

1987

The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction

Marjorie E. Kornhauser
Cleveland-Marshall College of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Law and Philosophy Commons](#), [Law and Society Commons](#), [Taxation-Federal Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss3/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE RHETORIC OF THE ANTI-PROGRESSIVE INCOME TAX MOVEMENT: A TYPICAL MALE* REACTION†

*Marjorie E. Kornhauser***

This title is not exactly true; it's not exactly false either.¹ It contains a truth that has been shaped by my preferences (or, if you wish, my biases, philosophy, or prejudices) and by my desire to grab the reader's attention and force him (and I mean him) to reach a specific conclusion. It is, in short, rhetoric. In that respect it is not unlike many of the arguments now popularly raised against the progressive income tax. My argument differs from many others in its open acknowledgment of the use of rhetoric.

The progressive income tax is currently under siege. This is a new phenomenon: new not in the fact of the opposition itself, but in the extent of the opposition. In 1913, the general public, economists, and politicians argued about the exact schedule of rates and exemptions,² but the *idea* of graduated or progressive rates was accepted with surprising ease and generally has remained unquestioned ever since.³ The economic and political consensus about progressivity began to fall

* Cf. Tina Turner, *Typical Male* (Capitol Records 1986).

† © 1987 by Marjorie E. Kornhauser.

** Associate Professor of Law, Cleveland-Marshall College of Law. — Ed. My thanks to Professors Lynne Henderson of Cleveland-Marshall and Lewis Kornhauser of New York University for their many helpful comments, my research assistant Ms. Leigh Hollingsworth for her able assistance, and The Cleveland-Marshall Fund which provided support for this project.

1. As will be discussed, the "true" portion is that the underlying philosophy of the anti-progressive movement is "male" in the sense that it is "scientific," "objective," and "individualistic" — characteristics typically seen as male, in contrast to an alternate philosophic vision, called feminine(ist), which can support progressivity. The title is false in two major respects. First, the text that follows is not merely about anti-progressivism; indeed the "true" purpose of the article is to make a statement in favor of progressivity. Secondly, the progressivity issue is more than a simple matter of male versus female perspectives; and certainly the issue can be categorized under other terms.

2. See, e.g., R. BLAKEY & G. BLAKEY, *THE FEDERAL INCOME TAX 223-50* (1940) (discussion of the Revenue Act of 1924).

3. For discussions of the adoption of the first income tax act under the sixteenth amendment, see S. RATNER, *AMERICAN TAXATION 324-33* (1942); R. BLAKEY & G. BLAKEY, *supra* note 2, at 71-103. Although some advocates favored progressivity on the basis of its redistributive powers, most favored it on the equitable grounds that it based taxation on a citizen's ability to pay. See generally J. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA 42-49* (1985). Congressional statements of the time reflect various positions. See, e.g., 50 CONG. REC. 3771-72 (Aug. 26, 1913); *id.* at 4613 (Sept. 9, 1913).

The Supreme Court upheld the progressive feature of the income tax with little discussion. *Brushaber v. Union Pac.* R.R. 240 U.S. 1, 25 (1916).

apart sometime in the 1970s.⁴ Two alternatives to progressivity gained strength: a modified flat or proportionate income tax and an expenditure- or consumption-based tax.⁵ An expenditure-based tax proved politically unacceptable but the (modified) flat tax alternative gained strength and culminated in the Tax Reform Act of 1986.⁶ This Act takes a large structural step away from a progressive tax towards a flat tax.⁷ The drastic erosion of support for progressivity spurred the writ-

4. See generally D. DAVIES, UNITED STATES TAXES AND TAX POLICY 1-6 (1986). The popular mood is harder to judge. For example, three different public opinion polls on the flat tax — all done during the summer and fall of 1982 — obtained different results, but this may reflect variations in the wording of the poll questions. Keene, *What Do We Know About the Public's Attitude on Progressivity?*, 36 NATL. TAX J. 371, 374-75 (1983); see also J. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 339-64 (1985) (examining the results of and problems with various polls). United States Senator Bradley of New Jersey has stated that a flat tax is "at odds with what I, and a majority of Americans, regard as a fundamental tenet of fairness — progressivity." Interview: Bill Bradley on TRA-86 . . . And What Comes Next, *Tax Times*, Jan. 1987, at 3, col. 2, 16, col. 4 [hereinafter *Bradley Interview*].

5. For a summary of the recent flat tax proposals leading up to the 1986 tax act, see Burton, *Major Tax Reform Proposals at a Glance*, 23 TAX NOTES 1095 (1984). See also O'Kelley, *Tax Policy for Post-Liberal Society: A Flat Tax-Inspired Redefinition of the Purpose and Ideal of Progressive Income Tax*, 58 S. CAL. L. REV. 727, 727 n.1 (1985). As to recent literature on an expenditure-based tax, see D. BRADFORD, BLUEPRINTS FOR BASIC TAX REFORM (rev. ed. 1984); Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974); Graetz, *Implementing a Progressive Consumption Tax*, 92 HARV. L. REV. 1575 (1979); Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081 (1980). For a comparison of the merits of a flat and progressive income tax, see C. GALVIN & B. BITTKER, THE INCOME TAX: HOW PROGRESSIVE SHOULD IT BE? (1969).

6. Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (codified at 26 U.S.C. § 1).

7. The Act is more progressive in actuality than its two-rate system suggests. This is due to base broadening and exemptions.

Measuring the actual difference in progressivity before and after the Act is difficult in part because there are various methods of measuring progressivity. David Kiefer, for example, measured "redistributional progressivity," the extent to which a tax equalizes *after tax* income; and "structural progressivity," the degree to which people with higher incomes make greater average tax payments. Kiefer, *The Progressivity Effects of the Individual Income Tax Revisions in the Tax Reform Act of 1986*, 32 TAX NOTES 1189, 1189 (1986). Kiefer concluded that the Act (at least the Conference Committee version) increases progressivity as determined by either measure, relative to current law. *Id.* at 1192. See also Okner & Bawden, *Recent Changes in Federal Income Redistribution Policy*, 36 NATL. TAX J. 347, 353 (1983) (progressivity exists if effective rates for low-income units fall more than for high-income units after the tax change, or if the percentage cut in tax liability is greater for low-income than high-income units). At least one researcher concludes that the Act only slightly reduces progressivity. See Ott, *The Impact of the 1986 Tax Reform Act on Progressivity*, 33 TAX NOTES 1223 (1986).

One problem with comparing the tax law before and after enactment of the 1986 Tax Reform Act is that much of the 1986 Act's increase in progressivity can be attributed to the removal of tax burdens from low-income people. This, as Professor Patrick McDaniel has stated, "was not a step forward. It was just a restoration of a 1969 policy that had been undone by inflation." *Law School Conference Examines Tax Reform Policy*, 34 TAX NOTES 93, 93 (1987). McDaniel also saw no reason to use 1984 tax distribution levels as the base of comparison, because the 1984 distribution reflected the 1981 tax cuts which reduced progressivity. *Id.*

A recent Congressional Budget Office (CBO) study compared effective individual income tax rates for 1977, 1984, and 1988 and found that for every income group the effective individual income tax rate for 1988 is less than or equal to the rate in 1977, with the largest drops occurring in the higher income groups. CONGRESSIONAL BUDGET OFFICE, THE CHANGING DISTRIBUTION OF FEDERAL TAXES: 1975-1990, at 43, 47 & Table 7 (1987) [hereinafter CONGRESSIONAL BUDGET OFFICE] (found in full in the Tax Notes Microfiche Database, Doc. 87-7129, Nov. 16,

1987). A summary of the CBO study appears in *Mitchell Says CBO Report Proves Federal Tax System Has Become Less Progressive Since 1977*, 37 TAX NOTES 664 (1987) [hereinafter *Summary*]. As with any tax study, the results of this one are affected by the assumptions made and by the difficulty of measuring changes caused by the new law itself, the affect the new law has on economic behavior (which affects the amounts), and independent changes. CONGRESSIONAL BUDGET OFFICE, *supra*, at 49. For a hint of the difficulties of economic modeling, see notes 91-92 *infra* and accompanying text. It has been suggested that tax reform acts not only provide relief for tax attorneys and accountants, but also for simulators and econometricians. Bristol, *NTA-TIA Conference Examines Tax Policy, Present and Future*, 37 TAX NOTES 676, 679-81 (1987).

Regardless of the actual progressivity of the 1986 Act vis-à-vis the 1984 law, the fact is that the 1986 Act accepts the idea of a modified flat or proportionate tax as the ideal on which to build. It takes a giant conceptual step away from progressivity despite assertions to the contrary. Senator Bradley, for example, said recently that TRA-86 was not the forerunner of the absolute flat tax because most Americans still favor progressivity. *Bradley Interview, supra* note 4, at 16, col. 4.

Since the passage of the 1986 Act, a number of economists have expressed various degrees of concern about the lack of progressivity at the high income level. Joseph Pechman has "serious reservations about the elimination of graduation at the top of the income scale. Surely there is a difference in ability to pay out of a marginal dollar at \$30,000 than at \$300,000 of taxable income . . ." Pechman, *Tax Reform: Theory and Practice*, 1 J. ECON. PERSP. 11, 22 (1987). Charles McLure and George Zodrow find "[t]he equity implications . . . troubling," McLure & Zodrow, *Treasury I and the Tax Reform Act of 1986: The Economics and Politics of Tax Reform*, 1 J. ECON. PERSP. 37, 56 (1987); and Richard Musgrave finds the relatively recent drop in high income tax rates from 70% to 28% "a giant and . . . excessive step towards a flat rate tax." Musgrave, *Short of Euphoria*, 1 J. ECON. PERSP. 59, 70 (1987).

Pechman nevertheless feels a flattening at the top end is politically necessary. If rates for high-income taxpayers are too high, he says, the rich will seek (and presumably receive) implicit or explicit loopholes. Thus, he claims, it is "a far better strategy to eliminate the loopholes first and expose the real effective tax rates applying to the top incomes. Only then does a battle over the rate of progression become possible." Pechman, *supra*, at 26.

I agree both that high-income taxpayers seek and find loopholes and that base broadening is necessary. I think, however, it is a strategic mistake to broaden the base incrementally as the 1986 Act did and at the same time dramatically lower and flatten the rates at the high end. Because the Act established flatness as a norm, it will be difficult (impossible) to reintroduce progressivity without reintroducing loopholes.

In contrast, linkage of base broadening with lower, but still progressive, rates would have provided incentive to resist loophole-seeking behavior and would have maintained the ideal of progressivity.

A family's total tax burden includes not just the federal income tax but other federal taxes as well as state and local taxes. The only other *progressive* taxes are estate and gift taxes, and state and local income taxes. These taxes, however, comprise "only about one-seventh of all tax revenue obtained from taxes other than Federal income taxes." Manvel, *The Pre-'Reform' Pattern of Tax Burdens for U.S. Families*, 35 TAX NOTES 805, 807 (1987). Thus, as the progressivity of federal income tax declines as it did from 1980 to 1985, the overall tax burden becomes "essentially" proportionate. *Id.* at 806.

The 1987 CBO study found that the Tax Reform Act of 1986 will make the overall federal tax system (individual and corporate income, social security, and excise taxes, other than the oil windfall profit tax) more progressive than it was in 1984 but not as progressive as in 1977. *Summary, supra*, at 665. The three main causes of the reduction in progressivity are (1) rate reductions for the wealthy not being offset by base broadening, (2) increased social security taxes, and (3) the large increase in real income for the wealthy. *Id.* at 665-66. We may be moving towards a regressive system: conceptually the federal income tax is close to a flat tax. The current focus for new revenue sources is no longer on income tax but on regressive taxes such as excise, sales, and value-added taxes. The Social Security tax also continues to grow.

The move against progressivity appears to be a trend among modern industrialized nations. In January 1987, representatives from 25 countries gathered in Paris at the International Symposium on Taxation in Developed Countries to discuss tax reform. Among the trends which emerged were a desire to cut taxes by broadening the tax base, and a preference for lower maximum rates and fewer numbers of brackets. Both trends lead to less progressivity. Johnson,

ing of this article.⁸ Before we consent to this erosion we should reevaluate the arguments upon which it is based.

On the surface, the current case against progressivity and in favor of a flat tax is made in terms of Adam Smith's four classic criteria for a good tax: equity, simplicity, fiscal responsibility, and certainty.⁹ While fiscal responsibility, in the form of economic efficiency, has always been an important objection to progressivity, it has become increasingly important in the past decade.¹⁰ Underlying and shaping the current objections are the neoclassical economic arguments of market

OECD Meets To Share Views on Tax Reform in Developed Countries, 34 TAX NOTES 318 (1987) (found in full in the Tax Notes Microfiche Database, Doc. 87-461).

8. Although the existing literature on progressivity is great, both quantitatively and qualitatively, it does not address the recent onslaught on progressivity. See generally Blum & Kalven, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952); C. GALVIN & B. BITTKER, *supra* note 5; Groves, *Toward a Social Theory of Progressive Taxation*, 9 NATL. TAX J. 27 (1956). Much literature also existed before Blum and Kalven's seminal article. Of particular mention are Fagan, *Recent and Contemporary Theories of Progressive Taxation*, 46 J. POL. ECON. 457 (1938); Buehler, *Ability to Pay*, 1 TAX L. REV. 243 (1946); Seligman, *Progressive Taxation in Theory and Practice*, AM. ECON. A.Q., Dec. 1908, at 1.

In 1982 Walter Blum reexamined the case for progressivity and found it even more uneasy than in 1952 for four reasons: (1) the slower pace of economic progress, (2) the increase in the inflation rate, (3) the increase in government welfare payments, and (4) the expansion of the government's role in the economy. Blum, *Revisiting the Uneasy Case for Progressive Taxation*, 60 TAXES 16 (1982).

9. 3 A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 255-58 (1796). Joseph Sneed, in a classic article, outlined seven purposes that he saw as guiding United States tax policy: (1) revenue raising; (2) practicability or administrability; (3) equity; (4) economic stability; (5) reduction of economic inequality; (6) free-market compatibility; and (7) harmonization of the income tax and the political order. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568 (1965).

10. See D. DAVIES, *supra* note 4, at 16-18. Adam Smith mentioned four ways in which a tax might be inefficient:

First, the levying of it may require a great number of officers, whose salaries may eat up the greater part of the produce of the tax, and whose perquisites may impose another additional tax upon the people. Secondly, it may obstruct the industry of the people, and discourage them from applying to certain branches of business which might give maintenance and employment to great multitudes. While it obliges the people to pay, it may thus diminish, or perhaps destroy, some of the funds which might enable them more easily to do so. Thirdly, by the forfeitures and other penalties which those unfortunate individuals incur who attempt unsuccessfully to evade the tax, it may frequently ruin them, and thereby put an end to the benefit which the community might have received from the employment of their capitals. An injudicious tax offers a great temptation to smuggling; but the penalties of smuggling must arise in proportion to the temptation. The law, contrary to all the ordinary principles of justice, first creates the temptation, and then punishes those who yield to it; and it commonly enhances the punishment too in proportion to the very circumstance which ought certainly to alleviate it, the temptation to commit the crime. Fourthly, by subjecting the people to the frequent visits and the odious examination of the tax gatherers, it may expose them to too much unnecessary trouble, vexation, and oppression; and though vexation is not, strictly speaking, expense, it is certainly equivalent to the expense at which every man would be willing to redeem himself from it. It is in some one or other of these four different ways that taxes are frequently so much more burdensome to the people than they are beneficial to the sovereign.

M. GRAETZ, FEDERAL INCOME TAXATION 17-18 (1985). But see Blum & Kalven, *supra* note 8, at 437 (economic efficiency has always been important).

efficiency,¹¹ and the philosophic premises of individualism based on concomitant beliefs in the primacy of individual property rights and a government with limited functions.¹² Various philosophies — such as neoconservatism and libertarianism — fit this loose description. Though they differ on many points, they concur in their belief about property rights and in their hostility towards progressive taxation. Therefore, for purposes of this article, I shall consolidate all philosophic schools holding these beliefs, and refer to them as “neo-conservative.”

These economic and philosophic schools (collectively, the “Neos”) are closely related. Neoconservative philosophy, with its belief in the primacy of individual rights, both leads to and is supported by the belief in the efficacy of the market as the means to achieve each person’s rights and satisfactions most fully. The “science” of economics thus easily becomes a tool of this particular vision of society. Because it is a “science,” however, its use as a tool — its rhetoric — tends to be masked.¹³

Rhetoric has a bad reputation these days, and with some reason. The term “rhetoric” can be used — and indeed often is used — in its negative sense, to mean insincere or flowery language used to mislead and emotionally sway an audience.¹⁴ But rhetoric need not have this pejorative connotation. The time-honored art of rhetoric — of speaking and writing persuasively — dates back at least to the ancient Greeks. Indeed, virtually all speech and writing must use rhetoric because the purpose of language is communication. Rhetoric is the study of “how people persuade,” discovering good reasons for conclusions or beliefs.¹⁵

Because the underlying assumptions of much of the current progressive tax debate are unstated — indeed unnoticed — by many of the speakers and audience, the debate tends to be rhetorical in the

11. D. DAVIES, *supra* note 4, at 16-17.

12. See, e.g., R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Although most popular and political discussions of tax reform ignore the underlying philosophic premises, some scholars have focused on the connection between ideology and taxation policy. See e.g., Abramson, *Philosophization Against Taxation: Why Nozick's Challenge Fails*, 23 *ARIZ. L. REV.* 753 (1981); Wagner, *Normative and Positive Foundations of Tax Reform*, 5 *CATO J.* 385 (1985).

13. See D. McCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985); McCloskey, *The Rhetoric of Law and Economics*, 86 *MICH. L. REV.* (forthcoming).

14. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1011 (1985).

15. McCloskey states that “[r]hetoric is exploring thought by conversation.” D. McCLOSKEY, *supra* note 13, at 29. Elaborating this point, he cites many definitions given by Wayne Booth in W. BOOTH, *MODERN DOGMA AND THE RHETORIC OF ASSENT* (1974). For example, McCloskey describes rhetoric as “the art of discovering good reasons, finding what really warrants assent, because any reasonable person ought to be persuaded.” D. McCLOSKEY, *supra* note 13, at 29 (quoting W. BOOTH, *supra*, at xiv).

pejorative sense. It hides the underlying premises which give the arguments their force; it confuses rather than illuminates.

This article examines the arguments against progressivity and the supporting philosophic premises behind the mask of rhetoric. It neither treats exhaustively nor demolishes the legitimacy of the arguments or the underlying philosophy. It does display some of the weaknesses of both. First, accepting the underlying premises, the article shows that the arguments against progressivity are not nearly as strong as supposed. Second, by exposing the limitations of the arguments' underlying premises, the article shows that these arguments depend not on objective "scientific" facts, but on a particular vision of people and society. This vision is certainly *a* legitimate one, but it is just as certainly not the *only* one.

Part I briefly summarizes the major arguments against progressivity. Part II examines the economic argument, its underlying assumptions, and its limitations. Part III examines the neoconservative philosophy which underlies the justification for a flat tax and contrasts it with an alternative feminist vision of people and society, which provides strong justification for progressive taxation.

Part IV concludes that there is a strong case for progressive taxation based not only on the feminist view of humanity but also on the Neo view. The conflict between these philosophies, which seems to require making a choice between a flat and a progressive tax is more illusory than we believe. To the extent that it is real, the choice of either one will be unsatisfactory to some people. We should choose progressivity, which better comports with modern society, and does relatively little violence to the Neo view because it places minimal restrictions on the individual's actions and property.

I. THE CLASSIC ARGUMENTS AGAINST PROGRESSIVITY AND THEIR REBUTTALS

Two types of rate schedules may be called "progressive." The first has graduated, or increasing, marginal rates that rise as income levels rise. The second has a flat (proportionate) rate with an exemption amount and is called a degressive tax. A flat tax with an exemption automatically has some progression unless the exemption is given only to those taxpayers with incomes at or below the exemption amount.¹⁶

16. Assume a system with a 10% rate and an exemption for the first \$10,000 of income. Taxpayer *A* has \$20,000 income and will pay a tax of 10% of \$10,000 (his \$20,000 minus his exemption), or \$1000. This is 5% of his total income ($5\% \times \$20,000 = \1000). Taxpayer *B* earns \$30,000 and will pay a tax of \$2000, or 6.66% of his total income. Note the difference here between *marginal* and *effective* tax rates.

Phasing out the exemption may temporarily lead to a marginal rate greater than the nominal

There is strong support for such a degressive tax, primarily based on the recognition that at least a minimum exemption for a subsistence amount is necessary for practical and/or humanitarian reasons.¹⁷

Although a degressive tax is progressive to an extent, support for it does not translate into support for a graduated progressive tax.¹⁸ On the contrary, the bases of support for a degressive tax are similar to the supports for a pure proportionate one. A degressive tax does not have the purported disincentive to work, save, or invest that a graduated tax does; it avoids the indeterminacy of deciding the marginal rate of utility; and like flat taxes, it can avoid much of the income manipulation (income shifting and splitting) caused by graduated rates, thereby eliminating some complexity. Because of these differences between degressive and graduated taxes, I shall refer only to the graduated tax as progressive.

