

## PERSONAL AND POLITICAL BIAS IN THE DEBATE OVER FEDERAL INCOME TAXATION RATES AND PROGRESSIVITY

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### I. INTRODUCTION

Recently, the *Boston College Law Review* published a symposium issue containing twelve articles on federal income taxation issues pertaining to rates, progressivity, and budget processes.<sup>1</sup> These articles are well written, copiously researched, and representative of contemporary legal scholarship.<sup>2</sup> For the most part, these articles variously support the idea that our federal taxation system is insufficiently progressive.<sup>3</sup> Often this body of work attributes deleterious social effects to insufficient progressivity caused by tax cuts legislated in 2001<sup>4</sup> and 2003.<sup>5</sup> Some of the symposium writing advocates for increased federal taxation on wealthy taxpayers without

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1. *The State of Federal Income Taxation Symposium: Rates, Progressivity, And Budget Processes*, 45 B.C. L. REV. 989 (2004) [hereinafter Symposium] (referred to generally throughout this article as "Symposium").

2. *See id.* The lead article, *The Matthew Effect and Federal Taxation*, by Professor Martin J. McMahon, Jr., occupies 136 pages of the Symposium issue and conveys a tone suggesting that some contemporary legal scholarship embraces a great deal of political invective, directed in this case against the "Bush tax cuts," which Professor McMahon and other scholars he cites view as having "corrosive effects on American society and democracy . . ." *Id.* at 1128.

3. *See* Symposium, *supra* note 1. One article in the symposium issue, *The Luke Effect and Federal Taxation: A Commentary on McMahon's The Matthew Effect and Federal Taxation*, by Professor Deborah H. Schenk, disputes the implication of the lead article that increasing tax rates on the super-rich would significantly decrease income inequality problems. 45 B.C. L. REV. 989, 1129 (2004). Yet, while purporting to rebut this primary implication of the lead article, Professor Schenk, assures the reader that she, like Professor McMahon, agrees "that something must be done to deal with increasing income inequality, and that tax rates should be more progressive." *Id.* at 1132.

4. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

5. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 252 (2003).

structural limitations beyond those that might be necessary to avoid unwanted effects that higher taxation might have on economic behavior.<sup>6</sup> Effectively, most of the symposium scholarship seeks a direct political solution to the perceived problem of not taxing the wealthy as heavily as practicable.<sup>7</sup>

Unlike the commentaries of flat tax proponents, this article will not attempt to dispel the notion of progressive taxation.<sup>8</sup> Rather, this article will first question whether professors who write about tax policy can as a group reach unbiased conclusions about progressivity policy.<sup>9</sup> Next, this article will address a few progressivity concepts that fuel taxation debates.<sup>10</sup> Finally, this commentary will outline some ideas for structuring the federal income taxation system in ways that reduce political rancor and potentially create reasonable acceptance by tax producers, tax beneficiaries, and their respective advocates.<sup>11</sup>

## II. TAX POLICY SCHOLARSHIP, POLITICS, AND PERSONAL BIAS

Most law professors possess intellectual gifts that bring them much recognition throughout the various stages of their careers. Many received LSAT scores in the ninety-ninth percentile, and by the time they left law school possessed many academic distinctions.<sup>12</sup> Law

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6. See Richard Schmalbeck, *The Death of the Efficiency-Equity Tradeoff?: A Commentary on McMahon's The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 989, 1143-56 (2004) (suggesting that increasing top marginal tax rates could at some point affect economic output).

7. See McMahon, *supra* note 3. Again, a Symposium author who ostensibly disagrees with the strident conclusions of Professor McMahon set forth in the lead article makes clear to the reader his basic support for increased progressivity against high income earners. Thus Professor Schmalbeck freely confesses that he shares Professor McMahon's "predispositions on this topic" though concerned that too much progressivity might lead to economically detrimental behavior by high-wealth individuals. Schmalbeck, *supra* note 6, at 1150. This leaves the implication that high-wealth persons do not inherently deserve any limitation against progressivity based on any concept of right or fairness inuring to them.

8. See *infra* Part III.C. of this article (examining the possibility for nonpolitical determinations of rate progressivity). Considerable scholarship exists supporting the notion that the income tax should contain no rate progressivity at all beyond basic allowances. For a list of prominent books and articles both for and against a "flat tax," see "Flat Tax" at Amazon.com, available at <http://www.amazon.com> (last visited Apr. 13, 2006).

9. See *infra* Part II (exploring possible reasons for biased statements and conclusions like some of those contained in Symposium articles).

10. See *infra* Part III (discussing considerations that might allow for an analysis of progressivity based on politically neutral principles).

11. See *infra* Part IV (leading to one possible view of progressivity based on neutral principles rather than on fluctuations of political power).

12. See, e.g., THE AALS DIRECTORY OF LAW TEACHERS (Thomson West and Foundation Press, Inc. 2005) (shows that many law professors earned the Phi Beta Kappa or Order of the Coif distinctions while working for their academic degrees).

professors often practiced law quite successfully, even without substantial monetary rewards, prior to answering the call for teaching, scholarship, and service to the community and legal profession. After entering the academy, most law professors receive additional recognition for professional achievements. As a group, they are very smart, experienced, hard working, considerably good at the art of advocacy, and highly effective in their professional endeavors.<sup>13</sup>

On the whole, though, law professors tend only to become affluent, but not wealthy, and today there is a huge gap between wealth and mere affluence.<sup>14</sup> Although a law professor usually earns a good salary and benefits package,<sup>15</sup> many of a typical law professor's students eventually become attorneys who earn much more. These economically achieving attorneys frequently have clients who earn multiples more of income than do their counselors. Consequently, law professors are not far removed, by professional association, with the highest earning, most wealthy of citizens.

Many of these wealthy citizens never scored in the ninety-ninth percentile of any standardized test, and several prominent rich persons never even earned a college degree.<sup>16</sup> Yet, because of the money they control, the wealthy can live in expensive homes, have the best of every kind of goods and services, select from a wide variety of potential mates, impress their friends and relatives, and perhaps most importantly, earn the gratitude and respect of numerous persons who become recipients of their money.<sup>17</sup>

Most law professors will miss out on these advantages, knowing perhaps that even if they had chosen a nonacademic career path, they nonetheless might not have become wealthy by today's standards despite

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13. Even if much the same is true about entrepreneurial professionals, the vast difference in potential economic rewards between the professoriate and the most successful entrepreneurs might cause an objective observer to question how the former could possibly evaluate the social utility of the latter in an unbiased manner.

14. Professor McMahon promptly seizes upon this point in his lead article of the Symposium when he laments that "the super-rich are soaring above the merely rich." McMahon, *supra* note 3, at 1003-08.

15. One could fairly speculate that the value of this package in the year 2000 would not have been greater than about one-tenth of the \$1,696,322 average income of the top 0.10% of taxpayers mentioned by Professor McMahon for that year. *Id.* at 1004.

16. See College Dropouts Alumni Association, available at <http://www.geocities.com/CollegePark/7734/cdoaa.html> (last visited Apr. 6, 2006). Wealthy persons who dropped out of college include Bill Gates, Steve Jobs, David Geffen, and Michael Dell. *Id.*

17. Gratitude and respect comes not only from gratuitous recipients but as well from a great variety of persons who provide goods and services to the wealthy. See also *infra* note 137 and accompanying text (respecting donees who are also law professors).

their considerable intelligence and industry.<sup>18</sup> Consequently, it might be too much to expect that when law professors research and write about income disparities, progressive taxation, and kindred topics, their own income disparity in comparison with the truly wealthy might create at least some subtext of bias that helps skew their scholarship toward inevitable conclusions.<sup>19</sup> As pointed out by one scholar from the Symposium, psychological studies have shown that some game participants would rather *burn* money than see it fall into the hands of a rival.<sup>20</sup>

Yet hopefully nobody really would want to see money burned just to keep those who acquire it from spending, investing, or giving it away themselves. A far better way to vent any atavistic urge to prevent wealth accumulation would be to support the redistribution of excessive wealth to benefit the unfortunate or to ameliorate other pressing national problems.<sup>21</sup> By such means, one might avoid the appearance of a spoiler while wearing the mantle of social progressiveness.<sup>22</sup> Wearing that cloak allows us to assert a voice in how money acquired by others

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18. Occasionally, professors try their hand at entrepreneurial activity via consulting or commercially targeted authorship, but in the overwhelming majority of cases, this still does not mean that the professor will be able to retire to that large and beautiful home on the water, the price of which has exploded in recent years as a result of the buying power of increasing numbers of wealthy persons who did not pursue the academic life. There seem to be many personal reasons to dislike and disparage the wealthy.

19. Indeed, the author of this commentary has many times asked himself, "Why not tax the rich until they squeal? They already have too much, we are many, and they are few, so it should be easy to take away their wealth for the benefit of the many." Despite all the good reasons intelligent persons might concoct to follow this approach, lingering doubts always seem to suggest that to do so might simply not be fair to the wealthy persons. This is a fundamental consideration that scholars have to address that goes far beyond whether high taxation might cause behavioral distortions that affect our economy adversely.

20. See Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 989, 1384 (2004).

21. See *id.* at 1363. These pressing national problems apparently include the perceived social detriment that occurs when the high incomes of some depress the happiness of others. See *id.* This social phenomenon used to be known as envy but now is viewed as a more generalized problem to be solved by wealth confiscation supported by an extraordinary scholarly endeavor known as "happiness research." See generally *id.*; Marjorie E. Kornhauser, *Educating Ourselves Towards A Progressive (And Happier) Tax: A Commentary on Griffith's Progressive Taxation and Happiness*, 45 B.C. L. REV. 989, 1399 (2004).

