Michigan Law Review

Volume 101 | Issue 6

2003

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Recommended Citation

Richard L. Kaplan, *Economic Inequality and the Role of Law*, 101 MICH. L. REV. 1987 (2003).
Available at: https://repository.law.umich.edu/mlr/vol101/iss6/26

ECONOMIC INEQUALITY AND THE ROLE OF LAW

*Richard L. Kaplan**

WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH. By *Kevin Phillips*. New York: Broadway Books. 2002. Pp. xxii, 473. $29.95.

In this ambitious book, famed commentator and analyst Kevin Phillips attempts nothing less than a political history of American economic life with a specific focus on the wealthy. Succeeding far more often than not, Phillips interweaves the development of American technology with the rise and fall of economic fortunes, crafting a compelling tale with significant implications for the formulation of public policy and the laws that implement such policy.

Festooned with more than seventy charts and graphs, the book explains how wealth has been accumulated throughout the entire history of the United States. It is full of intriguing insights and demands serious consideration of its message and warnings. For example, one of the book's persistent themes is that concentration of economic power inevitably corrupts the political process — a point dramatized in recent debates about campaign finance, including the valiant efforts of Senator John McCain and former Senator Bill Bradley in the most recent presidential-election campaign. But Phillips goes further to show how the political process, thus corrupted, spews forth public policies that protect its patrons, often at the expense of the masses whose votes theoretically sustain that process.

Even more important, Phillips shows how the economic concentration that corrupts the political process came about — namely, through exploiting public policies for private gain. As he states with unflinching clarity: "Laissez-faire is a pretense. Government power and preferment have been used by the rich, not shunned" (p. xiv).

At this point, a brief biographical note about Mr. Phillips is essential. A self-described Republican, he was the chief political analyst to Richard Nixon's successful presidential campaign in 1968. One can begin to appreciate how much the American political landscape has changed since that time from his reference to President Nixon's support for national health insurance and "income maintenance for the poor" (p. viii). Such positions today might jeopardize his standing

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in the *Democratic* party, let alone the Republican party! The political evolution of this transformation and its implications for various legal regimes are the focus of this commentary.

I. RISING ECONOMIC INEQUALITY

In recent years, there has been a growing awareness that the gap between rich and poor in America is increasing.[1] Whether measured in terms of annual income, percentage of financial assets owned, or the earnings of corporate executives compared to ordinary workers, the incontrovertible evidence shows that more and more economic resources are controlled by fewer and fewer people. One study revealed that the percentage of total household wealth held by the top one percent of families grew from twenty percent in 1976 to over forty percent in 1997 (p. 123). Another report found that ninety percent of the top quintile's increase in wealth accrued to just the top one percent (p. xiii). Phillips arranges his charts and stories with devastating effect: the very rich really are getting richer, and almost everyone else is either stagnating or declining. What Phillips adds to this discussion, however, is historical perspective and insightful explanation of the forces that produced this unparalleled concentration of income and wealth.

In Chapter One, for example, he examines how wealth was created during the early centuries of our country's existence. He explicates the role of inheritance laws by showing that for the richest families of 1828 to 1848, the surest path to wealth was to have rich parents (p. 23). The later rise of the so-called "robber barons" is then chronicled, though a fascinating comparison of the wealthiest household's assets to median household wealth shows that the storied accumulations of Cornelius Vanderbilt, Jean Paul Getty, and even John D. Rockefeller pale by comparison to that of Bill Gates today (p. 38).

The book examines the twentieth century in great detail, from the growth of the oil and steel fortunes in the Progressive Era (pp. 49-54), through the Great Depression, World War II, and subsequent events. Of particular interest to today, of course, is what Phillips describes as the "Great Technology Mania" of the 1990s (p. 98). It was during this period that economic inequality grew beyond all previous patterns. In 1999, for example, " 'the richest 2.7 million Americans, the top 1 per-

1. *See, e.g.*, BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825 (2001); *see also* Koen Caminada & Kees Goudswaard, *International Trends in Income Inequality and Social Policy*, 8 INT'L TAX & PUB. FIN. 395 (2001); Ray Bashara, *The $6,000 Solution*, ATLANTIC MONTHLY, Jan./Feb. 2003, at 91; Orlando Patterson, *Beyond Compassion*, DAEDALUS, Winter 2002, at 26; Sean Wilenz, *America's Lost Egalitarian Tradition*, DAEDALUS, Winter 2002, at 66. *See generally* Christopher Jencks, *Does Inequality Matter?*, DAEDALUS, Winter 2002, at 49.

cent, will have as many after-tax dollars to spend as the bottom 100 million' " (p. 103). The then-raging stock market was a major factor: "Of the stock market gains between 1989 and 1997, some 86 percent flowed to the top 10 percent of households. Slightly over 42 percent went to the top 1 percent alone" (p. 107).

One of Phillips's most important insights regards the active role of public policy in fostering and maintaining this concentration of wealth. One fascinating chart (pp. 105-06) details the "financial bailouts" during 1980-2000 from the Federal Reserve Board, the U.S. Treasury Department, and various instrumentalities — like the Resolution Trust Corporation for beleaguered savings and loan companies — that were created in response to specific financial calamities. Clearly, the resulting accumulation of wealth during this period had as much to do with dependence on government largesse as it did on rugged individualism or other nostrums of a merit-based culture centered on risks and rewards.

Phillips proceeds to demolish one major myth of our political economy after another. Far from President John F. Kennedy's hope that "a rising tide lifts all boats," recent U.S. history suggests that the past quarter-century of economic activity bestowed its benefits on only certain boats, specifically on yachts. Thus, after-tax income during 1977-1994 actually *declined* for the lower three quintiles and increased by only four percent for the next-to-the-highest quintile (p. 137). The real growth was at the top. Even within the top quintile, income growth was skewed to the highest ranked, with the top one percent seeing an increase in after-tax income of seventy-two percent (p. 137). Similarly, despite all the press about America becoming a nation of stockholders, ninety percent of all shares are held by the top ten percent of households (p. 142).

