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## **Cover Page Footnote**

I would like to thank Professors Adeno Addis, Lynne Henderson, and Lewis Kornhauser for their thoughtful readings of previous versions of this article. Thanks also to Heather Conahan, Anna Moses, and Bob Ripley for their research assistance and Tulane Law School for a grant which supported this research.

# EQUALITY, LIBERTY, AND A FAIR INCOME TAX

Marjorie E. Kornhauser\*

## Introduction

The original Superman television series captured the hearts and minds of many American children. Every week, as the picture on the screen dissolved into an image of Superman superimposed over an American flag, the announcer solemnly proclaimed (accompanied by stirring music) that Superman was fighting for "Truth, Justice, and the American Way."<sup>1</sup> To this watching child, and perhaps to the nation, Truth, Justice and the American Way seemed tangible and definite, as clearly visible as the flag that waved in the background.

Today the "American Way" is splintered into many paths. Old truths are being questioned; government "reinvented." Once there was (or at least so it seemed) unity; now Truth and Justice seem so fragmented that some say there is no Truth, only truths.

Taxation is one of the many areas in which the old Truth(s) are being re-examined. The progressive income tax system, which has been the ideal tax since it was established over 80 years ago, is now challenged vigorously as an unfair tax by many lay people, politicians, and commentators. Some claim a flat or proportionate income tax is fairer, while others aver that a consumption-based (or expenditure-based) tax is the only just tax.<sup>2</sup>

One common criticism of the current tax system, with its various deductions and loopholes, is that it is contradictory, and even inco-

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1. The reflective adult wonders why the saying was Truth, Justice, *and* the American Way. Wasn't the American Way supposed to be truth and justice? Watergate, the Iran-Contra affair, and Whitewater made clear that there is a distinction. Perhaps the announcer was prescient.

2. House Ways and Means Chairman Bill Archer (R-Tex.) has even called for the repeal of the Sixteenth Amendment, which gave Congress the power to tax income. Clay Chandler, *Archer Calls For End to Income-Based Tax*, WASH. POST, June 6, 1995, at D1; Testimony of Bill Archer, House Ways & Means Tax Code Revision Hearings, June 6, 1995 (on file with author).

herent.<sup>3</sup> Critics contrast this chaotic system with purer, simpler, fairer tax systems such as a flat tax or a consumption tax. However, the critics are contrasting apples and oranges: a *real* tax with an *ideal* tax. It is true that either an ideal flat income tax or an ideal consumption-based tax would be simpler and more coherent than the current progressive tax; however, an *ideal* progressive tax would be simpler as well. What makes the current tax complex and contradictory is not inherent in an ideal, hypothetical progressive income tax. Rather, the complexity and contradictions stem from Americans' complex sense of distributive justice. Our perception of what is a fair or just tax is not based on a single principle of justice, but on several principles which are contradictory to some extent. The compromises created by our multi-faceted sense of distributive justice would create stress and strain on any ideal tax, eventually causing it to bend and stretch to accommodate these contradictory principles. A real tax—unlike an ideal tax—always will be contradictory because our beliefs are contradictory. Consequently, even if we start out with a pure flat income tax or a pure consumption tax, inevitably the tax will develop many of the same features as the present tax.

The current tax debate appears to pit conflicting truths about the nature of a just tax against each other. This appearance is false; in reality most Americans do not accept one truth or the other. Rather, most Americans accept to some extent all the truths. We share fluid and contradictory beliefs about distributive justice and a fair tax.

This Article explores the principles of distributive justice which underlie the current American tax system. While a universal Justice may exist in theory, in reality "Justice" is replaced by culture-bound "justices"—particularistic and contextual—rooted in the societies which they shape and which, in turn, shape them. Similarly, there is no universal Truth in taxation. A tax is just or fair only for a particular society and only to the extent that it supports and furthers the normative goals of that society. As a consequence, this Article takes a particularistic approach to distributive justice and

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3. For example, it is a mixture of an income tax and a consumption tax in that certain corporate and individual business transactions and savings are exempted from taxation. See, e.g., 26 U.S.C. §§ 361 (providing for non-recognition of certain corporate gains and losses), 404 (providing for deductions for contributions of an employer to an employee trust or annuity plan), and 1031 (providing for nontaxable exchanges of certain business and investment property).

taxation.<sup>4</sup> Therefore, although it examines abstract general theories of justice and theories of taxation, it focuses on the particular context that molds American taxation: our historical and political tradition. Specifically, this Article asserts that the American sense of distributive justice and hence taxation rests on the twin foundational principles of America—liberty and equality. These principles have various meanings; under some definitions, liberty and equality are compatible, but most frequently they are in conflict. Nevertheless, a broad spectrum of the American people endorse particular conceptions of liberty and equality that support a mildly progressive hybrid income-consumption tax. In the tax field the battle between liberty and equality—often characterized as one between efficiency and equity—occurs primarily in two fundamental areas: choice of the tax base and choice of a rate structure.<sup>5</sup> Of course base and rates issues can conflate. For example, an “income” tax that permits the tax-free exchange of certain invest-

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4. See MICHAEL WALZER, SPHERES OF JUSTICE xiv (1983) (arguing his point from the particularistic standpoint of the cave, rather than from the mountain top, because, as he says, “Justice and equality can conceivably be worked out as philosophical artifacts, but a just or an egalitarian society cannot be.”). See also, Grzegorz Lissowski et al., *Principles of Distributive Justice: Experiments in Poland and America*, 35 CONFLICT RESOLUTION 98, 116 (1991) (commenting that “abstract ciphers lack the prerequisites for developing conception of justice”) (citation omitted).

In contradistinction, John Rawls does not consider his theory or political philosophy in general as a withdrawing from society. Rather, he views abstractions such as the original position as necessary, because they are

a way of continuing public discussion when shared understandings of lesser generality have broken down. We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots. Since the conflicts in the democratic tradition about the . . . basis of cooperation for a footing of equality have been persistent, we may suppose they are deep. . . . Seen in this context, formulating . . . abstract conceptions of society and person connected with those fundamental ideas is essential to finding a reasonable political conception of justice.

JOHN RAWLS, POLITICAL LIBERALISM 46 (1993) [hereinafter RAWLS, LIBERALISM]. See also Stephen M. Griffin, *Political Philosophy versus Political Theory: The Case of Rawls*, 69 CHI.-KENT L. REV. 691 (1994) for a discussion of political philosophy as compared to political theory. Griffin points out Rawls’ own emphasis, especially in *Political Liberalism*, that Rawls’ theory is a political one which uses society’s own ideas of justice “as [a] reasonable way of organizing and justifying at least some of the beliefs [society] already hold[s].” Griffin at 706.

5. Tax base refers to the domain which will be subject to the tax—income, consumption, sales, or earned income, for example. The rate structure, of course, refers to whether the rate of tax should be flat or proportionate (10% on the entire base), progressive or graduated (increasing rates applied to greater quantities—10% on the first \$10,000 of sales, income, etc., 20% on the next \$10,000), digressive (a flat tax applied to the base after a certain amount—say the first \$10,000—is exempted), or even regressive.

ments, or that allows savings to accumulate tax-free in a pension fund until withdrawn for consumption, has a zero tax rate on those savings and investments. In reality, this is a hybrid tax—part income, part consumption-based.

Part I of this Article summarizes various formal theories of justice and of income taxation. Part II explores the nature of the American perception of justice. First, it provides an overview of the two political concepts that have shaped our country—liberty and equality. It then summarizes the American tradition, which I have labeled “moral economic individualism,” that articulates the meanings of liberty and equality that resonate most strongly within our national psyche. Part III surveys empirical evidence of American beliefs about distributive justice and taxation. The Article concludes that American beliefs in liberty and equality support a mildly progressive hybrid income-consumption tax, rather than a pure income tax or a flat-rate consumption tax. Such a tax acknowledges the pluralistic meanings of liberty and equality under the unifying umbrella of a fluid and flexible conception of a fair tax.

### I. The Income Tax and Theories of Justice

Taxation, with its mathematical precision, appears to be a scientific field, neatly detached from messy normative issues. This, however, is not the case because taxation is inseparable from the society that produces it. Consequently, “[a] theory of taxation is necessarily bound up with fundamental questions of political science, economics and ethics.”<sup>6</sup> Nevertheless, general theories of justice often pay little attention to taxation; when they do, their

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6. STEPHEN F. WESTON, *PRINCIPLES OF JUSTICE IN TAXATION* 1 (1903). For Weston, natural rights were the foundation of taxation. *Id.* at 39. Therefore, the ethical goal of taxation was the individual. *Id.* at 41. See also *A Discussion of “The Ideologies of Taxation,”* 18 *TAX L. REV.* 1, 22 (1962) (“[T]here are no ideal solutions to suit everybody. Any intelligent thinking on taxes eventually reaches the ultimate purpose of life on this planet as each of us conceives it.”) (statement of discussion participant Louis Eisenstein). Cf. HAROLD GROVES, *TAX PHILOSOPHERS* 25 (1974) (“There may be some universal truths in taxation, but they are dwarfed by the constraints of a particular environment.”). Or as Thomas Griffith has recently written:

The correct relationship between normative goals and the choice of tax base is simply stated. First, the policy maker should adopt explicit normative goals. Next, she should choose a tax base which will help achieve those goals. Different tax bases will be “ideal” depending upon the particular normative goals which are selected.

Thomas Griffith, *Should “Tax Norms” Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 *WIS. L. REV.* 1115, 1152-53 (1993).

conclusions often differ both from reality and from what people intuitively believe ought to exist. More disturbingly, the existing tax system may not even reflect society's beliefs because of flaws in the political system,<sup>7</sup> or alternatively because of cognitive errors.<sup>8</sup> Despite these factors, a brief examination of the general theories of justice, and the specific theories of taxation help to articulate the issues involved in analyzing the nature of a fair tax.

### A. Methodology in the Determination of the Justice of Taxation

The method of determining whether a tax is just depends on whether that justness can be determined independently of the justness of the pre-tax wealth distribution. There are two possible situations. In the first, the justness of the tax is independent of the justness of the pre-tax wealth distribution. Consequently, a just tax is simply one that distributes fairly the tax burdens—the revenues of which will be used to provide approved public goods—and will not disturb the pre-tax distribution. Redistribution of income is not a permissible tax function under this view.

Conversely, in the second situation, the justness of a tax is related to the justness of the pre-tax distribution. Consequently, the tax may serve a re-distributive function in addition to its role as a collection vehicle to fund governmental duties.

Under this second situation the determination of a just tax is a two step process. First, one must determine whether the existing distribution of goods is just.<sup>9</sup>

The second step then distributes the burden of taxation. The second step depends on the results of the first step. If under the

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7. For example, when one political faction captures the reins of government, it uses that power to perpetuate and expand itself. Robert Stanley sees the tax system—especially the income tax—as a means of supporting the capitalist establishment. See generally ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913 (1993).

8. See, e.g., EDWARD J. McCAFFREY, A COGNITIVE THEORY OF TAXATION 59 (1994) (arguing that cognitive theory shows such a pervasiveness of errors in how we perceive taxation that it is difficult to say that our current system of taxation may not reflect our morality). On the other hand, what we perceive as correct is influenced by our perceptions of what actually is—or rather what we believe to exist. Michael L. Roberts & Peggy A. Hite, *Progressive Taxation, Fairness, and Compliance*, 16 *LAW & POL'Y* 27, 28 (1994) (observing that the average tax rates which survey respondents in the \$5,000 to \$100,000 income range felt were fair were closely tied to *marginal* rates, whereas the absolute dollar amounts they assessed as fair were slightly higher than, but still corresponded to, actual *effective* rates).

9. Of course, this determination depends on a prior determination of what is a “just” distribution.

first step, the pre-tax distribution was determined to be unjust, then the second step requires not simply a just or fair distribution of the tax burdens but also a redistribution of the wealth. Alternatively, if the pre-tax distribution were just, then no redistribution is required. A just tax would fairly distribute the burdens of taxation without altering pre-tax distribution. The ultimate effect would be the same as in the first situation where pre-tax distribution was not considered at all.<sup>10</sup>

Such discussions about a just tax are often confused and/or oversimplified for several reasons. First, people frequently do not articulate whether the justness of a tax is determined independently of the pre-tax distribution; that is, they do not specify whether the tax should have a redistributive function. Second, if redistribution is a function of a just tax, many people fail to distinguish between the distribution of the tax benefits (the redistributive function), and the distribution of tax burdens.

Consider, for example, Representative Dick Armey's (R-Tex.) statement in connection with the introduction of his 1994 tax bill proposing a flat or proportionate tax: "Fairness is in fact the flat tax's great virtue. It's based on the idea of fairness we learned in grade school: *Everyone would be treated the same.*"<sup>11</sup> His statement ignores the redistribution issue. He does not indicate

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10. Although these two steps are related, they are separate. For example, in a society consisting of A and B, A earns \$10,000 and B earns \$100,000, and the government needs \$5000 to fulfill its functions as conceived by A and B. Under the first step, we must decide whether the distribution of wealth is just. The distribution of wealth between A and B is just if society's conception of justice is that each individual is entitled to the amount earned through her efforts. However, this step does not necessarily require that the burden be distributed equally, \$2500 to A and to B. We must consider: (i) the individual's relationship to society as a whole, (ii) whether the burden of taxation should be shared equally, and (iii) what equally means. If we determine that the pre-tax distribution is not just, then the tax system must distribute the \$5000 tax burden between A and B, and it must redistribute some of society's goods by transferring some money from B to A.

11. Dick Armey, *Review Merits of Flat Tax*, WALL ST. J., June 16, 1994, at A20; *accord Flat Tax Proposals: Senate Hearing 104-209*, 104th Cong., 1st Sess., at 44, 93 (1995) (Rep. Armey). Compare Robert M. Willan, *Ugly Truths of the Progressive Income Tax*, WALL ST. J., Aug. 19, 1985, at A14 (arguing that "there is no justification on grounds of either fairness or morality for the progressive income tax"). Armey's bill, the Freedom and Fairness Restoration Act, was introduced on June 16, 1994, and provides for a low flat tax on individual earnings, coupled with a flat business tax which permits the immediate deduction or expensing of tangible property. See *id.*; see also H.R. 4585, 104th Cong., 1st Sess. §§ 101-102 (1995). In fact, when the effects of an income exemption are factored in, Armey's flat tax has some progressivity. For example, consider a flat tax of 20% on all income in excess of \$20,000. A earns \$30,000 and B earns \$40,000. A pays 20% of \$10,000 or \$2000 in taxes. B pays \$4000. A's effective tax rate is 6.7%, whereas B's is 10%.

whether he ignores redistribution because (i) he believes a fair tax is determined independently of the distribution of benefits, or (ii) he believes distribution of benefits is connected to the determination of a fair tax, but no redistributive element is needed because the pre-tax distribution is fair.

Armeý's failure to treat the distribution of tax burdens also lacks clarity because he assumes there is only one definition of fairness. He defines fairness as treating everyone the *same*, and he equates sameness with a proportionate or flat tax. He then assumes that there is only one meaning to treating people "the same." In fact, there are many ways people can be treated the same, or equally, and each way is based on a normative judgment.

The simplest, most obvious method of treating everyone equally is to give everyone identical benefits and burdens. Everyone, for example, has the same right (duty) to receive (contribute) \$100. This interpretation appears uncontroversially fair. What if, however, in a society consisting solely of A and B, A has no money and B has \$1 million? What if the good to be distributed evenly is bread and A is allergic to it? Or books written in Hungarian which B reads but not A? Or anchovy pizzas which B likes but A does not? Similarly, identical burdens (such as a tax) are not always fair. Prohibiting everyone from sleeping on park benches is equal or fair treatment—but only in a narrow sense of the word if A is homeless and B lives in a mansion. Certainly, the fairness of requiring everyone to donate a kidney to the organ transplant bank is questionable when A has two healthy kidneys and B has only one.

Representative Armeý's proposal to treat everyone the "same" is not quite this simple: he does not mean identical *amounts* but rather identical *proportions*.<sup>12</sup> Assume, for example, that our society of A and B has \$200 to distribute (or collect). Instead of distributing (collecting) \$100 from A and \$100 from B, society determines that the allocation will be proportionately the same. The question is: proportionate to what—income, wealth, ability, need, effort, moral worthiness? A and B may not be able to agree on the appropriate base. Different bases may be appropriate for different distributions (collections).