The current attack on progressivity stems from the classic arguments against it. Since traditional attacks have been discussed voluminously, I will merely summarize them. First, critics claim that progressivity fails Adam Smith's criterion of simplicity. Progressive rates lead to complex tax laws in order to forestall the shifting of income from one taxable year to another, or from one taxable unit to another.¹⁹

Second, progressivity has been called a "politically irresponsible formula,"²⁰ because it leads to the majority's irresponsibly voting higher taxes for the minority, or "soaking the rich." Progressivity is politically irresponsible in another manner: it leads to rhetorical posturing that often confuses or contradicts reality. For example, Congress votes for high nominal rates but at the same time passes

10%. For example, a flat tax that abruptly eliminated the exemption for those earning \$10,001 or more would create a tax of \$1000.10 on \$10,001, but no tax on \$10,000. The next dollar of income over \$10,000 would have an unacceptably high marginal rate of 1000%. The 1986 Tax Reform Act created a less radical bulge in its marginal rates. Married couples filing jointly pay a marginal rate of 33% on taxable income greater than \$71,900 but less than \$154,850. As income increases, the marginal rate declines again to 28%. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1, 100 Stat. 2085, 2096-98 (codified at 26 U.S.C. § 1).

17. See, e.g., O'Kelley, *supra* note 5, at 727. However, if the exemption amount is set higher than subsistence, problems arise. For example, a high exemption point can arbitrarily cut off many people from democratic participation in government, because those paying no tax have no incentive to watch the government's actions carefully. Blum & Kalven, *supra* note 8, at 514-16. See also 50 CONG. REC. 3773 (Aug. 13, 1913) (statement of Sen. Cummins) (low-income citizen should pay some tax so that s/he will have an interest in the management and conduct of government). The case for an exemption amount is based both on the diseconomy of collecting small amounts from many, and on the futility of collecting a tax only to return the money to the taxpayer in the form of welfare and other state transfer payments.

18. Blum & Kalven, *supra* note 8, at 509.

19. *Id.* at 431-32.

20. *Id.* at 435.

exclusions, credits, and deductions which effectively flatten the rates by narrowing the tax base of the wealthier taxpayers. The appearance is that of a highly progressive system, but the reality is otherwise: the rich don't get soaked because they have umbrellas in the form of tax preferences or shelters.²¹ Thus, the argument continues, the inevitable political posturing surrounding progressivity is itself an argument against progressive rates: a degressive tax is actually more progressive than a system with *nominally* high rates but low *effective* rates due to credits, deductions, and exclusions.²² Progressive tax schedules inevitably fall into rhetorical posturing and political legerdemain, resulting in discontinuity between the rhetoric and the actuality of progressivity.

The third major criticism of the progressive tax is that it is economically inefficient: marginal tax rates are disincentives to work and/or invest, and therefore they reduce society's productivity.²³ However, proponents of this objection may be confusing the effect of graduated rates with the effect of high tax rates generally.²⁴

In addition to these specific objections, critics reject the major justifications of progressivity as either invalid or too vague to be useful. Specifically, the benefit and marginal utility (or sacrifice) theories are rejected as invalid; theories of equality are rejected as too vague and

21. This situation existed in 1986 and was one of the motivations for the reduction in brackets. The argument went that since the rich avoided paying the highest marginal tax rates through use of legal loopholes and tax expenditures, it would be more fair and more in keeping with the progressive ideal to compress the rates and broaden the base. Since the base would be broader, the wealthy would pay a higher tax than before, despite the lower, flatter brackets. While this is true, it is also true that base broadening can be achieved without flattening the rates. If revenue needs remain constant, rates could be lowered, but still be progressive. See, e.g., M. LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933-1939* (1984) (on the gap between the rhetoric and the reality). See also Pechman, *supra* note 7; note 22 *infra*.

22. This is an argument used regarding the 1986 Act, see note 21 *supra*, and has been a historical constant. For example, in 1921 the rate schedule was debated at length while at the same time various preferences were passed which greatly reduced the effective rate. This discrepancy between verbiage and actual rates is also historically constant. In fact, rates increase in times of war to meet high revenue demands, but generally decline in peacetime. See J. WITTE, *supra* note 4, at 248-49. "The only legislated peacetime tax increases in U.S. history have been the Revenue Act of 1932, a slight one-year increase later in the 1930s, and a relatively modest and mostly administrative increase in 1982." *Id.* at 249. Clearly the country's commitment to progressivity has been ambiguous. See also note 4 *supra*.

23. Blum & Kalven, *supra* note 8, at 510-11; F. HAYEK, *CONSTITUTION OF LIBERTY* 316 (1960).

24. Blum & Kalven, *supra* note 8, at 510-11. The lower the tax rates, the less the drag on the economy, even with graduated rates. If the tax is a flat 40%, the disincentive to work will be greater than the disincentive in a system with rates graduated up to 33%, even if the taxpayer is in the highest marginal rate. Many flat tax proponents recognize that economic efficiency cannot be improved by a proportionate tax alone; the level of tax must also be reduced. See, e.g., Gwarty & Long, *Is the Flat Tax a Radical Idea?*, 5 *CATO J.* 407 (1985). Consequently, implicit in many proponents' thinking (and explicit in some) is the belief that government must be limited so as to reduce government spending and taxes. See generally Parts II and III *infra*.

personal.²⁵ A less frequently used justification for the progressive income tax is discussed just as summarily. Some proponents argue that progressive taxation can help achieve our social, economic, and political goals. By reducing economic inequality, progressivity helps provide political stability (by insuring against revolution), secure democratic institutions (hungry people don't care much about freedom of speech), and ensure that political power does not concentrate in the hands of a wealthy few.²⁶ The rebuttals to this rationale range from ignoring it to denying its effectiveness.²⁷

Anti-progressive arguments often fail to distinguish between cause and effect. For example, one recent commentator states that the best justification for progressivity is income redistribution to reduce economic inequality.²⁸ That commitment to redistribution, he contends, does not mandate a commitment to progressivity. Citing census statistics on the gap between rich and poor, he states that progressivity has failed to redistribute income. A flat tax with "a generous redeployment policy" can achieve more redistribution than a progressive tax.²⁹

His discussion is a good example of the way rhetoric shapes facts to lead to a desired conclusion. The census statistics reveal only that there has not been a decrease in the spread of wealth distribution. This does not necessarily lead to the conclusion that progressivity cannot decrease the inequality. First, as the commentator's statement about "redeployment" implies, the rate at which taxes are collected is not necessarily tied to a particular method of redeployment or spending. A progressive tax can be spent in a regressive manner, just as a flat tax can be spent in a redistributive manner. We cannot judge the redistributive capabilities of progressivity without taking spending patterns into account.³⁰ Comparisons of the wealth distributions resulting from a progressive or a flat tax are accurate only if spending patterns are kept constant. Leaving aside the spending issue, the redis-

25. The literature on the inability to measure utility is vast, *see, e.g.*, Blum & Kalven, *supra* note 8, as is that on the vagueness and personal preference of "equality," *see, e.g.*, H. SIMONS, *PERSONAL INCOME TAXATION* (1938) (reprinted by the University of Chicago Press, 1970).

26. *E.g.*, Blum & Kalven, *supra* note 8, at 495-506.

27. *Id.* These arguments can be fairly sophisticated. I will return to some of them.

28. *See* Berger, *In Behalf of a Single-Rate Flat Tax*, 29 ST. LOUIS U. L.J. 993, 996-98 (1985).

29. *Id.* at 1001-03.

30. In 1983, Okner and Bawden stated that a "necessary by-product" of Reagan's policies of decreasing taxes, increasing defense spending, and decreasing overall federal spending was a decline in transfers to individuals. This is because 80% of nondefense spending — excluding interest on the national debt — is *directly* transferred to individuals. The remaining 20% is mainly spent in the form of grants to states which then transfer much of the money to individuals. Two-thirds of these direct transfers are in the form of non-income-dependent transfers such as civil service retirement benefits, social security, and medicare. Okner & Bawden, *supra* note 7, at 351-52.

tributive success of progressivity cannot be judged based on the tax law of the 1970s and early 1980s, because that loophole-ridden law was not *effectively* progressive.³¹

Boris Bittker has trenchantly rebutted many of the classic criticisms of progressivity. Regarding the "lack of simplicity" criticism, he points out that complicating issues, such as timing and income splitting, would continue under a flat or proportionate tax.³² He also argues that the inability to determine the exact curve of marginal utility so as to set rates does not destroy the argument for progressivity because there is no reason to conclude that a proportionate tax is presumptively fairer than a progressive tax.³³ Finally, he states that there remain strong arguments for progressivity under a benefit theory of taxation.³⁴

The arguments for and against progressivity are richer than described here. In the end, many commentators concur with the economist Henry Simons that the case for progressivity ultimately rests on "the case against inequality — on the ethical or aesthetic judgment that the prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely."³⁵ Obviously not everyone holds the same judgment or "preference,"³⁶ and that is why much of the debate continues.

What is interesting about the current progressivity debate is that it is being fought on new terrain. The popular battlefield is not normative, *i.e.*, the competition is not between conflicting ethical or philosophic views. Rather, the arguments raised by the flat tax proponents are in the "objective" field of the science of economics: A flat tax is better because it is more efficient. Yet the economic reasons given as "facts" often merely reflect aesthetic or philosophic positions at variance with those that support progressivity. Moreover, the "fact" of economic efficiency, and therefore the overall superiority of a flat tax,

31. An August 1985 Treasury Department Analysis indicated that almost 30,000 taxpayers with earnings over \$250,000 paid less than 5% of their income in taxes. More than 55,000 paid 10% or less. Almost 17,000 taxpayers with income greater than \$250,000 "owed less than \$6,272 in tax, the amount that a typical four-person family with \$45,000 of income owed." *Rich Take Shelter at Tax Time*, Cleveland Plain Dealer, Aug. 2, 1985, at 8A, col. 1. Tax shelter losses were the most used means of reducing liability; capital gains exclusion was also important. The measure of income used was total positive income (TPI) which is the sum of salary and wages, interest, dividends, and income from profitable businesses and investments. *Id.* For a complete copy of the Treasury Department report, see 85 TAX NOTES TODAY 154-55 (Aug. 6, 1985) (LEXIS, Fedtax library, TNT file).

32. Bittker, *Second Lecture*, in C. GALVIN & B. BITTKER, *supra* note 5, at 33-34.

33. *Id.* at 34-38.

34. *Id.* at 48-55.

35. H. SIMONS, *supra* note 25, at 18-19.

36. Gwartney & Long, *supra* note 24, at 411-12.

is often linked illogically with other issues, or is unpersuasive. For example, the Reagan Administration claimed that the elimination of numerous tax brackets would significantly simplify the Tax Code. This claim is itself simplistic. While complexity may be *slightly reduced* by fewer or no brackets it cannot be eliminated.³⁷ Our complex world creates complex transactions which create complex tax issues which lead to complex statutes.

Similarly, President Reagan's tax plan linked a modified flat tax with the goals of reduced rates and base broadening. There is, however, no causal relationship between the flat tax and these goals. Rate reduction in a revenue-neutral setting can be achieved simply by broadening the base. If the tax base is broadened, and revenue needs remain constant, rates will fall automatically even under a progressive tax. A flat tax is not necessary, or even relevant, to this reduction.

37. The Administration consistently lumped economic growth, fairness, and simplicity together in a manner that made it difficult — if not impossible — to determine which provision accomplished which goal. Thus, the public was left with the impression that all the provisions and goals were inextricably tied together in a single package. For example, section A of the summary of the President's 1985 proposal states that "[p]ersonal income tax rates must be lowered substantially as the tax base is broadened," and then immediately continues that the current fourteen brackets would be replaced by "a simple 3-bracket system." *Summary of President's Tax Proposals to the Congress for Fairness, Growth, and Simplicity*, 72 *Stand. Fed. Tax Rep. (CCH) (spec. ed., May 29, 1985) (emphasis deleted)*. But the complexity of computing tax under a fourteen bracket system is not that much greater than a three bracket system; the top rate is more significant in terms of overall tax rates than the number of brackets; and base broadening is not logically connected to the number of brackets.

As to simplification generally, the 1986 Act contains many new complications including, but certainly not limited to, the alternative minimum tax, passive loss limitations, and "full-absorption" costing of inventory. This point has been widely recognized. *See, e.g., Graetz, Viewpoint: Policy & Perspective*, *Tax Times*, Apr. 1987, at 30, col. 1. As Senator Bill Bradley recently stated, the new law may be easier for low-income taxpayers now off the tax rolls, and middle-income taxpayers claiming the standard deduction, but for middle-income taxpayers who itemize and

[f]or wealthy individuals and businesses . . . the new code will not be simpler. The reason is twofold: First, they engage in complex economic transactions that require complicated tax accounting rules. Second, if they had wanted simplification, Congress would have given it to them. I have to believe they didn't really want it. Very few businessmen and investors told me their principal concern was simplification. They were much more interested in preserving certain tax preferences. And in many instances, Congress was responsive to them. But you can't have it both ways. *Simplification means getting rid of loopholes.*

Bradley Interview, supra note 4, at 3, col. 2 (emphasis added).

As Richard Pomp has said, "The concept of simplicity . . . means different things to different people." Pomp, *Restructuring a State Income Tax In Response to the Tax Reform Act of 1986*, 36 *TAX NOTES* 1195, 1197 (1987). Taxpayers measure simplicity by the ease in filling out forms; practitioners want certainty; and for administrators "simplification focuses on the management of the tax system . . . and on the processing and auditing of tax returns together with the resolution of conflicts and the supervision of taxpayer compliance." *Id.* at 1197 n.8 (quoting JOINT COMM. ON TAXATION, ISSUES IN SIMPLIFICATION OF THE INCOME TAX LAWS, SUBMITTED TO THE COMM. ON WAYS AND MEANS AND COMM. ON FINANCE, 10-11 (Sept. 19, 1977)).

As this article has gone through editing and April 15, 1988 approaches, the taxpaying public has been all-too-rapidly disabused of the notion that the 1986 Act simplifies taxes. *See, e.g., Get Ready for the 1040 Blues*, *NEWSWEEK*, Jan. 18, 1988, at 56. Of course, the early chaos surrounding the W-4 withholding forms might have alerted the average citizen to impending problems.

Yet by linking these issues to a flat tax, flat tax proponents use the authority of "science" — the objective fact of economic efficiency — to persuade others of the rightness of proportionate taxation.

Ultimately, the "facts" of economic growth and efficiency become overtly rhetorical and tied to patriotism. In a wonderful mom-apple-pie-and-the-flag speech, President Reagan signed the 1986 Tax Reform Act stating: "But for all tax reform's economic benefits, I believe that history will record this moment as something more — as the return to the first principles."³⁸ He continued:

It wasn't too much to call [the old Tax Code] "unAmerican."

. . . [T]he steeply progressive nature of the tax struck at the heart of the economic life of the individual, punishing that special effort and extra hard work that has always been the driving force of our economy.

. . . .

Throughout history, the oppressive hand of government has fallen most heavily on the economic life of the individuals. And, more often than not, it is inflation and taxes that have undermined livelihoods and constrained their freedoms.³⁹

This is rhetoric, but in the bad sense of the word. It seeks to persuade through bombast and confusion rather than careful examination of reasons and belief. Rhetoric in the sense of artful persuasion and thoughtful conversation occurs through examination of the assumptions that underlie the "objective facts" of the arguments.

The following sections examine some of these economic arguments and their philosophic underpinnings in order to reveal their assumptions and limitations. By exposing their rhetorical devices, I hope to encourage a more thoughtful consideration of progressivity than the current public debate allows. Such a consideration, I believe, will result in a more favorable view of progressivity.

II. ECONOMIC OBJECTIONS TO PROGRESSIVITY

The connection between economics and taxation has long been recognized.⁴⁰ The nature of that connection, however, is not entirely clear. More importantly, the role economics *should* play in taxation is even less clear. Understanding of the first issue may be improved by empirical research, but resolution of the second normative issue is

38. President Reagan's Remarks During Tax Bill Signing Ceremony, (Oct. 22, 1986) *reprinted in* 33 TAX NOTES 413 (1986) [hereinafter President Reagan's Remarks].

39. *Id.* Did inflation and taxes constrain the freedom of slaves? Of Japanese-Americans interned during World War II? Of those harmed by the McCarthy era witch hunts? I could go on.

40. Indeed, "fiscal responsibility" was one of Adam Smith's four tenets of taxation. *See* text at note 9 *supra*.

more problematic. In recent years economic objections to progressivity have increased dramatically. The following discussion cursorily examines some of those objections and the reasons for their increased force.

Because the popular press and political rhetoric tend to link unrelated issues (e.g., simplicity and proportionality) the first step in analyzing economic objections to the progressive income tax is to separate out those objections which relate specifically to progressivity. Some economic criticisms of the present system may be accurate but do not really criticize *progressivity*, whereas other complaints do treat progressivity but also apply to many other forms of taxation.

For example, progressive taxes have been criticized for creating a drag on the economy,⁴¹ but this can generally be said of all taxes. Any tax may reduce productivity if it is too administratively complex or its effects are uncertain. The progressivity of the income tax creates only a small part of the tax law's complexity, as the 1986 Act shows.⁴²

Similarly, some blame many of the present distortions of investment decisions on the progressive feature of the income tax. This is misleading because various taxes may distort marketplace decisions. Moreover, much of the distortion results from the loophole-riddled nature of our present system and overuse of tax expenditures:⁴³ market decisions regarding real estate, for example, are distorted by including debt in basis, accelerated depreciation, failure to tax unrealized gains, the (former) capital gains preferences, and my per-

41. Taxes *may* decrease capital or labor supply because they reduce the rate of return and therefore decrease incentive to work or save, but the extent to which taxes have these effects is not at all clear. See, e.g., Gwartney & Long, *supra* note 24, at 429. To some extent, taxes will also increase the amount of time a worker works in order to maintain his pre-tax level of income. Studies suggest that a change in the tax rate has "only a small net effect on the labor supply" of primary earners, "but a more substantial effect" (decreasing work) on secondary earners. That is, rate increases are tied to reducing the number of married women who work. B. BOSWORTH, TAX INCENTIVES AND ECONOMIC GROWTH 173 (1984).

42. See, e.g., Rukeyser, *Tax Reform May Be a Boondoggle*, Cleveland Plain Dealer, Jan. 25, 1987, at 4D, col. 1 (despite the 1986 Act's political appeal to fairness and simplicity, the Act is "more complicated than ever"). See also note 37 *supra*.

43. The concept of tax expenditures is based on a normative concept of the ideal tax. By definition, a tax expenditure is a revenue loss due to an exemption, exclusion, deduction, or credit; it is a provision which creates a deviation from the ideal definition of income. Although certain tax provisions are clearly tax expenditures under any definition — for example, the historic rehabilitation credit or the energy credit — there is no consensus on whether many other provisions fall under this definition. For example, is accelerated depreciation a tax expenditure or a true reflection of economic decline in value?

Since 1968, when the first tax expenditure budget was published, a large body of literature on the subject has developed. For a comprehensive discussion, see S. SURREY & P. MCDANIEL, TAX EXPENDITURES (1985). For pre-1973 developments, see S. SURREY, PATHWAYS TO TAX REFORM (1973). For a political scientist's view of the subject, see J. WITTE, *supra* note 4, at 271-338.

sonal "favorite," the like-kind exchange provision.⁴⁴ The role of graduated marginal rates in this distortion is relatively small. The more effective cure for investment distortion is to broaden the tax base and treat different sources of income more equally, not to eliminate progressivity.

Some criticisms address the choice of a tax base and not progressivity. For instance, income taxes, according to current theory,⁴⁵ distort the consumption/saving decision in favor of present consumption whereas a consumption tax does not. Once we have chosen, as we have, to use income as the tax base, the savings argument disappears, unless graduated rates harm savings more than flat rates do. The relationship between savings and taxes is far from clear, but there is evidence that the Tax Code's effectiveness in increasing savings is limited.⁴⁶ Many other factors, such as the huge federal debt and social attitudes about savings, affect savings rates. The higher rate of savings exhibited by the Japanese, for example, is not solely a factor of Japanese tax policy.⁴⁷ "Not everything is a tax problem."⁴⁸

Some of the objections to progressivity are, in reality, objections to high rates of tax. Returning to the issue of savings, to the extent that there is a correlation between taxes and savings, low rates seem to be an important factor. A flat but high rate of tax (*e.g.*, 60%) should depress savings (if at all) as much as, if not more than, a graduated tax with the highest marginal rate equal to the flat rate of 60%. Similarly, if the highest marginal rate is low enough, then the graduation of the rates should be insignificant.

