CHOOSING A TAX RATE STRUCTURE IN THE FACE OF DISAGREEMENT

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In this Article Professor Kornhauser proposes an Integrity Principle that Congress should use when legislating in the face of inevitable disagreement and conflict among principles. This Principle, loosely based on Ronald Dworkin's principle of integrity, requires Congress to promote coherence from both a practical and theoretical perspective. The practical aspect insists that Congress enact laws that best comport with reality; the theoretical aspect demands that Congress first interpret conflicting principles in a manner that best reconciles them and then enact laws that maximize this harmonization.

Professor Kornhauser then applies the Integrity Principle to the question of a tax rate structure, a situation in which fundamental American principles of equality and liberty collide. The practical prong of the Integrity Principle undercuts the assumption that a progressive rate structure is redistributive. This is a crucial assumption because the strongest objections to progressivity are based not on economics but on claims of justice. Thus, to the extent that progressivity is not redistributive, conflicts between equality and liberty disappear. The theoretical prong of the Integrity Principle demonstrates that even if a progressive tax rate were redistributive, progressivity best reconciles two fundamental, but often conflicting, sets of principles: fairness and justice, and equality and liberty.

The Integrity Principle, and its concomitant choice of progressivity, will increase the agreement between state action and individual belief and thereby enhance the legitimacy of the state. Since progressivity is a "better fit" with American principles, it boosts legal, moral, and popular support of the state; helps restrain concentrations of wealth and power—an historic threat to the legitimacy in America, and encourages national (or even international) unity.

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INTRODUCTION

The case for a progressive tax rate structure may be "uneasy," as Walter Blum and Harry Kalven so famously proclaimed half a century ago, but so is the case for a flat tax.[1] Both scholars and the general populace disagree as to whether the ideal rate structure is flat (proportionate) or progressive (graduated). The debate about the proper rate structure is so longstanding and intense that no analysis, no matter how strong, will resolve it. Given the inevitability of disagreement, the question becomes not how to end the debate, but how to act in light of it.

1. Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952). More recently, progressivity was discussed at a symposium at the Boston College of Law on April 16, 2004. *See* James R. Repetti, *Introduction* to *The State of Federal Income Taxation Symposium: Rate, Progressivity, and Budget Process*, 45 B.C. L. REV. 989 (2004). The long list of articles favoring a progressive (graduated) tax includes: Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905 (1987); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987); Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1 (1998). *But see, e.g.*, Jeffrey A. Schoenlum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221 (1995) (favoring a flat or proportionate tax). In recent years, many politicians also have proposed that the tax rate be flat. *See, e.g.*, Freedom and Fairness Restoration Act of 1997, H.R. 1040, 105th Cong. § 101 (proposal by Rep. Richard Armey and cosponsored by ten other congressmen); RICHARD ARMEY, THE FLAT TAX (1996); ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX (2d ed. 1995). However, General Wesley Clark, a candidate for the 2004 Democratic presidential nomination, recently stated that "[p]rogresssivity is more important than ever." Wesley Clark, *Real Tax Reform*, WALL ST. J., Jan. 9, 2004, at A10. The public is divided on the issue, as polls indicate. *See infra* note 66.

This Article proposes both the method that Congress should use to choose between a flat and progressive tax and what its ultimate decision should be. It begins by suggesting that in the face of inescapable conflict, Congress should be guided by an Integrity Principle derived from, but not identical to, the principle of integrity developed in Ronald Dworkin's *Law's Empire*.[2] It then states that the correct choice under this Integrity Principle is a progressive rate structure for three basic reasons.[3] First, progressivity best comports with the economic reality of how wealth and income are produced and acquired in society. Second, progressivity best reconciles two fundamental—but often conflicting—principles of American democracy: equality and liberty. Third, progressivity best promotes the state's legitimacy.

Objections to progressive taxation fall into three main categories: economic, administrative, and philosophical/political. Although the first two are important and should not be ignored, they ultimately should not determine the proper rate structure—and not simply because both economic and administrative concerns are frequently overstated.[4] Rather, choosing a rate structure involves fundamental questions about the nature of government and distributive justice that administrative and economic issues, important though they are, do not reach. The progressivity debate in the end revolves around conflicting visions of the relationship between the individual and the state, the meanings of liberty and equality, and their relationship to each other. Because these issues involve bedrock principles upon which American society and the legitimacy of its government rest, both the manner of choosing a rate structure and the ultimate choice must be governed by fundamental principles and a certain degree of pragmatism. When these principles conflict, there can never be consensus by scholars, politicians, or voters on any choice. Given the inevitability of disagreement, the best choice is the one that minimizes disagreement and maximizes areas of agreement.

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2. RONALD DWORKIN, LAW'S EMPIRE (1986). Although the book largely discusses integrity in the judiciary, it also applies to the legislature. *See id.* at 176.

3. Although most debates about progressivity focus on the income tax, the arguments also apply to other tax bases, such as consumption, estate/inheritance, and gifts.

4. Administrative objections focus on the complexity that progressivity adds to the tax law. However, the added arithmetical complexity is minimal. Any complexity added by tax provisions enacted to prevent manipulation to escape the higher rates can be minimized by eliminating deductions and credits, which both would lessen the opportunities to manipulate and broaden the tax base, thus allowing tax rates to decline, which in turn would decrease the motivation to manipulate. Moreover, the degree to which progressive rates affect economic behavior is frequently overstated. *See* DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 24 (Joel B. Slemrod ed., 2000). Optimal taxation provides economic support for a limited progressive tax. *See, e.g.*, Bankman & Griffith, *supra* note 1.

As the Article will explain, the Integrity Principle offers the best method to choose a tax structure because it maximizes coherence by requiring principles to be interpreted in the manner that most harmonizes fundamental principles with each other, with reality, and with individual citizens' beliefs. Since greater coherence minimizes disagreement with state actions, the Integrity Principle thereby increases the citizenry's support of government and therefore strengthens the state's legitimacy. Consequently, the Integrity Principle is the best method to resolve fundamental disagreements for practical as well as moral and philosophical reasons.

This Article does not develop a grand theory. Rather, it more modestly sketches the contours of a common sense approach to the problem of how to resolve an irresolvable conflict. Though concerned with philosophy, politics, and the law, it offers an everyday Integrity Principle, not an academic one. The Article is meant as a practical tool to guide politicians and concerned citizens to a better understanding of the issues so that politicians can make a real—not an abstract—decision about tax rate structure that citizens can accept.[5]

The Article proceeds as follows. Part I proposes an Integrity Principle under which legislative actions must promote coherence from both a practical and theoretical perspective. The theoretical aspect, loosely based on Dworkin's general principle of integrity, requires a legislature in a situation involving conflicting principles first to interpret those principles in a manner that best harmonizes them and then to enact a law that best implements the harmonization of those principles. The practical aspect promotes coherence among personal, political, and philosophical beliefs as well as reality. This, in turn, increases support for governmental actions and thereby enhances the legitimacy of American democracy.

Part II examines the assumption that a progressive rate structure is redistributive to determine whether it comports with reality, as demanded by the practical prong of the Integrity Principle. This is a crucial assumption because the strongest objections to progressivity are based not on economics but on claims of justice. Thus, to the extent that progressivity is not redistributive, conflicts between the fundamental principles of equality and liberty disappear, as do many issues of legitimacy. Its analysis from the standpoint of benefits taxation, burdens taxation, and property rights reveals the weakness of the redistributive claim.

5. In this sense, the Integrity Principle propounded here is similar to Richard Posner's everyday pragmatism. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 12–13 (2003).

Part III uses the theoretical prong of the Integrity Principle to demonstrate that even if a progressive rate were redistributive, it—rather than a flat tax—best reconciles two fundamental, but often conflicting, sets of principles: fairness and justice, and equality and liberty. Part IV explains that the theoretical prong of the Integrity Principle pragmatically promotes the legitimacy of American democracy. Since progressivity is a "better fit" with American principles, it boosts legal, moral, and popular support of the state; helps restrain the historic threat to American legitimacy—concentrations of wealth and power; and encourages national (and even international) unity.

A common theme runs through many of these arguments for choosing progressivity: Individuals are not isolated entities, and American society is not solely individualistic. Rather, both have individualistic and communal characteristics, and both are the products of individual and joint efforts. Ultimately, progressive taxation recognizes this duality whereas proportionate taxation unduly stresses the atomistic nature of individuals and society.

I. THE INTEGRITY PRINCIPLE AND ITS APPLICATION TO THE CHOICE OF TAX RATE STRUCTURE

A. The Integrity Principle Described

In the real world, legislatures frequently must act in the face of disagreement about what is fair or just. Even if people could agree on definitions of these concepts, legislatures would still encounter problems. Since fairness deals with process and justice deals with outcome, the two sometimes conflict. Unless justice is defined as the outcome of any process that people believe is fair, such as a generally accepted, unbiased method in which everyone has a voice, conflict may be inevitable.[6] For example, a majority rule winner-takes-all solution may be procedurally fair in that it was arrived at via the appropriate legislative process, but the outcome may be unjust because it oppresses or ostracizes individuals holding the minority view. A majority rule law may also violate constitutional or fundamental principles upon which the government rests, such as free speech.

Majority rule can also be problematic because it is often difficult to determine what the majority wants. In theory, in a representative government, whatever the majority of congressmen vote for is what the majority

6. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 136 (1971) (describing how decisions are made behind a "veil of ignorance" so that no one knows his or her particular status or character traits).

wants because legislators represent their constituents. In reality, of course, congressional votes are distorted by a variety of factors, such as lobbying, campaign contributions, and logrolling. Even if the legislative process were not influenced in such a way, it is often difficult—if not impossible—to tell what the majority really wants. Polls do not necessarily tell legislators what their constituents want because results are malleable, depending on variables such as when polls are taken, who asks the questions, how they are asked, and even in which order they are asked. At least two factors—ignorance and cognitive bias—make poll results in connection with taxes especially suspect.

People are incredibly ignorant about taxes. They lack knowledge about basic issues of taxation, including rate structure, the subject of this article. For example, a 2003 poll found that only 60 percent of respondents knew that high-income individuals pay a higher percentage of tax than low-income taxpayers.[7] In the same poll, only 21 percent of respondents had heard the phrase "progressive taxes" and knew what it meant; another 23 percent had heard it but didn't know what it meant, and 56 percent had not even heard of it.[8] Moreover, many of the 21 percent of respondents who allegedly knew the meaning of progressive taxation undoubtedly misconstrued the term. Because the tax field is rife with terms and concepts even more complicated than "progressive," ignorance and confusion regarding taxation are endemic.[9]

Cognitive psychology and behavioral economics reveal that humans do not always think or act in the rational way assumed by classical economists. People's views on taxation are affected by such factors as endowment (do they already have the money), whether payment is labeled a tax or a fee, and whether the rate applied is called a bonus or a penalty. Indeed, one

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7. NATIONAL PUBLIC RADIO ET AL., NATIONAL SURVEY OF AMERICANS' VIEWS ON TAXES 4 question 12 (2003) [hereinafter NPR POLL], *available at* http://www.npr.org/news/specials/polls/taxes2003/20030415_taxes_survey.pdf (showing that 11 percent thought the rates were the same and that 28 percent did not know enough to say).

8. *Id.* at 4 question 14a. The same poll found that only 50 percent of respondents knew that there had been tax cuts in the past two years. *Id.* at 3 question 11. Despite recent tax cuts that have reduced the average tax burden, in a 2004 poll, 25 percent of respondents stated that in the past three years their federal taxes had increased and 43 percent said that they had stayed the same. Will Lester, *Majority Favors Balancing Budget*, TIMES-PICAYUNE (New Orleans), Apr. 14, 2004, at A4 (reporting the results of an Associated Press poll).

9. According to the Adult Literacy Survey in 1993, a person needs more than a high school reading ability to understand the instructions on the 1040 form. *See, e.g.*, Anita L. Callahan & Paul R. McCright, *Literacy and Its Effects on Job Design*, 37 INDUST. MGMT. 6, 7 (1995) (stating that the instructions for the 1040 form require reading at a grade level of 12.28). Even the 1040 EZ requires reading at a grade level of 8.45. Maria Henson, *Students Find Form 1040 EZ Isn't So Easy*, ARKANSAS DEMOCRAT-GAZETTE, Apr. 3, 1988, *available at* LEXIS, ArkDem File.

study found that respondents favored more progressivity when the question was phrased in terms of percentages rather than absolute dollar amounts.[10]

The problems of cognitive bias and ignorance, added to design flaws in polling, mean that legislators have difficulty acting on behalf of the majority. Not only is it difficult to determine what the majority wants, but sometimes the majority wants inconsistent things. For example, some polls show that the public thinks taxes are too high, but nevertheless would rather maintain spending in areas such as health and education than cut taxes.[11]

Although "winner-take-all" legislation is flawed on both practical and theoretical grounds, a legislative compromise between disagreeing factions can sometimes be just as problematic. Consider, for example, what the federal government should do about gun control when one portion of the population favors it and another opposes it. A "checkerboard" compromise law might permit guns to be sold to people born in even numbered years, but not in odd numbered years.[12] Such a law may be fairer in a procedural sense than a majority rule law in that every faction's voice is heard, but the resultant law violates everyone's conception of justice. A checkerboard solution to the dispute about rate structure might result in a flat tax for people born in odd numbered years and progressive for those born in even numbered years or alternating the rate structure every other year. Yet such a tax would satisfy no principle of redistributive justice.

