21 of these 40 cities benefit homeowners using

[78] *See* Kenyon, Langley, and Paquin, *supra* note 77. Types of property tax incentives include property tax abatements, tax increment financing, and enterprise zones. *Id.* at ch. 4.

[79] Timothy J. Bartik, "A New Panel Database on Business Incentives for Economic Development Offered by State and Local Governments in the United States," W.E. Upjohn Institute for Employment Research, at 89-90 (Jan. 1, 2017).

[80] Bartik, "Making Sense of Incentives: Taming Business Incentives to Promote Prosperity," W.E. Upjohn Institute for Employment Research, at 9 (Oct. 8, 2019).

[81] For instance, the much broader inclusion of personal property in the business property tax base increases business property taxes by about three-fifths more on an annual basis than property tax incentives decrease business property taxes. In fiscal 2021, total state and local property tax collections were $671.4 billion and the differential between business and residential personal property tax payments was about 3.8 percent of all property taxes (for a total of $25.5 billion). By comparison, in 2021 property tax incentives (inflation adjusted from the 2018 estimate) were only about $16 billion. EY and COST, "Total State and Local Business Taxes: State-By-State Estimates for Fiscal Year 2021," at 5 (Dec. 2022) (for fiscal 2021 property tax total); Walczak, *supra* note 74, at 6-7 (for personal property tax base differential); Bartik, *supra* note 79, at 9 (for property tax incentives total for 2018, inflation adjusted to $16 billion for 2021). Note: Fiscal 2021 data was used in this calculation, and not fiscal 2022 data, to align the three different data sources.

[82] Kenyon, Langley, and Paquin, *supra* note 77.

[83] Lincoln-MCFE, *supra* note 6. The study is based on detailed examination of the property tax rules in the largest city in each state, the largest 50 cities in the country, and in a small city in each state. *Id.*

[84] Other business property categories not included in the study are farms, public utilities, and natural resources. The Lincoln-MCFE study commented on its selection of the four classes of property: "First, they represent the vast majority of property value across the country. . . . Second, these are the classes of property policymakers tend to focus time and attention on. Third, most omitted classes of property are either not relevant to all fifty states (cabin properties, for example) or require more complex work to develop assumptions about value (public utilities and farms, for example)." *Id.* at 47.

[85] *See* "Tax Base by Property Type" in Lincoln's Significant Features of the Property Tax database. The "four-fifths" estimate for the nationwide average of property value of the four categories included in the Lincoln-MCFE study is based on the disaggregated data by property class provided by about two-thirds of the states and included in Lincoln's database. *Id.*

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at least two of these four statutory preferences in 2022. In 10 cities, preferential treatment for homeowners is delivered through exemptions or credits alone, while in 9 cities preferences are delivered exclusively through differences in assessment ratios or nominal tax rates.[86]

The Lincoln-MCFE study uses a "classification ratio" to calculate the different ETRs for business and homeowner property, after factoring in the preferable treatment of homeowner properties and unfavorable treatment of business properties. State classification ratios are calculated for the largest city in each state and three additional unique property tax systems (New York City, Chicago, and Washington, D.C.). The study's analysis shows an average apartment rental to homestead classification ratio of 1.44, meaning that on average apartment rental businesses have an ETR that is 44 percent higher than homeowner properties.[87] The data collected in the study also shows an even larger average commercial to homestead classification ratio of 1.8 (meaning that on average commercial properties have an ETR that is 80 percent higher than homeowner properties),[88] and an average industrial to homestead classification ratio of 1.9 (meaning that on average industrial properties have an ETR that is 90 percent higher than homeowner properties) (see Figure 4).[89]

How Much More Property Tax Does Business Pay Than Under a Neutral Property Tax Design?

The impact of a property tax design that generally favors residential homeowners over business is evident in the aggregate property tax paid by business. In fiscal 2022 the most recent year available, the EY study of total state and local taxes on business estimates the business share of all property taxes is 54 percent (see Figure 5).

There is no publicly available estimate of how much less business would pay in property taxes on a nationwide basis if it were taxed neutrally (and uniformly) at the lower homeowner property ETR. However, a ballpark estimate is attainable for at least the three large categories of business property (commercial, industrial, and apartment rental property) based on three different data sources: the Lincoln Institute of Land Policy's database on "tax base by property type";[90] the Lincoln-MCFE study's determination of business/homeowner classification ratios for the three categories of business property;[91] and the EY study's calculation of annual property taxes paid by businesses and households.[92]

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[86] Lincoln-MCFE, *supra* note 6, at 3-4. The study also notes that "similarly, 36 cities have statutory preferences favoring homesteads relative to apartments, but only 12 offer more than one preference. Eight cities have preferential assessment ratios and/or nominal tax rates only, while 16 cities offer homestead exemptions or credits alone." *Id.* at 4.

[87] Lincoln-MCFE, *supra* note 6, at 3-4 and 33-36. The "apartment rental" classification ratio is lower than the commercial and industrial classification ratios because in some jurisdictions apartment rental property gets the same preferential treatment as homeowner property.

[88] *Id.*

[89] The Lincoln-MCFE study calculates the industrial property ETR (*id.* at 25-30), but not the industrial to homestead classification ratio. The industrial to homestead classification ratio, however, is nearly identical to the commercial to homestead classification ratio and was calculated by MCFE staff at a ratio of 1.90 based on data in the most recent Lincoln-MCFE study. For the method used in calculating ETRs and classification ratios, see Lincoln-MCFE, *supra* note 6, at 43-50. For an explanation of why the method may result in an understatement of all three business-homestead classification ratios, see *supra* note 81, *infra* notes 94 and 95.