These statistics actually disguise the true fate of America's middle class during this period, which is grimmer than has been generally acknowledged. Phillips points out that middle-class families have maintained their levels of economic well-being only by "sen[ding] new waves of women into the labor markets" (p. 113). As a result, the United States now has "the world's highest ratio of two-income households, with its hidden, de facto tax on time and families" (p. 113). Further comparisons with other Western industrialized countries make the United States look even worse: "[T]he typical American worked 350 hours more per year than the typical European, the equivalent of nine work weeks" (p. 113). And for what? American wage earners have "*less* pension and health coverage as well as . . . the Industrial West's *least* amount of vacation time, *shortest* maternity leaves, and shortest average notice of termination" (p. 113; emphasis added).

This point bears further underscoring. Almost half of American workers have no pension coverage beyond Social Security.[2] When I served as a delegate to the National Summit on Retirement Savings[3] last year, I observed that most of the discussion focused on getting Americans to save more for their retirement. Administration officials enthused about recently enacted legislation that increased the amount that could be saved through various tax-favored savings vehicles, such as so-called 401(k) plans, individual retirement accounts, and the like.[4] But these arrangements miss the essential point that U.S. employers have increasingly reduced their funding of employees' retirement,[5] deferring instead to these voluntary options.

The situation with health-care coverage is even worse. Phillips points out that "only 26 percent of employees in the bottom 10 percent had health insurance provided by their companies" (p. 133). Indeed, eighty-four percent of Americans without health insurance are in families with at least one employed person[6] — a situation with no counterpart in any other industrialized democracy. President Bill Clinton tried to address this situation in 1993,[7] but that effort was defeated ignominiously.[8] Indeed, some commentators attribute the loss of the Congress by Democrats in 1994, in part, to this attempt at fundamental health-care reform.[9] And this episode occurred during one of the greatest expansions of the U.S. economy! Apparently, a rising tide does *not* lift all boats.

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2. *See* JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO EMPLOYER-SPONSORED DEFINED BENEFIT PLANS (JCX-71-02, 2002), at 28 (stating that fifty-six percent of full-time private-sector employees have an employer-sponsored pension plan). There are significant variations in pension plan coverage among racial groups. *See* Yung-Ping Chen & Thomas D. Leavitt, *The Widening Gap Between White and Minority Pension Coverage, in* PUBLIC POLICY AND AGING 82 (2001). Gender differences, in contrast, are virtually nonexistent. *See* Craig Copeland, *Pension Coverage: Examining CPS Data*, EBRI NOTES, Sept. 2000, at 1.

3. This conference of experts on retirement savings was convened pursuant to 29 U.S.C. § 1147 (2000).

4. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 601(a), 611(d)(1), (e)(2), (f)(2), 115 Stat. 38, 94, 97-99 (amending I.R.C. §§ 219 (b)(5), 402(g)(1), 457(e)(15), 408(p)(2) (1986); codified as amended in scattered sections of I.R.C.).

5. *See* Dallas L. Salisbury, *Current and Emerging Trends in Employee Benefits, in* PUBLIC POLICY AND AGING, *supra* note 2, at 60.

6. PAUL FRONSTIN, EMPLOYEE BENEFIT RES. INST., BRIEF NO. 252, SOURCES OF HEALTH INSURANCE AND CHARACTERISTICS OF THE UNINSURED: ANALYSIS OF THE MARCH 2002 CURRENT POPULATION SURVEY 11 (2002) (finding that four out of five nonelderly persons with health insurance have employment-based coverage).

7. *See* Health Security Act, H.R. 3600, S. 1757, 103d Cong. § 1001 (1993).

8. *See generally* THEDA SKOCPOL, BOOMERANG: CLINTON'S HEALTH SECURITY EFFORT AND THE TURN AGAINST GOVERNMENT IN U.S. POLITICS (1996).

9. *See* MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 130 (1999).

Phillips goes on, in an extremely important segment, to rebut the claim that the U.S. situation has a silver lining in the form of lower unemployment (p. 164). This oft-repeated assertion ignores the estimates of up to six million workers who have lost their jobs but who no longer seek employment due to depression, lack of qualifications, and similar reasons. Including this cohort in the ranks of the unemployed boosts the U.S. unemployment rate to European levels, but without the social-services support that accompanies such high unemployment levels overseas (pp. 165, 345).

Phillips then explores the role of governmental policies in shaping these developments. Phillips demonstrates that industry by industry — from railroads to radio, from electricity to aircraft, through biotechnology and the Internet — governmental policies on taxation, franchises and charters, banking, trade regulation, and research funding have played major roles in the creation of vast personal fortunes and concentrated wealth (pp. 214-48, 294).

The process then comes full circle when those fortunes are used to finance political campaigns and determine future governmental policies. Phillips traces this cycle adroitly, providing several gems along the way. For example, a compilation of "shared characteristics" of the Gilded Age of the 1870s, the 1920s, and the 1980-1999 period include the following:

> 1. Conservative politics and ideology . . . .
>
> 2. Skepticism of government — from laissez-faire to program cuts and deregulation — and emphasis on markets and the private sector. . . .
>
> 4. Replacement of public interest politics by private interest politics, with high levels of corruption. . . .
>
> 7. Major economic and corporate restructuring — repeating merger waves . . . leveraged buy-outs, spin-offs et al. . . .
>
> 11. Concentration of wealth, economic polarization, and rising levels of inequality. (p. 297)

Other gems pertain directly to campaign finance: "Large individual donors" were the single-largest source of money in the 2000 federal election (p. 324); three-quarters of all funds contributed by individuals came from donors in the top one to one-and-one-half percent of income earners (p. 326).

The rationale for, and result of, this bizarre arrangement is best illustrated in a satirical — but accurate — advertisement on the website of billionairesforbushorgore.com:

> While you may be familiar with stocks and bonds, currency speculation, IPOs and all the rest, there's a new investment arena you should be aware of: *legislation*. . . .
>
> . . . Don't worry, it's completely legal. With the help of a professional legislation broker (called a Lobbyist), you place your investment (called

> a Campaign Contribution) with a carefully selected list of legislation manufacturers (called Members of Congress). These manufacturers then go to work, crafting industry-specific subsidies, inserting tax breaks into the code, extending patents or giving away public property for free.
>
> Just check out these results. The Timber Industry spent $8 million in campaign contributions to preserve the logging road subsidy, worth $458 million—the return on their investment was 5,725%. Glaxo Wellcome invested $1.2 million in campaign contributions to get a 19-month patent extension on Zantac worth $1 billion—their net return: $83,333%. The Tobacco Industry spent $30 million in contributions for a tax break worth $50 billion—the return on their investment: 167,000%. For a paltry $5 million in campaign contributions, the Broadcasting Industry was able to secure free digital TV licenses, a give-away of public property worth $70 billion—that's an incredible 1,400,000% return on their investment. (p. 326)

As this posting suggests, concentrated wealth is able to distort democratic processes for private enrichment, and the amazing aspect of this arrangement is not that public policy is for sale, but rather how cheaply it can be bought!

