

The Morality Of Money: American Attitudes Toward Wealth and the Income Tax[†]

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Wealth fascinates Americans. Alexis de Tocqueville said in 1835: “‘The love of wealth is . . . at the bottom of all that the Americans do.’”¹ In reality, American feelings about wealth are much more complex and ambiguous than Tocqueville claims. Americans fear and disdain wealth as well as love it.² We differentiate types of money and wealth, despite the economists’ claims that all money is fungible. In particular, Americans imbue earned income with an aura of morality and virtuousness that unearned income, particularly inherited income, does not have.³ Consequently, we Americans admire the person who acquires her wealth by means of her own talent and industry, while at the

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1. KEVIN PHILLIPS, *THE POLITICS OF THE RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* 36 (1990) (quoting a Tocqueville observation of American culture).

2. American society’s ambivalent attitude is reflected in various adages: “Money isn’t everything”; “It’s just as easy to fall in love with a rich man as a poor one”; “The best things in life are free”; “Wealth means power; it means leisure; it means ability”; and “Money is the root of all evil.” Many of these adages and others are cited in *A DICTIONARY OF AMERICAN PROVERBS* (Wolfgang Mieder ed., 1992). This anthology contains more than three pages of proverbs indexed under “money,” *id.* at 415-18, more than one page indexed under “penny,” *id.* at 457-58, and more than one page indexed under “wealth.” *Id.* at 645-46.

3. “Earned” income is income obtained through personal effort. *See, e.g.*, 26 U.S.C. § 911(d)(2) (Supp. V 1993). The effort may be difficult or easy; mental, physical, or mindless; skilled or unskilled; highbrow or lowbrow, but in all events, the effort is a critical element in the production of the income. Earned income is a return on a person’s human capital. “Unearned” income, in contrast, is a return on our nonhuman capital: stock, bonds, savings accounts, and real and personal property. Income may be a mixture of the earned and the unearned; it may be the product of labor and capital intertwined; or it may be the result (in whole or in part) of luck—a windfall, in short. The ultimate source of unearned income may in fact be earned income. For example, this year Laurie Liegl receives \$800 interest on a \$10,000 bond. This \$800 is unearned income even though she purchased the bond with earned income—money she received for performing her job as an attorney. William Wealthy’s bond, on the other hand, may have been purchased with unearned income profits from a nonworking oil and gas interest which he owns, but that interest may have been purchased with earned income. Wealthy may have purchased his bond with money he inherited from his grandfather, who inherited it from his grandfather, and so on. Not only is the money used to purchase the bond unearned income for Wealthy, or his grandfather, but it is not even income, in Wealthy’s hands, from a tax standpoint.

Money may be differentiated on other grounds as well. The Swiss prefer their money crisp and clean. “One of the real pleasures in everyday life is to hold a crisp, new bank note in your hand.” Bhushan Bahree, *They Can Tell Themselves They Needn’t Fret About Filthy Lucre*, WALL ST. J., Mar. 30, 1993, at B1 (quoting Fritz Blocher, a Zurich social worker). The Swiss maintain this crisp money by having the world’s highest replacement rate of money. *Id.* They maintain a crisp money supply mainly to prevent forgeries, but also for “image” reasons. The central bank’s chief cashier states: “The first thing you see when you arrive in a country is the money . . . It’s like a national identity.” *Id.*; *see also Help Wanted: Immaculate Person Needed to Handle Lots of Money*, WALL ST. J., July 11, 1994, at B1 (noting that San Francisco’s Westin St. Francis hotel washes all coins that it gives as change).

same time, we distrust (though perhaps also envy) the idle rich who live off of their clipped coupons.

Unearned income, however, also has a positive moral side, particularly when it is the return on earned income that has been saved and invested rather than spent. Frequently, society views saving, as opposed to consuming, as the better choice not just from an economic standpoint, but also from a moral one. The saver is virtuous; the spender a wastrel. The saver's virtuous aura extends to the earnings derived from his saving. The unearned income, the accumulated wealth, is a visible sign of his grace. The virtuousness of saving and the saver is frequently contrasted with the profligacy of consumption and the spender.

American attitudes about money, spending, and wealth are complicated because money and wealth are not mere commodities. They also signify deep-seated, complex values and beliefs about morality, equality, and the American system of government.⁴ The basic traditions of the United States extol individualism and the sacred right to property while simultaneously proclaiming the equality of man and government by and for equals. The former concepts inevitably result in unequal accumulations of wealth, while the latter argue for a more equal distribution.

America's cyclical history of periods of intense capitalism (as in the 1920's or 1980's) alternating with periods emphasizing greater equality (as in the New Deal of the 1930's and 1940's) reflects these contradictory attitudes. These attitudes about wealth have profound social and political effects ranging from the determination of popular American heroes to shaping governmental social policies and affecting legal theories. The battleground is everywhere, including the tax system.

This Article focuses on the United States' income tax system as it reflects our nation's ambivalence about earned and unearned income, saving and spending, and wealth in general. An ideal comprehensive income tax, the

4. Lewis Lapham states:

We like to assign spiritual meanings to the texts of money . . . What interests [Lapham] is not so much our vanity and greed (vanity and greed being as common among Balts or the Kurds as among Texans), but the place of money in the American imagination. What do we expect of it, and what do we think it means? How does it come to pass that we can transform a stock market trade into a symbol of salvation or a grocer's bill into "the romance, the poetry of our age"?

LEWIS H. LAPHAM, MONEY AND CLASS IN AMERICA: NOTES AND OBSERVATIONS ON OUR CIVIL RELIGION 4 (1988). For a fascinating discussion of how Americans personalize and differentiate money, see VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY (1994).

Lapham states that foreigners mistakenly think that Americans are greedy materialists. LAPHAM, *supra*, at 57. To him, America's obsession with money and wealth has nothing to do with consumption for its own sake, but with "what the act of consumption represents; it is the existential correlative that matters, the demonstration of what Thorstein Veblen called 'pecuniary decency' and the proof of belonging to what John Calvin called 'the company of the elect.'" *Id.* at 58. Money and consumption are how individuals define themselves and their status in a constantly changing world. *Id.*

For an examination of books that discuss this fascination with wealth and what it represents, see NELSON W. ALDRICH JR., OLD MONEY (1988) (exploring the psychology of the moneyed class); LUCIUS BEEBE, THE BIG SPENDERS (1966) (examining classic rich and famous people such as the Vanderbilts in a print version of *Lifestyles of the Rich and Famous*).

theoretical basis of our present income tax, treats all income equally, regardless of its source or its use. Nevertheless, the current income tax laws do not treat all income equally. For example, the Internal Revenue Code of 1986 ("Code") contains provisions that favor earned income (*e.g.*, section 32, the earned income credit for certain low income taxpayers),⁵ as well as provisions that favor unearned income, (*e.g.*, the preferential capital gains rate).⁶ Similarly, the Code has provisions that favor savings, (*e.g.*, qualified pension plans or like-kind exchanges),⁷ and provisions that encourage certain types of spending, (*e.g.*, the mortgage interest deduction).⁸ A close look at the basic structure of the Code—the tax base and the tax rates—reveals contradictory influences. Progressive rates, phase-outs of deductions, and provisions targeted at the poor suggest a sensitivity toward earned income (particularly at lower levels), while many deductions favor the wealthy.

The history of the United States income tax shows that this differential treatment is not unusual. Throughout its history, the income tax laws and the debates surrounding them have reflected, to varying degrees, American society's contradictory attitudes about earned income and wealth. In fact, the very establishment of the Sixteenth Amendment and the income tax involved debates over these issues. Occasionally, these attitudes are expressed openly, as when the opponents of the 1894 income tax act referred to it as "socialism, communism, [and] devilism."⁹ Frequently, especially in current debates, attitudes are couched in the "neutral" language of economic growth and efficiency, which often embody pro-wealth attitudes toward money. Regardless of how the arguments are couched, attitudes toward wealth and earned income affect not only individual provisions of the Code but also basic issues: Should income or expenditures be the tax base? What is the relationship between the source of income and the fundamental tax principle upon which the United States' income tax system is based—ability to pay? As the debates on capital gains taxation as well as the propriety of a consumption (or expenditure) tax once again heat up in Congress and in the nation, articulating American normative values which underlie and influence the debate can only be salutary.

This Article explores how American views regarding the morality of money and its involvement with society's political ideals affect tax debates and legislation.¹⁰ Part I traces and summarizes the roots of society's contradictory

5. 26 U.S.C. § 32 (1988 & Supp. V 1993).

6. *Id.* §§ 1201-1202.

7. *Id.* §§ 219, 401-421, 1031.

8. *Id.* § 163(h).

9. 26 CONG. REC. 6695 (1894) (Senator John Sherman (R-OH) speaking of the income tax as trying "to array the rich against the poor or the poor against the rich."); *see also* Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 674-75 (1895) (Harlan, J., dissenting) (stating that the arguments made before the Court suggested that income tax statutes represented an assault by the poor upon the rich).

10. *Cf.* Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 65 (1986) ("[T]he history of bankruptcy law reveals a persistent debate over a few fundamental moral and political issues about commercial culture, but . . . the debate takes form in different specific legislative issues at different times."). In the tax area, not only are the issues the same but many of the terms of the debate remain surprisingly static. Much of what was said in 1894 could just as easily have been said in 1994.

attitudes toward money and wealth which celebrate the accumulation of wealth on the one hand and the more egalitarian distributions on the other. Part II examines how these attitudes have played themselves out during the past century in the income tax laws and the accompanying debates. It focuses on three time periods during which radical changes occurred in the income tax and contrasts between attitudes toward wealth were glaring due to the predominance of the capitalist mode: (1) the establishment of the income tax, 1894-1913; (2) the 1920's; and (3) the modern era, the late 1970's to the present. Part III provides a short conclusion which summarizes some of the ways in which the contradictory attitudes toward wealth and the attendant rhetoric have shaped the income tax laws.

For the past one hundred years the income tax debates have reflected America's contradictory feelings about wealth with remarkable symmetry. The consistency of the rhetoric illustrates the deep and abiding nature of the conflicting feelings of fear and admiration; this ambivalence helps explain why the income tax statutes themselves are so contradictory and have failed to produce either dramatic progression or real redistribution of wealth.

I. THE MORALITY OF MONEY

A. Introduction: American Traditions

The individualistic nature of the American character has been long and frequently noticed; so too, however, has its sense of community.¹¹ Thus,

11. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 27-101 (Phillips Bradley ed. & Henry Reeve trans., Vintage Books Paperback 1945); cf. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 *TEX. L. REV.* 1, 24-26 (1990).