[90] For the approximate property tax valuation share of each of the categories of business property, see tables on "Tax Base by Property Type," *supra* note 85. Thirty-four states break out property values by class sufficient to estimate that the average commercial and industrial property share of total taxable property value is approximately 21 percent. Of the states that break out the share of taxable property tax base by property type, there are many variations in the way data is reported. *Id.* Nonetheless, the data still provides a reasonable basis for a ballpark estimate of the commercial and industrial property share of the total value of taxable property. This finding is nearly identical to that found in an earlier study, Kenyon, Langley, and Paquin, *supra* note 77, at 14. Fewer states break out the tax base value by class for apartment rental property. See tables on "Tax Base by Property Type," *supra* note 85. However, two other sources were used to supplement this data and conservatively estimate that the average apartment rental property share of total taxable property value is 5 percent. *See* Kenyon, Langley, and Paquin, *supra* note 77, at 14; and Minnesota House Research and Fiscal Analysis Departments, "Overview of Property Taxes," presentation to House Property Tax Division, at 17 (Jan. 2023).

[91] For the commercial and apartment rental property to homestead classification ratios, see Lincoln Institute of Land Policy and Minnesota Center for Fiscal Excellence, *supra* note 6, at 3-4 and 33-36. The industry to homestead classification ratio is nearly identical to the commercial to homestead classification ratio and it was calculated by the MCFE staff at a ratio of 1.90 based on data in the Lincoln-MCFE study (see discussion at *supra* note 89, and accompanying text).

[92] The total property tax collections in fiscal 2022 for all property was $690.7 billion. EY, STRI, and COST, *supra* note 5, at 3.

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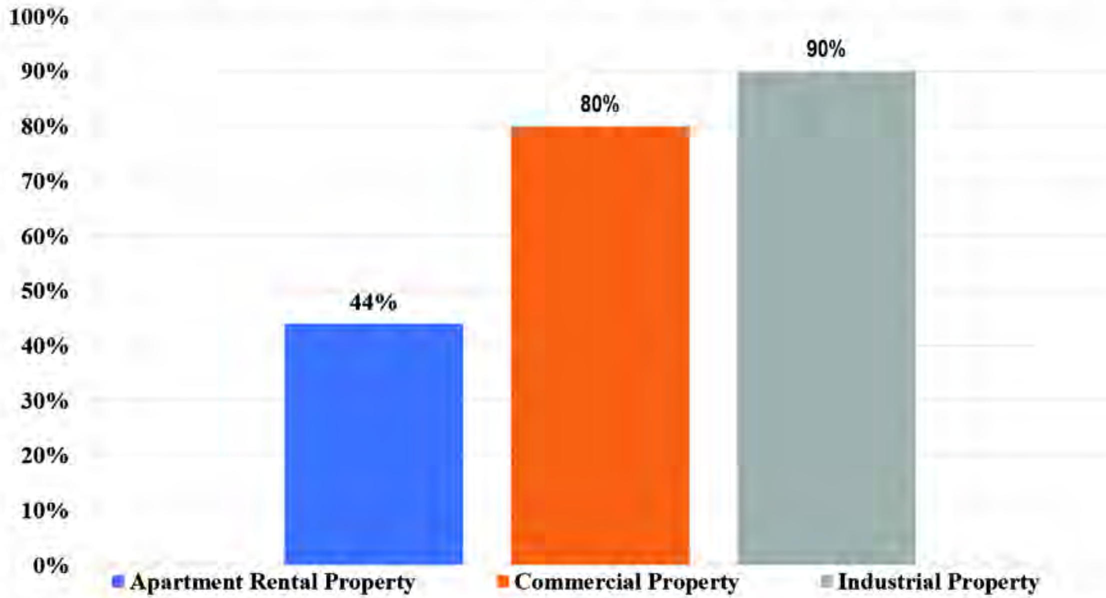
Figure 4.
The Business/Homeowner Property Classification Ratio
The Percent by Which Each Business Property Category's Effective Tax Rate Exceeds the Average Homeowner Property Effective Tax Rate



Source: Lincoln Institute of Land Policy and Minnesota Center for Excellence, 50-State Property Tax Comparison Study: For Taxes Paid in 2022 (August 2023).

Figure 5.
Total Business and Household Share of State and Local Property Taxes
State and Local Taxes ($ Billions) on Business and Households as a Share of Total Property Tax Collections, FY22

Property taxes (total: $690.7)

Business share   Household share

Source: Total State and Local Business Taxes: State-by-State Estimates for Fiscal Year 2022, study prepared by EY for STRI and COST (December 2023).

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These sources allow us to approximate the property value of the three categories of business property as a share of the value of all taxable property nationwide; determine the additional tax paid by the three business categories on their share of the total property value at the higher business/homeowner property classification ratios; and then compare the higher tax payments with what the three business categories would pay under a neutral ETR design for all classes of property. Based on this calculation, the property taxes on commercial, industrial, and apartment rental property are approximately $83 billion a year more than they would be if taxed at the same average ETR as homeowner property.[93]

This estimate of the overpayment of property taxes of these three categories of business property (based on the deviation from a neutral property tax design) is conservative and likely understates the aggregate overpayment of property taxes across all classes of business property. The reasons for the underestimation are that the Lincoln-MCFE classification ratios for commercial, industrial, and apartment rental property do not take into account certain factors that would lower the homeowner ETR and increase the business ETR,[94] and that the Lincoln-MCFE study does not include all categories of business property.[95]

While it is clear that most local property tax systems favor homeowners over businesses, there is less unanimity than in the sales tax context on the optimal design of a property tax. Some argue that property tax rates, classification, exemptions, and other provisions should apply uniformly to business and homeowner property; or that businesses should even get more favorable treatment because they use fewer public services (paid for with property taxes) than residential homeowners. Others believe that it is entirely appropriate to allow for homeowner preferences to protect vulnerable groups such as low- or modest-income households and the elderly, or to impose progressive-tax-like elements on property

