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by Karl A. Frieden

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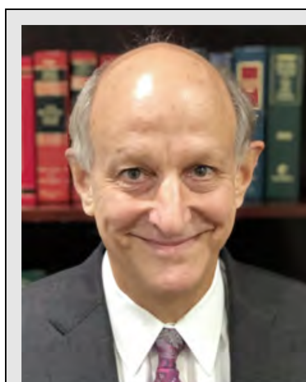
Karl A. Frieden

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In this article, Frieden challenges a response by Dan Bucks, Peter Enrich, Michael Mazerov, and Darien Shanske to his April 2024 article, "Wearing Blinders in the Debate Over Business's 'Fair Share' of State Taxes."

Introduction[1]

In an April 2024 *Tax Notes State* article, "Wearing Blinders in the Debate Over Business's 'Fair Share' of State Taxes" (hereinafter "Blinders" article), I challenged the validity of the frequently voiced opinion that businesses are not paying their fair share of state and local taxes.[2] The "Blinders" article used the criteria that some government and academic-oriented thinkers like to use for measuring fair share — deviation from an optimal or neutral tax design. Based on that yardstick, I concluded that business is "overpaying" far more of the largest state and local taxes on business (business property taxes and sales tax on business inputs) than they are purportedly "underpaying" in corporate income taxes (CITs).[3]

Dan Bucks, Peter Enrich, Michael Mazerov, and Darien Shanske (BEMS) — a group of leading progressives whose perspective on the "fair share" debate was at the center of my "Blinders" critique — responded in an October 2024 *Tax Notes State* roundtable with their rebuttal to the article.[4] Their response centers on four arguments:

- that they never said business does not pay its fair share of aggregate state and local taxes, just certain selected taxes;
- that a "fair share" comparison should include only taxes paid by larger multijurisdictional businesses, not small or medium-size or domestic-only businesses, because the former benefit from more favorable tax rules;
- that a "fair share" comparison should encompass state and local tax designs other than the CIT that favor business; and
- a meaningful study must consider not just the "legal" incidence of a tax (who has the responsibility to pay the tax), but also the "economic" incidence of a tax (who ultimately bears the burden of the tax).

This article responds to the BEMS's rebuttal. While BEMS make some thoughtful points, their observations are intermingled with self-contradictory arguments, overblown conclusions, and a plethora of anecdotal comments not backed by (and frequently in conflict with) empirical data. BEMS's continued defense of their "business does not pay its fair share" position, far from strengthening their cause, results in a boomerang effect, drawing more attention to how much the

[1]The author would like to thank Doug Lindholm, Marilyn Wethekam, Joe Donovan, and Andrew Phillips for their review of this article and for their helpful suggestions.

[2]Karl A. Frieden, "Wearing Blinders in the Debate Over Business's 'Fair Share' of State Taxes," *Tax Notes State*, Apr. 8, 2024, p. 91.

[3]*Id.*

[4]Dan Bucks et al., interviewed by Doug Sheppard, "Incidence Is Not Incidental: A First Response to COST's Flawed Critique," *Tax Notes State*, Oct. 21, 2024, p. 173. BEMS are assisted in this roundtable by a guest participant — Carl Davis of the Institute on Taxation and Economic Policy.

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designs of major state and local business taxes disfavor business.

State and Local Tax Designs Disfavor Business Far More Than They Favor Business

Let me start by restating and updating the key conclusion in the "Blinders" article: The designs of state and local taxes disfavor business far more than they favor business. The "Blinders" article focuses on BEMS's "fair share" assertions and perspective, not simply to use them as a foil, but because BEMS represent some of the most influential progressive thinkers on state and local tax policy. Their advocacy for more business taxes revolves around two principles. First, 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.[5]

To rebut the BEMS thesis, I asked the following questions: (1) does the structural design explanation for the business "underpayment" of corporate income tax apply equally to other key state and local taxes imposed on business; and (2) if not, is there a quantifiable business "overpayment" of other state and local taxes compared with what businesses would pay with a more optimal or neutral tax design?

The answer, backed by extensive data, is that the designs of the largest state and local taxes[6] disfavor businesses far more than they favor businesses. *First, the property tax on business property is the largest of all state and local taxes imposed on businesses, accounting for over one-third of all state and local taxes on businesses.* The property tax design in most jurisdictions significantly favors residential homeowners and disfavors businesses.[7]

Most state property tax laws have statutory exemptions that favor homeowners. These include homestead exemptions, property tax credits, assessment limits, and "circuit breakers" — almost all designed to provide property tax relief for homeowners, but not businesses. About half of the states impose dual (or split roll) tax rate classifications that favor homeowners and disfavor businesses. In addition, most states have enacted other tax base provisions that disfavor businesses. Thirty-six states (and Washington, D.C.) have some form of business personal property included in the property tax base. On a national basis, over 90 percent of the personal property tax base is derived from businesses and not homeowners. In sum, property taxes in most states deviate from a neutral tax design with the average effective tax rates of the largest categories of business property far in excess of the ETRs on homeowner property.[8]

The sales tax on business inputs is the second largest of all state and local taxes imposed on businesses, accounting for over one-fifth of all state and local taxes on businesses. Sales tax experts widely agree that a well-designed retail sales tax should exempt all or most business inputs to avoid sales tax pyramiding.[9]

The sales tax in all states where it is levied deviates significantly from an optimal sales tax model, relying heavily on the inclusion of business inputs in the sales tax base. The extensive taxation of business inputs culminates in a business share of total sales tax collections of about 42 percent. The "Blinders" article focused on (and quantified for the first time) the most clear-cut deviation from an optimally designed sales tax — the pyramided portion of taxable business inputs. Sales tax pyramiding — where sales tax is imposed more than once on a related series of transactions — accounts for over one-half of the dollar value of transactions involving taxable business inputs.[10]

Based on deviations from optimal or neutral tax designs, the "Blinders" article estimated business "overpayments" of property taxes on

[5] Frieden, *supra* note 2, at 95-97. I also included a third BEMS proposition in the "Blinders" article: that these structural deficiencies reflect inordinate business political influence over state legislative and administrative processes. I have left that principle out of this discussion because it is less relevant to the current dialogue with BEMS.

[6] *See* EY, Council On State Taxation, and State Tax Research Institute (STRI), "Total State and Local Business Taxes: State-by-State Estimates for FY23" at 5 (Dec. 2024) (the EY study shows that state and local taxes on business property (38 percent), sales tax on business inputs (21.9 percent), and corporate income tax (12 percent) make up 70 percent of total state and local taxes on businesses).

[7] Frieden, *supra* note 2, at 106-112.

[8] *Id.*

[9] *Id.* at 99-106.