Some modern commentators have explored both the communal and individualistic aspects which they identify as residing, to various extents, in separate American traditions. Others stress one of the two aspects, particularly the communal aspect which has frequently been ignored in the glorification of the individual. For a list of various citations to articles on republicanism, see *id.* at 28-29.

For example, a 1985 bestseller described four basic American traditions: the biblical tradition, republicanin, utilitarian individualism, and expressive individualism, with John Winthrop, Thomas Jefferson, Benjamin Franklin, and Walt Whitman, respectively, as examples of each tradition. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 28-35 (1985). In his 1989 book, David Fischer identifies four traditions, or "folkways," begun by British colonists which continue to influence American culture: the New England Puritans, the Delaware Valley Quakers, the royalist Virginians, and the Appalachians. DAVID FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 6 (1989). Each folkway, or "normative structure of values, customs, and meanings," is a complex system having its own attitudes about a vast array of cultural aspects including work, wealth, and freedom and liberty. *Id.* at 7.

Charles Sellers describes the conflict as one between "arminian" heresy and "antinomian" heresy. CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846* at 30 (1993). The former, "relating salvation to human capability and effort," followed from the Calvinist belief that work was "a religious duty and wealth [the] fruit of grace." *Id.* at 29-30. This became the religious backbone of capitalism while the latter, speaking for a rural, pre-market economy, "asserted the subsistence world's commitment to communal love against the market's competitive ethic." *Id.* at 30. Sellers' final sentence illuminates the intertwining of these two traditions. Speaking hopefully of the future, Sellers says: "A democracy purged by liberalism of racist and patriarchal contradictions may yet realize its Jacksonian promise by confronting arminian capital on behalf of antinomian humanity and ravaged land." *Id.* at 427.

American individualism, which by itself could lead to vast social and political inequality, is tempered by a sense of community which pushes for a more equal distribution of wealth and power. This inherent conflict in American society's nature creates a tension that continually manifests itself as variations on the same themes throughout American history, especially the last one hundred years. In this time there have been three periods which exalt capitalism and the accumulation of wealth ("capitalist heydays" as Kevin Phillips calls them): the Gilded Age (the last two decades of the nineteenth century), the 1920's, and the 1980's.¹²

Although the capitalist heydays glorified the individual, they did so in a complex manner. Because American individualism is rooted in the morality and politics that connect the individual to the common good, even these periods of frenzied individualism are tempered by essential concepts of equality. This tension between individualism and community plays itself out in all arenas of society. It shapes American views about the role of government, a sense of fairness, the definition of equality, and, of course, views on the role of money and the proper methods of taxation. It is not surprising, then, that the United States tax code contains elements of both attitudes, nor that some of the most intense tax activity would occur at the times when these forces were at their most intense—the capitalist heydays. Thus, the long march to the establishment of the income tax, from 1894 to 1913, began in the Gilded Age, and radical changes in the system occurred in the two other heydays—the 1920's and the 1980's.¹³

Before turning to look at the manifestation of the contradictions in the tax system during these periods, this Article will look more closely at the contradictions themselves. Some commentators portray them as separate traditions—classical political economy versus republicanism, for example. In the United States, however, even classical political economy contains egalitarian and communal aspects. American individualism is rooted in a morality that connects the individual to the common good and has been tempered by the egalitarian ethos of republicanism.¹⁴ Thus, this Article argues that Americans have melded one tradition—which I label "moral

12. PHILLIPS, *supra* note 1, at xviii (noting that capitalist heydays alternate with periods of more equal wealth distribution). The "capitalist heydays" have also been referred to as "entrepreneurial" periods. Alfred Chandler, *Part 2: The Valley, INC.*, July 1985, at 54, reprinted in PHILLIPS, *supra* note 1, at 66.

Habits of the Heart describes three pairs of contrasting visions of the "public good," pitting extreme individualism against a more communal, more equal society: (1) Establishment versus Populism, arising as a response to the industrialism of the 1880's and 1890's; (2) Neocapitalism versus Welfare Liberalism, arising from the market crash of 1929; and (3) The Administered Society versus Economic Democracy, emerging in the 1970's out of the "stalemate" of the second pair. BELLAH, *supra* note 11, at 257-67.

13. Of course, major changes occurred at other times, too, such as the extension of the income tax to the masses and the establishment of withholding during World War II.

14. As one commentator argued, socialism has failed in America, ironically because socialism's egalitarianism is integral to America. SOCIALISM IN AMERICA: FROM THE SHAKERS TO THE THIRD INTERNATIONAL 2 (Albert Fried ed., 1970). This book explores various religious and secular communal movements in America. While some traditions in America stress equality more than others, even those seen as most individualistic incorporate some sense of equality.

economic individualism"—out of two contradictory or conflicting philosophies. Because they are intertwined, these two opposing elements create an inherent tension.

*B. Moral Economic Individualism: The Meeting of
Economics, Politics, and Morality*

The two aspects of moral economic individualism are deeply rooted. The individualist side, which pushes towards wealth accumulation, is based in classical political economy. The more egalitarian aspect stems from republicanism. A religious, moral element infuses both aspects.

Classical political economy is derived from the works of John Locke, the Scottish Realists, and Adam Smith and rests on the primacy of the individual and the corollary principle of the sanctity of private property.¹⁵ The basis of this theory is Locke's belief that ownership of property is grounded in ownership of self. Since each individual owns himself, each individual has a natural right to his own labor and therefore has a right to the property received or produced in exchange for this labor.¹⁶ The rights of individuals precede the state, whose function is to provide those services necessary for the individual to flourish, such as the protection of private property. Smith believed that the best way to maximize an individual's happiness was to allow him to freely act in his own self-interest. This self-interest, unimpeded by the state, would naturally create the greatest benefit or wealth for the greater society.¹⁷ Because the individual precedes the state and each individual has a natural right to the product of his labors, an individual's right to property is grounded in morality as well as economics.¹⁸

15. What follows is a synopsis of what Americans *believe* that Locke and Smith said, rather than what they *actually* said. What they actually said is less important, for purposes of tradition formation, than what Americans believe them to represent, because it is our beliefs that form our social reality. Cf. Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961, 1008 n.129 (1992) (citing JAMES TULLY, A DISCOURSE ON PROPERTY 98-99 (1980), who argues that Locke would not accept the views of property we attribute to him).

16. Locke, of course, added the proviso that people could retain the fruits of their labor only if enough remained for others. At one time, this proviso may not have been a problem for "America the Bountiful." Today, however, resources are much scarcer. Nevertheless, some people have taken the bite out of the proviso by reinterpreting it. Robert Nozick, for example, states that the proviso is satisfied even if one person appropriates all of a good as long as others are not worse off than they would be in a state of nature. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 181-82 (1974).

A fuller description of Locke and Smith's theories can be found in their works. For a comprehensive summary of these works, see JAMES MACGREGOR BURNS, THE WORKSHOP OF DEMOCRACY 154-55 (1985), and HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836-1937, at 67-78 (1991).

17. As Adam Smith stated:

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

ADAM SMITH, THE WEALTH OF NATIONS 49-50 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1776).

18. See, e.g., HOVENKAMP, *supra* note 16, at 74-76. Hovenkamp emphasizes the importance in America of Adam Smith's views as expressed in ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759). Other Americans, such as Francis Wayland, an economist and a former president of Brown University during the Jacksonian period, have echoed the belief that the right to property (and its profits) rests in moral as well as economic grounds. *Id.*

In moral economic individualism, the religious and moral basis of American feelings about money and wealth stems from the idea that every Christian had two "callings": a general one to lead a godly life, and a specific one by which each person through his vocation would serve God by serving the common good.¹⁹ The idea of a calling exists in many Protestant sects. However, scholars such as Max Weber, and Americans more generally, associate it with Puritanism, particularly Calvinism.²⁰ According to Weber, the Calvinist doctrines of election and predestination provided the impetus to work and the "spirit" of capitalism: under these doctrines only some people were chosen for salvation, and the decision as to who would be saved was predetermined by God.²¹ Because doubting whether a person was chosen was considered to be a lack of faith, one was duty-bound to act as if she were one of the elect. This occurred through one's special calling—by working hard and accumulating wealth for the glory of God. A person could not obtain grace from her worldly acts, because that was predestined; she could, however, obtain and express to others her certainty that she was saved. Thus, wealth became a sign of grace: God created man to work, and through work, rather than leisure or idleness, man glorified God.²² A person could and should work as profitably

19. FISCHER, *supra* note 11, at 156. Bellah states that the idea of a "calling" links the public with the private sphere and refers to a passage from the Episcopal Book of Common Prayer which asks God to guide us in work for ourselves and for the common good. BELLAH, *supra* note 11, at 66.

Cotton Mather spoke of "Two Callings": "a General Calling, Which is to Serve the Lord Jesus Christ and Save [a person's] own Soul" and a "Personal Calling; or a certain Particular Employment." A DOCUMENTARY HISTORY OF AMERICAN THOUGHT AND SOCIETY 32 (Charles Crowe ed., 1965).

20. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1976).

21. *See id.* at 103-13. Weber's thesis has been criticized by many commentators. *See, e.g.*, Anthony Giddens, *Introduction to id.* 8; ROBERT H. NELSON, REACHING FOR HEAVEN ON EARTH: THE THEOLOGICAL MEANING OF ECONOMICS 79 (1991); MICHAEL NOVAK, THE CATHOLIC ETHIC AND THE SPIRIT OF CAPITALISM 2-9 (1993). Nelson states that although Calvin was "the first theologian to find that the path to salvation can lie along a route of economic advance," the "majority" of scholars have concluded that the Calvinist (and Puritan) belief that wealth was a sign of election was only a contributory factor to the rise of capitalism, not its root cause. NELSON, *supra*, at 79.

Neither the accuracy of Weber's thesis nor the accuracy of its interpretations is critical to this analysis, however. What is important is that his ideas have been incorporated into the popular (and political) mythology. Americans speak of a Protestant Ethic in some general sense of a connection between accumulation of wealth and religiosity. To this extent, Americans have accepted Weber's ideas—or its version of them. *See, e.g.*, ALDRICH, *supra* note 4, at 31 (noting that, during his great-grandfather's generation, "Social Darwinism [rode] high on a moralized Calvinism"); CHARLES D. ELDER & ROGER W. COBB, THE POLITICAL USES OF SYMBOLS 96 (1983) (tracing back to the Puritans the American belief that "material success is seen to be not simply the fruits of labor but a testimony to personal worth"); *see also* SELLERS, *supra* note 11, at 29-30 ("Calvinism also became the spiritual medium of capitalist transformation by sanctifying worldly work as religious duty and wealth as fruit of grace.").