The principle of integrity, expounded by Ronald Dworkin in *Law's Empire*, provides one well known solution to situations in which foundational principles of justice and fairness conflict. Dworkin states that these conflicts can best be resolved by following what he defines as a third foundational principle—the principle of integrity. By requiring legislatures and courts to act in ways that produce the most consistency and coherence among principles, the principle of integrity serves both moral and practical political purposes. By minimizing differences and conflicts, it reduces dissonance among moral beliefs and between moral beliefs and state actions. It thereby

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10. Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1755–57 (2005); *see also* ALAN LEWIS, THE PSYCHOLOGY OF TAXATION (1982); Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861 (1994). Presumably, this result occurs, at least in part, because flat rates appear to be progressive when put in dollar amounts. For example, $2000 (10 percent of $20,000) is higher than $1000 (10 percent of $10,000).

11. NPR POLL, *supra* note 7, at 2. (In question 6, 51 percent thought taxes are too high, but in question 7a, 80 percent preferred to maintain these programs to cutting taxes).

12. *See, e.g.*, DWORKIN, *supra* note 2, at 178 (using as an example a law that permitted abortions to women born in even numbered years, but forbade them for women born in odd numbered years). *Law's Empire* informs much of the following discussion, especially chapters 6 and 7.

not only decreases moral opposition to the state, but also increases the state's legitimacy by increasing the area of congruence between moral belief and state action. The integrity principle also increases the state's legitimacy when people disagree with a specific state action. By "demand[ing] that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation,"[13] the principle of integrity increases loyalty to the state because it fosters a sense of community and concern for all that overrides occasional disagreements.

This Article's Integrity Principle, being a practical principle, does not require absolute coherence, which in the real world is neither achievable nor even desirable given the complexity and the pluralistic nature of American society.[14] Operating in the real world, it accepts that some inconsistencies will occur and requires only that legislative integrity maximize coherence. It simply demands that laws be as coherent as they can be. This coherency is achieved by enacting laws that create the largest amount of agreement among competing principles so that inconsistencies are minimized to the greatest extent possible.

Because this Integrity Principle is a practical one, it is not just concerned with enacting laws that maximize coherence among principles. Unlike Dworkin's theory, it is also concerned with maximizing the coherence between a law's assumptions and premises and reality. If a law rests on assumptions or interpretations of principles that conflict with conditions in the real world, then the dissonance created by this gap undermines the validity of the principle and alienates supporters of those principles from the government that enacts the law. Reality is not always as discernable as people may think, nor is there always one reality, because cognitive processes affect what reality a person experiences. These processes, in turn, are affected by many factors, including philosophical, political, and spiritual beliefs. Despite this degree of malleability, much of reality consists of facts that are verifiable and upon which people can agree. The Integrity Principle used in this Article incorporates this factual aspect and requires that the legislature enact laws that best reflect reality. Later, Part II will focus on this factual aspect of the Integrity Principle to determine whether progressive taxation is redistributive, as its opponents claim.

13. *Id.* at 219; *see also id.* at 189 (stating that integrity "fuses citizens' moral and political lives"); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

14. *See* Andrei Marmor, *Should We Value Legislative Integrity?* (Sept. 27, 2004), *available at* http://ssrn.com/abstract=567782 (rejecting legislative integrity for these reasons).

This pragmatic Integrity Principle has practical consequences. By maximizing coherence—between theory and reality, and among various political, religious, philosophical, and moral beliefs—the Integrity Principle maximizes people's satisfaction with governmental actions. The factual prong increases the likelihood that economic problems will be addressed correctly; the theoretical side increases the congruence between personal convictions and state actions. The more the government satisfies people's needs (economic, moral, and political), the more the people will support the state, which in turn serves the inimitably practical purpose of strengthening the state's legitimacy.

B. The Integrity Principle Applies to Taxation and to Rate Structure

Although the factual prong of the Integrity Principle should apply to every legislative action, this is not the case for the theoretical aspect. Rather, as Dworkin states, the theoretical aspect should be used only when matters of principle—as opposed to simple policy—are involved.[15] To require the theoretical prong of the Integrity Principle for every law would overly burden—if not paralyze—the legislature without a corresponding benefit. Principles are overarching goals that cannot be achieved immediately through one decisive act. Rather, legislatures endeavor to implement them through more flexible, individual policies that, in the short term, may conflict with these principles. For example, a low-income housing subsidy violates the principle of equality in the short term because it favors the poor. Nevertheless, it does not violate the Integrity Principle because, in the long run, it helps implement the principles of liberty and equality.

Since the Integrity Principle applies only to issues involving principles, whether it applies to the choice of tax rate structure depends on whether this choice involves basic principles, not mere policies. The answer is yes, it does. Even if all a tax did were raise revenues, taxation would never be a trivial matter from the perspective of either the state or the taxpayer. From the citizenry's standpoint, taxation is of great political, social, and economic import. It is one of the primary responsibilities of citizens, and it has an enormous economic impact on individuals. From the state's perspective, a steady source of revenue is necessary for existence. Such revenue is obtainable, in the long run, only by means of a tax system that most citizens accept as

15. DWORKIN, *supra* note 2, at 222–23.

fair.[16] Thus, taxes never simply raise revenue but invariably implicate distributive justice. In fact, in a capitalist society, taxation is the state's primary tool for distributive justice because most distributional decisions are left to the market.[17]

What people think is fair depends on their views about basic issues such as the nature of human beings, the individual's relationship to society, and distributive justice. Americans strongly disagree on all these issues. Does a person earn or "merit" all the income and other property she acquires? Does she acquire it solely through her own efforts, with the help of others including the government, or by luck? What is the nature of a person's rights in the property that she does acquire? Although Americans may agree that each taxpayer should bear an equal share of the tax burden, they disagree about what "equal" means. Although most agree on the centrality of the free market, they disagree on the need for its regulation. Disagreement on such issues indicates, more fundamentally, that Americans disagree on the meaning of the country's foundational principles of equality and liberty, the nature and extent of government generally, and more specifically on whether government should redistribute wealth.

For both historical and economic reasons, taxation has always been a primary arena in which Americans express their opposing views on fundamental topics. Historically, the tax-centric revolution that forged the nation established a pattern in which taxation often serves—literally, as

16. Voluntary contributions by citizens do not provide a steady source of revenue to the state, as evidenced by the experience under the Articles of Confederation. *See, e.g.*, ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 24–28 (1993); W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY 11 (1996). Of the three methods that do provide steady revenue—state ownership of property, debt, and taxes—taxation is the best. For taxation to work efficiently, however, citizens must believe that both the government and the taxes are fair. Otherwise, there will be a high level of noncompliance, which both undermines respect for the government and decreases revenues.

17. *See, e.g.*, LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 3 (2002) ("In a capitalist economy, taxes are not just a method of payment for government and public services: They are also the most important instrument by which the political system puts into practice a conception of economic or distributive justice."). The use of tax preferences (credits, deductions) has also become, in recent times, a primary means of executing public policy, especially as regards to social welfare. *See, e.g.*, I.R.C. § 220 (2000) (expanding health benefits through medical savings accounts); I.R.C. § 24 (offering support for children through the child tax credit); I.R.C. § 25A (supporting education with the Hope and Lifetime Learning credits); I.R.C. § 32, 42 (helping the poor through the earned income credit and the low-income housing credit); *see also* Gene Steurele, *Can the Progressivity of Tax Changes Be Measured in Isolation?*, 100 TAX NOTES 1187 (2003).

well as figuratively—as the battleground for political debates.[18] Economically, the country's focus on the free market and entrepreneurship has meant that tax is a primary tool of any redistribution that occurs. Consequently, taxation implicates fundamental philosophical and political principles.

The fact that taxation as a whole involves fundamental principles does not mean that each tax provision does individually. Many tax provisions merely carry out policies that do not primarily affect distributive justice, such as encouraging environmental cleanups[19] or historic preservation.[20] However, the framework of any tax—its base (what to tax) and its rate structure—sets the parameters in which particular provisions operate. They inevitably have such far-reaching consequences for distributive justice that they do reach the level of principle. Consequently, the Integrity Principle should guide the resolution of any controversy about rate structure.

The next two parts use the Integrity Principle to examine the primary objection to progressive taxation—that it redistributes wealth and income and therefore violates individual rights to liberty and property. Part II uses the factual prong of the Integrity Principle to show that, rather than being redistributive, a graduated tax may best comport with the economic reality of how people acquire and retain wealth and income. To the extent that progressivity is redistributive, Part III describes how, under the theoretical prong of the Integrity Principle, a progressive tax best reconciles two sets of basic, but often conflicting, principles of American democracy: fairness as process versus fairness as outcome, and liberty versus equality.

II. IS PROGRESSIVITY REDISTRIBUTIVE?

There are at least three strong arguments that a progressive tax is not redistributive. Two rest on classic theories of taxation: the benefit and equal sacrifice theories. Parts II.A and II.B elaborate on how progressivity equitably matches taxes to burdens and benefits without redistribution. Part II.C, using economic reality and a theory of property that stresses the interdependence of people, argues that progressive taxation is not redistributive because it simply reflects the fact that the acquisition of any property is never entirely the result of one individual's actions. Its graduated rates thus insure that other factors of production—labor and government, as well as capital—receive their proper return.

18. Physical violence, for example, occurred in the Shays', Whiskey, and Frear's Rebellions, in addition to the American Revolution. *See* Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819 (2002).

19. I.R.C. § 198.

20. I.R.C. § 47.

A. Benefit Theory of Taxation

A benefit theory of taxation holds that taxes should be distributed among taxpayers according to the benefits they receive from government. Under this theory, taxation is merely a form of contract, with taxes being the consideration paid for goods received. Whether a tax structure is redistributive under this theory depends on whether the structure shifts the burden of tax so that a taxpayer pays an amount that exceeds the value of benefits received.

Benefit taxation has a long and checkered history. Once viewed as the primary principle of taxation, it was superceded at the turn of the nineteenth century by the ability to pay theory. By mid-twentieth century, many scholars viewed benefit taxation only as a curiosity. Nevertheless, it never disappeared entirely. For example, benefit taxation underlies international tax principles that allow both the country of residence and the source country to tax income.[21] More recently, benefit taxation has reemerged for two different reasons, one supported primarily by the political right and the other by the left. On the right, many conservatives and libertarians favor a theory of public economy that views taxation as a fiscal exchange—money (taxes) from the taxpayer in exchange for goods and services from the government. This view of taxes as a simple monetary exchange, like any private transaction, is congruent with a belief in the primacy of the market and the limited role of government. On the left, some liberals—viewing the relationship between individuals and government as more intertwined than simple fiscal exchanges—endorse benefit taxation on the grounds that government significantly helps individuals and businesses in numerous complex ways. Of course, this view can fit within a fiscal exchange model. It just defines the goods and services provided by the government more broadly.

The primary reason that benefit taxation lost support in the late nineteenth century was the belief that poor people receive many more benefits from the government than wealthier people. If true, the rate structure of any tax based on a benefit principal would never be progressive. The rate would be proportionate at best, with every taxpayer—no matter how rich or poor—paying the same percentage. However, if as surmised the poor receive many more benefits, then the rate structure would actually have to be regressive, with the poor paying a higher rate of tax than the rich.[22]

21. *See, e.g.*, Herwig J. Schlunk, *Double Taxation: The Unappreciated Ideal*, 102 TAX NOTES 893, 895 (Feb. 16, 2004) (arguing that benefit taxation justifies corporate tax); *see also* Deborah A. Geier, *Letter to the Editor, Time to Bring Back the "Benefit" Norm?*, 102 TAX NOTES 1155 (2004) (supporting benefits taxation).

22. Assume that Rich earns $100,000 and Poor earns $20,000. The government needs $12,000 to provide all the goods and services Congress agrees upon, $8000 of which go to Poor

The belief that the poor benefit more than the rich from government rests on a narrow, simplistic view of government benefits. It ignores the broad effects of the legal system itself, and it selectively identifies governmental payments to the poor as "welfare," but avoids similarly categorizing many payments to the nonpoor. If both of these factors are taken into account, then a strong argument can be made that a progressive tax structure is not redistributive. Rather, it simply reflects the greater benefits that people receive as their wealth and income increase.

The robust form of the above argument states that the government plays a role—at least indirectly—in the creation of all wealth and income because all private property is "a legal convention" constructed from "an elaborately structured legal system governing the acquisition, exchange, and transmission of property rights" that includes the tax system.[23] Without this governmental structure protecting, regulating, and enforcing property rights, neither the free market nor individual property rights would exist. Consequently, the robust argument holds that all wealth and income depends on (and benefits from) the government because it is government that defines and secures property rights.

The degree to which governments promote and protect private property can vary. The United States, with its individualistic, market oriented laws, strongly supports and advances the security of property rights. To the extent that higher income, wealthier taxpayers have more property to protect, they receive greater protection. They also benefit more from the public infrastructure that government creates in various forms, such as judicial and administrative systems, physical capital (for example, building and maintaining transportation systems), and human capital (for example, funding research and education). Moreover, people invest (and grow wealthy) in countries where stable governments and well-developed public infrastructures protect property rights and allow individuals to prosper.[24]

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and $4000 to Rich. If income is the tax base, then the rates would be regressive under a benefits tax. Poor would have a 40 percent rate (40 percent x $20,000 = $8000 tax). Rich's rate would only be 4 percent (4 percent x $100,000 = $4000 tax).

23. MURPHY & NAGEL, *supra* note 17, at 8; *see also* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 5 (1997) ("Free markets depend for their existence on law. We cannot have a system of private property without legal rules."). Some very wealthy people recognize this contribution. *See, e.g.*, WILLIAM H. GATES, SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES 115–18 (2002).

24. *See, e.g.*, David Alan Aschauer, *Why Is Infrastructure Important?*, *in* IS THERE A SHORTFALL IN PUBLIC CAPITAL INVESTMENT? 21 (Alicia H. Munnell ed., 1991) (noting the importance of infrastructure in quality of life and economic productivity); Alicia H. Munnell, *How Does Public Infrastructure Affect Regional Economic Performance?*, *in* IS THERE A SHORTFALL IN PUBLIC CAPITAL INVESTMENT?, *supra*, at 69 (discussing the positive correlation between infrastructure and regional economic growth).