[93] The property tax "overpayment" calculation method: This calculation is based on the average commercial and industrial (real) property valuation of about 21 percent and the apartment rental property valuation of about 5 percent of all property value (for a total of 26 percent of the value of taxable property); the classification ratios of 190 percent (industrial property), 180 percent (commercial property), and 144 percent (apartment rental property) compared with how much property tax would be paid under a neutral design conforming to the lower homeowner property ETRs; and the application of these classification ratios (blended at 175 percent) to all property taxes as measured by the EY study for fiscal 2022 (total property tax collections of $690.7 billion). *See supra* notes 90-92. Using this method, businesses are subjected to property tax overpayments of $83 billion based on current property taxes of $263 billion for those three classes of property (at the 1.75 classification ratio) compared with $180 billion if businesses were paying property taxes based on the homeowner ETR (assuming the level of $690.7 billion of property tax is maintained). This calculation assumes conservatively that other business property tax categories are paying property taxes on average at the homeowner ETR. The business property tax overpayments would be even higher at $113 billion based on current property tax of $263 billion for those three classes of property compared with $150 billion if businesses were paying property tax based on the homeowner ETR (assuming the total amount of $690.7 billion of property tax is lowered because of the reduction in business property taxes). This calculation is necessarily a ballpark estimate given the absence of detailed data on some states and the variation in state reporting methods in other states. However, the estimate is "conservative" because it uses the lower $83 billion and not the $113 billion estimate, doesn't include certain factors that would increase the business to homeowner property classification ratios, and omits other classes of business property that in totality would likely increase the level of business property tax "overpayments." *See infra* notes 94 and 95.

[94] The estimate of the property tax "overpayment" is likely understated because of excluded factors in the classification ratio. The Lincoln-MCFE study classification ratio calculation omits several provisions that would lower the homeowner ETR (property tax relief provisions that do not apply to all homeowners, such as low-income thresholds and circuit breakers) or increase the business ETR (the disproportionate tax base inclusion of business personal property tax). *See* Lincoln Institute of Land Policy and Minnesota Center for Fiscal Excellence, *supra* note 6, at 8, 33-36. The omission of these factors far outweighs the non-inclusion of property tax incentives in the calculation (that would lower the business property ETR). *See supra* note 81. These factors are all omitted from the classification ratio because of data or comparison limitations. However, their omission both overstates the homestead ETR and understates the business property ETR.

[95] The estimate of the property tax "overpayment" is also likely understated because of the omission of other categories of business property. The business property tax overpayment estimate includes three of the largest categories of business real property (commercial, industrial, and apartment rental property), but not other business property categories, including personal property, public utilities, farms, and occasionally natural resources. *See* Lincoln-MCFE, *supra* note 6, at 47. The structural design elements in most state and local property taxes that favor homeowners and disfavor businesses also generally negatively affect these other business categories. Of the omitted categories, only farms are sometimes provided with preferential ETRs similar to homeowners. As discussed above, the inclusion of personal property in the property tax base is heavily skewed against business (see *supra* note 76 and accompanying text). Public utilities are also subject to higher ETRs in many jurisdictions. *See, e.g.*, Executive Committee Task Force State and Local Taxation, "Property Taxation on Communication Providers: A Primer for State Legislatures," National Conference of State Legislatures (Oct. 16, 2023). A recent detailed statewide property tax burden study in Minnesota provides an example of a state where the business-homestead ETR differential increases once other business property categories are included. The Minnesota legislative study using 2022 data found that the combined business property ETR exceeded homeowner property ETR by 30 percent in the state. Minnesota House Research and Fiscal Analysis Departments, *supra* note 90, at 17. By comparison, the $83 billion overpayment estimate above based on some, but not all, business property factors and categories reflects a business property ETR that exceeds the homeowner ETR on a nationwide basis by 22 percent (see *supra* note 93).

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tax (similar to the personal income tax) based on the greater ability to pay of business. The latter view has largely prevailed and reflects a combination of the political power of homeowners (voters) and the ability of local jurisdictions to impose greater property tax burdens on businesses.

Two leading property tax experts, Adam Langley and Joan Youngman of the Lincoln Institute of Land Policy, discuss both views in the context of the debate over split property tax rates:

> Classification can be politically popular because it shifts the tax burden from homeowners to businesses. This shift allows for tax exporting, whereby the economic burden of the tax falls on individuals living outside the taxing jurisdiction. . . . However, there is an economic case that *effective tax rates* — the tax bill as a percentage of a property's market value — should be *lower* on business property because businesses often use fewer public services than households and may be more responsive to tax differentials. A reasonable middle ground would tax all property uniformly. . . . [96]

BEMS's Perspective on the Property Tax Burden

Even without consensus on an optimal design, it is apparent that the current structure of state and local property tax systems significantly favors homeowner property over business property. So what do BEMS have to say about this outcome that contradicts their thesis that state and local tax design invariably favors business? Almost nothing, as none of the 23 roundtables had a primary or even partial focus on property taxes. BEMS generally ignore property taxes even though it is undisputed that they constitute the largest single state and local tax on business.

Of the four roundtable participants, only one (Bucks) goes beyond casual observations on property taxes during their roundtable discussions. Even Bucks typically limits his comments to an occasional lament that intangible property should be included in calculations of the valuation of business property.[97] Of course, the inclusion of intangible property for business would only exacerbate the already unfavorable property tax treatment of businesses compared to residential households.

Unlike the sales tax on business inputs, where BEMS at least acknowledge the flawed tax design that disfavors business, no similar effort is made with property taxes. It's not clear whether BEMS are unaware that the statutory design of property taxes disfavors business. Or that they deliberately choose to remain silent because this outcome undermines their whole thesis that business pays less than its fair share of state and local taxes. If businesses really had the political power suggested by BEMS, they would never agree to a property tax system design that is heavily slanted in most local jurisdictions toward imposing significantly higher ETRs on business property than on homeowner property.

Part 4: Does Business Pay a Fair Share of Total State and Local Taxes?