The popular movie, *Forrest Gump*, illustrates the persistence of the Protestant ethic myth even in the face of modern skeptics. Columnist John Leo states:

And because he gets richer and richer by simply being decent, [Forrest Gump] acts out a bit of old Protestant theology: that wealth is a sign of moral worth. . . . This produces an endearing but inherently ridiculous message that there is no need to choose between virtuous living and the accumulation of great wealth.

John Leo, *Film Links Low IQ to High Morals*, TIMES-PICAYUNE (New Orleans), Aug. 2, 1994, at B5.

22. WEBER, *supra* note 20, at 157-58.

as she was able because in so doing, she did the work of God and worked for the common good:

Wealth is thus bad ethically only in so far as it is a temptatiou to idleness and sinful enjoyment of life, and its acquisition is bad only when it is with the purpose of later living merrily and without care. But as a performance of duty in a calling it is not only morally permissible, but actually enjoined.²³

Pursuit of wealth for its own sake, for consumption's sake, was wrong, whereas the "attainment of it as a fruit of labour in a calling was a sign of God's blessing."²⁴ This combination of encouraging work and discouraging spending led to an accumulation of capital "through ascetic compulsion to save."²⁵ Weber noted:

This worldly Protestant asceticism . . . restricted consumption, especially of luxuries. On the other hand, it had the psychological effect of freeing the acquisition of goods from the inhibitions of traditionalistic ethics. It broke the bonds of the impulse of acquisition in that it not only legalized it, but . . . looked upon it as directly willed by God.²⁶

Thus, the combination of economic individualism and a religious sense of calling produced the accumulation, capitalist side of moral economic individualism that encouraged capitalism through its legal, political, and moral justifications of personal accumulations of wealth.

There were, however, restraining influences on this accumulation of capital and wealth. First, the religious, moral, and economic bases of the worthiness of accumulation contained their own limitations. Accumulation was not meritorious per se, but, in the religious sense, it was evidence of a special calling or grace. Moreover, it was good from an economic sense only to the extent that it spurred economic growth and allowed the masses to improve their lives economically and morally. Excess wealth should not be spent on one's self nor amassed for one's heirs; it should be used to improve society.²⁷

Another greater limitation on the accumulation of wealth was republicanism. Republicanism, according to Gordon S. Wood, was what made the American Revolution a revolution.²⁸ It "was in every way a radical ideology—as radical for the eighteenth century as Marxism was to be for the nineteenth century. It challenged the primary assumptions and practices of monarchy—its hierarchy, its inequality, its devotion to kinship, its patriarchy, its patronage,

23. *Id.* at 163.

24. *Id.* at 172.

25. *Id.* The Quakers' way of life also encouraged Weber's "worldly asceticism." For them, work was also a calling: "Work itself became a sacrament, and idleness a deadly sin. Wealth was not to be consumed in opulent display, but rather to be saved, invested, turned to constructive purposes." FISCHER, *supra* note 11, at 556.

26. WEBER, *supra* note 20, at 170-71.

27. ANDREW CARNEGIE, *Gospel of Wealth, in THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS* 14 (Edward Kirkland ed., 1965) (1889).

28. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991).

and its dependency.²⁹ The Revolution was not just about independence from Great Britain; rather, it signified independence from a whole system of personal influence and patronage, where lineage mattered more than merit.³⁰ Under republicanism, the nation was governed by independent citizens rather than by a monarchy or an aristocracy.

Since a republic presumed "equally free and independent" men, ownership of property was essential: it was the source of free will and independence without which a person was not qualified to vote.³¹ Consequently, widespread ownership of property was necessary, but at the same time, the accumulation of wealth in the hands of the few endangered the very basis of a republic.³² Without a widespread distribution of property, the people would not have enough independence to maintain the civic or political equality essential to a republic. This equality did not mean that all differences had to be eliminated. Originally, equality meant "equality of opportunity, inciting genius to action and opening up careers to men of talent and virtue while at the same time destroying kinship and patronage as sources of leadership."³³ But soon the idea of equality expanded well beyond this to become

the single most powerful and radical ideological force in all of American history. . . . [I]t came to mean that everyone was really the same as everyone else, not just at birth, not in talent or property or wealth and not just in some transcendental religious sense of the equality of all souls. Ordinary Americans came to believe that no one in a basic down-to-earth and day-in and day-out manner was really better than anyone else. That was equality as no other nation has ever quite had it.³⁴

Equality can mean many things: equality of formal political rights, equality of basic necessities, equality of opportunities, or equality of resources. Equality in one context may create or lead to inequality in another.³⁵ Equality of resources, for example, creates inequalities of opportunity for a paraplegic vis-à-vis a fully mobile person.³⁶

Inequalities of wealth may create inequalities in other areas, including inequality in welfare or resources. Inequality of wealth, for example, may limit our equality of opportunity by effectively precluding the less wealthy from making certain choices or obtaining certain goals. Inequality of wealth can also create political inequality. Concentration of wealth leads to concentration of power and influence, as well as to patronage and corruption. It threatens the very foundations of a society. In Part II, this Article will show how this spectre continuously raises its head.

29. *Id.* at 96.

30. *Id.* at 178.

31. *Id.* at 178-79; see also *id.* at 104-09. For a discussion of the views held by Thomas Jefferson see *infra* notes 66, 87, and accompanying text.

32. WOOD, *supra* note 28, at 234.

33. *Id.* at 233-34.

34. *Id.* at 234.

35. See AMARTYA SEN, *INEQUALITY RE-EXAMINED* 12-30 (1992). Sen speaks of equality in different "spaces," such as income, wealth, welfare, basic needs, utilities, and liberties.

36. *Id.* at 20.

Although many concepts of equality thus argue against the accumulation of wealth and its consequent inequality, some concepts of equality argue in favor of wealth accumulation. American ideas of political equality, based on individualism, argue for the individual's right to the fruits of his labor, and (perhaps less so) his right to any legally obtained property. Any restriction on this right to accumulate would unfairly restrict the individual's rights. One of America's fundamental concepts of equality is the idea of equality of opportunity. This, by definition, includes the equal opportunity to be as rich as others. Thus, American antagonism towards the wealthy is tempered by the fact that people dream of achieving that status on their own. That is, through their own talent and industry (or luck—witness the booming lottery and casino businesses), they may someday be millionaires. Therefore, Americans do not want to judge the wealthy too harshly or impose overly burdensome taxes because, in so doing, they may burden themselves in the future.

In summary, moral economic individualism conjoins morality, economics, and politics in such a manner that its own contradictions both urge the vast accumulation of wealth and the limitation of that wealth. The tension between the accumulation and the egalitarian aspects of moral economic individualism leads to justifying the accumulation of wealth on the grounds that it helps others. This tradition was exemplified by Andrew Carnegie in the Gilded Age and, one hundred years later, by Ronald Reagan's advance man, George Gilder. Throughout the United States' history and in the tax code, these forces continually battle each other.

C. The Morality of Money: Earned versus Unearned Income; Spending versus Saving

The above discussion has shown that moral economic individualism's glorification of wealth was limited both by religion and by the tradition of republican equality. These traditions create differing, often ambivalent, attitudes towards earned and unearned income and towards spending money versus saving it.

Under moral economic individualism, earned income is morally distinguishable from (and superior to) unearned income. Only by earning money can one do God's work and thus display signs of grace. Unearned income does not display the same grace. Moreover, since work is a calling through which one enhances the public good, one is only a trustee or steward of the wealth one has. As such, the trustee should use all surplus money for proper philanthropic purposes, as Andrew Carnegie believed, rather than bequeath it to an heir; the heir has no moral right to the wealth primarily because he did not earn it. Moreover, such wealth can easily cause a moral fall by weakening the heir's moral virtues of industry and frugality.³⁷ Thus, in the 1880's Carnegie urged

37. CARNEGIE, *supra* note 27, at 20-21.

the confiscation of all wealth upon death, except for a modest amount for the surviving spouse and the children.³⁸

Republican equality also affects attitudes about the source of wealth: it is acceptable to receive money as a result of one's own talent and industry because that is what America is about—equal opportunity for achievement based on merit. It is quite another thing to acquire money through inheritance, because that practice continues the influence of heredity, the “dead hand” of property.

In other words, some money is better than other money. Even in the 1980's and 1990's Americans did not and do not aspire to be simply coupon clippers or inheritors of great wealth. The people we aspire to be, our heroes, are the Steven Jobs (and yes, the Michael Milken) who, through their own energy and industry, not only enrich themselves but also the nation by creating jobs for others.

In order to aid the common good (and thus do God's work and help the economy), a person must not only earn money but also save it. Spending or consuming money is the road to both moral degradation and economic stagnation. Only by saving and investing money can a person display his moral virtue and create economic growth. By amassing capital, a person helps others by helping himself.

Several forces urge spending, however. First, the notion of equality encourages consumption: if everyone is equal, then everyone possesses the right to consume luxury items (the BMW's, and so forth).³⁹ Moreover, only when a certain level of material comfort has been achieved can people turn to moral and spiritual development and devote their attention to the common good. The proper use of discretionary income improves the mind, the spirit, and moral fiber, thereby producing better citizens. The trusteeship concept of moral economic individualism also encourages some spending. Because the wealthy have a duty to use that wealth for the glory of God (and the betterment of man), charitable spending to enable the poor to improve themselves is good.

38. *Id.* at 22. More recently, Professor Mark Ascher urged that all wealth owned by a decedent, after the payment of debts and administrative costs, should go to the federal government with certain exceptions. Mark Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990). Ascher suggested six exceptions: (1) a marital exception which would increase, during the term of the marriage, from 20% to 100%; (2) an exception for *dependent* lineal descendants; (3) an exception for *disabled* lineal descendants; (4) an exception for lineal ascendants; (5) a universal exception of a limited amount to ease administrative costs; and (6) a *charitable* exception. *Id.* at 121-36. He urged this approach on several grounds, including “neutralizing” the “corrosive effects of wealth.” *Id.* at 99.

Ascher's other grounds for essentially eliminating inheritance related to classical political economy: Locke's theory of entitlement to property based on one's labor cannot entitle a person to inherit property because she obviously did nothing to earn the property. *Id.* at 81.

Even the person whose income derives from the profit on capital she earned herself is less virtuous than the person who works. In contrast to the worker, the coupon clipper is no longer engaged in a calling for the glory of God, no longer displaying the virtue of industry.

39. If equality abolishes (or diminishes) such traditional facets of identity as family and class, consumption may help in the identity of self. See generally LAPHAM, *supra* note 4; THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY IN THE EVOLUTION OF INSTITUTIONS* (1899).