The most commonly cited examples of progressivity's inadequacies are problems of timing and income splitting. However, as Boris Bittker has pointed out, these issues do not disappear with a flat tax: post-

44. See Kornhauser, *Section 1031: We Don't Need Another Hero*, 60 S. CAL. L. REV. 397 (1987).

45. See, *e.g.*, authorities cited in note 5 *supra*, and the classic book N. KALDOR, AN EXPENDITURE TAX (1955).

46. See, *e.g.*, Teuber, *Years of Experience Lead Economists To Conclude that Tax Code Cannot Spur Savings*, 35 TAX NOTES 222 (1987) (IRAs and § 401(k) plans merely shift savings). But see Venti & Wise, *The Evidence on IRAs*, 3 TAX NOTES 411, 415 (1988) (evidence "suggests a substantial effect of IRAs on savings"). Economist Barry Bosworth, after pointing out that the share of GNP saved by the private sector has been constant at 16 to 18 percent since the early 1950s, states: "[T]he stability of the rate should give pause to those who argue that it can be significantly altered by marginal adjustments in government policies." B. BOSWORTH, *supra* note 41, at 95. It would be better, he suggests, to reduce government deficits. *Id.* at 96. Differences in taxes on capital does not correlate well with differences in rates of capital formation. *Id.* at 117.

47. Cf. Sheppard, *What We Can Learn from the Japanese*, 35 TAX NOTES 224 (1987).

48. Sheppard, *IRA Deductions and Savings Incentives*, 31 TAX NOTES 874, 876 (1986) (quoting Urban Institute Senior Fellow Joseph Minarik).

ponement of income would still be desirable, and "income-splitting issues are inevitable once we decide to allow personal exemptions and a standard deduction."⁴⁹

Thus, the arguments against progressivity are neither new nor particularly persuasive. Nevertheless, economics and economic arguments play an increasingly important role in tax policy. There are, I believe, four reasons for this: (1) the state of the Tax Code prior to the 1986 Act; (2) increased sophistication in economic modeling; (3) the breakdown of economic consensus concerning taxation; and (4) the rhetoric of economics. The first factor has been so well publicized that there is nothing controversial about the assertion that in 1986, the country was politically ripe for massive tax reform due to the Code's many loopholes and its resulting actual and perceived complexity and unfairness. As such, progressivity was a caricature, a strawman easily knocked down by the winds of economic efficiency. The remaining three factors, which are connected to current trends in political philosophy, I discuss below.

A. *Economic Models*

The 1970s saw two major shifts in economic approaches to taxation. Analytically, economic theories proliferated. Keynesian economics (and its "demand" focus) lost its dominant position as other analytical approaches such as supply side, monetarist, and rational expectationist theories of economics gained credence.⁵⁰ Normatively, the seventies witnessed a breakdown in consensus among economists about what constituted a "good" tax system: the once dominant equity theory⁵¹ of the 1950s and 1960s faced strong challenges, primarily from the theories of optimal taxation and fiscal exchange. In 1985, Walter Hettich and Stanley Winer wrote an excellent article, summarized below, analyzing these economic theories.⁵²

Based in classical liberalism, the equity theory (ET) "emphasized individual liberty as the primary value, together with equality as next in importance" and formulated the concept of a comprehensive income tax base as the best method to achieve these goals.⁵³ ET distinguishes between horizontal equity — *i.e.*, among taxpayers in the same

49. Bittker, *supra* note 32, at 33-34.

50. D. DAVIES, *supra* note 4, at 1.

51. Henry Simons's classic formulation of this position is contained in H. SIMONS, *supra* note 25.

52. Hettich & Winer, *Blueprints and Pathways: The Shifting Foundations of Tax Reform*, 38 NATL. TAX J. 423 (1985).

53. *Id.* at 424. Some recent ET authors advocate a consumption-based tax as the best means of achieving equity. See, e.g., Andrews, *supra* note 5; Graetz, *supra* note 5.

position — and vertical equity — among taxpayers of different economic positions. Traditionally, ET prizes horizontal equity, as opposed to other tax goals such as economic efficiency (or growth) and simplicity.⁵⁴ In addition, the ET approach — although based on a pluralistic view of government — generally ignores the political process and separates the revenue from the expenditure side of the budget.

Optimal taxation (OT) is rooted in classical sacrifice doctrine which speaks of requiring each taxpayer to suffer equally.⁵⁵ OT defines sacrifice broadly, looking to the whole of social welfare, rather than simply to a loss in individual marginal utility.⁵⁶ Consequently, it counterbalances the ET concentration on equity: “[B]y integrating equity and efficiency goals into a single welfare function, [optimal taxation theory] makes the deadweight loss resulting from pursuing any equity goal an *explicit* part of tax design.”⁵⁷ In defining the optimal equity efficiency balance, OT analyzes various influences on the private sector⁵⁸ in precise mathematical terms. As a result, social values which cannot be so formulated are omitted from the model.⁵⁹ Politics are ignored completely.⁶⁰

Fiscal exchange theory (FE), on the other hand, concentrates on politics. Derived from a “voluntary-exchange theory of public economy,” FE is concerned with the process of limiting government power and size.⁶¹ FE, like OT, assumes that the private market works well and will respond to tax incentives. This is in contrast with ET, which “emphasizes the inequities of imperfect capitalization of tax loopholes across income sources . . . suggest[ing] . . . that the private economy is not highly competitive.”⁶² Hettich and Winer conclude that none of the three theories have all of the essential elements required for a “complete normative theory of taxation,” which they list as:

1. a philosophical foundation which permits quantification of value judgements;

54. *Id.* See also Sneed, *supra* note 9.

55. Hettich & Winer, *supra* note 52, at 426. There are various forms of the sacrifice doctrine — marginal and proportionate, for example. All have been criticized as fatally and immeasurably vague. See Blum & Kalven, *supra* note 8, at 455-61.

56. Hettich & Winer, *supra* note 52, at 427.

57. *Id.* (emphasis in original). See also Nacev, *A Commentary on the Literature on Tax Policy*, 30 TAX NOTES 1019, 1026 (1986).

58. Hettich & Winer, *supra* note 52, at 427.

59. *Id.*

60. *Id.* at 442.

61. *Id.* at 432. The concern arises from a Leviathan view of a government “attempting to maximize its extractions from citizens.” *Id.*

62. *Id.* at 441.

2. an explicit treatment of tradeoffs between major objectives in tax reform;
3. a well developed public choice analysis;
4. a complementary view concerning the private sector of the economy and;
5. an explicit treatment of partial tax reform.⁶³

They recognize that consensus on tax reform may be impossible because of disagreements on underlying basic values. Nevertheless, they suggest that tax policy would be improved by creating a theory that incorporated elements from each of the three current approaches and "would allow a clear and explicit connection between underlying assumptions and policy conclusions."⁶⁴

The current anti-progressive tax movement has an FE approach which differs greatly from Hettich and Winer's suggestion. Of importance here is the movement's trend away from clarification of philosophical foundations, and from explicit tradeoffs among tax reform objectives. President Reagan's "Tax Proposals to the Congress for Fairness, Growth, and Simplicity" ("Treasury II"),⁶⁵ issued in May 1985, illustrates this point. Although the title implies consideration of a variety of tax reform goals, the proposal at heart was allegedly economic and obfuscated rather than clarified the explicit connection between assumptions and conclusions. Manuel H. Johnson, Assistant Secretary for Economic Policy at the Treasury Department, described Treasury II as "a search for 'economic neutrality' and optimal growth."⁶⁶

The primary objective of economic policy, he continued, should be to maximize the total wealth of the nation. . . .

. . . .

The pro-growth effects of the president's tax reform plan are based on the principles of lower marginal tax rates and more neutral tax treatment of income. Lower marginal tax rates on labor and capital should improve labor supply, saving, and investment. Treating income more neutrally with respect to federal taxation should enhance efficient resource allocation and increase the economic growth potential of the United States.⁶⁷

According to this theory, increased economic growth achieved through the private market is the best way to help everyone: increased

63. *Id.* at 442.

64. *Id.* at 443.

65. President's Tax Proposals to the Congress for Fairness, Growth, and Simplicity, 72 *Stand. Fed. Tax Rep. (CCH)* (spec. ed. May 29, 1985) [hereinafter *Treasury II*].

66. Johnson, *President Reagan's Modified Flat Tax: Analysis and Comparison*, 5 *CATO J.* 499, 501 (1985).

67. *Id.* at 511, 518.

growth enlarges the economic pie so that everyone — including the poor — gets a larger slice.

There are several problems with this theory. First is the empirical question: does the wealth, in fact, “trickle down”?⁶⁸ It is far from clear that an increased pie benefits everyone. The gap between rich and poor is widening.⁶⁹ This does not necessarily mean that the poor get no benefit from a bigger pie; it may just be minimal when compared to the benefit those in the upper incomes receive. Furthermore, some people may not be affected by the larger pie — they may get the same size slice or no slice at all.

More importantly, even if the (relatively) poor do get a larger slice, there are questions of equity and fairness about the resultant distribution which economic efficiency does not address. Pie (especially apple) may be greatly desired by the American public, but a bigger one is not necessarily a better one. As the private market has shown, quality as well as quantity determine the price a consumer is willing to pay for a good. From a societal standpoint, “quality” includes non-“economic” values such as fairness: traditional tax reform goals include fairness and simplicity as well as economic efficiency. As Hettich and Winer point out, a comprehensive tax theory should deal explicitly with the tradeoffs among objectives.⁷⁰ The “bigger pie” theory fails to do this.

68. The “trickle down” or “bigger pie” theory is not new. Andrew Mellon stated the theory succinctly in 1924: “[A] decrease of taxes causes an inspiration to trade and commerce which increases the prosperity of the country [and results in] an ultimate saving to all people in the country.” A. MELLON, *TAXATION: THE PEOPLE’S BUSINESS* 20-21 (1924). More recently — and dramatically — Lowell Harriss, Executive Director of the Academy of Political Science, testified before the House Ways and Means Committee, on September 27, 1984, that “in a sense saving for capital formation is the epitome of ‘doing good for others.’” 25 *TAX NOTES* 5 (1984). Other people express doubts as to the efficacy of the theory, such as Representative Landford in 1924:

The theory of those in power seems to be that if the Congress will only help the railroads, the Wall Street bankers, the big manufacturing monopolies, and the immensely rich, enough will ooze through for the laboring man, the farmer, and the common folks. The contention of the powers that be is that the way to feed a starving dumb brute is to give some thoughtless, selfish man all he desires to eat and perhaps he will leave enough bones for the poor dog to gnaw.

65 *CONG. REC.* 2570 (Feb. 16, 1924).

69. Studies suggest that income inequality has grown over the past decades. See, e.g., *Black Poverty Spreads in 50 Biggest U.S. Cities*, *N.Y. Times*, Jan. 26, 1987, at A27, col. 1; *An Ominous Trend to Greater Inequality*, *N.Y. Times*, May 3, 1987, at 2F, col. 3. A Joint Economic Committee report shows that the gap is widening and that “the share of wealth held by the very rich [is] at its highest level in more than 60 years.” Martin, *Gap Grows Between Rich, Poor*, *Cleveland Plain Dealer*, Aug. 17, 1986, at E1, col. 1. The top 0.5% of the U.S. population owned 35% of the country’s wealth, and 43% if personal homes are excluded. This figure was about twice that of 1976, the last time a detailed study of U.S. wealth occurred. Note that this was a survey of wealth, not income. The report also points out that while younger Americans generally “enjoy higher incomes, [they] possess relatively few of the assets that constitute wealth.” *Id.* This indicates, perhaps, a need for an estate and gift tax that works, but that is the topic of a different, though related, article.

70. Hettich & Winer, *supra* note 52, at 442. See also Graetz, *Introduction to the Edwin S.*

Another problem with the efficient private market view is its idealized concept of the private market. Although in *theory* the market always achieves efficiency, in *actuality* there are market failures. These failures may be due to a variety of factors, such as imperfect information, free rider problems, and administrability difficulties. Consequently, and perhaps paradoxically, true economic efficiency may be impossible without state intervention.⁷¹

These analytical shortcomings are compounded by the multiplicity of definitions of efficiency. Under one definition, Pareto efficiency, a rule or system "is efficient if it induces people to behave in such a way that no one can be made better off (in terms of her own preferences) without making someone else worse off. At an efficient point, no mutually beneficial bargains are available."⁷² Thus, starting from any established distribution pattern, economic efficiency helps achieve economic wealth (because it eliminates waste) through voluntary transactions which reflect each individual's uncoerced choices or preferences.⁷³ Different existing distributions therefore lead to different

Cohen Tax Symposium: An Overview of Business Taxation, 5 VA. TAX REV. 577, 588 (1986) ("[O]ne must be cautious about structuring a business tax system responsive solely to arguments grounded in economic efficiency considerations. The choice to tax income implies an acceptance of some economic inefficiency. . . . There is great danger in losing sight of the important role of fairness . . ."); Calabresi, *Transaction Costs, Resource Allocation and Liability Rules — A Comment*, 11 J.L. & ECON. 67 (1968), reprinted in THE ECONOMICS OF LEGAL RELATIONSHIPS 204 (H. Manne ed. 1975) (we may have to choose between a bigger pie and other goals).

71. See, e.g., Rose-Ackerman, *Inalienability and The Theory of Property Rights*, 85 COLUM. L. REV. 931, 938 (1985) (some rules of inalienability of property are second-best responses to market failures that arise from externalities); Calabresi, *supra* note 70, at 206 (sometimes market misallocations are more cheaply corrected by law than the market).

72. L. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 688-89 (1986) (footnote omitted). Kornhauser uses a hypothetical situation in which a rule must be devised to distribute \$1000 among ten people. Under Pareto efficiency, any division which allocates all \$1000 is efficient, whether it is a division of \$100 to each or \$1000 to one person and none to the rest. It is efficient because none of society's wealth is wasted and no person can be made better off without someone being made worse off. *Id.* at 689. Kornhauser notes that efficiency does not equal profit maximization. *Id.* See also notes 75-76 *infra* and accompanying text.

73. Economists generally assume preferences do not change over time, are unaffected by wealth or even cultural differences, and are interchangeable or undifferentiated (*i.e.*, there is no "conceptual distinction" between choosing between life and death and choosing Maxwell House over Folger's coffee). Cf. G. BECKER, A TREATISE ON THE FAMILY 4-12 (1981) (omitting any reference to personal preferences in analysis of consumer behavior). Becker does not even believe that education, or advertising, can alter individuals' preferences. Many people have some difficulty with this assumption. A good discussion of these difficulties as well as a good source of reference is Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309 (1986). Harrison first discusses the possibility that preferences may have priorities or lexical ordering and therefore are not interchangeable. *Id.* at 1328-38. He then discusses other market "illusions": (1) people's preferences may change depending upon how the choice is framed, *id.* at 1354-57; see also Keene, *supra* note 4 (support for progressive taxation may depend on the wording of opinion poll questions); and (2) wealth and endowment effects may affect preferences, Harrison, *supra*, at 1358-61. For example, the price one puts on an item may depend on whether one is a buyer or seller. *Id.*

points of economic efficiency.

Whereas Pareto efficiency requires an *actual* voluntary exchange, the Kaldor-Hicks definition of efficiency does not. Kaldor-Hicks efficiency is only *potentially* Pareto efficient: only if the winners *were* to compensate the losers would there be Pareto efficiency. Because Kaldor-Hicks efficiency does not require actual compensation, efficiency is reached when net gains accrue for society as a whole — in other words, when profit or wealth is maximized.⁷⁴ For example, assume a world in which a change in the law would have only one result: *A*'s profits would increase by \$100 and *B*'s would decrease by \$50. In a private transaction *A* and *B* could negotiate a deal in which *B* would voluntarily agree to the changed situation on condition that *A* compensate him for his loss. After the transaction *A* and *B* would have reached a Pareto efficient equilibrium. Neither was made worse off by the change and no more mutually beneficial bargains could be made. In contrast, the change in the law which results in *A* increasing his wealth by \$100 and *B* decreasing his by \$50 is not Pareto efficient; *B* is worse off than before. It is, however, Kaldor-Hicks efficient and maximizes profits.⁷⁵

Pareto efficiency with its actual exchanges is in harmony with the anti-progressive movement's supporters, who believe that the rates of an efficient tax system should reflect citizens' willingness to pay, consistent with the free-market model.⁷⁶ This principle is, in effect, the old benefit theory of taxation: people should pay taxes in an amount equal to the benefits they receive from the government; and because most benefits do not correlate with ability to pay, the tax should be flat.⁷⁷ Furthermore, because these benefits are difficult to determine in a nonmarket setting⁷⁸ and because taxation occurs in a nonmarket setting (*i.e.*, not totally uncoerced), the economic efficiency argument supports limited government functions, minimal taxes, and flat taxes.

The economic efficiency argument, therefore, seems to justify not just a flat tax but a limited tax: a flat, limited tax helps maintain a limited government.⁷⁹ Since voluntary markets work best, the state

74. See, e.g., R. POSNER, *ECONOMICS OF JUSTICE* 60-88 (1981); G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 85-86 (1978).

75. Some people equate Pareto and Kaldor-Hicks efficiency, but such an equation is "morally dubious." D. MCCLOSKEY, *supra* note 13, at 44.

76. Dorn, *Introduction — The Principles and Politics of Tax Reform*, 5 *CATO J.* 361, 366 (1985) (introduction to papers presented at a conference on flat tax).

77. *Id.* at 373.

78. *Id.* See also F. HAYEK, *supra* note 23, at 316-17 (the most important argument in favor of a flat tax is its efficiency).

79. Limited government may, in fact, be the real focus of the rhetoric, illustrated by a recent statement by President Reagan: "If individuals are to possess genuine autonomy, then they must

should have minimal functions: voluntary exchanges on the private market will achieve the most efficient allocation of resources.

Because efficiency can occur at any fixed level of distribution, it works within a presumed framework of prior rights of persons and property.⁸⁰ Thus, justification for a tax system based on economic efficiency ultimately depends on normative judgments about the distribution of goods, and theories of public choice.⁸¹ The flat tax movement relies on a contractarian minimal state view of government emphasizing "procedural (or process) justice and private property rights."⁸² This approach, with its reliance on voluntary exchange, is seen as more appropriate for a society of free people⁸³ than theories of end-state (or distributive) justice. To the extent that progressive taxation is justified by an appeal to redistributive justice, it is seen as violative of the liberal rule of law.

B. *Economic Rhetoric*

This discussion suggests something that careful thinkers have long recognized: no tax system can be evaluated without reference to a theory of political economy or public choice.⁸⁴ A tax system for revenue only is a chimera.⁸⁵ Although tax systems need not, and I believe should not, be designed primarily to accomplish specific economic or

be free to control their own resources, to enjoy the fruits of their labor, and to keep what they earn, free from excessive government taxation and spending." *Excerpts from the President's 1988 Legislative and Administrative Message to Congress*, 38 TAX NOTES 499 (1988) [hereinafter *President's Legislative Message*] (message accompanying the State of the Union address of Jan. 25, 1988). See also *Transcript of President's Message to Nation on State of Union*, N.Y. Times, Jan. 28, 1987, at A16, col. 4 (The "American" people "know that we don't have deficits because people are taxed too little; we have deficits because big government spends too much."); note 106 *infra* and accompanying text.

Reagan's earlier State of the Union addresses also focused on reducing spending. See *The Reagan Years: How He Viewed the State of the Union*, N.Y. Times, Jan. 28, 1987, at A16, col. 2. The reality of Reagan's actions differs from his rhetoric. In 1985 government spending set a peacetime record not only in dollars but in relation to GNP. Manvel, *The Changing Pattern of Public Spending*, 34 TAX NOTES 515 (1987). Of course, the funding of this spending can and does occur through borrowing as well as taxation. The huge deficit resulting from the borrowing increases pressure to bring in revenue (taxes). Cf. note 106 *infra*.

80. See, e.g., L. Kornhauser, *supra* note 72, at 689. "Efficiency is defined by consensual action within the framework of . . . prior rights of person and property, and is not something that can be assessed with reference to some objective, external criterion." Wagner, *Normative and Positive Foundations of Tax Reform*, 5 CATO J. 385, 387 (1985). See also Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness*, 4 PHIL. & PUB. AFF. 223, 231, 239 (1975).

81. See, e.g., O'Kelley, *Rawls, Justice, and the Income Tax*, 16 GA. L. REV. 1, 32 (if pre-tax distribution of income is unjust, an income tax is necessary).

82. Dorn, *supra* note 76, at 368.

83. Wagner, *supra* note 80, at 389.

84. *Id.* at 392-93.