[10] *Id.*

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business property and pyramided sales taxes on business inputs are more than 10 times greater than the purported business "underpayments" of state corporate income tax.[11]

EY, in its 2024 annual study of "total state and local business taxes" commissioned by the Council On State Taxation/State Tax Research Institute (STRI) (hereinafter "EY business taxes study"), added a new section which estimates "excess tax" paid by businesses based on deviations from neutral tax designs.[12] EY's estimates are based on a more comprehensive methodology and expanded data sources than used in the "Blinders" article, but derive similar results. First, with regard to property taxes paid by businesses, EY concludes that businesses paid $142.8 billion a year more in property taxes in fiscal 2023 than they would have if businesses paid at the average ETR applied to homeowners and had the same personal property base inclusion as homeowners (see Figure 1).[13] The EY analysis looks not just at the three largest groups of business taxpayers covered in the "Blinders" study (commercial, industrial, and apartment rentals) but at all business sectors.[14] The EY study found that the average ETR on business real property is about 50 percent higher than the average ETR on homeowner real property.[15] The estimate of "excess" business property taxes constitutes over one-third of the total property taxes paid by business in fiscal 2023.[16]

Figure 1. Excess Business Property Taxes Compared to Current Homeowner Rate and Personal Property Tax Base, Fiscal 2023 ($ billions)

Business Real Property ETR to Homeowner ETR Ratio	
Homeowner ETR	1.17%
Business Real Property ETR	1.73%
Real Business Property Classification Ratio	1.48%
Business Real Property Tax if Taxed At the Homeowner ETR	
Total state and local property tax on business real property	$370.7
Business real property tax if taxed at homeowner rate	$250.6
Excess Business Real Property Tax	**$120.0**
Business Personal Property Tax if Taxed Based on the Homeowner Personal Property Tax Base	
Business Paid Personal Property Tax	$23.7
Business Paid Personal Property Tax on Vehicles	$0.9
Business Paid Personal Property Tax on All Other Property	$22.8
Excess Business Personal Property Tax	**$22.8**
Total Excess Business Personal Property Tax	**$142.8**
Excess Business Property Tax as a Share of Total Business Property Tax	*36.2%*

Source: "Total State and Local Business Taxes: State-by-State Estimates for FY23," prepared by Ernst & Young for COST and STRI, December 2024.

EY LLP estimates based on data from the U.S. Census Bureau Annual Survey of State and Local Government Finances and the Lincoln Institute of Land Policy/ Minnesota Center for Fiscal Excellence, "50-State Property Tax Comparison Study for Taxes Paid in 2023."

[11] *Id.* at 112-115.

[12] *See* EY, COST, and STRI, *supra* note 6, at 26-27 (EY has produced the business taxes study (on behalf of COST/STRI) on an annual basis since fiscal 2002); and COST, COST/STRI Studies, Articles and Reports.

[13] *Id.* at 26-27.

[14] *Id.* at 26-27, 34, n.15, n.16 (the EY business taxes study covers all business real and personal property encompassing the commercial, industrial, apartment rental, agriculture, utility, and other sectors. The EY property tax estimates supplement data from the Lincoln Institute of Land Policy/Minnesota Center for Fiscal Excellence 50-state comparison study with data from the U.S. Census Bureau Annual Survey of State and Local Government Finances. The EY methodology fills in the data gaps of the "Blinders" article's property tax calculations noted by Dan Bucks in the BEMS rebuttal); *see* Bucks et al., *supra* note 4, at 183.

[15] EY, COST, and STRI, *supra* note 6, at 26-27.

[16] *Id.*

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Figure 2. Estimated Pyramided Sales Taxes Paid by Business in the Production of Taxable Goods and Services, Fiscal 2023 ($ billions)

	Business Sales Tax on Inputs
Total State and Local Sales Tax on Business Inputs	$240.4
Amount Paid to Produce Taxable Output (Pyramided Amount)	$118.1
Share of Sales Tax on Business Inputs That Results in Pyramiding	49%

Source: "Total State and Local Business Taxes: State-by-State Estimates for FY23," prepared by Ernst & Young for COST and STRI, December 2024.

EY LLP estimates based on data from the Bureau of Economic Analysis and the U.S. Census Bureau Annual Survey of State and Local Government Finances.

Regarding the sales tax on business inputs, EY's business taxes study estimates that 49 percent of all sales tax on business inputs represent "pyramided" sales taxes — where taxes are imposed more than once on the same supply chain of goods and services. Based on EY's fiscal 2023 estimate of $240.4 billion of sales taxes paid by businesses on purchases of business inputs, this amounts to $118.1 billion of pyramided taxes (see Figure 2).[17]

The EY analysis of the two largest state and local taxes paid by business (property taxes and sales taxes on business inputs comprise about three-fifths of all state and local business taxes) concludes that businesses paid about $261 billion more in fiscal 2023 than they would have under neutral tax designs (see Figure 3). This finding, while slightly different in the particulars, is consistent with the "Blinders" article's conclusion that "excess" property taxes on business property and pyramided sales tax on business inputs attributable to design flaws that disfavor businesses are far greater than BEMS's claims of business "underpayments" of CIT arising from design flaws that favor businesses.[18]

The BEMS Response to My 'Fair Share' Perspective

The BEMS rebuttal never actually contradicts the key conclusion of the "Blinders" article (reinforced by the recent EY data) that the largest state and local business taxes deviate from optimal or neutral designs in ways that significantly disfavor businesses.[19] Rather, they take a more circuitous four-part approach to contesting the findings.

Extending the 'Fair Share' Critique to All Business Taxes

First, BEMS argue that their position has been mischaracterized. They state they have never said that design flaws in aggregate state and local business taxes favor businesses, but only that such design flaws favor businesses regarding the CIT and within a few other select categories. Accordingly, BEMS assert that my characterization is a "straw man."[20] As Bucks avers in their roundtable critique:

> Well, Michael, I don't think that this group has ever argued in a global sense whether there's been some kind of fair share division of taxes, but rather has often discussed, within particular tax

[17] *Id.* (the EY estimate of the pyramided share of the sales tax on business inputs is slightly lower than the "Blinders" article estimate, which was based not on U.S. data, but on data from Canada's experience with a national goods and services tax (basically a value added tax) and provincial sales and use taxes); Frieden, *supra* note 2, at 102.

[18] Frieden, *supra* note 2, at 112-114. BEMS allege businesses are underpaying as much as $17 billion in CIT as the result of the absence of water's-edge combined reporting in some states and worldwide combined reporting in all states (*id.* at 98).

[19] BEMS roundtable guest panelist Davis misses the central point of the "Blinders" article when he states: "my first thought on reading his article was just how familiar it all felt. I mean, this line of argument was not invented for the first time in his piece. Some of my colleagues here at ITEP spend a lot of time combing through the financial statements of large corporations, and when they find that a company is not paying much in the way of corporate income tax, the most common response they get from that company is talk about all the other taxes they do pay." Bucks et al., *supra* note 4, at 175. The annual EY business taxes study certainly provides a detailed accounting of the full range of state and local taxes businesses pay (on average about 90 percent of which are non-CITs). *See* EY, COST, and STRI, *supra* note 6, at 3. The "Blinders" article, however, focuses on a different approach, quantifying for the first time how much businesses pay in property taxes and pyramided sales tax on business inputs — the largest two state and local business taxes — in "excess" of what they would pay under more optimal or neutral tax designs. *See* Frieden, *supra* note 2, at 113.

[20] Bucks et al., *supra* note 4, at 174.