Finally, in a mass market economy, economic growth—the engine of moral economic individualism—cannot occur if only savings occurs. Saving and spending and investing and consuming have become interdependent. Savings and large wealth accumulation are needed for economic growth in an industrial society. If, however, no one is willing to *spend*—to consume that which is produced—then the system will collapse and a downward spiral will result.⁴⁰ Thus, as industrialization progressed, a shift from a producer to a consumer society began and gained momentum from 1880 to 1920.⁴¹

The interdependence of production and consumption in industrialized society transformed the early moral/religious emphasis on saving and frugal living. In the Puritan tradition, wealth provided temptations to evil; a life of luxury and spending weakened not only one's individual moral fiber, but also weakened society. But if consumption was a necessary concomitant of saving, then the morality of spending needed to be transformed. Thus, the nineteenth century theorists began to differentiate between "good" and "bad" spending.⁴² Simon Patten, for example, believed that surplus wealth could elevate society if it were spent for cultural and educational purposes, as opposed to being spent on drinking, frivolous clothes, or mass entertainment. Thus, he believed that the "new" morality "does not consist in saving, but in expanding consumption."⁴³

Even though certain types of spending were being cautiously encouraged, the virtue of saving remained strong. Some thinkers became concerned that people, especially the middle class, were not saving enough. This failure to save was important because consumption prevented adequate capital formation, thus "mortgag[ing] the future . . . recklessly."⁴⁴ More importantly, the decline in savings was seen as a decline in morals.⁴⁵

40. Henry Ford, for example, noted the dual aspect of the worker: the worker as laborer who mass-produced the goods (such as the Model-T) which he, as consumer, then bought. See RICHARD GODDEN, *FICTIONS OF CAPITAL: THE AMERICAN NOVEL FROM JAMES TO MAILER* 170 (1990). The 1992 recession, prolonged by the consumers' lack of confidence in the economy and their consequent failure to spend, illustrates this point.

41. DANIEL HOROWITZ, *THE MORALITY OF SPENDING* xxvi (1985). Horowitz states that the roots of the consumer society actually lie in the eighteenth century. *Id.* at xxv. Similarly, Gordon S. Wood also recognizes the American Revolution's effect on the growth of consumption. WOOD, *supra* note 28, at 134-36.

42. HOROWITZ, *supra* note 41, at 32-34.

43. SIMON W. PATTEN, *THE NEW BASIS OF CIVILIZATION* 213 (1907); see also GEORGE GUNTON, *WEALTH AND PROGRESS: A CRITICAL EXAMINATION OF THE WEALTH PROBLEM* 30, 33, 88-89, 93 (1887).

The belief in an elevating aspect of properly controlled wealth and consumption began earlier in the nineteenth century. For example, in the mid-nineteenth century, Unitarians, strong supporters of enterprise, believed that a certain level of material comfort was necessary before a person could move on to more moral and spiritual concerns. LEONARD N. NEUFELDT, *THE ECONOMIST: HENRY THOREAU AND ENTERPRISE* 33 (1989).

44. HOROWITZ, *supra* note 41, at 78 (noting one commentator's concern that Americans were spending their future on frivolous goods of the present).

45. How one spent money was as important as how much one spent. Thus, spending on religious, cultural, and charitable items was virtuous in contrast to extravagant spending on material items beyond one's means. *Id.* at 78-83. Spending money to purchase a home was particularly valuable, because ownership strengthened family values. *Id.* at 83.

Today the same interdependence of, and ambivalence about, spending and saving exist. On the one hand, moral and economic virtues impel Americans to save: by helping oneself, one can help society. Under this attitude, spending is a personal and societal evil leading an individual to sin and a community to both economic stagnation and the failure to help others. On the other hand, too much saving is detrimental to individuals and to the nation. Thus, consumption is also a positive act because through "proper" consumption one morally elevates herself on a personal level; on an aggregate societal level, she helps keep the wheels of economic growth rolling. Moreover, the emphasis on the individual and equality encourages consumption as a means of self-definition.

II. THE MORALITY OF MONEY AND THE INCOME TAX

Contradictory feelings about money are played out in the income tax as in other parts of American culture. Three of the most important periods for the income tax were also capitalist heydays. Because they glorified wealth, these periods were marked by particularly acute tensions between equality and accumulation. In the tax area, the tensions usually centered on specific issues: the rate of tax, the differential treatment for earned and unearned income, attention to consumption versus saving, and inheritance (or estate) taxes. This Part examines some of these issues in the three time periods.

The income tax debates in all three periods employed similar, if not identical, rhetoric. This rhetoric reflected the conflict between equality and accumulation. Some people view this rhetoric (as well as all rhetoric) merely as a tool by which the powerful can appease the masses without making many substantive concessions.⁴⁶ This view, however, underestimates the role of the masses and the power of the rhetoric. Because rhetoric must persuade, politicians use rhetoric that reflects people's beliefs. But the politicians are not totally free to mold that rhetoric to fit any ends they desire (whether the thought process be cynical or sincere, conscious or unconscious). The rhetoric people use affects how they perceive both a problem and its solution. Consequently, moral economic individualism, as reflected in its rhetoric, has influenced the shape of the income tax. As this Part shows, the income tax rhetoric reflects the conflicts within moral economic individualism which are mirrored in the income tax laws themselves.

46. See generally MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964) (arguing that political rhetoric promises much and delivers little). The rhetoric serves to soothe the masses while making few substantive changes. *Id.* at 24; see also ROBERT STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913* (1993) (stating a similar point as to the origins of the income tax).

*A. The Establishment of the Income Tax, 1894-1913:
The Gilded Age and Progressivism*

The origins of the modern income tax lie in the rapid industrialization of America, which occurred during the Gilded Age of the 1880's and 1890's, and extended through the Progressive Era until 1913 and the passage of the Sixteenth Amendment. The first American income taxes, wartime measures, were not renewed once the revenue strains of the Civil War receded. The demand for a new income tax began in the Gilded Age as various classes and sections of the country reacted to the first capitalist heyday and sought to shift the burdens of supporting government to the wealthy people who prospered from it.

Andrew Carnegie's *Gospel of Wealth*, published in 1889, epitomized the credo of the Gilded Age—a theory widely held by the masses as well as the wealthy.⁴⁷ The *Gospel of Wealth* illustrates the tenacity of the traditions previously discussed. The essay has three components: (1) an economic element based on laissez-faire; (2) a religious element based on the doctrine of stewardship or trusteeship; and (3) a scientific element—Social Darwinism—based on the evolutionary concept of the survival of the fittest.⁴⁸ The first two elements are the familiar traditions of economic individualism and religious/moral asceticism. The third, newer in its origin, reflects the scientific advances of the time.

The *Gospel of Wealth* began with a tenet of economic individualism: man's natural right to property. Carnegie premised the very foundations of civilization on this right:

[U]pon the sacredness of property civilization itself depends—the right of the laborer to his hundred dollars in the savings-bank, and equally the legal right of the millionaire to his millions. Every man must be allowed “to sit under his own vine and fig-tree, with none to make afraid,” if human society is to advance⁴⁹

The doctrine of laissez-faire followed from this basic right. The state's proper role was to do only those acts necessary to protect property and to prevent others from infringing upon the individual's rights. Without the right to property, one would never work—mankind would live in poverty. As people worked and acquired property, they automatically improved the conditions of others. For example, the accumulation of capital which allowed the establishment of giant business enterprises helped the masses by providing economies of scale, which lowered prices and made more goods available to the common man.⁵⁰ According to the *Gospel of Wealth*, progress could not

47. See Ralph H. Gabriel, *The Gospel of Wealth of the Gilded Age*, in DEMOCRACY AND THE GOSPEL OF WEALTH 55, 58 (Gail Kennedy ed., 1949).

48. *Id.* at 66.

49. CARNEGIE, *supra* note 27, at 18.

50. ANDREW CARNEGIE, *Popular Illusions About Trusts*, in THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS, *supra* note 27, at 78, 81-83. (*Popular Illusions About Trusts* was originally published in 1900).

occur without inequality; without the accumulation of capital and the division of the rich from the poor, the poor would not be raised up to a higher level of living.⁵¹ Thus, the *Gospel of Wealth* took the Enlightenment's ideal of progress and "transformed [it] into a handmaid of capitalism."⁵² Industry and the accumulation of capital thus automatically helped the greater society. But the *Gospel of Wealth* went even further. It added the religious/moral element of Puritanism, which stated that one had a duty to be industrious and thrifty.⁵³ Only the virtuous would accumulate wealth. Moreover, once a person accumulated wealth, his duty was to use that accumulated wealth to help others.⁵⁴ Any accumulation of property beyond a person's reasonable needs was held in trust for the people. As Carnegie believed, the wealthy person should live modestly, holding all surplus money merely as a steward or trustee of a trust fund which he should administer for the betterment of the community.⁵⁵

The *Gospel of Wealth's* third element, Social Darwinism, added the strength of "science" to the first two traditions. The economics of laissez-faire became a scientific imperative. Propounded by Herbert Spencer in England, Social Darwinism prescribed that civilization would progress in an evolutionary fashion only if the state did not interfere; through unimpeded competition, the fittest would survive and progress thereby would occur.⁵⁶ Thus, Spencer's philosophy gave a "biological," scientific grounding to the doctrine of laissez-faire and the free reign of individual enterprise.⁵⁷

In America, Social Darwinism, with William Graham Sumner of Yale its preeminent spokesman, was immensely popular, reaching its peak in 1882 and being endorsed by entrepreneurs such as Andrew Carnegie.⁵⁸ Progress

51. CARNEGIE, *supra* note 27, at 14-18. Thus, progress can come only through Individualism, not Communism. *Id.* at 18.

52. Vernon L. Parrington, *The American Scene, in DEMOCRACY AND THE GOSPEL OF WEALTH*, *supra* note 47, at 27, 36.

53. See, e.g., Gabriel, *supra* note 47, at 58-61.

54. Gabriel included a number of amazing quotes of the times from sources such as ministers and presidents of universities. Mark Hopkins, president of Williams College, believed that the existence of property was necessary for the existence of society because without the right to the product of his labor, no one would work. *Id.* at 60.

55. As Carnegie said:

This, then, is held to be the duty of the man of wealth: To set an example of modest, unostentatious living, shunning display or extravagance; to provide moderately for the legitimate wants of those dependent upon him; and, after doing so, to consider all surplus revenues which come to him simply as trust funds, which he is called upon to administer, and strictly bound as a matter of duty to administer in the manner which, in his judgment, is best calculated to produce the most beneficial results for the community—the man of wealth thus becoming the mere trustee and agent for his poorer brethren, bringing to their service his superior wisdom, experience, and ability to administer, doing for them better than they would or could do for themselves.