Even if people do agree on a base, they may differ as to how to define or measure it. What, for example, is moral worthiness, and how is it measured? Even if people agree on how to define the base, its application across a broad spectrum of situations is more

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12. Assuming there is no exemption amount, or alternatively ignoring it, as Armeý seemed to be doing, a flat tax takes the same proportion of tax from each.

complicated than it might appear at first glance. Assume, for example, that income is the chosen base. Consider a simple situation in which society consists of two individuals, A and B, who are identical twins. This year A receives a total of \$30,000 and B receives \$1 million. Assume they receive the money for the alternative reasons: (i) as a return on investments of equal amounts in the oil industry, (ii) as a result of their personal efforts at their respective jobs, (iii) as a result of winning lottery tickets, and (iv) as an inheritance from their parents. Are the distributions to A and B just in each of these situations? If the government needs revenues of \$10,000, how should the tax burden be distributed between A and B? Should the burden be the same in each situation?

While there is not agreement on any one principle of distributive justice, common principles include, for example, per capita distributions, and distributions based on needs, merit, or requirements of the common good (general welfare). Some of these principles are principles of desert, that is, the recipient deserves or merits the distribution because of some personal characteristic such as ability, effort, or even ascription. Other principles of distribution, such as general welfare, look more at the society as a whole than at the individual. Robert Nozick accepts a desert theory based on labor,<sup>13</sup> while John Rawls' veil of ignorance rejects the idea of desert<sup>14</sup>—because no one deserves the ability and talents they are born with—in favor of a general welfare principle.<sup>15</sup>

Some theorists promulgate a single overarching principle that is used for all distributions in all situations, while others believe that no single standard applies to every situation. John Rawls, for example, uses his difference principle for all distributions other than those of basic rights and liberties,<sup>16</sup> whereas Michael Walzer believes that different spheres require different criteria, “[a]lthough what happens in one distributive sphere affects what happens in the others . . . .”<sup>17</sup>

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13. See *infra* notes 29-38 and accompanying text for a discussion of Robert Nozick's theory.

14. See *infra* notes 39-51 and accompanying text for a discussion of John Rawls' theory.

15. See, e.g., GEORGE SCHER, *DESERT* 22-36 (1987). People do not even deserve distributions based on effort if effort is conceived of as being genetically determined. Thus, Rawls' general welfare principle is based on the intrinsic moral worthiness of each individual, which is by its nature equal for each person.

16. JOHN RAWLS, *A THEORY OF JUSTICE* 75-78 (1971) (explaining the difference principle) [hereinafter RAWLS, *JUSTICE*].

17. WALZER, *supra*, note 4, at 4, 10 (“[T]here has never been a single criterion, or a single set of interconnected criteria, for all distributions. Desert, qualification, birth

The relationship between taxation and theories of justice is honored mainly in the breach. Much tax analysis focuses on taxation as a revenue raising function only: Social norms are taken as a given (or ignored), and the question is only what is the most efficient way to raise the money. Other theories of tax incorporate an overarching conception of justice—such as utilitarianism—but fail to acknowledge, define, or discuss justice adequately. Many tax theorists either fail to articulate or to explain in detail their underlying norms of distributive justice.<sup>18</sup> Conversely, theories of justice usually pay little attention to taxation, particularly in any detailed sense. Consequently, general theories of justice and general theories of taxation often have little connection with reality—with American perceptions about what is a just distribution of income and wealth. This Part examines some specific theories of taxation and general theories of justice as they relate to taxation.

## B. Specific Theories of Taxation

There are various theories of taxation including benefits, sacrifice, optimal fiscal exchange, ability to pay, and the currently dominant theory of comprehensive income taxation. Each has strengths and weaknesses; each has received support at various times in history.

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and blood, friendship, need, free exchange, political loyalty, democratic decision: each has had its place, along with many others, uneasily coexisting, invoked by competing groups, confused with one another.”); accord JENNIFER HOCHSCHILD, WHAT'S FAIR? 106-11 (1981) (explaining that we use principles of differentiation—or deserts—for the market and principles of equality for the non-market, private or family spheres).

18. There are exceptions, of course. See, e.g., Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221 (1995); Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739 (1995); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1945-65 (1987) (using welfare theories of distributive justice to support a progressive but not confiscatory income tax implemented through large cash grants and flat or even declining marginal rates); Charles R. O'Kelley, Jr., *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 S. CAL. L. REV. 727 (1985) (commenting that a flat tax with a large personal exemption accords with society's individualism tempered by some communitarianism). Other commentators more briefly connect normative concepts to a particular tax. See, e.g., Griffith, *supra* note 6, at 1148-55 (discussing briefly various theories of the ideal tax base); Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145, 1172 (1992) (discussing Rawls in connection with a consumption or expenditure tax). For an early examination of the philosophic bases of taxation, see generally WESTON, *supra* note 6.

The benefits theory of taxation holds that people should pay tax in proportion to the amount of benefits they receive from the government. This theory is difficult to apply because it is difficult to determine the exact amount of benefits each person receives. Some theorists argue that wealthier individuals receive more benefits primarily because they have more property to protect; others argue that poorer people receive the lion's share of benefits because they receive valuable goods and services that they would not otherwise receive. In contrast, some believe that all people receive equal benefits because the major governmental benefit is protection of the person. According to John Stuart Mill, failure to provide equal benefits is a sign of a major societal flaw.<sup>19</sup>

The benefits theory was basically abandoned by the end of the nineteenth century.<sup>20</sup> It has been revived, however, by fiscal exchange theorists who emphasize liberty: The "tax system should resemble a voluntary exchange economy in which prices reflect consumer[s'] willingness to pay. . . ."<sup>21</sup> By treating the tax system like the market economy, this theory limits the size of government.

Sacrifice theories of taxation, based on utilitarianism, attempt to maximize aggregate happiness or utility, using income as the measure of utility.<sup>22</sup> There are three major types of sacrifice: equal, proportional, and minimal. Equal sacrifice requires each taxpayer

19. Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 455 (1952) (quoting 2 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 806 (Ashley's ed. 1923)). See also Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 491-97 (1987) (the wealthy may receive greater benefits from government than the poor).

As to benefits taxation, Richard Epstein states that "[t]o insist that classic public (non-divisible, non-exclusive) goods provide equal subjective benefits, much less benefits that exceed tax payments, is entirely inconsistent with our (indeed any) system of organized government." RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 295 (1985). What is relevant for determining the justness of the tax, he says, is whether the "tax produces a disproportionate impact and whether it enlarges the overall pie." *Id.* A proper tax structure seeks to minimize the discrepancy between tax costs and benefits. *Id.* at 298-99.

20. See John F. Witte, *Tax Philosophy and Income Equality*, in VALUE JUDGMENT AND INCOME DISTRIBUTION 340, 350 (Robert A. Solo & Charles W. Anderson eds., 1981); see generally EDWIN R.A. SELIGMAN, *ESSAYS IN TAXATION* (10th ed., 1925).

21. James A. Dorn, *Introduction—The Principles and Politics of Tax Reform*, 5 CATO J. 361, 366 (1985). See also Walter Hettich & Stanley Winer, *Blueprints and Pathways: The Shifting Foundations of Tax Reform*, 38 NAT'L TAX J. 423, 432 (1985).

22. As John Witte has said, "Since taxation considered apart from benefits constitutes lost utility, utilitarian-based theories are expressed in terms of sacrifice." Witte, *supra* note 20, at 350. This portion of this Article relies heavily on Witte's excellent summary of utilitarian and ability to pay theories, *id.*, and on a similar summary found in Blum & Kalven, *supra* note 19, at 455-486.

to pay tax in an amount such that each loses the same amount of utility. Thus, if before taxes, A had six utiles and B had two, the tax would consume the same amount from each, say one utile, leaving A, after-tax, with five utiles and B one. Proportional sacrifice requires that the after-tax ratio of utility equal the pre-tax ratio. Under proportional sacrifice, in the above situation the pre-tax ratio of 3:1 would remain the same after taxes. Minimal sacrifice requires that the tax minimize the aggregate amount of sacrifice by society. Thus, assuming the marginal utility of money declines, those with more money will always pay more in absolute dollars than those with less money. Minimum sacrifice theory, followed to its logical extreme, leads to the leveling of incomes, a result at odds, as will be shown, with the concept of liberty, many theoretical concepts of equality, and the popular tradition.

The difficulty, if not impossibility, of making interpersonal comparisons of utility creates well-known problems for utilitarian principles. For example, even if we agree that the utility of money declines, we do not know the rate at which it declines. Consequently, it is impossible to determine equal and proportional sacrifice. The uncertainty of the rate of decline is immaterial for minimum sacrifice since any rate of decline requires that those with larger incomes pay the tax until incomes have equalized.<sup>23</sup>

Optimal taxation, a recent theory, is also based on utilitarianism, but in a more complicated way than sacrifice theories. Through a complex methodology it takes into account the disincentive to work caused by taxation, and accommodates some welfarist concerns about guaranteed or minimum incomes.<sup>24</sup> Through economic

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23. No matter what the rate, so long as marginal utility always declines, the loss of a dollar to a person with more income (say \$20,000) will be less than the loss of a dollar to one with less income (\$10,000). While minimum sacrifice avoids the problem of discerning the precise rate of decline, it does not avoid the problem of defining the exact nature of utility and then determining its relationship to money.

24. See Witte, *supra* note 20, at 363-68, for a summary of optimal taxation; see also Bankman & Griffith, *supra* note 18, at 1950-65.

The disincentive to work arises from the substitution effect of a tax increase. Any tax has two conflicting effects: a substitution effect and an income effect. When taxes rise, a taxpayer will substitute leisure for work because she gets to keep less of her income than before the tax increase. On the other hand, under the income effect a taxpayer needs to increase her work when taxes rise to maintain her standard of living; without increased work, take-home pay will decrease. It is generally believed that secondary earners are more subject to the substitution effect—and thus more likely to have a disincentive to work in the face of taxes—than primary workers. See, e.g., Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1038-39 (1993). To the extent that

modeling, the theory attempts to determine an ideal tax that will maximize both tax and welfare.

The faculty theory of taxation holds that taxation should be based on one's ability to pay. The exact meaning of the "ability to pay" concept has varied over its long history.<sup>25</sup> In earlier times when most wealth was held in the form of real or personal property, property provided an appropriate measure of the ability to pay. In an industrialized society, however, income became a more appropriate measure of ability because wealth was held in intangible as well as tangible forms. Using income to calculate "ability to pay," however, presents several problems.

The first problem concerns the marginal utility of money. Although most people agree that marginal utility declines, there is disagreement as to how fast it declines. Differing curves argue for differing tax rates. For example, a steep decline has been used to justify a graduated or progressive tax rate rather than a proportionate or flat rate. However, as with the sacrifice theory, the impossibility of determining the exact rate of decline creates the same problem of uncertainty. Even if the rate of decline were ascertainable, there would still be a problem. We would need to know something about the needs of A and B before we could determine their ability to pay. If A had a spouse and three children to support and B had no dependents, then how much greater would be A's ability to pay than B's? Even if A and B both had no dependents, would A's *ability* to pay be greater than B's if A were earning the maximum per hour that the market will pay given her abilities but B had the education and skills to earn \$200,000 as a heart surgeon but had chosen a less stressful job that pays only \$50,000 (or chose to work part-time so she could wind surf)? What if A's income were earned through her labors, but B's were all investment income and she sat and ate bonbons all day?

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people work for non-monetary reasons such as prestige, self-esteem, and interest, a tax produces no work disincentive.

25. For a history of the theory, *see, e.g.*, SELIGMAN, *supra* note 20; Alfred G. Buehler, *Ability to Pay*, 1 TAX L. REV. 243 (1946). The first of Adam Smith's four maxims of taxation—equality, certainty, administrability, and efficiency—states:

The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.

2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 825 (R.H. Campbell & A.S. Skinner eds., Liberty Classics, 1981) (1776) (Book V, Ch. II, Part II).

Some theorists believe the best measure of ability to pay is not income but expenditures or consumption, because basing ability to pay on income ignores assets beyond income.<sup>26</sup> Compare A, who has \$50,000 of accumulated wealth and annually earns and spends \$50,000, with B, who spends \$100,000 and owns property worth \$1 million which earns \$50,000 income. Because basing ability to pay on income ignores the extra assets that B has, many people advocate a consumption tax. However, if A spends \$100,000 (dipping into all her savings) and B spends only her \$50,000 investment income, is A's ability to pay higher than B's? Clearly, at a minimum, ability to pay cannot be determined on a yearly basis.

The current dominant basis of taxation, the comprehensive income tax, avoids many of the difficulties of the previous theories by adopting a more practical approach. The comprehensive tax is concerned with two types of equality: vertical and horizontal. Vertical equality ("vertical equity") is based on the idea of ability to pay. It holds that those with a greater income should pay a greater amount of tax. Horizontal equality ("horizontal equity") says that those with equal amounts of income should pay equal amounts of tax. Income is determined under the Haig-Simons all-inclusive definition of income as the the sum of "the market value of rights exercised in consumption and . . . the change in the value of the store of property rights between the beginning and end of the period in question."<sup>27</sup> A uniform tax rate is then applied to all income regardless of its source. Thus, all income is taxed equally, be it earned, unearned, in-kind, cash, or—theoretically—imputed income such as that from owner-occupied homes and owner-provided services. The result of this uniform treatment is, or should be, horizontal equity.

Of course the equity issue is not resolved so easily because it is difficult to determine when two taxpayers are in like situations. Consider, for example, A and B, each earning \$50,000. Are they equal if: (i) A is healthy and B is chronically ill and requires constant expensive medical treatment? (ii) A has three dependents

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26. See, e.g., 2 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 317 (The Colonial Press 1899)(Bk. V, Ch. II); IRVING FISHER & HERBERT W. FISHER, *CONSTRUCTIVE INCOME TAXATION* (1942); NICHOLAS KALDOR, *AN EXPENDITURE TAX* 31 (1958). Modern supporters of a consumption tax also advocate it on both ability to pay grounds and efficiency grounds. See, e.g., William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 *HARV. L. REV.* 1113, 1165-77 (1974) (discussing fairness and efficiency arguments for a consumption-type personal income tax).

27. HENRY SIMONS, *PERSONAL INCOME TAXATION* 50 (1938).

and B none? (iii) A's house burns to the ground? (iv) A earns her income via personal labor and B receives it as investment income? (v) B prefers to eat steak and wear designer clothing while A eats hamburger and shops at a generic brand discount store? Traditionally, the tax code has considered the first three situations unequal and consequently has allowed deductions for them. Income in the fourth situation frequently has been treated differently whereas income in the fifth has not. Once the tax code starts making distinctions between equal amounts of income, the requirement that income from all sources be treated equally becomes meaningless.<sup>28</sup>

### C. General Theories of Justice

General theories of justice, by virtue of their generality, affect all aspects of society. Consequently these theories create—in broad strokes at least—the framework of a just tax system. The vagueness of most theories' tax framework means that often one general theory can suggest more than one tax system. Utilitarianism, for example, as discussed in the prior section, supports the sacrifice theory of taxation with all its variations and difficulties. Moreover, utilitarianism also is involved in the ability to pay and optimal tax theories. This section briefly examines two general theories of justice and their implications for taxation: Robert Nozick's libertarian theory, and John Rawls' maximin or difference principle.

#### 1. Robert Nozick's Theory

Robert Nozick's *Anarchy, State, and Utopia* exemplifies the conservative libertarian philosophy which underlies the fiscal exchange theory of tax.<sup>29</sup> Nozick's theory of justice is procedural, emphasizing freedom or liberty. His stress on procedure justifies unequal distributions: An unequal distribution is just if the method which produces it is just.

Nozick's premise is a Lockean conception of entitlement, but with a very important modification. According to Locke, the rights of the individual precede the state, whose function is to provide such services as are necessary (such as protection of person and

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28. The various theories of taxation described above are based on differing conceptions of fairness. Some emphasize liberty, others equality. Both concepts have varied meanings which are examined in Part II, *infra*.

29. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). See also EPSTEIN, *supra* note 19, at 5-6 (private property and personal liberty exist prior to the state and it is the state's function to protect them). For another view of property which differentiates between fungible property and property connected to a person's sense of identity, see MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 11-18 (1993).

property) to enable the individual to flourish. The individual has a natural right to his body and, as a consequence, has a natural right to the fruits of his labor and to any property with which he has commingled his labor. This entitlement is limited by Locke's proviso that a person may appropriate property only if his appropriation does not disadvantage another. In other words, I may appropriate some of good X only so long as enough X is left for others.

In today's world of scarcity, the proviso not to disadvantage others would prevent the appropriation of most property. Nozick avoided this problem of scarcity by modifying the proviso to state that a person may appropriate X even if no more X is available to others so long as others can still improve their situations in other ways.<sup>30</sup> "The crucial point," according to Nozick, "is whether appropriation of an unowned object worsens the situation of others."<sup>31</sup> In short, Nozick's interpretation of the Lockean proviso supports economic efficiency principles or at least wealth enhancement, if not wealth maximization.<sup>32</sup>

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30. NOZICK, *supra* note 29, at 175. *But see* JOHN L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 174-78 (1977) (concluding that although there should be laws governing the ownership of property, there is no "natural" property law); John Christman, *Can Ownership Be Justified By Natural Rights?* 15 *PHIL. & PUB. AFF.* 156, 174-75 (1986) (answering the question posed by the title in the negative).

31. NOZICK, *supra* note 29, at 175. Even if all property is appropriated, Nozick suggests that the system is legitimate if others are not worse off than they would be in a state of nature. *Id.* at 177. Henry Sidgwick stated that private property based on one's labors is permissible even though it diminishes another's opportunities because this inevitable diminution of opportunities is adequately compensated; . . . the appropriation by first comers of the 'spontaneous gifts of nature' [land] is not substantially unfair to those who come after, because though they find the land and its produce appropriated, they are placed in a better position than they would be in if there had been no appropriation.

HENRY SIDGWICK, *THE PRINCIPLES OF POLITICAL ECONOMY* 502 (3d ed. 1901).

32. Thus, as Geoffrey Miller states, the Lockean proviso as revised by Nozick 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 . . . .

Geoffrey Miller, *Comment: Economic Efficiency and The Lockean Proviso*, 10 *HARV. J.L. & PUB. POL'Y* 401, 410 (1987). Richard Epstein also uses efficiency arguments to support private property. *See, e.g.,* EPSTEIN *supra* note 19, at 3-5. There are different definitions of "efficiency." Under Pareto efficiency no person can be made better off without someone else being made worse off. Kaldor-Hicks, or potential Pareto efficiency, states that a transaction is efficient if there are in the aggregate more gains than losses. Wealth is maximized because the winners could compensate the losers so that no one would be worse off. While Pareto efficiency requires an *actual* voluntary exchange, the Kaldor-Hicks definition does not. The Nozickean version of the Lock-

The Nozickean theory, based on an entitlement to private property as a prerequisite for liberty and human flourishing, mandates a free-market system. Since the right to property includes the rights to use, possess, and dispose of the property,<sup>33</sup> freedom of contract is necessary. Under Nozick's theory the state has a claim on a person's goods only in two instances. First, the individual must pay his share of the expenses of providing a minimal state. Second, through a principle of rectification, the state may remove property from an individual who has obtained it improperly—such as through theft. If a person has rightfully obtained his property, the state may not appropriate one person's property to help another—taxation to redistribute wealth, therefore, is blatantly wrong.<sup>34</sup>

While Nozick recognizes that the lack of equality of opportunity may seem both unfair and unfortunate, he generally opposes equality of opportunity because it interferes with liberty and legitimate property entitlements:

The major objection to speaking of everyone's having a right to various things such as equality of opportunity, life, and so on, and enforcing this right, is that these "rights" require a substructure of things and materials and actions; and *other* people may have rights and entitlements over these.<sup>35</sup>

Nozick's system of entitlement argues for taxation at a flat, low rate. Because of its focus on individual rights, logically this theory supports a limited view of government, and therefore a minimal amount of tax.<sup>36</sup> Moreover, redistribution is a prohibited tax function because it contradicts this entitlement theory.

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ean Proviso implements Pareto superiority, not Pareto optimality: It may be true that my appropriation of an object, X, will not make you worse off. Thus, my appropriation is Pareto superior to neither one of us appropriating X. However, my appropriation may not be Pareto optimal (and therefore efficient) since your possession of X might be more socially useful than mine.

33. See EPSTEIN, *supra* note 19, at 58-59. See also RADIN, *supra* note 29, at 121-22, and *infra* notes 62-64 and accompanying text.

34. Nozick even went so far as to state that "taxation of earnings from labor is on a par with forced labor." NOZICK, *supra* note 29, at 169. He did comment, however, that he was unclear as to whether such taxation equaled forced labor or was merely similar to it. *Id.* at 169 n.\*.

35. *Id.* at 238 (emphasis in the original).

36. It is theoretically possible that people who believe in the entitlement theory also believe in many governmental functions. Cf. EPSTEIN, *supra* note 19, at 99-100 (a tax is a taking and therefore subject to the eminent domain clause; legitimacy of tax therefore rests on "[t]he justifications available for all other forms of taking: police power, consent, and compensation . . ."). Epstein believes that although a direct correlation between governmental benefits and tax burdens is impossible, a flat tax is

Nozick recently softened the absolutism of his entitlement theory by suggesting that a limited inheritance tax may be justified. Such a tax would allow a person to bequeath whatever wealth she had earned but none of the wealth she had inherited herself.<sup>37</sup> Nozick's concession in the inheritance area implies a recognition of the limits of his theory. It also exposes a fundamental weakness: under his theory, entitlement ultimately rests on the acquisition of property through labor. Once he admits that entitlements to inherited property may be limited because it is unearned, other types of non-earned, legitimately-held property are open for redistribution purposes—such as lottery winnings.

If the legitimacy of redistribution depends on whether income is earned, the definition of "earned" becomes crucial. For example, does it depend on the amount of time, effort, quality, or other factor one puts into work, or is it simply market driven? If earned income is based on individual criteria such as effort, one must differentiate between those criteria and luck. When businessman A "earns" \$100,000 a year and B "earns" only \$75,000, is the difference due to individual merit or luck? Some studies suggest that very frequently the disparity in income is due to luck.<sup>38</sup>

## 2. Rawls' Theory of Justice

The touchstone of modern general theories of justice is John Rawls' *Theory of Justice*.<sup>39</sup> Under his conception of justice as fairness, starting from its "original position" behind a veil of ignorance, there are two principles of justice:

- a. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

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better than a progressive one because it minimizes the discrepancy between the two. *Id.* at 298. Furthermore, progressive taxation increases the chance of an impermissible taking. *Id.* at 299.

37. ROBERT NOZICK, *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* 30-31 (1989). *But see* EPSTEIN, *supra* note 19, at 303-05 (progressive transfer taxes are impermissible takings); Elliott M. Abramson, *Philosophization Against Taxation: Why Nozick's Challenge Fails*, 23 ARIZ. L. REV. 753 (1981) (general critique of Nozick with respect to taxation).

38. *See* Gian Singh Sahota, *Theories of Personal Income Distribution: A Survey*, 16 J. ECON. LIT. 1, 7-9 (1978) (tracing the development of stochastic theory).

39. RAWLS, *JUSTICE*, *supra* note 16. For a more recent elaboration in which Rawls places his theory more overtly in a political context, see RAWLS, *LIBERALISM*, *supra* note 4, at 289-371 (concerning basic liberties and their priority).

b. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society [the maximin or difference principle].<sup>40</sup>

According to these two principles, Rawls states: "All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored."<sup>41</sup> The Rawlsean difference principle permits fairly earned inequality of incomes because aiding the least favored requires significant, long-term capital accumulation.<sup>42</sup> Some capital accumulation raises the standard of living for current and succeeding generations, and therefore justifies income inequality to the extent necessary to bring "about the full realization of just institutions and the fair value of liberty."<sup>43</sup>

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40. RAWLS, LIBERALISM, *supra* note 4, at 5-6. Rawls writes that "the equal basic liberties in the first principle of justice are specified by a list as follows: freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law." *Id.* at 291. Such basic liberties can be limited or denied only when two liberties conflict, not simply to improve economic growth and efficiency or to help the least well-off. *Id.* at 294-95.

The veil of ignorance is a figurative limitation on information whereby parties to a discourse are allowed to know neither the social position of those whom they represent, nor the comprehensive doctrine of such persons. *Id.* at 24-25. The concept has also been used—prior to its use by Rawls—to support utilitarianism; for example, because a person would not know how well-off she would be, she would rationally choose a system which maximizes total utility, because it maximizes the average amount of her expected return. Louis Kaplow, *A Fundamental Objection to Tax Equity Norms: A Call for Utilitarianism*, 48 NAT'L TAX J. 497, 502-03 (1995). This, of course, assumes that people are risk neutral. Kaplow, in defending a utilitarianism norm against an equitable norm, says that an equitable norm should not hinge on individual preferences. *Id.* at 500.

41. RAWLS, JUSTICE, *supra* note 16, at 303.

42. *Id.* at 285.

43. *Id.* at 290. Accumulation beyond that, says Rawls, is "more likely to be a positive hindrance, a meaningless distraction at best if not a temptation to indulgence and emptiness." *Id.* Incomes and wages are fairly earned or "just once a (workably) competitive price system is properly organized and embedded in a just basic structure." *Id.* at 304.

In his justification of capital accumulation as necessary to general progress for all society, Rawls is reminiscent of Andrew Carnegie. See, e.g., ANDREW CARNEGIE, *Popular Illusions About Trusts*, 60 CENTURY MAGAZINE 143 (May 1900), reprinted in *THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS* 78, 81-83 (Edward C. Kirkland ed., 1965).

Under Rawls' theory, the role of taxation is to maintain a just distribution of income in two respects. First, taxation has a non-revenue raising function: "gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity."<sup>44</sup> Since unequal inheritances endanger both political liberty and equal opportunity, inheritance taxes are appropriate.<sup>45</sup> Rawls notes that unequal inheritance of wealth is "no more inherently unjust than the unequal inheritance of intelligence."<sup>46</sup> What is important for both is that any or either inequality meet his difference principle: the inequality is allowable if it helps the least well-off and does not encroach upon liberty and opportunity.<sup>47</sup> Inherited wealth must be redistributed because inheritance restricts liberty by creating centers of power that devalue representative government and restrict opportunity by limiting access to equal education and cultural growth.

The second function of taxation is to raise revenue to pay for necessary public goods and transfer payments to the least well-off in a just manner. Rawls has little to say about this function. He merely suggests that a flat or proportional expenditure tax

may be part of the best tax scheme. . . . [A flat tax] is preferable to an income tax of any kind at the level of common sense precepts of justice, since it imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes (assuming here that income is fairly earned).<sup>48</sup>

Rawls' support of an expenditure tax is flawed because he ignores how a person controls and gets advantages from funds that he owns but does not consume. In addition to the unfair social and political power one obtains through ownership of earned wealth,<sup>49</sup> a person's investment decisions may yield more personal gains than

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44. RAWLS, JUSTICE, *supra* note 16, at 277. Very little has been written on the application of Rawls' theory to tax. Examples include Byrne, *supra* note 19, at 774-78, and Charles R. O'Kelley, Jr., *Rawls, Justice, and the Income Tax*, 16 GA. L. REV. 1 (1981).

45. The exact limits of such a tax are a political issue—not one for a theory of justice. RAWLS, JUSTICE, *supra* note 16, at 278. Presumably a gift tax would also be appropriate.

46. *Id.*

47. *Id.*

48. *Id.*

49. Ownership of earned wealth poses the same threat to liberty and opportunity as inherited wealth. See *infra* notes 86-91 and accompanying text for discussion of the threats posed by inherited wealth.

gains for the common good. Rawls assumes that economic growth (a product of the investments) will further the common good. This is not necessarily so—the rich can get richer while the poor get poorer.

Finally, although Rawls recognizes that a progressive rate may be necessary to maintain liberty and opportunity,<sup>50</sup> he relegates the issue of the exact character of the progression to the political arena. However, the rates may have to be so high to accommodate the minimum welfare of the least well-off that such a tax is totally impracticable. Unlike Nozick, Rawls thus believes that because a just tax considers the pre-tax distribution, redistribution is a valid tax function.

Rawls recognizes that his ideal methods of taxation are applicable only in an ideal world. In an existing world with unjust institutions and conditions, he accepts that even a highly progressive income tax may be justified.<sup>51</sup> Rawls, by his own admission, offers no advice regarding the most just tax for twentieth century America because even those who think the system is generally fair—or the fairest in existence—would admit presumably that America is not a perfectly just society.

## II. American Political Tradition, Distributive Justice, and A Fair Income Tax

As the survey of theories in Part I indicates, there is no single principle of distributive justice upon which all theorists agree. However, common norms of distribution include:

1. equal lots (per capita);
2. investments or inputs (such as education, capital, time);
3. needs;
4. ability;
5. effort;
6. market supply/demand;
7. requirements of common good (general welfare);
8. ascription (characteristics such as age, physical condition, sex, race); and

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50. RAWLS, JUSTICE, *supra* note 16, at 278-79.

51. *Id.* at 279 ("In practice, we must usually choose between several unjust, or second best, arrangements; and then we look to nonideal theory to find the least unjust scheme."). Rawls is not particularly concerned with taxation since it generally is not involved in issues regarding basic rights and political liberties. See RAWLS, LIBERALISM, *supra* note 4, at 214.

9. luck.<sup>52</sup>

Different formal theories of justice emphasize different norms. Rawls, for example, focused on general welfare requirements while Nozick emphasized investment inputs and personal merit factors, such as ability. To varying extents the American public accepts *all* of these norms as morally just; nevertheless, we do not evaluate all situations by the same one. For example, distribution according to need—the classic Marxist criterion<sup>53</sup>—occurs in the public sphere in the form of general welfare programs such as those that help the poor. Distribution according to effort is a common criterion in the home and to some extent in school, but not in the market.<sup>54</sup> A common distributive norm in the market is supply and demand: A person “deserves” to get the market price—that price another is willing to pay for the proffered good or service.<sup>55</sup> Even ascriptive criteria such as race, age, and gender, that are generally invalid, have validity in limited situations such as in social security or other age-based retirement programs.<sup>56</sup>

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52. See, e.g., HOCHSCHILD, *supra* note 17, at 47-82 (analyzing six “norms of distributive justice”); SCHER, *supra* note 15, at 6-7 (listing fifteen “desert bases”); Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?*, 31 J. SOC. ISSUES 137, 139 (1975) (listing eleven “key values” which underlie distributive justice). Ronald Dworkin supports an equality of resources, not general welfare. See generally Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987).

53. Walzer rightly notes that the first part of the Marxist credo—“from each according to his ability”—is also a distributive principle which at times conflicts with the second half of his credo of distributing according to needs. WALZER, *supra* note 4, at 25.

54. See, e.g., KEITH JOSEPH & JONATHAN SUMPTION, *EQUALITY* 71-72 (1979). They state that rewarding the *effort* of the producer occurs at the “direct expense of the consumer, and since the consumer’s money is the product of his own work, the rewards of his effort are correspondingly reduced.” Therefore, distribution by effort in the market can occur only if one part of the population subsidizes the other.

55. Walzer, however, states that to conceive of price as “desert” because it reflects the value of the goods or services to others “is to misunderstand the meaning of desert. Unless there are standards of worth independent of what people want (and are willing to buy) . . . there can be no deservingness at all. We would never know what a person deserved until we saw what he had gotten.” WALZER, *supra* note 4, at 108.

Walzer, nevertheless, accepts the fairness of market distribution as long as it is limited to the commercial sphere only: “The morality of the bazaar belongs in the bazaar. The market is a zone of the city, not the whole of the city.” *Id.* at 109. Cf. Heather Milne, *Desert, Effort and Equality*, 3 J. APP. PHIL. 235 (1986). There is a difference, Milne says, between merit and desert. One may merit something based on natural ability or attributes but “a person cannot be deserving of praise or reward without trying.” *Id.* at 240.