Among the important myths that Phillips explodes is that the last two decades of American history have been unique. To the contrary, he shows that speculative fever has a long pattern of occurrence and that the end result each time is *more* concentration of economic opportunity, not less (pp. 366-68). Furthermore, the so-called "democratization" of finance in the age of personal computers had surprisingly little net impact.[10] To be sure, the Internet enabled ordinary Americans to access economic data that was previously the exclusive province of financial elites. And electronic day trading by everyone from teenage truants to Barbara Streisand meant that people were no longer restricted to conventional channels of amassing wealth.

But the end results were largely unchanged. Millions of Americans followed the stock markets, but it profited them not. One study found "that 71 percent of families individually owned no shares or held less than $2,000 worth" (p. 362). Phillips displays a devastating series of six graphs taken from *Barron's* magazine but arranges them with the following captions that he wrote:

> 1) As the stock indexes soared, pumped up by stockbrokers and analysts
>
> 2) the price-to-earnings ratio of Nasdaq stocks left sober precedent far behind
>
> 3) dwarfing even the excesses of the late 1920's
>
> 4) as householders who had abandoned stocks . . . were lured back in

10. Pun intended.

5) . . . by putting their money in equities [and] by taking on record levels of margin debt

6) while the insiders sold out . . . . (p. 363)

The bottom line: "The history of the United States, in short, is full of money and wealth-related democratizations . . . . But . . . they have not, for more than brief periods or wave crests, notably changed the concentration of wealth in general or the concentration of financial assets in the hands of the top 1 percent" (p. 368). This is an important reality that Americans have not yet begun to comprehend.

II. THE ROLE OF LAW

What, then, should law do about this dismal situation? That is where Phillips is notably deficient. He devotes a scant five pages to the U.S. tax system (pp. 218-23), and virtually ignores the one tax directed at accumulations of wealth — namely, the federal estate tax. Nor does he more than casually mention the Social Security statutes or Medicare laws, both of which have enormous potential for ameliorating income disparities of the sort that Phillips documents so compellingly. To be sure, at the very end of the book he notes that "high taxes on the assets, incomes, or consumption patterns of the rich — or all three — could be used in the twenty-first century to fund the late twentieth-century promises of entitlements like Social Security and Medicare" (p. 422). At that point, he also makes an oblique reference to inheritance taxation as a tool "to diminish wealth concentration" (p. 422). But no specifics are offered, no current proposals are considered, and no substantive comment is offered on the tax legislation enacted in June 2001,[11] even though the book was not completed until January of 2002 (p. viii).

This Part takes Phillips's critique seriously and considers various legal developments from the standpoint of their likely impact on America's economic inequality. This analysis begins with the tax legislation previously mentioned and proceeds to health care and Social Security.

A. *Tax Act of 2001*

The first major legislative enactment of the new Bush Administration was the so-called Economic Growth and Tax Relief Reconciliation Act of 2001 ("2001 Tax Act").[12] Its myriad provisions may yet have some impact on "economic growth," but they have

11. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of I.R.C.).

12. *Id.*

already provided "tax relief" to millions of American taxpayers. In terms of addressing economic inequality, however, this legislation could hardly have been more poorly designed. This Section focuses on only three of its major provisions — namely, those with the greatest impact on the issues addressed in *Wealth and Democracy*.

1. *Estate Tax Repeal*

No part of the 2001 Tax Act better encapsulates the insouciance with which its proponents regard Phillips's concerns than the repeal of the federal estate tax.[13] To be sure, repeal does not take place until the year 2010 and then for only one year,[14] but those qualifications were required by congressional budgetary constraints. The law's message is clear nonetheless: the federal estate tax is irredeemably offensive to the notion that wealth should be accumulated and transferred to succeeding generations without governmental interference of any kind.

Although the estate tax has not been a terribly effective deterrent to dynastic accumulations of wealth, it makes an effort in that direction. Thus, it falls only on estates of fewer than two percent of decedents.[15] Moreover, that limited level of coverage was *before* the estate-tax exemption was increased by forty-eight percent, to one million dollars, in 2002.[16] This substantial increase was possible fiscally because the resulting revenue loss was relatively small, further testament to the extraordinary concentration of wealth in America that Phillips documents in his book. The real money is in *large* estates: in fact, more than half of the revenue generated by the estate tax comes from estates of more than five million dollars,[17] even though they represent a tiny fraction of decedents.

In any case, the estate tax has never been as onerous an exaction as its opponents have contended. Annual gifts of eleven thousand dollars

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13. I.R.C. § 2210 (2000) (codifying § 501(a) of the 2001 Tax Act). *See generally* Sanford J. Schlesinger & Dana L. Mark, *The Economic Growth and Tax Relief Reconciliation Act of 2001: Title V*, J. RETIREMENT PLAN., July-Aug. 2001, at 42.

14. I.R.C. § 2210(a) (2000) (added by Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 501(a), 115 Stat. 38, 69) (repeal after 2009); *id.* at § 901(a), 115 Stat. at 150 (reinstatement after 2010).

15. *See* Jacob M. Schlesinger & Nicholas Kulish, *Will Power: As Paper Millionaires Multiply, Estate Tax Takes a Public Beating — The Long Economic Boom Eases Many Misgivings About Inherited Wealth — Gates Trumps Rockefellers*, WALL ST. J., July 13, 2000, at A1.

16. I.R.C. § 2010(c) (2000) (estate tax exemption of $675,000); *id.*, *amended by* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 521, 115 Stat. 38, 71 (exemption of $1,000,000 in 2003).