CARNEGIE, *supra* note 27, at 25.

56. See, e.g., RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 38-42 (rev. ed. 1959).

57. *Id.* at 46.

58. *Id.* at 45, 48, 51. According to Hofstadter, Sumner "brought together three great traditions of western capitalist culture: the Protestant ethic, the doctrines of classical economics, and Darwinian natural selection." *Id.* at 51. Social Darwinism, built on classical economics and its autonomous, self-

resulted from the economic virtues of frugal living and industriousness—lots of saving and little leisure and consumption.⁵⁹ Great accumulations of wealth were an inevitable step in the evolution of society. Concentration of wealth was necessary for progress to occur for everyone. Sumner stated, “No man can acquire a million without helping a million men to increase their little fortunes all the way down through the social grades.”⁶⁰ The wealthy, he continued, are

the naturally selected agents of society for certain work. They get high wages and live in luxury, but the bargain is a good one for society. There is the intensest [sic] competition for their place and occupation. This assures us that all who are competent for this function will be employed in it, so that the cost of it will be reduced to the lowest terms; and furthermore that the competitors will study the proper conduct to be observed in their occupation. This will bring discipline and the correction of arrogance and masterfulness.⁶¹

Thus, success, according to this secular piety, was a result of economic virtue, a visible sign of economic and biologic grace, just as wealth, according to the Puritan piety, was a visible sign of religious grace. Under this view, success through hard work was merited; it was never the result of class advantage, unequal educational opportunity, or the vagaries of chance.

Social Darwinism’s belief in the natural law of competition and the survival of the fittest argued against equality because the struggle for survival inevitably led to inequality. Interference with the natural law of competition enabled the less fit to survive. Thus, although such interference might further social equality, it ultimately meant the demise of liberty, defined by Social Darwinists as “the freedom to do one’s best to triumph in the struggle for existence.”⁶² As Sumner said, the only way to ameliorate inequality is to “take from the better and give to the worse. . . . We shall thus lessen the inequalities. We shall favor the survival of the unfittest, and we shall accomplish this by destroying liberty.”⁶³

interested man, merely “involved an addition to the vocabulary rather than to the substance of conventional [i.e., classical] economic theory.” *Id.* at 144. It converted the religious drive of the Puritan ethic into a secular, scientifically derived drive to be industrious and live modestly.

59. *Id.* at 10-11, 61.

60. William G. Sumner, *The Concentration of Wealth: Its Economic Justification*, in *DEMOCRACY AND THE GOSPEL OF WEALTH*, *supra* note 47, at 81, 85. Sumner acknowledged that some millionaires may have obtained their fortunes “by privileges created by law and not by legitimate enterprise and ability.” *Id.* at 84. He considered this irrelevant, however, since the effect of that wealth still trickled down to others. *Id.* at 84-85. Even so, Sumner opposed the granting of privileges by the government or the legal system. To him *laissez-faire* meant that private enterprise, unaided by government, could best ensure economic, and hence political, freedoms. Consequently, he opposed the tariff system as a method of raising revenue because it interfered with the natural struggle for the survival of the fittest by benefiting certain private enterprise. This view thus led him indirectly to support income taxes in the 1870’s as a way to lessen state interference. See STANLEY, *supra* note 46, at 73-75.

61. Sumner, *supra* note 60, at 85.

62. Robert C. Whittemore, *The Philosophical Antecedents of American Ideology*, in *IDEOLOGY AND AMERICAN EXPERIENCE* 15, 26 (John K. Roth & Robert C. Whittemore eds., 1986).

63. *Id.* (quoting Sumner).

The Reverend William Lawrence, Episcopal Bishop of Massachusetts, also exemplified the *Gospel of Wealth*, combining religion, economics, and science, when he proclaimed: “[I]t is only to the man of morality that wealth comes.”⁶⁴ In other words, material wealth elevated man’s character and helped the community. Lawrence said that when man struggled at the poverty line, he was consumed by self-interest merely to exist; with wealth, man connected to others. He voluntarily contributed to his community, to schools, to churches, to the arts, and to charity.⁶⁵

Lawrence’s point that some prosperity is necessary to effectively connect a person with society echoes a theme of republicanism. In the republican view, people who struggle in poverty cannot adequately govern themselves, just as in Lawrence’s view people at the poverty line cannot develop their moral character and sense of society without some degree of wealth. While Social Darwinism stressed the accumulation of wealth and its “trickle down effect,” republicanism argued for a more equal distribution of wealth so that everyone would have the independence that came from being a property owner.⁶⁶

In the Gilded Age, a variety of movements incorporated the republican theme of a more equal wealth distribution. These groups—such as the Knights of Labor, the Alliance, the Populists, and the Progressives—challenged the accumulationist aspect of moral economic individualism, Social Darwinism, and the *Gospel of Wealth*.⁶⁷

64. Reverend William Lawrence, *The Relation of Wealth to Morals*, in DEMOCRACY AND THE GOSPEL OF WEALTH, *supra* note 47, at 68, 69. (*The Relation of Wealth to Morals* was originally published in 1901); cf. NEUFELDT, *supra* note 43 (giving an earlier illustration of the same connection between consumption and spirituality). Lawrence continued:

We believe in the harmony of God’s Universc. We know that it is only by working along His laws natural and spiritual that we can work with efficiency. Only by working along the lines of right thinking and right living can the secrets and wealth of Nature be revealed. . . . [T]o seek for and earn wealth is a sign of a natural, vigorous, and strong character. . . . The race is to the strong. The search for material wealth is therefore as natural and necessary to the man as is the pushing out of its roots for more moisture and food to the oak.

Lawrence, *supra*, at 69-70. Lawrence went on to state that “material prosperity is helping to make the national character . . . more Christlike.” *Id.* at 73.

65. Lawrence, *supra* note 64, at 71-72.

66. Jefferson believed that owning property was so vital to citizenship that, in 1776, he proposed that Virginia give 50 acres to each man who did not own that much land. WOOD, *supra* note 28, at 179.

67. Social Darwinism was challenged from a variety of viewpoints including criticisms from the scientific (Kropotkin), sociological (E.A. Ross), and economic (Simon Patten) perspectives. MERLE CURTI, *THE GROWTH OF AMERICAN THOUGHT 576-79* (2d ed. 1943).

Charles S. Peirce cogently framed the religious aspect of the disagreement:

The gospel of Christ says that progress comes from every individual merging his individuality in sympathy with his neighbors. On the other side, the conviction of the nineteenth century is that progress takes place by virtue of every individual’s striving for himself with all his might and trampling his neighbor under foot whenever he gets a chance to do so. This may accurately be called the Gospel of Greed.

Charles S. Peirce, *The Century of Greed*, in DEMOCRACY AND THE GOSPEL OF WEALTH, *supra* note 47, at 89, 91.

A variety of reformers such as Henry George, Henry Demarest Lloyd, and Edward Bellamy preached a more equal distribution of wealth and power. See, e.g., EDWARD BELLAMY, *LOOKING BACKWARD* (1888). For a general description of these expressions of the more egalitarian traditions, see, for example, BURNS, *supra* note 16, at 163-72; and ROBERT WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at 137-43 (1967).

The Populist and Progressive movements, two of the most influential, were diverse and complex movements.⁶⁸ While the Populists sought to revive a simpler, more agrarian era, the Progressives dealt more realistically with the conditions of industrial and urban life. Neither group advocated absolute equality. What each wanted was to restore the economic individualism, the political democracy, and the morality of personal responsibility that existed in an earlier America.⁶⁹ Neither of these two groups necessarily rejected the *Gospel of Wealth* nor moral economic individualism; many of the groups' followers merely wanted to restrain it so that they could have a chance at the golden ring themselves. As Richard Hofstadter noted, Progressivism appealed to the small businessman and the new middle class, both of whom resented and feared the vast accumulations of wealth but "none the less [sic] maintained a half-suppressed feeling of admiration and envy for the captains of industry who had after all done no more than fulfill the old dream of heroic personal ascendancy."⁷⁰

The 1890's through 1913, the year in which the Sixteenth Amendment was ratified, were years of dramatic social and political change. The changes resulted from the social and economic dislocation which accompanied the transformation of the American economy from a system of owner-managed companies existing in a predominantly unregulated market to a regulated market dominated by a few large, mostly non-owner-managed corporations.⁷¹ As a result of this economic and social turmoil, classes and regions sparred with each other on the political battleground.⁷² Open class warfare was avoided, but the accumulationist aspect of moral economic individualism won. McKinley's defeat of William Jennings Bryan in 1896 was a major victory, as was the 1895 defeat of the income tax when the Supreme Court ruled that the Income Tax Act of 1894 was unconstitutional.

By 1894, an income tax was not unfamiliar to Americans. Internationally, England and a few other countries had income taxes; at the federal level, this

68. I use the terms broadly to include those protests against the rapid industrialization, the growth of cities, and the concentration of wealth that arose in the latter part of the nineteenth century. Populism tended to be associated more with rural interests and Progressivism tended to be associated with urban interests. Each movement wanted "to keep the benefits of the emerging organization of life and yet to retain the scheme of individualistic values that this organization was destroying." RICHARD HOFSTADTER, *THE AGE OF REFORM* 217 (1955); see BURNS, *supra* note 16, at 172-91. The Populist and Progressive movements have received much critical attention. See, e.g., JOHN D. HICKS, *THE POPULIST REVOLT* (1931); HOFSTADTER, *supra*; WIEBE, *supra* note 67. For a more recent treatment see BURNS, *supra* note 16.

The Progressive era extended roughly from 1890 to 1916. See, e.g., MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916*, at 1 (1988). Other authors mark the beginning and the ending of the era slightly differently. For example, LOUIS GALAMBOS, *THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880-1940*, at 117 (1975). Hofstadter dates the beginning of the era at about 1900. HOFSTADTER, *supra*, at 5. All seem to agree that World War I ended the period.

69. HOFSTADTER, *supra* note 68, at 5-7.

70. *Id.* at 217; see also *id.* at 225; WEBER, *supra* note 20, at 176-77. Some Progressives, of course, were motivated more by an idealistic desire to better society than by resentment and fear.

71. See SKLAR, *supra* note 68, at 1-4. For a partial list of sources for this time period, all of which help form the background for the discussion that follows, see Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 55 n.2 (1990).

72. See, e.g., BURNS, *supra* note 16, at 223-35.

country had experienced income taxes during the Civil War; and at the state level, by 1895, a minimum of seventeen states had at one time or another employed an income tax.⁷³ The 1894 tax emerged partly as a result of the Democratic victory in the 1892 election, the economic recession accompanying the Panic of 1893, and widespread popular unrest, evidenced by Populist and labor movement revolts against lowered wages, growing "trusts," and the rapid urbanization of the country.