56. Race- and gender-based affirmative action programs raise the issue of whether race and gender are ever valid criteria or whether the law always must be color- and sex-blind. Critical Race Theory in fact states that race does and should matter in all

Distribution criteria generally fit within one of two basic principles: the principle of equality or the principle of differentiation. The criteria of equal lots and needs, for example, fit the former and the criteria of ability and effort fit the latter. In general, distributions based on equality will contradict distributions based on differentiation that stress liberty. The two, however, can produce the same result if the method of differentiation (investment, for example) is based on a factor held equally by all.

Commentators have noted that people generally use the principle of equality in their family lives, but they use the principle of differentiation in the economic sphere.<sup>57</sup> Therefore, for example, the uneven distribution of an inheritance between siblings seems unjust, whereas an unequal distribution based on earnings does not. Even within the economic sphere, however, we do not use only a principle of differentiation. For example, people's judgments will differ about a distribution of \$50,000 income to A and \$1 million to B according to whether the income is the result of personal labor, a gift, a passive investment, or luck. Even within one sphere we often evaluate an allocation of goods according to several criteria of a particular principle.<sup>58</sup> Some factors, such as investment, ability, and effort, carry more weight than others. Americans frequently concentrate on desert norms (broadly defined as contribution—be it ability, effort, or performance) as well as on need and strict equality.<sup>59</sup>

We use this mixture of principles and criteria (and in which situations) because they are connected to the twin foundations of our nation, equality and liberty,<sup>60</sup> which in turn are connected to our

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aspects of the law. Barbara Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 955-56 (1993). For a survey of Critical Race Theory articles, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

57. HOCHSCHILD, *supra* note 17, at 47-48.

58. See, e.g., *id.* at 106-11. Beliefs about justice thus are "pluralistic" in the strong sense that more than one criterion is used in a single situation as well as in the weaker sense of there being one different principle for each different domain. See David Miller, *Distributive Justice: What the People Think*, 102 ETHICS 555, 558-59 (1992).

59. See Miller, *supra* note 58, at 569.

60. Alexis de Tocqueville, early in our history, declared equality to be our "principle [sic] passion," 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 504 (George Lawrence trans., Doubleday, 1969) (1835), *quoted in* William Kristol, *Liberty, Equality, Honor*, in *LIBERTY AND EQUALITY* 125, 136 (Ellen Frankel Paul et al. eds., 1985), but others see liberty as the dominant force. While some see the two principles as compatible, others view them as in conflict. See, e.g., Werner J. Dannhauser, *Democracy in America*, in *LIBERTY AND EQUALITY* 141, 156-57 (Ellen Fran-

sense of morality, which I have labeled moral economic individualism. This Part examines distributive justice in the context of the American political experience. First it surveys various concepts of liberty and equality. Next it describes our tradition of moral economic individualism which gives special force to conceptions of liberty and equality.

### A. Liberty

The Declaration of Independence proclaims that we have an "unalienable" right to liberty. Although liberty has many meanings, the most common, traditional meaning in America is freedom from coercion.<sup>61</sup> Liberty in this popular sense is a negative liberty because it means freedom *from* intentional restraints (or coercion) by others—exemplified by our constitutional rights to freedom of speech and assembly, and protection against warrantless searches.

Negative liberty is inextricably connected to private property, the free market, and principles of economic efficiency. Because negative liberty requires that a person be able to use his body, and by extension that property over which he gains control, free from the constraints of others, it requires a system of private property which assigns complete (or almost complete) ownership to individuals. Without such individual ownership, a person's use and enjoyment of property would be contingent on another's will.<sup>62</sup> Moreover, private property is the most efficient way of assuring the fullest development of the self—the goal of liberty—because the individual can best determine his own interests.

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kel Paul et al. eds., 1985). The confusion as to how these principles relate to one another stems from the fact that each principle has many different conceptions.

61. See, e.g., R.M. Hare, *Liberty and Equality: How Politics Masquerades as Philosophy*, in LIBERTY AND EQUALITY 1, 1 (Ellen Frankel Paul et al. eds., 1985). Isaiah Berlin states that there are over 200 conceptions of liberty, but he deals only with the two most used: positive and negative liberty or freedom. ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 121 (1969). The dominance of negative liberty has recently been critically scrutinized in the legal field. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2342 (1990) (critiquing "conventional wisdom" of a constitution based on negative liberty as being based on "questionable" and "anachronistic" assumptions).

62. See, e.g., Jan Narveson, *Equality vs. Liberty: Advantage, Liberty*, in LIBERTY AND EQUALITY 33, 55-56 (Ellen Frankel Paul et al. eds., 1985). But see RADIN, *supra* note 29, at 53-55 (certain property is so personal that it should be treated differently from fungible property, which is property with which the individual has a less personal involvement).

The right to private property also has a moral basis that emanates from the Protestant Ethic tradition. See *infra* notes 84-87 and accompanying text.

Private property and the liberty to pursue one's own interest also increases others' ability to flourish. When individuals pursue their self-interest, they stimulate economic development, causing the proverbial pie to grow (the expanding pie theory), giving everyone a bigger slice. Thus, according to this view of liberty, the free market system is not only the best system to maximize liberty, but it is the most efficient way to maximize benefits.<sup>63</sup> Despite recent statistics that undermine the expanding pie theory, libertarians still can justify a free-market, private property system on the grounds of wealth maximization: Since winners' gains exceed the losers' losses (and the winners could hypothetically compensate the losers), society remains better off.<sup>64</sup>

Negative liberty conflicts with most meanings of equality. For example, allowing individuals with varying degrees of talent, skills, needs, desires, and effort to pursue their self-interests inevitably will create inequalities of wealth, income, and satisfaction. Nevertheless, negative liberty is founded on a type of equality—equality of respect or concern for each individual's right to liberty. Equality of respect supports political equality—each individual has equal rights to negative liberty vis-à-vis the government and other individuals. This political equality is contained in many of our constitutional rights such as the right to vote, to speak freely, and to travel.

Liberty also has a positive aspect which leads more directly towards equality. Positive liberty is a freedom

to be [one's] own master, . . . to be the instrument of [one's] own, not of other men's, acts of will . . . to be a subject, not an object; to be moved by reason, by conscious purposes, which are [one's] own, . . . to be . . . a doer—deciding, not being decided for, self-directed and not acted upon by external nature or by

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63. The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations.

1 SMITH, *supra* note 25, at 540 (Book IV, Ch. V, Part II). Robert Nozick's entitlement theory turns Locke's theory of property into an economic efficiency principle. See *supra* text and notes immediately following note 31.

64. See, e.g., RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 90-91 (1981). The widening gap in income equality in the 1980s and 90s has raised economists' fears, however, that the income gap hurts growth. See, e.g., Editorial, *Attack the Income Gap at Its Source*, *BUSINESS WEEK*, Aug. 15, 1994, at 76.

other men as if [one] were a thing, or an animal, or a slave incapable of playing a human role.<sup>65</sup>

According to Isaiah Berlin, positive liberty answers the question "By whom am I governed?" while negative liberty answers "How much am I governed?"<sup>66</sup> Other theorists define positive liberty as ensuring that the individual has what she needs in order to exercise her liberty.<sup>67</sup> Positive liberty holds that it is meaningless to say that A has the liberty of living wherever he pleases when he does not have the financial resources to purchase any home or if no one will sell to him. Certain requirements are so basic that even the exercise of negative liberty is meaningless without them. It is not enough to be free to do what you wish if you are too ignorant, hungry, or cold to do anything but struggle for survival.

In short, positive liberty states that people have no liberty unless they have a minimum of material goods which permit them rationally to conceive goals and the opportunities to achieve them; mere struggle for survival is not liberty. Under positive liberty, people have a right to some private property since it is necessary for their moral development and for real autonomy.<sup>68</sup> Berlin would call these provisions of goods and choices pre-conditions of liberty rather than positive liberty.<sup>69</sup> Thus, even negative liberty points towards a leveling of inequality to the extent that goods must be redistributed from the better-off to the worse-off to ensure that the latter have enough to enable them to be independent actors and that opportunities be available for all to achieve their goals.

Negative liberty, says Berlin, is "a function of what doors, and how many, are open to [the individual]. . . ."<sup>70</sup> In this sense it is

65. BERLIN, *supra* note 61, at 131.

66. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* xliii (1969).

67. Narveson, *supra* note 62, at 51. Accord James M. Buchanan & Loren E. Lomasky, *The Matrix of Contractarian Justice*, in *LIBERTY AND EQUALITY* 12, 17 n.8 (Ellen Frankel Paul et al. eds., 1985) ("Proponents of a conception of positive liberty maintain that person P has the liberty to do x if and only if no one or no social institution constrains P from doing x, and if it is the case that P has the ability to do x (i.e., does not lack the means necessary for doing x).").

68. Jeremy Waldron states that this view that property is a right of man is found in philosophical papers, not in political constitutions, because it would be "very radical" in its requirement that private property not just exist, but be held by every person. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 23-24 (1988). Thomas Jefferson, in fact, proposed in 1776 that Virginia distribute fifty acres of land to every man who did not already own that many. GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 179 (1991).

69. BERLIN, *supra* note 66, at liii.

70. *Id.* at xlvi.

related to equality of opportunity.<sup>71</sup> Positive and negative liberty thus have some common goals, but they also conflict: to increase the positive liberty of the many may restrict the negative liberty of others. Ensuring universal health care, for example, may require restricting others' health care options.

While positive and negative liberty do overlap, their extremes point in opposite directions. Negative liberty validates a principle of differentiation which justifies unequal results or outcomes. Carried to the extreme, however, negative liberty can deny liberty to some people because they lack the political or economic resources to exercise that liberty. Positive liberty permits more equality of access to resources and opportunities, but often at a cost of negative liberty. Each supports "equality," but their definitions of equality differ.

## B. Equality

Equality, like liberty, is fundamental to the United States. Before proclaiming the inalienable right to liberty, the Declaration of Independence asserts that "All men [sic] are created equal." Indeed, the "radicalism" of the American Revolution, according to Gordon Wood, lies in the revolution's abolition of a system of privilege, hierarchy, and patronage and the establishment of a political (and social) system based on equally free and independent men.<sup>72</sup> Whether the principles of equality and liberty conflict depends, in part, on the definition given to each term. Since both principles are foundations of our country, the best definitions, it would seem, would be ones that are compatible with each other.<sup>73</sup>

Equality has a multitude of meanings including equality of opportunity, of results, of resources, of needs satisfaction, of utility; individual or group equality.<sup>74</sup> Some definitions of equality are more democratic than others. Equality based on birth, for exam-

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71. See *infra* notes 79-80 and accompanying text.

72. WOOD, *supra* note 68, at 96-97.

73. Ronald Dworkin states that if the two concepts conflict, equality will always trump liberty because it is "absurd that government should show no concern for the lives of its citizens, and immoral that it should show more concern for the lives of some than of others." Dworkin, *supra* note 52, at 9. There are two ways, he says, to reconcile liberty and equality: liberty is either an instrumental step to achieving equality or it is a "constitutive" part of equality. *Id.* at 13. Under his conception of equality, equality of resources, liberty is a constitutive part of the very definition of equality. *Id.* at 22-24.

74. There are as many fine books and articles on equality as there are on liberty. See, e.g., DOUGLAS RAE ET AL., EQUALITIES (1981); AMARTYA SEN, INEQUALITY REEXAMINED (1992); PETER WESTEN, SPEAKING OF EQUALITY (1990); Ronald Dworkin,

ple, is less democratic than equality based on need, or even merit. Some meanings are dramatically inconsistent with each other. For instance, equality of opportunity holds that so long as each person begins with the same opportunity of obtaining a given end, then differing results are fair. Results or outcome equality, on the other hand, requires that all end up with the same amount. Varying conceptions of equality are illustrated by considering a situation in which there are two people (A and B) in the world and \$1000 to be distributed. Equal opportunity states that so long as each person has an equal opportunity to acquire the \$1000, then the result is fair if A acquires \$1000 and B acquires zero. Equal results demands that A and B each get \$500. Equal needs, on the other hand, might require a distribution of \$700 to A and \$300 to B.

Plato said that there are only two types of equality: numerical and proportional.<sup>75</sup> Numerical—or *strict* equality—is the simplest and perhaps the paradigmatic<sup>76</sup> meaning of equality. This is the sense contained in the political equality mentioned earlier: everyone has equal rights to freedom of speech, religion, the right to vote, and so forth. It is an equality of lots, or *per capita* equality: everyone gets the same (equal) amount of the same goods. Treating everyone the same, however, assumes that everyone is the same. Prohibiting everyone the right to sleep on park benches is equal treatment only in a narrow sense of the words. Similarly, giving everyone wheel chairs, left-handed golf clubs, and bicycles is also equal treatment. Such treatment ignores individual needs, desires, resources, talents, and abilities. Thus strict equality fails to treat individuals with equal concern and respect.

In the tax system, strict or per capita equality results in a poll tax: everyone pays the exact same amount of tax (\$10,000, for example) no matter how much she earned or how much she needs to live on.

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kin, *What is Equality? Part 1*, 10 PHIL. & PUB. AFF. 185 (1981); *Part 2*, 10 PHIL. & PUB. AFF. 283 (1981); *Part 3*, *supra* note 52; and *Part 4*, 22 U.S.F.L. REV. 1 (1987).

Rae points out that there can be only one type of equality in one type of society where policy could easily be based upon equality. Such a society would have the following characteristics: 1) allocations occur only within the society which consists of one class of members, 2) individuals are alike in all aspects, 3) there is a one time allocation of all goods, 4) all goods can be divided into identical parts without decreasing the total value of the whole, and 5) there is "dichotomous" thinking—something is either true or not true. RAE, *supra*, at 6.

75. PLATO, *THE LAWS OF PLATO*, Bk. VI, Ch. 757 (A.E. Taylor trans., 1960). Per capita equality can be viewed as simply a subset of proportional equality where the ratio is always 1:1. Aristotle basically equated proportionality with distributive justice. ARISTOTLE, *NICOMACHEAN ETHICS*, 127-28 (J.A.K. Thomson trans., 1953).

76. See, e.g., WESTEN, *supra* note 74, at 146-55.

When Great Britain recently enacted a poll tax, the public response was outrage—people protested, burned their assessments, and rioted.<sup>77</sup> The paradigm of per capita equality apparently does not hold up in reality.

Under proportional equality everyone does not get the identical amount of a good; rather, each gets an amount proportionate to what she deserves according to a particular standard. The ratio of X goods distributed to Y people must be the same for each person. In other words, people must pay the same percentage. Representative Armev's reference to fairness as "sameness," in the context of proposing a flat 17% tax, was an appeal to proportional equality.

Consider the distribution of 175 pounds of food to 3 people: A, B, and C. Per capita equality says each should get 58 and 1/3 pounds. Proportional equality says that the distribution of food should be determined by reference to a standard such that the proportion or ratio of food to that standard remains constant. If the standard is weight, for example, and A weighs 200 pounds, B weighs 100, and C weighs 50, then A will get 100 pounds of food, B will get 50, and C will get 25. The distribution is proportionate in that there is a constant ratio of 2:1 (weight:food). If the relevant criterion is income, and A's income is \$50,000, B's is \$100,000, and C's is \$200,000, then A will get 25 pounds of food, B will get 50, and C will get 100 (for an income-to-food ratio of 2000:1). If the criterion is moral worth and everyone has the same moral worth, then A, B, and C will get 58 1/3 pounds of food each. In this instance a proportionate distribution is a per capita distribution—everyone gets the same amount. Setting the standard or criterion for determining the distribution is problematic. We are more comfortable with some equalities than with others because we find their standards to be more democratic.<sup>78</sup>

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77. See, e.g., David Connett et al., *Mobs Riot in West End*, THE INDEPENDENT (London), Apr. 1, 1990, at 1; Heather Mills, et al., *Wave of Violence Sweeps Through West End*, THE INDEPENDENT (London), Apr. 2, 1990, at 2 (417 injured, 341 arrested).

Thomas Cooley called poll taxes "odious" in his 19th Century treatise. EPSTEIN, *supra* note 19, at 297 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 613 (5th ed. 1883)). Richard Epstein stated that such a tax is an "illicit redistribution to the rich." *Id.*

78. See Brian Barry, *A Grammar of Equality*, NEW REPUBLIC, May 12, 1982, at 36, 38-39 (review of RAE, *supra* note 74). We find some standards more meritorious than others. According to Aristotle, *democrats* measure merit according to status as a free man so that goods are distributed per capita to all free men; *oligarchs* determine merit according to wealth and social position; and *aristocrats* measure merit according to nobility of birth. WESTEN, *supra* note 74, at 56-57 (citing ARISTOTLE, NICOMACHEAN ETHICS Bk. V, Ch. 3 1131a20-30, ARISTOTLE, POLITICS Bk. V, Ch. 1 1301a27-b5 and ARISTOTLE, POLITICS Bk. III, Ch. 3 1280a).