Parts 1, 2, and 3 focus on the largest state and local taxes paid by business — the corporate income tax, sales and use tax on business inputs, and the property tax — analyzing whether the design of each tax type favors or disfavors business. Now I am going to look at the broader picture of whether business pays its fair share of *total state and local taxes*.[98]

In Part 2, I analyzed the sales and use tax on business inputs. There is near-universal belief among sales tax experts that a well-designed retail sales tax should exempt all or most B2B transactions for fairness and efficiency reasons. The amount of the business tax overpayment

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[96] Langley and Youngman, *supra* note 69, at 20-21. Langley and Youngman reference a study by Richard M. Bird, Enick Slack, and Almos Tassonyi, "A Tale of Two Taxes: Property Tax Reform in Ontario," Lincoln Institute of Land Policy (2012).

[97] Bucks et al., "Critical Reflections on COST's Sales Tax Study," at 864; and Bucks et al., "Is It Time to Tax the Digital Economy?" *supra* note 3, at 35. Other occasional BEMS remarks on property taxes steer clear of any commentary on differential ETR treatment of business and homeowner property.

[98] On one level, the question of how much and what share businesses should pay in state and local taxes is a value judgment resolved on the basis of different political, social, and economic perspectives. In this article, however, I avoid that subjectivity by using BEMS's own measure of "fair share" — the deviation from an optimal or neutral state and local tax design — as a yardstick. For another view of how much business pays in state and local taxes per dollar of net government spending that benefits businesses under the "benefits principle," see EY, STRI, and COST, *supra* note 5, at 24-25.

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attributable to the design flaw is also clear — with the upper limit of $225 billion a year (the sales tax attributable to all taxable business inputs) and a lower limit of approximately $135 billion a year (the sales tax relating to pyramided business inputs).[99]

While Part 2 focused on the flawed design of taxing business inputs under the sales tax, the same analysis applies to taxing business inputs under excise taxes. According to the EY study, excise taxes make up about 5.2 percent of all state and local taxes on business (see Figure 1), and include business purchases of fuel, hotel room occupancy, and rental cars for business use. These excise taxes are generally separate gross receipts taxes used to facilitate the imposition of higher tax rates than under the sales tax. The business overpayment of excise taxes on business inputs is $56.3 billion a year at the upper limit (the excise taxes on all taxable business inputs) or approximately $33.8 billion a year at the lower limit (the excise taxes on pyramided business inputs).[100]

In Part 3, I reviewed the property tax and established that its design in most jurisdictions significantly favors residential homeowners over business. Property taxes carry a broad range of statutory exemptions, split-roll tax rates, and differential tax bases on personal property, almost all of which favor residential homeowners over businesses. In 2022, the latest year for which information is available, the Lincoln-MCFE study found that the ETR for apartment rental, commercial, and industrial property ranged from 44 to 90 percent higher than the residential homeowner property ETR. When quantified for these three large categories of business property, a conservative ballpark estimate is that businesses are paying approximately $83 billion more in property taxes than they would under a neutral design tied to the lower ETR for homeowner property.

The corporate income tax is the only one of the largest taxes imposed on business that fits BEMS's paradigm that the design of state and local taxes favors business. There is a global consensus that international profit shifting by multinational businesses is a serious problem attributable to design flaws in the corporate income tax. As noted above, there is no similar consensus about the extent of profit shifting at the state level (particularly after the pillar 2 GMT takes effect) or whether (or how) the problem should be separately addressed with solutions at the state level. However, for purposes of making comparisons between the scale of business tax "underpayments" and "overpayments" based on structural design optimality, I am using (without endorsing) the ITEP estimate of $17 billion a year as BEMS's benchmark for corporate income tax underpayments.[101]

The outcome of the comparative "fair share" inquiry for total state and local business taxes is now clear. Using BEMS's method for measuring whether business is paying its fair share of state and local taxes based on the deviation of the tax from an optimal or neutral design, the overpayments of sales and excise tax on business inputs and property tax on business property are a staggering *15 to 21 times greater* than even the highest (unadjusted) ITEP estimates of the underpayments of corporate income tax (see Figure 6).[102]

[99] *See* Part 2's analysis of pyramided vs. non-pyramided business inputs.

[100] For the amount of all excise taxes on business inputs and their share of state and local business taxes, see EY, STRI, and COST, *supra* note 5, at 3. The rough estimate of the pyramided portion of the business inputs taxable under excise taxes is calculated using the same 60 percent used in Part 2 for calculating the pyramided portion of business inputs taxable under sales and use taxes.

[101] *See* discussion in Part 1.

[102] The 15 to 1 ratio is calculated as follows: business "overpayments" of $252 billion based on (1) the pyramided portion of the sales tax on business inputs ($135 billion), (2) the pyramided portion of excise tax on business inputs ($33.8 billion), and (3) the property tax differential if commercial, industrial, and apartment rental property pay the same ETR as homeowner property ($83 billion); compared with the business "underpayments" of $17 billion (using the unadjusted ITEP estimate). The 21 to 1 ratio is calculated as follows: business overpayments of $364 billion based on (1) the sales tax on business inputs ($225 billion), (2) the excise tax on business inputs ($56 billion), and (3) the property tax differential if commercial, industrial, and apartment rental property pay the same ETR as homeowner property ($83 billion); compared with the business underpayments of $17 billion (using the unadjusted ITEP estimate). For the source of these estimates, see the discussion in Parts 1, 2, and 3.