22. Much righteousness results from what might be termed "Robin Hood syndrome," but one should remember that the Robin Hood of legend took from the agents of centralized government – specifically the Sheriff of Nottingham and high ecclesiastical officials who effectively held the power to tax. Robin Hood did not take from merchants, tradesmen, or other property owners with whom the populace freely transacted and who were themselves subject to the taxing powers of centralized authority. See generally Wikipedia, available at [http://en.wikipedia.org/wiki/Robin\\_Hood](http://en.wikipedia.org/wiki/Robin_Hood) (last visited Apr. 3, 2006).

should properly be spent.<sup>23</sup> Thus, we can simultaneously take the money away from persons who we might dislike or even fear,<sup>24</sup> accomplish a perceived social good with that money, and avoid any pressure to divert any additional resources of our own toward accomplishing the intended social good.<sup>25</sup>

Asking government to use its considerable power to force a select group of persons to give up disproportionately large quantities of income requires a great deal of political effort.<sup>26</sup> Not surprisingly, the professoriate from which many forceful and intelligent arguments supporting tax progressivity emanate tend overall to identify with the political philosophy known for disparaging wealthy persons as a group.<sup>27</sup> Law professors, in particular, possess extraordinary advocacy skills, so when they strongly identify with a political philosophy, their scholarship can sometimes take on a broader political bias animated all the more by

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23. Professor Griffith concludes his “happiness” article by stating: “The challenge for policymakers lies in the design of tax and spending policies which provide lasting improvements in the overall happiness of society.” Griffith, *supra* note 20, at 1398. Perhaps we should be thankful that the criterion of overall social happiness is not seriously considered in policy discussions involving nontax issues. Elsewise, policymakers might have to consider comprehensive group happiness in deciding, for example, whether to issue new building permits, execute convicts, standardize automobiles, enforce traffic rules, restrict speech, and a host of other governmental concerns in which competing rights and interests are balanced without reference to generalized happiness.

24. See Diane M. Ring, *Why Happiness?: A Commentary on Griffith’s Progressive Taxation and Happiness*, 45 B.C. L. REV. 989, 1421 n.14 (2004). There seems to be a presumption among some scholars that wealth concentration per se harms the democratic process and leads to abuses of power. *Id.* See also *infra* Part III B. (for a more neutral view of the wealthy). From the viewpoint of the wealthy themselves, one could assert that wealth concentration is intrinsically democratic, since wealth tends to accumulate when multitudes of consumers “vote” for their favorite goods and services by spending their dollars freely. Consequently, confiscatory taxation, by trying to reverse these dollar placements, is actually the antidemocratic force most to be feared.

25. One of the difficulties in trying to resolve social problems with someone else’s money is that our solutions can be less efficient than if our own money is involved. Indeed, we might even ignore whether money can resolve certain problems in any event. See generally J. PETER GRACE, *BURNING MONEY, THE WASTE OF YOUR TAX DOLLARS* (Macmillan Pub. Co. 1984).

26. Despite the federal tax decreases complained of by the majority of the Symposium authors, the most recent IRS Collections Data, which analyzes tax returns for the year 2003, indicate that the top 1% of filers paid 34.3% of all federal income tax in 2003 (up from 33.7% the previous year). See Action America – IRS Collections Data (2003), available at <http://www.actionamerica.org/taxecon/irsdata.shtml> (last visited Apr. 3, 2006). From this one might conclude that despite recent tax cuts, the political forces needed to tax the rich disproportionately are alive and well. See *id.* One might note also that in 2003, the top 1% of filers made just 16.8% of all adjusted gross income. *Id.*

27. It should be no secret by now that academia contains a disproportionate number of professionals who identify themselves with a politically liberal philosophy. One study showed that at elite schools, 87% of faculty identified themselves as liberal and only 13% as conservative. See Sarah E. F. Milov, *Study Finds Academia May Favor Liberals*, <http://www.freerepublic.com/focus/f-news/1379192/posts> (last visited Apr. 3, 2006).

their tenacious powers of persuasion.<sup>28</sup>

It is hard to see how the potential combination of personal bias resulting from professional income disparities and a broader political bias exacerbated by contested presidential elections, important court nominations, a war in the Middle East, and other issues cannot cast at least some doubt on the objectivity of current academic scholarship pertaining to basic tax policy.<sup>29</sup> And law professors, among all academic professionals, are most attuned to arguing effectively either side of a debatable issue. Thus, when choosing for themselves which side to argue (rather than having a client choose), law professors will do a most splendid job in supporting the view they find personally comfortable, even to the point of completely ignoring that different views might have any credible support at all.<sup>30</sup>

Consequently, it is not surprising that the lead article in a tax progressivity symposium issue of a prominent law review should contain in its one hundred and thirty-six pages<sup>31</sup> some propositions that might appear rather startling when isolated from the well crafted arguments presented:

A high income earner . . . must pay more for the use of . . . public goods – however much more the seller, the citizenry acting through government, wants to charge. If she doesn't like the price, she can choose a lower income level.<sup>32</sup>

It is . . . logically impossible that people should have any kind of entitlement to their pre-tax income.<sup>33</sup>

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28. See also *infra* note 51 and accompanying text (respecting the powers of persuasion frequently exhibited by law professors).

29. Throughout the Symposium issue, authors repeat the name “Bush” so many times that their political focus becomes unmistakable. See Daniel N. Shaviro, *Reckless Disregard: The Bush Administration's Policy of Cutting Taxes in the Face of an Enormous Fiscal Gap*, 45 B.C. L. REV. 989, 1285 (2004). Although the 2001 and 2003 tax cuts were proposed by President Bush, Congress, of course, enacted the tax cut legislation complained of after appropriate political debate in which liberal voices were fully heard. See H.R. REP. NO. 108-95, at 2-4 (2003). Note in particular the provocative title of a Symposium article written by Professor Daniel N. Shaviro of New York University School of Law: *Reckless Disregard: The Bush Administration's Policy of Cutting Taxes in the Face of an Enormous Fiscal Gap*, 45 B.C. L. REV. 989, 1285 (2004).

30. In general, only sparse and guarded opposition to the Symposium's overall theme of political criticism occurs among its dozen articles and commentaries. See *supra* notes 3 and 7.

31. McMahon, *supra* note 3, at 993-1128.

32. McMahon, *supra* note 3, at 1105 (citing Martin J. McMahon, Jr. & Alice G. Abreu, *Winner Take All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1, 69-70 (1998)).

33. *Id.* at 1106 (citing LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 16-17 (2002)).

[I]t should be obvious that pre-tax income is in no way “deserved.”<sup>34</sup>

Other authors whose work follows the Symposium’s lengthy lead article contribute additional ideas and conclusions in support of steeper progressivity in the imposition of federal income taxes:<sup>35</sup>

- Effectively, the only limitation that our federal tax system should recognize against imposing higher rates against wealthy taxpayers is the practicality of their taxing evasive action once their tax burden becomes too high.<sup>36</sup>
- Tax cuts recently enacted cannot be sustained due to the impossibility of controlling federal spending.<sup>37</sup>
- Recent tax cuts will have a morally unacceptable impact on future generations.<sup>38</sup>
- Procedural rules for tax legislation unfairly make the federal taxation system appear more progressive than it actually has become.<sup>39</sup>
- As a result of reckless tax cutting, the United States could face “an Argentina-style melt-down in the U.S. government’s position as a borrower in world capital markets, potentially yielding chronic inflation, unemployment, and bank and currency crises that may affect our economic productivity for an indefinite period.”<sup>40</sup>
- Aggressively progressive taxation is justified by the conclusion that increasing wealth has only marginal utility to an individual and provides no meaningful enhancement to personal happiness while simultaneously, san redistribution, depriving others an opportunity for increased happiness.<sup>41</sup>
- Accepting that enhanced tax progressivity would increase the

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34. *Id.*

35. To avoid long quotations, the following ideas and conclusions have been paraphrased.

36. Schmalbeck, *supra* note 6, at 1143-56.

37. William G. Gale & Peter R. Orszag, *An Economic Assessment of Tax Policy in the Bush Administration, 2001-2004*, 45 B.C. L. REV. 989, 1231 (2004).

38. Paul R. McDaniel, *A Commentary on Gale & Orszag’s An Economic Assessment of Tax Policy in the Bush Administration, 2001-2004*, 45 B.C. L. REV. 989, 1253-57 (2004).

39. Linda Sugin, *A Commentary on Gale & Orszag’s An Economic Assessment of Tax Policy in the Bush Administration*, 45 B.C. L. REV. 989, 1259-83 (2004).

40. Shaviro, *supra* note 29, at 1286.

41. Griffith, *supra* note 20, at 1363-98.

happiness of most citizens, any widespread opposition to sharper progressivity must be caused by “the combination of ignorance, cognitive bias, and inflammatory rhetoric.”<sup>42</sup>

- Happiness research aside, proponents of increasing progressivity should not ignore the proper role of progressive taxation in curbing the *power* of wealthy persons.<sup>43</sup>

These symposium conclusions point to the overarching proposition that tax cuts for the wealthy are the result of very bad policy choices. A companion thought for this proposition is that tax progressivity – the steeper the better – is inherently good for society and should be advanced as forcefully as possible.<sup>44</sup> Yet, in the wider realm of public debate outside mainstream academia, analyses against these propositions abound.<sup>45</sup> This suggests the legal academy has become somewhat politicized respecting fundamental notions about tax fairness.

Soak-the-rich law professors might assert that such politicizing of the legal academy is appropriate both because their positions on such issues are intrinsically correct and, as lawyers, their scholarship *should be* advocacy oriented. Thus, scholarship can elevate morality, as the scholars define it, over any acknowledgement that certain tax policy arguments can legitimately have opposing inputs.<sup>46</sup> By extension, a law professor convinced of the righteousness of a political view might conclude that he or she has a professional duty not only to let authorship serve political advocacy but also to insert political advocacy into classroom and public service activities that are important components of a professor’s work.

The advocacy model for finding truth and justice is a marvelous feature of our judicial system. We let opposing attorneys argue their best in a deliberately biased manner from both facts and law. The results of these opposing efforts go before a hopefully unbiased judge or jury, and

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42. Kornhauser, *supra* note 21, at 1405.

43. Ring, *supra* note 24, at 1421.

44. This seems to be the primary theme of the symposium’s lead article. *See*, in particular, McMahon, *supra* note 3, at 1122-28.

45. *See, e.g.*, Editorial, *The World is Flat*, WALL ST. J., Oct. 7, 2005, at A16.

The mainstream press is finally discovering the flat-tax movement that has been sweeping Europe. It must be painful to credit an idea associated with the likes of Milton Friedman and Steve Forbes, but reality can’t be ignored forever . . . . Russia, for example, has reported that it now gets more tax revenues from the rich from its 13% flat tax than from its pre-existing Swiss cheese tax code with massive evasion and 50% - plus tax rates.