An early, commonly held American view of equality is equality of opportunity for the individual. Emerson calls this “the most distinctive and compelling element of our national ideology.”<sup>79</sup> This meaning of equality is consistent with positive liberty and with the preconditions necessary for negative liberty. Equality of opportunity is connected fundamentally to the basic revolutionary premise of our country. Implicit in the abolition of privilege and hierarchy is the belief that each individual is as good as the next person and is entitled to the same opportunity to achieve or obtain as every other person. Equality of opportunity will lead to equality of results only if everyone has the same characteristics as well as the same opportunities. If people differ in such qualities as talents, abilities, desires, and effort, these varying characteristics (or inputs) when combined with the uniform input of opportunity will produce different results. These unequal results will be “fair” both under this norm of equality and under the principle of negative liberty since equality of opportunity existed.

Under the norms of equality of opportunity and negative liberty a free market system is the appropriate system to further both liberty and equality if equality of opportunity exists. Such a system treats everyone equally (gives no advantages to anyone) and gives each person maximum liberty. Everyone begins the race at the starting line; how the race finishes depends on each individual’s uncoerced actions and her own particular skill, effort, and desire. If there is not equal opportunity, however, if there are barriers preventing some from getting to the starting line, then—according

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79. RAE, *supra* note 74, at 64 (quoting Emerson); *see also* WOOD, *supra* note 68, at 233-34. Rae points out that there are two forms of “opportunity” equality which are rarely distinguished from each other. “Prospect regarding” equality holds that each has the same statistical probability of attaining X. For example, each person has a 1 in 1000 chance of becoming president of IBM or winning the lottery. “Means regarding” equality requires that the *rules* to obtain X be the same for all. However, because each person has differing talents, skills, etc., the chances or prospects of each person obtaining X will differ. Whereas prospect regarding equality ignores individual differences, means regarding equality allows those differences to determine the outcome and therefore is consistent with the market economy. Rae believes that the “ideological power of equal opportunity . . . lies very largely in the prospect-regarding variant . . .” RAE, *supra* note 74, at 66-67; *accord* WESTEN, *supra* note 74, at 172-73 (giving the example of a track race where there are no formal barriers to participation—equal access to participation under equal conditions (same track, same starting time)—but there is not equal opportunity to win, since participants have different racing abilities). Westen states that equal opportunity is also ambiguous in that it does not mean the *same* opportunity in all respects but merely the same according to a particular standard of measurement such as ability or formal characteristics. Equal opportunity removes particular barriers such as those of race, gender, or ability. The trick is determining which obstacles are relevant. *Id.* at 171-77.

to a recent view of equality—*unequal* treatment is necessary or fair to the extent that such treatment moves the disadvantaged person up to the starting line. This view justifies affirmative action programs designed to get people to the starting line. Of course, one person's equal opportunity is another person's denial of opportunity.<sup>80</sup> Whites or males claiming reverse discrimination, for example, fall into this category.

Equality of needs is the second half of the Marxist dictum "from each according to his ability; to each according to his need." Under this standard, the 175 pounds of food in my earlier example would not be distributed 58 and 1/3 pounds to each of three people; nor would it be distributed according to each person's relative wealth (and ability to purchase the goods) or even according to effort. Rather, the food would be distributed according to the principle of need. Of course, determining the standard of need is difficult. Should need be determined by state of hunger, health, weight, or metabolism, for instance?

A Marxist equality of needs seems adverse to our capitalist nation. Nevertheless, this type of equality is often a determining principle. Certainly, equality of needs exists in the private sphere of family, but it sometimes exists in the public sphere as well. Various social welfare programs, for example, incorporate an equality of need—at least to the extent of providing minimums—for the distribution of food, housing, medical, and even legal care. Examples of these programs are unemployment benefits, supplemental social security, and aid to dependent children. In the tax area, examples include the refundable earned income credit and the non-refundable credit for the elderly and permanently disabled. Equality of need meshes with positive liberty and with equality of opportunity. By meeting basic needs, this equality helps "level the playing field" so that each person can take advantage of opportunities and exercise their freedom.

Equality of contributions requires that outcomes should be proportional to the inputs. Whether the resulting distribution is numerically equal depends on which contributions are deemed relevant. If the contribution is one owned equally by all—such as citizenship—then the resulting distribution of goods will be equal (one person, one vote). If, however, people possess differing amounts of input, then the goods will be distributed unequally.

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80. "When a society creates opportunities by removing obstacles that affect people differentially, it necessarily denies an opportunity to people who benefit from the differential." WESTEN, *supra* note 74, at 177 (citing RAE, *supra* note 74, at 69).

Equality based on effort, for example, does not create the same distribution as equality based on talent or skill: two children may expend the same amount of effort in writing a term paper, but the coherency, depth of analysis, etc., of the papers may vary drastically. Two entrepreneurs may each invest \$100,000, but the first may invest in Edsels and the second in McDonalds. Equality of contribution (by amount) would require that both entrepreneurs earn the same amount on their investments. Equality of contribution (by effort) requires that both students get the same grade and both entrepreneurs receive the same return on investment; whereas equality of contribution (by skill or talent) leads to unequal outcomes. The distribution, of course, may be determined not by individual contribution but by luck.

Equality can be applied at the group level rather than the individual level. Society can require that each individual have equality with every other individual (be it equality of opportunity, results or some other conception of equality) or it can require that the groups as a whole have the same equality.<sup>81</sup> Assume there is \$1 million to be divided up between two relevant groups of people (the Blues and the Greens), and each group has 500 people in it. Individual-results equality requires that each individual receive \$1000; group equality simply requires that the Blues and the Greens as a whole each receive \$500,000. Group equality says nothing about the division of the \$500,000 within each group. Within a group, some individuals might get \$2000 and some might get nothing.

Many other meanings of equality also exist. This discussion merely illustrates the multifaceted nature of the concept of equality. Out of the many possible meanings of the term, the major conceptions of equality held in this country are equality of opportunity, equality of merit, and to a lesser extent, equality of needs. These conceptions draw their strength from the particular, concrete experiences in American history, which in turn have created a deep-seated, widespread tradition in America which is described in the following section.

### C. Moral Economic Individualism

I have argued elsewhere that there exists a tradition in America which I have labeled "moral economic individualism." This tradi-

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81. See, e.g., RAE, *supra* note 74, at 20-38; Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 652-55 (1991); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1597 (1993).

tion has two intertwined strands—one which exalts individualism and its resultant unequal wealth distributions and another which, contradictorily, urges a more equal, “democratic” distribution.<sup>82</sup> At various time periods in our history, the accumulation strand has dominated; at others the more egalitarian strand predominates.<sup>83</sup> The dual nature of the tradition of moral economic individualism limits the reach of each strand and causes constant societal conflict and contradiction as each strand exerts its influence.

The roots of the conflict lie within the three elements which comprise the tradition: 1) a conception of liberty which is primarily the negative “freedom from”; 2) a conception of equality primarily as equality of opportunity and merit; and 3) a moral belief in the virtue of wealth arising from personal effort. This section examines the third—or moral—element since the first two have already been explored.

The moral element which glorifies work and its material rewards is based on what is frequently called the “Protestant Ethic.” This ethic derives from the belief that every Christian had two “callings”: a general one to lead a godly life and a specific one whereby each person serves God through his special calling, or vocation, and thereby serves the common good.<sup>84</sup> Max Weber has described the connection between capitalism and Protestantism, particularly Calvinism, as stemming from the doctrines of election and predestination.<sup>85</sup> Because these doctrines pre-ordained who was saved, a person could not obtain grace from his worldly acts. Nevertheless,

82. Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Towards Wealth and the Income Tax*, 70 IND. L. J. 119 (1994).

83. In the past century, for example, the glorification of wealth accumulation in the Gilded Age of the 1880s and 1890s was followed by more egalitarian concerns of the Progressive Era; the 1920s wealth accumulation was followed by the New Deal programs of the 1930s; the most recent period of rampant accumulation was the 1980's. See Kevin P. Phillips, *U.S. Industrial Policy: Inevitable and Ineffective*, HARV. BUS. REV., July-Aug. 1992, at 117.

84. See, e.g., A DOCUMENTARY HISTORY OF AMERICAN THOUGHT AND SOCIETY 32 (Charles Crowe ed. 1965) (quoting Cotton Mather). For a more detailed discussion of this topic, as well as a source of reading material on the subject, see generally Kornhauser, *supra* note 82.

85. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 103-13 and 151-71 (Talcott Parsons trans. 1976). Although Weber has been criticized by commentators, the idea of a spiritual connection to wealth has become part of the American Myth. See, e.g., CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846, at 29-30 (1991) (“Calvinism also became the spiritual medium of capitalist transformation by sanctifying worldly work as religious duty and wealth as fruit of grace.”); Kornhauser, *supra* note 82, at 125; Kathleen Deveny, *Immigrants: Still Believers After All These Years*, WALL ST. J., July 12, 1994, at B1 (“The American work ethic also has its roots in religious belief.”). On the universalization

a person was obliged to act as if he were one of the elect, or else he was considered to lack faith. One did this through his special calling, by working hard and accumulating wealth not for its own sake but because God created man to work, and through work man glorified God. Wealth was thus a visible sign of God's grace. Industriousness and hard work were virtuous traits and those who became wealthy by exercising these traits were therefore virtuous. Under this view, virtue attaches to wealth only if the wealth is the result of those traits through which man practiced his vocation and thereby glorified God—traits such as hard work, thrift, foresight, and planning. Inherited wealth, therefore, trails no clouds of glory; even Andrew Carnegie was against it.<sup>86</sup> Investment income, even though it is the result of the virtue of thriftiness, does not elicit for its owner the paeans of praise that earned income does—particularly when it is income earned via an entrepreneurial venture.

By now the "Protestant Ethic" has become so ecumenical that the American ethos generally glorifies enterprise and the entrepreneur.<sup>87</sup> People such as John Rockefeller, Andrew Carnegie, and Bill Gates win the praise of both presidents and writers, as well as the admiration of the masses.

Entrepreneurs epitomize the three strains of moral economic individualism: liberty, equality, and morality. Free from coercion by others—especially the government—each individual has equal opportunity to accomplish deeds and acquire goods via the virtuous traits of work, thrift, and planning. The resultant wealth reflects the acquirer's moral worth and expands his liberty because possess-

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of the Protestant Ethic into the American ethic, *see* Kornhauser, *supra* note 82, at 125,157.

86. Andrew Carnegie, *The Gospel of Wealth*, 143 N. AM. REV. 653 (June 1889), reprinted in *THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS* 14, 20 (Edward C. Kirkland ed., 1965).

87. *See, e.g.*, GEORGE GILDER, *THE SPIRIT OF ENTERPRISE* 19 (1984) ("It is the entrepreneurs who know the . . . laws of God. . . . They are the heroes of economic life."). Gilder was the prophet of Reaganomics. Representative Jack Kemp, in connection with the 1986 Tax Reform Act envisioned an America "that liberates people, enterprises, and human capital through a continuing revolution of Democratic capitalism . . ." 132 CONG. REC. E2855 (daily ed. Aug. 13, 1986) (statement of Rep. Jack Kemp (R-NY)). Ronald Reagan also glorified enterprise and the entrepreneur:

Those who say that we're in a time when there are no heroes, they just don't know where to look. You can see heroes every day going in and out of factory gates. . . . There are entrepreneurs with faith in themselves and faith in an idea who can create new jobs, new wealth and opportunity.

AMOS KIEWE & DAVIS W. HOUCK, *A SHINING CITY ON A HILL* 138 (1991) (quoting Reagan's first inaugural address).

ing more material goods creates more opportunities to develop morally and spiritually and to reach his goals.

A person's increased wealth benefits society in general by increasing the liberty and, to some extent, the equality of the less wealthy. This occurs in two ways. First, economic growth is widely—but not universally—believed to trickle down to the poor. A larger pie means a bigger piece for everyone. As Andrew Carnegie noted, large accumulations of wealth allow for the cheap production of goods which makes them more affordable to the poor. This, he said, “does not tend to make the rich poorer, but it does tend to make the poor richer in the possession of better things, and greatly lessens the wide and deplorable gulf between the rich and the poor.”<sup>88</sup> While the past decade's widening gap between rich and poor has shown that economic growth does not inevitably lessen economic inequality, much of society still seems to believe that growth increases liberty, providing a better materialistic basis for exercising free will. Moreover, conventional wisdom holds that the costs of decreasing inequality are high in terms of decreasing economic efficiency (and growth), though recently some economists are changing their views and now “see greater income equality as compatible with faster growth—and perhaps even contributing to it.”<sup>89</sup>

The second way accumulated wealth aids society is through the concept of trusteeship of wealth: the holder of great wealth, according to this theory, does not own the wealth for his own personal benefit but holds it as a steward or trustee for the people. Andrew Carnegie's belief that a person must disperse his wealth during his lifetime in uplifting ways is an example of the stewardship of wealth. The money must be gifted in ways that will help people help themselves, rather than as handouts. Wealth should be used, in other words, to ensure equality of opportunity. Thus, Carnegie urged that the wealthy endow institutions such as libraries and schools.<sup>90</sup> The trustee concept has been criticized for the obvious reason that the owner of wealth receives many personal bene-

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88. CARNEGIE, *supra* note 43, at 83.

89. Sylvia Nasar, *Economics of Equality: A New View*, N.Y. TIMES, Jan. 8, 1994, at 39. For the traditional view, *see, e.g.*, ARTHUR OKUN, *EQUALITY AND EFFICIENCY* (1975); Edgar K. Browning & William R. Johnson, *The Trade-off Between Equality and Efficiency*, 92 J. POL. ECON. 175, 201 (1984) (redistribution via wage rate or earnings subsidies such as the earned income credit may be more efficient than redistributing via a tax-and-transfer system).

90. Carnegie, *The Gospel of Wealth*, *supra* note 86, at 27-28.

fits, including social status, power, and security. Nevertheless, there are still people who endorse this view.<sup>91</sup>

Moral economic individualism—as epitomized by Carnegie, the benevolent entrepreneur—sanctions merit-based outcomes equality. One deserves what she acquires through merit (primarily defined as her skill, talent, and effort) because: 1) liberty declares that the economic race for goods is valuable because it is the uncoerced means to self-fulfillment; 2) equality of opportunity assures that the race is fair, that everyone has a chance; and 3) our morality asserts that the rewards (money, goods) are the result of the virtuous traits of effort, thrift, and foresight and are, therefore, merited.<sup>92</sup>

Merit outcomes equality, however, has contradictory effects. At the individual level, merit equality dictates that each person with equal merit receive equal economic distributions. For the population as a whole, merit equality means that the just distribution of goods will be an unequal one. Those people possessing greater merit—as determined by such criteria as skill, talent, or perhaps risk-taking ability—will receive a greater portion of the proverbial pie. Merit equality is premised on the existence of equal opportunity which can be destroyed by the very wealth inequality that merit equality produces.

Outcomes equality, however, can lead to both great wealth and political inequalities. Wealth inequalities may endanger the liberty of individuals by creating conditions of poverty which prevent some people from acquiring the essential goods necessary for autonomy and self development. Moreover, wealth inequalities are also dangerous to society as a whole. Concentrations of wealth lead to concentrations of power which threaten to undermine the political equality essential to our government. Consequently, our belief in outcomes equality, which leads to wealth accumulations and disparities, is confronted by an opposing urge towards greater wealth distributions. Merit equality thus is tempered both by a needs equality and by a desire to narrow the gap between the outermost distributions. The latter is not a desire for strict or equal lots equality *per se*; it is simply a desire to limit the extremes—to smooth out but not level the distribution patterns.

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91. See, e.g., Eliza Newlin Carney, *Bodies and Souls*, 27 NAT'L J. 2651, 2653 (1995) (discussing George Bush's and Ronald Reagan's stress of voluntary charity).