Under this strong argument, a progressive tax is not redistributive but merely reflects the vast benefits of private property that the wealthy receive from the government.

The weaker form of the argument considers only specific benefits that people receive from the government, but it still concludes that progressive rates reflect benefits received rather than redistribute property. According to this version, despite a nominally laissez-faire government, much private wealth in America always has been based on government largesse, such as land grants to railroads, below market-rate grazing rights to ranchers, water rates to farmers, and low royalty payments by miners.[25] The fortunes of many current millionaires (and billionaires) rest on government sponsored technology, such as the Internet and the genome project. The great danger to the continued prosperity of the wealthy, it has been said, is not high taxes but reduced government spending on basic research.[26]

The wealthy receive large benefits from the government both directly and in the form of tax expenditures. Assume the government wants to encourage a particular behavior (for example, farming or homeownership) by subsidizing it. The government can accomplish this result by subsidizing the behavior either by giving cash directly to individuals who engage in it or by reducing their tax liability. If the government administers the subsidy program by a direct expenditure, it must first collect the necessary amount from all taxpayers and then disperse the money to those who engage in the behavior. A tax expenditure or preference (a deduction, exclusion, or credit) directly subsidizes the activity by reducing the tax liability of those who engage in it. Other taxpayers, however, help pay for the activity, just as they do with a direct expenditure, because their taxes must be raised to replace the revenues lost when the subsidized taxpayers' taxes are reduced.[27]

25. *See, e.g.*, Jim Carlton, *Is Water Too Cheap?*, WALL ST. J., Mar. 17, 2004, at B1 (stating that farmers in California are subsidized by "rock-bottom" water rates).

26. *See, e.g.*, Lee Gomes, *Battle Over Access Tax Is Going to Determine Future of the Internet*, WALL ST. J., Dec. 8, 2003 at B1. In the 1913 debate on the income tax, Senator Poindexter supported a progressive tax on the grounds that large fortunes resulted more from special favors from the government than from individual industriousness. 50 CONG. REC. 3835–36 (1913). Theodore Roosevelt's support of a graduated inheritance tax, and, "if possible, a graduated income tax," rested on the same grounds—that the wealthy individual "derives special advantages from the mere existence of government." 41 CONG. REC. 27 (1906) (recording Roosevelt's message to Congress).

27. There is a vast literature on tax expenditures. *See, e.g.*, STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985). Some people question the continued relevance of the tax expenditure concept since it depends on agreement regarding the normative tax base from which preferences vary. *See, e.g.*, Leonard E. Burman, *Is the Tax Expenditure Concept Still Relevant?*, 56 NAT'L TAX J. 613 (2003), *available at* http://www.taxpolicycenter.org_UploadedPDF/410813_NTA_Tax_Expenditure.pdf.

The top 5 percent of individual filers receive over half of the benefits from the largest tax expenditures, for example, and high-income taxpayers also are large beneficiaries of corporate tax expenditures because they own a great percentage of stock.[28]

The financial elite also benefit more directly from government expenditures that fund the administrative and judicial systems. These systems not only create and enforce property rights, but also increase their value (for example, by ensuring a stable and liquid market). Governments also subsidize the wealthy more directly. For instance, large government contracts—especially those connected to the military, national defense, and outer

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There are various problems with the tax expenditure system. For example, generally a person must have some tax liability to take advantage of a tax expenditure, although a few are refundable—such as the earned income credit, which gives money even if there is no tax liability. A preference in the form of a tax deduction is worth more to a high bracket taxpayer than a low bracket one. A $100 deduction, for example, saves a 30 percent taxpayer $30 but saves a 20 percent taxpayer only $20. Moreover, in order to take advantage of most deductions, taxpayers must itemize. Most people, however, do not itemize; and the larger the income, the more likely a taxpayer is to itemize. 34.2 percent or 44,562,000 of the 2001 individual tax returns itemized deductions. David Campbell & Michael Parisi, *Individual Income Tax Returns*, 2001, *in* IRS, STATISTICS OF INCOME BULLETIN 11 (2003). 81.5 percent of those returns with itemized deductions claimed a home mortgage interest deduction for a total amount of approximately $330.7 billion. *Id.* The government spends much less on direct expenditures to help the poor with housing. For example, in 2001, tax expenditures for private housing totaled $87 billion ($65 billion for mortgage interest and $22 billion for property taxes), whereas direct spending for the poor totaled $23 billion ($14 billion for rental vouchers, $6 billion for public housing, and $3 billion for low-income housing tax credits). Burman, *supra*, at 622. The fiscal year (FY) 2004 budget allocates $23 billion to public housing assistance. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004: ANALYTICAL PERSPECTIVES 493 tbl.25-1 (2003) [hereinafter OFFICE OF MGMT. & BUDGET], *available at* http://www.gpoaccess.gov/usbudget/fy04/index.html. In contrast, over $46 billion of the home mortgage interest went to taxpayers with $100,000 or more income. JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009, at 46 tbl.3 (2005) [hereinafter JOINT COMM. ON TAXATION, 2005–2009 ESTIMATES OF FEDERAL TAX EXPENDITURES], *available at* http://www.access.gpo.gov/congress/joint/hjoint01cp109.html, as corrected in JOINT COMM. ON TAXATION, CORRECTION OF ERROR IN TABLE 3 OF JCS-01-05, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009, at 2-6 tbl.3 (2005).

Each year, the Joint Committee on Taxation publishes a list of tax expenditures. The five largest estimated for FY 2004–2008 are: the exclusion of employer paid health care, employer pension plan contributions, reduced dividend and long-term capital gain rates, home mortgage interest deduction, and the exclusion of capital gains at death. JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2004–2008 (2003), *available at* LEXIS 2003 TNT 247-20. The executive branch puts out a similar, but not identical list. *See, e.g.*, OFFICE OF MGMT. & BUDGET, *supra*, at 101–40. In 2005, the tax credit for children under seventeen ($46.6 billion in 2005) replaces exclusion of capital gains at death ($38.0 billion in 2005). JOINT COMM. ON TAXATION, 2005–2009 ESTIMATES OF FEDERAL TAX EXPENDITURES, *supra*, at 37, 33 tbl.1; *see also* Dustin Stamper, *Last Year's Tax Bills Increase Tax Expenditures—Again*, TAX NOTES, Jan. 13, 2005, at 271, *available at* LEXIS, Tax Analysts, Tax Notes Today, 2005 TNT 9-1.

28. Burman, *supra* note 27.

space—enrich a relatively small number of the wealthy, with little or no risk transferred from the public to the private sector because of cost-plus contracts. As government spending in these fields increases, it tends to crowd out discretionary spending for social needs and to increase pressure to limit the entitlement spending that helps the poorer segment of society. Moreover, many other governmental functions are being privatized, such as prisons and even education, which funnels profits and therefore wealth to a limited number of people.

Even public goods that the rich do not use directly benefit the rich. Public education—the alleged paradigm of a government good that primarily benefits the poor—provides substantial benefits even to a rich person who only used private schools. Among other things, a good public school system enhances the value of her home. If she owns a business, the public schools subsidize it by providing most employees with the education that businesses otherwise would have to provide to obtain a skilled workforce; alternatively, a large, unskilled workforce would negatively impact the economy as companies moved offshore to secure better labor.[29] Less directly, but just as importantly, public education transmits both knowledge and cultural norms that are politically and socially necessary to a democracy. It produces (in theory at least) literate citizens who can and will participate in informed political debates and elections; who can and will be productive members of society rather than a drain on it; who have a vested stake in the maintenance of a capitalist society in which they believe there is a chance to achieve high social, economic, and political status.

Flat tax proponents might reject the preceding analysis on several grounds. This Article briefly examines and refutes three of the major possible objections. The first objection is that the legal benefits the wealthy receive are necessary to provide benefits to the poor as well. Second, the largest and possibly the most costly benefit that the government bestows is not protection of property but protection of life—which is bestowed equally on all. Consequently, any extra property benefits received by the wealthy are minimal (and may be disregarded) in comparison to the greater personal benefits that everyone receives. The third major objection is that benefit

29. *See, e.g.*, Sam Fleming, *Lack of Skills Saps British Jobs*, INT'L HERALD TRIB. (Paris), June 12–13, 2004, at 14 (reporting that the British government is expanding the education budget to forestall the loss of jobs due to employer dissatisfaction with the skills of the British work force); Will Sentell, *No-skill Workers Drag on Economy*, ADVOCATE (Baton Rouge), Jan. 22, 2005, at 1–C; *U.S. May Be Abandoning Leadership in Science and Innovation, Business, Academic Leaders Warn; Call for Boost in Federal Research*, U.S. Newswire, Feb. 16, 2005, *available at* LEXIS, News Library, USNWR File ("U.S. employers are being forced to look overseas, as they face shortages of qualified technically trained talent in the U.S.").

taxation should be measured not by the *cost* of a benefit but by its *value* to the recipient. Therefore, even if the wealthy receive more benefits, progressive taxation is still redistributive because less well-off people value the benefits they receive more than those with higher economic status.

The first objection is premised on the theory that a "rising tide raises all boats," which current statistics belie. It is true that some benefits to the wealthy also benefit the less well off by creating jobs, for example. The "trickle down" effect, however, does not negate the fact that the benefits disproportionately flow to the wealthier. Rising income and wealth disparities, high poverty rates, and unemployment statistics all indicate that lower income-level individuals have benefited significantly less (or not at all) than those at higher ends. Moreover, to the extent that some disparity in wealth and income may be necessary to stimulate the economy (and theoretically, to help everyone), the disparity in the United States is so great that it is excessive in comparison to other countries and to other times in U.S. history.[30]

The "protection of life" objection to progressivity also should fail. It has two strands. One measures benefits by cost; the other measures by value and as a special case of the value-based argument, is discussed in connection with that objection. The cost-based objection rests on the fact that military and national defense costs make protection of life an expensive—if not the most expensive—benefit provided by the government. Since this benefit is bestowed equally on every American, the vast majority of benefits are not progressive. Indeed, some may even argue that the poor receive more protection than the wealthy because the government not only protects them from aggressors but also provides them with benefits—such as basic shelter and health care—that keeps them alive, even without a threat from others.

30. The differential between CEO and average-employee compensation in the United States has grown enormously over the past two decades, and it is far greater than the differential in similar economies. *See* Andrew Blackman, *Putting a Ceiling on Pay*, WALL ST. J, Apr. 12, 2004, at R11 (reporting that the differential in 1982 was about 42:1, peaked in 1999–2000 at almost 600:1, and declined in 2002 to 282:1); Claudia H. Deutsch, My *Big Fat* C.E.O. *Paycheck*, N.Y. TIMES, Apr. 31, 2005, § 3, at 1 (stating that CEO compensation as a multiple of average worker wage ranged from 400 plus in 2001 to about 250 in 2004); Greg Ip, *The Gap in Wages Is Growing Again for U.S. Workers*, WALL ST. J., Jan. 23, 2004, at A1; David Leonhardt, *Time to Slay the Inequality Myth? Not So Fast*, N.Y. TIMES, Jan. 25, 2004, § 3, at 4; Gretchen Morgenson, *Explaining (or Not) Why the Boss Is Paid So Much*, N.Y. TIMES, Jan. 25, 2004, § 3, at 1 (noting that the pay American CEOs receive is 531 times greater than that of the average employee, whereas the differential in Great Britain is only twenty-five, twenty-one in Canada, and ten in Japan); *see also* ISAAC SHAPIRO & DAVID KAMIN, CTR. ON BUDGET & POLICY PRIORITIES, SHARE OF ECONOMY GOING TO WAGES AND SALARIES DROPS FOR UNPRECEDENTED 14TH STRAIGHT QUARTER 1 (2004), *available at* http://www.cbpp.org/10-24-04pov.pdf (showing that the size of the decline is without precedent while corporate profits over the same period have increased significantly).

The cost-based protection of life objection is seriously flawed. Some national defense spending, for example, does not protect life but protects property, or, as shown previously, it simply produces high profits for a relative few. To the extent that national defense spending protects people from a regime change as opposed to actual physical destruction, then this spending is not protecting life itself. Instead, it protects a way of life that, as described previously, distributes governmental benefits disproportionately to the upper classes.

The cost-based objection is also wrong to the extent that the government protects people domestically (from internal not external harms). The wealthier a person is, the more protection he receives, as evidenced by the higher personal and property crime rates in poorer neighborhoods. Wealthy individuals also tend to live longer and healthier lives than individuals who are less well-off.[31] To the extent that these benefits are related to the wealth and income that the government has helped produce, then these wealthier individuals have received more benefits. As to the very poor, who may receive the extra benefits of basic necessities that keep them alive, some of these people may be poor because of the legal and economic systems that the government supports. Moreover, since the very poor generally do not pay income or wealth taxes under any rate structure, the argument is irrelevant to those tax systems. Finally, to the extent the poor do receive greater benefits, they are already paying disproportionately higher consumption taxes since consumption taxes are regressive.

The value-based objection to progressivity states that benefits should be measured not by the cost to the government, but by the value to the recipient. This objection states that even if the wealthy receive more benefits than the less wealthy, a progressive tax is still incorrect because the marginal utility of government benefits declines. Therefore, even if the nominal dollar amount of benefits increases as wealth and income increase, the actual value of these benefits declines because the utility of these benefits declines. Although the declining utility objection has merit from the burden perspective, as discussed later in Part II.B, it is greatly flawed from the benefits side. First, the extent of wealth and income disparities is so large that overall utility should be higher for high-end taxpayers even given a declining utility of money. This argument gains force as wealth and income disparities increase, as they have done in recent years. Ultimately,

31. *See, e.g.*, Peter R. Orszag, The Legacy of U.S. Fiscal Policy, Ibrahim M. Oweiss Lecture at Georgetown University (Apr. 16, 2004), *available at* http://www.brookings.edu/dybdocrootviews/speeches/orzag/20040416.pdf.

this greater net utility justifies progressive taxation. Although it may be impossible to determine the exact slope of utility and hence the exact amount of progression needed, an estimate is more accurate and fairer than a proportionate tax that always would be wrong.