*Id.*

46. *Id.*



as good a result comes out as can be humanly engineered. But the system only works when *both* sides are given effective opportunities for advocacy.<sup>47</sup>

When law professors too exuberantly wear their political positions on their sleeve, they might forget that the parents and students who pay tuition, as well as alumni, persons whose tax money and private contributions might support their law schools, and members of the general community who are supposed to benefit from their presence do not all share one political persuasion.<sup>48</sup> Perhaps a better expression of professional duty for professors than engaging in political advocacy whenever the job affords it would be to strive for at least a semblance of objectivity in analyzing important legal issues like tax fairness.<sup>49</sup> We need to remember that the advocacy model only works when both sides are fully heard. When this is not possible, perhaps because of insufficient numbers of advocates to support the other side, a professor might want to assume a bit greater role as an unbiased arbiter.<sup>50</sup>

In the classroom, law professors sometimes let students take a position on a legal issue and then argue against that position to the point that the student experiences a change of mind – at which time the professor changes the course of argument back in favor of the student’s original position until the student is once again convinced of the correctness of his or her original position.<sup>51</sup> Individual works of legal scholarship cannot always illustrate this kind of mental dexterity, but perhaps the same effect should at least be accomplished collectively

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47. Thus, the legal advocacy system is much concerned about problems like *ex parte* communications, inflammatory statements, factual misrepresentations, and the like. If academic scholarship turns to legal advocacy as its model, how should the academy manifest similar controlling devices against political uses of scholarship involving controversial issues?

48. The political deviousness resulting from the last two controversial Presidential elections should be a good reminder of this.

49. Legal scholarship should permit a professor to take a stand on an important issue but only after acknowledging the opposition’s most compelling arguments. (This means those arguments must be identified and understood.) Merely setting up the opposition’s easiest “straw man” arguments for the sake of readily knocking them down probably does not fulfill the highest scholastic standards. *See, e.g.,* McMahon, *supra* note 3, at 1101-09 (labeled *The Myth of Ownership*). *Cf. infra* Parts III.B. and C. of this article (which attempt to explore how to find a rational balance between individual property rights and governmental claims).

50. This article is hardly any kind of balance to the sentiments predominantly expressed in the Symposium articles. After all, this article will still support the concept of at least modest tax progressivity, though on a basis more technically founded than politically advanced. *See infra* Part IV. C. of this article.

51. This practice, vexatious from the viewpoint of many students, illustrates effective advocacy techniques but more importantly, tends to leave conclusions on the matter argued, if any, until *both* sides of the issue have been competently argued. Hopefully, the professor’s goal in such exercises is not just to showcase personal skills.

through a body of scholarship. This is most difficult to accomplish when the legal issue is politically volatile and most of the academy holds one political persuasion.<sup>52</sup>

### III. OBSERVATIONS ABOUT MAJOR CONCEPTS THAT SUPPORT ENHANCED TAX PROGRESSIVITY

This article is not written as a rebuttal to all the research and arguments presented in the Symposium issue that criticize recent federal tax cuts or advocate steeper progressivity for wealthy taxpayers. Accordingly, this section will tersely set out only a few considerations that might help balance some of the more controversial conclusions presented in the Symposium issue.

#### *A. Political Advocacy Tends to Invoke Political Responses*

There is no direct Constitutional, statutory, or current policy limitation that prevents Congress from taking away the majority of a high income person's annual accessions to wealth.<sup>53</sup> The only restraint that prevents the federal government from taking most of the income of wealthy taxpayers is political. As recently as the 1960's, marginal income tax rates were as high as 91%,<sup>54</sup> but the progressivity suggested by such a top rate was mitigated greatly via authorized loopholes, some of which no longer exist.<sup>55</sup> Effectively, the federal income tax system publicly displayed soak-the-rich rates while offering various means to permit high income taxpayers to avoid confiscatory taxation.<sup>56</sup>

The tension between imposing high progressivity while taking no more than a reasonable share of any taxpayer's income has resulted in many intervening changes to the Internal Revenue Code, including implementation of the alternative minimum tax in 1969,<sup>57</sup> cascading

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52. See *supra* note 27 and accompanying text. Let us hope that our pursuit of diversity in the academy does not produce a group of academicians, quite different from one another in appearance and background, who all have the same political and philosophical views.

53. See *Brushhaber v. Union Pac. R. Co.*, 240 U.S. 1 (1916) (discussing the broad Constitutional powers granted to Congress under the Sixteenth Amendment).

54. See I.R.C. § 1 (1954) (setting forth income tax rate tables for individuals).

55. See JEROME R. HELLERSTEIN, *TAXES, LOOPHOLES AND MORALS*, 16-27 (McGraw-Hill, 1963) (Chapter 2 – titled *A Grand Delusion: The Appearance and Reality of High-Bracket Rates*).

56. The link between rates and loopholes was illustrated in reverse in 1986, when income tax rates were dropped significantly while tax shelter limitations like I.R.C. § 469 (restricting passive activity losses) were implemented. See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat 2085.

57. See I.R.C. §§ 55-59 (2006).

rates until 1986,<sup>58</sup> and increased rates until 2001.<sup>59</sup> During the post-World War II era, many states and municipalities began to adopt or expand their own tax impositions that made ample use of the progressivity concept.<sup>60</sup>

For decades, there have been compromises between political forces pushing to get as much as possible from taxpayers in general, but wealthy taxpayers in particular, and political forces that favor some degree of restraint against wealth confiscation.<sup>61</sup> Since political struggle invokes strong emotional responses<sup>62</sup> and follows cycles of waning and waxing power as the electorate searches for leadership that frequently disappoints, the process of determining a balance between appropriate progressivity and inordinate wealth confiscation has been inefficient, unstable, and unpredictable.<sup>63</sup>

Although many nontax areas of legal development have consistently evolved toward defining norms, limitations, and overarching policy consensus,<sup>64</sup> no benchmark rules for determining policy strictures against tax progressivity have emerged. The courts cannot develop a policy consensus because the tax issues they hear are too narrowly framed.<sup>65</sup> The Treasury Department cannot do both because it is under the control of the Executive Branch, which automatically assumes a political agenda, and because it must assume an enforcement role that places its efforts in as narrow a context as experienced by the courts.<sup>66</sup> Congress, which enacts an ever-changing stream of tax legislation, is the crucible for political combat over tax rate impositions and thus is unlikely to act with any principled restraint in

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58. *See supra* note 56.

59. The top income tax rates in I.R.C. § 1 increased from 28% to 39.6% between 1986 and 2001. *See* I.R.C. § 1 as variously amended during that period.

60. *See, e.g.*, Cal. Rev. & Tax Code §§ 17001 et. seq. (2006) (setting progressive income tax rates in § 17041 that start at 1-percent and end at 9.3-percent).

61. There have always been doubts about the possible deleterious effects of inordinately high federal income taxation on the economy in general. These kinds of reservations against wealth confiscation are expressed in some of the Symposium literature. *See supra* note 7.

62. *See supra* notes 32-34 and accompanying text.

63. Which law professors teaching corporate taxation in the twentieth century could have predicted that the maximum rate of taxation on corporate dividends would be as low as 15% at the beginning of the twenty-first century? *See* I.R.C. § 1(h)(11) (2006).

64. *See infra* note 104.

65. This is because tax litigation usually focuses on the meaning of just one portion of a Code section, rather than on the validity of fundamental features of the Code like I.R.C. § 1, which sets income tax rates that fluctuate over a wide range as a result of direct political inputs. *See* I.R.C. § 1.

66. Thus, the Treasury Department devotes most of its efforts, outside direct enforcements, toward the resolution of numerous technical problems involving Code interpretations pursuant to its duty to promulgate “all needful rules and regulations” for tax enforcement under I.R.C. § 7805(a).

either direction absent outside influences that rise above political rancor.<sup>67</sup>

The academy of tax policy scholars could serve as such an outside influence, if we do not lose our group credibility as a result of blatantly tainting our scholarship with political advocacy. If we want to point the way toward a reasonable balance between progressivity and wealth confiscation restraint, we need to unfetter our work from the personal and political biases that potentially mar our objectivity.<sup>68</sup> A tax scholar who zealously joins one or the other of the political teams that push and pull over how much the wealthy should pay offers no true means to soften the political struggle on neutral grounds. Such a scholar simply encourages a continued cycle of political over-reaction that later will be countered with political over-reaction of the opposite kind. Rather than solving a fundamental tension in our tax system, that scholar will assist in pushing for extremes that keep the tension going.<sup>69</sup>

### *B. Impediments Against Reaching a Fair Balance Respecting Progressivity*

Interjecting certain ideas into the discussion about tax rates and progressivity can definitely lessen a scholar's objectivity from the outset. Foremost among these ideas, whether expressed directly or indirectly, is the notion that wealthy people generally should be feared and controlled.<sup>70</sup> Starting from such a premise, a political advocate might forget certain principles of universal application with which most of us agree. For example, wealthy people should be viewed as equal (neither superior *nor* inferior) to the rest of us under the law.<sup>71</sup> They have basic

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67. The key consideration would be whether Congress could agree to set tax rates according to neutral principles that operate regardless of whether Congress is controlled by the Left or Right at any time. It might be too much to ask that Congresspersons themselves formulate such principles, although Congress conceivably might embrace them if presented nonpolitically by respected outside institutions.

68. *See supra* Part II.

69. Of course, a scholar inordinately devoted to a libertarian or objectivist philosophy might produce startling scholastic conclusions every bit as strident, but having the opposite effect, as the "scholarly" conclusions set forth *supra* at notes 32-34 and accompanying text.

70. This sentiment produces conclusions like this one found at Symposium, p. 1421, note 14: "[W]ealth concentration harms the democratic process by giving too much power to the rich and . . . a tax system to prevent such wealth concentration is appropriate." Ring, *supra* note 24, at 1421 n.14. An anti-progressivity advocate might just as easily state: "Wealth confiscation harms democratic expressions in society by undoing the effects of millions of citizens who vote with their dollars by purchasing favored goods and services produced by those who thereby become wealthy."

71. The motto "equal justice under the law" cannot mean that when a poor person sues a rich person, the former should always win, nor that when a rich person sues a poor person, the former

civil rights, property rights, and due process rights as enjoyed by the nonwealthy. They should have full freedom to contract, legal protections of every kind derived from legislative enactments, and full access to courts and political processes as would benefit any other group of citizens.<sup>72</sup>

Like many of us who are not wealthy, wealthy persons can at times exhibit behavior that is both highly contemptible and highly laudatory.<sup>73</sup> Just as wealthy people should be regarded as having equal rights under the law, as a group they should be viewed as morally neutral respecting matters of social policy.<sup>74</sup> If a scholar were to try to demonstrate that the wealthy as a group visit more harm on society than good, surely another scholar of equal ability but differing attitude could as well offer a demonstration that the wealthy do more good than harm to society.<sup>75</sup>

If wealthy people have equal status under the law and at least moral neutrality in matters of social policy, we should be wary about seeking special rationales for taxing them differently (in either direction) from the rest of us. Only compelling reasons should support any special treatment.<sup>76</sup> Consequently, it should be possible to identify special

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should always lose.