17. Computation done by author using data in Lynn Asinof, *Heirs' Gains May Mean Losses for 'Avoidance' Industries*, WALL ST. J., Feb. 26, 2001, at C1.

per beneficiary can reduce a person's taxable estate considerably.[18] And if the property owner is married,[19] she may double these amounts each year — again *per beneficiary* — with zero tax consequences. Furthermore, any amount left to a surviving spouse bears no estate tax whatsoever, regardless of amount.[20] This generous provision, which would enable Bill Gates to leave all of his billions to his wife Melinda without owing any estate tax, is not a new tax gimmick — it has been the law since 1981.[21]

Other provisions also existed prior to 2001 that dramatically reduce, if not eliminate, the estate tax on family businesses and farms.[22] For example, estate taxes due can be paid over a period of fourteen years, with interest-only payments for the first four years.[23] This is hardly the sort of calamity portrayed by the estate-tax repealers when they cry that "you shouldn't have to meet the undertaker and the taxman on the same day." Even in 1977, Professor George Cooper described the estate tax as a "voluntary tax," because it had so many escape hatches and acknowledged loopholes.[24] Nonetheless, opponents of the estate tax successfully engineered its repeal in 2001 and continue their efforts to make this repeal permanent.[25]

As I have indicated elsewhere,[26] the estate tax was vulnerable to attack because its exemption amount had not kept up with the growth of the U.S. economy. Perhaps an exemption of nine million dollars — the approximate relative value of the estate tax's original exemption

18. I.R.C. § 2503(b)(1) (2000), *amended by* Rev. Proc. 2002-70, 2002-46 I.R.B. 845, § 3.24.

19. I.R.C. § 2513(a)(1) (2000). *See generally* DAVID WESTFALL & GEORGE P. MAIR, ESTATE PLANNING LAW AND TAXATION ¶ 9.04[2][a][ii] (4th ed. 2001).

20. I.R.C. § 2056(a) (2000).

21. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(a), 95 Stat. 301 (codified as amended at I.R.C. § 2056(a) (2000)).

22. *See* I.R.C. §§ 2032A, 2057 (2000) (stating special valuation rules for farms and business real estate and special deduction for "qualified family-owned business interests").

23. *See* I.R.C. § 6166(a) (2000). This payment schedule applies if at least thirty-five percent of an estate's value consists of closely held business interests. § 6166 (a)(1), (b)(1). Otherwise, the estate tax is due nine months after the decedent's death. § 6075(a). *See generally* WESTFALL & MAIR, *supra* note 19, at ¶ 7.04.

24. George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 161 (1977); *see also* William M. VanDenburgh & Philip J. Harmelink, *Estate Tax Planning Implications After the 2002 Mid-Term Elections*, TAXES, Jan. 2003, at 53, 56 ("Currently, through a variety of devices, extremely large estates (say $50-100 million or more) can effectively plan around estate taxes.").

25. *See* Permanent Death Tax Repeal Act of 2002, H.R. 2143, 107th Cong. (2002).

26. Richard L. Kaplan, *Crowding Out: Estate Tax Reform and the Elder Law Policy Agenda*, 10 ELDER L.J. 15 (2002).

amount[27] — would have forestalled the repeal effort, but perhaps not. This repeal effort, after all, is a perfect example of what Phillips describes as the interaction of concentrated wealth and democratic processes: a tax that is imposed on the very wealthiest of decedents is targeted for repeal, because that is the same segment of the population that provides the bulk of political campaign financing. And both major political parties joined in the repeal effort, because they feed at the same campaign financing trough, validating Ralph Nader's pithy characterization that the Democratic and Republican parties " 'have morphed together into one corporate party with two heads wearing different make-up' " (p. 320).

2. *Retirement Savings Incentives*

The 2001 Tax Act increased the amount that working Americans can contribute to special tax-favored savings accounts that are intended to fund their retirement.[28] Elsewhere,[29] I analyzed the most ubiquitous of these arrangements — the individual retirement account, or IRA[30] — and concluded that major structural defects exist that mitigate against its presumed role in providing retirement income to retired Americans. But there is no doubt that these accounts represent attractive vehicles for channeling retirement-oriented savings. By boosting the maximum contribution thresholds,[31] therefore, the 2001 Tax Act seems to empower nonwealthy Americans to accumulate wealth for themselves, no?

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27. *Id.* at 20 (citing GARY ROBBINS & ALDONA ROBBINS, INST. FOR POLICY INNOVATION, THE CASE FOR BURYING THE ESTATE TAX 8 (1999) (finding that the equivalent amount in 1998 was $8,845,267)).

28. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 601(a), 611(d)(1), (e)(2), (f)(2), 115 Stat. 38, 94, 97-99 (amending I.R.C. §§ 219 (b)(5), 402(g)(1), 457(e)(15), 408(p)(2) (1986)). The maximum contribution limits are increased according to different schedules for the various types of retirement-oriented accounts as follows:

Year	Individual Retirement Accounts	Salary Reduction Plans: Under § 401(k), § 403(b), § 457	Salary Reduction Plans: SIMPLE
2002	$3,000	$11,000	$7,000
2003	$3,000	$12,000	$8,000
2004	$3,000	$13,000	$9,000
2005	$4,000	$14,000	$10,000
2006	$4,000	$15,000	Indexed
2007	$4,000	Indexed	Indexed
2008	$5,000	Indexed	Indexed

29. Richard L. Kaplan, *Retirement Funding and the Curious Evolution of Individual Retirement Accounts*, 7 ELDER L.J. 283 (1999).

30. I.R.C. § 408 (2000).

31. *See supra* note 28.

The ugly truth is that most eligible taxpayers were not contributing the maximum allowable before the law was changed. Indeed, one study by the U.S. Treasury Department's Office of Tax Analysis revealed that only four percent of eligible taxpayers contributed the maximum amount of two thousand dollars to their IRAs.[32] Who, then, is likely to benefit as this threshold was raised to three thousand dollars in 2002, on its way up to five thousand dollars in 2008?[33] Obviously, only that elite group of IRA contributors who were contributing the maximum amount previously, and probably only a *portion* of that group, in fact.

The reasons for this lack of broader utilization of retirement savings vehicles are varied, and these reasons are not confined to IRAs. For example, even when employers set up retirement savings plans at work — typically, 401(k) plans — and arrange for automatic payroll deductions to fund these accounts, many employees do not participate,[34] or fail to fund their accounts to the maximum allowed prior to the 2001 Tax Act.[35] And if an employee did not put ten thousand five hundred dollars[36] into her 401(k) plan in 2001, will she really put twelve thousand dollars into her plan in 2003?[37] Get real!