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Figure 3. Estimated 'Excess' Business Property Taxes and Pyramided Sales Taxes on Business Inputs, Fiscal 2023 ($ billions)

	Estimated Business Tax Paid (EY)	Estimated Tax if Business Property Is Taxed at Homeowner ETR/Tax Base; And SUT on Non-Pyramided Business Inputs	Excess Tax Based on Neutral Tax Design
Property Tax on Business Property	$394.3	$251.5	$142.8
Sales Tax on Business Inputs	$240.4	$122.3	$118.1
Total Selected Taxes	$634.7	$373.8	$260.9

Source: "Total State and Local Business Taxes: State-by-State Estimates for FY23," prepared by Ernst & Young for COST and STRI, December 2024.

EY LLP estimates based on data from the Bureau of Economic Analysis, the U.S. Census Bureau Annual Survey of State and Local Government Finances, and the Lincoln Institute of Land Policy/Minnesota Center for Fiscal Excellence 50-state property tax comparison study.

categories, whether businesses are being held to the same standard as individuals.[21]

Similarly, Michael Mazerov states in the roundtable: "We have never taken it upon ourselves to make overarching assertions about whether or not 'business is paying its fair share of state and local taxes.'"[22]

This rhetorical dodge is contradicted by BEMS's continued efforts to assert (with gross inaccuracy) that businesses are currently paying the lowest share of state and local taxes since the 1950s. In an earlier roundtable, Enrich (endorsed by Shanske) stated: "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."[23] To buttress his claim, Enrich alluded (without providing a citation) to data from the Advisory Commission on Intergovernmental Relations (ACIR) purportedly showing that in the 1950s businesses were paying about 50 percent of state and local taxes but that had dropped to 25 percent in the 1990s. Enrich added: "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."[24]

In the "Blinders" article, Enrich's claims were challenged as unsubstantiated and unfounded and were refuted by EY's annual business taxes studies documenting that the business share of all state and local taxes fluctuated within a narrow band between the low and mid-40th percentiles over the last four decades.[25] In the recent October 2024 BEMS roundtable, Enrich repeats his assertions and offers as validation a 1994 article by Laird Graeser and Al Maury, two New Mexico Taxation and Revenue Department staff analyzing pre-1990 ACIR data.[26]

Upon closer examination, however, the 1994 article and the underlying ACIR data do not provide any support for Enrich's claims regarding the declining business share of state and local taxes. First, the 30-year-old Graeser/Maury article is based on ACIR data from 1989 and earlier.[27] So, there is nothing in the Graeser/Maury article that supports or justifies (nor does Enrich provide any

[21]*Id.* at 174.

[22]*Id.* at 182 (emphasis in original).

[23]Frieden, *supra* note 2, at 117 (quoting Bucks et al., "Pragmatism Not 'Punishment': Why Some Should Pay More in a COVID-19 World," *Tax Notes State*, July 27, 2020, p. 379, at 383).

[24]Frieden, *supra* note 2, at 116 (quoting Bucks et al., "Shoring up State Corporate Income Taxes," *Tax Notes State*, Dec. 2, 2019, p. 709, at 711).

[25]Frieden, *supra* note 2, at 115-116.

[26]Bucks et al., *supra* note 4, at 176. *See also* Laird Graeser and Al Maury, "Business Taxes — Quo Vadimus?" *State Tax Notes*, Oct. 3, 1994, p. 917.

[27]Graeser and Maury, *supra* note 26, at 918, 920, 925 (citing Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism, Vol. 2 (1990)).

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further documentation for) Enrich's prior misinformed statement that the business share of state and local taxes has "continued to drop fairly steadily" below 25 percent over the last 25 years.[28]

Second, Enrich misinterprets the Graeser/Maury article, which describes the 40-year decline of state and local business taxes as a percentage of all state and local revenues (not as a percentage of all state and local taxes as alleged by Enrich). The category of state and local "revenues" addressed in the Graeser/Maury article includes all federal grants in aid and state and local nontax revenues that are combined to calculate aggregate state and local government revenues (but would not be included in a comparison of state and local taxes).[29] This addition alone completely distorts the comparison, as federal grants-in-aid and nontax state and local revenues grew rapidly during the 40-year period compared to tax revenues, thus lowering the share of all taxes in relation to total state and local government revenues in a manner that has nothing to do with the point Enrich was attempting to make.[30]

Third, and of greatest significance, the New Mexico Department of Revenue staff completely misread the ACIR data. Nowhere in the cited data does ACIR reveal the amount of state and local taxes paid by businesses (other than implicitly in the CIT figures). The property tax, sales tax, and personal income tax (PIT) reported in the ACIR data is the total property, sales, and PIT, and does not separate household taxes from business taxes. So, when the New Mexico authors created their 40-year chart (covering 1950 to 1989), they used a nonsensical comparison (one never made by ACIR) that included corporate income taxes, some excise taxes, and all property taxes in the numerator of the alleged "business share," and all state and local revenues including all state and local taxes (paid by both households and businesses) plus all federal grants-in-aid and nontax state and local revenues in the denominator.[31]

I can only assume that BEMS are unaware of Graeser/Maury's fundamental misinterpretation and misuse of the 35-year-old ACIR data. But on such a critical point, purportedly supporting their assertion about the diminishing share that business pays of overall state and local taxes, BEMS's misplaced reliance on a three-decades-old article, which is based on even older data that does not even separate business and household taxes, is disappointing. But it is consistent with BEMS's broader efforts to either ignore and/or be dismissive of the far more comprehensive and up-to-date EY annual business taxes study.[32]

The ACIR exercise also undermines BEMS's argument that their position in the "fair share" debate was misstated. There is no reason to make multiple (and wildly inaccurate) assertions of the drastic shrinkage of the business share of all state and local taxes unless BEMS are trying to create a belief among readers and state tax policymakers that businesses are not paying their "fair share" of all state and local taxes.[33] In fact, in one of the roundtables, Enrich specifically ties the public perception that large businesses are not paying their fair share to the alleged long-term decline in the business share of state and local taxes.[34]

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[28]Bucks et al., *supra* note 24, at 711 (Enrich's comment on the business share of state and local taxes "steadily" dropping over the last 25 years refers to the period between 1995 and 2020).

[29]Graeser and Maury, *supra* note 26, at 918, 920. Exhibit 3 in the Graeser/Maury article is labeled "State and Local Taxes Percent of All Revenues." *Id.* at 920. Graeser and Maury do not provide a page reference for the Advisory Commission on Intergovernmental Relations (ACIR) 1990 data used in Exhibit 3 of their article and referenced by Enrich, but the 40-year comparison corresponds to Table 18 of the ACIR (Vol. 2). *See* ACIR (Vol. 2), *supra* note 27, at 38. Table 18 makes clear it includes all state and local government "receipts" from both tax and nontax sources (including federal grants-in-aid). *Id.*

[30]State and local nontax revenues, including intergovernmental revenue (federal grants-in-aid) and nontax charges and miscellaneous revenue, grew from 23.9 percent in 1950 to 40.1 percent in 1988 as a share of all state and local general revenue. *See* ACIR (Vol. 2), *supra* note 27, Table 52, at 91.