72. Respecting the potential problem that the wealthy might have disproportionate access to the legal system and political processes, *see infra* Part IV.B. of this article (discussing regulation of abuses of power by the wealthy).

73. Perhaps Andrew Carnegie is an example of a very wealthy person who exhibited both kinds of behavior subsequent to his becoming wealthy. Carnegie was ultimately responsible for the bloody excesses associated with the labor strife of the "Homestead strike," yet Carnegie faithfully followed his belief that a rich person should distribute his wealth for the general welfare, preferably before dying. *See generally*, Wikipedia, the free encyclopedia, Andrew Carnegie, [http://en.wikipedia.org/wiki/Andrew\\_Carnegie](http://en.wikipedia.org/wiki/Andrew_Carnegie) (last visited Apr. 3, 2006).

74. Fortunes per se do not produce social irresponsibility, as recognized by most American leftists when contemplating the sizeable fortunes associated with the families of many of their favorite politicians like Ted Kennedy and John Kerry.

75. *C.f.* McMahon, *supra* note 3, at 1103 (citing William H. Gates Sr. & Chuck Collins, *Tax the Wealthy: Why America Needs the Estate Tax*, 13 AM. PROSPECT, June 17, 2002, at 20, 21). William H. Gates, Sr., voices his "expert" opinion about how wealthy people really owe their fortunes to luck, privilege, and society in general. *Id.* However, Bill Gates, his son, is busy using his wealth to help others. Thus, the Wall Street Journal for December 2, 2005 reports under the heading "Gift of the Week" that Mr. Gates, Jr. and his wife recently donated \$60 million to fund research on how to implement solutions to high newborn mortality in developing countries. Elizabeth Bernstein, *Gift of the Week: Baby Boon*, WALL ST. J., Dec. 2, 2005, at W2. The article further notes that the Gates Foundation is the largest foundation in the country, with an endowment of \$28.8 billion, and that it gives away about \$1.5 billion each year for such purposes as global health, education, and libraries. *Id.* No mention was made of how much philanthropy William H. Gates, Sr. has effected, nor whether he is personally disconcerted as a result of his son's enormous success. *See id.*

76. *See infra* note 143 and accompanying text (regarding a conceptual limitation on wealth confiscation); *see infra* Part IV.A. of this article (regarding overly favorable rates of taxation for the

treatment rationales that are less than compelling based either on logic or appropriate consensus.

For example, possible rationales for taxing wealthy persons *less onerously* than the nonwealthy include the ideas that economic success deserves additional recognition or reward,<sup>77</sup> the wealthy know better than the rest of us how to use money,<sup>78</sup> and the wealthy need not pay as much as the rest of us toward alleviating social problems like poverty because wealth-building activity has already had a salutary effect on such problems.<sup>79</sup> If we view wealthy people as legally, socially, and morally neutral, these kinds of rationales for taxing them less cannot stand.

Similarly, a neutrality assumption means that certain arguments in favor of taxing the wealthy disproportionately heavily should be suspect. For instance, the wealthy should not bear an increased tax burden because *some* wealthy persons, or individuals associated with wealthy persons,<sup>80</sup> publicly state that the wealthy are not paying enough taxes.<sup>81</sup> When all wealthy people feel that way, the government can surely take their money with impunity.<sup>82</sup>

Progressive taxation arguments based on the marginal utility of

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wealthy).

77. If this idea seems patently false, ask yourself why it should be patently true that economic success should invoke extraordinarily detrimental responses from government.

78. We can all think of examples of how the wealthy spend money frivolously, just like the general public does frequently. (Think of how sales of “pet rocks” once startled economic observers.) On the other hand, wealthy persons can at times dispose of their fortunes in noble ways. *See supra* notes 73 and 75.

79. The “I gave at the office” argument would not likely convince many of the Symposium authors that the rich should be taxed proportionately less than the rest of us, but perhaps some of them would at least acknowledge that wealth-building activity does confer substantial benefits upon society in many instances.

80. “Individuals associated with wealthy persons” could include, for example, Teresa Heinz’ husband and Bill Gates’ father. As to the latter, see *supra* note 75.

81. Note reliance on the wisdom of Warren Buffet in the Symposium’s lead article: “I personally think that society is responsible for a very significant percentage of what I’ve earned. If you stick me down in the middle of Bangladesh or Peru or someplace, you’ll find out how much this talent is going to produce in the wrong kind of soil.” McMahon, *supra* note 3, at 1102-03. Mr. Buffet’s modesty aside, the first thing a person of his ability placed in “the wrong kind of soil” might do is emigrate, as many talented British citizens did in the heydays of wealth confiscation in Britain following World War II. It would be interesting, furthermore, to see how Mr. Buffet would define “significant percentage,” since that goes to the true philosophical and moral basis for determining exactly how much the wealthy should share with government. *See infra* Parts III. C. and IV. C. of this article.

82. Perhaps many would agree that simply finding African-Americans who oppose affirmative action does not in itself weaken arguments that support that concept. In the same way, the opinions of some poor persons that the wealthy are overtaxed should not mean much in a debate about tax progressivity, nor the opinions of some wealthy persons that they are undertaxed.

income or the marginal happiness that comes with increased wealth are likewise suspect. The point is that most wealthy people feel that their wealth is quite useful to them. When they give up that sentiment, they tend to give their wealth away.<sup>83</sup> They, like the rest of us, ought to be able to decide subjectively how useful their property is to themselves.<sup>84</sup> This should be a fundamental precept of a free society. As for happiness, it should be enough to say that under putatively equal legal, social, and moral dignities, the rationale for *not* taking something away from someone should be that to do so would make the rightful owner *unhappy*, even if the property in question caused no happiness enhancement for its owner. Moreover, this criterion should be observed even if the property caused a *decrease* in the possessor's happiness.<sup>85</sup>

But what if taking one person's property and turning it over to a less fortunate person would increase the recipient's happiness?<sup>86</sup> Under the principle of equal legal, social, and moral dignities, the happiness of potential recipients of anyone's property would likewise be irrelevant.<sup>87</sup> Additionally irrelevant should be any perception that a widened gap in economically determined income distributions resulting from a free economy is inherently malevolent.<sup>88</sup> If the gap itself had independent

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83. See *supra* notes 73 and 75. Giving one's wealth away is quite a different experience than having it confiscated by government. For one thing, the former method of disposition permits capable citizens to apply their wealth in solving problems government might not be able to address efficiently. See Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in IV RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2025, 2039 (Dept. of Treas., 1977) (commenting how private enterprise and diversity of action are believed to do some social work better than government action and how preservation of individual initiative and decentralization is deemed vital in itself).

84. Even the nonwealthy sometimes give away the bulk of their assets before dying. The fundamental choice to give away or keep one's assets is part of our property rights that is and should be unrelated to objective utility. Thus, even though an eighty-nine year old individual is no longer able to drive, most of us would be taken aback by the suggestion that such person should automatically be forced to dispose of his or her automobile by either government or officious family members. Subjective utility is an important aspect of property ownership.

85. See *generally* Griffith, *supra* note 20, at 1363; Kornhauser, *supra* note 21, at 1399; Ring, *supra* note 24, at 1413 (respecting the "happiness" rationale for wealth confiscation). Perhaps we should not strain so much to find esoteric rationales to justify what at some point becomes taxation as a form of legalized theft. For example, if one were to buy an unneeded vacation home that resulted in unplanned maintenance expenses, boorish new neighbors, or other inconveniences, should government take the vacation home from the owner because his or her happiness *decreased* as a result of owning the extra abode?

86. Is the case for taking the vacation home in the preceding note any stronger if government promises to use it to alleviate poverty or solve some other social problem?

87. We are talking about increments in a recipient's level of happiness, not takings necessary to avoid life or death circumstances.

88. The presumed malevolence of a widening income gap is a theme well represented in

significance, a hypothetical destruction of all wealth (independent of taxation) would automatically increase the welfare of society in general and for the poor in particular. Yet if any wealthy person's assets were suddenly to disappear, it is much more tenable to conceptualize how the welfare of nonwealthy persons, such as those working on the wealthy person's newest mansion, would diminish than to conceptualize how anyone other than a competitor of that wealthy person would be benefited.<sup>89</sup>

Gaps in income distributions might be a problem for some who do not like the fact that the wealthy live much more extravagantly than merely affluent professionals.<sup>90</sup> Even if there are income gap decriers who honestly believe that income redistribution would greatly benefit the disadvantaged, they still must support the confiscation of wealth for reasons analogous to why outlaw Willie Sutton supposedly said he robbed banks – “because that's where the money [was].”<sup>91</sup>

No doubt there should be instances when the mere existence of a potential resource should give government the power to confiscate property in violation of egalitarian property rights,<sup>92</sup> but surely that power should be exercised with great restraint and with a view toward a very high justification. Calls for the confiscation of “excessive” wealth based on social desirability pertaining to poverty alleviation, universal healthcare, additional funding for education, etc. have not yet passed either a political or intellectual test of justification sufficient to suggest that only one narrow segment of the population should exclusively bear the full burden of such social enhancements.<sup>93</sup>

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Symposium writings. *See, e.g.*, Kornhauser, *supra* note 21, at 1400 (asking the question: “[I]f people logically should support progressivity because its redistributive effect would increase their happiness, why do so many people oppose it for the very reason (redistribution) that they should support it?”). Not emphasized in the discussion following this question is any notion, perhaps held by a large number of persons, that increasing one's happiness at the expense of another might simply not be fair to the other or intrinsically moral.

89. *See* Griffith, *supra* note 20, at 1384 and accompanying text (discussing the possibilities for ignoble justification for one's desire to see another's wealth diminished).

90. *See generally* Part II. of this article (discussing differences between professors and the wealthy).

91. *See* Wikipedia, the free encyclopedia, Willie Sutton, [http://en.wikipedia.org/wiki/Willy\\_Sutton](http://en.wikipedia.org/wiki/Willy_Sutton) (last visited Mar. 30, 2006).