85. See, e.g., *Comprehensive Tax Reform, 1986: Hearings on the President's Tax Proposals to the Congress for Fairness, Growth, and Simplicity Before the House Comm. on Ways and Means*,

social goals, the choice of a system inevitably has social, economic, and political effects. The choice must be a normative one.⁸⁶

While the inevitability of normative decisions is recognized in many economic and philosophic discussions, it is generally missed at the popular and political level of debates. In fact, much of the current flat tax reform rhetoric obscures the inevitability of normative choices through its linkage of the flat rate issue to separate issues such as fairness, comprehensiveness, and rate reduction⁸⁷ and by its emphasis on economic efficiency and growth as objective goods. This is not surprising; economic analysis has had a "long tradition" of obscuring the normative underpinnings of economic theories of tax.⁸⁸ It lends a

99th Cong., 1st Sess. 1803 (1985) (prepared statement of K. Martin Worthy, Chairman, American College of Tax Counsel, on June 17, 1985), *reprinted in* 4 AM. J. TAX POLY. 1, 2 (1985).

86. Recognition of the effect of taxes on society is not new. In 1906 an expert noted that although "[i]t is sometimes asserted that the fiscal object of taxation is simply to secure revenue," the fact is that government cannot raise money "without inevitably affecting social relations." Seligman, *Pending Problems in Public Finance*, 7 CONG. ARTS & SCI. 190, 191 (1906), *reprinted in* E. SELIGMAN, *ESSAYS IN TAXATION* 316, 317 (10th rev. ed. 1931). This sentiment was echoed in 1947 by Randolph Paul, who argued that the idea that a tax can be for revenue only is "one of the most dangerous assumptions we could make." R. PAUL, *TAXATION FOR PROSPERITY* 214 (1947). After recognizing that social and economic impact are inevitable, he continued, planners must then choose between imposing a tax after considering social and economic effects, or imposing a tax with the "dominant purpose of achieving certain desired social and economic objectives. The first attitude is neutral. It conceives that the function of taxes is to raise revenue; but it refuses to try to raise revenue by methods which may be too costly in other directions." *Id.* at 217. Paul favored the "positive use" of tax as an "instrument of social and economic control," first picking the goals and then the taxes to reach those goals. *Id.*

The extreme manifestation of Paul's position can lead to too many tax expenditures, a fact which, at least in part, drove the recent tax reform movement to try to simplify the tax and make it fairer by returning it to a "neutral" attitude. Yet "neutrality" is a misnomer. Although the position Paul describes may be neutral in comparison with the "instrument of social control" position, this position cannot be totally "neutral," because as Paul himself admitted, all taxes inevitably affect society.

87. See note 37 *supra*. While noting that in many respects the 1986 Tax Act accomplished very little, former Colorado Senator Floyd Haskell pointed out that it made "one very important accomplishment. . . that the administration had in mind from the beginning. . . the new law writes 'finis' to the principle of progressive taxation in America. Often the principle failed to be carried out in practice, but it has been an article of faith for two generations . . ." Haskell, *Tax Reform*, 35 TAX NOTES 301, 303 (1987).

Haskell summed up the net effect of the tax act with this nursery rhyme:

The noble Duke of York,
He had ten thousand men,
He marched them up to the top of the hill,
And he marched them down again.
And when they were up, they were up,
And when they were down, they were down.
And when they were only halfway up,
They were neither up nor down.

Haskell, *supra*, at 303. It is, perhaps, telling that the nursery is such a frequent source of reference for the tax area. See also note 128 *infra*.

88. Wagner, *supra* note 80, at 392. Needless to say, political rhetoric also plays a role. See President Reagan's Remarks, *supra* note 38. A particularly good example of this phenomenon has been incisively described by economist John Kenneth Galbraith, writing on three central Reagan administration policies which have been marketed as good for the entire country but

patina of neutrality, because economics — particularly neoclassical economics — is viewed by many noneconomists (and even by some economists) as a “science,” and therefore as factual and objective. Economics is indeed a science, but not in the way we understood “science” in high school, not in the way we as lay people wish it to be: it is not absolute, totally demonstrable, truth; it is, as all human knowledge is, fallible, tentative, and evolving.⁸⁹ Nevertheless, the appearance of neutrality and truth is reinforced by the language of economics, the dazzling statistical displays economists produce, and finally by the willingness (even eagerness) of the public (and some economists) to accept the first two on a surface level.

which have had “a wonderfully favorable impact on the upper-income brackets”: supply-side tax cuts, strict monetary policies, and increased military spending. J. GALBRAITH, *Are the Rich a Dirty Secret?*, in *A VIEW FROM THE STANDS* 179, 180 (1986).

The supply-side tax reductions, with their large absolute benefit in the upper-income brackets and the companion cuts in social expenditures, could not be seen as a service to the rich. . . . Cutting taxes was purely a design for invigorating the economy, *incentives* being the magic word. There was a major sensation in 1981 when Mr. David Stockman, the budget director, conceded that all this was, in reality, a cover for reducing the taxes on the affluent. . . .

. . . [Recent monetary] policy is held to be neutral as between rich and poor. In fact, it works through high interest rates . . . and such interest rates, it will not be doubted, are very welcome to those who have money to lend. Those who have money to lend normally have more than those who do not have money to lend. As economic truth, this stands with the possibly apocryphal theorem of Calvin Coolidge that when many people are out of work, unemployment results.

. . . .

A more complex set of motivations is involved in the third major policy of the Reagan administration, the huge increase in military spending. The bilateral dynamic of the arms race, the oft-mentioned conservative fear of Communism and liberal fear of being thought soft on Communism, the bureaucratic power of the Pentagon, are all involved. But . . . [w]eapons expenditures reward well-paid executives, technicians and stockholders, and their economic interest is sustained in Washington by a remarkably effective array of well-lubricated lobbies, now commonly called consultants. A budget policy that combines severe curtailment of social programs with large continuing weapons expenditure reflects the interest of the affluent in having more money. And once again this is little mentioned.

Id. at 180-81.

89. See, e.g., D. McCLOSKEY, *supra* note 13, at 32-34. “[M]athematicians do not ‘prove’ theorems for ever and ever. They temporarily satisfy their interlocutors in a conversation.” *Id.* at 34. McCloskey makes similar points about other sciences such as physics and paleontology. *Id.* Only in nineteenth-century England did science begin to have an irrefutable aspect. *Id.* at 54-56. See also A. MACINTYRE, *AFTER VIRTUE* 79 (1984) (“‘Fact’ is in modern culture a folk-concept with an aristocratic ancestry. . . . What each observer takes himself or herself to perceive is identified and has to be identified by theory-laden concepts. Perceivers without concepts, as Kant almost said, are blind.”) Cf. M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 200 (1985) (There is no “objective political ‘reality’ from which symbols can divert attention; interpretations and meanings shape behavior (and vice versa) regardless of the interpretations of the historian or the social scientist.”).

This article was written well before October 19, 1987. Obviously the debacle of “Black Monday” on Wall Street, see, e.g., *Stocks Plunge 508 Points, A Drop of 22.6%; 604 Million Volume Nearly Doubles Record*, N.Y. Times, Oct. 20, 1987, at 1, col. 2, has shown how fallible economic predictions can be. As the months pass, however, we will undoubtedly forget this lesson. Therefore, what follows serves as a needed reminder of the tentativeness of economic predictions. More importantly, the following discussion centers not on the mere fact of tentativeness of predictions but on the underlying reasons for their variations.

First, the language of economics appears "hard": unequivocal and factual. It seems to deal in unmalleable quantities of neutral factors: demand curves, supply, marginal product. In actuality, however, economics — like all scholarly fields — is a literary endeavor and amply employs rhetoric, metaphors, analogies, etc. What is perhaps different about economics is the resistance people display to this notion. The very words used are metaphors — demand curve, production functions, invisible hand — but because economists use the words so frequently, they and their audiences lose sight of the fact that the words remain metaphors even in their "scientific" usage.

The very form of the terms shapes the contours of our thoughts.⁹⁰ People, in the language of economics, are profit maximizers, are thought of in terms of supply and demand curves. Those human attributes that mesh with the metaphors will be emphasized, those that are dissonant will be downplayed or ignored. If the metaphors are self-seeking and individualistic as neoclassical economic ones are, then the individualistic aspects of people are emphasized. Other metaphors emphasize other traits. The language of Marxist economists, for example, emphasizes the class aspect of society.

The methodology of neoclassical economics emphasizes "hard" numbers and statistics. Computers enable economists to produce dazzling arrays of numbers, precise to the Nth decimal. These elaborate printouts appear accurate and objective but, of course, the results of economic projections depend on the information fed into the computer and on the assumptions built into the computer model. Because these assumptions may vary widely, economists often achieve different results even when the same information is fed into the computer.⁹¹

90. See D. McCLOSKEY, *supra* note 13, at 82.

91. See, e.g., Teuber, *Revenue Estimators Play a New Role as Numbers Dictate Policy*, 33 TAX NOTES 698 (1986); Sheppard, *The Computer Models that Generate the Numbers*, 33 TAX NOTES 788 (1986); *Good Times, Bad Times: Treasury's Higher Revenue Estimates*, 34 TAX NOTES 6 (1987). TRA-86 seems to have heightened public awareness of the importance of revenue estimates and the methods by which these estimates are reached. There is disagreement, however, about whether the estimates should be made public or whether doing so would "politicize" the tax legislative process. See, e.g., Rosen, *Tech Corrections May Be Delayed Until 1989; Revenue Estimating Generates Controversy*, 38 TAX NOTES 435, 436 (1988). Since political beliefs influence the assumptions and variables in the models, the issue really is not whether politicization will occur, but whether the inevitable political factors will be revealed.

Tax Notes presented an interesting symposium on the distributional effects of the Economic Recovery Tax Act of 1981 (ERTA) which illustrates the problems of analyzing data. The Congressional Budget Office basically found that under ERTA, the "rich got richer and the poor got poorer." *Effects of the 1981 Tax Cut on the Distribution of Income and Taxes Paid*, 35 TAX NOTES 489 (1987). However, Lawrence Lindsey, an Assistant Professor of Economics at Harvard and a Research Fellow at the National Bureau of Economic Research, questioned the appropriateness of the CBO's definition of income and its methodology for projecting revenues in the absence of ERTA. Lindsey, *Criticizing the CBO Analysis of ERTA's Effect on the Distribution of Income and Taxes*, 35 TAX NOTES 491 (1987). Finally, Donald Kiefer attempted to explain

Moreover, since many variables are hard to calculate mathematically and/or are unknown, they are omitted from economic models.⁹² This does not mean that we should reject the models merely because they do not duplicate reality. What we must do is *evaluate* their results. Some academic literature does this; it recognizes and explains the models' flaws and limitations. Policymakers and the press, however, pay little attention to the problems.⁹³ We should not abandon economic modeling in making policy, but we should not overly rely upon it. It is but one tool for making a decision which is ultimately based not on the model but on whether the decision is a "good reform": "The only real conclusion is that there is no substitute for good judgment."⁹⁴ In making judgments we must remember that economics itself involves judgments. Behind the "scientific" methodology lie assumptions and presumptions.

We must remember not only that statistical economic results have these limitations, but also that they comprise only one of many tools

the "fundamentally different" methodologies of Lindsey and the CBO. Kiefer, *Measurement of Taxpayer Response in the Lindsey and CBO Studies of the 1981 Tax Cut*, 35 TAX NOTES 501 (1987). At issue, Kiefer stated, was the degree, if any, to which ERTA's lower tax rates caused taxpayers to report more taxable income than if the tax change had not occurred. The CBO compared the income distribution and tax system in a base year (1980, pre-ERTA) to that in the focus year (1983, post-ERTA). *Id.* at 501-02. Lindsey, on the other hand, compared income distribution and the tax system in the focus year (1982) to what he *estimated* they would be in the focus year *if* no tax revision had occurred. *Id.* at 502. It is interesting to note that, despite their differences, "both studies found substantial income growth at the top of the income distribution after enactment of the 1981 tax cut which seems to require explanation." *Id.* at 504. *Accord* Neilsen, Sammartino & Toder, *CBO Replies to Lindsey*, 35 TAX NOTES 496, 501 (1987).

92. See Hettich & Winer, *supra* note 52, at 427-31 (on optimal taxation); see also G. CALABRESI & P. BOBBITT, *supra* note 74, at 109.

93. Fullerton, *The Use of Effective Tax Rates in Tax Policy*, 39 NATL. TAX J. 285, 287 (1986). The rhetoric of politics and journalism forces economics into an unsuccessful role of "social weather forecasting." D. McCLOSKEY, *supra* note 13, at xix.

94. Fullerton, *supra* note 93, at 291. This conclusion is an old one, but apparently one we must keep rediscovering. In his 1927 Presidential Address to the Fourteenth Annual Meeting of the American Economic Association, T.S. Adams put it as follows:

The world needs the economist's version of the truth when it is fashioned after mature study. But let the economist cherish no illusion that it will prevail The economist's "truth" is only one factor in the contest we call taxation. . . . [The economic truth] will have proved more effective, the more completely its author — the economist — recognize[s] in advance its limitations, its functions, and the character of the other contestants.

Adams, *Ideals and Idealism in Taxation*, 18 AM. ECON. REV. 1, 8 (1928).

Earlier, in speaking of the role of economics, Adams said:

[Statistics and economics] are invaluable aids to intelligence; they can never be substitutes for intelligence. The mind may be closed as well as enkindled and illuminated by erudition. It is necessary to know history and statistics. It is just as necessary to know when to toss them overboard. The disinterested mind and the passion for precision are of priceless value in the calling of the economist. But they cannot of themselves produce the broad judgment and wisdom which envisage the future as well as the past, and which constitute the fruit and flower of political economy. A political economy which is mere science is not enough; partly because it is an impossibility, partly because there is something more excellent.

Id. at 3-4. See also Nacev, *supra* note 57, at 1027-28 (citing comments by such tax notables as Boris Bittker and Stanley Surrey about the necessity for judgment in evaluating statistics).

for making policy decisions. There are many ways to persuade people that an assertion is correct. As the economist Donald McCloskey so elegantly stated:

Not all regression analyses are more persuasive than all moral arguments; not all controlled experiments are more persuasive than all introspections. . . .

. . . .

It may be claimed in reply, and often is, that people can agree on precisely what a regression coefficient means but cannot agree precisely on the character of their introspection. This is false: people can converse on the character of their introspections, and do so habitually — about their aesthetic reactions, say, to a painting by Brueghel or a theory by Lucas. The conversations often reach conclusions as precise as human talk can. But even if it were true that regression is more precise, this would not be a good argument for economists to abandon introspection in economics. Introspections, even if imprecise, can be better than regression estimates infected with misspecifications and errors in the variables. That the regression uses numbers, precise as they look, is irrelevant. To speak precisely, precision means low variance of estimation; but if the estimate is greatly biased, it will tell precisely nothing.⁹⁵

The problem, then, with the use of neoclassical economics to support a flat limited tax is that its conclusions are viewed as hard objective facts — facts which, moreover, are the only possible relevant, valid facts, produced by a methodology which is the only relevant, valid methodology. The foregoing discussion has shown, however, that the “facts” are not as determinative nor the methodology as exclusive as they claim to be. Because the ascendant theory of economics is premised on private property and market exchange, its assumptions (overt and implicit), as well as the very language of much of its theory, reflect these values. The economic arguments are not neutral and must be evaluated through examination of their underlying premises.

III. PHILOSOPHICAL PREMISES AND PROGRESSIVE TAXATION

In this section I shall treat three issues. First, accepting for argumentation the neoclassical contractarian premise that only a benefits tax is a just tax, I examine whether a progressive tax can be justified on

95. D. McCLOSKEY, *supra* note 13, at 44-45.

The point is that one cannot tell whether an assertion is persuasive by knowing from which portion of the scientific/humanistic rectangle it came. One can tell whether it is persuasive only by thinking about it. . . . People should not discriminate against propositions on the basis of epistemological origin. There are some subjective, soft, vague propositions that are more persuasive than some objective, hard, precise propositions.

Id. at 44. *Cf.* A. MACINTYRE, *supra* note 89, at 80 (“Natural science teaches us to attend to some experiences rather than to others and only to those when they have been cast into the proper form for scientific attention.”).

this basis. Second, through a summary of the literature, I reexamine the underlying premise of the neoclassical view of efficiency. By pointing out several of its flaws, I thereby expose weaknesses in the arguments favoring a flat tax. Third, I outline an alternative philosophy or vision of society (and human nature) which lends support to a progressive tax.

A. *The Benefit Theory of Taxation*

The benefit theory of taxation, though popular in an earlier age, fell into disrepute by the turn of the century.⁹⁶ The neoclassicists, with their emphasis on liberty of exchange, revived it. Their benefit theory of tax rests on the fact that a government should provide certain (minimal) goods and/or services to its citizens because individuals cannot purchase them on the private market; national defense is one example. The "tax system should resemble a voluntary exchange economy in which prices reflect consumer[s'] willingness to pay, that is, their marginal evaluations of the private goods."⁹⁷ The tax should equal the price of the benefit (governmental goods and/or services) that the taxpayer willingly would pay.

The case for a benefit theory of progressive taxation must maintain that (1) government benefits increase as income increases *and* (2) the rate of increase in benefits is greater than the rate at which income increases. If the latter is not true, then a proportionate rate would compensate adequately for the increased benefits. Traditional thinking holds that the benefit theory cannot support progressivity because an increasing correlation between income and benefits cannot be achieved, whether the benefits measured are services to people, protection of property, or improvement of the citizen's well-being. Governmental services to people, it is said, are alike for all citizens. Everyone receives fire, police, and national defense protection, free education, and so forth. In fact, the argument goes, some of these services are of more benefit to the poor than the wealthy because if the government did not provide the service — education is the most notable example — the poor could not afford to purchase it. Thus, if the benefit theory were the justification for tax, taxation would have to be regressive.

Services to property, the argument proceeds, also do not benefit the

96. Blum & Kalven, *supra* note 8, at 451 n.92. For a history of the benefit theory, see Seligman, *supra* note 8, at 158-204. For an example of the dismissive treatment the theory currently receives, see R. MUSGRAVE & P. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 227-32 (1984).

97. Dorn, *supra* note 76, at 366. "Determining an *acceptable* tax burden, therefore, ultimately requires a correspondence between taxes paid and benefits received, just as in the private-goods case." *Id.* at 371 (emphasis in original).

rich more than the poor. Everyone's property is equally protected by the fire department, police, and army. Moreover, the primary purpose of these services is to protect persons (all of whom are equally protected) and the amount of protection which is adequate to protect people is enough to protect property. Therefore, protection of property provides little, if any, additional benefits. This is especially true since most property today is intangible property.

A progressive benefit theory as measured by well-being is faulted for a variety of reasons. For example, income is not and should not be the sole measurement of well-being. Furthermore, defining well-being as a benefit may be stretching the meaning of "benefit" too far.

There are several responses to the various objections to the benefit theory as a basis for progressivity that have not been adequately stated in the past. I will briefly examine two. The first attacks the "benefits to property" argument for its focus on the *cost* of the benefit provided rather than the *amount* of benefit received. Even if the amount spent on police or armed forces to protect people adequately were automatically the same amount as that needed to protect property, this would merely show that there is no additional cost to protecting property. It would say nothing about the value (or benefit) of that protection to those with property. Clearly, those with property to protect receive greater benefit from property protection than those with less (or no) property. The better argument regarding the benefit of property protection is that this protection has *de minimus* value vis-à-vis the value we receive from the protection of our selves. Yet, although people may *say* this (and some may actually believe it), in general we *behave* as if property protection is of great value to us.

The second response focuses on the "services to people" benefits arguments, arguing that, in fact, governmental services may increase as income increases. At any rate, it is far from clear that these benefits are provided equally to all, let alone more to the poor. This response can be illustrated by reexamining the provision of free education, which commentators see as one of the most glaring contradictions of the benefit theory.⁹⁸ There is no dispute that wealthier people can af-

98. In 1969, Boris Bittker "suggest[ed] that we all benefit from public education," but he did not elaborate other than to say that he "would assert that the quality of life, especially for those who are moderately well-off, is improved immensely by a widely-shared high level of literacy, university education and culture." Bittker, *supra* note 32, at 53. The discussion in the text fleshes out Bittker's suggestions.

The other commonly cited example of the inadequacy of the benefit theory is welfare payments: the poor, it is alleged, receive more than the wealthy. If taxes were allocated according to benefits, once again the tax would have to be regressive. This argument, however, is overstated and may in fact just be plain wrong, if welfare payments to the wealthy are more closely examined. The problem, of course, is to define "welfare payments": one person's welfare may be

ford to purchase private education whereas poorer citizens cannot. This does not mean, however, that the free education of those who could not otherwise afford it benefits only those people. The wealthy also receive political and economic benefits from the education of the poor. The first category includes intangible benefits that promote and stabilize our society. Mass education helps provide the basis for an informed citizenry, a prerequisite to a functioning democracy, and creates areas of common information, promoting the transmittal of shared values and goals. This creation of common bonds is vital for the survival of a country as culturally diverse as ours. It gives people a stake in the political system both by acculturating them into the system and providing them a tool to help them advance in the system, without eliminating cultural differences. Diversity is vital to our nation, but so is a sense of shared community.