The move to increase retirement savings plan limits, moreover, ignored the biggest impediment to full funding of these accounts — namely, the stagnating incomes of the nonwealthy, one of the major themes in Phillips's book. An analysis by the Congressional Budget Office in 2001 revealed that after-tax income in inflation-adjusted

32. *See* PETER ORSZAG & JONATHAN ORSZAG, WOULD RAISING IRA CONTRIBUTION LIMITS BOLSTER RETIREMENT SECURITY FOR LOWER- AND MIDDLE-INCOME FAMILIES OR IS THERE A BETTER WAY?, 2000 CENTER ON BUDGET & POLICY PRIORITIES 1 (citing ROBERT CARROLL, OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, IRAS AND THE TAX REFORM ACT OF 1997 (Jan. 2000)), *available at* http://www.cbpp.org/4-12-00tax2.pdf; *see also* U.S. GEN. ACCOUNTING OFFICE, GAO-01-846, PRIVATE PENSIONS: ISSUES OF COVERAGE AND INCREASING CONTRIBUTION LIMITS FOR DEFINED CONTRIBUTION PLANS 14-15 (2001) (stating that approximately eight percent of pension plan participants would benefit from increased contribution limits).

33. I.R.C. § 219(b)(5)(A) (2000), *amended by* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 601(a), 115 Stat. 38, 94.

34. *See* David Joulfaian & David Richardson, *Who Takes Advantage of Tax-Deferred Saving Programs? Evidence from Federal Income Tax Data*, 54 NAT'L TAX J. 669 (2001).

35. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-98-5, 401(K) PENSION PLANS: LOAN PROVISIONS ENHANCE PARTICIPATION BUT MAY AFFECT INCOME SECURITY FOR SOME 3 (1997) (finding an average contribution rate of 7% of salary). During the survey period, the maximum contribution rate was 20%. EMJAY CORP., 401(K) ANSWER BOOK 8-14 (2000); *see also* SARAH HOLDEN & JACK VANDERHEI, EMPLOYEE BENEFIT RESEARCH INST., BRIEF NO. 238, CONTRIBUTION BEHAVIOR OF 401(K) PLAN PARTICIPANTS (2001) (finding a 6.8% contribution rate using 1999 data); David Cay Johnson, *401(k) Changes Go Unheeded*, N.Y. TIMES, Dec. 19, 2001, at C18 (reporting that only 11% of 401(k) participants made the maximum allowable contribution in 1999).

36. I.R.S. Notice 2000-66, 2000-2 C.B. 600.

37. I.R.C. § 402(g)(1)(A) (2000), *amended by* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 611(d)(1), 115 Stat. 38, 97-98.

dollars had actually *declined* for the lowest twenty percent of U.S. households from 1979 to 1997, and that the middle quintile had an increase of less than five percent over this period, to slightly more than thirty-three thousand dollars (p. 396). By contrast, income of the top one percent had increased by more than two hundred and fifty percent (p. 396). For most Americans, in other words, increasing the limits on retirement savings contributions is an empty gesture. They simply cannot afford to set aside even the old limit!

Even worse, legislation boosting retirement-account limits distracts attention from a fundamental source of economic inequality — namely, the lack of employer-provided pension coverage for an increasing proportion of nonwealthy Americans.[38] First, the professionally managed "defined benefit" pension plan was phased out in favor of "defined contribution" plans[39] that put all of the control — and all of the risk of investment failure — into the hands of individual employees.[40] Then, the "defined contribution" plan morphed into salary reduction plans — 401(k)s, 403(b), 457, and the like — to which employers provided only matching contributions,[41] and often not even that.[42] The increased risk of these plans was then augmented most dangerously when employer stock became their principal investment, as is often the case,[43] even after the Enron debacle and similar calamities.

The end result of these changes is that the retirement income of nonwealthy Americans is more precarious than ever before. The widespread decimation of 401(k) plans has only recently awakened most Americans to the very real dangers that these plans present. And what is the Bush Administration's response? Revise pension laws to encourage defined benefit plans? Mandate matching contributions to salary-reduction arrangements? Limit or restrict employer stock in 401(k) plans? Try boosting the amount that the wealthiest employees

38. *See* Richard L. Kaplan, *Enron, Pension Policy and Social Security Privatization*, 46 ARIZ. L. REV. (forthcoming 2004).

39. *See* JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO EMPLOYER-SPONSORED DEFINED BENEFIT PLANS (JCX-71-02, 2002), at 31; *see also* CRAIG COPLAND & JACK VANDERHEI, EMPLOYEE BENEFIT RES. INST., BRIEF NO. 223, PERSONAL ACCOUNT RETIREMENT PLANS: AN ANALYSIS OF THE SURVEY OF CONSUMER FINANCES 7-8 (2000).

40. *See* LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 357 (3d ed. 2003).

41. *See* EMJAY CORP., *supra* note 35, at 2-7 (stating that seventy-one percent of 401(k) plans surveyed have matching contributions).

42. *See* CINDY HOUNSELL ET AL., WOMEN'S INST. FOR A SECURE RETIREMENT, YOUR FUTURE PAYCHECK: WHAT WOMEN NEED TO KNOW ABOUT PAY, SOCIAL SECURITY, PENSIONS, SAVINGS AND INVESTMENTS 26 (2002); EMJAY CORP., *supra* note 35, at 2-7.

43. *See* Daniel Kadlec, *Time Bomb: 401(k)s Stuffed With Employer Stock Are a National Calamity*, TIME, Mar. 5, 2001, at 84; Ellen E. Schultz, *Employers Fight Limits on Firm's Stock in 401(k)s*, WALL ST. J., Dec. 21, 2001, at C1.

may contribute to their retirement accounts. A good idea for those employees, to be sure, but one that can only exacerbate the economic inequality that retirement plans currently represent.

3. *Education Incentives*

The 2001 Tax Act created several distinct incentives for funding the costs of higher education, but most of these provisions are of limited significance.[44] For example, the maximum contribution to a Coverdell Education Savings Account was increased from five hundred dollars to two thousand dollars per year.[45] Nice, but not likely to have a serious impact on the disparity in economic resources facing the next generation of college attendees.