The traditional Progressive view of the income tax holds that its passage resulted from the pressure of reform-minded groups such as the Greenback Party, the Knights of Labor, the Populists, and finally, in 1896, the Democratic Party. The Pluralist interpretation views the tax more broadly as the outcome of a conflict among various groups, including business.⁷⁴

Robert Stanley, however, rejects both traditional views and explains the early history of the income tax (1861 to 1913) as a result of what he calls centrism—"political officials acting as relatively autonomous trustees on behalf of the most powerful segments of society through the use of multiple dimensions of law."⁷⁵ According to Stanley, the tax was neither a product of reform nor of competing interest groups, but was enacted (during the Civil War, in 1894, and in 1913) by the establishment to preserve the status quo and to quiet dissent.⁷⁶ Stanley claims that the low rates and the high exemptions of the 1894 tax, like the earlier Civil War taxes, proved that most legislators who supported the tax intended it to be a rhetorical device to quiet dissent rather than a substantive tool to enact real wealth redistribution. The battle in Congress and the Court in 1894 and 1895 was a battle within centrism to determine how best "to control the explosive growth, staggering economic inequality and resulting political challenges of the late 1880's, and the upheaval of the Panic and depression of the 1890's."⁷⁷ The passage of the Income Tax Act of 1894 showed the acceptance by centrism of the income tax as a means to pacify dissent; it was a "safety valve" against those desiring greater change.⁷⁸

Stanley's interpretation of *Pollock v. Farmer's Loan and Trust Co.*⁷⁹ again differs from the traditional view in that it suggests that the decision was not a complete triumph of conservatism for the following reasons: (1) only a federal income tax on property was invalidated, (2) it was acknowledged that states had the right to tax income, and (3) progressivity was not ruled

73. JOHN D. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA* 2-3 (1985). A federal income tax had been proposed in 1815 to meet the revenue needs of the War of 1812. For additional histories of the early years of the income tax, see ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* (1940), and SIDNEY RATNER, *AMERICAN TAXATION* (1942). For a recent book challenging the traditional view of the early history of the income tax, see STANLEY, *supra* note 46.

74. See, e.g., STANLEY, *supra* note 46, at 3-7 (summarizing Progressive and Pluralist interpretations).

75. *Id.* at ix.

76. *Id.* at viii.

77. *Id.* at 101.

78. *Id.* at 117.

79. 157 U.S. 429, *aff'd on reh'g*, 158 U.S. 601 (1895).

unconstitutional. Thus, the *Pollock* decision was not a conservative Court's victory, but a centrist Court's small limitation of "growing concentrations of economic and legal power."⁸⁰ The struggle over the income tax, according to Stanley, was not one between left and right or among conflicting interest groups, but a struggle within centrism itself. He thus relegates the income tax to the status of a mere rhetorical device.

While Stanley's view explains many anomalies in the early history of the income tax which the Progressive/Pluralist view cannot,⁸¹ his interpretation ignores the importance of rhetoric. Because the purpose of rhetoric is to persuade, the particular form the rhetoric takes is important. It must reflect deeply and widely held views or else it will lack the power it needs to persuade. Moreover, because rhetoric shapes the debate, it affects the ultimate shape of the end result. The fact that Stanley views the debate as one within centrism rather than between extremes of right and left makes the debate in some sense more—rather than less—important. According to Stanley, the debate—which occurred within the dominant power structure—centered on concern over growing concentrations of wealth and power. His interpretation illustrates that the conflict over the nature and the limits of wealth lay not merely at the fringes of society but within its very core, deeply embedded in the American tradition. The conflict he describes is the inherent conflict of moral economic individualism, which evidences itself throughout American history in alternating periods of orgiastic capitalism and quieter moments of greater egalitarianism. Thus, the income tax debates in 1894 (and later) are important because they illustrate the continual tension in the American tradition, which exists regardless of whether the historical interpretation is Progressive, Pluralist, or centrist.

Although the 1894 debates contained many appeals to class and geographical sectionalism,⁸² the debate reached far beyond such issues. It implicated the very foundations of American government. It reflected, in fact, the tension within moral economic individualism between the two themes of wealth (and

80. STANLEY, *supra* note 46, at 138.

81. For example, his theory explains why Representative John Sherman (R-OH) went from being a supporter of the income tax in the 1860's to being an opponent in the 1890's.

82. BLAKEY & BLAKEY, *supra* note 73, at 10-11. Consumption taxes, such as sales and excise taxes, bear proportionately more heavily on the poorer classes. Thus, the South, the West, and the agricultural bloc generally supported an income tax as a means of making the richer, industrial North and East bear their fair share of the taxes. Representative George Ray (R-NY) stated that the South favored an income tax "because it knows that it will not pay over from 3 to 5 per cent of it, and that the Republicans of the North will have to pay the great part of it." 26 CONG. REC. 1601 (Jan. 29, 1894). There was some support for an income tax in the East; however, Joseph Pulitzer, the owner of the *New York World*, supported the tax from the time he bought the paper until the passage of the income tax in 1894. BLAKEY & BLAKEY, *supra* note 73, at 11-12. Representative Uriel Hall (D-MO) stated that the "great metropolitan press," except for the *St. Louis Republic*, the *Chicago Times*, and the *New York World*, opposed the income tax. 26 CONG. REC. 1611 (Jan. 29, 1894).

Stanley claims that "class legislation" arguments were a "poor third" in frequency in the income tax debates—behind appeals to war experience and claims of the tax being undemocratic because it was not in the Democratic Party's platform in 1892. STANLEY, *supra* note 46, at 121. Looking for "class" arguments only obscures where the real tension laid. That tension, of course, was moral economic individualism's contradictory attitudes toward wealth—which transcended classes. For a traditionally progressive view of the tax as class and sectional conflict, see Elmer Ellis, *Public Opinion and the Income Tax, 1860-1900*, 27 MISS. VALLEY HIST. REV. 225 (1940). See also JEROLD L. WALTMAN, *POLITICAL ORIGINS OF THE U.S. INCOME TAX* (1985).

wealth (and power) accumulation and greater equality. Some saw the income tax as an assault on the moral and political foundations of American democracy. Joseph Choate, for example—one of the plaintiff's attorneys in *Pollock*—stated that the income tax, with its communistic tendencies, was an attack on the very system of private property.⁸³ The system of private property, of course, was not merely the basis of the American political system, but under moral economic individualism and the “Gospel of Wealth,” it also had religious and moral implications. The income tax, which deprived people of a portion of their property, thus threatened the idea of the godly and the goodly man acquiring property not simply for his own benefit, but for the public good and the glory of God.

Less dramatically, the income tax was denounced as rewarding the idle and the wastrel by “put[ting] tax upon thrift and impos[ing] a penalty on success[.]”⁸⁴ A tax on thrift and success threatened the very basis of moral economic individualism because it undermined the idea of a worldly “calling” through which one served God and demonstrated one's grace.

Some speakers, stressing the republican value of equality, favored the income tax because they thought that it would help break up the rapidly growing concentration of wealth. While the concentration of wealth might be dangerous to any civilization, it was particularly menacing for a democracy.⁸⁵ The income tax would and should affect only the wealthy because

83. *Pollock*, 157 U.S. at 532. See also BLAKEY & BLAKEY, *supra* note 73, at 18; 26 CONG. REC. 1645 (Jan. 30, 1894) (Representative Frankin Bartlett (D-NY) suggesting that the Founding Fathers would be angered by the income tax's assault on private property: “Such a communistic theory is absolutely hostile to the fundamental principles of our Government.”); David A. Wells, *The Communism of a Discriminatory Income Tax*, 130 N. AM. REV. 236 (1880). Wells, a former special commissioner of Internal Revenue, was quoted in the 1894 debates. See, e.g., 26 CONG. REC. 1645 (Jan. 30, 1894) (statement of Rep. Bartlett).

84. 26 CONG. REC. app. at 207 (Jan. 31, 1894) (statement of Rep. Robert Adams, Jr.); see also *id.* at 1600 (Jan. 29, 1894) (Representative Ray stating that the income tax “proposes to tax brains, enterprise, and industry. . . . The man who prefers to let his brain and body rest, pays no tax. This is a warning that men must not be too industrious, too enterprising, or too saving.”); *id.* at 1650 (Jan. 30, 1894) (Representative Joseph Walker (R-MA) stating that “[t]he sluggard, the thriftless, the inheritor of property who is wasting his fortune in riotous living and in debauchery, under your income tax pays nothing. . . . [But] the men who accumulate fortunes and serve their country and serve their generation by furnishing work for those they employ, they are obliged to pay a penalty . . . directly into the pockets of their reprobate neighbors.”).

85. The threat could come from either socialism or despotism. On the one hand, vast wealth disparities threatened to bring about either socialism or anarchy, and the income tax acted as a bulwark against this threat. Without it, the wealth disparities and the unjust distributions of the burdens of government would become so great as to threaten revolt:

But my friends, I tell you when you oppose a measure of this kind, when you come to the great masses of the people and say that the wealthy of this Government shall bear none of its burdens, then you make a foundation for the argument of anarchy, socialism, and demagoguery, that eventually will sweep back and curse this country, as it did in France in the days of the French Revolution.

Id. at 1609 (Jan. 29, 1894) (statement of Rep. Hall). Representative Hall, a congressman from Missouri, was believed to be the father of the income tax. BLAKEY & BLAKEY, *supra* note 73, at 15 n.22.

More frequently, speakers saw threats from the right because of the power and the privilege that came with the concentration of wealth. See *infra* notes 126-27 and accompanying text.

Representative William Talbert (D-SC) cites Senator Daniel Voorhees (D-IN), speaking in the Senate on March 19, 1890: “When darkness settled over Egypt and she lost her place among the great nations of the earth, 3 per cent of her population owned 97 per cent of her wealth. When Babylon went down, 2 per cent of her population owned all the wealth.” 26 CONG. REC. 1674 (Jan. 30, 1894). Senator Voorhees had further claimed that in 1870, capitalists owned 63% of the country's wealth; in 1880 they

only they and their concentration of wealth threatened democracy.⁸⁶ Speaking on the same point, Representative John Davis (R-KS) referred to Thomas Jefferson for support for the proposition that "equality of wealth" must be preserved.⁸⁷

Equality did not mean that all incomes had to be leveled;⁸⁸ it simply meant that extremes should not exist. At one extreme, poverty prevented the exercise of independent will necessary for self-government. At the other extreme, great accumulations of wealth led to concentration of power and the very system of patronage, personal influence, and hereditary privilege that the Revolution had

owned 37 1/2%; and in 1890 they "probably" held over 80%. *Id.* Representative William Jennings Bryan (D-NE) stated that 9% of the families owned about 71% of the wealth. *Id.* at 1657.