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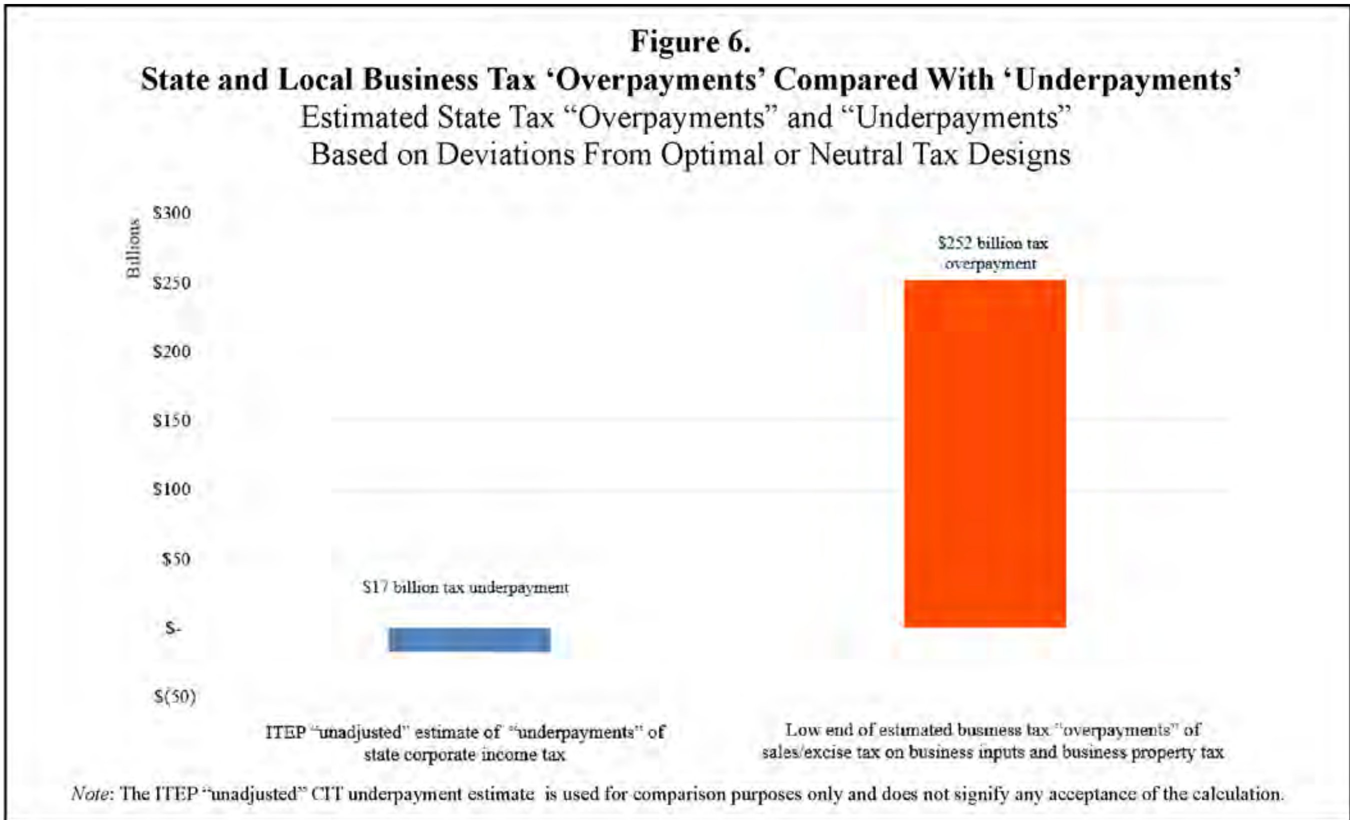

Together, these four taxes make up about three-quarters of all state and local taxes on business. The remaining one-quarter of taxes on businesses are mostly smaller categories such as individual income tax on business income, business and corporate license taxes, and public utility and insurance premium taxes (see Figure 1), and are not large enough (nor characterized collectively by favoritism to business) to change the conclusion that in the aggregate the design of state and local taxes overwhelmingly disfavors business.[103]

In making these calculations, of course, there are many assumptions and data limitations that prevent precision, but with the ratio of estimated business tax overpayments exceeding underpayments by an order of magnitude of over one, no data adjustments would materially change the outcome. Even the low-end estimate shows that business overpayments exceed underpayments based on optimal or neutral state and local tax designs by 15 to 1 (or putting it in dollar terms, more than $225 billion annually).[104] The key here is not identifying an exact amount of net overpayments but recognizing the indisputable conclusion that the current design of state and local taxes results in business paying significantly more, not less, than its fair share of state and local taxes.

The problem is not with BEMS's use of a more "objective" measure of "fair share" — using an optimal or neutral tax design as its yardstick — but with their erroneous conclusion that the "part" (the corporate income tax) that dominates their analysis is similar to the "whole" (the entirety of state and local taxes imposed on business). The corporate income tax is not a microcosm of state and local taxes from a design perspective. It is an outlier. The design of the primary state and local taxes imposed on business overwhelmingly disfavors business and refutes any notion that business has unimpeded political control over favorable outcomes in the state and local tax arena.

[103]EY, STRI, and COST, *supra* note 5, at 3.

[104]That ratio doubles to 30 to 1 or more when adjustments are made to lower the ITEP $17 billion corporate tax underpayment estimate to account (at a minimum) for the impact of the pillar 2 GMT.