One change, however, has far greater significance: the complete exemption of certain college-savings plans from federal income taxation.[46] These plans, colloquially styled 529 plans because of the Internal Revenue Code section that sets forth their essential features, enable taxpayers to set up special accounts for college tuition as well as the related room and board expenses.[47] The plans are nominally fashioned by state law, so the specifics vary among jurisdictions.[48] But their most fundamental appeal is a function of federal law: all investment income and capital gains derived by the plans are exempt from federal income tax, if the funds are used for the costs of higher education.[49] In addition, there is typically no time limit during which the funds must be so used, unlike Coverdell Education Savings Accounts, which require distributions by the time the named beneficiary reaches thirty years of age.[50]

These accounts existed prior to 2001, but they lacked tax exemption. Instead, the income tax was deferred until the student applied the funds towards college expenses, and then the tax was imposed at the student's presumably low income-tax rate.[51] This arrangement was

44. *See generally* Richard L. Kaplan, *Funding a Grandchild's College Education*, J. RETIREMENT PLAN., Sept.-Oct. 2001, at 15 [hereinafter Kaplan, *Funding a Grandchild's College Education*].

45. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 401(a)(1), 115 Stat. 38, 57 (amending I.R.C. § 530(b)(1)(A)(iii) (2000)).

46. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 402(b)(1), 115 Stat. 38, 61 (amending I.R.C. § 529(c)(3)(B)(i) (2000)).

47. *See* Kaplan, *Funding a Grandchild's College Education*, *supra* note 44, at 22.

48. *See* http://www.savingforcollege.com (last visited Jan. 2, 2003) (offering state-by-state compilation of available plans and their salient features).

49. I.R.C. § 529(c)(3)(B)(i) (West Supp. 2002). Many states exempt this income from their income taxes as well. *See* http://www.savingforcollege.com (last visited Jan. 2, 2003).

50. *See* I.R.C. § 530(b)(1)(E) (2000) (treating any unused balance as distributed when the account beneficiary becomes thirty years old).

51. *See* Kaplan, *Funding a Grandchild's College Education*, *supra* note 44, at 20-21.

certainly appealing, but the 2001 Tax Act made the deal that much sweeter by exempting the plans' investment income and profits from taxation entirely.[52] As a result of this change, the investment companies that operate these plans went into advertising overdrive, and states that had not previously authorized such plans hastily did so.

From the standpoint of economic inequality, which is the focus of Phillips's book, after all, why are these plans counterproductive? Simply because they allow wealthy taxpayers to move substantial sums off the tax rolls for the benefit of their privileged progeny. While states set the maximum amount that can be contributed to their 529 plans, these limits often exceed a quarter of a million dollars *per named beneficiary*.[53] While most plans have low minimum-contribution levels,[54] the real benefit is obtained by those who are able to fund these plans up to the maximum allowable by law. And at a time when access to higher education is increasingly becoming the ticket to economic opportunity,[55] the complete tax exemption of 529 plans exacerbates existing income and wealth inequalities and operates to perpetuate these disparities into succeeding generations.

B. *Health Care*

Fewer issues are more central to physical and financial well-being than health care, in particular who will pay for health-care expenses. For that reason, most modern societies provide some mechanism to ensure that health-care financing does not become a source of economic inequality. Not so the United States. Among the various aspects of this critical subject, this Section considers only two — health insurance and long-term care.

1. *Health Insurance*

Most health insurance in the United States is provided to nonelderly persons as a feature of their employment.[56] But recent

52. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 402(b)(1), 115 Stat. 38, 61 (amending I.R.C. § 529(c)(3)(B)(i) (2000)).

53. *See* http://www.savingforcollege.com (last visited Jan. 2, 2003) (stating that plans allowing contributions of $250,000 or more include those of Alabama, Alaska, Delaware, the District of Columbia, Florida, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, and West Virginia). The limit in South Dakota is $305,000. *Id.*

54. *See* http://www.savingforcollege.com (last visited Jan. 2, 2003) ($25-$50 per beneficiary, often less with automatic-contribution arrangements).

55. *See generally* ACKERMAN & ALSTOTT, *supra* note 1.

56. FRONSTIN, *supra* note 6, at 4 (stating that four out of five nonelderly persons with health insurance have employment-based coverage). Older Americans generally receive health insurance through the federal government's Medicare program. *See* 42 U.S.C. § 1395c(1) (2000).

trends, including the increasing use of "temporary" or part-time workers that Phillips describes in his book (pp. 133, 164), have led to more Americans without health insurance.[57] The legal response to this problem was the Health Security Act, proposed by President Bill Clinton in 1993.[58] Although he artfully described Americans' plight as "one paycheck away from being uninsured," the vast majority of Americans had some sort of health insurance at the time and could not identify with those who had no such insurance.[59] Collectively, they were comfortable with this fundamental economic inequality, even though the financial consequences of an uninsured illness or accident can be ruinous. The same impulse that tolerates a higher degree of economic inequality in this country than in any other Western democracy (pp. 123, 345-46) produced an attitude that can be summarized as: "I've got mine; get yours."

A very different American impulse created Medicare in 1965 to pay for the medical costs of older Americans.[60] The potentially catastrophic costs of hospitalization have been essentially eliminated through this statutory regime.[61] Medicare's coverage extends to almost all Americans age sixty-five and older, without regard to their specific economic resources.[62] Medicare, therefore; has been a major factor in reducing the economic inequality of senior citizens with respect to health-care costs. But this communitarian impulse did not carry the day in 1993, and the Clinton health plan was unceremoniously dumped without even the courtesy of a recorded vote.

Why was the response so different a generation earlier? For one thing, most people could identify with older Americans. They knew them personally and anticipated becoming older themselves some day. In contrast, most Americans did not know people without health insurance, or at least they did not know that they knew such persons, and they certainly did not anticipate — let alone desire — to join them.

But another factor was afoot: a general disdain of government in all its forms, from taxation to social programs. This attitude was captured sardonically by President Clinton when he observed that "most of our folks think that the Government would mess up a two-

57. *See* FRONSTIN, *supra* note 6, at 8; *see also* Steven A. Schroeder, *Prospects for Expanding Health Insurance Coverage*, 344 NEW ENG. J. MED. 847, 847 (2001).