In addition to these political benefits, the wealthy receive economic benefits from the education of the poor. Wealthy employers need employees with some general education in addition to specific job skills. Basic literacy is needed if only to fill out forms and read company rules and regulations. More literacy is needed for most jobs: car mechanics need to be able to read and understand manuals, a good secretary (or lawyer or businessman) needs knowledge of spelling, grammar, and literary styles. Obviously, the list of examples could be endless. The point is that to the extent that an employee does not have

another's earned desserts. It seems fairly clear that military pensions, for example, could be classified as welfare payments to the same extent that social security payments are. Even if these pensions are seen as earned (to the same extent that private pensions are earned), the amount by which these pensions exceed comparable private or — perhaps more accurately — other government pensions should be considered a welfare payment. Similarly, if school lunch programs are welfare, what about business meals deductions? Prior to the 1986 tax revision, federal subsidization of the latter was enormous compared with lunch programs: the estimate for 1986 federal outlays for child nutrition programs was estimated at \$5.6 billion, H.R. DOC. NO. 17, 99th Cong., 1st Sess. 5-125 (1985) (Budget of the United States Government: Fiscal Year 1986) [hereinafter 1986 BUDGET] versus approximately \$12 billion for business meal deductions. The latter figure is a rough estimate I arrived at through a conversation with a staff member of the Joint Committee on Taxation, who stated that the Committee estimates that approximately \$50 billion was spent on business meals in 1987. At a 30% tax rate, \$15 billion in revenues would be lost due to deductions for business meals. My \$12 billion estimate is thus conservative, yet still is more than twice the amount spent on the school lunch program in 1986. And if subsidized housing for the poor is welfare, what is the mortgage interest deduction? Once again, the latter amount dwarfs the former: an estimated \$27.1 billion for mortgage interest, *Joint Committee on Taxation, Tax Expenditure Estimates by Budget Function, Fiscal Years 1986-1990*, 30 TAX NOTES 861, Table 1 (1985) (found in full in the Tax Notes Microfiche Database, Doc. 86-1614, Mar. 3, 1986), versus \$1.8 billion for low-income housing in 1986, 1986 BUDGET, *supra*, at 5-122.

Moreover, as Bittker has rightly pointed out, the well-to-do receive benefits from low-cost housing and other public assistance in that "we all derive *some* benefit from the alleviation of human misery." Bittker, *supra* note 32, at 53. Note also that tax economists generally consider charitable gifts to be consumption items, because the donor gets some personal satisfaction. *Id.* (The issue of how to treat gifts in a consumption tax is not settled. *See, e.g., Graetz, supra* note 5, at 1592 n.51.)

the required skills, s/he is inefficient and thereby lessens productivity. Training costs money either directly or indirectly: the employer either suffers this decreased efficiency or provides the education the employee lacks.⁹⁹

Thus, government services to people are not as inversely proportionate to wealth as opponents of the benefit theory suggest. This inverse proportion argument, however, is the most extreme objection. A milder version holds that progression is not justified under the benefit theory because the government provides the *same* benefits to all. This argument also has flaws. The most commonly given examples of equal service to all are fire and police protection, national defense, and garbage collection. These services are not provided equally to all; police and fire protection is better in richer than in poorer neighborhoods.¹⁰⁰ National defense protects everyone equally, but some benefit from it more than others. Moreover, other services which are nominally equally available to all are in fact used more by the wealthy. For example, college education is a government-subsidized benefit which affects economic classes differently, with the middle class as the largest beneficiary.¹⁰¹ Similarly, the national highway system is used by and

99. See, e.g., Holsendolph, *Business to Study School Failure*, Cleveland Plain Dealer, Apr. 26, 1987, at 2E, col. 3 ("The failure of urban schools to educate youngsters . . . has become increasingly the concern of the nation's business leaders. They understand full well that well-trained and educated youths are fundamentally more important, on a long-term basis, than trade policy, economic conditions and even fiscal and monetary policies.").

Increasingly, corporations have had to train poorly educated workers to prevent costly mistakes and productivity losses. The Business Council for Effective Literacy in New York cited the case of "an insurance clerk who paid a claimant \$2,200 on a \$22 settlement because she didn't understand decimals." Simpson, *Firm Steps — A Shallow Labor Pool Spurs Businesses To Act To Bolster Education*, Wall St. J., Sept. 28, 1987, at 1, col. 1. Anthony Carnevale, chief economist of the American Society for Training and Development in Arlington, Virginia, "estimates that productivity losses caused by poorly educated workers, together with the price of remedial training, costs business about \$25 billion a year." *Id.* Approximately one of every three major corporations provides some basic skills training to employees. *Id.* One of these, Onan Corporation, claims training increased production by 50%. *Back to Basics*, NEWSWEEK, Sept. 21, 1987, at 54. See Kaptur, *Companies' Education Investment Pays High Dividends*, Wall St. J., Oct. 26, 1987, at 26, col. 3.

Businesses have begun to use political action to improve education. Examples include business pressure in South Carolina and Texas to force legislatures to increase state funding for education. Wall St. J., Sept. 29, 1987, at 19, col. 2.

Failure to educate the youth costs society millions of dollars. For example, according to a study by James S. Catterall of UCLA, dropouts from the Cleveland Public Schools for the 1985-1986 school year suffer potential earnings losses of \$469 million, which in turn deprives local, state, and federal governments of \$18.8 million in taxes. In addition, dropouts increase governmental expenses in the areas of police, judicial, penal, welfare, employment, and health services, because dropouts tend to be unemployed and unemployable, and resort to crime at higher rates. Wendling, *Cleveland Kids Flunk the Future by the Thousands*, Cleveland Plain Dealer, Apr. 26, 1987, at 1A, col. 1.

100. Inman & Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1663 (1979).

101. Robinson, *Who Benefits from Subsidies? Does Anyone?*, 26 POLY. REV. 59, 61 (1983). See also Quinn, *Tuition Aid 1980s Style*, NEWSWEEK, Oct. 12, 1987, at 74 (discusses plans such

benefits many industries much more than it does the average consumer. Although excise taxes pay for some of this benefit, part of it is not paid for by users but by the government generally. Granted, industry passes some of this subsidy on to the consumer by way of lower product costs, but some of this subsidy nevertheless increases profit margins and provides wealthier individuals an opportunity to create or expand industries and the profits associated with them.

Countervailing or unclear examples also abound. For example, the middle class probably uses the national park system more than both the lower class and the upper class. The lower class benefits less from SEC regulations than the middle class since few poor people can afford to buy stock.

The opponents of the benefit theory argue that this vagueness dooms the theory. Not only is there no proof that government benefits increase with income, but there is no evidence that the benefits increase more rapidly than income. Arithmetical exactness, however, is not necessary to justify progression. Once an increasing slope in benefits is discernible, progression is appropriate. Without an exact plotting of the correlation of benefits to income, it is true that the progression may be inexact. Yet surely a careful estimate of the proper rate is better than a flat tax which is clearly in error.

The outline, if not the details, of a correlation between benefits and income are discernible. Recent evidence shows that the current trend in public spending is toward increasing expenditures that benefit the

as Michigan's, which guarantees that a deposit left to grow during a child's youth will cover tuition at a state college or university. These plans obviously benefit those wealthy enough to put down a deposit; at the same time, states are cutting back on aid to the poor.

Last fall, Senators Kennedy and Pell introduced a bill to allow tax-free interest to be earned on U.S. savings bonds to provide for either college education or vocational training. Although the bill does not help the few extremely wealthy taxpayers with adjusted gross income (AGI) in excess of \$150,000, it certainly helps the wealthy. The exclusion is 100% for taxpayers with AGI up to \$75,000; 67% for taxpayers with AGI between \$75,000 and \$125,000, and 34% for those with AGI between \$125,000 and \$150,000. Senate Bill 1817 was introduced by Senator Kennedy on October 23, 1987; an identical measure will be introduced by House Ways and Means Committee Member Charles B. Rangel. *Congressional Roundup*, 37 TAX NOTES 554 (1987). See also *Lawmakers Seek To Ease Tuition Burden*, Wash. Post, Oct. 24, 1987, at A4, col. 1 (discussing Vice President Bush's proposal for an education savings bond program as part of his presidential campaign). Senate Minority Leader Robert Dole has introduced four tuition payment bills, and Representative Pat Williams, Chairman of the Subcommittee on Postsecondary Education of the House Committee on Education and Labor has proposed legislation to establish individual education trusts. The proposal has 70 cosponsors.

On January 27, 1988, Rep. Williams introduced two bills. One would create tuition savings bonds that would allow parents to deduct up to \$36,000 and allow children to use the bonds for postsecondary education without paying tax on the interest; the other would tax tuition savings at the child's tax rate, not the parents'. 88 TAX NOTES TODAY 11-21 (Jan. 29, 1988) (LEXIS, Fedtax library, TNT file). And President Reagan has called for college savings bonds which would have tax-free interest, to help lower- and middle-income families. *President's Legislative Message*, *supra* note 79, at 500.

wealthy.¹⁰² Individuals certainly create much of their own wealth through their hard work and their natural talents. Luck — good or bad — is another factor. But government is certainly an important factor, too. Throughout history, much of our legal structure has enabled and encouraged the amassing of property — examples range from railroad grants to the laissez-faire of substantive due process. At the infancy of the income tax some political leaders recognized this government favoritism as a legitimate basis for progression.¹⁰³ Indeed, our entire system of private property benefits those with wealth and income to purchase property more than those with less money. As Boris Bittker said, “What good are stock certificates, or even deeds to real estate, in a society in which ownership depends on brute force?”¹⁰⁴

The government’s role in benefiting the wealthy is varied but massive, including involvement at the basic level of the very structure of our system. Any system based on private property rights must favor those with the wealth and income to purchase that property. The extent of these benefits may be debated; countervailing examples may be given (*e.g.*, homestead acts and minimum wage laws). Still, one need

102. Military spending, for example, rose from 4.86% of GNP in 1977 to 6.45% in 1985. Manvel, *supra* note 79, at 515. If, as I suggest in the text, national defense benefits those who have more stake in the society than those with less, then benefits to the wealthy are increased through this surge in spending. In contrast, outlays for more redistributive programs such as the federal government’s largest income support program (old age, survivors, and disability insurance) have remained relatively unchanged as a percentage of GNP: 4.63% in 1977 and 4.81% in 1985. *Id.* at 516. Spending for other programs sometimes considered redistributive, such as education and other “socially oriented” programs, has actually decreased, whereas spending for highways, employee retirement, and international affairs has increased faster than the economy’s growth rate. *Id.* at 516-17. *See also* Okner & Bawden, *supra* note 7, at 351-52. Reducing total federal expenditures while increasing defense spending automatically reduces transfers to individuals and families because four-fifths of the nondefense budget (excluding debt repayment) goes to these transfers. *Id.* at 351. Moreover, about two-thirds of these payments are not income dependent (*e.g.*, Medicare and Social Security), and therefore are only “moderately redistributive.” *Id.* *See also* note 98 *supra*.

103. *See, e.g.*, Sen. Poindexter’s statement during the 1913 tax debates, 50 CONG. REC. 3835-36 (Aug. 25, 1913). Poindexter argued that graduation was necessary because large fortunes were due more to special favors of the government than to the taxpayer’s own industriousness. He specifically mentioned transportation rates and government grants of public and other resources such as mines. Theodore Roosevelt’s 1906 speech to Congress reiterated his support for “a graduated inheritance tax, and, if possible, a graduated income tax” because “[t]he man of great wealth owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government.” 41 CONG. REC. 27 (Dec. 4, 1906) (written message of President Roosevelt to Congress). *See also* J. BUENKER, *supra* note 3, at 51-52.

104. Bittker, *supra* note 32, at 49. *Cf.* Edelman, *The Next Century of Our Constitution: Re-thinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 43-46 (1987). Edelman argues that the government has an equal protection obligation to provide a minimal survival income (vaguely defined) because state action is in part responsible for poverty. “The entire economic structure of American society and a sense of specific governmental policy decreases over time have contributed to the existence, scope, depth, and perpetration of poverty.” *Id.* at 43. Edelman also makes a substantive due process argument. *Id.* at 26-29.

not accept the doctrinal position of some Critical Legal Scholars or Marxists — that *all* government is a tool by which the dominant class exerts and maintains its control — to recognize that to some degree, and at a basic level, our society is structured to benefit property holders.

The preceding statements do not speak to the merits of our system — whether it is good in and of itself, or good in comparison to alternative societal arrangements. These statements merely acknowledge that in our system, some people receive more benefits than others. Moreover, these others might fare better under an alternative system, whether it be a socialist, communist, mixed economy, or religious society, or a society that values and rewards artistic development, for example, more than the mere ability to earn money. Whether our system is consensual is immaterial, as is the question of whether it is the most “efficient” in whatever sense of that word we choose. The only question at issue under a benefit theory is whether the benefits increase as income (or wealth) increases. If they do, then a proportionate tax can be based, at least in part, on the benefit theory. If the increase in benefits is more rapid than the increase in income, then a progressive tax is justified.

This discussion suggests that the benefit theory of progressive taxation is not as weak as others suppose. I have made no attempt to measure the degree of benefits; such an attempt, I believe, would be doomed to fail. I do not believe that the lack of a precise measure of increased benefits is fatal, although it does prevent an airtight “scientific” case. I clearly stand to lose more than a poor urban dweller does if the rules of society changed. Similarly, the millionaire has more to lose than I do. Some of what I have to lose that my poorer sisters do not may be due to my innate talent, my hard work, or my good luck. But, as I hope this discussion has shown, some of what I have is due to a system which nurtured me (and my parents), provided me relatively easy access to higher education, rewarded me with status, money, relative leisure, and security, and permitted me to retain these rewards and view them all as legitimately mine — except for some taxes. Under a benefit theory these taxes are just payment for the benefits I have received. While I cannot discover and prove the exact schedule of progressive rates, there is evidence that benefits rise geometrically with income. If this lack of definiteness makes the case for progressive taxation based on a benefit theory uneasy, it is still less uneasy than the case for a flat tax which ignores the basic curve altogether.

B. *The Premises of Neoclassical Economics and Neoconservative Philosophy*

Both neoclassical economics and neoconservative philosophy are founded on a belief in the primacy of the individual and the satisfaction of his¹⁰⁵ interests. Liberty of individual action and choice is essential because without it individuals cannot achieve their interests. The free private market is the best mechanism to achieve the highest level of satisfaction because individuals themselves are best situated to make choices for themselves and the market allows them to do so in a way that respects autonomy: because the market is based on explicit or implicit consent, this concept of economic efficiency is congruent with its underlying normative value of liberty.¹⁰⁶ Because the market is efficient, most activities should occur in the private market. When government must step in, it should mimic the private market as much as possible. This view inevitably leads to a limited government which raises what little revenue it needs through a flat tax, preferably consumption-based.¹⁰⁷

This Neo view of individuals and society is anchored in a belief in the total sanctity of private property. Since an efficient equilibrium can be reached given any existing pattern of distribution,¹⁰⁸ the Neos must believe in the justness of the existing pattern. The market mechanism achieves efficiency through voluntary exchanges: trading occurs until no two persons are willing to trade anymore. Willingness to

105. I use "his" deliberately. This atomistic view of the world is proposed predominantly by men from Hobbes to Locke to Nozick to Epstein.

106. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (1972) (efficiency maximizes satisfaction, as measured by willingness to pay); Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975) [hereinafter Baker, *Ideology*] (analysis of Posner's methodology); Dorn, *supra* note 76, at 366-67, 373 (liberty is best served by flat tax); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 490-92 (1980). The normative view that the market system is good because it "incorporates people's capacity for self-determination and self-realization" and that it expresses people's voluntary consent assumes that the market reflects rather than creates preferences, but this is not entirely correct. The market responds differently to different demands. This selective response encourages the development of those demands that are best rewarded. Further, the supply side of the market encourages, through advertising, those demands which it can more readily meet. Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 794-96 (1986) [hereinafter Baker, *Property and Liberty*].

107. This view holds that consumption taxes are better because they do not distort the choice between future and present consumption.

108. E.g., Varian, *supra* note 80, at 231. The footnotes in this section, like the text they accompany, merely summarize a large body of literature on private property, economic efficiency, and fairness. In one sense, no footnotes are required: much of what I am saying here is not only not original to me but in fact has been stated so frequently that the arguments are well-known enough to do without notation. I give a few notes, however, as illustrative of sources. Good anthologies in the area include *ETHICS AND ECONOMICS* (E. Paul, F. Miller, Jr. & J. Paul eds. 1985); *ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV* (J. Pennock & J. Chapman eds. 1982) [hereinafter *NOMOS XXIV*].

trade, however, depends on one's wealth under the existing distribution. How much a person is willing to pay for a good, service, or right depends both on how much total wealth he has and on his preferences,¹⁰⁹ because wealth affects both maximum ability to spend on a particular good (the rich can always outbid the poor) and preferences for particular goods. Since the results of a market mechanism depend on preexisting distributions, the results are just only if the preexisting distribution is just. The justness of preexisting distribution depends on the sanctity of private property. Sanctity of private property means the right of an individual to the total ownership and benefits of property he owns so long as the *process* by which he attained the property was proper — the concern is with procedural rather than distributional fairness.¹¹⁰

What gives people this ultimate right to property? Most proponents derive it from John Locke's theory of a person's natural right to his body, his labor, the fruits of his labor, and any property with which he has commingled his labor.¹¹¹ Locke, however, attached an important proviso to the right to property: one is entitled to the property so long as his appropriation does not disadvantage the next person. That is, enough of good *X* must remain after an appropriation so that others may also appropriate it. Most resources today obviously are not (and have not been for many years) so abundant that this proviso can be met. Robert Nozick solves this problem by modifying the proviso: my appropriating *X* is proper even if *X* is no longer available for others so long as others have not lost the opportunity to improve their situations in other ways: I can take all the apples so long as there are still peaches you can have.¹¹² Nozick continues: even if all the property is

109. *E.g.*, Baker, *Ideology*, *supra* note 106, at 6-7; Coleman, *The Economic Analysis of Law*, in NOMOS XXIV, *supra* note 108, at 83, 93-94.

110. *See, e.g.*, Sen, *The Moral Standing of the Market*, in ETHICS & ECONOMICS, *supra* note 108, at 1, 3-4.

111. *See, e.g.*, R. NOZICK, *supra* note 12. Nozick bases his theory on Locke, noting certain differences. *Id.* at 9. *See also* Christman, *Can Ownership Be Justified By Natural Rights?*, 15 PHIL. & PUB. AFF. 156 (1986); J. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 172-82 (1977).

112. Christman, *supra* note 111, at 174-76; R. NOZICK, *supra* note 12, at 175. "The crucial point," says Nozick "is whether appropriation of an unowned object worsens the situation of others." *Id.* In considering whether a person's position is worsened, consideration must be given to whether my appropriation of an object improves the other's position, perhaps by creating employment, encouraging inventions, etc. *Id.* at 179. Nozick does note that certain appropriations are not valid. A person may not appropriate all the water holes in a desert, nor may he charge whatever he wants for his water if all but his well later dry up. *Id.* at 180. Nozick qualifies this: "The situation would be different if his water hole didn't dry up, due to special precautions he took to prevent this." *Id.* at 180 n.*. In other words, I can hoard all the water — more than I need — even though others will die, *if* my efforts, at least *in part*, were involved in conserving the water.

appropriated, the system is still proper if others are not worse off than they would be in a state of nature.¹¹³ This is surely a peculiar justification. As John Christman points out, surely this does not justify *A* owning all oil wells and *B* receiving only subsistence wages: the comparison should not be between a system of private property and a state of nature but between a system of full private ownership and another system of ownership (e.g., socialism, redistributive capitalism, etc.).¹¹⁴

In the view of Nozick and others, the Lockean proviso becomes a restatement of autonomous man's economic efficiency principles;¹¹⁵ but the problems with the justness of the Neo system of full private ownership do not end there. It may be that I have a right to use, manage, and benefit from property with which I have mixed my labor, but does that necessarily entail the right to transfer the property to others? The property's exchange value, when I later transfer it, may not be due to my labor but to changed circumstances (such as changes in the resource's scarcity).¹¹⁶ Even if circumstances do not change and I transfer property to *B*, why should my rights (especially if I am dead) justify *B*'s ownership of the property?¹¹⁷ Even if I acquire the property myself, I have not necessarily "earned" it, and thus am not necessarily entitled to keep it under a Lockean theory. I may acquire property through chance (the lottery), through luck or being in the right place at the right time, or through society's prejudices (lawyer *A*, trained at Harvard, finds it easier to get a "good" legal job than *B*,

113. See Christman, *supra* note 111, at 174-76; R. NOZICK, *supra* note 12, at 181-82.

The fact that someone owns the total supply of something necessary for others to stay alive does *not* entail that his (or anyone's) appropriation of anything left some people (immediately or later) in a situation worse than the baseline one. A medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms does not worsen the situation of others by depriving them of whatever he has appropriated.
Id. at 181.