The second, broader, flaw in the declining utility objection is that all benefits do not have the same utility slope. Some decrease in value less sharply than others, and some—especially some nonmonetary benefits such as protection of life or happiness (the ultimate tax base)—may actually have increasing slopes that require a progressive tax.[32] There is, furthermore, disagreement about how much happiness or psychic satisfaction money can buy. Even those who believe that a person's happiness is primarily determined internally (by genes, personality, or attitude) agree that externalities, such as money, can affect that happiness—especially at lower income ranges.[33] Moreover, it is clear that money can buy certain goods and services that provide financial, physical, and psychic benefits even if they do not increase happiness. Money, for example, can buy education that provides both financial benefits (high paying jobs) and psychic ones (self-fulfillment, self-esteem, regard from others, and sense of security). More money usually brings a person better health and more economic stability. Increased social and political power, prestige, reputation, and self-regard also generally accompany increased financial rewards.[34]

Causality, however, can run both ways. For example, a person with a good reputation has a higher capability to earn more money than a person with a poor reputation, but causality also runs in the other direction: Increased economic status enhances reputation. This bidirectional causation is even true for a person's health. A healthy person can work more efficiently than a sick person and thus acquire more wealth and income.

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32. The related argument that these benefits are minimally affected by taxes is explained *infra* Part II.B.

33. *See, e.g.*, MARTIN E.P. SELIGMAN, AUTHENTIC HAPPINESS 53 (2002) (noting the relative unimportance of money to happiness, beyond lowest income levels); Robert A. Cummins, *Personal Income and Subjective Well-Being: A Review*, 1 J. HAPPINESS STUD. 133 (2000) (stating that although people may have a built-in range of happiness, that range is affected by certain externalities; money, therefore can buy some happiness because it maximizes people's ability to be happy); Benjamin Radcliff, *Politics, Markets, and Life Satisfaction: The Political Economy of Human Happiness*, 95 AM. POL. SCI. REV. 939, 940 (2001) (citing to studies for both propositions); *see also* Alberto Alesina et al., Inequality and Happiness: Are Europeans and Americans Different? 11 (Mar. 7, 2003) (unpublished manuscript), *available at* http://econweb.fas.harvard.edu/faculty/alesina/papers/HappIneqREVApril3.pdf.

34. Ralph Nader, for example, stated that he believes in progressive taxation because the power of the rich "developed from laws that enriched them." Jeffery L. Yablon, *As Certain as Death—Quotations About Taxes*, 102 TAX NOTES 99, 125, 135 (2004).

However, a person's health is often related to her economic status. The very wealthy generally receive better health care than the middle class, who usually have better health care than the poor. A person who grows up poor and malnourished may suffer permanent health consequences that affect both mental and physical abilities to work, quality of life, and length of life. Moreover there is evidence that relative economic status affects health even when there is no poverty and everyone has access to health care.[35] In other words, those with a higher economic status simply have better health than those with lower economic status.

These increasing psychic benefits counterbalance the decreased physical utility of the money itself. It is true that the utility of money to purchase material goods (and accompanying lifestyle) must decline to some degree, regardless of a person's individual tastes, because there is a limit to how much he can actually consume or hoard. Nevertheless, the intangible benefits from money are not subject to the same physical limitations. Consequently, if their utility slopes decline, they should decline more slowly than those of the goods and services that money actually buys. Indeed, if the greatest benefit the government provides is protection of life, then the slope arguably is positive, as evidenced by the correlation between financial resources and health and longevity. Moreover, a proportionate wealth or income tax does not tax these intangible benefits at all, because all it taxes is money. Progressive taxation can be viewed, in part, as valuing and taxing these otherwise unaccounted-for benefits.

If the proper measurement of government benefits is value received rather than government costs, and value disproportionately goes to the financially well off, then a broad based progressive tax—rather than specific user fees—is the appropriate method of accounting for these benefits. Government user fees tend to be based on costs rather than values, because the government is not supposed to make a profit. Additionally, the benefits are frequently so broad that there is no specific service or good to which a fee properly or efficiently can be applied. For example, when a person makes a trade on the stock exchange, he benefits not just from securities laws and regulations, but from an entire statutory and regulatory scheme that supports capital markets in a variety of ways including general monetary policy, tax policy, and economic policies. A user fee on the transaction

35. *See, e.g.*, James P. Smith, *Healthy Bodies and Thick Wallets: The Dual Relation Between Health and Economic Status*, 13 J. ECON. PERSP. 145, 158–59 (1999) (discussing British studies showing that despite rising absolute income levels and more equal access to health care, people with higher paying, higher grade civil service jobs had better health—probably due to "psychosocial factors," such as job-related stress).

cannot capture this total benefit without being unacceptably high. A broad based tax, on the other hand, can easily do so if its rate structure is progressive.

Part II.A has examined taxation from the benefits perspective, viewing tax as simply a payment by the taxpayer for benefits received from the government. This part has argued that benefits increase progressively as wealth and income increase, regardless of whether measured by the cost or the value of benefits received. Under this view, progressive taxation is not distributive to the extent that it merely extracts payments for the benefits that people receive from the government. Although it is probably impossible to calibrate precisely the rate structure to the amount of government benefits received, a graduated rate is a better measurement than a flat rate that would always be wrong.

B. Burden Theory of Taxation—Equal Sacrifice

Progressive taxation is not redistributive when viewed from the perspective of burdens rather than benefits. Unlike the benefits perspective, which can be viewed as a contract or fiscal exchange between taxpayer and government, the burdens perspective of tax views taxation solely as an exercise of sovereign power. Any tax extracted from a taxpayer is a coercive taking by the government. Consequently, theories about the distribution of tax burdens focus on fairness—distributing the burden among taxpayers so that each suffers or sacrifices equally. Any tax is re-distributive under this theory if some taxpayers bear a greater burden by sacrificing more than others.

Defining equality, of course, is not any easy task. While Part III further explains equality from the benefits side of distributive justice, this part examines it from the burden side. Numerical equality—the simplest form of equality—is appropriate in some situations,[36] but it receives little support in the context of tax burdens. Most people view uniform tax payments as creating unequal tax burdens because they ignore taxpayers' resources (and hence ability to pay) and benefits received. The quick repeal of the United Kingdom's poll tax in the early 1990s in the face of extreme—and sometimes violent—protest illustrates the depth of opposition to uniform tax payments.[37]

Analysts generally agree on several simplifying assumptions when discussing equal sacrifice. First, they use money as the sole measure of sacrifice

36. This concept, for example, underlies the American abhorrence of people being able to buy their way out of military service. Similarly, the fact that exemptions favored the wealthy was a factor in the demise of the draft after the Vietnam War.

37. David Connett et al., *Mob Riot in West End*, INDEPENDENT (London), Apr. 1, 1990 at 1.

on the grounds that although it is not the only sphere in which sacrifices occur, it is a primary one and certainly more measurable and comparable than other sacrifices, such as psychic ones. Next, using money to measure equality of sacrifice, analysts make two economic assumptions that further simplify the problem of determining equality. First, they assume that money has a declining marginal utility. Second, they assume a "rational" person so that the rate of declining utility is the same for every person, thus eliminating any problem of interpersonal comparisons. Despite these simplifying assumptions, the debate about whether progressivity creates equality of sacrifice is complicated because the term lacks clarity. Sacrifice can mean, for example, that each taxpayer pays, or loses, the same amount of utility.[38] It can also mean an equality of sacrifice in a utilitarian sense—that in the aggregate, society suffers the least sacrifice.[39]

Rather than completely reopen this well-developed, complicated, and often technical debate concerning equality of sacrifice and progressivity, this part explores two related aspects of nonmonetary benefits that accompany increased wealth and income. The first aspect relates to the declining utility argument, mentioned in Part II.A. The second concerns imposing tax burdens based on psychic, as well as monetary, resources.

Tax burdens are paid in money, a commodity that most people agree has declining marginal utility, although they might disagree about the severity of its slope and the ability to compare utility between individuals. As our monetary resources increase, we may now *need* steak for dinner instead of the beans we were satisfied with when poorer, but a declining slope is still evident. At the lower end, there is an acute difference between our need for beans and rice and starving; at the higher end, there is a limit to the amount of steak that we can physically eat, no matter how large our appetites. Nevertheless, some people argue that because our needs grow as our income grows, money's marginal utility cannot decline enough to justify progressive rates.

Psychology and sociology, however, support the claim that declining utility justifies progressivity. The argument rests on two related facts. The first is that increased financial resources confer nonmonetary benefits. These benefits are most often thought of as psychic satisfactions, but they also can include physical benefits such as health. The second fact is that money has utility in both an absolute and a relative sense. Absolute utility means that the money derives its value from its purchasing power. That is, a

38. A good analysis of this definition of equal sacrifice, as well as other definitions of the term, can be found in Blum & Kalven, *supra* note 1, at 455–79.

39. *See, e.g.*, *id.* at 466–71.

person who earns $10,000 derives utility from it primarily because it can purchase goods and services that keep him from starving. Relative utility is connected to the nonmonetary, or psychic satisfactions money bestows that derive not from the absolute amount of goods and services the money can purchase but from the relationship of that amount of money to the amount other people have.[40] At the lower ends, what matters most is absolute utility and the monetary aspects of financial resources. As financial resources increase, absolute utility declines and the nonmonetary aspects of wealth and income increase. These are more connected to the relative—not absolute—amount of financial resources that a person has.

People have a hierarchy of needs. First, people require enough money to satisfy the basic necessities of life—adequate food, clothing, and shelter. Next, they want a certain amount of money to achieve a minimal level of physical and psychological comfort beyond basic survival. Any money beyond these two stages satisfies less essential, and more discretionary, needs. At the first level, money is measured in absolute terms, and most—if not all—of the money's utility is in its actual purchasing power. The second, minimal comfort level, is also measured to some degree in absolute terms and terms of purchasing power. However, it also has an element of relativity and psychic satisfaction. Beyond this second stage, money's utility is largely relative and psychic.

The utility of the absolute power of money—that is, its use in fulfilling basic needs—is large at lower levels of financial resources but declines relatively quickly once basic necessities and minimal comforts are achieved. Thus, as to the portion of money that provides actual purchasing power, a mildly progressive income tax would not impose any extra burden or sacrifice because the value of the money declines as its amount increases absolutely. Psychic utility, on the other hand, does increase with increased financial resources, and it probably does not decline as quickly as the purchasing power of utility. Nevertheless, a progressive tax would not impose an extra burden on this aspect of money because utility is largely based on relative, not absolute, amounts of money. This means that utility will remain unchanged so long as A, B, and C maintain the same relative monetary positions after tax that they had pretax.[41]

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40. *See, e.g.*, SELIGMAN, *supra* note 33; Bankman & Griffith, *supra* note 1; Repetti, *supra* note 1.

41. This can be illustrated as follows. Imagine three taxpayers, A, B, and C. Pretax, A earns three times more than B, who earns three times more than C. So, in one example, A earns $450,000, B $150,000, and C earns $50,000. A progressive tax is imposed: 10 percent on the first $100,000; 15 percent on the second $100,000; 20 percent on the third $100,000; 25 percent on the fourth $100,000 and 30 percent on the fifth. A pays $85,000 in taxes and is left with $365,000; B pays $17,500 in taxes and has $132,500 after tax. C pays $5,000 in taxes and has $45,000 after tax. A, B, and C thus remain in the same relative positions. A is still better off than B, who is still better off than C.

Relative rather than absolute income or wealth is important for psychic utility in that needs, other than basic ones, are primarily culture driven. People need food and clothing, but no one has an inherent need for steak as opposed to hamburger, or designer clothes instead of clothes from Wal-Mart. Since these needs are culture driven, they are relative and not absolute. One of several things will happen if a progressive tax leaves people in the same relative monetary positions they were in pretax and post-tax. The need for these objects will disappear, or more likely will transfer to some other less expensive but still exclusive object. Alternatively, their prices will decrease. Consequently, so long as people remain in the same relative monetary positions after tax as before tax, then there will be no decreased utility. If prices decrease, then taxpayers can still buy what they bought previously. If people shift their consumption to another object, they are also no worse off because the purchase of the object was primarily motivated not by the inherent qualities of the object, but by its psychic qualities. That is, the object was desired because of what it signified to the individual and to others about status, self-worth and accomplishments. These statements are still made, no matter what the identity of the particular good or service purchased, so long as it is exclusive.[42]

Nonmonetary benefits of money have physical, social, and political aspects. People with more financial resources generally have healthier, longer lives, increased leisure, prestige, and regard from others, and greater political influence than less well-off individuals. Regardless of the degree to which these benefits increase happiness, they exist and exist largely untaxed. Traditionally, we have not taxed them because of the administrative difficulties of determining individual psychic benefits and comparing them from person to person. This difficulty does exist, but it is overstated. The benefits are visible to others and can be studied, measured, and taxed indirectly via a progressive tax system.

Consider, for example, two high-income taxpayers, Laura Leisure and Ricky Rich. The utility of their income as regards to physical objects may decline, since they can consume, use, or store only a limited number of goods and services. The psychic utility they receive from the money—in forms such as increased leisure, sense of worth, prestige, influence, and security—does not decline, however. It does not matter that Laura achieves this psychic benefit via extravagant vacations that soothe her soul whereas

42. The truth of this is evident in the common phenomenon that occurs when better-off people stop buying a good or frequenting a vacation spot because less well-off people start buying the good or vacationing there. Nothing has changed except the exclusivity of the product.