[31]Graeser and Maury, *supra* note 26, at 918, 920, misuse data from ACIR, *supra* note 27, at Table 18 (at 38) that does not separate out the business and nonbusiness share of state and local taxes. For verification that the ACIR data for state and local taxes on Table 18 (at 38) include all (household and business) property, sales, and personal income taxes, and not just the "business" share, see the totals for each of those categories reported in ACIR, *supra* note 27, at Tables 48 and 51 (at 84, 90).

[32]Frieden, *supra* note 2, at 115-117.

[33]For a discussion of BEMS's linking of the fair share discussion to aggregate state and local business taxes (in addition to Enrich's comments in the October 21, 2024, roundtable), see Frieden, *supra* note 2, at 95-96, 116-117.

[34]In reviewing the results of a Massachusetts poll that found that 78 percent of the respondents said that large national/international companies doing business in Massachusetts were paying either too little or much less than their fair share, Enrich commented: "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." Bucks et al., *supra* note 24, at 711 (emphasis added).

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Regardless of whether BEMS fully acknowledge their explicit and implicit rhetoric that business is not paying its fair share of all taxes, this is certainly how their messaging is understood (and amplified) by many sympathetic state legislators and policymakers. Moreover, the fundamental tax policy issue raised here is not BEMS's intent with their fair share analysis but is independent of that finding: whether the designs of state and local taxes on businesses disfavor businesses significantly more than they favor businesses.

The Weak Rationale for Disregarding the Aggregate Business Tax Burden

In their second argument, BEMS allege that the aggregate business tax burden should not be the starting point for measuring whether business is paying its fair share but rather that the appropriate yardstick should be only the portion of the total business tax burden paid by larger businesses, particularly multijurisdictional companies. The BEMS rationale is that the designs of both income and non-income state and local business taxes favor large businesses over small or medium-size or wholly domestic businesses, and thus the latter should be excluded from the fair share comparison.[35]

For instance, Dan Bucks in the October 2024 roundtable states:

> I want to highlight a bit more the fallacy of lumping all business together. A good deal of concern about the taxation of multijurisdictional businesses, and whether there is fair reporting in relation to the income earned within a jurisdiction, is out of concern for the fact that smaller businesses that operate in one or a few states are typically held to a standard of accountability for their total income earned that is more rigorous in practice than occurs regarding large, global multijurisdictional enterprises.[36]

There are several problems with BEMS's analysis. First, in their use of the aggregate tax data to argue that business is paying a sharply diminishing share of state and local taxes, BEMS make no such distinction. The ACIR data from decades ago that they refer to but misquote do not separate out business taxes by the size of the business.[37] Similarly, BEMS's argument that "economic incidence" is more important than "legal incidence" in determining who bears the burden of a business tax (see discussion below) relies on data that do not segregate taxes paid by small and large businesses.[38] Clearly, where it serves their own purposes, BEMS reference all business taxes and not just those paid by larger multijurisdictional businesses.

Furthermore, available studies suggest exactly the opposite outcome — that larger businesses are generally not favored by the state and local tax system as compared to smaller or domestic-only businesses. First, regarding business income taxes, BEMS do not account for a fact that is common knowledge in the tax community and among tax scholars: The vast majority of small, medium, and even many large-size businesses do not pay corporate income taxes at all but are taxed under more favorable PIT passthrough entity laws. The business income of C corporations (including virtually all large multinationals) is taxed at the entity level (CIT) and is taxed again at the shareholder level (PIT) as dividends are paid. Passthrough businesses (primarily domestic-only entities) including partnerships, S corporations, limited liability companies, and sole proprietorships are typically not taxed at the entity level but are taxed instead only once at the ownership level on their allocable share of business income under PIT statutes.[39]

A PwC study in 2017 found that passthrough entities make up about 95 percent of all business

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[35] Bucks et al., *supra* note 4. For BEMS's comments on income taxes, see *id.*, Shanske at 174, and Bucks at 175; for BEMS's comments on sales taxes see *id.*, Shanske and Davis at 180; for BEMS's comments on property taxes, see *id.*, Shanske at 179, and Enrich and Bucks at 184. As articulated by Enrich: "But more striking to me is the framing that completely ignores what the underlying realities are . . . the biggest and the most multinational are able to avoid tax liabilities in ways that their more local, smaller competitors simply can't." Bucks et al., "Weak Corporate Tax Reform Critiques Suggest Serious Debate Isn't Intended," *Tax Notes State*, Oct. 23, 2023, p. 288.

[36] Bucks et al., *supra* note 4, at 175.

[37] In fact, as noted above in note 31, other than the state CIT data, the 1990 ACIR data does not separate out the business portion at all.

[38] *See* Bucks et al., *supra* note 4.

[39] *See* PwC LLP, "Corporate and Pass-Through Business State Income Tax Burdens: Comparing State-Level Income and Effective Tax Rates," prepared for STRI (Oct. 2017).

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entities and generally earn about three-fifths of all business revenues.[40] The study was the first ever to quantify the differences in state-effective tax rates on business income earned by C corporations compared to passthrough entities. The study (based on 2013 data) concluded that the aggregate state-level effective business income tax rate for C corporations (6.1 percent) was 30 percent higher than the aggregate rate for passthrough businesses (4.7 percent).[41] The rate differential was attributable both to generally lower PIT rates for passthrough entities (than CIT rates for C corporations) and the single level of tax on passthrough entities.[42] A similar federal-level study in 2024 (based on 2021 data) by William Gale (Brookings Institution) and Kyle Pomerleau (American Enterprise Institute) found that the average federal ETR of C corporations exceeds the rate of passthrough businesses by more than 20 percent. The federal-level study found passthrough entities have had a sizable ETR advantage over C corporations continuously for the last four decades.[43]

Regarding non-income taxes, BEMS similarly argue that smaller businesses pay a disproportionate share of business taxes. They offer no studies to prove this point — only a slew of anecdotal commentary. For instance, Shanske in discussing sales tax pyramiding concludes that small and medium-size businesses are more impacted: "So to the extent pyramiding is a thing, it is likely affecting small and mid-sized companies in certain industries to a greater degree, and these big companies are being thrown into this big pot of pyramiding to muddy the waters."[44]

The available statistical data points in the opposite direction. Large multinational businesses pay an outsize share of all major state and local taxes on businesses relative to the size of their employment base. EY, as part of its annual state and local business tax burden study, conducted a distributional analysis in fiscal 2003 of the share of state and local business taxes paid by Fortune 1000 corporations (almost all of which are multinational businesses). The EY study determined that the Fortune 1000 corporations employed about 20 percent of the workforce. Nonetheless, the Fortune 1000 corporations accounted for 46.6 percent of all state and local business taxes, including 53.8 percent of CITs, 45.9 percent of property taxes on business property, 51.4 percent of general sales taxes on business inputs, and 51.4 percent of excise and gross receipts taxes.[45]

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[40] *Id.*; *see also* William G. Gale and Kyle Pomerleau, "Efficient and Equitable Income Taxation of the Affluent," *Tax Notes Federal*, Nov. 19, 2024, p. 1409, at 1419-1421.