92. When government takes property by eminent domain, public necessity is still balanced by a governmental duty to transfer back reasonable compensation to the owner of the property taken. *See* 26 AM. JUR. 2D *Eminent Domain* § 112 (2006).

93. *See supra* notes 85 and 86. Consider also the at least debatable assertions that: a) reasonable social needs might be adequately met by existing program and institutions; b) sometimes additional funding fails to result in discernible social improvements; and c) in some instances, overfunding social programs actually produces adverse social results. The first of these assertions



*C. Recognizing the Proper Role of Government as a Partner in Building Wealth for Individuals*

Among the concepts that promote politicalization of intellectual analyses about tax progressivity, the most troublesome is the notion that the government's role in wealth building is so prominent that only by the good graces of government should economically successful persons be allowed to retain any substantial portion of their extraordinary incomes.<sup>94</sup> Scholars who believe this stress that government provides the infrastructure, means to enforce contracts, and various legal protections, such as antitrust, patent, and securities enactments, necessary for fair and orderly wealth attainment and preservation.<sup>95</sup> Except for government, the reasoning goes, there could be no wealth at all, so like a mythical debtor who is in thrall to the person who has saved his life, the wealthy ought to pay similar homage to government at least in respect to taxation.<sup>96</sup>

However, government and wealthy individuals are in a symbiotic relationship with each needing the other equally. Unlike governments operated entirely with voluntarily donated goods and services,<sup>97</sup> governments in modern societies require huge amounts of revenue raised involuntarily and under threat of compulsion even to the point of

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finds support in the realm of health care, since the *combination* of Medicare, Medicaid, state and local medical assistance programs, healthcare granted by tax-exempt hospitals and other I.R.C. § 501(c)(3) organizations, employer health insurance, and privately acquired health insurance meet the healthcare needs of our citizenry to an extent that puts us at the top of the list of countries in this regard. The second assertion might best relate to education in that continuously rising expenditures for government provided education at all levels has not produced continuously rising performances by our students. The third assertion pertains best to direct welfare payments, which in the past brought increasing numbers of citizens to shun contributing to economic output in favor of (sometimes generational) reliance on governmental assistance. Thus, welfare reforms were initiated under the Clinton administration as a response to the social problems (waste of human potential among them) caused by attempts to alleviate poverty too comprehensively.

94. See generally McMahon, *supra* note 3, at 1101-09 (titled *The Myth of Ownership*).

95. *Id.*

96. See Wikipedia, the free encyclopedia, Bunbuku Chanama, [http://en.wikipedia.org/wiki/Bunbuku\\_Chagama](http://en.wikipedia.org/wiki/Bunbuku_Chagama) (last visited Apr. 5, 2006). In Japanese folklore, a mythical character called a tanuki is saved by a poor man. *Id.* In gratitude, the tanuki transforms himself into a teapot and tells the man to sell him for money. *Id.* Later the tanuki returns to the man who saved him and offers further service as a roadside attraction – a teapot that walks a tightrope – in order to provide revenue to the man. *Id.*

97. The family seems to be the largest institutional unit that can function in this manner. Attempts to operate larger, more diverse, societies entirely through voluntary contributions generally fail. See THOMAS AYRES, *THAT'S NOT IN MY AMERICAN HISTORY BOOK*, 15-20 (Taylor Trade Publishing 2004) (recounting "The Great Communist Invasion of Texas" involving a group of settlers who unsuccessfully attempted to set up a utopian community in the mid-nineteenth century).

physical violence.<sup>98</sup> It is much easier politically and practically for government to raise \$3,000,000 from one taxpayer who earned \$10,000,000 than to raise the same amount from two hundred taxpayers who each earn only \$50,000.

If Government *did not* facilitate wealth concentration, it surely would hurt itself as well as hurting financially ambitious members of society.<sup>99</sup> Additionally, if Government facilitates unlimited wealth building for individuals, but nobody responded to wealth building opportunities – say everyone strived only to become teachers, professors, civil servants, or other similar workers privately employed – government would have to shrink and thus lose comparative effectiveness.<sup>100</sup>

Although wealth concentration benefits government, it is not always clear that government does its best to assist wealth building, quite aside from how taxation itself impedes wealth. For example, businesses chronically complain about overregulation, and from time-to-time their complaints are actually justified.<sup>101</sup> And, if government is to take inordinate credit for wealth building by individuals, should not government bear some responsibility for losses associated with *failed* wealth building, beyond merely excusing affected investors from taxation?<sup>102</sup> Furthermore, if ambitious individuals deserve no credit at

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98. One might note that IRS “special agents” are authorized to carry firearms. They have the power to seize property by force in connection with tax liabilities under I.R.C. § 6331(b), which states: “The term ‘levy’ as used in this title includes the power of distraint and seizure by any means.” I.R.C. § 6331(b) (2006)

99. If all the income earned by the wealthy were magically to become income earned by tens of millions of common workers, tax increases would become a much greater political problem for government, since tens of millions of voters would much more closely examine the alleged necessity for costly social enhancements provided by government, as evidenced by the chronic difficulty experienced by local governmental units, like school boards, who regularly face defeat when placing property tax levies on the ballot. Wealth concentration has its advantages from the governmental perspective.

100. Note again the disproportionate amount of income tax paid by the wealthy. *See supra* note 26. The wealthy pay so much tax because they, unlike the workers mentioned, earn disproportionately larger incomes. This is good for them *and* government.

101. *See, e.g.,* Leslie Evans, *Lawrence Lessig Sees Public Domain Sinking in a Sea of Overregulation*, UCLA International Institute, *available at* <http://www.international.ucla.edu/article.asp?parentid=10831> (last visited Apr. 6, 2006) (summarizing the complaint of a Stanford law professor about overprotection of intellectual properties).

102. Loss deductions authorized in the first instance by I.R.C. § 165, cannot adequately compensate for economic losses, since these deductions can only save, at best, a percentage of each dollar of loss that relates to the marginal tax rate that offsetting income would otherwise bear. Additionally, loss deductions are limited or eliminated as a result of many features of the Code. *See* I.R.C. §§ 165(c), 1221, 465, 469 (2006).

all for the wealth they build, and government alone is to take credit for the creation of wealth, would it be possible for government to “franchise” wealth attainment by selling its indispensable services only to those who would be willing to pay back to government the most? Indeed, many of us would gladly pay government an 80% or greater imposition if only government would grant us the capacity to earn \$10,000,000 annually.

The idea that government is infallibly indispensable in the wealth creation process, and thus can exact from wealthy persons all the taxes the nonwealthy citizenry might desire has palpable flaws.<sup>103</sup> Because the importance of the individual’s role in wealth building is indisputable, the most appealing way to fashion a nonpolitical characterization of the relationship between enterprising individuals and government is to analogize that the two are partners in a joint venture intended to benefit both. Accepting this characterization invites partnership law comparisons that might be useful in analyzing how to strike a nonpolitical balance between appropriate tax progressivity and inappropriate wealth confiscation.<sup>104</sup>

- Partners are simultaneously both agents and principals for each other,<sup>105</sup> and in the former capacity, owe each other fiduciary duties.<sup>106</sup> This implies that when the taxpayer partner cheats, all extraordinary remedies available to aggrieved partners, including the equivalent of a constructive trust remedy, ought to be used by the government partner to correct the situation.<sup>107</sup> Wealth confiscation is thus entirely appropriate when the taxpayer partner denies the government partner its fair share of the venture’s

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103. Whether by risk taking, effort, skill, or simply placing oneself in the path of fortune, individuals are just as indispensable to wealth building – arguably more so – than is government, and most citizens know this instinctively at the very least when contemplating the effects of taxation against their own attempts to accumulate even modest wealth. *Cf. supra* notes 32-34 and accompanying text.

104. The Uniform Partnership Act (UPA) was formulated in 1914 and still serves to govern partnership relations and transactions in a number of states. 1-11 BUSINESS ORGANIZATIONS WITH TAX PLANNING § 11.02 (Mathew Bender & Company 2006). *See, e.g.*, Uniform Partnership Law § 1775.01, OHIO REV. CODE ANN. § 1775 (West 2006). The long and relatively stable interpretive history of the UPA makes it a particularly useful analytical tool to illustrate how competing interests can be balanced in joint endeavors.

105. *See* UNIF. PARTNERSHIP ACT § 9.

106. *See* UNIF. PARTNERSHIP ACT § 21(1).

107. *Id.* Partners also owe each other duties of disclosure. *See* UNIF. PARTNERSHIP ACT § 20. This implies that the taxpayer partner has few excuses to grumble about the government’s seemingly burdensome tax reporting requirements.

profits.<sup>108</sup>

- From the taxpayer partner's point of view, a fiduciary responsibility comparison suggests that the government partner cannot shirk its responsibility to provide the means under its control necessary to facilitate the wealth building venture, nor try through political force or indirect means to constantly increase its share of profits.<sup>109</sup>
- Profits (and losses) are shared by partners according to agreement, or in the absence of agreement are shared *equally*.<sup>110</sup> The functional equivalent of actual agreement between taxpayer and government partners, a very key concept throughout partnership law,<sup>111</sup> has to be implied agreement that accounts both for the consent element of agency and the relative bargaining power of the parties.<sup>112</sup> Implied agreement cannot exist unless the bargain struck is understood and deemed fair by *each* party, even assuming that the government partner represents all members of the nonwealthy citizenry.<sup>113</sup>

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108. The Code contains many penalty provisions that are thus justified and that arguably should even be enhanced. *See generally* I.R.C. §§ 6671-6675, 6677, 6679, 6682, 6684-6686, 6688-6690, and 6692-6724 (2006).

109. When one partner attempts to take advantage of other partners, the UPA provides special rights to the aggrieved partners. *See* UNIF. PARTNERSHIP ACT §§ 22 (providing an action for an accounting), 32 (providing for judicial intervention), and 38(2) (providing special dissolution remedies when a partner acts in contravention of the partnership agreement). In the metaphorical partnership between taxpayers and government, the government partner's recourse when the taxpayer partner acts wrongly is codified. *Id.* The taxpayer partner's recourse is much less formal but still very effective – that is, the taxpayer supports political action leading to legislation that sometimes perceptibly overcorrects against the government partner's overreaching. Recent political action of this type is the subject of much complaint throughout the Symposium articles. *See generally* Parts III. A. and IV. A. of this article.