Ricky does so by donating large sums to a charity that builds hospital wings in his name. So long as relative wealth remains unchanged by taxation, all the intangible benefits remain the same. Even if relative after-tax positions change, many psychic satisfactions would remain unchanged. For example, a CEO may value worth (and others may value it) by pretax compensation, not his after-tax compensation. Since these benefits are largely untouched by a monetary tax, a progressive rate can be an indirect means of assuring some degree of equal sacrifice among taxpayers. Such a rate increases the tax on the monetary benefits of money to compensate for the inability to tax the psychic benefits that accompany higher financial resources.

C. Property Rights: Individualistic Versus Cooperative Views of the Creation and Ownership of Property

The argument that progressive rates are redistributive rests on an individualistic theory of property, in which the individual is an independent agent who acquires property solely through his own efforts. These efforts entitle the individual to complete ownership; nobody, including the state, can claim to own any portion of the property. Frequently, but not necessarily, this argument is based on a natural rights theory in which the individual's rights, including his rights to property, preexist the state. This theory is expressed, at its most extreme, in terms of John Locke's famous statement that every individual has a natural right to his body and therefore also has a right to any property with which he has mixed his labor.[43] Locke adds a proviso that such appropriation of property is permissible only if there is enough of the same type of property remaining for others.[44] Theories based on Locke, however, often ignore this proviso, or at least interpret it in such a way as to make it unproblematic.[45] A less extreme version adheres to a Lockean view of property, while acknowledging that the state contributes in equal amounts to people's economic welfare.[46]

43. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 27 (Thomas P. Peardon ed., 1952) (1690).

44. *Id.*

45. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 175 (1974) (implying that appropriation is permissible so long as other people can still improve their situations in other ways).

46. Richard Epstein, for example, believes that the economic surplus, that is, the portion of economic wealth derived from the value of the state, should be distributed among citizens in proportion to their Lockean—that is prestate—property holdings, because it is the most equal distribution. RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 98 (1993); *see also* RICHARD A. EPSTEIN, TAKINGS 3–5, 52–53, 90–98 (1985) [hereinafter EPSTEIN, TAKINGS].

There are both internal and external arguments against this view of people and property. For example, even if a person acquires property solely through his own efforts, he does not retain it by himself. In a Hobbesian world of all against all, ownership of property would be short lived. A person would hold property only until a stronger person inevitably came along to take it away. The fate of the gunslinger in that classically American movie genre, the Western, illustrates the high cost of a lawless society. Consequently, the right to own property is worth little without the state's efforts to protect the property.

Leaving aside the problem of retaining property, people often acquire many types of property without any effort at all. It certainly takes no effort (at least on the part of the recipient) to acquire property by gift, inheritance, or winning the lottery. People do not even "earn" all of their salaries through their personal efforts, but rather often obtain high-paying jobs by being in the right place at the right time, having the right connections, or being born with the right physical characteristics. Even if a person were hired solely based on personal merit, she may earn more than a similarly situated person for reasons unconnected with effort. Most people are aware of the numerous studies that indicate wage differentials based on race. Studies also show, however, that thin people receive higher incomes than overweight people, tall people get more than short ones, and beautiful people more than ugly ones.[47] It is difficult to conceive of a definition of effort that would dictate that a tall person merits a higher salary than a short one.

More generally, even assuming that a person is the absolute owner of property she has legally acquired (and that she can retain without assistance from society), society still plays an important role in wealth acquisition. There may be some intrinsically valuable goods, services, and talents, but even their value is affected by society. For example, the popularity of the Atkin's diet led to an increased demand for beef, which helped increase price of cattle in the United States despite the contemporaneous first reported American case of mad cow disease.[48] Many goods, services, and

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47. *See, e.g.*, Susan Averett & Sanders Korenman, *The Economic Reality of* The Beauty Myth, 31 J. HUM. RESOURCES 304 (1996); Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174 (1994); Markus M. Mobius & Tanya S. Rosenblat, *Why Beauty Matters* (2004), *available at* http://www.nber.org/~mmobius/Post/Beauty/main.pdf.

48. *See, e.g.*, Jerry Hirsch, *Hog Farmers Fear Fallout From Mad Cow Case*, L.A. TIMES, Jan. 25, 2004, at C1 (reporting "little evidence" that mad cow has decreased demand; in fact, sirloin steak prices increased 27 percent in 2003 from 2002); *see also* Jim Siegel, *New Diet Trends Help Ohio Farmers*, LANCASTER EAGLE GAZETTE (Ohio), Feb. 16, 2004, at A3 (noting that egg prices, which once decreased due to medical cautions about high cholesterol, have surged with trends like the Atkins diet emphasizing protein consumption).

talents, however, have little intrinsic merit. It is society that decides which talents to reward and by how much; which goods are valuable and which are not.[49] The fact that many people could neither produce their goods and services, nor find buyers for them without society's existence, leads to a more general external critique.

The external critique states that the individualistic view of people and property is distorted because it ignores the interdependence of people and society. At its strongest, this critique is identical to the previously discussed argument that there can be no private property without government. The weaker version, expressed in various political, philosophical, and religious theories, does not deny the importance of the individual. Instead, it acknowledges that each person's existence is dependent on and intertwined with others from conception to death.[50] Science supports this latter viewpoint. Economics, psychology, and even biology provide evidence of human altruism.[51] People are not a product simply of their genes, but also are a product of their environment.[52] A person born with "good" genes may not realize his or her potential due to the action of others. A baby with a high I.Q. may fail to develop it without stimulation by others. A child born with good genes for straight, white teeth may end up with ruined (or no) teeth because of a bad diet or a failure to get proper dental care. Conversely, nurturing can ameliorate the consequences of less favorable genes through, for example, special education,

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49. *See, e.g.*, GATES & COLLINS, *supra* note 23, at 122 (quoting Warren Buffett); Barbara Fried, *Proportionate Taxation as a Fair Division of the Social Surplus: The Strange Career of an Idea*, 19 ECON. & PHIL. 211, 222–26 (2003) (critiquing David Gauthier's support of proportionate tax).

50. Religion, obviously, emphasizes connections to others despite its concern with individual salvation. Many political theories, from republicanism to communism, also have communal aspects, and throughout history there have been attempts to put such theories into practice. Examples in the United States include communities such as the Oneida community, the Shakers, and "hippie" communes. Some strands of feminist theory have noted that the philosophy upon which law is based overemphasizes the individual and ignores connections between people. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). I have written earlier about how feminist theory can support a progressive income tax. *See* Kornhauser, *supra* note 1.

51. *See, e.g.*, C. DANIEL BATSON, THE ALTRUISM QUESTION: TOWARD A SOCIAL-PSYCHOLOGICAL ANSWER (1991); GARY BECKER, A TREATISE ON THE FAMILY (enlarged ed. 1991); EDWARD O. WILSON, SOCIOBIOLOGY (1980).

52. *See, e.g.*, Natalie Angier, *Not Just Genes: Moving Beyond Nature v. Nurture*, N.Y. TIMES, Feb. 25, 2003, at F1; Sharon Begley, *Good Genes Count, But Many Factors Make up a High IQ*, WALL ST. J., June 20, 2003, at B1; Sandra Blakeslee, *A Pregnant Mother's Diet May Turn the Genes Around*, N.Y. TIMES, Oct. 7, 2003, at F1; C. Claiborne Ray, *Q&A: Twins and Allergies*, N.Y. TIMES, Nov. 25, 2003, at F2 (noting a study finding that only 65 percent of identical twins, who carry identical genes, end up with identical peanut allergies; that only 25 percent share asthma symptoms; and arguing that other environmental factors play a part in the development of these traits).

orthodontics, and so forth. In short, each person's ability to obtain property is itself a product of the efforts of others, not just individual efforts or genes.

The interdependency of people in the acquisition of property goes beyond merely providing the individual with the abilities needed to obtain property. In today's society, property is not the product of only one person's effort. Even the scientist who works alone in his lab sixteen hours a day searching for a cure to AIDS does not find that cure (if he does) solely by his own efforts. Governmental efforts may have provided instrumental assistance, for example in the form of the genome project or patent protection. Individuals also provide help—from fellow scientists, to lab technicians, to janitorial staff who keep the lab sterile, and to the spouse who takes care of all household and personal chores.

Even capitalism and capitalist societies are more interdependent and cooperative than people commonly believe.[53] The existence of large firms and elaborate contracts binding suppliers and manufacturers reveals the need for cooperation. Factors of production also need each other and often must act in cooperation. Management needs the cooperation of labor, as countless corporate boards of directors have discovered. Producers and consumers are also codependent, as Henry Ford long ago recognized when he paid good salaries to his workers so that they could afford to buy his cars.[54] The recent and lengthy economic recession in Japan endured so long, in part, because of the failure of consumers to spend money that in turn would spur investment and production. According to some feminist theorists, even the "ideal" worker upon whom capitalism depends cannot exist independently but needs the cooperation of domestic help at home.[55]

This interdependence of people individually and as a society means that much of the property any one individual obtains is a product of both her own effort and the effort of others. To the extent that it is the product of others (including government), those others have a claim to it if they have not been properly compensated for their efforts.[56] At the very least,

53. *See, e.g.*, Symposium, *Socio-economics and Corporate Law: The New Corporate Social Responsibility*, 76 TUL. L. REV. 1187 (2002) (applying the socioeconomics movement's belief that human nature has both competitive and cooperative aspects to corporations). For more on the socioeconomics movement, see Robert Ashford, *Socio-Economics: What Is Its Place in Law Practice?*, 1997 WIS. L. REV. 611; Section on Socio-Economics of the Association of American Law Schools, Ass'n of Am. Law Schs., 1997 PROCEEDINGS 63–64 (1999).

54. *See, e.g.*, RICHARD GODDEN, FICTIONS OF CAPITAL: ESSAYS ON THE AMERICAN NOVEL FROM JAMES TO MAILER 170 (1990).

55. *See, e.g.*, JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 114–41 (2000).

56. *See* Louis Uchitelle, *Were the Good Old Days that Good?*, N.Y. TIMES, July 3, 2005, § 3 at 1, 7 (noting that wages have not increased to the extent that productivity has).

market imperfections such as uneven bargaining power and transaction costs, suggest some degree of misallocation of property based on effort.[57]

Some aspects of the law already acknowledge the cooperative nature of labor. This is primarily true in the domestic context. Community property and equitable distribution laws, for example, already give spouses rights to property nominally earned by one spouse, and proposals exist to further extend the property rights of spouses in part to recognize their contribution to acquiring that money.[58] There is no reason, however, to limit this recognition of labor's cooperative nature to the domestic context. Minimum and living wage statutes, for instance, can be viewed as guarantees that workers receive a minimum amount for their efforts in producing goods and services. Without such regulation, the imperfect market could (and some say does) allocate unduly large amounts of receipts from the goods and services that workers help produce to others (such as top executives or shareholders). Thus, the workers receive less than they should. More broadly, if the production of property is a collaborative effort rather than an individual one, progressive tax rates are not redistributive to the extent that they merely distribute property to those who, because of their role in its production, are entitled to it.

The property rights resulting from this collaborative theory of production could be either collective or individual. If the rights belong to individuals, then progressive rates will enforce the property rights of those unfairly denied proper compensation in the market so long as the government expends that portion of revenues collected by the graduated rates for the benefit of the underrewarded. This method is less desirable, and less efficient, than people getting the money directly because Congress would determine which benefits the underrewarded received. This "second best" result nevertheless is superior to them getting nothing.

Alternatively, one could view the property rights flowing from a collaborative theory of production as collective rights, at least to the extent that the factor of production is society or government itself. Under this view, the state is a coinvestor, and tax rates merely allocate to the government its

57. The growing discrepancy between rising profits and stagnating wages (coupled with a shrinking job pool) suggests that labor's weak position affects its ability to reap proper rewards. *See, e.g.*, Louis Uchitelle, *A Recovery for Profits, But Not for Workers*, N.Y. TIMES, Dec. 21, 2003, § 3, at 4. Some suggest that the profits result, at least in part, because companies keep wages low—so low, in fact, that 40 percent of fully employed workers earned less than $30,000 in 2001. Andrew Hacker, *The Underworld of Work*, N.Y. REV. OF BOOKS, Feb. 12, 2004, at 38, 40 (citing 2002 Bureau of the Census data). CEO salaries, in contrast, continue to rise—even when performance does not merit it. *See, e.g.*, Deutsch, *supra* note 30.

58. *See, e.g.*, WILLIAMS, *supra* note 55.

proper share of property. Economists already acknowledge that the government is a coinvestor when it comes to taxpayer losses in various income tax provisions such as casualty and capital losses.[59] A collective theory merely extends this recognition to gains as well. From an economic standpoint, any factor of production merits a return on investment. Since the government was a factor in producing an individual's wealth and income, it is entitled to a return on its investment, just like any other investor. Under this theory, some portion of tax burdens simply represents that return.

D. Matching the Tax Rate Structure to the Theory of Property

Under a Lockean, individualistic view of property, an individual's tax burden should equal the value of the benefits he receives from the government. Consequently, if benefits rise progressively, then so should the tax. Most people who favor this view of property, however, reject the arguments that these benefits increase exponentially and therefore reject progressive taxation.[60] Logically, however, they should also reject proportionate taxation, too, since it is just as unlikely that benefits would be proportionate as progressive. If they believe, as most do, that any benefits that society provides are provided equally to each person, then they should favor a head tax that taxes every person in the exact same amount. However, like almost everyone else, most Lockeans reject head taxes as unfair if economically sound. In fact, most also reject a strictly proportionate tax. No flat tax proposal makes a person pay tax on her first dollars. All proposals exempt low levels of income or wealth from taxation on the grounds that a certain amount of money is necessary to provide the basic necessities of life. Thus, for example, a flat rate of 20 percent on all income that exceeds $10,000 is not totally flat because it has a slight progression.[61] Once they have admitted to the logic of some progressivity, the question is not whether there should be progressivity, but what degree of progressivity is appropriate.