92. See PETER McCLELLAND, *THE AMERICAN SEARCH FOR ECONOMIC JUSTICE* 25 (1990) (stating these are the reasons people believe that an unequal distribution of goods is fair).

Moral economic individualism, with its two contrasting elements both favoring and opposing great accumulations of wealth, creates multiple norms for distributive justice. Its beliefs in negative liberty and equality of opportunity support a free market system of exchange that permits governmental intervention only when opportunity becomes so unequal that interference is necessary to remedy the imbalance. Negative liberty and equality of opportunity together justify an economic distribution based on merit, with merit usually defined by effort, skill, education, and foresight. Merit equality is tempered, however, by the ideas of pre-conditions of liberty (or positive liberty), needs equality, and fear of concentrations of wealth which can lead to the deprivation of liberty. These ideas argue for a less unequal distribution than merit equality might otherwise produce.

Moral economic individualism's conceptions of liberty, equality, and morality support our present tax system: mildly progressive rates applied to a hybrid income-consumption base which has both earned and unearned income preferences. The analysis of a just tax, it will be remembered, requires that the burdens of revenue raising be distributed fairly. Under some theories, a just tax must do even more; it must also correct for the unjust pre-tax distribution of benefits. For both the (re)distribution of the benefits and the distribution of the burdens, moral economic individualism advocates that the principles of negative liberty, equal opportunity, and merit equality be modified by positive liberty, equality of needs, and by a softening of unequal results to preserve political liberty and equality. Guided by these principles, a just tax system would have a progressive rate since those with more income have more "ability to pay" than those with less income. The graduation, however, would be mild in keeping with the beliefs in liberty, merit equality, and the rewards of effort. It would also support specific provisions in the Internal Revenue Code which help the needy such as the § 32 earned income credit (and especially the proposal to abolish the "earned" requirement), the § 22 credit for the elderly and handicapped, the § 42 low-income housing credit, and the phase-out of credits designed primarily to help the needy (arguably the § 44A child care provisions, for example). The system would have provisions that both favor earned income (again the earned income credit and pension provisions such as §§ 219 and 401, which are based on earned income) and those that generally facilitate the accumulation of wealth for investment purposes (such as capital gains provisions and tax-free exchange provisions such as § 1031

like-kind exchanges and § 368 reorganizations). The simultaneous favoring of capital accumulation and emphasis on earned income creates a somewhat inherently contradictory system which has aspects of both an income and a consumption tax. In short, the tax would look remarkably like our present tax system.

### III. Distributive Justice, the Income Tax, and Empirical Studies

Part II has shown how the concepts of liberty and equality—as viewed through the lens of moral economic individualism—support a complex sense of distributive justice. The overriding principle is one of merit distribution, with merit primarily defined as effort, talent, and ability. This equality of merit leads to a general belief in the justness of economic inequality, but an economic inequality with important limiting principles. First, the unequal distribution must be premised on the availability of equal opportunity. Second, the unequal distribution must be modified by appropriate distributions according to need. Finally, the unequal distribution by merit must be narrowed, but not eliminated, if necessary for the preservation of individual and political liberty.

This Part examines some empirical studies on the subjects of distributive justice and taxation and concludes that the data tend to support the distributive pattern described above. The inherent flaws in the examined data necessitate that any conclusion can be only suggestive. Both opinion polls (surveys) and controlled laboratory experiments, the two types of empirical data examined here, have serious drawbacks. For example, experiments which require subjects actually to distribute goods are marred by the simple fact that they are controlled experiments and not real life. It is one thing to act in a certain manner when a person is in a simplified, controlled environment and another to act in the same manner in the multi-stimuli situation of life. Opinion polls also have major drawbacks whether they are conducted in the form of open-ended or multiple choice questions. For example, subjects say one thing and often do another. Also, results are extremely sensitive to the language used in the survey. How the designer of the poll phrases the possible responses or even the questions affects the ultimate answer.

Tax attitudes are particularly sensitive to the language used in a poll because most people are fiscally ignorant. They fail to make

the "fiscal connection" between taxation and benefits.<sup>93</sup> Consequently, the framing of the question greatly influences the response. For example, questions, phrased in the abstract or in a positive manner produce different results from questions phrased in the particular or in the negative. People are more likely, for example, to favor taxation in general if specific benefits are mentioned and more likely to favor progressive taxation if the question is phrased abstractly.<sup>94</sup>

Ignorance of taxation causes other problems relating to people's attitudes towards taxes. First, the greater the visibility of a particular tax, the more likely it is to be viewed as unfair.<sup>95</sup> This explains why the income tax is more unpopular than a sales tax even though the latter is more regressive.<sup>96</sup> Second, the media's power to affect attitudes is large, since what the media stresses forms a large part of the public's knowledge. For example, the media stresses marginal rates rather than effective rates. This emphasis is reflected in one study that showed the typical citizen will pick as a fair *average tax rate* a rate close to statutory marginal rates (as opposed to the actual effective rate) but will choose in dollars an amount close to the current effective or average rate.<sup>97</sup>

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93. See, e.g., ALAN LEWIS, *THE PSYCHOLOGY OF TAXATION* 42 (1982). The more educated a person is the more likely she is to be fiscally knowledgeable and to have a high income. In general, the higher one's income, the less support one gives to taxing and spending. Nevertheless, there is evidence that people with higher incomes are more willing to pay taxes in order to increase public services. *Id.* at 57.

Of course, ignorance about tax laws generally must affect individual attitudes as well. Treasury Assistant Secretary for Tax Policy Leslie B. Samuels has stated that the current attacks on the tax system are the result of "a great deal of misunderstanding about the system and how it works." Chuck Davenport, *Tax System Under Attack, Samuels Tells Law Schools*, 95 *TAX NOTES TODAY* 9-5 (Jan. 13, 1995), available in WESTLAW, TNT database. To illustrate this misunderstanding, Samuels cited an opinion poll which showed that many people believed a value-added tax has been enacted under the Clinton administration. *Id.*

94. LEWIS, *supra* note 93, at 48 (Lewis provides a chart depicting how to phrase the questions to produce a particular result); Michael L. Roberts et al., *Attitudes Toward Progressive Taxation*, 58 *PUB. OPINION Q.* 165, 185 (1994) (undergraduate tax students favored progressivity when asked abstractly whether a flat or progressive tax was fairer, but favored a flat tax when questioned about two named individuals who earned specific amounts of money).

95. LEWIS, *supra* note 93, at 42.

96. Income taxes, especially federal income taxes, almost consistently are rated less fair. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES* 1-2 (1993). *But see* Tom Herman, *Tax Report*, *WALL ST. J.*, Mar. 22, 1995, at A1 (Louis Harris & Associates poll for Lutheran Brotherhood found sales and property taxes more unpopular than federal income taxes).

97. Michael L. Roberts & Peggy A. Hite, *Progressive Taxation, Fairness, and Compliance*, 16 *LAW & POL'Y* 27, 40-42 (1994). Another problem with tax studies is the

The debate over the income tax occurring as this Article was written also exemplifies the relation of the media to opinions. There are so many sound bites and so much rhetoric that it seems harder than ever to determine the public's true feelings. When a consumption tax is not labeled as such, but merely as a flat tax, it is difficult to determine what the public really favors.<sup>98</sup> As the presidential primaries begin, the rhetoric only increases. The resultant overdose of rhetoric makes current polls even more unreliable than those conducted in less incendiary times.

Another related difficulty with tax opinion polls is the relationship between conceptions of distributive justice and actual distributions. Does the existing distribution affect our normative beliefs or do our normative beliefs affect our perception of reality? How accurate, in fact, is our perception of reality? These questions, the subject of debate in sociology literature, obviously have enormous impact on distributive justice but their resolution is not clear.<sup>99</sup>

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definition of class in America. Many studies formulate questions in terms of tax burdens or income distributions according to upper, middle, or lower income. The problem is that most Americans define themselves as middle class. See, e.g., LARRY HUGICK & LYDIA SAAD, PUBLIC BELIEVES TAXES UNFAIRLY HIT MIDDLE-CLASS, POOR, THE ROPER CENTER FOR PUBLIC OPINION RESEARCH, THE GALLUP POLL 1 (1992):

"Upper-income" may mean "makes more than I do." While 60 percent of those with household incomes over \$50,000 feel that their own taxes are too high, it appears they don't consider themselves to be in an upper-income bracket. This \$50,000 and over group is about as likely as those who earn less to say 'upper-income' people pay too little in taxes (73 percent vs. 78 percent).

*Id.* On the effect of the media, see, e.g., LEWIS, *supra* note 93, at 72-73. V.O. Keys has stated that the interested, knowledgeable portion of the American public rarely exceeds 20% except in times of crisis. *Id.* at 74. The figure is probably considerably lower for such an intimidating, technical, and arcane subject as tax. See also, BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES 355-383 (1992) (Media, officials and experts affect the public's knowledge and often manipulate the public. Nevertheless, the public can and does form rational opinions.).

98. See, e.g., *Washington Wire*, WALL ST. J., Sept. 22, 1995, at A1. ("Republicans increasingly fret that flat-tax proposals may not be so popular once the public understands the specifics."). See *infra* note 123 for results of public polls.

99. See, e.g., Norma Shepelak & Duane F. Alwin, *Beliefs About Inequality and Perceptions of Distributive Justice*, 51 AM. SOC. REV. 30 (1986); Bruce Headey, *Distributive Justice and Occupational Incomes: Perceptions of Justice Determine Perceptions of Fact*, 42 BR. J. SOC. 581 (1991). Headey, using Australian data, concludes that people's perceptions of income distribution do not accurately reflect reality but they do reflect their normative standards. In other words: "a normative standard of equality appears systematically to distort perceptions of reality. What ought to be largely influences perceptions of what is, rather than vice versa. Perceptions of justice determine perceptions of fact." *Id.* at 593.

Interpreting the data is another serious issue. What does it mean, for example, when people believe the deductions for mortgage interest and property taxes are fair? Their belief may reflect their desire to increase housing construction which indicates a self-interested, rational man, efficiency approach to distribution. On the other hand, it may reflect a belief that homeowners have a right to housing subsidies or it may even reflect a belief in a more general right to housing subsidies for all, a needs-based distributive approach.<sup>100</sup>

A final difficulty inherent in tax opinion polls is the complex array of issues involved in this area. These are both political and personal. For example, over a long period of time polls consistently show, with a few exceptions, that people believe the taxes they pay are too high.<sup>101</sup> Why people say this, however, can vary. Partly, it may be a visceral response to parting with money that is "theirs."<sup>102</sup> The response, however, also may reflect people's belief that their taxes are too high *relative* to the taxes paid by others.<sup>103</sup> In other words, a person might not mind paying X dollars of tax so long as others pay their "fair share" and do not get special privileges and loopholes. Partly, the response may arise from a political belief not that the taxes are too high but that they are spent on the wrong programs. More basically, the response may reflect a political belief about the nature (and limits) of government. Because of these many possible rationales for a "too high" response, this type of poll says less about distributive justice principles than may appear at first glance.

Despite the shortcomings of empirical studies, their results do have some evidentiary value when considered as a whole. What emerges from the studies is a general pattern, most notable for

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100. Karyl A. Kinsey et al., *Framing Justice: Taxpayer Evaluations of Personal Tax Burdens*, 25 *LAW & SOC. REV.* 845, 849, 866 (1991). The authors believe that taxpayers use either an outcome processing or a norm-processing frame to evaluate tax fairness. Outcome processing frames assume rational, self-interested individuals, who focus on utilitarian concerns and evaluate fairness based on an exchange theory of costs and benefits whereas norm processing frames use peoples' "normative beliefs about the legal rights and moral obligations of themselves and others." *Id.* at 84. Which frame one uses is affected by the particular tax policy and the individual's situation. *Id.* at 864.

101. PAGE & SHAPIRO, *supra* note 97, at 160.

102. See, e.g., Norbert Lloyd Enrick, *A Pilot Study of Income Tax Consciousness*, 16 *NAT'L. TAX J.* 169 (1963). One person refused to participate in the author's study, stating: "I don't know what my taxes are. I think taxes are far too high, but there is no use worrying about it. No point in knowing exactly what I paid, so long as I know it was too much." *Id.* at 170.

103. See, PAGE & SHAPIRO, *supra* note 97, at 160.

what it lacks. What is lacking is one single overarching principle of distributive justice which applies—undiluted—to all situations. Rather, what emerges is a complex, flexible set of principles which mixes principles of inequality and equality, distributions based on merit and distributions based on need.

Several experimental studies examine subjects' general distributive justice preferences, sometimes taking tax into consideration, sometimes not. Elizabeth Hoffman and Matthew Spitzer, for example, conducted a series of experiments from which they concluded that subjects divided rewards under a "Lockean theory of earned deserts" when the subjects felt they had earned their rewards; subjects divided rewards under an egalitarian theory when the subjects felt there was no moral basis for the rewards.<sup>104</sup> Other experiments, such as those by Norman Frohlich and Joe Oppenheimer, have shown that most people use neither Rawls' difference principle nor any entitlement system exclusively. These studies show that most subjects (more than 75%) use a combined principle of effort and of need. Under these combined principles they maximize the group's average income, but they also institute a floor below which the worst-off cannot fall.<sup>105</sup>

These experimental studies indicate that Americans did not apply a single norm such as the difference principle or merit equality to all situations. Rather, they used mixed principles to justify unequal wealth distributions (distribution according to merit) and to lessen (but not eliminate) by an equality of need that looks beyond narrow self-interest and merit—to need. The experimental results are confirmed by certain opinion surveys, as discussed below.

Americans support the inequality created by merit distributions because of their strong belief in the principle of equal opportunity

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104. Elizabeth Hoffman & Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEGAL STUD. 259, 261, 281 (1985).

105. Norman Frohlich & Joe A. Oppenheimer, *Choosing Justice in Experimental Democracies With Production*, 84 AM. POL. SCI. REV. 461, 463 (1990) ("mixed principle" of maximizing goods for the group is subject to a constraint that the worst off not fall below a predetermined floor is chosen more than 75% of the time). See also Lissowski et al., *supra* note 4, at 100 (citing their own and other studies). Interestingly, in the authors' study both Polish and American groups chose Rawls's difference principle which would maximize the minimum income last. *Id.* at 115.

Some of the experiments actually distributed money while the latter ones merely discussed hypothetical distributions. Nevertheless, the former is not necessarily a more accurate predictor of real-life results since it dealt with extremely limited amounts of money in a very controlled situation where needs criteria were inapplicable. The hypothetical distributions in the other experiments, however, dealt with total income amounts which might reflect other considerations more accurately.

which assures everyone an equal chance to obtain the rewards. They believe in unequal outcomes (varying amounts of income), so long as the process (equal opportunity) gives everyone an equal chance at achieving the wealth.<sup>106</sup> This is not surprising given the tradition of equality and liberty discussed in Part II. The current battle raging over affirmative action is not a fight about whether equal opportunity is a good thing. There is a broad consensus on that issue. The disagreement occurs over whether such opportunity actually exists.<sup>107</sup> If equal opportunity exists, there is no need for governmental "affirmative actions" to promote it; if equal opportunity does not exist, then the question becomes what, if anything, ought society do to create it. While polls show disagreement

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106. A 1993 survey, for example, asked the following question:

Some people think America should promote equal opportunity for all, that is, allowing everyone to compete for jobs and wealth on a fair and even basis. Other people think America should promote equal outcomes, that is, insuring that everyone has a decent standard of living and that there are only small differences in wealth and income between the top and bottom of society. Which do you favor: promoting equal opportunity or promoting equal outcomes?

Q. 243, General Social Survey, Feb. 5, 1993 – April 26, 1993, *available in* WESTLAW, Poll-C Database (search for records containing "National Opinion Research Center" and "equal opportunity" and da(aft 2-4-93)). Responses were as follows:

Equal opportunity	84%
Equal outcomes	12
Other	1
Don't know	3

Cf. The following 1994 survey question:

Which is more important—insuring that each individual has as much opportunity as possible, even if that means some people enjoy far more success than others or insuring greater equality of income, even if that limits individual opportunities?