110. UNIF. PARTNERSHIP ACT § 18(a).

111. Important provisions of the Uniform Partnership Act set forth a default principle prefaced by the phrase, “unless otherwise agreed,” thus placing great value on the partners' contractual undertakings among themselves. *See, e.g.*, UNIF. PARTNERSHIP ACT § 18 (prior to paragraph (a)).

112. Partners frequently share profits unequally even if contributions suggest that a partner's share of profits should be otherwise than agreed. *See, e.g.*, *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928) (in which one partner put up half the money needed to renovate a building plus all management services, yet ultimately only received a 50% share of profits as against the 50% share of the partner who only provided the other half of the initial capital needed). If a businessperson cannot get the capital needed to engage in a lucrative enterprise except by taking on a partner, this kind of accommodation might be necessary. Similarly, a partner providing all the capital might have to grant a large share of profits to a partner who provides indispensable services. Since it can be demonstrated that the wealth-builder and government indispensably need each other, considerations other than bargain-forcing capacities might enter an analysis of whether taxpayer/government profit shares should be skewed in favor of one partner. *See infra* note 113.

113. The government partner must represent wealthy citizens as well as nonwealthy citizens.

Under the default rules of partnership law, partners have *equal* rights in management,<sup>114</sup> but when one partner becomes too insistent about how to run the enterprise or how to distribute profits, the partnership becomes unworkable or at least very inefficient.<sup>115</sup> In the taxpayer/government partnership, the former acts as initiator of the enterprise and on-site manager, while the latter exerts managerial prerogatives via regulation and the power to determine when and how profit shares are distributed.<sup>116</sup>

The power of the governmental partner to determine when and how profit shares are distributed is particularly significant, because that power might be abused, contrary to partnership theory, to permit the government partner to increase its overall share of profits beyond the reasonable implied bargain that binds the partners. While analyzing federal income tax policy, scholars should consider that the governmental partner takes its annual share of profits in a great variety of ways, including redistributive payroll taxes,<sup>117</sup> the corporate income tax,<sup>118</sup> federal excise taxes,<sup>119</sup> and a host of state and local taxes levied against both individuals and entities.<sup>120</sup> In addition, the government

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Consequently, some measure of services and protection that government provides as its contribution to wealth-building enterprises are owed to the taxpayer partner in any event. Elsewise, a poor person could enforce a contract, but a wealthy person could not without payment of a special fee. The same is so respecting enforcement of various laws (pertaining to crimes, antitrust activities, property rights, etc.) and provision of public services and infrastructure. In a fair bargain between taxpayer/government partners, this consideration could suggest that the government partner's share of profits from wealth-building enterprises should be something less than one-half. *See also supra* notes 101 and 102, and accompanying text for additional considerations suggesting that the government partner's share should be less than one-half.

114. *See* UNIF. PARTNERSHIP ACT § 18(e), (h).

115. *Cf., e.g.,* Owen v. Cohen, 119 P.2d 713 (1941) (in which a judicial dissolution of a partnership was granted because "acts provocative of dissension and disagreement between the partners made it impossible for them to carry on the partnership business"). Personal discord translates into political rancor when the taxpayer/government partnership is considered.

116. The power to tax and regulate gives the government partner much discretion in the determination of its own share of profits. The taxpayer partner also has some control over how and when its share can be taken, but only within rules set out by the government partner, which not only writes the Internal Revenue Code but also regulates the taking of the taxpayer's share by other citizen's and government via lawsuits of all kinds.

117. For example, the hospital insurance portion of FICA taxes is imposed on earned income without limitation and without consideration of the actual hospital insurance needs of high-earning taxpayers. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207(a)(2), 107 Stat. 312, 13207 (Aug. 10, 1993).

118. *See* I.R.C. § 11 (2006).

119. *See generally* Subtitles D and E of the Internal Revenue Code.

120. These include income taxes, sales and use taxes, various kinds of business or franchise taxes, excise taxes, and property taxes. *See generally* STATE AND LOCAL TAXES, ALL STATES TAX GUIDE, *State Outlines* (RIA ed., Thomsom 2005).

partner has further exercised its managerial prerogative by extracting an increasing share of profits through a wide array of unfunded mandates that affect remunerative activity<sup>121</sup> and by letting monetary inflation work to its advantage.<sup>122</sup>

#### IV. MOVING TAX POLICY ANALYSIS AWAY FROM PERSONAL AND POLITICAL BIAS

In short, the government has kept quite busy devising ways to increase its share of profits from its uneasy partnership with persons who create wealth. When the private partner exhibits a knack for making the enterprise highly remunerative, the stakes in determining profit shares produce much political drama.<sup>123</sup> Giving dignity to the roles of *both* partners in the wealth creating enterprise, and considering carefully their respective contributions, Government should promulgate technical rules that reduce political friction in the taxation process.

##### *A. The Recent Rate Cuts for Capital Gains and Dividends*

If both the government and successful taxpayers deserve equal dignity in formulating tax policy,<sup>124</sup> equal dignity ought also to be conferred upon labor and capital in our mixed economy that relies so heavily on the efficacy of each. Consequently, rates of taxation against capital accretions should not theoretically be any lower than rates applied to services income.<sup>125</sup> The new low rates applied to dividends and capital gains ostensibly represent a political reaction that favors wealthy investors, but a political counter reaction to disfavor them would not do more than set up some future response that swings the

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121. See generally U.S. GENERAL ACCOUNTING OFFICE (GAO), REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA, COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE: UNFUNDED MANDATES, GAO-04-637 (May 2004) [hereinafter *GAO Report*], available at <http://www.gao.gov/new.items/d04637.pdf> (last visited May 11, 2006).

122. See *infra* notes 127-131 and accompanying text.

123. Compare the tension created in a law firm when one partner brings in an extraordinarily high fee or new clients that produce abnormally lucrative billings. Especially when the partnership agreement incorporates a profit sharing formula based to some degree on internal (political) consensus within the firm's hierarchy, such situation produces conflicts between the "rain-making" partner and other less productive partners who hope the spirit of joint venture is sufficient to let them share generously in the windfall. Frequently, dissolution of the firm results – an untenable solution for the government/wealth-builder partnership.

124. See *supra* Part III.B. of this article (discussing impediments against reaching a fair balance respecting progressivity).

125. See I.R.C. § 1(h) (setting a maximum 15% rate of federal taxation on most dividends and long-term capital gains).

political pendulum back.<sup>126</sup>

Although services income represents new accessions to wealth, capital gains represent in part a return of value already earned and taxed. Our current federal taxation system does a marvelous job in emphasizing the creation, preservation, and transformation of basis for the computation of potential gains and losses upon dispositions of property.<sup>127</sup> Notwithstanding, basis is not normally adjusted to reflect the effects of monetary inflation.<sup>128</sup> This is surprising given recent propensities for the Internal Revenue Code to incorporate inflation adjustments for a great variety of federal tax purposes.<sup>129</sup>

In part then, the recent lowering of rates on capital gains is justified. This justification is based not only on the inequity of effectively double taxing value already earned and accounted for under the tax system,<sup>130</sup> but as well because it is the governmental partner that seems to have most managerial control over the value robbing effect of monetary inflation.<sup>131</sup>

Likewise, the lowering of the income tax rate applicable to dividends is at least *in part* justified by structural inequities attributable to the governmental partner. Although the Internal Revenue Code permits several structures that avoid entity taxation while directly taxing entity earnings to equity holders,<sup>132</sup> the Code still stubbornly imposes

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126. See *supra* Part III.A. (addressing how political advocacy invokes political responses).

127. For example, careful attention to basis effects, determinations, and adjustments permeates “Subchapter K” of the Internal Revenue Code (pertaining to the federal income tax consequences that affect partners and partnerships). See I.R.C. §§ 704, 705, 722, 723, 731(a), 732, 733, 734, 737, 742, 743, 752, 754, 755.

128. This is largely due to the fundamental rule of I.R.C. § 1012, which sets basis initially as the taxpayer’s “cost” of an item. § 1012 (2006).

129. See, e.g., I.R.C. §§ 1(f) (adjustments in tax rate tables so that inflation will not result in tax increases), 415(d) (cost-of-living adjustments for limitations on contributions and benefits under qualified retirement plans).

130. Perhaps an “inflation exclusion” should apply to interest income to the extent that the interest returns on bonds and other debt instruments fail to keep up with the erosion in principal value caused by monetary inflation. The Internal Revenue Code at the moment does not allow for such in addition to not permitting basis adjustments that compensate for inflation.

131. The federal government’s role in controlling inflation is brought to mind by recent speculation regarding the “inflation philosophy” of Ben Bernanke, who recently replaced Alan Greenspan as chairperson of the Federal Reserve system. Mr. Greenspan’s efficacy in keeping inflation and unemployment low during his tenure is discussed in Greg Ip, *Greenspan’s Legacy Rests on Results, Not Theories*, WALL ST. J., Jan. 31, 2006, at A1.

132. Thus, “Subchapters J, K, and S” of the Code each contain intricate sets of rules for the avoidance of entity taxation involving trusts, partnerships, limited liability companies, and electing corporations. See I.R.C. §§ 661 (allowing trusts to avoid taxation by use of a distributions deduction), 701 (explicitly relieving partnerships from income taxation), 1363(a) (giving eligible electing corporations tax exemption).

both an entity tax and a tax on distributees in the case of dividend paying Subchapter C corporations.<sup>133</sup> Dividends taxation is another example of how the governmental partner's control over the means by which it acquires its share of profits from wealth building enterprises affects fairness in the context of only one technical aspect of income taxation.<sup>134</sup>

*B. The Federal Taxation System is Complex Enough Without Expanding Its Policy Goals to Regulate Abuse of Power by the Wealthy*

Some commentary from the Symposium suggests that since wealth can equate with power, and power can be abused, wealth confiscation via highly progressive taxation is desirable to prevent the wealthy from harming the rest of us.<sup>135</sup> This approach is wrong for at least two reasons.