59. For example, assume a taxpayer in the 30 percent tax bracket suffers a deductible capital loss of $3000, and that he can offset it against $3000 of capital gain (or up to $3000 ordinary gain). Assume that he offsets it against $3000 of ordinary income. He thus pays $900 less in taxes than he would but for the loss, and the government collects $900 less in taxes than it otherwise would. In essence, the government, not the individual, absorbs $900 of the loss.

60. *See, e.g.*, EPSTEIN, TAKINGS, *supra* note 46, at 162, 303.

61. Individual X with taxable income of $20,000, for example, would pay only $2000 of tax whereas Individual Y with $40,000 would pay $6000. Although both have a nominal tax rate of 20 percent, X's effective tax rate is 10 percent [$2000/$20,000] and Y's is 15 percent [$6000/$40,000]. This type of tax is called a degressive tax.

A collaborative view of property stresses the critical role of other people, individually and collectively, in producing any one individual's property. By deemphasizing prestate property rights, the collaborative view supports a progressive tax calculated in one of two ways. First, as described previously, the progressive rate could be interpreted as merely recognizing the government's progressively larger role in producing increases in wealth and income. Additionally, or alternatively, the larger percentage is analogous to the larger percentage that many investors, or CEOs for that matter, get as profits rise. In either situation, the larger percentage would not indicate redistribution, but rather a return on investment.

III. Progressivity Best Fits With Basic American Principles

Assuming that some readers remain unconvinced by the argument that a progressive rate structure is redistributive, then inevitably some portion of the voting public will disagree with the rate structure, whatever it is. This will occur because there will be no consensus on whether wealth and income redistribution is a proper function of government. What is the best structure, then, given that this disagreement is not a mere trifling, but rather involves basic political and moral principles of fairness and justice? Whereas Part II argued that the practical aspect of the Integrity Principle supports progressive taxation as a realistic application of traditional benefit and sacrifice theories of taxation, this part argues that the theoretical aspect of the Integrity Principle supports a redistributive progressive tax because progressivity best fits, or reconciles, basic American principles of fairness, equality, and liberty. It is important to keep in mind that arguments against a progressive tax rate, from a redistributive standpoint, make sense only if the distribution and the collection of government revenues is redistributive. The discussion assumes that this is the case.

A. Progressivity Best Reconciles Concepts of Fairness and Justice

Although both fairness and justice can be interpreted in terms of process or outcome, some theorists believe that fairness concerns process, whereas justice concerns outcome. According to this view, a checkerboard law allowing people born only in even years to drink alcohol is fair if it were arrived at through the appropriate process, even though its result is not just. Others conflate fairness and justice. Under this view, any outcome is just that has been arrived at by a process that people agree is fair, such as majority rule. This theory may be especially suited to a society in which people have diverse ideas of justice. Under this view, for example, large concentrations of wealth and income are just—whether obtained through gift, inheritance, luck, or effort—provided that they have been acquired legally (which by definition is a fair process).[62]

In the United States, what is a just outcome is much more debatable than what is a fair process. There are many norms of distributive justice, such as distribution by equal lots (numerical or per capita), needs, efforts, resources, market determinations (supply/demand), luck, or requirements of the common good.[63] Americans subscribe to many of these norms, sometimes at the same time, sometimes depending on the circumstances. For example, despite constitutional and statutory prohibitions of discrimination based on race, age, sex, and disability, a variety of laws do distribute benefits by ascription, such as Social Security (age) and Medicaid (physical disability).

What Americans do agree on, however, is that all people should have an equal chance to achieve their goals, including the accumulation of wealth and income. Ralph Waldo Emerson, in fact, called this belief in equality of opportunity "the most distinctive and compelling element of our national ideology."[64] Today, most Americans not only believe in equal opportunity, but also believe that society collectively ought to take steps to achieve it.[65] They disagree, however, on the exact nature of the steps that need to be taken. Nevertheless, it seems reasonable to say that Americans would be likely to approve limited distributions that help equalize opportunities to achieve goals, whereas they would disapprove of distributions that create equality itself (for example, of income). Polls support this conclusion. They consistently show that a majority of respondents believe that wealth should be distributed

62. *See, e.g.*, NOZICK, *supra* note 45, at 150–52. Rawls' *Theory of Justice* defines justice in both fairness (process) and outcome terms. The "original position" under the "veil of ignorance" from which people make decisions is process oriented. RAWLS, *supra* note 6, at 11–17. The difference principle, however, is outcome oriented. *Id.* at 76–83 (stating that distributions may be unequal if they improve the condition of the worst off).

63. *See, e.g.*, JENNIFER L. HOCHSCHILD, WHAT'S FAIR? AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE 47–82 (1981) (analyzing six norms of distributive justice).

64. DOUGLAS RAE ET AL., EQUALITIES 64 (1981) (quoting Ralph Waldo Emerson).

65. Although polls can be unreliable, as previously mentioned, the consistency of answers to this question over time gives some trustworthiness to their content. For example, in one recent poll, 91 percent of respondents agreed with the statement: "Our society should do what is necessary to make sure that everyone has an equal opportunity to succeed." 2003 Values Update Survey, *available at* Westlaw POLL database, question USPRA.110503 R28CF1 and PY (reporting that 53 percent of respondents "strongly agree" and 38 percent "mostly agree") (on file with author). *See also* Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607, 650 (1996) (discussing polls that indicate support for equality of opportunity).

more equitably, and in some polls, a substantial minority or even a majority believe that government has a responsibility to reduce the inequalities.[66]

In essence, Americans to some degree merge fairness as process and fairness as outcome. The fair and just process is one that produces an outcome of equal opportunity. This outcome is only an intermediary one, because people ultimately will have different outcomes depending on such variables as their luck, abilities, and effort. This intermediate outcome is essential, however, because without equality of opportunity, the final outcome can never be fair. The underlying foundation of equal opportunity thus is process not outcome. All people need an equal opportunity to achieve their goals, but what they do with that opportunity will differ. Consequently, the final outcomes will differ, regardless of whether the outcome is the amount of education, income, wealth, or any other measure.

Equality of opportunity also underlies the core American principle of one person/one vote. This political concept reflects the philosophic and moral belief that every person has equal value. As equal beings, each citizen deserves an equal voice in political decisions. The aim of the one person/one vote concept, therefore, is not to ensure any particular outcome but to ensure that the process of achieving that outcome is fair. This fairness occurs, however, only if each person has had the same opportunity or ability

66. *See, e.g.*, AM. ENTER INST., PUBLIC OPINION ON TAXES 22–23 (Karlyn Bowman et. al. compilers, 2003) [hereinafter AEI TAX POLL], *available at* http://www.aei.org/publication16838. For example, in a 2003 poll, 49 percent of respondents agreed with the statement: "It is the responsibility of government to reduce the differences in income between people with high incomes and those with low incomes." NPR POLL, *supra* note 7, at 6 question 20. Forty-seven percent disagreed. *Id.* The original report incorrectly adds positive responses to total 48 percent, but it is correctly tallied in the AEI TAX POLL, *supra*. Interestingly, in the same poll, more people (56 percent) believed that the government had a responsibility to redistribute from high to middle income people; and fewer (only 40 percent) thought they did not. NPR POLL, *supra* note 7, at 6 question 21. Yet polls a few years earlier with a similarly worded question show much higher percentages favoring redistribution by the government. AEI TAX POLL, *supra*, at 22 (using a different scaling of responses). Polls from 1984 through 2000 consistently indicate that a majority favor redistribution. *Id.* at 23. When asked specifically about rate structures, responses are even more varied. In one 2003 poll, a flat tax was favored over a progressive tax by 36 percent to 32 percent (with 31 percent not knowing enough to say). NPR POLL, *supra* note 7, at 8 question 25 (comparing the current graduated rate of higher income taxpayers with paying a higher percentage, a flat rate, or the same percentage rate). In another poll from the same year, 57 percent of respondents favored a progressive tax and only 38 percent favored a flat tax when they were asked to choose between the two. The poll, taken of "likely" voters, asked which of two statements they agreed with: (1) "[w]e should institute a flat tax meaning people are taxed at a [sic] equal rate, no matter what your level of income"; and (2) "[w]e should make sure tax rates are lowest for those with lower incomes and higher for those with higher incomes." Thirty-eight percent agreed with the first statement (26 percent strongly), and 57 percent agreed with the second (39 percent strongly). 2003 Values Update Survey, *supra* note 65, at question USGREEN.03 PUBIP R41 and PY.

to influence the vote.[67] This equal opportunity to affect the political process cannot exist when some citizens lack the resources and capabilities not only to make informed decisions, but also to make their voices heard. Lobbying and large financial campaign contributions, of course, can endanger this equality (as campaign finance laws indicate). So can more basic conditions, such as lack of education, homelessness, and poor health.

Equality of opportunity in all spheres, including the political, the social, and the financial, requires—as the clichés say—that everyone begin, more or less, at the same starting line, or that the playing field be level. For this to occur, people must have access to resources such as healthcare, housing, and education. The lack of these basic resources undermines an individual's ability to achieve equality of opportunity in both personal and political aspects of life. Consequently, the conception of distributive justice that best fits American democracy is one that ensures the satisfaction of these basic needs, as occurs under both Dworkin's equality of resources and Sen's capabilities.[68] These conceptions stress equality of an intermediate distribution (opportunity) rather than equality of the final outcome. They, therefore, recognize the importance of the exercise of liberty (through, for example, individual merit and effort) in determining the justness of ultimate results.[69]

If equality of opportunity is the dominant meaning of equality in America, then a progressive tax system is the best tax structure to ensure this equality. To the extent that a graduated tax is redistributive, it helps people meet their minimum needs and obtain resources and capabilities sufficient to provide equality of opportunity. Certain substantive provisions of the present Internal Revenue Code can be interpreted in this manner, such as section 22 (credit for the elderly and disabled)[70] and section 25A (Hope and Lifetime Learning credit).[71] Indeed, polls indicate that a majority of

67. *See, e.g.*, Thomas Christiano, *Deliberative Equality and Democratic Order*, *in* POLITICAL ORDER 251 (Ian Shapiro & Russell Hardin eds., 1996); *see also infra* note 90 and accompanying text.

68. Both Dworkin and Sen have repeatedly described and elaborated their concepts. *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE 65–119; AMARTYA SEN, INEQUALITY RE-EXAMINED 39–55 (1992). Although the two concepts are not identical, they are similar in their emphasis on equality of individual freedom to achieve (by ensuring resources and capabilities) rather than on equality of actual outcomes. *See, e.g.*, DWORKIN, *supra*, at 299–303 (comparing the two concepts); *see also* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

69. *See e.g.*, DWORKIN, *supra* note 68, at 299–303.

70. I.R.C. § 22 (2000).

71. I.R.C. § 25A.

taxpayers not only support lowering taxes for those with basic needs, but also are willing to cancel recent tax cuts to pay for education and health care.[72]

A progressive rate also supports another popular distributive justice norm—distribution by need. This norm is demonstrated not just by Americans' charitable inclination, but also by a willingness to pay heavier taxes rather than cut programs that aid the general welfare. In tax law, many specific code sections—such as the charitable deduction (section 172),[73] the earned income credit (section 32),[74] the previously mentioned credit for the elderly and disabled (section 22),[75] and the exclusion of disaster relief from income (section 139)[76]—illustrate the way in which the need norm moderates the merit norm. Even people who protest progressivity reject distribution by simple equality when it comes to taxation in that they do not propose per capita or head taxes. Moreover, as discussed previously, even those who purport to support a flat or proportionate tax implicitly recognize the need norm (and some degree of progressivity) by giving large exemptions or credits from tax. The fact that a progressive rate best recognizes the blend of distribution by need and by merit may explain why a progressive rate structure historically has been the norm for income, gift, and estate taxes in the United States.

It should be noted that in modern society these two norms—distribution by need and equality of opportunity—support a graduated rate structure, not just a degressive one. At first glance, it may appear that a degressive tax, which achieves a limited progressivity by having a flat rate with an exemption, satisfies the requirements of equality of needs and opportunity because it is most progressive at the lower ends of the tax base. This is true, however, only if "need" and "opportunity" are defined narrowly and if both terms are defined in an absolute sense rather than a relative one.

72. *See, e.g.*, John Harwood, *Voters Warm to 'Canceling' Some Tax Cuts*, WALL ST. J., Jan. 15, 2004, at A4 (citing a Jan. 10–12, 2004 poll finding that respondents would rather pay more taxes than cut spending for health and education); 2003 Values Update Survey, *supra* note 65, at question USICR.03TaxesR36C (Apr. 15, 2003) (showing that 71 percent of respondents thought it was fair that when two families had the same income, the family with more medical expenses pay less tax); question USODFOX.101703 21B (Oct. 17, 2003) (showing that 70 percent of respondents also favored canceling a portion of the 2003 tax cuts for higher income people to pay for health care); *see also* AEI TAX POLL, *supra* note 66, at 34 (reporting on a 2003 poll showing that 80 percent preferred maintaining spending on education, health, and Social Security to cutting taxes and a 2004 poll showing that 62 percent preferred spending more on education, health and economic development rather than balancing the budget); *see also supra* notes 7–10 and accompanying text for a short discussion of the malleability of polls.