114. Christman, *supra* note 111, at 175.

115. Thus, as Geoffrey Miller states, the Lockean proviso resembles the concept of economic efficiency. He restates the proviso as follows:

It is permissible under the law of nature to acquire unowned property by mixing one's labor with it, so long as the value of the property that one has taken in excess of one's pro rata share is less than or equal to the benefits to others that flow from the appropriation . . . Miller, *Comment: Economic Efficiency and The Lockean Proviso*, 10 HARV. J.L. & PUB. POLY. 401, 410 (1987).

116. J. MACKIE, *supra* note 111, at 176-77. See also Kearn, *Do Entitlements Imply That Taxation Is Theft?*, 7 PHIL. & PUB. AFF. 74 (1977). C. Edwin Baker suggests that different uses of property may properly be subjected to differing amounts of state regulation: regulation of the exchange use of property may be state-regulated whereas regulation of other uses is a presumptively objectionable infringement of liberty. Baker, *Property and Liberty*, *supra* note 106, at 804.

117. J. MACKIE, *supra* note 111, at 176-77. See also Christman, *supra* note 111, at 162-63. For Locke, natural rights justified only the right to accumulate, use, and merge property. Full ownership — that is, the ability to transfer property freely — is based only on convention which is always "subject to limitations and revisions necessary for securing and promoting the common good." *Id.* at 164.

trained at Generic U, even though *B* may be as smart and knowledgeable as *A*).¹¹⁸ Have I really “earned” the money I receive for having the inborn traits needed to be a model, a lawyer, or a basketball star? I have done *some* work that the market rewards with huge fees. But surely, my ability to receive that money comes not only from my personal effort but also from qualities inherited via my genetic pool. Does possession of these genes “earn” me absolute ownership forever as against others’ claims?

Even if I receive the money for my labor, is it my labor alone that produced the product so that I am entitled to sole ownership? An affirmative answer is more conceivable in a simple society than in a highly complex, industrialized one. The final product — be it a Barbie doll or synthetic insulin — is a joint product of many people. Each of these people is, in turn, a product of many people and things (genes, environment, education, nurturing). It is hard, if not impossible, to separate out the contribution of each individual in modern society¹¹⁹ as Locke would have us do.

It is possible, however, to identify a contribution by the state. Even under the private property theory of efficient use of resources, the state must exist, though minimally, in order to provide the conditions necessary for private property to work: protection, stability, and security of property. Consequently, the state itself is a factor of production. As such, the state is entitled to a return on its contribution. The individual is not entitled to retain *all* the profits from his endeavor because the state has also contributed to the success of the endeavor. The tax the individual must pay to the state, therefore, is not “theft” by the state but is the state’s just share of the profits.¹²⁰

118. There is no agreement among economists as to the correct causation theory of personal income distribution. Perhaps obviously, neoclassical economists (and neoconservative philosophers) favor the theory that income distribution is largely a result of voluntary choice. Individuals earn income through personal effort and therefore deserve to keep it. Other theories stress different causes of inequality: environment, genetic inheritance, luck. A thorough survey of the area with an extensive bibliography is Sahota, *Theories of Personal Income Distribution: A Survey*, 16 J. ECON. LIT. 1 (1978). See also Varian, *Redistributive Taxation As Social Insurance*, 14 J. PUB. ECON. 49, 50 (1980) (randomness or luck is a large causal component of incomes).

119. Abramson, *Philosophization Against Taxation: Why Nozick's Challenge Fails*, 23 ARIZ. L. REV. 753, 759-61 (1981). Abramson argues that Nozick’s “solution” to the joint effort problem is inadequate. Nozick states that when incentives must be paid to mobilize production, “there is no talk of a joint social product from which no individual’s contribution can be disentangled. If the product was all that inextricably joint, it couldn’t be known that the extra incentives were going to the crucial persons. . . .” *Id.* at 759 (citing R. NOZICK, *supra* note 12, at 188-89). Abramson’s response is that the product is still joint even when we know which individual to call upon to induce the others to produce. He illustrates this with the example of stimulation of the pituitary gland to increase growth. Though the pituitary is the “button” one must press to start growth, no growth will occur unless other organs not only continue to function, but also respond to the pituitary. The process must be a joint, cooperative one. *Id.* at 760.

120. See Kearn, *supra* note 116, at 75.

The Neo view of property interprets Locke's labor theory of property as justifying absolute ownership of any property a person legitimately acquires. This view arises from and confirms an extremely atomistic view of people, rendering another's claim upon any part or use of one's property illegitimate. Under this view, if taxation exceeds the amount that one would voluntarily trade for public goods, it is an involuntary and uncompensated — and hence illegitimate — taking of property.¹²¹

Even accepting the Neo premise of individual autonomy, one can derive different property theories, which limit ownership. First, one's ownership of one's body does not automatically justify full ownership of all property with which one has mixed one's labor, let alone the property acquired without labor (investments, gifts, inheritances).

Moreover, some property is more intimately related to personhood than other property. For example, the house in which I live is more important to me than the house I rent to others. The former is my "home" and is a part of me. There are numerous other examples of property which is a part of a person: family mementos, wedding rings, often clothing. The paradigmatic man-and-his-car relationship may reflect the ultimate connection between person and property. Perhaps the extent of our ownership of property should correlate with the degree of connection the property has to our personhood.¹²²

121. Richard Epstein states that a progressive tax would be permissible if benefits from government increased faster than income. R. EPSTEIN, *TAKINGS* 297-98 (1985). He admits that a flat tax may also incorrectly match benefits, but feels that it is superior to a progressive tax because it prevents uncompensated takings by preventing taxes in excess of benefits. *Id.* at 299. See also R. NOZICK, *supra* note 12, at 169 (comparing taxation to forced labor); cf. *Remarks by the President at Star Spangled Salute to America, July 3, 1987*, 34 TAX NOTES 4 (found in full in the Tax Notes Microfiche Database, Doc. 87-4202, July 6, 1987) ("Taxation . . . is more than mathematical calculations. It is forced labor and, if it goes beyond reasonable bounds, it is a yoke of oppression."). Others forcefully disagree. C. Edwin Baker, for example, argues that taxes are not forced labor because they relate only to the reward for an activity. People value both the activity itself and the liberty to choose among activities. Taxing is just one of society's methods to determine the amount of the reward. Baker, *Property and Liberty*, *supra* note 106, at 811. See also Abramson, *supra* note 119, at 764 (taxation is not forced labor because it follows rather than precedes labor: the idle person is not forced to work to pay a tax).

122. See, e.g., Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Radin states that property rights are more absolute the more they reflect one's personhood. Under this view a system of welfare rights could arise that guaranteed all citizens the basic shelter and food needed for personhood. This personhood theory of property also suggests a welfare rights theory under which government not only distributes "largess in order to make it possible for people to buy property in which to constitute themselves but [also] rearrange property rights so that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property." *Id.* at 990 (footnote omitted). Under this theory, constraining the property rights of those with excess goods would be proper through taxation or otherwise so as to allow others the opportunity for "self-constitution." *Id.*

Another conception of the right to the goods which are necessary preconditions of action is that it produces

an equality of *opportunity* rather than of *outcomes*. What is of central importance here is not that wealth or property itself is to be equalized, but rather that, beyond the minimum re-

Next, "just deserts" has more than one meaning. For example, it may be interpreted as meaning

- (1) To each according to his or her virtue;
- (2) To each according to his or her effort;
- (3) To each according to his or her contribution;
- (4) To each according to his or her agreement with others;
- (5) To each according to his or her needs; or
- (6) To each according to his or her society's rules.¹²³

The first four interpretations stress liberty whereas the latter two are more concerned with equality.¹²⁴ The Neo view seems to be an amalgam of (2) and (3), as measured by another's willingness to pay for the effort or contribution. This is not surprising since the Neos emphasize freedom of the individual to take voluntary actions. But this premise of voluntary action can lead to a limitation on property rights. In order to be able to take voluntary action, to be free agents, people must have certain types of goods. A starving person has little (no) freedom of action. Thus, people must have certain *basic goods* (life, health, minimum shelter, food). In addition, people need goods beyond this: goods to enable them to *maintain* their general condition (e.g., freedom from violence), as well as goods that enable them to *increase* their level of fulfillment (e.g., education).¹²⁵ One person's right to surplus goods may not be absolute, but may be constrained by another's right to goods essential to her liberty.¹²⁶ In short, an indi-

quired for basic goods, persons have as nearly as possible equal chances for developing and utilizing their own capabilities for successful agency. The main concern must be for each person's equal opportunity to develop and maximize his own capacities for purpose-fulfillment. However, the fostering of such equality requires a certain degree of economic redistribution.

Gewirth, *Economic Justice: Concepts and Criteria*, in *ECONOMIC JUSTICE* 7, 29 (K. Kipris & D. Meyers eds. 1985). To reach Gewirth's "successful agency" and "purpose-fulfillment" requires a conception of personhood that includes self-constitution in property.

123. Meyers, *Reason, Unreason, and Economic Justice*, in *ECONOMIC JUSTICE*, *supra* note 122, at 1.

124. *Id.* at 2.

125. Gewirth, *supra* note 122, at 23-25. Gewirth divides essential preconditions into three categories: basic goods, nonsubtractive goods, and additive goods. *Id.* Cf. S. WESTON, *PRINCIPLES OF JUSTICE IN TAXATION* 240 (1903) (available in AMS edition, 1968):

Necessities, when confined to absolute necessities, are a pre-condition to any development. Development begins only when the stage of necessities is passed, when the stage of comforts, or of "culture" begins. And progress is marked by the gradual merging of comfort into culture necessities, and the conversion into luxuries of what has been regarded as superfluous. But the order of their importance remains unchanged.

Accord Chapman, *The Utility of Income and Progressive Taxation*, 23 *ECON. J.* 25, 34 (1913) ("[T]he wants satisfied by the earlier increments to income are usually of more importance socially than the wants satisfied by later increments . . ."). In 1913, Senator Poindexter noted that the income tax was based on "the theory that luxuries should be taxed more heavily than necessities; that superfluity should bear a heavier portion of the burdens of the Government than mere sufficiency." 50 *CONG. REC.* 4613 (Aug. 26, 1913).

126. See Gewirth, *supra* note 122, at 28-29.

vidual's property rights, premised on his right to liberty, may be limited by another's basic rights; the former's excess property may be taxed to ensure the latter's preconditions of liberty. Indeed, some commentators maintain that even Lockean theory incorporates a social welfare aspect, in that a person's acquisition and continued ownership of property is conditioned upon not impinging on another's welfare.¹²⁷

The social welfare interpretation contradicts the Neos' atomistic view of society. Thus, although the Neo view may be dominant in the nursery (It's mine, you can't have it!), it is not the only view. Even in the nursery we learn to share. Whether it be toys (4x4s or BMWs) or food (chocolate chip cookies or pat ),¹²⁸ by the time we exit the nursery, we each have learned (to a greater or lesser extent) to accommodate the needs of others. In the course of our lives, we meet many others and often incorporate a more communitarian vision of people and society, which includes a regard for the welfare of others. The following section focuses primarily on one of these alternate visions and the support it provides for progressive taxation.

C. *Alternative Visions*

Neoclassical economic methodology and its underlying neoconservative philosophy see "[t]he history of all hitherto existing society [as] the history of interactions among selfish individuals."¹²⁹ Cer-

127. See Becker, *Property Rights and Social Welfare*, in *ECONOMIC JUSTICE*, *supra* note 122, at 71, 75. Becker elaborates that each of the four major justifications for private property "contains a social-welfare proviso that constrains acquisitions[...]" *id.* at 75, as follows:

(1) The utilitarian theory justifies private property only if it increases the aggregate welfare. If, for some reason, my title to Greenacre no longer is in the interest of the general welfare, then there is no longer a justification for my ownership.

(2) Locke's version of the labor theory conditions ownership on there being enough left over for others. "Changed social conditions can change the range of permissible acquisitions." *Id.*

(3) Another version of the labor theory is that ownership is valid to the extent that it appropriately rewards effort; what is appropriate varies with social conditions.

(4) Political liberty theories hold that "any defensible system of liberty must allow people enough freedom to acquire some property." *Id.* Thus, those property acquisitions which infringe on a person's basic liberty are not permissible.

See also Sanders, *Justice and the Initial Acquisition of Property*, 10 *HARV. J.L. & PUB. POLY.* 367, 370-72 & n.7 (the needs of others restrict an individual's right to acquire and maintain property).

128. Blum and Kalven also use the nursery to describe human nature:

[A]rdently as every child clamours for equality of treatment, and later of status, he desires just as fiercely to be rewarded for his endeavors and his achievements. . . . It is but human that the child should on the one hand take offense at the preference shown to his fellows as a reward for their endeavors, and, on the other, be equally offended if some special success of his own remains unrewarded.

Blum & Kalven, *supra* note 8, at 498 n.204 (citing BIENENFELD, *REDISCOVERY OF JUSTICE* 20 (1947)).

129. D. McCLOSKEY, *supra* note 13, at 25.

tainly, selfishness is a human characteristic and much of history can be read as a playing-out of this trait. But selfishness is not the only human trait, and history is not solely the recitation of centuries of acts of selfishness. If we view people and history through a lens of selfishness, then perhaps we see more of it than is really there.¹³⁰ There are numerous documented examples of actions which are exactly the opposite of selfish — true “heroic” acts to help others without regard for self — as well as many other acts which are, if not exactly unselfish, at least not purely selfish. These include the acts of Mother Theresa, Albert Schweitzer, Martin Luther King, freedom riders, Peace Corp volunteers, missionaries, Andrew Carnegie medal winners, and ordinary people who helped Jews in Nazi Europe. These people, and many others like them, prove daily that the history of humankind cannot be called simply a history of the interactions of selfish individuals. Through a different lens we might view people and history as the interactions of economic classes, or as the struggle for a kingdom of God on earth, or as the cooperative efforts of people to enrich their lives and those of their fellow humans.

Certain philosophies, or just plain outlooks on life, see people and society not solely in terms of their individual rights and entitlements but also — or even primarily — in terms of people’s needs and obligations to others as well as themselves. Many religious visions, for example, prescribe a life in which individuals help others, are connected to others, and as a *community* move toward a just society.¹³¹ Both religious and secular utopias throughout the ages, from early Christianity

130. *Id.* at 82 (Metaphors shape our thinking. If we call men wolves, then that is how we see them.). *Accord* Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1884 (1987) (“Market rhetoric, if adopted by everyone, and in many contexts, would indeed transform the texture of the human world.”). According to Radin, market rhetoric leads to an inferior conception of “human flourishing.” *Id.* at 1884 n.131.

131. See, e.g., R. PASQUARIELLO, *TAX JUSTICE* (1985). This book addresses the need for a redistributive tax system as a means to help achieve distributive justice which is part of God’s mandate:

Distributive justice presupposes not only the right of individuals to the goods given by creation, but it also presupposes the right that persons have to participate in the creation of a society in which justice, love, peace and mutuality are effective, a society which is characterized by communal well-being and mutual interdependence. These goods are not individual and private, but essentially public and social.

Id. at 6. *Accord* Krietemayer, *Toward A Consensus of Economic Rights: The Pastoral Letter of the Catholic Bishops*, 9 HARV. J.L. & PUB. POLY. 117, 118 (1986): The Catholic view of society tends to put more emphasis on social and communal values such as cooperation and the common good.

. . . [It] is not a strict individualistic concept, where rights are viewed as forming a set of protective “fence posts” that surround the individual person. Instead, rights are viewed as a kind of moral framework that is much more social and focuses on concepts such as social justice and participation in the community.

Religions other than Christianity also acknowledge connectedness. The Hebrew word “tzadakah,” for example, means both “charity” and “justice.”

to hippie communes of the sixties, also have had strong communal goals. True, many have failed, but their values persist as each generation reincarnates them in different forms: Saint Simeon, the Oneida community, the Shakers, 1960s-style hippie communes, Israeli kibbutzim. Various political theories also include communal aspects. Historically, socialism and communism come to mind; more currently, other communal visions of humanity have gained prominence: republicanism,¹³² the Critical Legal Studies movement (CLS),¹³³ and feminism. These theories differ, but each presents a view of humanity which contradicts the extreme individualism posited by the Neos. According to each, a sense of connectedness with and obligation to others is an intrinsic part of the nature of the individual. Such a view of humanity naturally supports a redistributive progressive income tax.¹³⁴ While each vision is supported by a rich body of literature, I shall only briefly describe one — feminism — to illustrate the strength of the alternatives to the Neo view. I have chosen feminism because in its loosest form, the form I shall describe, it is less a theory than a way of knowing and of being, experienced by a large segment of the world's

132. Republicanism obviously is not new. It dates back at least to Aristotle. Only the current interest is new. See, e.g., Sunstein, *Madison and Constitutional Equality*, 9 HARV. J.L. & PUB. POLY. 11 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Michelman, *The Supreme Court — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). Michelman presents a concise summary of republicanism and directs readers to more extensive literature on the subject. Traditionally, at the core of republicanism was *telos*, "a defining end or purposive essence," which led to civic virtue. *Id.* at 22. This notion is difficult to sustain in the face of individualistic post-Enlightenment society. *Id.* See also A. MACINTYRE, *supra* note 89; Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 545-47 (1986) (The modern paradigm is an individualistic, atomistic vision of autonomy and separation in which relationships among people are of secondary importance; classical republicanism, in contrast, focuses on these relationships.).

133. See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1771-72 (1976) (Under the premises of altruism "justice consists of order according to shared ends. . . . Good judging, in this view, means the creation and development of values, not just the more efficient attainment of whatever we may already want."). See generally R. UNGER, *KNOWLEDGE AND POLITICS* (1975); R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

Suzanna Sherry argues that CLS appears to reject autonomy in favor of communitarianism, but "closer examination" reveals that even CLS "vacillate[s] between endorsement of a communitarian perspective and mere tinkering with the liberal perspective." Sherry, *supra* note 132, at 569. She continues that the contrast between classical republicanism and CLS is "most marked in the absence of any teleological underpinnings to modern radical scholarship." *Id.* at 570. Since this is not the place to discuss CLS in detail I will merely add that the vacillation may reflect various viewpoints within CLS: an individual writer may not vacillate but his/her view may differ from that of another writer, so that, as a whole, the movement may appear to vacillate. As to underpinnings, it has been suggested that they exist, but have not yet been fully articulated. Lecture by Professor Mark V. Tushnet to Jurisprudence Class, Cleveland-Marshall College of Law (Apr. 8, 1987).

134. I am assuming for purposes of the following discussion that a benefits-based tax does not support progressivity.

population. As such it stands in stark contrast to the views of the Neos.

As an attitude, feminism provides a flexibility that is compatible with the idea of a variety of connections to others. It would be unrealistic to assume that one method of connecting — one universal rule or principle — could apply to all people and situations. A multiplicity of others necessitates a multiplicity of responses, of ways of connecting. Formally defined theories tend to objectify and universalize. Republicanism, for example, ossifies the idea of the community's public good.¹³⁵ It thus closes off avenues of connectedness to those outside the definition of that common good. Feminism — as a way of knowing, as an attitude, as a view about human nature — remains receptive to diversity and change.

A major work on the feminine vision is Carol Gilligan's *In a Different Voice: Psychological Theory and Women's Development*.¹³⁶ She notes, as other feminists have, that the modern paradigm of humanity is in actuality only a paradigm of *man*: man as a being who is essentially individualistic and autonomous. Consequently, moral problems, problems of justice and fairness, are seen as formal, universal, and abstract.¹³⁷ Problems are defined in terms of conflicting rights and rules. Under this paradigm, the highest stage of morality and justice is that position at which rights and rules are universally defined and weighted, and decisions are made impartially on the basis of these abstract rules without regard to context.¹³⁸ Studies show that women consistently fail to reach this stage; they are mired in a "lower" stage

135. A theory, of course, can be flexible; witness pragmatism. See West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 696-701 (1985) (the goal of liberalism is to enhance life and to release inherent potential through empirical study, concepts which evolve through history).

Feminism itself may be seen as a flexible theory. It encompasses a wide range of views. See Benhabib & Cornell, *Introduction*, in *FEMINISM AS CRITIQUE* 1, 4 (S. Benhabib & D. Cornell eds. 1987) ("Although there is no agreement in the contemporary Women's Movement as to what this (feminist) vision entails precisely, there is consensus around a *minimal utopia* of social life characterized by nurturant, caring, expressive, and nonrepressive relations between self and other, self and nature."). Feminism's relation to theory itself is often problematic. "Feminism is only partially and peripherally concerned with academic theorising." Bottomley, Gibson & Meteyard, *Dworkin; Which Dworkin? Taking Feminism Seriously*, 14 J.L. & SOC. 47, 47 (1987). This problematic relationship can be attributed in part to the conflict between feminism's methodology of particularity and specific narratives, and the generalizing and universalizing methodology of traditional theoretical argument, at least as it traditionally (*i.e.*, masculinely) has been approached. The conflict is but one example of the feminist "claim that the very project of constructive theoretical argument is more value-laden and gender-specific than is ever accepted." *Id.* at 49.