First, wealth confiscation to prevent abuses of power ignores the fact that the great majority of wealthy persons are actually very good citizens.<sup>136</sup> To assume otherwise is to engage in a form of politically motivated bigotry against the class of citizens known as the wealthy. For every indicted businessman associated with graft, corruption, fleecing, and other forms of social misconduct, scores more can be found both nationally and in any local community who exhibit exemplary citizenship. Indeed, every one of the professors who contributed to the Symposium should be mindful that many wealthy persons, aside from paying a lot in taxes, *voluntarily* confer substantial economic benefits upon others for no consideration beyond mere name recognition. Thus, the majority of the Symposium authors display their full titles in the first note of their articles clearly indicating the largess of various named benefactors who sponsored the scholars' professorships.<sup>137</sup> Those symposium contributors who do not exhibit a

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133. Unlike trusts as permitted under I.R.C. § 661, corporations have no distributions deduction for paying out dividends. *Cf.* I.R.C. § 162 (permitting deductions only for "ordinary and necessary expenses paid during the taxable year in carrying on any trade or business).

134. Thus, the corporate tax, imposed at rates up to 35% under I.R.C. § 11, can be likened to a tax on capital that rivals the effects of inflation in eroding capital values and returns. This view gives additional credence to support for a more favorable capital gains tax rate, as well as support for a reduced tax on dividends distributions. Whether the 15% capital gain and dividends rates overcompensate for the effects of inflation and the (potentially) double tax on corporate earnings is a proper subject for economic analysis. Such analysis and calls for special rates would be unnecessary if *all* entities were excused from income taxation and bases in assets were adjusted for inflation.

135. *See* Ring, *supra* note 24, at 1421. *See also supra* note 43 and accompanying text (providing further discussion).

136. *See, e.g., supra* note 75.

137. The author of this article proudly acknowledges his own professorship attributable to the



professorship title containing the name of some wealthy benefactor most likely aspire to do so, since they are either associate professors or perhaps newer full professors.<sup>138</sup>

Second, wealth confiscation to prevent abuses of power is a bad idea because abuses can and should be addressed by means of more surgically effective nontax laws having no purpose other than abuse prevention. If we are concerned about undue political influence from wealthy persons, perhaps we should push for better campaign finance statutes. Concern about abuses by wealthy corporate executives should lead to laws like the Sarbanes Oxley Act of 2002,<sup>139</sup> or tougher criminal sanctions, but not legislation to hypertax corporate executives. And, if we are concerned that business executives receive too much pay from publicly owned enterprises, perhaps we should direct our powers of persuasion toward convincing equity owners that they should curb compensatory excesses.<sup>140</sup> This can be done both via scholarship and more directly by acquiring shares of stock, attending shareholder meetings, and raising questions if not raising Cain.”

Surely the interaction of our voluminous taxation statutes within their respective federal, state, and local Codes is complex enough to forego policy inputs that reflect broad attempts to curb abuses by a minority of the wealthy. We should not steer attention away from more relevant dynamics of the conceptual partnership between financially successful taxpayers and the government.<sup>141</sup>

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McDowell family of Akron, Ohio. The author was fortunate enough in his early professional years to practice law under the direction of C. Blake McDowell, Sr. and C. Blake McDowell, Jr. (both now deceased) and attests that he has yet to meet any more decent, self-effacing, and civic minded persons. Scholars who fear the wealthy and worry about their power might similarly benefit from contact with those whose largess has made their own professorships possible.

138. The author apologizes to any Symposium author who holds a professorship but did not display it. He extends apologies also to any author whose professorship title indicates the name of someone who was honored by a benefactor who wished relative anonymity. Not all wealthy persons want personal public recognition for their largess.

139. See Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (July 30, 2002) (providing generally for higher standards of corporate governance so as to avoid accounting abuses perpetrated by errant corporate officers).

140. See Ian Ayres & Barry Nalebuff, *When the Blind See Better*, FORBES MAGAZINE, Feb. 13, 2006, at 111. The authors, professors at Yale Law School and Yale School of Management, argue that excessive corporate compensations result from compensation consultants who lack objectivity, because they are more likely to be rehired when the chief executive is happy with the result. *Id.* The solution proposed for this problem is to have consultants give blind evaluations for a group of executives without knowing who the client is indirectly paying the consultant. *Id.*

141. See *supra* Part III.C. of this article (conceptualizing how wealthy persons and government form a *de facto* partnership).

*C. Determining a Fair Share of Profits for Government to Take from Its Partnership with the Wealthy*

Both the partnership model and the principle of equal dignities for classes of citizens suggest that wealth confiscation should be limited in principle by some approach that transcends mere political power exercises limited only when those who would confiscate wealth are convinced that to take more would harm the economy or promote extraordinary evasive action by the wealthy.<sup>142</sup> Viewing wealth confiscation from the point of view of neutral principles rather than from the vantage of personal and political bias could lead to the conclusion that government collectively should not, except in the face of dire national emergency, take more than one-half of any taxpayer's periodic accessions to wealth.<sup>143</sup>

As mentioned previously, the governmental share must take into account the unique power of government to fashion its impositions in a multiplicity of ways, direct and indirect, originating all the way from the halls of Congress down to the modest offices of the smallest villages spread across fifty states.<sup>144</sup> This means that the federal government cannot itself lay claim to anything near to fifty percent of any one person's accessions to wealth, let alone structure any one imposition, like the federal income tax, to take close to a one-half share.

Economists seem best suited to find and analyze data that indicate the relative bites taken by the various exercises of government fiat, especially in situations involving indirect takings.<sup>145</sup> Tax policy analysts, including law professors, seem best suited to crafting systems of rules that would coordinate how the various governmental bites might be taken into account using the basic tool of a flexible federal income tax that should equitably address the widely varying circumstances of individual taxpayers.<sup>146</sup>

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142. See *supra* note 36 and accompanying text.

143. This statement should not be construed as unequivocal support for taking as much as one-half of a taxpayer's accessions to wealth, since the governmental partner might not be able to justify a full one-half. See *supra* notes 101, 102, 113 and accompanying text.

144. Even small municipalities can get very aggressive about collecting revenues out of all proportion to the services they actually provide to particular taxpayers. See, e.g., *Wayne Miley v. City of Cambridge*, 1997 Ohio App. LEXIS 3243 (Ohio Ct. App. June 25, 1997) (in which an Ohio municipality unsuccessfully attempted to collect an income tax on a worker who neither lived nor worked in the municipality but whose employer was located in the city).

145. See generally *GAO Report, supra* note 121.

146. One problem in assessing the widely varying circumstances of individual taxpayers is that Congress has created so many different kinds of tax allowances that it is sometimes difficult to judge whether costs incurred by taxpayers to achieve particular allowances should be regarded as

One problem involving rate setting under our current federal taxation system is that the only flexibility for setting rates comes solely from fluctuations in political sentiments.<sup>147</sup> Perhaps tax rates should vary instead according to objectively determined externalities applied both broadly and at individual levels. At the individual level, for example, it might be desirable to vary tax rates imposed against a high income taxpayer from year to year depending on an objective evaluation of that taxpayer's total governmental burden during a period.<sup>148</sup> By such means, a taxpayer might actually pay income tax at lower rates in a year when income is considerably higher than in some other year, or vice-versa.<sup>149</sup>

At a broader level, base line starting rates might float from year to year depending on national economic conditions,<sup>150</sup> the electorate's capacity to curb its representatives' appetites for making commitments that carry big price tags far into the future,<sup>151</sup> or even according to built-in alarms that relate to the size of the national debt and annual budget deficits.<sup>152</sup>

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governmental expenditures rather than personal expenditures that happen to have a tax benefit attached to them. The former category of tax allowances should include, for example, state and local taxes deductible under I.R.C. § 164 and charitable contributions deductible under I.R.C. § 170. Tax allowances in the latter category might include deductions for qualified residence interest under I.R.C. § 163(h)(2)(D), which can involve personal use indebtedness of up to \$1,100,000. See I.R.C. § 163(h)(3).

147. See *supra* notes 53-59 and accompanying text.

148. Thus, the alternative minimum tax (I.R.C. §§ 55-59.) remains a remarkably effective means to impose surtaxes against taxpayers who are a bit too accomplished in their ability to marshal and compound the various tax allowances referred to generally *supra* in note 146. Amazingly, in the voluminous academic discussions generated by the concept of tax progressivity, very little mention is made of the fact that the alternative minimum tax is hardly progressive at all. It has only two rates – 26% and 28%. I.R.C. § 55(b)(1)(A). In one regard, the alternative minimum tax provides us with a good technical, and relatively uncontroversial, answer to the question of precisely what “fair” share of federal income tax wealthy earners should pay.

149. What should count is the total tax bite that government collectively takes. If this is so, the alternative minimum tax needs some technical adjustments, since it *ignores* deductions for state and local taxes (I.R.C. § 56(b)(1)(A)(ii)) while *allowing* generous deductions for “qualified housing interest” I.R.C. § 56(b)(1)(A)(ii); I.R.C. § 56(b)(1)(C)(i), (e).

150. At the moment, rate structures in the Code are based fundamentally on designated levels of taxable income that fluctuate only as a result of political alteration and cost-of-living adjustments as provided in I.R.C. § 1(f). In theory, both rates and levels of taxable income could be subject to automatic adjustments that reflect objectively determined changes in prior period revenue collections. By such means, taxpayers might better be able to appreciate how the public and private sectors of the economy integrate and how general economic conditions affect tax revenues.

151. Public perceptions about future financial obligations might be enhanced if payments for such obligations begin in the present, just as, for example, condominium owners become more sensitive to deferred maintenance problems if forced to amortize future expenses with current additions to their HOA fees.

152. An independent mechanism that automatically adjusts tax rates to reflect excess

One limitation against rate setting seems fairly certain. The vast middle of taxpayers are unlikely to want to pay total impositions that leave them with less than most of their annual incomes. Additionally, most taxpayers are likely to favor some form of tax relief for persons whose incomes officially make them poor.<sup>153</sup>

These propositions lead inexorably to at least a limited notion of progressivity, since loss of contributions to the government's share resulting from protection of lower income levels must be born either proportionately by *all* income above the designated cut-off point or be born disproportionately by higher income levels in order to protect middle levels of income.<sup>154</sup> If the wealthy had protection assuring in the aggregate that they could keep substantially more than one-half of their accessions to wealth, they might more willingly accept a degree of progressivity necessary to assure that truly basic levels of income do not get taxed.

This reasoning suggests that just three tax brackets are necessary to achieve equitable, and politically undramatic, progressivity under neutral principles. A zero tax bracket would protect the lowest income levels.<sup>155</sup> Next, a broad middle bracket would simulate a flat tax and reflect a normalized share of government spending.<sup>156</sup> Third, a top rate bracket

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governmental spending could have the same kind of politically neutralizing affect as is displayed by the Federal Reserve system, which independently influences interest rates when the economy runs either too hot or too sluggishly.