One Populist editor believed that the income tax would break up the plutocracy. Letter from C.H. Jones to William Jennings Bryan (May 8, 1893), quoted in Ronald F. King, *From Redistributive to Hegemonic Logic: The Transformation of American Tax Politics, 1894-1963*, 12 POL. & SOC'Y 1, 19 (1983). King's thesis is that the game of United States federal taxation politics changed from a zero-sum game in the 1890's to a nonzero-sum game model. *Id.* at 2; see also RONALD F. KING, MONEY, TIME & POLITICS (1993) (elaborating on King's thesis). In a zero-sum situation, one side wins only at the expense of the other. According to King, this explains the dire predictions of class warfare that occurred in the 1890's. By 1921, however, the model had changed to a nonzero-sum game model—whereby the gains of one do not come at the expense of the others. Rather, the gains of the rich "trickle down" to help the poor. The nonzero-sum model thus alleviated—but did not eliminate—the political and the ideological warfare and caused both political parties to buy into a system of encouraging economic growth via the tax system.

Although Professor King and I agree on many points, I disagree with a few of his assertions. On the economic level, I believe the game was never zero-sum to begin with. Even in the 1890's, many people believed, as the *Gospel of Wealth* proclaimed, that wealth accumulation led to economic progress for all. Moreover, those favoring the income tax did not want to abolish all wealth, merely unjust wealth. This leads to my second point: economics and political ideology are closely intertwined. Each shapes the other. There are different forms of economics and each has its own underlying political structure. As this Article argues, the American version of classical political economy has a particular view of man and society just as surely as does Marxist economics. The battle over the 1986 tax act showed this clearly. Perhaps our main difference may be summarized as follows: King sees economics as the driving factor in the tax area; I admit economics is an important factor, but in a large part because of the ideological weight it carries. While we both acknowledge the importance of economics and ideology, King stresses the former whereas I give more weight to the latter.

86. 26 CONG. REC. 1730 (Jan. 31, 1894) (Representative Joseph Sibley (D-PA) stating: "It is not the twenty-five-hundred-dollar incomes or the five-thousand-dollar incomes that are a menace to this Republic, but it is the incomes reaping up into the millions that threaten us.")

87. *Id.* at 1663. Davis quotes at length from a letter written by Jefferson from Fontainebleau, France, on October 28, 1785. Commenting on the concentration of wealth and poverty in France, Jefferson wrote:

I am conscious that an equal division of property is impracticable; but the consequence of this enormous inequality producing so much misery to the bulk of mankind, legislators can not invent too many devices for subdividing property

Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometric progression as they rise.

Id. (reproduction of Jefferson's letter).

Jefferson felt that property laws had been extended beyond "natural rights." He then went on to stress the importance of "small landholders" to the state. Senator David Hill (D-NY) later stated that this letter was an argument *against* an income tax. *Id.* at 3563 (Apr. 9, 1894); see also *id.* at 3783 (Apr. 17, 1894) (statement of Sen. Smith).

Although the letter does not directly support an income tax, it does comport with the concept of equality and the necessity of free, independent citizens. The letter, therefore, indirectly supports an income tax to the extent that an income tax lessens concentrations of wealth and spreads tax burdens equally.

88. See, e.g., *id.* at 1605 (Jan. 29, 1894) (Representative John Williams (D-MS) stating that "[n]atural inequalities exist, and I am certainly no leveler."); see also *id.* at 6707.

so radically overthrown.⁸⁹ Justice Harlan, who dissented in *Pollock*, stated in a May 24, 1895, letter to his sons that *Pollock*

“will become as hateful with the American people as the Dred Scott case was when it was decided. That was the attempt of the owners of slave property to dominate the freemen of America The recent decision will have the effect . . . to make the freemen of America the slaves of accumulated wealth.”⁹⁰

Under this tradition of equality, wealth per se was not the danger; rather the danger was the privileges and the patronage that came with it. Representative Henry Johnson (R-IN), for example, did not favor taxing the rich simply because they were rich; he wanted to tax only those who acquired wealth through “special advantages” rather than through their personal earnings and savings.⁹¹ Moreover, because equality rather than hierarchy was the foundation of American democracy, the burdens of supporting government should be distributed equally. The income tax system was, therefore, the ideal tax system because it was based on two ideas: (1) the ability to pay; and (2) “equal sacrifice” from its citizens. Representative Hernando DeSoto Money (D-MS) stated that the income tax is a “moral tax . . . founded upon the rules of equity and justice and the equality of all men before the law.”⁹²

Because privilege and undue concentrations of wealth were the evils, the source of income became important. Many objected not to the fact of wealth itself but to the manner in which people had accumulated wealth. Senator William Allen (Populist-NE), for example, stated that the Populists were in favor of property and “honest” fortunes but not fortunes acquired through privilege and special legislation.⁹³ Money earned through industry and talent was compatible with democracy and equality because every person of industry and talent had an equal opportunity. Consequently, some differentiated between the worthiness of earned income and the unworthiness of unearned income. Senator James Kyle (Independent-SD), for example, spoke of the nation’s toiler who

89. See WOOD, *supra* note 28. Representative Williams stated: “So bold and daring has accumulated wealth become in its efforts to control the affairs of our Government, . . . there is nothing in my judgment which so threatens the rights and liberties of the American people as these rising pyramids of fortune.” 26 CONG. REC. app. at 213 (Jan. 30, 1894); see also *id.* at 271 (statement of Rep. Richardson).

90. David G. Farrelly, *Justice Harlan’s Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175, 180 (1951) (quoting a letter from Justice Harlan to his sons (May 24, 1895)).

91. 26 CONG. REC. 1652-53 (Jan. 30, 1894) (Representative Johnson favored a single land tax à la Lloyd George); see also *id.* app. at 329-30 (Representative James Maguire (D-CA) stating that a land tax would be a better way to destroy “the power of accumulated wealth over labor”).

92. *Id.* at 1731 (Jan. 31, 1894); see also *id.* at 1606, 1617 (Jan. 29, 1894) (Representative Williams emphasizing that many other democratic countries had income taxes). Religion was also brought in to bolster egalitarian support for the income tax. For example, Representative Hall spoke of Moses, St. Paul, and St. Luke, *id.* at 1608, while Representative Money referred to God. *Id.* at 1731.

93. *Id.* at 6706-07 (June 22, 1894); see also *id.* at 6712-13 (Senator Allen discussing the privileges that the railroads received); *id.* at 6684 (Senator Kyle stating that favoritism had led to a rigid class system—almost as rigid as the European system); *id.* app. at 213 (Jan. 30, 1894) (statement of Rep. Williams). This abhorrence of special privilege also fueled nontax debates regarding big corporations and trusts.

gives of his lifeblood to add to the material wealth of the nation and knows little of ease or luxury. The rich are often the children of fortune, living on the fruits of others' labor, and it is right economically and morally that they should bear the larger share of public expense.⁹⁴

Those who were against an income tax and who favored an accumulation of wealth also stressed earned income. It was claimed that many of the millionaires "are self-made men who have commenced life in poverty and availing themselves of industry, intelligence, and opportunity, have been successful. Many . . . have devoted their lives to the public good, and have given freely for all good purposes."⁹⁵

The tension within moral economic individualism, as reflected in the debates, produced a modest tax. The rates under the 1894 law were low (only 2%). Further, because of the \$4000 exemption, only the relatively wealthy were subjected to the tax.⁹⁶ The fact that the Act did not differentiate between earned and unearned income was noted as a major failing of the statute.⁹⁷

Although the *Pollock* Court held the income tax unconstitutional, the desire for such a tax did not die. Gradually, the support built to such a level that a constitutional amendment was proposed in 1909.⁹⁸ The ratification of the

94. *Id.* at 6684 (June 22, 1894) (statement of Sen. Kyle). Arguments against an inheritance tax also reflected this distinction between earned and unearned income. See *CARNEGIE*, *supra* note 27, at 20-25.

95. 26 CONG. REC. 6695 (June 22, 1894) (statement of Sen. Sherman). Even those in favor of the income tax proclaimed themselves in favor of property and "honest" wealth. *Id.* at 6703 (statement of Sen. Allen).

96. *BLAKEY & BLAKEY*, *supra* note 73, at 17.

97. *RATNER*, *supra* note 73, at 191-92. The Civil War income tax acts also did not differentiate between earned and unearned income. President James Garfield, who favored a lower tax on earned income, had complained that a tax which did not so discriminate was "the very essence of injustice." *Id.* at 97-98 (quoting an unidentified speech of President Garfield). "We do not think it right to tax an income which is the fruit of present personal exertion as though it were derived from an inheritance or from invested capital." *Id.* at 98 (quoting the *New York Tribune*, Jan. 23, 1862).

98. Although the income tax originally was supported largely by the South and the West, by 1909 it also had gained significant strength in the Northeast. While support rested primarily on the belief that tax burdens ought to be borne by citizens according to their ability to pay (as best measured by income), some also supported an income tax as a method of redistributing wealth. *BUENKER*, *supra* note 73, at 40-48. By 1909, the Democrats, together with the Insurgent Republicans, had enough votes to threaten passage of an income tax. President Taft disliked the idea of the Supreme Court being confronted with another income tax and compromised by proposing a corporate excise tax (based on income) and a constitutional amendment—or so the traditional story goes.