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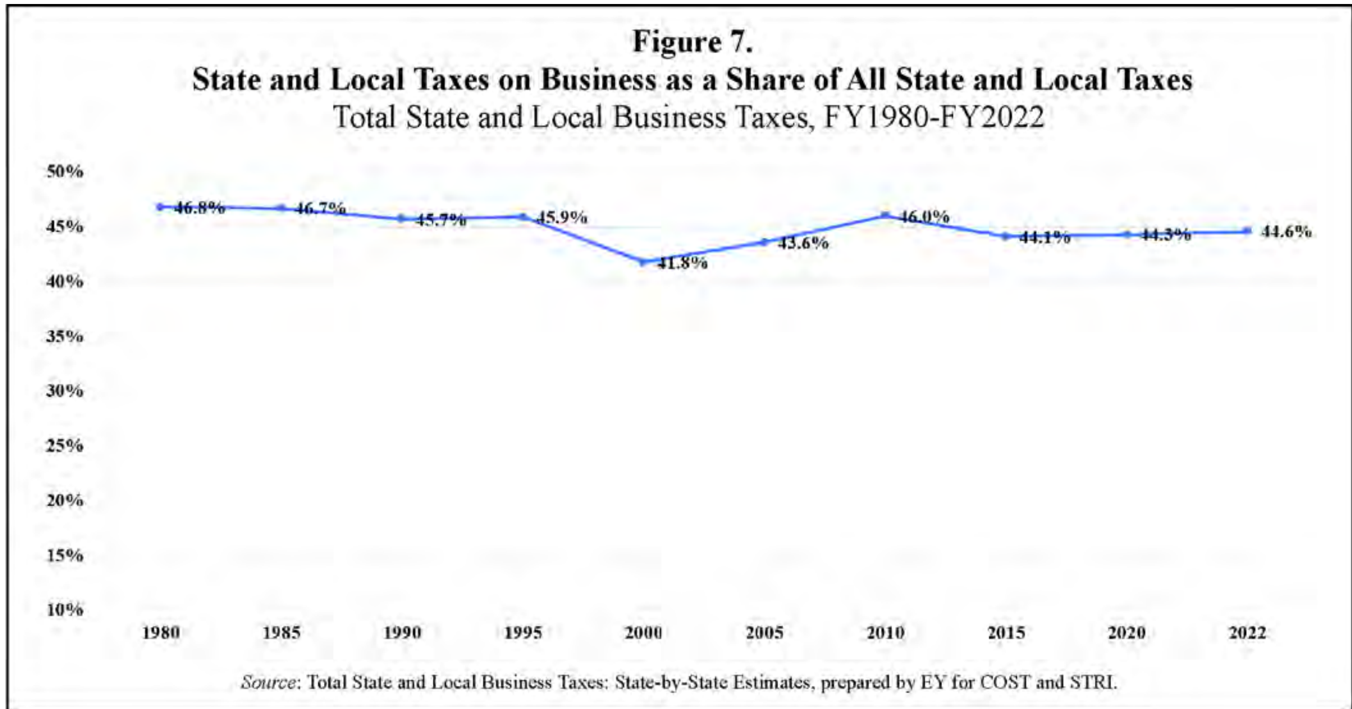

Figure 7.
State and Local Taxes on Business as a Share of All State and Local Taxes
Total State and Local Business Taxes, FY1980-FY2022

Source: Total State and Local Business Taxes: State-by-State Estimates, prepared by EY for COST and STRI.

Total State and Local Taxes Paid by Business

The breadth and scope of state and local taxes imposed on businesses provide a parallel factor that reinforces the conclusion that business is paying its fair share (or more) of state and local taxes. For the most recent fiscal year (2022), the EY study shows that the business share of all state and local taxes is 44.6 percent (see Figure 7).[105]

Moreover, the business share of state and local taxes has remained remarkably consistent for over 40 years. The business share of all state and local taxes has fluctuated in a narrow range between 41 and 47 percent of all state and local taxes (see Figure 7).[106]

The fact that business pays such a large proportion of state and local taxes and has consistently done so for decades frequently surprises many not familiar with the multiple sources of state and local business tax revenue. This is especially so given the mantra from BEMS and others that business does not pay its fair share of state and local taxes and has the power to manipulate the political and tax administration systems to obtain favorable tax outcomes.

In fact, the large share of all state and local taxes paid by business and the design elements in the state and local sales, excise, and property taxes that significantly disfavor business are interconnected. If the pyramided sales and excise taxes on business inputs were exempted to align with the principles of optimal sales taxes and the property tax laws were changed so that commercial, industrial and apartment rental properties were taxed neutrally at the same ETR as homeowner property, then the business share of all state and local taxes would drop by one-sixth or more.[107]

[105]EY, STRI, and COST, *supra* note 5. EY has produced the study on behalf of COST on "Total State and Local Business Taxes" for 20 years, beginning with fiscal 2002. All the annual studies are available on the COST website. The study is based on federal, state, and local government data, supplemented by EY's own research. The method has been clearly laid out since the earliest studies. *See* EY, specifically Cline, Neubig, and Phillips, with Fox, *supra* note 7, at Appendix: Description of Methodology.

[106]For the data for 1980-2004, see *id.* at 15. For the data from fiscal 2005 to 2022, see the annual EY "Total State and Local Business Taxes" studies available on the COST website.

[107]The purpose of this analysis is not to advocate for immediate reductions in taxes on business, or to weigh in on the ideal level of state and local government spending and taxes, but to rebut BEMS's thesis that business does not pay its fair share of aggregate state and local taxes as measured by deviations from optimal or neutral tax designs.

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BEMS's Position on the Aggregate Share of State And Local Taxes Paid by Business

So what is BEMS's response to the EY study that for the last 20 years has annually documented the share of all state and local taxes paid by business? The blinders worn by BEMS in the "fair share" debate are readily apparent when the conversation turns to their view of the aggregate state and local taxes paid by business. BEMS are mostly silent, but when they do address the overall business tax burden, they blatantly understate the business share of state and local taxes by one-half or more.

BEMS's approach is akin to the Sergeant Schultz character in the 1960s television series *Hogan's Heroes*, who frequently uttered, "I see nothing. I know nothing." I could find only three instances in the series of 23 BEMS roundtables in which the panelists addressed any aggregate statistics on the business share of state and local taxes. And in none of their comments did the panelists acknowledge that business pays over two-fifths of all state and local taxes (and has consistently done so for decades), or try to explain how that large share corresponded with their bleak view of business contributions to state and local taxes.