[41] PwC LLP, *supra* note 39.

[42] *Id.*

[43] Gale and Pomerleau, *supra* note 40. The Gale/Pomerleau study found that the average federal C corporation ETR has exceeded the passthrough entity ETR continuously since 1982 when the federal tax laws began treating passthrough entities more favorably than C corporations. *Id.* BEMS have argued that some large multinational corporations have income tax advantages over smaller or domestic-only businesses because of the ability of MNCs to lower ETRs by moving operations and intangible assets to lower-tax foreign jurisdictions. This may constitute an offsetting factor for some MNCs, but as the PwC and Gale/Pomerleau studies illustrate, the income tax advantages of passthrough businesses over C corporations are substantial, debunking any notion that state and local income taxes generally favor large multijurisdictional businesses over small or medium-size or wholly domestic businesses.

[44] Bucks et al., *supra* note 4, at 180. Shanske provides no statistical analysis supporting his position that sales tax pyramiding is more pervasive for smaller and medium-size companies than for large businesses. Shanske merely observes that some larger businesses can avoid sales tax pyramiding through vertical integration that reduces the number of steps in the supply chain subject to sales tax on business inputs. That is certainly one factor for some highly integrated companies, but cutting in the opposite direction are the very significant capital expenditures made by larger, more capital-intensive businesses that are broadly subject to sales tax on business inputs. For instance, a COST study of sales tax pyramiding in the telecommunications, cable, and electric and gas utility sectors found that 10 states impose a tax on both business inputs and consumer outputs of one of these three industries; 16 states impose a double tax on two of them; and 11 states double tax all three industries. Frieden and Douglas L. Lindholm, "A Global Perspective on U.S. State Sales Tax Systems as a Revenue Source: Inefficient, Ineffective, and Obsolete," State Tax Research Institute, at 48-49 (Nov. 2021).

Another example in the retail industry, the focus of Shanske's commentary, is the almost universal sales taxation (and pyramiding) of business inputs commonly used by all retailers, regardless of size of business. As part of a 2022 study, COST researched state sales tax treatment of retail industry purchases of electricity, point of sale equipment, and furniture and fixtures. The study found that all states (and Washington, D.C.) with sales taxes include these large business purchases in the sales tax base, except for about one-fifth of the taxing states that exempt commercial electricity. Frieden, Fredrick J. Nicely, and Priya D. Nair, "The Best and Worst of State Sales Tax Systems," COST, at 9 (Dec. 2022).

[45] Robert Cline et al., "Total State and Local Business Taxes: Fiscal Year 2003 Update (National Estimates)," prepared for COST, at 6 (Jan. 2004). In the property tax sphere, Shanske argues (again without any statistical support) that larger businesses pay proportionately less property tax than smaller businesses because of the ability of the former to "rack up" property tax incentives. *See* Bucks et al., *supra* note 4, at 179. As previously documented in the "Blinders" article, however, the broad inclusion of personal property in the business property tax base, disproportionately paid by larger businesses, more than offsets any amount of property tax incentives that large businesses (in general) may receive. *See* Frieden, *supra* note 2, at 107-108; *see also* Jared Walczak, "Personal Property De Minimis Exemptions Slash Compliance Burdens at Trivial Cost," Tax Foundation (Dec. 2023) (finding that the vast majority of personal property tax revenues come from a very small number of large businesses and utilities).

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The inclusion of aggregated data from businesses of all sizes in a business tax burden study — as is done in the annual EY business taxes study[46] — makes sense because available state and local governmental data sources typically don't provide tax information based on entity size. In addition, there is no indication that aggregating business tax burden data distorts a comparison in favor of larger businesses — if anything, the opposite is the case. Finally, the seeming preference by BEMS to focus on large businesses, particularly multinationals, as they are a better political target, is an insufficient reason to separately report this data, especially given the impracticality and expense of doing so on a regular basis.

The Inclusion of Other State and Local Tax Designs That Favor Business

In their third criticism of the "Blinders" article, BEMS argue that many state and local tax designs favor businesses other than the widely discussed state CIT.[47] Indeed, BEMS raise a valid point that the $17 billion they allege businesses are underpaying in CIT as the result of the absence of water's-edge combined reporting in some states and worldwide combined reporting in all states is not the only possible design defect on their side of the ledger.[48]

The "fair share" comparison in the "Blinders" article acknowledges that the structure of the state CIT is not the only state and local tax design issue that arguably favors business.[49] The "Blinders" article focuses on BEMS's estimates of state revenue losses from suboptimal CIT design because this is the most visible and highest dollar value of all the tax design issues BEMS highlight to validate their fair share perspective. The state CIT, the third largest state and local business tax, is the primary or partial focus of about two-thirds of the five-year run of BEMS roundtables in *Tax Notes State*.[50] CIT design is the battering ram, and the fulcrum for their argument, explicitly or implicitly, that state and local tax designs are tilted in favor of businesses. Therefore, it serves a useful purpose to show that, even if for the sake of argument their estimates are accepted at face value, these "underpayments" of CIT are very small compared to the "excess" tax paid by businesses on the much larger business property taxes and pyramided sales taxes on business inputs where the tax designs disfavor businesses.

It is entirely appropriate for BEMS to raise awareness of other flaws in state and local tax designs that they believe are favorable to businesses. And they certainly do so in their recent roundtable (and in other articles), highlighting several other state income and non-income tax design issues.[51] In doing so, however, it is incumbent upon them to quantify only the portion of such taxes that truly represent a deviation from an optimal or neutral tax design.[52] For instance, BEMS draw attention to abuses or lack of efficient results associated with state and local tax credits and incentives, and there are certainly numerous examples in the tax literature of these occurrences. But it would be inappropriate to include all or most credits and incentives in the category of design flaws that are favorable to business as these government tax and nontax benefits are typically provided in exchange for some reciprocal action by business (like hiring, capital investment, research and development, or locational choices) that provide value to the public as well. Similarly, estimates of "tax gap" noncompliance by individuals or businesses with existing tax laws highlight a serious problem but are generally indicative of

[46] *See* EY, COST, and STRI, *supra* note 6.

[47] Bucks et al., *supra* note 4, at 180.

[48] For BEMS/ITEP estimates of lost CIT revenues resulting from the absence of state adoption of water's-edge combined reporting (WECR) and worldwide combined reporting (WWCR), 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). Since the majority of states, particularly large population states, have already adopted WECR, the ITEP revenue estimate associated with the adoption of WECR in the remaining states is only $3 billion of the $17 billion. *Id.* at 10.

[49] *See* Frieden, *supra* note 2, at 99 (n.31):

> The use of the ITEP [$17 billion] 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 [citing a 2020 article by Shanske, David Gamage, and Reuben Avi-Yonah].

[50] Frieden, *supra* note 2, at 91-92.

[51] Bucks et al., *supra* note 4, at 180-181.

[52] The "Blinders" article and the EY "excess" business tax estimates have taken this conservative approach with the sales tax on business inputs, treating only the pyramided portion as a deviation from an optimal or neutral sales tax design.