136. C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

137. See, *e.g.*, *id.* at 73, 100 (women generally construct moral problems in terms of care and responsibility whereas men generally construct them in terms of rules and rights).

138. See *id.* at 5-23, 73, 100.

where "morality is conceived in interpersonal terms and goodness is equated with helping and pleasing others."¹³⁹ Gilligan and other feminist writers posit that rather than being a lower level of morality, this is a *different* view of reality and morality. Women see themselves and the world with different eyes and, therefore, they speak with a different voice. Women perceive themselves, and thus the world, in terms of caring for others, in terms of responsibility to others, in terms of connectedness to others, whereas men perceive themselves and the world in terms of separateness, autonomy, and universal rules and rights.¹⁴⁰

The fact that women see the world as one of interrelatedness, of the interconnectedness of people, as a "web of relationships," is not a denial of the self. Rather, it is a realization that the self is not imured in a nonpermeable plastic bubble. The self is created, maintained, and enhanced through connections with others. At its most mature level this view means being responsible not only to yourself but to others. Being responsible to yourself *includes* being responsible for others. Thus, the "male" distinction between self-interest and altruism is a false one which disappears.¹⁴¹ Responsibility in this sense goes beyond the conventional meaning of making and adhering to a commitment; it means being aware and responsive to others:

Responsibility in this context means response. The concept of autonomy remains, but it is conveyed by the seemingly paradoxical conjunction of

139. *Id.* at 18. According to Freud, Piaget, and Kohlberg, women's sense of justice is always mired in context. Women fail to make decisions through an appeal to abstract, impartial logic and principles. See *id.*, especially at 18-23. Kohlberg devised six stages of moral development, the highest (stage six) being one of principled discussion based on abstract concepts of rights and rules. See L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* 409-12 (1981). Although Kohlberg claimed his theory had universal application, his original study included only boys; and, interestingly, when he later studied girls, girls rarely attained his highest stage. C. GILLIGAN, *supra* note 136, at 18.

140. C. GILLIGAN, *supra* note 136, at 25-51. Women and men have different epistemological perspectives which can be most dramatically illustrated by noting the metaphors each uses. Women tend to use the metaphor "voice" to describe their experience and development; men use visual metaphors "such as equating knowledge with illumination, knowing with seeing, and truth with light." See M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN'S WAYS OF KNOWING* 18 (1986). "Visual metaphors encourage standing at a distance to get a proper, [objective] view"; thus "'blind justice' and donning the 'veil of ignorance'" are good. *Id.*

Another frequently used illustration of the different perspectives is the distinction between law and equity: "[Women's] reasoning looks like equity: they expand the available universe of facts, rules, and relationships in order to find a unique solution to each unique problem." Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373, 1381 (1986). Not only do women have a different way of knowing, *what* they know is different than what the men know, as the text of this section shows.

141. This is in contrast to the "[male] opposition of selfish and selfless choice — an opposition in which selfishness connotes the exclusion of others and selflessness the exclusion of self." Gilligan, *Remapping the Moral Domain: New Images of the Self in Relationship*, in *RECONSTRUCTING INDIVIDUALISM: AUTONOMY, INDIVIDUALITY, AND THE SELF IN WESTERN THOUGHT* 237, 250 (T. Heller, M. Sosna & D. Wellbery eds. 1986) [hereinafter *RECONSTRUCTING INDIVIDUALISM*].

“taking charge of yourself by looking at others around you.” It does not mean taking charge of yourself by separating yourself. Rather, it means taking charge of yourself by looking at others around you, seeing what you need, seeing what they need, and taking the initiative to respond. Doing something once you have seen it.¹⁴²

A female proceeds from the premise of connection and sees responsibility to others as part of that context. In contrast, a male starts

from a premise of separation but recognizing that “you have to live with other people,” he seeks rules to limit interference and thus to minimize hurt. Responsibility in his construction pertains to a limitation of action, a restraint of aggression, guided by the recognition that his actions can have effects on others, just as theirs can interfere with him. Thus rules, by limiting interference, make life in community safe, protecting autonomy through reciprocity, extending the same consideration to others and self.¹⁴³

Thus, there are “two voices, two ways of speaking. One voice speaks about equality, reciprocity, fairness, rights; one voice speaks about connection, not hurting, care, and response. . . . [T]hese voices are in tension with each other.”¹⁴⁴ Responsiveness to others is “pro-active” in the “female” voice, reactive in the “male.” For the female voice, being receptive to others and caring for others involves initiating action, not merely responding. More importantly, caring is a constitutive act of the self: we become more fully ourselves by caring for others.¹⁴⁵ The male voice, in contrast, sees caring almost as a defensive act to protect the self: we “care” about others so that they will care about us and our rights, so that we may remain our independent selves. Male “caring” is self-referential; it emerges from a need for reciprocal caring by the other in order to protect the self. It is tit-for-tat: I will care for you, so that you will care for me.¹⁴⁶

However, even under the feminine vision that we care best for ourselves when we also care for others, we cannot care for everyone to the same degree. Such an ideal is unrealistic. To erect such an ideal would be an invitation to ignore the goal in despair of ever achieving

142. *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 44 (1985) [hereinafter *Feminist Discourse*] (remarks of Carol Gilligan at the 1984 James McCormack Mitchell Lecture).

143. C. GILLIGAN, *supra* note 136, at 37-38.

144. *Feminist Discourse, supra* note 142, at 44.

145. N. NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION 51 (1984) (“My very individuality is defined in a set of relations. This is my basic reality.”). *Accord* Gilligan, *supra* note 141, at 241.

146. Gilligan says that this “golden rule” of caring or responsibility “always refers back to the self. Despite the transit to the place of the other, the self oddly seems to stay constant.” Gilligan, *supra* note 141, at 240. *Accord* N. NODDINGS, *supra* note 145, at 30 (you must care from the “inside,” not put yourself in another’s shoes and see what *you* would see, but try to see as the *other* sees, apprehending her reality — her nature, needs, and desires).

it, even in those instances when it is obtainable. Moreover, such a demanding ideal, even if achievable, might lead to a deconstruction of the self. Whereas caring should be a constitutive act, caring about everyone equally would leave no time to care about oneself. This would lead to self-effacement.¹⁴⁷ Therefore, there must be some limits on caring. Even within the limits of care there must be different levels so that our responsiveness and obligations to our friends, for example, are different than our responsiveness and obligations to acquaintances or strangers.¹⁴⁸ Yet we cannot even exclude the stranger that we meet completely from our care. S/he is connected to us, not just as a fellow human, but potentially as a future spouse, a child's spouse, a dearest friend, a valued employee; every current stranger is perhaps a person who will one day be within the inner circle of caring. Thus, in *direct* contact with a stranger, we must be responsive to her needs.¹⁴⁹

We also must maintain a minimal, less burdensome connectedness to the nonproximate stranger. At this minimal level of care, I need make no great sacrifices to help the unmet others. Moreover, I need respond only to those others' most urgent and basic demands. The basic needs of any person go beyond those of bare survival to include attainment of the preconditions of liberty that allow us to be free, voluntary agents working towards self-fulfillment. These conditions in-

147. See C. GILLIGAN, *supra* note 136, at 74-90. The danger in caring is that the caregiver will care for others at the expense of self. Thus, the conventional image of the self-sacrificing mother. The mature feminine vision sees no conflict between self and other. Caring for oneself is not selfish, is not done at the expense of caring for the others because self and other are interdependent. To care for others responsibly, one must also care for oneself. *Id.* at 74. See also *id.* at 147.

148. Noddings describes this phenomenon as "concentric circles of caring." N. NODDINGS, *supra* note 145, at 46. We cannot care for everyone without trivializing the term; the level of care is "limited and delimited by relation." *Id.* at 86. To Nodding, caring involves a receptivity to a *proximate* other, even if that other is a stranger. *Id.* at 113. The proximity of the other is necessary because caring is of necessity a relationship involving two people. *Id.* at 68. Thus, we can care "about" "starving children in Africa" but we cannot "care" for them because there is no way for the relationship to be completed by the cared-for. *Id.* at 86. But we can — must — care for the stranger at the door. *Id.* at 113. Noddings thus differentiates between "caring for" and "caring about" people: we can care about everyone only in the sense that "we can maintain an internal state of readiness to try to care for whoever crosses our path." *Id.* at 18. Cf. J. MACKIE, *supra* note 111, at 77-79 (the obligation to help others, and the ease with which it may be overcome, varies with the degree of relationship to the other). Even those who accept the reality of egoism and "confined generosity" or self-referential altruism, may still see cooperation among individuals as desirable:

[H]uman life is social. We can see each individual as located in a number of circles — smaller and larger, but sometimes intersecting, not all concentric . . . Within any circle, large or small, we must expect and accept not only some cooperation but also some competition and conflict, but different kinds and degrees of these in circles of different size.

Id. at 172.

149. "The proximate other . . . [is] my student, my colleague, my stranger at the door selling his religion. He is also the one who must be brought into proximity if I would transform my caring about into caring for." N. NODDINGS, *supra* note 145, at 113. See also note 148 *supra*.

clude education and some level of personal safety and comfort. Only when a person has these basics is she able to work towards her potential and self-fulfillment. The minimal level of care, then, requires that I help others attain these basics so that they have an *opportunity* to achieve self-fulfillment just as I do. Because it involves a *minimal* level of responsibility, my obligation to help others attain this state of opportunity does not require that I give up my own opportunity, nor even that I constrain it very much. It does require that as my discretionary income grows, I contribute money at a greater rate than previously to help others. This is not an unduly burdensome obligation. It denies me no freedom of action. I can still choose when, where, and how much to work. I am still rewarded for my efforts. The income contribution required of me will not be so large as to unduly handicap my own attempts at self-fulfillment. As my income grows, it is easier for me to contribute more without impinging on my ability to reach my own goals. My minimal obligation to others requires that I contribute that nonintrusive amount. Thus, a progressive income tax rate satisfies my obligation to myself and others. It is not a redistribution of wealth, merely a paying of my "just debts" to others.

The "male" and "female" voices, of course, do not belong exclusively to males and females, respectively. In fact, by the time people are adults, most use both voices. However, approximately seventy percent of those who use both focus on one voice, using the other minimally.¹⁵⁰ As their labels imply, the female voice is predominantly the domain of women and the male voice belongs to males. The male voice traditionally is the dominant, valued one. It informs our view of the law as a domain of rules, rights, and blind justice: we are autonomous, independent beings and the law as fashioned by men helps maintain that separateness. It constructs barriers between "my" property and "yours"; "my" rights and "yours." The female voice emphasizes our relatedness to others. It builds bridges rather than barriers. In this sense, the feminist vision is aligned with other communitarian visions such as classical republicanism, whereas the male vision more closely follows the pluralistic, individualistic, liberal theory of today.¹⁵¹

Regardless of whether the female voice is due to nature or nurture (biology or environment), the voice reflects reality.¹⁵² A person's life

150. *Feminist Discourse*, *supra* note 142, at 48.

151. *See, e.g.*, Sherry, *supra* note 132, at 543.

152. *Feminist Discourse*, *supra* note 142, at 57 (remarks of Carrie Menkel-Meadow) (not only is it a reality, it is a valuable one). *Cf.* C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 74 (1987) (the different voice is due to societal not biological causes); N. NODDINGS, *supra* note 145, at 97 ("[T]here is reason to believe that women are somewhat better

is not simply a struggle for autonomy and equality with others. It is also a story of attachment to and interdependence with others. From birth to death people are connected to other people. We are more connected to some people than to others and the extent of our connectedness varies with time. Yet even if we live alone, we are connected to others. We cooperate with, rely on, and trust others in our everyday lives.¹⁵³ We even define ourselves through others. To say that I am a white middle-class law professor, wife, mother, daughter means nothing except in relationship to others (nonwhites, upper- or

equipped for caring than men are.”). While the debate about the origins of “female” characteristics is important, we must also focus on the traits themselves. As Carrie Menkel-Meadow emphasizes, echoing Simone de Beauvoir, if the traits have merit, they are worth preserving even if their origins lie in oppression. Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 43 (1987).

Psychological theories often explain the difference in male and female development as resulting from the fact that the primary caregiver, especially in the early years, is generally female. Consequently, boys and girls undergo radically different experiences. Mothers and daughters identify with each other, “thus fusing the experience of attachment with the process of identity formation,” whereas mothers and sons experience separation. “Consequently, male development entails a ‘more emphatic individuation and a more defensive firming of experienced ego boundaries.’” C. GILLIGAN, *supra* note 136, at 7-8 (quoting, in part, N. CHODOROW, *THE REPRODUCTION OF MOTHERING* 166-67 (1978)). Thus, girls incorporate attachment and empathy as part of themselves while boys do not. *Id.* As a result men and women experience relationships differently; for men, “separation and individuation are critically tied to gender identity.” *Id.* at 8. Accord N. NODDINGS, *supra* note 145, at 97. For the traditional masculine interpretation of development as seen by Freud and his followers, see C. GILLIGAN, *supra* note 136, at 6-17; Scales, *supra* note 140, at 1389-91. The traditional view of the autonomous self derives from a developmental model centered on Freud’s explanation of the Oedipus complex. In a successful resolution of the struggle, the self breaks free from the father, severing the relationship, and leaving an autonomous self. See, e.g., Chodorow, *Toward a Relational Individualism: The Meditation of Self Through Psychoanalysis*, in *RECONSTRUCTING INDIVIDUALISM*, *supra* note 141, at 197-99. This view of the development of the self is decidedly male. However, Freud offered an alternative view of the self in his essay *On Narcissism*. S. FREUD, *On Narcissism: An Introduction*, in 14 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 73 (J. Strachey ed. 1957). Freud discussed the ability of one’s libido to attach to other people as well as to oneself. Mental well-being depends on reaching a balance between the two. Under this view of the self, maturation lies in “belongingness or connectedness . . . instead of ego autonomy and control.” Chodorow, *supra*, at 200. This view is similar to the one Carol Gilligan outlines.

Nevertheless, traditional Freudian psychology as well as traditional moral thought emphasizes equality and autonomy and ignores the value of attachment. Gilligan, in contrast, explains the two basic aspects of the parent-child relationship: “[I]ts inequality and its interdependence or attachment also ground a distinction between the dimensions of inequality/equality and attachment/detachment that characterize all forms of human connection.” Gilligan, *supra* note 141, at 238-39.

153. See Baier, *Trust and Antitrust*, 96 ETHICS 231, 232 (1986):

It seems fairly obvious that any form of cooperative activity, including the division of labor, requires the cooperators to trust one another to do their bit, or at the very least to trust the overseer with his whip to do his bit, where coercion is relied on. One would expect contractarians to investigate the forms of trust and distrust parties to a contract exhibit.

Baier distinguishes trust from reliance in that the former involves “reliance on [another’s] good will toward one,” whereas reliance merely refers to the dependability of one’s habits. *Id.* at 234. People are not self-sufficient. We cannot care for all our goods ourselves. We must trust others with our belongings and ourselves: we trust (generally) that people have not poisoned our food and “we used to trust our children to day-care centers.” *Id.*

lower-class, students, parents, children, etc.). Similarly, one of the very features which makes us human is language, the ability to communicate with others through speech. If there are no others, then we are less human than our potential.

The female voice not only fits reality but is the best interpretation of reality in that it "fits" what we see.¹⁵⁴ Even on casual observation people display much behavior that does not appear to fit the Neo view that all action is determined by self-interest: witness parents' actions towards their children, charitable giving, "heroic" savings of people and animals, and volunteer services. Experimenters have even discovered that participants in their studies did not always respond in the self-interested manner that was expected.¹⁵⁵ In short, this nonselfish

154. Cf. R. DWORKIN, *LAW'S EMPIRE* 53 (1986) ("[A]ll interpretation strives to make an object the best it can be . . ."). The best interpretation of a theory, a piece of literature, or a legal practice is the one that makes the object the best it can be, given the constraints of history or other facts. *Id.* at 52. Thus, the best interpretation of law, says Dworkin, is law as "integrity," because that interpretation "fits" the reality of law. *Id.* at 176-275. "[P]ropositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." *Id.* at 225.

Theories of human nature and the societies people form fit best if they provide the best interpretation of human actions. Thus, a theory of atomistic, self-interested man fails because it fails to account for much human behavior, or accounts for it in forced ways. See the discussion in the text that follows.

155. Hoffman & Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEGAL STUD. 259 (1985) [hereinafter *Entitlements, Rights, and Fairness*]; Hoffman & Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J. L. & ECON. 73 (1982). In the earlier study, two subjects participated in a coin toss. The winner of the toss could choose to receive \$12 from the testgiver and the loser would receive nothing. However, if the winner and the loser negotiated, the tester would split \$14 between the two however they agreed to divide it. Cooperative game theory suggested that the \$2 gain would be split between the two so that the winner would receive \$13 and the loser \$1. The hypothesis was that the winner would never accept less than the \$12 she could receive without negotiation. Contrary to this theory, most subjects actually split the \$14 at \$7 each.

In their 1985 study, Hoffman and Spitzer hypothesized that in the previous study the pairs split the money evenly because they didn't see flipping a coin as a just way of allocating unequal property rights. Because the subjects saw themselves as morally equal in the coin toss situation, they split the money equally even though the winner was "legally" entitled to more. *Entitlements, Rights, and Fairness, supra*, at 260. Consequently, Hoffman and Spitzer designed a variation on the coin flip in which the tester led the winner to believe that she had earned the money. In these situations, they found that the winner acted under a Lockean theory which justifies retention of earned property and allows for differences in efficacy of effort to support differing returns. (Although winner and loser "worked" as hard, the winner's effort was more efficacious and therefore entitled to greater reward.) *Id.* at 273-77. In contrast, under the original simple coin toss experiment, the winners saw themselves as morally equal to the losers and so acted in a non-Lockean, egalitarian manner and divided the money evenly. *Id.* at 283.

These experiments suggest that people do not always act in the self-interested manner suggested by the Neos. People may behave differently if they earn wealth than if they simply inherit it. *Id.* at 291. Under this theory, for example, people might object less to an inheritance tax than an income tax. The study also suggests that to the extent income is not earned, people will object less to a progressive tax. If this is true, then perhaps different rate schedules should apply to earned and unearned income. This, however, would not take into account the fact that even a portion of "earned" income is due not to the individual's own effort but to random factors. See, e.g., Varian, *supra* note 118.

altruistic behavior does not “fit” the Neo theory of people. The Neos attempt to explain away these discrepancies, and to achieve “fit” in either of two ways. Each roughly corresponds to one of the two major definitions of altruism:

- 1: unselfish regard for or devotion to the welfare of others
- 2: behavior by an animal that is not beneficial to or may be harmful to itself but that benefits the survival of its species.¹⁵⁶

One Neo approach to altruism, based on the first definition, acknowledges the existence of altruistic behavior but confines it to the private sphere of life. The other Neo approach to altruism is to define away the behavior.¹⁵⁷ Both approaches fail to achieve a satisfactory “fit.”

The first approach dichotomizes human behavior. People are assumed to be self-interested in the marketplace but altruistic (or at least not totally self-interested) at the hearth. It is natural and proper to care for and share with others — but only within the family circle or small voluntary groups. There is no place for duty to others in the marketplace or the political forum. In those fora, *man* is a separate individual whose rights and self-interests are paramount.

This view is arbitrary at best. How can people have one nature in private and a totally different one in public? Perhaps, as the group gets larger and our participation in it less direct or less voluntary, our relationships with and responsibilities to others in the group are altered, but the connection is not severed.¹⁵⁸

How, indeed, can we separate public from private? In a less technological, less interdependent world, *perhaps* it was easy to determine that an individual's condition was a private condition, and should be ameliorated only by private means. By “private condition” I mean a condition neither caused (in part or in whole) by society nor affecting society. Today, however, many conditions needing aid — for example, poverty and disease — have social causes and social impact which implicate public and state institutions. It is, therefore, appropriate for the state to participate in ameliorating the conditions.

Many of the distinctions we make between private and public areas are artificial and based on exploitation. Under the first Neo approach,

156. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 76 (1984).

157. Economists deal with this problem in one of two ways: Either they recognize that self-interested behavior applies only in certain areas, but for purposes of their models, they *assume* all behavior is self-interested; or they assert that *all* behavior is self-interested and therefore the apparently anomalous behavior is really selfish because the actor receives an equal benefit in return for his action, such as psychic income. Under the first approach, economics does not apply to such private spheres of action as decisions about marriage and children. *See* Harrison, *supra* note 73.

158. *See* N. NODDINGS, *supra* note 145.