153. The federal tax system need not be dependent on its own politically determined definitions of income levels that should comport with zero income taxation. Thus, the Code could do away with the standard deduction provision of I.R.C. § 63(c) and the personal exemption definitions of I.R.C. §§ 151, 152 by relying directly on federal poverty definitions to describe initial levels of exempt income that vary according to family size. See U.S. Census Bureau, Poverty Thresholds 2005, available at <http://www.census.gov/hhes/www/poverty/threshld/thresh05.html> (last visited Apr. 3, 2006).

154. Flat tax proponents would argue in favor of assigning the "cost" of exempting threshold income proportionately against all income above the threshold. Yet, taking every argument in favor of progressive taxation as set forth in the Symposium and adding both the historical fact that progressivity has been a long accepted national norm and the unlikelihood that the electorate would embrace a flat tax anytime soon, we have left only the question of how to structure progressivity in a reasonably fair and nonpolitical manner that treats the wealthy as no less dignified than any other class of citizens. As developed *supra* in Part III.A., to do otherwise will invoke political responses like the 2001 and 2003 rate reductions so bitterly complained of by some of the Symposium authors.

155. Although FICA employment taxation of earners at the basic level effectively builds for them intangible assets in the form of future pension and medical payments, to assure full protection of basic income against federal impositions, the "cost" of exempting threshold income might have to include the financial burden of the (refundable) earned income credit under I.R.C. § 32.

156. That is, taking into account all tax allowances granted to taxpayers except the exemption for low earner income, the cost of government could be calculated as a uniform percentage of all reportable income. Because these tax allowances would be treated as governmental "expenditures," the generalized rate of tax would be higher or lower depending on the extent such allowances were

would address the need to “pay” for the poverty related income exemption without imposing a full proportionate share of governmental spending on middle taxpayers.<sup>157</sup>

The symmetry, simplicity, and fairness of a three bracket system that gears the middle bracket to overall levels of governmental spending compared to total income are apparent.<sup>158</sup> The rich pay the poor’s share of contribution to government, but both the middle and the rich pay proportionately for the total costs of government, including direct relief to the poor beyond excusing them from taxation. The starting point, under flexible rate determinations, for the highest rate bracket would depend not only on the ratio of government spending to total income,<sup>159</sup> but as well on the need to cap total governmental wealth confiscation at something less than a one-half share of individual earnings, and the consensus as to which levels of income are objectively associated with

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granted, effectively making those who get fewer allowances “pay” for those who get more allowances. To prevent individual taxpayers from unfairly using too many allowances, a surtax mechanism like the alternative minimum tax would still be necessary. See *supra* note 148 and accompanying text. See also *infra* note 158 (discussing a hypothetical illustration of how rate brackets and progressivity might be determined in a more politically neutral manner than exists currently).

157. The level of taxable income at which the higher rate commenced would fluctuate according to the potentially changing ratio of governmental spending to total income and changes in the poverty level determined exempt income base. Thus, the rate bracket threshold would be determined technically and objectively, not politically.

158. Here is an illustrative, though factually imprecise example of how a three bracket system based on politically neutral principles might work: Assume \$10 trillion of total income and \$1.3 trillion of direct federal expenditures outside those covered by non-income taxation (such as employment taxes). Against total income, direct expenditures would thus represent a 13% normalized rate of taxation. However, additional indirect expenditures, or so-called “tax expenditures” exist in the form of numerous and varied tax allowances that effectively exempt or shelter a large portion of the gross income collectively realized. Assume further that these allowances shelter \$4 trillion of the \$10 trillion of total gross income and that \$1.5 trillion represents allowances needed to protect low earners from income taxation, and the other \$2.5 trillion represents income sheltered by other taxpayers. Effectively, the remaining \$6 trillion of income must “pay” for these “tax expenditures” via rates higher than the normalized 13%. If we evenly assign the “cost” of the \$2.5 trillion of nonpoverty allowances (13% of \$2.5 trillion = \$325 billion) to the \$6 trillion of taxed income, the normalized rate of 13% would be adjusted to 18.4% (\$325 billion divided by \$6 trillion = 5.4% extra). If the “cost” of poverty-related allowances (13% of \$1.5 trillion = \$195 billion) is assigned symmetrically to the top \$1.5 trillion of taxed income, the progressivity rate would be 31.4% (18.4% plus an additional 13% representing the 13% normalized tax not collected against the \$1.5 trillion of income generated by lower earners). See generally PHILIP D. OLIVER & FRED W. PEEL, JR., TAX POLICY: READINGS & MATERIALS 505-07 (1996) (respecting the long held view of Congress that tax allowances are a form of governmental financial assistance that substitutes for direct expenditures). Note also that the above illustration is intended to explore only one possible scheme for setting rates and determining progressivity in a manner that minimizes political fluctuations.

159. See *supra* note 153.

poverty alleviation.<sup>160</sup> If middle taxpayers insist on increasing overall governmental spending, they would see increased taxation for themselves as well as for the wealthy. Likewise, higher rates would result if the electorate is too effective in implementing special tax deductions, exclusions, and credits.<sup>161</sup> Taxpayers at the high end and in the middle would experience higher offsetting rates. Both groups would experience the detriment of higher rates either caused by the alleviation of taxation against the poor or direct payments under poverty programs and have an incentive to work for the structural alleviation of poverty.<sup>162</sup>

Such a system would effectively set new, technically determined, definitions of wealth. Wealth would begin when a taxpayer first starts to earn dollars taxed at the highest bracket. At such point, a taxpayer would *begin* to pay not just a normalized share of the total direct and indirect burden of government but as well a share attributable to excusing the poorest of our citizens from taxation. Wealth would surely be indicated when a taxpayer started to have more dollars taxed in the third bracket than in the middle bracket. Likewise, lower and upper middle class status would be indicated by how much income more one earns over the starting point of the middle rate bracket.<sup>163</sup> These definitions would fluctuate from year to year automatically in a way that could reduce political and social contentiousness.<sup>164</sup>

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160. See *supra* notes 143 and 153 and accompanying text.

161. Every taxpayer enjoys finding exclusions, deductions, and credits that produce personal benefit. As well, every taxpayer wants those dollars that are to be taxed beyond the application of such allowances to bear tax at the lowest possible rate. These conflicting desires will likely assure the continued existence of the alternative minimum tax or similar surtax mechanism, the indirect effect of which is to prevent ever higher rates of taxation on dollars of income not protected by the various tax allowances. See *supra* note 148.

162. Poverty alleviation would produce more income that would share in the tax cost of government, and that cost would go down to the extent that higher incomes would decrease demand for governmentally provided goods and services designed to assure that poor persons have a designated minimum standard of living.

163. The key to separating the zero bracket from the middle, or second bracket, would be federal definitions of poverty, but the separation point between the middle bracket and the third and highest bracket would be more technically problematic. Nonetheless, an objective way to define that threshold might come from a reasonable and symmetrical statistical partitioning that relates directly to the normalized "tax cost" of both poverty-related and other tax allowances. For example, that tax cost could be born by the same percentage of the taxpayer population that corresponds with the number of poor earners who would pay no income tax as a result of not having income in excess of the zero bracket threshold. Alternatively, the tax cost of the zero bracket amount as pertains to low earners could be assigned to the top segment of income, regardless of how many taxpayers earned that segment, that corresponds with the number of dollars of income exempted for low earners. See *supra* note 158.

164. Hopefully, an objectively designed floating system for determining both rates and thresholds between rate brackets would help emphasize that the costs of government should be born by dollars of income earned, not individuals per se. The wealthy under such a system would thus be

The body politic, working collectively through all levels of government, would continue to make the usual politically contentious decisions about the proper role of government in providing goods and services outside the private sector. The political system might continue its addiction to creating various tax deductions, exclusions, and credits, but ultimately members of the middle and highest tax brackets would pay a collective price for these in the form of increased base rates required technically, not politically, to meet revenue needs.<sup>165</sup> Surtax rates, individually applied, would further assure that individuals in the wealthy *and* broad middle classes of taxpayers who are too successful in engineering the advantages of tax allowances would pay higher effective rates as required under the current alternative minimum tax.<sup>166</sup>

Overall, a federal income tax system structured to account for total governmental takings and creating just three rate brackets designed to float automatically according to both revenue needs and political permissiveness in the establishment of tax allowances would function as a self-sustaining governor that measures, assesses, and responds to each taxpayer's total economic contribution to society.<sup>167</sup> Effectively, each taxpayer's annual payments reflected on Form 1040 would constitute the key economic variable needed to define overall good citizenship in a reasonably objective manner.<sup>168</sup>

## V. CONCLUSION

It should be possible to design a federal income taxation system that determines rates and progressivity in an objective manner that

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viewed as paying for the *share* of contribution to governmental costs that would be paid by poor earners if they were not excused from paying income tax. This is quite a different burden than expecting the wealthy to bear disproportionately either the costs of goods and services distributed to the poor by government or the costs of other social enhancements that some proponents of progressivity deem desirable.

165. This would redirect political emphasis from tax rates and progressivity to spending issues involving both "tax expenditures" and direct outlays. *See supra* note 158.

166. *See supra* notes 161 and 148.

167. Taking into account taxation burdens at the state and local levels in determining both impermissible wealth confiscation and alternative minimum tax adjustments (*see supra* note 149) invites more closer coordination between state, local, and federal tax and budget authorities, as currently exists in many other ways pertaining to law enforcement, education, welfare payments, and Medicaid administration.

168. It is not possible in so short a space as the final segment of this article to address all the technical implications of the federal income tax rate system proposed. Other interesting possibilities for setting rates within an objectively determined framework could certainly be advanced by scholars and policy makers. The point of the exercise here is to try to steer attention away from the political forces that often enter discussions about tax progressivity and set forth in broad outline how a rate structure might be formulated with a minimum of political vulnerability.

reduces political rancor and volatility. To do so, tax policy makers will have to avoid either lionizing or demonizing the wealthy. Recent scholarship suggests that the tax policy debate in academia has exhibited much personal and political bias, effectuated with strong advocacy toward greater wealth confiscation.<sup>169</sup> By viewing the wealthy neutrally as partners with government in wealth building enterprises, tax policy scholars can better promote objectivity, the principle of equal dignities under the law, and credible tax policy analysis that could lead to balanced and reasonable determinations respecting rates and progressivity.

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169. *See supra* Part II (discussing political and personal bias in tax policy scholarship).