Give each as much opportunity as possible	73%
Greater equality of income	17
Refused/don't know	9

Reader's Digest/Institute for Social Inquiry, Aug. 8, 1994 – Aug. 29, 1994, Q.0G7, *available in* WESTLAW, Poll-C Database (search for records containing "Institute for Social Inquiry" and "Equality" and da(aft 8-21-94)).

In 1979, however, only 59% of respondents agreed with the statement: "It is all right for the good things in life to be distributed unequally, as long as everyone has an equal opportunity to compete for them." Monitoring attitudes of the Public '79, May 29, 1979 – June 22, 1979, Q 38, *available in* WESTLAW, Poll-C Database (earch for records containing "Yankelovich" and "Equal Opportunity" and da(aft 5-28-79)) (18% strongly disagreed; 23% had no opinion).

107. Polling data on affirmative action is difficult to interpret because people's definitions of affirmative action vary widely. Thus, the manner in which the question is phrased has dramatic effects on the response. *See, e.g.,* Jim Norman, *Politics of the Nineties: America's Verdict on Affirmative Action Is Decidedly Mixed*, 6 THE PUBLIC PERSPECTIVE (Roper Center for Public Opinion Research) 49 (June-July, 1993).

on these two issues (existence of opportunity and governmental action), belief in equal opportunity as an ideal is widespread.

Data on the existence of equal opportunity varies so widely that it is impossible to give precise facts. Several trends seem clear, however. Although the belief in the *existence* of equal opportunity is fairly widespread, the extent has varied over the past decades.<sup>108</sup> Also, belief in the existence of equal opportunity increases as income increases and is higher among whites than minorities.<sup>109</sup> Data on whether Americans as a society ought to do whatever is necessary to achieve equal opportunity is particularly muddy be-

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108. For a while, the extent of the belief decreased. In one 1994 poll, for example, 48% of respondents believed "Americans have an equal chance to succeed in life . . ." (49% did not so believe). Readers Digest/Institute for Social Inquiry, Aug. 22, 1994 – Aug 29, 1994, Q.003, available in WESTLAW, Poll-C Database (search for records containing "equality" and "Institute for Social Inquiry" and da(aft 08-21-94)); accord The Roper Center for Public Opinion Research, *General Social Surveys* Q.387D p. 423 (1990) (49.9% of persons in national poll agreed with the statement "One of the big problems in this country is that we don't give everyone an equal chance." 49.3% disagreed.)

This contrasts with James Kluegel and Eliot Smith's 1988 finding that 70% of people generally believe "there's plenty of opportunity and anyone who works hard can go as far as he wants . . ." JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY 43-44 (1986). They state that their study shows a slight decline in the existence of opportunity, citing a 1952 study showing 88% believed in the existence of opportunity. *Id.* at 44.

109. See, e.g., JOAN HUBER & WILLIAM H. FORM, INCOME AND IDEOLOGY: AN ANALYSIS OF THE AMERICAN POLITICAL FORMULA 171-172 (1973) (studying Anglos & Chicanos). 75% (poor Chicanos) to 100% (middle income Anglos) believed they had the same or better economic opportunities as others. *Id.* at 171. Support for the existence of economic, educational and political opportunity in general ranged from 53% (high-income Chicanos) to 86% (high-income Anglos). Belief in equality in specific fields, however, was significantly lower: 19%–54% for "equal opportunity" of poor and rich, 22%–86% for equal educational opportunity, 16%–54% for ability of rich and poor to influence government equally. *Id.*; accord KLUEGEL & SMITH, *supra* note 108, at 45–49 (using slightly later data and showing slight decline over time in existence of equal opportunity). A recent 1993 poll shows significantly higher belief in the existence of equal job opportunity among whites than blacks (70% versus 30%). However, the percentage of both groups that believed in the existence of equal opportunity was higher than in 1963. C. Gray Wheeler, *30 Years Beyond "I Have A Dream"*, THE GALLUP POLL MONTHLY, Oct. 1993, at 2, 4; accord Roper Center for Public Opinion Research for NBC News, June 8-June 19, 1995, available in WESTLAW, Poll-C Database (search for "equal opportunity" and da(aft 5/1/1995) (74% of whites thought blacks and whites had equal job opportunities but only 25% of blacks).

Part of the reason why earlier polls showed higher rates of belief in the existence of equal opportunity may be that minorities were frequently underrepresented in the polls. For example, one 1986 study which oversampled blacks and weighted results for their proper proportion found that only 30% of respondents believed there were equal opportunities for all. AMERICAN DREAM, Oct. 1986, available in WL, Poll-C Database (search for records containing "Roper Organization" and "equal opportunities" and da (aft 10-86)).

cause negative responses to questions about the necessity of action may reflect either a belief that no actions are necessary because (i) equal opportunity does not exist but such actions are inappropriate for government or (ii) equal opportunity exists and therefore no action is needed.

Nevertheless, support for societal action is consistently high. Ninety percent of respondents in a 1987 poll "completely" or "mostly" agreed with the statement "Our society should do what is necessary to make sure that everyone has an equal opportunity to succeed."<sup>110</sup> By 1994, 91% so agreed, with the percentage completely agreeing rising from 37% to 52%.<sup>111</sup>

Moving from the general to the specific, people often appear to believe in their own specific equal opportunity. One study, for example, found that approximately 70% of people generally believe that there is plenty of opportunity but 90% believed their own opportunity was as good or better than the average.<sup>112</sup> Studies also show that people evaluate the fairness of income and wealth distribution primarily on a principle of liberty by approving outcomes based on merit. Moreover, people tend to attribute their own income to individual merit factors (such as ability) rather than to non-deserving factors such as luck or structural factors, such as political pull.<sup>113</sup>

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110. Gallup Organization for Times Mirror, Apr. 25, 1987 – May 10, 1987, Q.150, available in WESTLAW, Poll-C Database (search for records containing "Gallup Organization" and "Equal Opportunity" and da(aft 4-24-87)).

111. Princeton Survey Research Associates, [PSRA], July 13, 1994 – July 27, 1994, Q.25, available in WESTLAW, Poll-C Database (search for "Equal Opportunity" and "Princeton Survey Research Associates" and da(aft 7-12-94)). These percentages and the trends are fairly consistent. Older respondents seem to favor social action more strongly than the general public. In a PSRA survey of 1510 adults for the AARP from 8-12-92 to 9-08-92, 68% "completely" agreed with the statement, PSRA (for American Association of Retired Persons), whereas a survey a few days later of 1508 adults showed only 53% completely agreeing with the statement. PSRA, Sept. 10-1992 –Sept. 13, 1992, Q55, available in WESTLAW, Poll-C Database (search for "Princeton Survey Research Associates" and "Equal Opportunity" and da(aft 9-9-92)). The difference seems to be that in the survey for the AARP, 35% of the survey population was age 50 or older.

112. KLUEGEL & SMITH, *supra* note 108, at 44-46.

113. See, e.g., KLUEGEL & SMITH, *supra* note 108, at 76-84; Norma J. Shepelak & Duane F. Alwin, *Beliefs About Inequality and Perceptions of Distributive Justice*, 51 AM. SOC. REV. 30, 43-44 (1986); Norma J. Shepelak, *The Role of Self-Explanations and Self-Evaluations in Legitimizing Equality*, 52 AM. SOC. REV. 495, 501 (1987); Sidney Verba & Gary R. Orren, *Rendering What's Due: Views on Income Equality*, 8 PUB. OPINION 48, 52 (1985). Kluegel and Smith, however, found that 64% of their respondents felt inherited money was a "very important" factor in determining wealth. KLUEGEL & SMITH, *supra* note 108, at 77. They also found that the young

Assuming equal opportunity exists, most people favor income inequality. They prefer, however, a less unequal distribution than currently exists.<sup>114</sup> Study results, however, disagree on how people believe that income gap should be narrowed. Some show that people wish to narrow the gap, not by redistributing income from the rich to the poor but by having a minimum, or floor, for lower incomes.<sup>115</sup> Such a belief meshes with what I have described as the prevalent ideology: (i) a belief in equality of economic opportunity, which means that each individual potentially may be rich, (ii) a belief that wealth legitimately earned is an exercise of liberty, and (iii) a belief in the morality of rewarding merit.<sup>116</sup> Another study, however, shows that all groups (except business people) would narrow the gap by decreasing top incomes, not increasing the lowest ones.<sup>117</sup> On the other hand, people do not favor limiting or putting a ceiling on incomes,<sup>118</sup> most likely because such governmental interference conflicts directly with their liberty interest and with the belief that wealth (at least earned wealth) reflects moral worth. Such conflicting results on the preferred method of lessening income inequality may reflect either methodological differences such as the age of the studies, or different phrasing of questions.

The disagreement about how the income gap should be narrowed does not seem to reflect widely disparate principles of distribution. On the contrary, many studies show a basic agreement on general principles of distribution. Most people believe that a just distribution is not based solely on merit but is based on both merit and need.<sup>119</sup> The existence of this dual standard may explain par-

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believed less in individual courses of wealth (or poverty) than older folks. *Id.* at 76, 78.

114. KLUEGEL & SMITH, *supra* note 108, at 121. *Accord* Verba & Orren, *supra* note 113, at 50.

115. Wayne M. Alves & Peter H. Rossi, *Who Should Get What? Fairness Judgments of the Distribution of Earnings*, 84 AM J. SOC. 541, 544 (1978). Support for a minimum floor is a general statement which does not necessarily translate directly into support for specific programs, such as minimum wage.

116. *Cf.* KLUEGEL & SMITH, *supra* note 108, at 165 (probable causes are: 1) optimism that the individual will get rich, 2) wealth is seen as legitimately earned, and 3) belief in the value of income inequality). Note that this failure to support redistribution from the rich conflicts with most people's belief that certain occupations earn too much. *Id.* at 121.

117. Verba & Orren, *supra* note 113, at 50.

118. KLUEGEL & SMITH, *supra* note 108, at 165.

119. *E.g.*, Alves & Rossi, *supra* note 115, at 551; Verba & Orren, *supra* note 113, at 52. These studies showed agreement on the principles of distribution (merit and need) but disagreement on how to lessen inequality. *See supra* note 97. *See also* Fröhlich & Oppenheimer, *supra* note 105, at 463.

tially the differing beliefs regarding the narrowing of income inequality. General agreement on need and merit allows for flexibility in the applications of each standard. Some people may stress need, for example, while others stress merit.

The needs principle requires people to look beyond their own self-interest and their own benefits and burdens and consider others. Whereas the merit principle focuses on self-interest (*I deserve this*), the needs principle causes people to look beyond their own interests to the interests of others.<sup>120</sup> Studies show that most people believe that a just distribution of income takes into account not only an individual's merit (did she deserve the goods?) but also her needs, or at least the satisfaction of her minimum needs.<sup>121</sup> Evidence suggests that most people also believe that the government should satisfy these minimum needs if individuals cannot do so themselves.<sup>122</sup> Given these beliefs, the income tax system is an appropriate vehicle for carrying out the "needs" strand of Americans' sense of distributive justice. In particular, a mildly-progressive income tax that implements a combined efforts-needs standard of distribution would not be appropriate. Many—if not most—studies, in fact, show that a majority of the public does support progressivity despite all the current publicity about flat taxes.<sup>123</sup>

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120. This broader scope of concern can be defined as simply enlarged self-interest, or "reciprocal altruism", a type of insurance which states "I'll help you now in case I need you to help me later." As to the insurance aspect, *see, e.g.*, Karol Edward Soltan, *Empirical Studies of Distributive Justice*, 92 *ETHICS* 673, 683 (1982). *See generally* C. R. BADCOCK, *THE PROBLEM OF ALTRUISM* (1986); GARY S. BECKER, *A TREATISE ON THE FAMILY* 179 (1981); EDWARD O. WILSON, *On Human Nature* (1978).

121. *See, e.g.*, Alves & Rossi, *supra* note 115, at 563; Norma J. Shepelak & Duane F. Alwin, *Beliefs About Income Inequality and Perceptions of Distributive Justice*, 51 *AM. SOC. REV.* 30, 43 (1986).

122. *See, e.g.*, TIMES MIRROR POLL, *People, The Press & Politics*, July 8, 1992. Sixty-nine percent of the respondents "completely" or "mostly" agreed with the statement "It is the responsibility of the government to take care of people who can't take care of themselves." *Id.* at Q.67. The Poll was a national telephone poll of 3517 people. 65% of respondents similarly agreed with the statement "The government should guarantee every citizen enough to eat and a place to sleep." *Id.* at Q.69. Fifty-three percent even agreed (completely or mostly), that the government should help the needy "even if it means going deeper in debt". *Id.* at Q.68. In a recent study respondents were asked how fair it was to spend government money on 1) shelters for victims of spousal abuse, 2) homeless shelters, 3) job training for the unemployed, 4) medical care for AIDS patients, 5) college student loans, 6) preservation of endangered species. Combined "somewhat fair"/very fair responses ranged from 71.5% (endangered species) to 89.4% for job training. William J. Turnier et al., *Redistributive Justice and Cultural Feminism*, 45 *AM. U. L. REV.* — (1996) [forthcoming book 5]. The study found women somewhat more supportive of social spending than men.

123. The public opinion data on progressivity is particularly vulnerable to all the difficulties of polling since the topic is not only highly charged politically but also is

highly technical, if not arcane. Most people do not understand progressivity and the difference between marginal and effective rates. Roberts & Hite, *supra* note 97, at 28, 40-42. Turnier's study shows strong evidence of the general populace's ignorance and/or confusion. Public policy suggests that those favoring progressivity would also oppose a capital gains preference. Yet the study showed only a weak correlation. Turnier, *supra* note 122, n.114. A reasonable interpretation of this data is that the inconsistency is due to respondents' confusion and the authors believe this "most likely accounts" for the result. *Id.* n.56. Of course other explanations are possible. For example, people may support progressivity generally, but see capital gains as particularly deserving of favorable treatment for various reasons, such as the risk involved or the virtue of saving and investing. See, e.g., Kornhauser, *supra* note 82.

Despite the confusion, much of the public seems to favor progressivity. This is fine despite the hot debate and strong rhetoric about the flat tax preceeding and during the presidential primaries of 1996. See, e.g., *The Flat Tax is Losing its Appeal Among U.S. Voters, Poll Finds*, WALL ST. J., Mar. 8, 1996 at R2 (Wall Street Journal/NBC News poll showing a 54% to 39% support of a progressive tax); accord, Roberts & Hite, *supra* note 97 (2/3 favor progressivity; 1/3 flat tax). However, Turnier et. al. find less support for a progressive role. According to them, only a slight majority of respondents believe a progressive tax is somewhat or very fair. Turnier et. al., *supra* note 122, supported it. Turnier's data is based on the Fall 1992 Southern Focus Poll, which found geographic variations for support of progressivity—58.7% of southern respondents found progressivity fair while 65.8% of non-southerners did. Southern Focus Poll, Q.110 at p. 56. Turnier's percentages were weighted to reflect national demographics. Turnier, *supra* note 122, at 35. Despite the findings favoring progressivity in Roberts & Hite, *supra* note 97, the two authors, along with Cassie F. Bradley, found in another study that while respondents favor progressivity in the abstract, that preference changes to a preference for a flat tax when concrete examples are given which mention actual dollar amounts of income and tax. Roberts, Hite & Bradley, *Attitudes Toward Progressive Taxation*, 58 PUB. OP. Q. 165, 182 (1994). This seems to contradict their earlier study, although it is hard to tell since the questions used in the earlier study are not duplicated in their article. These two studies starkly highlight the language sensitivity and general difficulty of interpreting data in this area.

Over the past year, poll results seem more volatile than ever. This is most likely due to the increased attention and intense rhetoric politicians are now devoting to the issue. Some studies still show strong support for a progressive income tax. See, e.g., *Tax Overhaul? Yes. Flat Tax? Not So Fast*, WALL ST. J., Apr. 28, 1995, at A1 (two-thirds of poll respondents say the current tax is unfair; 51% want a "complete overhaul," but by a 3 to 2 margin they favor graduated rates). On the other hand, many polls show increased support for a flat tax. See, e.g., Rep. Dick Armey, *Armey News Release on Polls on Flat Tax*, 95 TAX NOTES TODAY 98-46 (May 17, 1995), available in WESTLAW, TNT database. Armey's press release cites among other polls a Newsweek poll which he claims shows that Americans want a flat tax by a margin of 2 to 1. While the poll did indeed show that 61% of respondents preferred either a 20% or a 17% flat income tax to the *current* tax, that response does not necessarily mean that people would favor a flat tax over a broader, more comprehensive (and therefore having lower rates) graduated tax. This illustrates, once again, the delicacy with which the question must be phrased and the answer interpreted. Reading the documents in the Westlaw Poll-C database under "flat and income" is instructive. The exercise shows not only how responses vary with the phrasing of the question, but also how they change over time. Current polls show much more opposition to a progressive tax (compared to a flat tax) in the past year than previously. The rise in popularity of a flat tax must be viewed against a backdrop of highly charged political rhetoric which plays on the dislike of taxes. The rhetoric stresses an *ideal* low flat tax in contrast to the current actual tax. The rhetoric thus contrasts perfect oranges with wormy apples.