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underreporting and tax enforcement issues, not tax design issues.[53]

To the extent BEMS identify and quantify other state and local tax design flaws that favor business, however, they also need to revise downward their revenue estimates of lost state CIT revenue attributable to international profit shifting. The BEMS's analysis of CIT design flaws related to foreign source income is becoming increasingly outdated because of changes in global and national income tax laws.[54] For the first time ever, nations are aggressively addressing legal global profit shifting through the OECD/G-20 inclusive framework and the pillar 2 global minimum tax (GMT).[55] According to an internal OECD study released in January 2024,[56] the adoption in 2024 of the pillar 2 GMT (at a top-up tax rate of 15 percent) by a large number of both high-tax and low-tax nations will reduce global profit shifting by nearly 50 percent, and more importantly, reduce the percentage of profits earned in low-tax jurisdictions (those with tax rates below 15 percent) by over two-thirds.[57]

In the final accounting, because the largest two state/local business taxes (the property tax and sales tax on business inputs) represent about three-fifths of all state and local taxes on businesses, BEMS are unlikely to place on their side of the ledger anything close to the $261 billion EY identified as "excess" business taxes paid based on deviations from neutral property and sales tax designs that disfavor businesses.

The 'Economic' vs. 'Legal' Incidence of Tax

Fourth, along with their denials relating to their overall "fair share" position, BEMS have shifted their argument to speak not about the "legal" incidence of a tax (who has the responsibility to pay for the tax) but the "economic" incidence of a tax (who ultimately bears the burden of the tax). In this revised focus, they assert that although business property taxes, sales taxes on business inputs, and other taxes are paid initially by business, the "incidence" of these taxes does not necessarily fall on businesses and therefore they shouldn't fully count as "business" taxes.

In their critique, BEMS express surprise that the economic "incidence" of business taxes is not addressed in the "Blinders" article. This is an ironic starting point since in their previous roundtables, BEMS barely mention the concept of "incidence." A review of their 23 *Tax Notes State* roundtables before the April 2024 "Blinders" article found only two instances where they even briefly discussed tax "incidence" and only when noting that the incidence of the state CIT falls

[53] *Id.* at 180 (for BEMS and guest panelist Davis discussion of ineffective credits and incentives and the passthrough entity "tax gap"). The IRS definition of the tax gap makes clear it is not based on any deviation from an optimal or neutral tax design, but from collection and enforcement issues: "The gross tax gap is the difference between true tax liability for a given tax year and the amount that is paid on time. It is comprised of the nonfiling gap, the underreporting gap, and the underpayment or other late payments." *See* IRS, The Tax Gap.

[54] For instance, in a comprehensive article written by Michael Mazerov advocating for state adoption of WWCR, published in July 2024, after dozens of nations had adopted the global minimum tax (GMT), Mazerov surprisingly never once mentions the potential impact of pillar 2's GMT in reducing global profit shifting, the very issue at the core of his justification for WWCR. Michael Mazerov, "States Can Fight Corporate Tax Avoidance by Requiring Worldwide Combined Reporting," *Tax Notes State*, July 22, 2024, p. 227.

[55] In 2024, the first year of planned GMT implementation, adoption of the provisions of pillar 2 is sweeping the globe. To date, over 60 countries have adopted some of the key provisions of pillar 2 or declared their intentions to do so. Pillar 2 adoption has occurred in both advanced nations, such as the 27 members of the European Union, and also in smaller low-tax nations, including Hong Kong, Singapore, Liechtenstein, Luxembourg, Bulgaria, Gibraltar, Isle of Man, and Jersey. *See* PwC, OECD Pillar Two Country Tracker.

[56] *See* Felix Hugger et al., "The Global Minimum Tax and the Taxation of MNE Profit," OECD Taxation Working Papers (Jan. 2024).

[57] *Id.* at 52. To date, the United States has not adopted the pillar 2 GMT. Nonetheless, the U.S. government's adoption of GILTI, a form of a GMT, was the primary cause for the replacement of a series of OECD BEPS 1.0 solutions with mixed adoption records with pillar 2's GMT — a global juggernaut that represents the most sweeping international tax reform in the last century. Currently, for most U.S. MNCs, GILTI has an effective rate of 13.125 percent (when factoring in the 10.5 percent rate and only 80 percent foreign tax credit). But in 2026, this effective rate will generally increase to 16.406 percent (when the section 250 deduction is reduced from 50 percent to 37.5 percent) — a rate higher than the GMT rate — and one that could create a competitive disadvantage for U.S. multinationals. *See* Frieden and Barbara M. Angus, "Convergence and Divergence of Global and U.S. Tax Policies," *Tax Notes State*, Aug. 30, 2021, p. 937.

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primarily, but not fully, on corporate shareholders.[58]

Moreover, whenever BEMS highlight business "underpayments" of CIT attributable to design flaws, they never discount the revenue impact because of any difference between the economic and legal incidence of the CIT.[59] Similarly, when BEMS advocate for gross receipts taxes on digital advertising, they do not qualify their support or modify their revenue estimates because under their economic incidence theory these costs would significantly be borne by the ultimate consumers, not advertisers.[60] Apparently, the "legal" incidence model works just fine for BEMS when they are discussing the imposition of new taxes on business.

That said, BEMS raise a valid point when they note that the initial imposition of taxes on businesses is not necessarily the same as the economic "incidence" of such taxes. But then they completely oversell the significance of this observation by treating it not as a qualification but as a partial or full refutation of the "Blinders" article thesis.[61]

To begin with, the primary goal of "economic" incidence studies is to address the distributional impact of taxes on households, not the fiscal impact on businesses. The reason for this is the great importance in tax policy debates of distributional equity and in determining the "regressivity" or "progressivity" of various taxes imposed on households. To some degree these studies measure the indirect incidence of business taxes on different household income deciles, but the studies much more reliably capture data relating to PIT, sales and use tax on purchases made by households (business-to-consumer commerce), homeowner property taxes, and other taxes that are assessed directly on families or individuals.[62]

A good example of the focus on distributional equity is the study "Who Pays? A Distributional Analysis of the Tax Systems in all 50 States," published annually by the Institute on Taxation and Economic Policy.[63] The BEMS group invited Carl Davis, the ITEP research director (and the "Who Pays?" project leader), as a special guest to participate in their roundtable critiquing the "Blinders" article and to provide commentary on tax incidence studies. The ITEP study is focused on a distributional analysis of the impact of state and local taxes on households:

> This comprehensive 7th edition of the report assesses the progressivity and regressivity of state tax systems by measuring effective state and local tax rates paid by all income groups. . . . It includes state-by-state profiles that provide baseline data to help lawmakers and the public understand how current

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[58] For a list of the 23 BEMS roundtables before April 2024, see Frieden, *supra* note 2, at 91 n.3; for the two roundtables that briefly mention the word "incidence," see Bucks et al., "Deferred Corporate Tax Relief: Bad Policy Based on Unsupported Assertions," *Tax Notes State*, May 16, 2022, p. 655; and Bucks et al., *supra* note 24.