73. I.R.C. § 172.

74. I.R.C. § 32.

75. I.R.C. § 22.

76. I.R.C. § 139.

A narrow definition of needs and opportunity is necessary for practical considerations, but insufficient for substantive reasons. A narrow definition produces a relatively low exemption amount, thereby requiring a meaningful progressive structure to help achieve these equalities. In contrast, if the terms were defined more expansively, the exemption amount would have to be higher. The higher the amount, the more people are exempted from the tax base, which means that those left in the base will have much higher marginal rates (assuming that the same amount of revenues must be raised). Both these results create practical problems. High rates can create economic inefficiencies, increased noncompliance, and general opposition to the tax. Moreover, as more people are exempted from tax, taxpayers' resentment of nontaxpayers can rise and cause political divisions to occur. Finally, excluding large numbers of citizens from the tax base can be politically unwise because citizens may feel they have less invested in government and society when their money is not at stake. Practicalities thus require a low exemption amount that, in turn, can be accomplished only if needs and opportunity are defined narrowly.

Narrow definitions, though more practical, fail to achieve equality because needs and opportunity are best defined relatively, rather than absolutely. The social and political aspects of these equalities mean that they must be viewed in the context of society and not in isolation. This is more obviously true in the case of equality of opportunity. For example, giving a person the opportunity to learn to read and write may be enough in some societies to create equality of opportunity. In a modern developed society, however, this opportunity is insufficient because others have realistic opportunities to attend college and acquire the more advanced skills necessary to compete and succeed. Consequently, opportunity cannot be measured in abstract terms, but must be measured in comparison to what is available to other members of the same society. The same is true for needs. Although it is possible to determine absolute minimum requirements for staying alive in terms of consumed calories, shelter, and so forth, this absolute measure has limited utility because people do not live Robinson Crusoe-like on islands, but in socially and politically complex societies. Needs, therefore, must be determined in a relative context of what one requires to be valued, productive, and participatory in the particular society in which one is situated. A person who has only the basic survival needs met has difficulty developing her potential, achieving her goals, and fully participating in modern western society. In this sense, needs and opportunity are closely related.

Viewing needs and opportunity in the relative sense, a flat tax with an exemption amount that produces a mild progressive tax does not adequately achieve the desired equalities. Consider, for example, an income tax that exempts the first $30,000 of income and then applies a flat 20 percent rate to all other income. Assume there are five families each with two parents and two children. The Lowe family has two workers who earn a total of $40,000 and pay $2000 of tax, which is an effective 5 percent rate on their total income. The Middleton family, also with two workers, earns $80,000 (twice what the Lowes earn) and pays $10,000 tax, which is an effective tax rate of 12.5 percent (more than double the Lowes' rate). The Rich family, again with two workers, earns $200,000, pays $34,000 tax, and has an effective tax rate of 17 percent. The Supremes, with one worker, earn $1 million, pay $194,000 tax, and have an effective tax rate of 19.4 percent. The total amount of tax raised is $240,000. The limited progressivity of this degressive tax helps further equality of needs and opportunity, but only in a limited way. The Lowes, whose low tax rate enables them to stay self sufficient, still have an extremely limited ability to participate in acquiring the goods of society (material, psychic, and human capital). The Middletons' after-tax income of $70,000 also provides only limited access once the mortgage, childcare costs, and the cost of the two cars necessary to get them to and from work are accounted for. In contrast, the Rich family's tax rate is only 4.5 percentage points higher than the Middletons, even though their income is more than twice as much. Yet even the Riches, who live in New York City, may be having difficulty saving for their children's college education after all their expenses. Their tax rate, however, is only 2.4 percentage points below the Supremes, who can obtain much more easily the goods and opportunities of society.

A graduated progressive tax, in contrast, could go further toward achieving equality. Assuming the same amount of revenue is desired, the Supremes' marginal rate (and perhaps the Riches) would increase while some or all of the others' would decrease. This would shift some of the burden to those who are more able to pay the tax and who will not suffer as significant a decline in their ability to achieve their needs and opportunities. If desired, graduated rates could be used to increase the amount of revenues raised, and the additional amount could then be spent on goods and services such as childcare or education that would increase equality.

B. Progressivity Best Reconciles Equality and Liberty

Equality and liberty are the basic principles of American democracy. Although conflicts between them may be unavoidable, the Integrity Principle demands that both equality and liberty be defined so as to minimize the incompatibility. The prior section explained how equality of opportunity mediated by a needs-based norm of distribution captured essential elements of equality, and how progressivity best furthered it. This section explains that the Integrity Principle requires a greater emphasis on positive liberty to reconcile opposing meanings of liberty and to minimize the conflict between equality and liberty. A progressive rate structure best expresses these concepts as interpreted by the Integrity Principle.

There are two basic types of liberty: positive and negative. In America, the most common meaning of liberty is negative, in the sense of freedom "from" limitations by government or individuals. Under this view, taking a person's property infringes her liberty because people acquire property by dint of exercising their freedom to act. Accordingly, progressive tax—to the extent that it is redistributive—restricts people's liberty by limiting their property rights. Positive liberty, which recognizes certain basic human rights, is also part of American principles, despite its lower visibility. The constitution's preamble, in fact, lists promotion of the general welfare (that is, positive liberty) as a reason for its adoption, and positive liberty is a prerequisite of basic conceptions of equality discussed earlier—equality of opportunity and the equality of political power inherent in the one person/one vote concept.

Positive liberty rests on two related foundations: basic human rights and the belief that negative liberty itself requires positive liberty. Human rights law, expressed in many international agreements, enumerates basic human rights to goods such as food, health, and education.[77] According to these agreements, these natural rights preexist society and impart a duty on society to protect and secure them, just as society has a duty to protect and secure preexistent negative liberty rights.[78]

77. *See, e.g.*, UNIVERSAL DECLARATION OF HUMAN RIGHTS arts. 25 & 26, G.A. Res. 217(a)(111), U.N. GAOR, 3d Sess., U.N. DocA/810 (1948), *available at* http://www.un.org/Overview/rights.html; International Covenant on Economic, Social, & Cultural Rights arts. 11–13, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

78. *See, e.g.*, UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at 24–25 (2000); *see also* NUSSBAUM, *supra* note 68, at 5, 78–80 (describing and stating that governments must constitutionally establish rights to basic capabilities).

Even if positive rights do not preexist society, society should help secure and protect them because they are the preconditions that give meaning and substance to negative rights. For example, a person without a bare minimum of food and shelter is not in a position to exercise any negative rights. Moreover, negative liberty's insistence that society enforce property rights derives, in part, from the Jeffersonian/republican idea of democracy that views property as a necessity for effective citizenship.[79] However, since land—the ultimate property—was freely available in the United States during its early history, this emphasis is premised on everyone having an equal opportunity to acquire land.[80]

Positive liberty is also consistent with the important meanings of equality in American society. It is a prerequisite to the primary meaning of equality of opportunity, because there can be no such equality unless all people are assured basic rights to health, education, and other necessities. It is also consistent with equality of needs for the same reason. Although not totally consistent with equality based on merit—which rests squarely on negative liberty—the two concepts are less contradictory than it appears at first glance. First, as previously discussed, it is hard to determine precisely what property an individual acquires by merit, as opposed to what he acquires through luck, inheritance, or the efforts of others. To the extent that positive liberty requires some redistribution of property acquired through merit, then it only impinges slightly on negative liberty. It does not restrict any actions or thought; it simply requires a limited amount of redistribution—enough for people to have the minimum needed to exercise their positive liberties, that is, to have equal opportunities. Moreover, positive liberty can promote investment in human capital (education) which in turn helps sustain a flourishing free market, which is a primary expression of negative liberty.[81]

Some degree of positive liberty is also necessary to ensure true political equality, another manifestation of negative liberty. American constitutional history manifests the expansion of voting rights in order to give meaning to the one person/one vote concept, which is the primary political means in American democracy of ensuring negative liberty. Yet studies

79. *See, e.g.*, 26 CONG. REC. 1663 & 3563 (1894) (quoting a 1785 letter from Thomas Jefferson. Of course, American democracy depended on widespread ownership of land since originally only male landowners could vote).

80. *See, e.g.*, ROBERT A. DAHL, DEMOCRACY, LIBERTY, AND EQUALITY 158, 163 (1986) (stating that in 1850, the federal government owned enough land so that every person could have fifty acres).

81. *See, e.g.*, AMARTYA SEN, DEVELOPMENT AND FREEDOM 40–43 (1999); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 838 (2001).

consistently show that people with low incomes and little education do not engage in the political process to the same degree as higher income, better educated people. Not only do they register to vote in lower percentages, but they are also less likely actually to vote or to contribute to political campaigns.[82]

Conflicts among the various definitions of liberty are inevitable. So are the conflicts among definitions of equality and the conflicts between concepts of liberty and equality. Since these conflicts cannot be avoided entirely, the best resolution is to define liberty and equality in ways that promote consistency between and among both principles, as mandated by the Integrity Principle. Such a resolution would stress equality, especially equality of opportunity, and positive liberty. A state that emphasized only negative liberty would doom a certain portion of its citizens, thereby undermining its own legitimacy.[83]

A progressive tax structure best reconciles equality and liberty because it most coherently expresses these principles. To the extent that it is redistributive, such a tax structure promotes many of the meanings of equality, especially the all important equality of opportunity. For this reason, it also advances positive liberty. Unlike other redistributive methods, such as wage and price controls, progressive taxation barely infringes upon negative liberty. It does not prevent anyone from doing or thinking whatever she pleases. Moreover, it minimally interferes with the market system, the major avenue for expressing negative liberty, and may even promote economic growth.[84] To the extent that progressive taxation has a negative impact, that negative is overridden by the way it promotes the state's legitimacy through harmonizing

82. *See, e.g.*, Roland Bénabou, *Unequal Societies: Income Distribution and the Social Contract*, 90 AM. ECON. REV. 96, 106 (2000). This is especially true in initiatives and referenda. *See infra* note 90 and accompanying text.

83. *See, e.g.*, DWORKIN, *supra* note 2, at 19 (stating that equality should always trump liberty because it is "absurd" that government shows more concern for the lives of some than of others).

84. *See, e.g.*, Martin J. McMahon Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1080–91 (2004); Repetti, *supra* note 81, at 831–38. Even if progressive taxation does not encourage growth, there is evidence that it is less of a deterrent than many believe. *See, e.g.*, DOES ATLAS SHRUG?, THE ECONOMIC CONSEQUENCES OF TAXING THE RICH, *supra* note 4, at 24 (summarizing the empirical evidence in the book on behavioral responses of the rich as being "mixed"—showing little response in labor and savings behavior but showing response in areas such as charitable giving). Professor Reuven Avi-Yonah interprets the evidence in *Does Atlas Shrug?* as showing behavioral responses mostly in relation to tax avoidance strategies (rather than "real activities" regarding labor and savings) which can be minimized by broadening the tax base (which both closes loopholes and lowers tax rates) and enforcement. Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1398 (2002) (book review); *see also* Anna Bernasek, *Do Taxes Thwart Growth? Prove It*, N.Y. TIMES, Apr. 3, 2005, § 3, at 6 (reporting that in the U.S. "periods of strong productivity growth actually occurred when the top tax rates were the highest.").

and promoting basic American principles of liberty and equality. This is especially important in the area of taxation, as explained in Part IV.

IV. PROGRESSIVITY PROMOTES LEGITIMACY

Although states have coercive power by definition, in the long run, a nation's stability (and hence longevity) depends less on that power than on its legitimacy and its ability to raise revenues. Legitimacy and taxes are intertwined. Without a steady source of revenues, a state becomes increasingly unstable and illegitimate because it cannot perform the functions that people expect it to perform. A steady source of revenue exists only if citizens pay taxes voluntarily—for tax purposes, this means that the state does not need to exercise its coercive power to collect the taxes.[85] People willingly pay tax only if they think the tax is legitimate both in terms of originating from a fair process and in terms of resulting in a just outcome (spreading the tax burden in a fair manner). Although increased state legitimacy is not always a positive good, it is desirable in the American democratic state.

In the United States, a progressive tax rate enhances a tax's legitimacy for the same reason that it is the proper choice of a rate structure under the Integrity Principle. In other words, it encourages support and minimizes disagreement by best fitting reality and democratic principles. Progressivity—as the expression of integrity—increases legitimacy because, as Dworkin has stated, integrity "fuses citizens' moral and political lives."[86]

Progressive taxation also strengthens the American government's legitimacy in a more direct, or practical, manner. Previously, this Article mentioned one way that progressive tax can strengthen legitimacy in a democracy—improving citizen participation in elections.[87] This part explains two other means by which progressive taxation promotes the American government's legitimacy. Part IV.B explains that progressivity enhances legitimacy by fighting one of its historic

85. Tax protesters frequently claim that they do not have to pay taxes because they are "voluntary." Payment of taxes, however, is required by law, and therefore not voluntary in the common meaning of the word. Taxpayers do not have a choice as to whether they must pay the taxes. In its publication *The Truth About Frivolous Tax Arguments*, the IRS states that "voluntary" means that taxpayers, not the government, determine the amount of the tax they owe. INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS 1 (2005), *available at* http://www.irs.gov/ pub/irs-utl/frivolousarguments-3-14-2005.pdf. This statement, however, does not go far enough. For a system to be truly voluntary, taxpayers must accurately determine and pay their tax liability, rather than waiting for the government to discover, assess, and collect tax deficiencies.

86. DWORKIN, *supra* note 2, at 189; *see also id.* at 219 ("Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation."); PETTIT, *supra* note 13.

87. *See supra* notes 72–86 and accompanying text.

enemies—the concentration of wealth. Part IV.C discusses the manner in which progressivity strengthens legitimacy by stressing the ties that bind individuals together as one interdependent society.

A. Legitimacy and the Concentration of Wealth

A progressive rate structure, to the extent that it is redistributive, best addresses one of the most consistently recognized dangers to democracy: concentrations of wealth. Louis Brandeis bluntly but elegantly expressed this position when he stated, "we can have a democratic society or we can have great concentrated wealth in the hands of a few. We cannot have both."[88] His statement echoes those of America's founders who believed that a republican form of government is most virtuous because only its citizens will act for the common good and not for their own self interest. A republic, however, is in constant danger of being "corrupted" in the sense that its governors will act either in their own self-interest or in the interest of only a certain portion of the governed. Concentrated wealth, therefore, poses a threat to government because it leads to concentrated power. In turn, this can lead to corruption.