58. *See* Health Security Act, H.R. 3600, S. 1757, 103d Cong. § 1001 (1993).

59. *See* David Blumenthal, *Health Care Reform — Past and Future*, 322 NEW ENG. J. MED. 465, 467 (1995).

60. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified in scattered sections of 42 U.S.C.). *See generally* FROLIK & KAPLAN, *supra* note 40, at 58-102.

61. *See* FROLIK & KAPLAN, *supra* note 40, at 67-68.

62. *Id.* at 58-63.

car parade."[63] After a decade of President Reagan exhorting the citizenry that "government is not the solution, it is the problem," Americans collectively did not want to expand the reach of government programs, even if the result was more economic inequality.

2. *Long-Term Care*

Another health-care issue that results in major economic dislocation and inequality is long-term care. As I explained elsewhere,[64] most older Americans have very limited coverage of long-term care expenses via Medicare, even though the cost of such care can exceed one hundred thousand dollars per year in some areas.[65] A small percentage of this vulnerable population have private long-term care insurance,[66] but most are simply unprotected for such potentially cataclysmic expenditures. Only the wealthy can approach this issue with relative equanimity, but that is why this issue has not received any significant governmental attention: the rich can take care of themselves, so the issue is not on the government's radar screen.

Yet, the cost of long-term care may become one of the defining sources of economic inequality as the wealth of the current generation of older Americans is passed along. For the poor, this issue is fairly benign, because their impoverishment, immediate or imminent, ensures their entry into the Medicaid program,[67] with its coverage of long-term care costs.[68] For those with more resources, however, long-term care costs pose an enormous threat to the transfer of wealth between generations. These folks, with perhaps as much as one million dollars in financial assets and equity in their residence, have no exposure to the predations of the federal estate tax,[69] but risk economic devastation from the costs of long-term care. In another context, I described this potential financial obligation as "a 100 percent estate tax on the middle class!"[70]

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63. William J. Clinton, Remarks on the Reinventing Government Initiative, *in* 2 PUB. PAPERS 1543, 1544 (Sept. 14, 1994).

64. Richard L. Kaplan, *Financing Long-Term Care in the United States: Who Should Pay for Mom and Dad?*, *in* AGING: CARING FOR OUR ELDERS 65 (David N. Weisstub et al. eds., 2001) [hereinafter Kaplan, *Financing Long-Term Care in the United States*].

65. *See* PHYLLIS R. SHELTON, LONG-TERM CARE PLANNING GUIDE 1 (2000).

66. U.S. GEN. ACCOUNTING OFFICE, GAO/T-HEHS-00-196, LONG-TERM CARE INSURANCE: BETTER INFORMATION CRITICAL TO PROSPECTIVE PURCHASERS — THE CONSUMER RESOURCE FOR LONG-TERM CARE FINANCING 3 (2000) (stating that fewer than ten percent of older Americans have long-term care insurance).

67. *See generally* FROLIK & KAPLAN, *supra* note 40, at 106-12.

68. *Id.* at 105-06.

69. I.R.C. § 2010(c) (West Supp. 2002) (estate-tax exemption).

70. *See* Kaplan, *Financing Long-Term Care in the United States*, *supra* note 64, at 70.

This source of economic inequality could be ameliorated if there was political interest in doing so. I examined this issue at length elsewhere[71] and proposed that the Medicare statute be amended to liberalize its restrictions on coverage of nursing-home expenditures.[72] I also suggested that private long-term care insurance be regulated[73] along the lines that were enacted in 1990 for so-called "Medigap" insurance.[74] This change would standardize the available packages of benefits to minimize consumer confusion and facilitate the informed purchasing of this important coverage. Both approaches would reflect current medical practices and the new realities of extended life.

A step in this direction was taken in 1996, but it was a very small step. Some basic consumer protections were enacted in that year's Health Insurance Portability and Accountability Act.[75] And the *deus ex machina* of tax deductibility was applied to premiums for long-term care insurance,[76] but these tax benefits are usually more illusory than real.[77] While improvements to the tax treatment of these premiums have been proposed,[78] they have not yet been adopted. Accordingly, long-term care remains an accident waiting to happen for most Americans, an unanticipated financial calamity when the need for such care arises. The longer this critical issue is not addressed, the more it perpetuates economic inequality as the gains of the nonwealthy are expended on the costs of long-term care.

C. *Social Security*

In terms of budgetary significance and societal impact, no statutory regime has more of an ameliorative effect on income inequality than Social Security. It provides monthly benefits, adjusted for inflation, to

71. Richard L. Kaplan, *Cracking the Conundrum: Toward a Rational Financing of Long-Term Care*, 2004 U. ILL. L. REV. (forthcoming 2004).

72. *Id.*

73. *Id.*

74. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4351(a)(3), 104 Stat. 1388, 1388-126 (adding 42 U.S.C. § 1395ss(p) (2000)). *See generally* FROLIK & KAPLAN, *supra* note 40, at 90-96.

75. *See* I.R.C. § 7702B(b)(1)(C) (2000) (guaranteed renewability); § 7702B(g)(2)(A) (compliance with certain model Act and model regulation provisions); § 7702B(g)(3) (disclosure requirements); § 7702B(g)(4) (nonforfeitability).

76. I.R.C. § 213(d)(1)(D) (2000) (added by Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 322(b)(1), 110 Stat. 1936, 2008).

77. *See* Kaplan, *Financing Long-Term Care in the United States*, *supra* note 64, at 77 (giving extended example illustrating the minimal tax benefit from purchasing long-term care insurance).

78. *See* Long-Term Care and Retirement Security Act of 2001, H.R. 831, S. 627, 107th Cong. § 2(c)(1).; *see also* Improving Access to Long-Term Care Act of 2002, H.R. 4946, 107th Cong. § 2.

thirty-two million retirees, seven million surviving spouses and minor children, and another seven million disabled Americans.[79] It functions as a combination retirement annuity, life-insurance policy, and disability coverage.[80] Income inequality in this country would be even worse than Phillips documents if Social Security did not exist.