[59] Bucks et al., *supra* note 4, at 179 (BEMS (and Davis of ITEP) cite studies showing that 25 percent to 40 percent of the economic incidence of the state CIT falls on workers. And yet neither ITEP (Davis) nor BEMS ever discount their revenue estimates of underpaid state CIT (attributable to the absence of WECR or WWCR) to consider that the economic incidence of the CIT does not fully fall on business). *See* Phillips and Proctor, *supra* note 48; Mazerov, *supra* note 54, at 236.

[60] On BEMS advocacy for digital advertising taxes, see Bucks et al., "The Maryland and New York Approaches to Taxing the Data Economy," *Tax Notes State*, Apr. 12, 2021, p. 147. For Shanske's acknowledgement that a gross receipts tax on digital advertising is essentially a consumption tax 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, at 101-104.

[61] Bucks et al., *supra* note 4, at 175. For instance, in the BEMS October 2024 roundtable, guest panelist Davis observes: "And I think the tax incidence discussion, which I'm definitely eager to get into, is a big part of why we shouldn't get much comfort from this idea that businesses are paying other kinds of taxes aside from the corporate income tax." *Id.* at 176. Peter Enrich in commenting on the Graeser/Maury 1994 article discussed earlier expresses a similarly overreaching opinion: "Part of the way that [Graeser/Maury] analysis drew its conclusion was by excluding sales tax paid by business from business taxes on exactly the grounds that Carl has just observed — so it's not so unsubstantiated." Enrich leaves himself some wiggle room: "Whether it's exactly right how we decide what counts as a business tax is certainly open to dispute, but at the very least, there is support for the claim that I've made in the past." Thus, Enrich doubles down on the nonsensical notion that *all* sales tax on business inputs ($240 billion in fiscal 2023, including the one-half that represents pyramided sales tax on business inputs — see Figure 2) could rationally be excluded from classification as "business" taxes. (As discussed above in note 31 and accompanying text, Graeser/Maury misinterpret the ACIR data, but that does not alter the fallacy of the Enrich analysis.)

[62] *See* 2024 Minnesota Department of Revenue Tax Research Division, "2024 Minnesota Tax Incidence Study: An Analysis of Minnesota's Household and Business Taxes," at Appendix B (Mar. 1, 2024). The Minnesota study highlights the much greater complexity and ambiguity in determining the incidence of taxes on businesses than on households:

> The rationale for this study's incidence assumptions is discussed in the next two sections. First, taxes on households are discussed. The incidence of business taxes, which is discussed next, is much more complex. Many issues are unsettled, and a wide variety of approaches have been used in incidence studies other than Minnesota's approach. As a result, this section provides an extended discussion of the methodology underlying this study's approach to business tax incidence.

Id. at 84.

[63] Institute on Taxation and Economic Policy, "Who Pays? A Distributional Analysis of the Tax Systems in All 50 States" (7th ed., Jan. 2024).

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> tax policies affect taxpayers at all income levels.[64]

To the extent these distributional studies calculate the economic incidence of "business" taxes, their findings are not necessarily consistent with BEMS's perspective. For instance, the ITEP "Who Pays?" study substantially undercuts the point BEMS are trying to make on the potential differences between the legal and economic incidence of business taxes, at least regarding the property tax, which is the largest of all the state and local taxes paid by businesses. The 2024 "Who Pays?" study concludes that most of the economic incidence of business property taxes falls on businesses and their owners, not on consumers or workers:

> Businesses pay a substantial share of real and personal property taxes. This analysis calculates the amount of property taxes falling initially on businesses — including but not limited to real property taxes, tangible personal property taxes, and inventory taxes — and allocates these taxes to owners of capital, labor, and consumers. The bulk of these taxes remain with owners of capital, though a portion is passed back to workers and a small share is passed forward to consumers.[65]

The ITEP study reaches a different (although qualified) conclusion on sales tax on business inputs:

> The final incidence of sales, excise and gross receipts taxes levied on business-to-business [B2B] transactions depends both on the nature of the product changing hands and the type of market in which the purchasing business competes (specifically, whether it is a local market or national market). These taxes are usually passed through to consumers in the form of higher prices.[66]

But there is nothing nearing unanimity of opinion on this subject. A 2010 study by EY authors found that, on average, only a small portion of the burden of existing state and local business taxes is passed on to consumers and that most of the burden is shouldered by business owners (including shareholders) and workers. Conversely, the EY study found that business has a much greater ability to pass the costs of additional (new) state and local business taxes on to consumers.[67]

With business taxes, unlike household taxes, even if some of the tax is passed on to consumers or workers and not owners/shareholders, an additional consideration emerges that undermines the utility of incidence studies. Businesses operate in a market environment and differential tax burdens can weaken a business's competitive standing whether they result in increased product costs, lower wages, or reduced profits. Two things can be true at once: The economic incidence of a business tax can be partially passed on to consumers in a way that may increase tax regressivity; and the additional tax costs, particularly if they reflect deviations from an optimal or neutral tax design, can financially disadvantage the business, whether or not the tax is passed on.

For instance, the key design flaw of a sales tax on B2B purchases is the potential for sales tax pyramiding if related business-to-consumer transactions are also subject to sales taxes. In that case, even if the sales tax is partially passed on to consumers, the entire transaction results in an inefficient (and unfair) double taxation within a given supply chain. This creates a competitive disadvantage for a business even if it can pass part of the taxes on to consumers. This helps explain why virtually all leading tax experts who criticize the design of sales tax systems with extensive tax pyramiding look to the legal incidence and not the economic incidence of the sales tax on business inputs.[68]

The weakness of BEMS's economic incidence argument as applied to business taxes is also

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[64] *Id.* at 5.

[65] *Id.* at 85-86 (the ITEP study also notes that the final incidence of business property taxes varies by industry and whether businesses operate in nationwide or local markets).

[66] *Id.* at 86.

[67] Cline et al., "The Economic Incidence of Additional State Business Taxes," *State Tax Notes*, Jan. 11, 2010, p. 105, at 118-125.

[68] See Frieden, *supra* note 2, at 99 n.33, for a list of academic critics of state sales tax design that results in extensive sales taxation of business inputs. This additional consideration — the increased supply chain costs of pyramided sales tax on business inputs — reinforces why tax incidence studies are better equipped to measure distributional tax equity among income groups than to address in any meaningful way the fiscal impact on businesses.