Historically, the corruption occurred in one of two ways: The very wealthy are themselves elected to office, or they unduly influence elected officials. Either way, the government ceases to act for the common good. In the first instance, the officials enact legislation that benefits them. In the second situation, wealthy citizens influence officials to enact special legislation. More recently, a third method of corruption has become more prevalent: The wealthy use their money to influence the general public to enact legislation that the wealthy favor via initiative and referenda.

Today, anxiety about corruption remains high. Recent corporate scandals and concerns about campaign funding and undue lobbying influences indicate a continuing worry that concentrated wealth can imperil democratic government by leading to concentrated power. The Responsible Wealth movement, for example, believes that the danger of concentrated wealth is a primary reason to retain the estate tax.[89]

88. This statement is much attributed to Brandeis, but it is impossible to find its exact source. *See, e.g.*, Press Release, Responsible Wealth, Forbes 400 Richest Americans: They Didn't Do It Alone (Sept. 24, 2004), *available at* http://www.responsiblewealth.org/press/2004/Forbes400-pr.html. Wide income and wealth disparities can undermine any regime, not just democracy. *See, e.g.*, Andrew Browne, *China Wrestles Rich-Poor Gap*, WALL ST. J., Apr. 4, 2005, at A12 (stating that "arguably China's biggest threat [is] social unrest engendered by a widening wealth gap between the rich coast and poor interior").

89. GATES & COLLINS, *supra* note 23. Indeed, a large portion of Gates and Collins' book focuses on this issue.

Some theorists also believe that concentration of wealth poses a problem as the number of referenda and initiative increase. Rather than being the purest form of democracy, directly expressing the people's will, these ballot issues are often proposed, drafted, and marketed by individuals or special interest groups. Wealth plays a powerful role from beginning to end: Extremely wealthy people tend to initiate, fund, and guide the measures; and as usual in elections, lower income people are underrepresented. In fact, there is evidence that low-income, low-educated citizens vote even less in ballot initiative elections than they do in other elections.[90]

Concentrations of wealth, with their concomitant social, economic, and political inequality, can cause unrest and undermine democracy in any nation.[91] Economic inequality creates cognitive distress because of the importance of relative—as opposed to absolute—financial worth. This has social and political reverberations as less well off people become more marginal, either because they do not have the resources to participate fully in society or because others treat them as inferior. In the face of wide economic disparities, people become more willing to sacrifice democracy to economic growth.

In the United States, wealth concentration—especially when it is increasing—poses a particularly acute paradox. On the one hand, many view wealth accumulation as the ultimate expression of individual liberty. Moreover, many view it as necessary for economic growth—which in a market-oriented democracy such as the United States is the primary way of achieving individual fulfillment and promoting liberty. On the other hand, too great a concentration of wealth contradicts the very foundations of American democracy: the belief in economic progress and social mobility, the belief in the power of the individual, and the belief in equality. Moreover, recent studies indicate that too much inequality can hinder economic growth, which is the justification often used to support concentrations of wealth.[92] Consequently, increased concentrations of wealth can cause Americans to lose faith in the government's ability to honor its founding principles and to help them achieve their own economic and social goals. Either way, the government loses legitimacy.

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90. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 419 (2003). The article provides excellent citations to literature on direct democracy. *See, e.g.*, DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA (1982) 120, 140 (characterizing California's Proposition 13, the measure that began the current wave of direct democracy, as a revolt of the "haves" and not the "have nots"); Symposium, *The Initiative Process*, 41 SANTA CLARA L. REV. 937 (2001).

91. *See, e.g.*, UNITED NATIONS DEV. PROGRAMME, DEMOCRACY IN LATIN AMERICA 51 (2004), *available at* http://www.undp.org/democracy_report_latin_america/.

92. *See, e.g.*, Philippe Aghion et al., *Inequality and Economic Growth: The Perspective of the New Growth Theories*, 37 J. ECON. LITERATURE 1615, 1619 (1999) (stating that evidence suggests more equal income distribution benefits economic growth); *see also supra* note 84.

A progressive rate structure provides a good compromise to this paradox of concentrated wealth, as politicians such as Theodore Roosevelt have noted.[93] It still allows wealth to accumulate and at realistic levels would not greatly reduce concentrations of wealth. Nevertheless, by redistributing a small portion of wealth, a progressive rate can mediate against the worst dangers of concentrated wealth from both economic and political perspectives. Economically, redistribution helps both the rich and the poor. In the short term, it increases the poor's ability to be active consumers and producers by giving them more discretionary money to spend. In the long term, it increases human capital (through increased health and education, for example), which in turn spurs more economic growth. Politically, a progressive rate helps limit the negative political consequences of concentration of wealth. Its redistributive aspect directly furthers equality of resources. This, in turn, promotes equality of opportunity and fairness of process. It also increases political stability by expanding the stake that poor people have in society. Progressive taxation, then, enhances the American state's legitimacy through its promotion of economic stability and its enhancement of core democratic principles.

B. Legitimacy, Progressivity, and a View of Individuals and Society as Intertwined

Progressivity is consistent with a view of individuals and society as interconnected, which bolsters state legitimacy in two ways. First, to the extent that people already hold this view of individuals and society, legitimacy is strengthened in accordance with the Integrity Principle because there is consistency between private belief and government action. Second, progressivity encourages Americans to develop a sense of national unity that promotes legitimacy.

Since a state's legitimacy must ultimately rest on consent rather than force, legitimacy is strengthened whenever the congruence between the public's beliefs and the state's actions increases. Although Americans disagree about the size of government, few argue that it should shrink so much that all welfare functions should cease. Many argue, for example, that programs

93. 41 CONG. REC. 28 (1906) (recording a speech by President Theodore Roosevelt stating that a graduated inheritance tax would still encourage "thrift and ambition" because it would primarily burden "the inheritance of those swollen fortunes which it is certainly of no benefit to this country to perpetuate"). Fiorello H. La Guardia said: "The purpose of the income tax law is to prevent the accumulation of enormous fortunes, and the control of industry and commerce that goes with such large fortunes." Yablon, *supra* note 34, at 125.

for the poor should be less generous, but few argue they should be abolished entirely. Moreover, what one person sees as welfare may be an entitlement to another. Inevitably, some government programs will not help everyone. The Integrity Principle argues that we should enact statutes that encourage consistency among principles and between individual beliefs and state actions. Progressive taxation does that. It recognizes that despite America's focus on the individual and negative liberty, the American persona is also more "other-oriented."

This communitarian strand in America is both wide and deep. Like the individualistic strand, it traces its origins back to the country's founding and exists in all spheres—political, social, and religious. Whereas the individualistic strand stresses negative, individual liberties, the communitarian strand focuses on the common good and thus encompasses positive liberty. From a political standpoint, civic republicanism, for example, can support policies that promote the general welfare in order to assure that each person is an active participant working for the common good.[94] Religion, which is also other-oriented, plays a large role in the lives of many Americans. Indeed, many Americans believe in the religious foundations of the country. Many government actions support this—from including "God" in the pledge of allegiance and on money, to laws (and proposed constitutional amendments) about marriage. The religious duty to help others is not merely an individual obligation, but one that must be carried out by the state. For example, a 1986 pastoral letter by U.S. Catholic Bishops states that groups (such as businesses and labor unions) as well as the government have a duty to help reduce inequality because "institutional relationships" more frequently cause the concentration of privilege than do differences in talent or effort.[95] Socially, or philosophically, there is also a long and strong history in this country of groups that put these beliefs into action—including Oneida, New Harmony, Shaker, and hippie communities.

This communitarian-oriented strand is consistent with progressivity—regardless of whether progressivity is redistributive. On the one hand, its view of society supports the position that, based on the benefit theory, a progressive tax is not redistributive. On the other hand, if a progressive tax is redistributive,

94. *See, e.g.*, Rob Atkinson, *Reviving the Roman Republic; Remembering the Good Old Cause*, 71 FORDHAM L. REV. 1187 (2003); Frank M. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). *See generally* Jon D. Michaels, Note, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457 (2002).

95. NAT'L CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY ¶ 76 (1986) [hereinafter NAT'L CONFERENCE OF CATHOLIC BISHOPS].

then it is consistent with beliefs about promoting the welfare of others. A recent statement by the Catholic Bishops of Iowa in favor of progressive taxation illustrates both views.[96] It explained that there are both *contributive* and *distributive* principles of justice. The more familiar distributive justice principle requires that there be "a just and equitable distribution of income, wealth, and power" that first takes into account the poor and the basic needs of people.[97] Referring to the 1986 pastoral letter from the United States Bishops called *Economic Justice for All*, it suggests that the principle of contributive justice requires "all members of a society to have a responsibility to contribute to the common good" according to their ability to pay. "Catholic social teaching," it proceeds, supports progressive taxation: "Those who make the most profit from our economic system benefit most from the structures and infrastructure that make economic enterprise possible."[98]

Progressive taxation can strengthen the state's legitimacy in America because it is consistent with many people's core beliefs. Many people who claim to support a proportionate tax seem to put their political beliefs regarding negative liberty and the individual in conflict with their religious beliefs; progressivity aligns these beliefs. By increasing areas of confluence between personal convictions and government actions—and taxation is one of the most visible and ubiquitous government actions—progressive taxation can strengthen support of the government.

Progressive taxation also can strengthen legitimacy in America by encouraging a sense of community among people who disagree. In a country that distrusts government and stresses individual rights, the ties that separate can at times seem stronger than those that bind. This is especially true in a geographically large and demographically heterogeneous country such as the United States. Yet governments must instill in their citizens a sense of loyalty to the country as a whole that transcends more provincial affiliations. Without such loyalty, people will be less willing to accept state actions with which they do not personally agree (and in a large and widely heterogeneous population, no one will agree with every action). This decreased satisfaction with government action undermines legitimacy as people see the state as less willing and able to meet their own needs and desires.

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96. Iowa Catholic Conference, *Taxation Should Be Based on Ability to Pay*, 102 TAX NOTES 277 (2004). *See generally* RONALD PASQUARIELLO, TAX JUSTICE: SOCIAL AND MORAL ASPECTS OF AMERICAN TAX POLICY (1985). Although Susan Pace Hamill makes an eloquent religious argument for tax reform to alleviate heavy burdens on the poor, she does not address whether that tax system should be progressive. Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1, 48 n.158 (2002).

97. Iowa Catholic Conference, *supra* note 96, at 277.

98. *Id.*; *see also* NAT'L CONFERENCE OF CATHOLIC BISHOPS, *supra* note 95, at ¶ 202.d.

Nations build this loyalty in many ways. Naturally, they do it through the actual fulfillment of people's needs and expectations, such as providing roads or security. They also do it in less tangible ways, such as by acting in accordance with the principles in which people believe and which form the basis of government. That is why the Integrity Principle enhances legitimacy.

Nations also build loyalty in more emotional or psychological ways. For example, a shared history creates loyalty, and governments nourish it with shared rituals (Independence Day), hero-saints (George Washington and Thomas Jefferson), and symbols (the flag). A less obvious way of encouraging national patriotism is to recognize the actual interdependency of individuals and to emphasize those strands of American thinking, such as religion or civic republicanism, that stress responsibility and commitment to others. Emphasizing this type of thinking would provide some counterbalance to the centrifugal force of the prevailing American myths of self-reliance and individualism. This type of thinking strengthens the central government's legitimacy by binding the fate and general welfare of each individual to that of his fellow citizens. Moreover, it validates governmental actions taken to promote the welfare of others. Since progressive taxation is consistent with this interconnected view of society—regardless of whether it is redistributive—it builds links among people and to the government, which thereby reinforces legitimacy.

CONCLUSION

It is unlikely that Americans will ever agree about whether tax rates should be progressive or flat because the decision involves fundamental principles that are subject to disagreement. Given the impossibility of unanimity, Congress should decide the issue by following an Integrity Principle that incorporates both pragmatic and theoretical aspects. The Integrity Principle dictates that the appropriate tax rate structure be one that best reflects reality, best harmonizes the differing beliefs and conflicts among principles, and therefore best promotes the state's legitimacy. A progressive rate is that choice. If progressivity is redistributive, it best fits and harmonizes key democratic principles of equality and liberty. However, the reality prong of the Integrity Principle indicates that progressivity is not redistributive but simply reflects the actual benefits and burdens existing in a complex society.

A mildly redistributive progressive tax is pragmatic because it strengthens the legitimacy of the American democratic state. By harmonizing individual beliefs with state actions, it increases the individual's identification with, and loyalty to, the state. This increases support for the state, including the willingness to pay the taxes necessary for the state to fulfill its functions. By emphasizing the interconnectedness of individuals and society, a progressive tax also counteracts isolating individualism and antigovernment sentiment, fortifies a sense of national unity, and strengthens the ties that bind citizens to each other. More directly, progressive taxation actively promotes core democratic principles and goals such as equal opportunity, equality of resources, positive liberty, and political equality. It also gives teeth to the one person/one vote ideal by helping ensure that each person has the resources and capabilities to vote meaningfully. At the same time, by slightly limiting concentrations of wealth, progressive taxation can help contain the undue political influence that such wealth can have.

The great American humorist Will Rogers once said, "People want *just* taxes more than they want *lower* taxes."[99] This Article has shown that in the face of irresolvable disagreement, the Integrity Principle is the best method for deciding what a just tax rate structure is. That principle demonstrates that the most just tax is not a proportionate tax, but a progressive one. Progressivity best promotes fundamental meanings of liberty and equality, best reconciles any conflict between liberty and equality, and thereby reinforces American democracy.

99. Yablon, *supra* note 34, at 125.