This Part's brief survey of empirical data on distributive justice reveals great consistency at the general level, but some inconsistencies in the detail. At the most general level, many studies reveal that most Americans believe in the principle of equal opportunity. Additionally, they believe that for the most part it exists. Consequently, Americans generally believe that a just distribution is one that occurs according to merit. This is in accord with the tradition of negative liberty. Merit distribution and negative liberty cause the question of whether a tax is fair to focus on the result to the individual. Since Americans tend to believe they deserve what income they receive (i.e. it is a result of talent and effort not luck), a just tax—based solely on a merit criterion—would be either an amount equal to the benefits one received from the government (fiscal-exchange theory) or a proportionate amount (a flat tax pre-

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Moreover, it often ignores the fact that many of the current flat-tax proposals eliminate the mortgage deduction and do not tax capital gains and interest on equities

mised on the assumption that governmental benefits are proportionately distributed). Merit-based determinations of a tax's fairness hinges on self-interest. However, data shows that "fairness and self-interest [are] distinguishable" in public policy decisions, generally and specifically in the tax area.<sup>124</sup> This distinction exists because negative liberty and merit distribution are mediated by positive liberty (or pre-conditions of liberty) as well as by failures to achieve equal opportunity. These forces cause people to support some distribution by need. The more one supports the need principle the more one is likely to support a progressive tax.<sup>125</sup>

The two criteria of need and merit play themselves out in a mildly-progressive income tax that generally supports unequal distributions because of a theoretical belief in merit distribution and a practical belief that income has in fact been so distributed. Nevertheless, most people think their taxes are too high. This opinion, however, does not necessarily reflect their beliefs about distributive justice; it may reflect their beliefs about how the government spends the taxes, their beliefs about the role of government, or simply the phrasing of the questions in the study. Most people support income inequality but would lessen the amount. Here inconsistencies in the studies seem most apparent: some showing that the preferred way to narrow the gap is by raising the bottom; others by lowering the top. These inconsistencies do not deny the existence of a consensus on standards of distribution. Rather, they merely reflect differences in their application to a specific situation or simply reflect procedural differences in the studies.

### Conclusion

For over 80 years the United States has had a progressive income tax system, and for 80 years that system has been criticized.<sup>126</sup> De-

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124. Roberts & Hite, *supra* note 97, at 27.

125. Supporters of progressive rates are less concerned about their own tax burdens than flat tax supporters and more likely to view their tax as fair even though they get governmental benefits that are smaller than their taxes. Roberts & Hite, *supra* note 97, at 43.

126. See, e.g., *Brushaber v. Union Pacific Railroad*, 240 U.S. 1, 25 (1916) (upholding the constitutionality of the first income tax passed under the sixteenth amendment, including its progressive feature); Marjorie E. Kornhauser, *Section 1031: We Don't Need Another Hero*, 60 S. CAL. L. REV. 397, 431-435 (1987) (describing the push for a national sales tax—or even a cash-flow type expenditure tax—in the 1920s); DAVID BRADFORD, *BLUEPRINTS FOR BASIC TAX REFORM* (1984) (discussing the renewed interest in a cash-flow consumption tax in the 1970s); William Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974) (same); Michael Graetz, *Implementing a Progressive Consumption Tax*, 92 HARV. L. REV.

spite this continuous criticism, the progressive income tax has endured. Its contradictions and inconsistencies also have endured, despite incessant "reforms." The key to the tenacity of both the criticism and the contradictions lies in the American sense of what constitutes a fair or just tax. The multi-dimensional nature of this sense of fairness creates an inherent tension in our tax system: any tax structure we choose will contain its own contradictions and will elicit criticisms. Consequently, even if the current calls to abandon the progressive income tax for a flat income tax—or more radically, a consumption or expenditure based tax—are successful, the new tax will contain (if not immediately, then soon thereafter) many of the same contradictions that exist in our present system. The contradictions are not inherent in any particular tax system but in our sense of distributive justice.

This sense of justice is shaped by our political traditions of liberty and equality and by our moral tradition of elevating hard work to a spiritual level. This historical grounding of distributive justice means that out of all the various definitions of equality and liberty, three have particular resonance: negative liberty, equal opportunity, and equality based on merit. These principles are central to American ideology. Americans believe in these principles both as ideals to strive for and, to a more limited extent, as current realities. These beliefs exist to varying degrees across cultural groups, despite the existence of competing conceptions of liberty and equality. Specifically, negative liberty and equality of opportunity—coupled with a belief in the moral worthiness of effort and hard work—create an equality of desert or merit based on individual effort and skill. Together these principles justify an extremely uneven distribution of wealth.

The principles of negative liberty, equality of opportunity and equality of desert are tempered, however, by other principles which argue for less unequal wealth distributions. Negative liberty itself possesses mediating factors. It recognizes that a person needs enough physical goods so that she can act as a free moral agent. These requirements are the preconditions of liberty (or minimal positive liberties) which lead to a distribution based on equality of (minimum) need.

While equality of merit (based on effort and skill) is a non-egalitarian distributive principle, our tradition also supports more egalitarian meanings of equality. Our democratic form of government

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1575 (1979)(same); and the mid 1980s campaign that led to the flattened three-tier rates in the Tax Reform Act of 1986.

requires a strict equality in the political sphere: one vote per person.<sup>127</sup> Moreover, this belief in political strict equality moderates our support of unequal distributions in the economic sphere even if they are the result of equal opportunity and merit. We fear great wealth disparities because we fear that great concentrations of wealth will create concentrations of power which will destroy our political equality.

Our belief in political equality also tempers our belief in merit-based equality. The principle of political equality emanates from our belief that all people are created equal. This is—at bottom—a belief that the fundamental quality of man is an equality of moral worthiness. How can we “merit” the rewards of our talents, skills, and efforts when we acquire the genes that create these talents, skills, and efforts by luck. Carried to the extreme, all that is left to determine merit is moral worthiness and since we are all morally equal, then the distributions of goods ought to be more or less equal. This, in fact, is the motivating force behind John Rawls’ original position.<sup>128</sup> This belief in moral and political equality conflicts with our belief in moral economic individualism which finds moral worthiness in effort and its material rewards. The contradictory pull of the various facets of our tradition means we support wealth and income disparities but only within limits; we support merit-based equality that creates income disparities, but we recognize an underlying moral equality that argues against great disparities; and we support negative liberty but recognize an equality of (minimum) needs.

In the tax area, the tradition manifests itself in both the overall structure of the existing tax code (the Code) and in specific sections. Merit equality, equality of opportunity, and needs equality all exert their influences. The result is an often contradictory tax law whose contradictions result not simply from politics but from an underlying complex sense of distributive justice.

The minimum-needs criterion is reflected in the basic structure of the Code as well as specific sections. This criterion is in accordance with the ability to pay rationale and the mildly graduated rates of our current tax system. Income used to meet basic maintenance needs is non-discretionary and therefore not available for tax payments. One’s ability to pay taxes is measured only by dis-

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127. *But see* Guinier, *supra* note 81 (advocating group voting rights).

128. JOSEPH & SUMPTION, *supra* note 54, at 92. The authors state, however, the original position “does not get us anywhere unless we happen to agree with [Rawls] that nullifying the accident of natural endowment is a good thing to do.” *Id.*

cretionary income—by subtracting out amounts needed for basic subsistence. Marital status and number of children, both of which are provided for in the Code,<sup>129</sup> are two rough measurements of subsistence needs. The § 63(c) standard deduction is another example of a needs-based provision. In fact, the 1986 Tax Reform Act's increase of both the standard deduction and the personal exemption amounts was aimed at removing needy people from the tax rolls. Similarly, the constant expansion of the § 32 earned income credit represents a desire to provide relief for low-income taxpayers (as well as to provide a work incentive).<sup>130</sup> A needs-based distribution criterion also (roughly) justifies tax provisions that provide for credits for the elderly and the handicapped, medical deductions, casualty losses, perhaps the home mortgage interest deduction, and even to some extent the life insurance exclusion. Deferral of taxation on qualified pension plans and individual retirement accounts also can be seen as needs based to the extent that they encourage people to save for their retirement when they will need the savings to live on.

Tax deferral for income saved for retirement is available only for earned income not investment income because of a long-standing belief that people with earned income have less ability to pay taxes than those with unearned income from investments. As John Stuart Mill stated, people who earn their income through their own efforts should be taxed more lightly than the person who earned his money from investments because the former has "smaller means" and "greater necessities."<sup>131</sup> A wage earner's means were smaller because she had a limited working life in which to earn her money whereas investments can earn money indefinitely; she had greater necessity because out of this temporary income she had to save money to provide for illness, retirement, and death. Mill believed that the ideal solution was to exempt savings from taxation,

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129. See, e.g., *Alves & Rossi*, *supra* note 115, at 551-55 (finding that their respondents were less generous in allowing for children than was Code § 151). Marital status, of course, is accounted for in the § 1 rate schedules which provide lower rates for a married couple than a single individual with the same amount of income. The joint return's origin lies in two 1930 Supreme Court decisions: *Poe v. Seaburn*, 282 U.S. 101 (1930), and *Lucas v. Earl*, 281 U.S. 111 (1930). As a result of these two cases, a husband could split his earned income for tax purposes with his wife if he lived in a community property state but not if he lived in a common law state. Nevertheless, theoretical justifications for permitting joint returns that reduce but do not split the tax burden for married couples include the idea of need—that two can live more cheaply than one.

130. See, e.g., 1986-3 C.B. 43 (legislative history of earned income credit).

131. 2 MILL, *supra* note 26, at 315 (Bk.V, Ch.II).

but since that was impractical (due to taxpayer fraud), there should be a lower tax rate on the amount of earned income a person should save.<sup>132</sup> Throughout much of the United States' income tax history, earned income has received some preference either due to the belief in greater need due to the uncertainties of earned income<sup>133</sup> or more recently for economic reasons such as to encourage work<sup>134</sup> or savings.<sup>135</sup> However, the needs aspect of earned income must to some extent remain underneath the economic reason because tax deferral for savings only applies to earned income.

The Code's treatment of the principle of equality of opportunity is less clear than its treatment of the needs-based principle. For the most part, the Code is silent, apparently assuming such equality already exists. However, many of the sections I have listed as needs based could also be viewed as attempts to help provide equal

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132. *Id.* at 319. Mill also developed another rationale for exempting savings: the double tax theory. Under this theory, all savings should be exempt from tax because if they are not, then they are taxed twice—once when earned and again when the saved money earns interest. See Kaldor, *supra* note 26, at 11-17. For a summary of the development of Mill's position, see F. SHEHAB, PROGRESSIVE TAXATION 92-94, 101-02, 104-05, 125-26, 133-36, 145-46, 150-54 (1954). Mill, in short, originally supported a (partial) consumption or expenditure-based tax for the sake of favoring earned income. Ironically, a full broad-based expenditure tax ends up being a tax on wages, since all savings are exempted, even savings which are earned from unearned income.

133. The 1913 Act did not differentiate because Congress thought it was too difficult to distinguish between earned and unearned income. H.R. Rep. No. 767, 65th Cong., 2nd Sess. 4-5. The same reason—administrative difficulty—was given in 1926 for not enacting a preference. See, e.g., 61 CONG. REC. 6670 (Oct. 24, 1926) (statement of Sen. Penrose). The first preference, passed in 1924, provided for a 25% reduction of the rate for the first \$10,000 of "earned income". Revenue Act of 1924, ch. 234, § 209(a)(3), 43 Stat. 263 (1924). In recommending its passage, Secretary of Treasury Andrew Miller justified it on the grounds of the uncertainty and limited duration of earned income: sickness, death, and old age diminish or destroy it. See *Hearings on H.R. 6715 Before the Comm. on Finance*, 65th Cong., 1st Sess. 8-9 (March 7-April 8, 1924) (Statement by A. W. Gregg, Special Assistant to the Treasury Secretary), in 2 INTERNAL REVENUE ACTS OF THE UNITED STATES 1909-1950 (B. Reams, Jr. ed. 1979); ANDREW MELLON, TAXATION: THE PEOPLE'S BUSINESS 56 (1924); H.R. Rep. No. 179, 68th Cong., 1st Sess. 5 (1924). This reason was bolstered by a moral factor which saw earned income as more meritorious than unearned income. See, e.g., 50 CONG. REC. 3818 (Aug. 27, 1913) (it is necessary to distinguish between the salary of a professional man who "giv[es] his brain and his ability to serve his fellow men" and the income of a man who inherits property and "is a drone and an idler . . .").

134. For example, the 50% maximum tax on earned income from 1970-1981. The primary purpose of that provision, however, was to prevent "tax gimmickry" such as deferred compensation and conversion of ordinary income into capital gains. See Michael Asimow, *Section 1348: The Death of Mickey Mouse?*, CAL. L. REV. 801, 865 (1970).

135. Individual retirement accounts, for example.

opportunity. The earned income credit and credit for the handicapped, for example, can be viewed as attempts to level the playing field.

Certain provisions that give tax benefits to employers or businessmen also can be viewed as implementing the equal opportunity principle because the tax incentives are designed to encourage opportunities. Section 38 general business credits such as the targeted jobs credit (§ 51), the low-income housing credit (§ 42), the empowerment zone employment credit (§ 1396), and the Indian employment credit (§ 45A) fall into this category.

The Code also implements the principle of distribution according to desert or merit. The general rate structure of the Code, in fact, basically supports this principle despite its progressive nature. The effective rates are so mildly graduated that the result is a general endorsement of the inequality of merit distribution with a nod to need distribution. Moreover, specific provisions give particular rewards for effort and risk-taking—the entrepreneurship we find so morally bracing. The capital gains preference is a classic example of this as are non-recognition provisions such as tax-free reorganizations. Some sections specifically promote small-scale entrepreneurship such as § 1244 (allowing recognition of ordinary losses on small business stock), § 1202 (50% exclusion of gain from certain small business stock), § 1044 (deferral on gain when proceeds are invested in “small business investment companies”), and the S corporation provisions, §§ 1361-1378 (which effectively eliminate the corporate double-tax system for certain kinds of domestic corporations).

The income tax provisions described in the previous paragraphs may cause the tax system to appear contradictory, even incoherent. Although this may be true at a superficial level, it is not true at a deeper level. The Code’s blend of income and consumption features, its various provisions which favor earned and unearned income, and its progressive rates which “fail” to radically redistribute wealth are not merely the result of political manipulation and compromise. The income-tax laws did not fail to radically redistribute wealth because Congress never intended them to do so. Contradictory provisions are permanent, not transitory, features of the Code. The Code, however, is not incoherent because there is a pattern to these inconsistencies. This Article has shown that they all reflect a deep-seated multi-faceted sense of distributive justice which emerges from an American tradition which emphasizes negative liberty, equality of opportunity, and merit equality. While these

principles exert competing, often conflicting, influences on the Code, they operate within the framework of that tradition, which sets limits on the competing forces. It is the center without which things fall apart. The income tax is complex and contradictory because we ourselves have complex, often contradictory beliefs about equality, liberty, and distributive justice.

The enactment of any of the current proposals to reform or abolish the progressive income tax will not eliminate the contradictions in our tax system. The same (or similar) contradictions will simply reappear (at enactment or soon thereafter) in any replacement tax. These contradictions do not inhere in the income tax but in our sense of distributive justice. We cannot escape them by changing taxes because the fault, if fault it be, "is not in our stars,/But in ourselves. . . ." <sup>136</sup>

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136. WILLIAM SHAKESPEARE, JULIUS CAESAR, Act I, Scene II.