Enrich stated in one of the early roundtables:

> The other thing that keeps coming back in my mind is the long-term trends in how much of state and local taxes are paid by businesses, as opposed to by individuals. And the only really consistent set of statistics I've ever seen that does this in any uniform way over a long period is the way the Advisory Commission on Intergovernmental Relations did back when it existed. Its data, if you go back to the 1950s using its method, said that businesses were paying about 50 percent of state and local taxes. And by the time the commission went out of existence in 1996, that had dropped to 25 percent. And I think all of the indicators I have seen over the past 25 years suggest that it's continued to drop fairly steadily through that period of time.[108]

The problem with Enrich's commentary is that he completely misstates the facts and never provides any citation or documentation for his claims. A review of the Advisory Commission on Intergovernmental Relations data in the 1990s shows no indication that the commission during that period separated out the business and household shares of overall state and local taxes, or concluded that the business share was down to 25 percent.[109] On the contrary, the EY historical data shows that the business share of state and local taxes in the mid-1990s was about 46 percent (not 25 percent as claimed by Enrich).[110] Nor did the business share continue to "drop fairly steadily through the present time" as Enrich claims, but rather fluctuated in a narrow band between the low and mid-40s during the last two decades, with the latest figure at 44.6 percent (see Figure 7). With Enrich underestimating the business share of total state and local taxes by more than one-half, it's no wonder that he and the other BEMS members keep claiming business is not paying its fair share of state and local taxes.

In a subsequent roundtable, Shanske followed up on Enrich's theme:

> And there is not much public disagreement from the large corporate taxpayers that they should pay their fair share and that it is important for the tax system that they be seen to be paying their fair share. How else can one explain why large taxpayers insist that reporters just don't understand when they are shown to have paid little or nothing in taxes? Or how does one explain somewhat tendentious reports that indicate that,

[108]Bucks et al., "Shoring Up State Corporate Income Taxes," *supra* note 3, at 711.

[109]Advisory Commission on Intergovernmental Relations (ACIR), "Significant Features of Fiscal Federalism: Volume 1 Budget Processes and Tax Systems 1995"; ACIR, "Significant Features of Fiscal Federalism: Volume 2, Revenues and Expenditures 1995" (Sept. 1995); and ACIR, "Significant Features of Fiscal Federalism, Volumes 1 and 2 for 1990-1994."

[110]EY, specifically Cline, Neubig, and Phillips, with Fox, *supra* note 7, at 15.

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contrary to what you might have read in the papers, businesses pay a lot in taxes?[111]

Now, there are a number of things wrong with Shanske's statement. First, he is trying to perpetuate the fallacy that business taxpayers "pay little or nothing in taxes" by again generalizing based solely on the corporate income tax, and not by addressing the aggregate levels of all state and local taxes paid by businesses. At least in this instance (and for the one and only time in the roundtables), Shanske acknowledges (in a footnote) his awareness of the EY annual study on the business share of state and local taxes.[112] But curiously he does so only so he can refer to the annual studies as "somewhat tendentious reports" that state facts he claims are contrary to "what you might have read in the papers." This is sheer misinformation — Shanske makes no effort to critique the EY method or findings or to provide any evidence of his own that business is paying less in state and local taxes than the EY findings. I guess we are just supposed to take his word for it, or put faith not in a comprehensive, well-documented annual study based on publicly available federal and state government statistics, but in the occasional newspaper account that highlights a small subset of corporate taxpayers that do not pay any corporate income tax.[113]

BEMS's third and final comment on the aggregate tax burden on business is made by Enrich in a subsequent roundtable when he doubles down on his earlier erroneous statement about how much business pays in state and local taxes:

> The other thing that I need to keep coming back to, and Darien said this already, but it needs reinforcing: We are at a point where the share of state and local taxes being paid by businesses is probably as low as it has ever been in the history of recordkeeping, and at a time when corporate profits are a larger share of the overall economy than they have been in many decades. So to see efforts to increase business taxes in this crisis as piling on against businesses, as opposed to looking for some ways to bend a curve a little bit, strikes me as rather disingenuous.[114]

In the roundtable discussion, Shanske then immediately endorses Enrich's statement: "I agree with all of that."[115]

What is clearly "disingenuous" here is not the business perspective, but Enrich and Shanske's repetition, again without any citation or documentation, of the wildly inaccurate statement that the business share of state and local taxes "is probably as low as it has ever been in the history of recordkeeping." Based on the latest available information from fiscal 2022, the business share of state and local taxes is in the mid-40s percentile — which is completely in line with the average business share for the last four decades (see Figure 7).[116]

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[111] Bucks et al., "Corporate Disclosure Is Essential," *supra* note 3, at 554.

[112] *Id.* at n.5.

[113] In sowing confusion on the overall business tax burden at the state and local level, BEMS are aided by gaps in public knowledge of tax policy and outcomes. First, the public is generally unaware of the range, diversity, and breadth of different taxes imposed on business at the state and local level. Second, large businesses that pay no income taxes typically result from economic losses or the use of legislatively enacted tax credits or accelerated deductions, the latter of which the United States and other nations are addressing with strengthened minimum taxes. Third, most attention to business taxes is driven by the federal level, where government imposes neither a broad-based sales nor property tax. At the federal level, a critique based on corporate income tax "underpayments" is more legitimately conflated with all taxes on business since there are fewer other taxes at the federal level (other than the business share of the social security tax). Finally, public opinion on whether corporations pay their fair share often overlaps with views toward taxes on wealthy individuals, although taxes on business and on individuals (under the personal income tax or estate tax) are clearly different tax policy issues.

[114] Bucks et al., "Pragmatism Not 'Punishment': Why Some Should Pay More in a COVID-19 World," *supra* note 3, at 383.

[115] *Id.*

[116] BEMS's roundtables are conversational, but footnotes are apparently added by the participants afterward, so the lack of any documentation or citations here is highly relevant.

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Part 5: Conclusion

It is atypical to begin a conclusion by emphasizing what is not said in an article. Nonetheless, it's important to do so here. This article is not about all taxes; just state and local taxes.[117] This article is not about all state and local taxes but is centered on those imposed on business.[118] The reason for this approach is to align the discussion with BEMS's primary focus in the roundtables on state and local taxes on business.