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evident from their reliance on a more subjective rationale to make their case. Without providing any empirical data, BEMS assert that the relative passivity of business in contesting state and local business taxes other than the CIT is proof that the incidence of these non-CIT taxes does not fall on business. For instance, according to Mazerov:

> So, again, it's just an indication that the major concern on the part of corporations is the state corporate income tax. They will rant about sales taxes on business inputs, but when push comes to shove in terms of actual policy choices, it's really not particularly a priority for them, because they do believe — that those taxes are almost entirely passed on to consumers.[69]

Later in the roundtable, Mazerov observes: "If the business community is so up in arms about taxation of business inputs and what it perceives to be overtaxation of its property, why isn't there more political activity on those two issues?"[70]

This argument is both factually incorrect and substantively incoherent. The opposition of business to the sales tax on business inputs has a long and storied history. For instance, over the last 50 years, nearly every sweeping legislative effort to impose a sales tax on a broad range of services has failed, in large part because of business opposition to the inclusion of B2B services in the base expansion.[71] In the last five years alone, COST has authored or published 13 studies and articles either fully or partially focused on, and critical of, the sales taxation of business inputs; it has submitted legislative testimony or letters 52 times opposing state legislation expanding the sales tax base to additional business inputs.[72]

Similarly, vociferous business opposition to the inclusion of business (but not household) personal property in local property tax bases has led to a significant reduction in the personal property share of aggregate business property taxes.[73] With regard to business activity relating to real property taxes, the BEMS roundtable participants contradict themselves, arguing both (a) that businesses are passive toward business property taxes and (b) that businesses vigorously litigate property tax assessments, seek property tax incentives, and oppose property tax base inclusion of intangibles.[74] As noted above, even ITEP's "Who Pays?" study concludes that the economic incidence of business property taxes falls primarily on business owners, undermining any BEMS argument that business pays less attention to property taxes based on a belief that the burden of these taxes falls elsewhere.

The BEMS argument that business is passive in opposing non-CIT business taxes is fiction and more indicative of the weakness of their economic "incidence" argument than of the perceived absence of corporate advocacy. Business restraint in opposing the heavy reliance of states and localities on higher effective tax rates on business property or business inputs in the sales tax base, to the extent it occurs, is more likely a reflection of political realities than it is any indication of disinterest because these costs are not borne by business.[75] Instead of asserting that business does not believe the burden of these taxes falls on business, BEMS should applaud business for shouldering a significant share of all state and

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[69] Bucks et al., *supra* note 4, at 176. Enrich concurs: "I agree that this is one of the clearest places where looking at what the large-business advocacy community does is some indicator of where the real heat on large businesses is, and it's not on the sales tax." *See id. See also* Davis at 180.

[70] *Id.* at 185.

[71] Frieden and Lindholm, *supra* note 44, at 49-51. A similar pattern is emerging with the debate over the expansion of the sales tax base to digital products, where business opposition to sales tax pyramiding through the inclusion of digital business inputs in the tax base is intensifying. *See* Frieden and Nicely, "Digital-Business Input Exemptions: Lessons From Sales Tax History," *Tax Notes State*, Jan. 29, 2024, p. 355. Vocal business opposition to gross receipts taxes on digital advertising and data mining, a recent approach to imposing a consumption tax on business inputs, also refutes BEMS "passivity" analysis. *See* Frieden and Lindholm, *supra* note 60; Frieden and Stephanie T. Do, "State Adoption of European DSTs: Misguided and Unnecessary," *Tax Notes State*, May 10, 2021, p. 577.

[72] On COST/STRI studies and articles on the sales tax on business inputs, see COST, COST/STRI Studies, Articles And Reports. On COST legislative testimony and letters relating to legislation on the sales tax on business inputs, see COST, COST Comments and Testimony. The BEMS roundtable participants contradict themselves on this topic, arguing both that business is passive toward the sales tax on business inputs (Bucks et al., *supra* note 4, at 185) and that business has succeeded through its advocacy in stopping the expansion of sales tax on business inputs (*id.* at 176).

[73] The personal property tax share of all property taxes has fallen about two-thirds since the 1950s. Walczak, *supra* note 45, at 3.

[74] Bucks et al., *supra* note 4, at 183-185.

[75] Frieden and Nicely, *supra* note 71, at 367-369 (for instance, in the debate over exempting digital business inputs from the sales tax base, I noted (with co-author Nicely) that it may be politically impracticable to undo existing sales taxes on B2B purchases, but that additional sales tax pyramiding should be vigorously opposed).

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local taxes and not trying vigorously to reverse all or even most business-unfavorable design outcomes.

Economic incidence analysis provides additional context for, but does not supplant, the primacy of legal incidence in establishing what qualifies as a business tax. BEMS's inconsistent and distortive economic incidence argument does not rebut the key finding of the "Blinders" article (reinforced by the recent EY data) that the designs of the largest state and local business taxes disfavor businesses far more than they favor businesses. Rather, BEMS make a more modest observation — that the disproportionately unfavorable outcomes for businesses are partially mitigated because businesses can arguably pass some of these tax costs on to consumers or workers.

Conclusion

In the closing remarks of their roundtable, BEMS do their best to belittle the "Blinders" article's "fair share" perspective, opining that the core arguments have no legitimacy. As Shanske states: "A lot of the significance of Frieden's article is simply its heft and the niceness of its color charts. And we need to make sure that we note that there's not a 'there' there, and that's the upshot of our discussion — at least to me."[76] And Bucks chimes in: "In fact, what our argument is, in essence, is that if you actually look at the questionable rationale for a number of Frieden's charts, they disappear into vapor."[77] After 15 pages of commentary critiquing my "fair share" perspective — the longest of all of their 25 roundtables over the five year period — these summary dismissals are thin on substance and thick on fallacy, directly contradicted by Mazerov's closing comment: "But this is just a start of our ongoing debate with Frieden and COST about this issue."[78]

Peter Enrich takes a different tack, asserting the strategy of the "Blinders" article is to divert attention and say: "Stop worrying about the corporate income tax and trying to fix that because businesses are already paying way more than their fair share in other categories."[79] He is half right. I have shown clearly that businesses, using BEMS's own criteria of determining a "fair share" based on deviation from an optimal or neutral tax design, are paying more than their "fair share" in the largest state and local business tax categories. Nothing in BEMS's response, other than the "economic incidence" argument — the significance of which is grossly overstated — does anything to refute the "Blinders" article's "fair share" analysis or the $261 billion identified by EY in "excess" business property taxes and pyramided sales taxes on business inputs attributable to deviations from neutral designs of state and local taxes.

But the point here is not that states should ignore the CIT or stop worrying about its design. BEMS raise relevant questions about state CIT design, highlighting a long-standing debate over combined reporting and the inclusion of foreign-source income in the CIT base. However, if BEMS want to push for significant increases in CIT or other business taxes justified— by "design" and "fair share" arguments — then they must expect businesses will insist that the designs of state and local business taxes are evaluated on a broader basis, to determine if they favor or disfavor business.

In the "Blinders" article, I made clear the goal was not to opine on the appropriate level of state and local taxes or spending. Nor was it to suggest that the large gap between what businesses pay in state and local taxes and what they would pay under more optimal or neutral tax designs should be addressed now with reductions in business taxes.[80] There are certainly other non-fair-share justifications progressives can (and do) use to advocate for higher state and local business taxes, including the need for more tax revenue to offset budget shortfalls or to fund new or expanding government programs. BEMS and similarly minded advocates, however, should be more circumspect in broadly implicating "fair share" arguments relating to state and local business

[76] Bucks et al., *supra* note 4, at 187.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 174-175.

[80] Frieden, *supra* note 2, at 118. I also explained that the "Blinders" article did not cover or critique either federal taxes or nonbusiness state and local taxes.

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taxes. The "fair share" tax debate carries for them a high risk of a boomerang effect — of highlighting (rather than undercutting) how much the designs of state and local business taxes tilt far more heavily toward disfavoring than favoring business. ■

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