“economic man” is self-interested, self-reliant, and individualistic in the marketplace but caring and sharing within the family. Yet even if we accept this dichotomized description, the self-reliant individual is made possible in part by the fact that he has depended on a wife who supplied daily physical and psychological maintenance, cared for the children, and generally provided services that might otherwise cost money in the private or public sector.¹⁵⁹

When women enter the work force, they continue to provide caring and support, but doing so becomes more difficult. Thus, the lament in two-career families that what the couple needs is a “wife.” Sometimes it becomes impossible for the family to meet all of its needs. Collective responsibility in the form of some government obligation may then be necessary. This collective responsibility is not necessarily inconsistent with individualism. Individualism presupposes that the government will create or preserve those elementary conditions which allow persons to pursue their own self-interest. To the Neos, of course, the necessary condition is simply the protection of private property. According to some feminists, however, this preservation/creation of necessary conditions is “precisely” what is missing from our social policy vis-à-vis women.¹⁶⁰ Thus, for example, since parents cannot simultaneously work full-time at inflexible jobs and take care of dependent children, the government has a responsibility to help.¹⁶¹

159. See Sapiro, *The Gender Basis of American Social Policy*, 101 POL. SCI. Q. 221, 232 (1986). Sapiro advances the thesis that “[w]omen have been defined primarily as dependents, because others depend upon their dependency. American social policy . . . not only assumes, but helps to maintain this state of affairs.” *Id.* at 224-25. She notes that this dependency was recognized a century ago by John Stuart Mill, *id.* at 235; see J.S. MILL, *THE SUBJECTION OF WOMEN* 50 (M.I.T. Press ed. 1970) (original ed. 1869). Sapiro’s article is “a call for collective as well as individual responsibility.” Sapiro, *supra*, at 237.

Elizabeth Fox-Genovese put the issue as follows: “Individualism worked as a standard of justice and of freedom only so long as more than half the population was excluded from it.” Fox-Genovese, *Women’s Rights, Affirmative Action, and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338, 363 (1986). Indeed, those who believed in the “dominant ideology of individualism . . . should have favored admitting any qualified individual to any social role, but in actuality they regularly countenanced the exclusion of whole groups from the benefits of individualism.” *Id.* at 350. This exclusion, she continues, was a negative form of collectivism, an ideology that the individualists rejected. *Id.* at 348-49 (where collectivism is defined as “a social and political theory and practice that places the group above the individual, or that recognizes the individual as a product of the group rather than the reverse”).

For women to achieve the same opportunities as men, they need special opportunities. But that need should not be fought for in the name of bankrupt individualistic principles. It should be fought for in the name of social justice for all — not social justice for all individuals viewed as so many atoms, but social justice for individuals viewed as responsible and interdependent members of a society. *Id.* at 374.

160. Sapiro, *supra* note 159, at 237.

161. *Id.* at 236. Sapiro suggests government-mandated work policies on issues such as parental leave. The United States, after lagging behind most western industrialized countries, is finally examining legislation in this area. See, e.g., *House Panel Approves Medical Leave Bill*, Cleveland Plain Dealer, May 14, 1987, at 16A, col. 3 (Bill approved by a “politically divided” House

The first Neo solution to the problem of altruism is, then, clearly unsatisfactory. Its division of human nature/behavior into private altruism and public self-interest is arbitrary, artificial, and arguably based on exploitation.¹⁶² The second Neo response is no better. This solution resembles a magician's sleight of hand: it makes altruism "disappear," while all along it remains, albeit hidden. The advantage of this solution is that it eliminates the dichotomy between public and private behavior, by analyzing private behavior from the economic, self-interested vantage point. The works of the economist Gary Becker epitomize this approach.¹⁶³ He has analyzed a host of personal decisions — when to pursue education (human capital decisions), whether (and when) to marry or to have children (and how many) — and found each decision determined by economic self-interest. I accept that a decision to invest in human capital is clearly connected to the public market exchange (it affects one's ability to engage in that market). Even so, whether to get a college degree in, for example, English Literature, is not totally determined by that market. Yet other family matters are not so obviously connected. For example, the connections between the decisions to have children, invest in their education, and thus transfer wealth, are not clear.

To the extent that the decision to have children may involve hidden costs, the analysis is a traditional economic one.¹⁶⁴ But the Neos go beyond this. They argue that seemingly disinterested behavior is altruistic in the sense of the second dictionary definition of the word: it ultimately benefits the survival of the individual's species by improving the odds that the individual's own particular genes will survive. Behavior, then, is not disinterested, but is the ultimate in self-interest because it promotes survival. What appears to be an act of altruism is in actuality an act driven by our "selfish genes" to perpetuate themselves. We have now entered the realm of sociobiology¹⁶⁵ in which there are two types of apparently altruistic behavior: "reciprocal" and "nepotistic" (or kinship) altruism. In the former a person acts to ben-

Labor-Management Relations Subcommittee "would require employers of 15 or more people to offer unpaid, job-protected leaves of up to 18 weeks to employees who have new, newly adopted or seriously ill children." A compromise bill with shorter leave and more exemptions was expected to emerge from later negotiations. Government flex-time is another response to the problem.

162. Sapiro concludes that "[h]istorically, for vast numbers of men the individualistic ideology of self-reliance has not worked. For women it never existed." Sapiro, *supra* note 159, at 238.

163. See, e.g., G. BECKER, *supra* note 73; G. BECKER, *HUMAN CAPITAL* (2d ed. 1975).

164. G. CALABRESI & P. BOBBITT, *supra* note 74, at 93-96, 101-06.

165. This is a growing — even trendy — field. See, e.g., E. WILSON, *ON HUMAN NATURE* (1978); E. WILSON, *SOCIOBIOLOGY* (1975); C. BADCOCK, *THE PROBLEM OF ALTRUISM* (1986); J. BECKSTROM, *SOCIOBIOLOGY AND THE LAW* (1985).

efit another in the belief that the other will later return the favor. In the latter, person *A* benefits person *B*, whose genetic make-up is similar to *A*'s, so as to increase the chances of *B*'s survival and, therefore, the survival of *A*'s gene pool.¹⁶⁶

In reciprocal altruism people may be good "out of the badness of (their) hearts."¹⁶⁷ Becker explains that even selfish children in a family will not act so as to harm the family (lower its income) because any action that lowers family income will cause the altruistic family head(s) to reduce their transfers to the children.¹⁶⁸ Thus, even the "rotten kid" (the egoist) may perform acts that help the altruist. By increasing the wealth of the altruist, the egoist increases the willingness of the altruist to transfer wealth to him/her. The altruist, in turn, benefits from the "reciprocal" altruism of the "rotten kid." In addition, in the kin setting, his/her utility has been increased by his/her altruism because survival of the common genes has been enhanced.

This economic model also explains altruism in nonkinship groups where there is much interaction among individuals, such as in groups of co-workers or neighbors.¹⁶⁹ Altruism, according to this theory, does not survive in the open market, however, because it is too inefficient. "[S]elling below cost to certain people [is] an *inefficient* form of altruism. An altruistic robber baron can achieve his ends more efficiently by giving unrestricted cash *gifts*, that is by philanthropy."¹⁷⁰

We have thus come full circle. Altruism has been explained away: it has disappeared and reappeared as another form of self-interest. The Neo premise of individualism remains, in theory unsullied. I am left, however, a little unsettled by the sleight of hand which changed altruism into self-interest. The sleight of hand is necessary because the "fit" is wrong: a theory of atomistic self-interested beings does not reflect reality. The very formation of the issue is wrong. The issue is not self-interest or egoism versus altruism, because lives are, in fact, interrelated and interdependent. To care about oneself includes caring about another. Under a feminist vision the issue is not one of artificial distinction between egoism and altruism but is one of how to "act with

166. J. BECKSTROM, *supra* note 165, at 12-15. Beckstrom calls the latter nepotism, but it is more frequently called kin altruism. See, e.g., C. BADCOCK, *supra* note 165, at 18-19.

167. C. BADCOCK, *supra* note 165, at 72 (conversation between Anna Freud and Joseph Sandler, recorded in 6 BULLETIN OF THE HAMSTEAD CLINIC 332 (1983)).

168. G. BECKER, *supra* note 73, at 179. See also Hannan, *Families, Markets, and Social Structures: An Essay on Becker's A Treatise on the Family*, 20 J. ECON. LIT. 65, 69 (1982); Becker, *Altruism, Egoism, and Genetic Fitness: Economics and Sociobiology*, 14 J. ECON. LIT. 817 (1976).

169. Becker, *supra* note 168, at 826.

170. Hannan, *supra* note 168, at 69 (first emphasis in original).

responsibility and care toward oneself and toward others."¹⁷¹

Whatever we call it, there is documented behavior that justifies progressive income taxation. If that behavior reflects an "other"-oriented aspect of human nature (the alternative communitarian visions), then the progressive tax is a means by which individuals fulfill their responsibilities to others. If the behavior is, as the Neos say, merely a form of self-interest, then we can view the progressive tax as a form of reciprocal altruism: we help the less fortunate by paying more tax when we have surplus income, anticipating that they will do the same if the situation is reversed.¹⁷²

IV. CONCLUSION

The anti-progressive tax movement claims that the progressive income tax is too complex, economically inefficient, and unfair because it unjustly takes private property which belongs to the individual. This article has shown, however, that these arguments are not only overstated, but premised on an atomistic view of humanity which many people do not share and which does not explain the totality of human behavior. Other views of humanity, such as the feminist vision, see people as interrelated and therefore support and even mandate some progressivity. It is one way in which I can be responsible to myself and nonproximate others. For such a stranger I need not sacrifice myself, as I would for my husband or child. Nor must I even inconvenience myself as I might to aid a friend. Yet I cannot ignore entirely the needs of my unknown fellow citizens. I am connected to them, too, if only potentially. That unknown person may become my neighbor or may save my life. But because, as of now, that person is only a stranger, I am only marginally connected to him and my responsibilities to him are minimal. A progressive tax matches that limited level of care. Because the tax is based on my ability to pay, I never sacrifice, I never even *greatly* inconvenience myself, when I pay taxes to help meet his or her needs. Yet to the extent the tax is redistributive, I recognize and meet my connection to the other.

171. *Feminist Discourse*, *supra* note 142, at 46 (The "notion that life is a zero-sum game, that one is egoistic or altruistic, is based on a false premise. It denies the reality of interdependence.").

172. This, of course, assumes that the tax is not based on the benefit theory, *i.e.*, it assumes that there is a transfer or redistribution of income from the wealthier to the less wealthy. *See* Part III.A *supra*.

Several authors have suggested that a progressive income tax can be justified as a form of social insurance: it is an efficient method of spreading the risks of income variation. *See, e.g.*, Varian, *supra* note 118, at 51; Dworkin, *Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 292-304 (1981); R. DWORIN, *supra* note 154, at 276-312. "As risk aversion increases, a more progressive tax is desirable . . ." Varian, *supra* note 118, at 64.

Since there can be no unanimous agreement on the "proper" rate schedule (progressive versus flat), what is to be done?¹⁷³ Because consent is the normative basis of the Neo view that underlies the anti-progressive tax movement, it would be somewhat odd for the Neos to take the position that where no majority opinion is clearly discernible, those who disagree with them (*i.e.*, supporters of progressivity) should lose. Such a position reflects not the individualism and liberty they extol but less congenial (to them) forms of government.¹⁷⁴ Further debate between the two views might be procedurally nice, but would it be productive? At first glance, suasion appears unlikely: when a choice is premised on different world views, neither side is likely to convince the other, no matter what the evidence or method of presentation. You may extol the virtues of strawberry ice cream however and as long as you want, but you will not convince me that it is better than peppermint stick.¹⁷⁵ If the debate about progressivity reflects this type of choice, then one side must win and one must lose.

We need not, however, reach that choice. This article has shown that a progressive tax applied to a comprehensive income base is not as incompatible with the Neo view as it appears. Many of the Neo objections to progressivity are really objections to *high* tax rates or to *income* tax itself, not to progressivity. A progressive tax on a comprehensive income base can meet these objections as well as a flat income tax can. A comprehensive base permits relatively low rates. Low rates — even if progressive — will eliminate much of the offensive, fancy, legal tax evasion. From an economic standpoint, such legal manipulation would no longer be cost-effective, because what would be saved in taxes would not be worth the time and money spent to secure the savings.¹⁷⁶ Low rates will mitigate the adverse effects (if any) on work and savings incentives. Granted, complexity will remain, but it will remain with any tax. A complex, sophisticated world requires a complex tax.

More importantly, progressivity is not necessarily adverse to the Neo view that the amount of tax paid should reflect the benefits received. Governmental benefits and income show some positive corre-

173. Cf. V. LENIN, *WHAT IS TO BE DONE?* (1902); N. CHERNYSHEVSKY, *WHAT IS TO BE DONE?* (1961) (original ed. 1863).

174. See generally note 173 *supra*.

175. Thus, in a sense, the text of this article is largely irrelevant. Any gaps or errors are not fatal. Notwithstanding the flaws, it will probably convince those predisposed to progressivity; notwithstanding the absence of any flaws, it probably will not convince those against progressivity.

176. The 1986 Tax Act, for example, reduced (but did not eliminate) the tax savings that can be achieved by splitting income between a trust and an individual. Because the advantage has been so reduced, setting up trusts *solely* for tax purposes makes little sense.

lation. That we cannot determine the precise degree of this correlation does not mean we should abandon graduation. If benefits and income do correlate, a flat tax is clearly erroneous. Where is the merit in choosing a clear error over an approximation at truth? Simply because we cannot attain perfection does not mean we should do nothing. The second-best option is that which does the least harm. Overtaxing those who can more easily afford it is more desirable than overtaxing those less able to bear the burden.

Finally, and perhaps most importantly, progressive taxation can help maintain some of the conditions of freedom and liberty basic to the thinking of most Americans and certainly to that of the Neos. Even flat tax proponents recognize there is some merit in considering ability to pay. Consequently, they support a basic exemption amount. But a bare subsistence exemption amount does not create the preconditions necessary to be the free autonomous individuals that Neos envision. Basic individuality and the growth of culture require something beyond satisfaction of mere survival needs. Some amount of a second level of "needs" or wants of comfort must be met;¹⁷⁷ beyond the comfort level is a level of luxuries. It is true that my luxury may be your comfort. It also may be true that what was a "comfort" to me at a \$10,000 income now feels like a "necessity" at \$40,000. Nevertheless, the ordering of these wants does not change. Moreover, there is a sense that as income increases, I am able to satisfy more of my less urgent needs because I have more discretionary income.

The preconditions of freedom are not merely physical. They include those conditions — such as education, security of person, and property — necessary to enable individuals to be free agents who make voluntary choices. If individualism and individual development require that these basic preconditions be met, then a person's rights in any excess property may be constrained by a duty to provide these to others. A progressive tax is one way to reflect this. The more "excess" a person has, the less right he has to it in the face of another's basic needs.¹⁷⁸

177. See notes 125-26 *supra* and accompanying text.

178. Charles O'Kelley, Jr. argues that a flat tax with an exemption equal to the minimum wage is consistent with society's dominant ideology of individualism, and with its view that society is a cooperative venture. O'Kelley, *supra* note 5, at 727. Thus, graduated taxes contradict our individualistic belief that we are entitled to our earned and (more problematically) unearned income. *Id.* at 751-55. Yet our communitarian ideals acknowledge that we all should contribute equally to the public good, and that we all have a basic claim to a minimal portion of the social product. A flat tax with a minimum wage exemption, he claims, recognizes both the dominant individualistic and the subservient communitarian ideologies.

The minimum wage exemption neither meets the preconditions of liberty (as described in the text) necessary to the dominant individualistic ideology nor can it be called truly communitarian. It is simply a grudging acknowledgment of another's right to bare subsistence (only), while I live

A redistributive progressive tax can help provide another precondition of freedom: stability of a democratic form of government. Although a democracy does not need an *equal* distribution of wealth, a wide gap between the wealthy few and a large dispossessed or marginal class is destabilizing. Moreover, a healthy middle class (defined only as an income level between poor and rich) also increases stability by increasing citizens' vested interests in the continuance of the government.¹⁷⁹ A redistributive progressive tax need not level income. To the extent it is used to mitigate the disparity between income levels, it can further rather than hinder the preconditions of autonomy cherished by the Neos.

Finally, progressive taxation can help ensure the preconditions of Neo philosophy in a more fundamental way. In the Neo view, the proper political organization is a loose conglomerate of individuals in a democratic society with minimal government. When the organization is as large and diverse as our country is, and when individualism is emphasized, the danger always exists that the pressures of individualism and diversity which pull against organization will overcome the weak center (the state) which holds things together. Some force must counteract this. The only force powerful enough to do so is a sense of community, a sense that we are all connected to each other, that we acknowledge our fates are somehow tied together. Some people feel this sense of relatedness more than others, but even the individualistic

in luxury with an income of \$300,000. Moreover, it assumes that the person with \$20,000 should provide for that other's bare subsistence at the same rate as I.

This is hardly a community-oriented view and certainly is not a feminist-based view. In fact, the minimum wage exemption is more easily justified on practical grounds than on communitarian grounds: (1) it is not cost-effective to collect minimal amounts from marginal-income people, and (2) taking money from marginal-income people would impinge on their ability to provide for themselves, and would strain society.

The minimum wage exemption does not even meet the preconditions of liberty the Neos require. Minimum wage exemptions (at least at current minimum wage levels) hardly provide individuals with basic survival needs let alone a cushion of comfort and security that would provide some level of dignity and permit them to make truly voluntary choices. Moreover, the plan fails the Neos' preconditions in other ways: persons making a minimal wage also have a minimal stake in society. Finally, O'Kelley's plan does little to mitigate the wide disparity in income and wealth among people. See note 179 *infra*.

179. After the Joint Economic Committee reported in 1986 that the gap between rich and poor in America was widening, a noted economist stated that "the political and social foundations of the country could be at risk. At some point, those who are losing ground, including a majority of the middle class, are going to start demanding political action to restore their economic position." Martin, *Gap Grows Between Rich, Poor*, Cleveland Plain Dealer, Aug. 17, 1986, at E1, col. 1, E4, col. 1. The report thus supported an income transfer tax system, citing warnings from such notables as John Adams and Thomas Jefferson about the dangers to liberty posed by extreme concentrations of wealth. *Id.* Economists such as John Kenneth Galbraith and Lester Thurow have argued that such concentrations can also lead to economic collapse. *Id.* Accord Batra, *An Ominous Trend to Greater Inequality*, N.Y. Times, May 3, 1987, at 2F, col. 3 (four major depressions in America have followed periods of "huge and growing disparities in income and wealth").

Neos feel it to some extent, though they may label it something else. Ironically, the sense of community tends to decrease as economic growth (a key Neo goal) occurs: time becomes monetarily too valuable to "waste" on interpersonal relations or traditional social institutions such as church, family, and civic organizations;¹⁸⁰ even the work place becomes more specialized, more impersonal. Although these phenomena may appear efficient on the surface, diseconomies occur. Workers and citizens become alienated and disaffected. Workplace productivity decreases. Society segments into factions which are unwilling to help each other despite the economic wisdom of cooperation.¹⁸¹

Paradoxically, the Neos must cultivate this sense of community, or connectedness to others, in order to preserve and protect their individualistic society. The progressive income tax is a good way to reaffirm our nation's sense of community against the pulls of individuality. It acknowledges a commitment and sense of responsibility to the other members of our society. Without this sense of connectedness and obligation we lose our sense of identity as a nation. Instead we splinter into factions which feel no loyalty to each other.

Furthermore, progressivity serves this communal purpose in an individualistic way. Progressivity is not coercive in the manner of mandatory military service or forced labor. We as individuals are still free to choose where and when, how and how much we work. All progressivity asks of individuals is a progressively larger amount of their income. If this is redistributive (and it is not clear that it is) then surely it is a gentle manner of redistributing. If it is an offense to the individualist, then surely it is a minor offense. Yet truly, the individualist is receiving value for this contribution. It is in his self-interest to support progressivity for it in turn will support the sense of community which is not only essential under a feminist vision but is also necessary as a precondition to the survival of the form of government the Neo needs.

This article has shown that to a large degree both the Neo and feminist views support a progressive tax. Some Gentle Readers, however, may be unconvinced of the compatibility of Neo theory and

180. Although there is a connection between high economic value of time and low allocation of that time to interpersonal relationships, noneconomic social values also play a role. Sander, *The Economics of Time and Community*, 42 REV. SOC. ECON. 44, 45 (1984). Thus, the importance society places on family or community values affects the time appropriated to these values. The Japanese approach to work, for example, is a result of both a "conscious effort" to create work incentives, and traditional values. *Id.* at 48.

181. Suburbs, for example, that are economically connected to urban cores, nonetheless refuse to aid their cities. *Id.* at 49.

progressivity. For them, the choice of a flat or a progressive tax is still a choice between opposing philosophies. If that choice exists, I believe the choice should be progressivity with its vision of consideration for others and its sense of common humanity rather than proportionality and its narrow vision of the self-interested man. Although we may be self-interested, our selves are inextricably tied to others about whom we care. It is difficult to be a hermit these days, and even if we could be, few of us would so choose.