In addition, I do not opine on the appropriate level of state and local taxes or spending. Nor do I suggest that the large gap between what business pays in state and local taxes and what it would pay under more optimal or neutral tax designs should be addressed now with reductions in business taxes. Ultimately, these are decisions made in the state and local legislative arena based on a number of different political, social, and economic factors and perspectives.

What then is this article about? It is about the framework for the debate on how much and what share business should pay in state and local taxes. BEMS want to use as the starting point their postulate that business does not pay its fair share of state and local taxes. From their vantage point, the business underpayment of state and local taxes is based on flaws in the design of taxes that favor business and reflect the disproportionate business influence on state tax policy. While they primarily make this argument based on the corporate income tax, the key to their worldview is that this one single tax type is emblematic of the whole.

BEMS's perspective, however, that the design of total state and local taxes is tilted in favor of business is demonstrably false. In fact, quite the opposite is true: business pays significantly more sales and excise tax on business inputs and property tax on business property than it would under optimal or neutral tax designs. Together, the business overpayment of sales, excise, and property taxes likely exceeds even the BEMS/ITEP worst-case scenario of underpayment of corporate income tax by margins of 15 to 1 at the low end or 21 to 1 at the high end.[119]

The unfavorable imposition of state and local taxes on businesses does not mean the business community is a minor player in the political arena, with limited ability to affect tax legislative outcomes. Indeed, given the importance of tax and fiscal issues, the business community, like other significant interest groups, is an active and skillful participant in state tax policy and administration. Certainly, in the corporate income tax arena, business has affected legislative outcomes. But if business had disproportionate influence over state tax legislation and administration, as BEMS assert, why would it accommodate tax designs in sales, excise, and property taxes that make up over three-fifths of all state and local business taxes and that are heavily skewed against business?[120]

BEMS would like you to believe that state and local tax policy is a simplistic arena of "good guys" and "bad guys." They try to occupy the high moral ground by focusing on tax design issues in the corporate income tax, and then ignoring, rationalizing, belittling, or misstating

[117] The article does not cover or critique federal taxes, which have very different tax rates, tax bases, and composition of business and individual/household shares of total taxes than state and local taxes. For instance, the Tax Cuts and Jobs Act significantly lowered federal corporate income taxes, but had the opposite effect at the state level because states generally conformed to the federal corporate tax base broadeners, but not to the federal corporate tax rate reduction. *See* Phillips and Steve Wlodychak, "The Impact of Federal Tax Reform on State Corporate Income Taxes," prepared for the STRI, at introduction and 16 (Mar. 2018). The revenue enhancement provisions of the Tax Cuts and Jobs Act and favorable economic conditions resulted in state corporate income taxes increasing from $66.2 billion in fiscal 2018 to $141.4 billion in fiscal 2022, about a 100 percent increase after adjusting for inflation. State corporate income taxes also increased over that four-year period as a share of all state and local business taxes from 8.5 percent to 13.2 percent. EY, STRI, and COST, "Total State and Local Business Taxes: State-by-State Estimates for Fiscal Year 2018," at 2 (Oct. 2019); EY, STRI, and COST, *supra* note 7, at 3.

[118] As a result, other topics not directly related to state and local taxes on businesses, such as progressive income taxes, individual wealth taxes, and sales tax base inclusion of B2C goods and services, are not addressed.

[119] *See supra* note 102 for the basis of the calculations. As stated in Part 4, in making these estimates, of course, there are many assumptions and data limitations that prevent precision. But with a 15 to 1 or more differential between state and local tax designs that disfavor business or favor business, none would materially change the outcome.

[120] For the historical, structural, and financial factors contributing to the widespread sales and excise taxation of business inputs, see Frieden and Nicely, *supra* note 32, at Part 4.

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tax design issues and outcomes regarding other state and local taxes that disfavor business and dwarf the problems in the corporate income tax from a business tax revenue "overpayment" perspective.[121]

BEMS like to label critics of their corporate income tax analysis and proposed solutions as "not serious" about state tax policy.[122] However, the accusation is more appropriate in describing BEMS's approach to state and local taxes on businesses as a whole. While they express unrelenting concern and outrage over corporate income tax design flaws and favorable business outcomes, they stick their heads in the sand and refuse to recognize the much greater unfavorable business tax treatment attributable to deviations from optimal sales and excise tax and neutral property tax designs.

The conclusion is inescapable that BEMS are not really interested in business paying its "fair share" of state and local taxes, but in business paying "more" in state and local taxes. There is certainly a place in state tax policy debates for all viewpoints, including a progressive-oriented perspective in favor of more state and local government spending, funded in part by more taxes on business. But the starting point for this debate should not and cannot be BEMS's invalid and erroneous premise that the current design of state and local taxes favors business and allows them to pay less than their fair share. The opposite is true: Business pays significantly more in aggregate taxes than it would under more optimal or neutral designs of state and local taxes. ■

[121] A good example of BEMS's self-righteous approach, based on viewing the corporate income tax as representative of and not an aberration from other state and local taxes on business, is Enrich's comment in the latest roundtable questioning how "the business tax advocacy community" can "look themselves in the mirror." Bucks et al., "Multistate Series More Collegial, but Still Wrong About Combined Reporting," *supra* note 3, at 389.

[122] In October 2023 I coauthored a *Tax Notes State* article articulating a reasonable perspective that the new Minnesota statute that includes 50 percent of all foreign-source income in the corporate income tax base with *zero* foreign factor representation was unfair to business and likely unconstitutional. Frieden and Nicely, *supra* note 4. BEMS's roundtable responded with a chorus of disbelief and outrage. In just one roundtable, they used the following terms to critique our arguments: "no coherence," "no consistency," "hypocrisy," "stonewalling," "not serious," "ignore underlying realities," "preposterous," "nonsense," "fairly silly," "series of fairytales," "flimsy," "confused and distorted," and "wrong on virtually everything." *See* Bucks et al., "Weak Corporate Tax Reform Critiques Suggest Serious Debate Isn't Intended," *supra* note 3.

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