Yet, this ubiquitous program is under attack precisely because of the conditions that Phillips describes, especially the impact of concentrated wealth on the democratic process. President George W. Bush campaigned on the issue of "privatizing" Social Security and created a presidential commission charged with implementing that goal.[81]

But this issue first rose to political awareness in the presidential campaign of Malcolm Stevenson ("Steve") Forbes III in 1996. This personal embodiment of Phillips's thesis of concentrated wealth distorting the political agenda assailed Social Security by claiming that folks could do better investing the money themselves.[82] As I have explained elsewhere,[83] this is one of the most enduring myths surrounding Social Security, one that fails to consider the full range of benefits it provides to a variety of recipients in a multitude of circumstances.

But one aspect of the Forbes critique sticks: Social Security's effort to reduce income inequalities translates into less-impressive benefits for those who are more financially secure.[84] Usually, the issue is not presented quite this starkly, but that is the crux of the privatizers' complaint — namely, that Social Security reduces Americans' income disparities, and some folks do not like being part of that process.

To understand this phenomenon even superficially, a simplified example is necessary. Consider two workers, Ashlie and Sean, both of whom have worked in employment covered by Social Security's tax regime[85] and are now entitled to retirement benefits. Assume further that the average monthly earnings, indexed for inflation according to Social Security's somewhat convoluted methodology,[86] are $5,000 for

79. Social Security Online, Social Security Beneficiary Statistics, http://www.ssa.gov/OACT/STATS/OASDIbenies.html (last updated Dec. 17, 2002).

80. *See generally* FROLIK & KAPLAN, *supra* note 40, at 273-319.

81. *See* REPORT OF THE PRESIDENT'S COMMISSION, STRENGTHENING SOCIAL SECURITY AND CREATING PERSONAL WEALTH FOR ALL AMERICANS (2001), *available at* http://csss.gov/reports/Final_report.pdf (last visited Jan. 11, 2002).

82. *See* Christopher Georges, *Forbes's Proposal to Restructure Social Security Suggests System Is No Longer Political Third Rail*, WALL ST. J., Feb. 9, 1996, at A14.

83. Richard L. Kaplan, *Top Ten Myths of Social Security*, 3 ELDER L.J. 191, 205-08 (1995).

84. *See id.* at 200-02.

85. *See* I.R.C. §§ 3101(a)-(b), 3111(a)-(b), 3121(a)-(b) (2000); *see also* FROLIK & KAPLAN, *supra* note 40, at 278-81 (explaining covered employment).

86. *See* FROLIK & KAPLAN, *supra* note 40, at 288-89.

Ashlie and $2,500 for Sean. No doubt, Ashlie would expect that her retirement benefit will be twice that of Sean's, since her average earnings are twice his.

In many private pension systems, such proportionality would indeed be the rule, but Social Security calculates its retirement benefit by applying a three-part formula to a retiree's average lifetime earnings.[87] This formula is 90%-32%-15%, and the "bend points," or bracket parameters (in 2003), are $606 and $3,653.[88] So, for Ashlie, her Social Security benefit is 90% of the first $606 of her average monthly earnings, plus 32% of the amount between the two "bend points" ($3,653 less $606 equals $3,047), plus 15% of her average monthly earnings beyond the second "bend point" ($5,000 less $3,653 equals $1,347). The result is a retirement benefit, or Primary Insurance Amount ("PIA") in Social Security's terminology, of $1,725. In similar fashion, Sean's PIA is 90% of the first $606 of his average monthly wages, plus 32% of his remaining wages ($2,500 less $606 equals $1,894), since his average earnings did not exceed the second "bend point." His PIA, therefore, is $1,151.

Stripped of the arithmetic, the bottom line is as follows:

Recipient	Average Wage	Benefit
Ashlie	$5,000	$1,725
Sean	$2,500	$1,151

Clearly, Ashlie receives a larger benefit from Social Security than does Sean, but her benefit is *not twice* as large as his (i.e., $1,151 times 2 equals $2,302), even though her average monthly earnings are precisely twice his. In this manner, Social Security provides a proportionately *larger* benefit to the lower-income recipient, Sean in this case. As a consequence, Social Security's retirement benefit calculation mollifies the income disparity between higher- and lower-earning workers to some degree. And therein lies the rub.

If the Social Security program were privatized, even in part, the benefit-calculation methodology illustrated above would necessarily change. In place of these guaranteed and bottom-weighted benefits, affected workers would be exposed to the vicissitudes of the financial markets. In all likelihood, lower-income recipients would do less well than their higher-income counterparts in navigating the shoals of these markets.[89] The end result of Social Security privatization, therefore,

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87. *See id.* at 286-87.

88. *See* Social Security Online, Table of Automatic Increases, http://www.ssa.gov/OACT/COLA/autoAdj.html (last updated Oct. 18, 2002).

89. *See* Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities, and Lower-Income Workers*, 65 MO. L. REV. 341 (2000). *See generally* JOHN MUELLER, NAT'L COMM'N TO PRES. SOC. SEC., WINNERS AND LOSERS FROM "PRIVATIZING" SOCIAL SECURITY (1999).

would be *more* inequality of income for recipients, not less — precisely the opposite of what Phillips contends is needed at this point in America's history.

III. CONCLUSION

Kevin Phillips has written an important book in *Wealth and Democracy*, one that should give serious pause to lawmakers involved in a wide range of critical issues facing America today. As he notes, the increasing economic inequality of recent decades poses a significant challenge to the U.S. legal system and its democratic processes. He contends that the status quo is "unsustainable" and that plutocracy is where we are headed, if we are not already there (p. 422).

What the future holds is not particularly heartening. Repealing the estate tax, creating retirement funding and education incentives that primarily benefit financial elites, rejecting universal health insurance, ignoring the "silent" crisis[90] represented by the costs of long-term care, and eliminating the redistributionist aspects of Social Security via "privatization" — all of these developments point toward *more* economic inequality, not less. One of Phillips's final chapters begins with the observation of historian Arnold Toynbee that "what was common to twenty-one past civilizations that had failed" was " 'concentrated ownership' and the inflexibility of elites in dealing with it" (p. 373). Yet, President Bush championed his program of tax cuts with the slogan, "It's not the government's money, it's yours." Obviously, a different message is needed if economic inequality is to be arrested and democratic vibrancy restored. Bravo to Kevin Phillips for setting out the path for those who are not too blind to see it.

90. *See* Kaplan, *Financing Long-Term Care in the United States*, *supra* note 64, at 65.