This brief summary follows the traditional progressive/pluralist interpretations of Blakey & Blakey and Buenker. See *supra* note 73. Stanley, as previously noted, does not see either the passage of the Sixteenth Amendment, or the enactment of the 1913 statute, as arising out of a reform movement that began with the aftermath of *Pollock* and culminated with the ratification of the Sixteenth Amendment in 1913. Rather, Stanley sees the amendment and the statute as centrist responses to the 1909 panic, its resulting unrest, and the inability of the party system and the tariff structure to deal with the problems. "The corporate tax [of 1909] and the amendment resolution emerged from a compromise designed to accomplish the re-establishment of the usual lines of authority, to produce the appearance of reform, and to avoid a direct challenge to the Court, all of which helped reseal centrist fissures." *STANLEY*, *supra* note 46, at 178 (emphasis added). For another view of the Corporate Excise Tax of 1909, see *Kornhauser*, *supra* note 71, at 53 (explaining that the corporate excise tax is partially a response to concerns about concentrations of wealth and to calls for corporate regulation). Stanley notes the "familiar themes of social stability and the alleviation of class tension" in the pro-income tax debate. *STANLEY*, *supra* note 46, at 23. He postulated that, for centrists, those themes—plus the lack of a real

Sixteenth Amendment finally occurred in 1913. The platforms of all parties in the 1912 election contained a great deal of rhetoric against big business, and the victor, Woodrow Wilson, "had made a name for himself as a critic of monopolies and trusts."⁹⁹

The first income tax act under the Amendment, enacted in 1913, looked very much like the 1894 law. It had low rates (a normal tax of 1% and a graduated surtax with a maximum of 6%), and a high exemption amount (\$3000 if single, \$4000 if married).¹⁰⁰ Like the earlier law, the 1913 Act did not distinguish between earned and unearned income. As in 1894, Congress discussed and focused on the moral nature of money. Senator Coe Crawford (R-SD), for example, had proposed a lower tax on earned income, not to redistribute wealth but merely to distribute the tax burden fairly. It was necessary, he stated, to distinguish between "the earning power of an active force for service in society and the income from dead property."¹⁰¹ As Senator Crawford proclaimed:

[I]t is fundamentally wrong to place the salary which is earned by a professional man . . . a genius who so contributing his service, giving his brain and his ability to serve his fellow men, on the same basis that you put the income that is enjoyed by a favored child of fortune whose parent has left him great property and who is a drone and an idler, doing nothing for his fellow men.¹⁰²

allocative function to the by-then familiar low rate/high exemption tax structures—indicated the symbolic nature of the tax. The Centrist position again used the income tax not to promote real change but to stifle dissent. *Id.*

99. BLAKEY & BLAKEY, *supra* note 73, at 72.

100. Income Tax Act of 1913, Pub. L. No. 63-16, Sec. II, 38 Stat. 114, 166, 168.

101. 50 CONG. REC. 3815-16 (Aug. 27, 1913). Crawford's proposed amendment was modeled on the British tax and would have allowed a deduction from the normal tax for income "immediately derived by the individual from carrying on or exercise [by the taxpayer] of a profession, trade, vocation, and so forth." *Id.* He would have made up the lost revenues by imposing both a larger tax on income from property and an inheritance tax. *Id.* at 3815. The amendment was defeated 46-16, with 33 senators abstaining. *Id.* at 3818. The next day Crawford proposed a Senate resolution directing the Finance Committee to study the issue. *Id.* at 3837 (Aug. 28, 1913). After considerable debate, the issue was referred to the Finance Committee and, apparently, oblivion. *Id.* at 3858 (Aug. 29, 1913). The issue resurfaced, more successfully, in later years.

Senator Henry Cabot Lodge (R-MA) also favored differentiating between earned and unearned income. He proposed that such a differential was an indirect way to tax wealth which, he believed, was the superior tax base. Economists, he stated, viewed the failure to differentiate as "serious" because they recognized that a "tax imposed upon the earning capacity of a community is not theoretically the best tax. It is inferior, for example, to the inheritance tax. . . . The earning capacity of a community, which is the motivating power of prosperity, is something which it is desirable under every civilized government to encourage." *Id.* at 3839 (Aug. 28, 1913).

The economist Richard Goode lists this argument—the indirect taxation of wealth—as one of three traditional arguments in favor of an earned income preference. The other two are compensation for the precariousness or fragility of earned income, and compensation for the "real" costs of earned income (such as depreciation and the psychic costs of labor). RICHARD B. GOODE, *THE INDIVIDUAL INCOME TAX* 238-39 (rev. ed., 1976). For early governmental discussions of the rationale for an earned income preference, see 2 JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, *PRELIMINARY REPORT ON EARNED INCOME*, pt. 1 (1931); Treasury Department (Div. of Tax Research), *The Tax Treatment of Earned Income* (1947).

102. 50 CONG. REC. 3815 (Aug. 27, 1913).

Senator John Williams (D-MS), on the other hand, stressed the positive, moral aspects of saving. He noted that two doctors may earn the same amount of income, but one lives as a "prince" while the other, who invests his saved income, is "thrifty, industrious, [and] frugal."¹⁰³ Senator Williams contended that taxing the earnings from these savings in effect taxed the frugal taxpayer and exempted the spender.¹⁰⁴

The 1913 debates, then, reiterated some of the basic arguments and attitudes about money that appeared in 1894 and that would remain throughout the subsequent income tax debates. The moral tones heard in the debates regarding earned and unearned income reflected conflicting feelings about wealth. On the one hand, wealth—particularly earned wealth—was a result of individual moral virtue and was good for society as a whole. On the other hand, too much wealth—especially unearned wealth—was detrimental to the moral fabric of the individual and to the political fabric of the nation. The modest scope of the tax (due to its low rates and high personal exemption amount) was emblematic of the conflict about wealth: The tax did "something," but not very much. It was an "uneasy" compromise.

B. The 1920's

The 1920's were another period in which the accumulation side of moral economic individualism dominated. Perhaps the most phenomenal illustration of this fact was Bruce Barton's *The Man Nobody Knows*,¹⁰⁵ which portrayed Jesus as a businessman. The book speaks of Jesus' "executive" abilities;¹⁰⁶ how He created and sold a new idea (product) with no funds and a small, uneducated work force,¹⁰⁷ and how He so successfully "advertised" His idea (product) that it has lasted thousands of years.¹⁰⁸ The book speaks of various entrepreneurs such as Henry Ford and Theodore N. Vail, founder of American Telephone & Telegraph Company, who threw their lives into work—not for money but for the work itself. Their commitment to work enriched their own lives and the lives of others, thereby gaining "fortune and immortality."¹⁰⁹ These entrepreneurs believed that fame resulted not through taking from but from giving to and serving the community.¹¹⁰ There is no difference, Barton said, between work and religious work: "[A]ll business is His Father's business All work can be worship; all useful service prayer."¹¹¹ Here, indeed, is the Puritan idea of a special calling which was

103. *Id.* at 3838 (Aug. 28, 1913).

104. *Id.*

105. BRUCE BARTON, *THE MAN NOBODY KNOWS* (1925).

106. Barton recognized Jesus' ability to persuade, *id.* at 24, and noted His ability to develop His employees' talents and "mold[] them into an organization which carried on victoriously." *Id.* at 30-31.

107. *Id.* at 89.

108. *Id.* at 125-58.

109. *Id.* at 170.

110. *Id.* at 176-77.

111. *Id.* at 180 (emphasis in original).

also visible in the *Gospel of Wealth*.¹¹² Once again, the moral tradition combined with economic individualism to endorse the accumulation of wealth.

The income tax debates of 1921, 1924, and 1926 played themselves out against this conflict within moral economic individualism. At its most basic level, the conflict was between those congressmen who saw the accumulation (and the accumulator) of wealth as the moral bastion of civilization, progress for all, and national democracy; and those who saw great accumulations (and the accumulators) of wealth as morally wrong on an individual and a national level. Traditionally, the battle is described as one pitting northern, conservative Republicans against a coalition of Democrats (from the South and West) and Insurgent Republicans (progressive and agrarian Republicans primarily from the Midwest and West).¹¹³ In actuality, the conflict was a bit more complicated. Democrats were not against all wealth; many felt taxes needed to be reduced to encourage business.¹¹⁴ The battle was over the *balance* between wealth and equality and was fought on the same grounds and with the same language as it had been in the Gilded Age.

Those favoring lower taxes and business incentives emphasized the accumulation of wealth as the engine of economic growth and democracy. The wealthy benefited the community not simply by investing and spending money, but also by contributing to religious and charitable organizations and by doing public work. As Senator William Bruce (D-MD) said, “[A] rich man in a community is nothing less than an irrigating stream passing through an arid plain.”¹¹⁵ Reduced taxes, under this view, would increase savings and investments which would, in turn, increase “employment of people and their consumptive power.”¹¹⁶ According to this supply-side theory, a tax decrease would increase investment which would lead to an increase in employment, thus creating an unending spiral of economic growth and prosperity for all.¹¹⁷

Not only would lowered taxes increase prosperity, but they would preserve the fundamental form of our nation’s government: high tax rates and excess profits taxes were confiscatory of property, the first step in a march whose “logical conclusion” was that the United States “would have [B]olsheviki Russia at our own doors.”¹¹⁸ The problem was not simply that the taxes

112. CARNEGIE, *supra* note 27.

113. *See, e.g.*, RATNER, *supra* note 73, at 406, 410.

114. *E.g.*, 1920 SECRETARY OF TREAS. ANN. REP. 37 (1920) (statement of Secretary Houston); 61 CONG. REC. 5346 (Aug. 20, 1921) (statement of Rep. Burton); *id.* at 5355 (statement of Rep. Mondell).

115. 67 CONG. REC. 3618 (Feb. 9, 1926); *see infra* notes 134-39 and accompanying text.

116. 61 CONG. REC. 5242 (Aug. 18, 1921) (statement of Rep. Fess).

117. *Id.* at 6535 (Oct. 20, 1921) (statement of Sen. Edge).

118. *Id.* at 5242 (Aug. 18, 1921) (statement of Rep. Fess); *see also* 65 CONG. REC. 2620-21 (Feb. 16, 1924) (statement of Representative Thomas Phillips (R-PA) using biblical parables to support his opposition to a progressive tax which “replace[d] individualism with socialism. . . . It is for us to decide whether we wish to follow the constructive precepts of Christ or the destructive dogma of Lenin.”); 61 CONG. REC. 6472 (Oct. 12, 1921) (Senator George Moses (R-NH) stating that a progressive income tax was a modern adaptation of communism). The 1926 debate on the estate tax was particularly replete with accusations of socialism and communism against supporters of the tax. *See, e.g.*, 67 CONG. REC. 3606 (Feb. 1, 1926) (statement of Sen. King); *id.* at 949 (Dec. 12, 1925) (statement of Rep. Frear); *id.*

might equalize wealth, but that high taxes would revolutionize the role of government by furthering the "pernicious idea" of state socialism, that government should do more than protect life and property.¹¹⁹

Those who favored higher surtaxes and excess profits taxes, while opposing consumption taxes, were not against wealth and property per se. Like their opponents, they recognized that property was the basis of a republican society.¹²⁰ Even the self-proclaimed socialist, Representative Victor Berger (WI), believed it was "wise" for everyone to own some property so that each person would have a stake in the system.¹²¹ These individuals were not opposed to wealth per se, but rather to too much wealth: large accumulations of wealth injured both the individual and the nation. For the individual, great wealth prevented character development,¹²² led to idleness, and stifled ambition.¹²³

More importantly, too much wealth endangered the very fabric of the nation. As the "radical" Representative Christian Ramseyer (R-IA) stated, although property was the basis of "the whole social structure," the danger was that property tended to become concentrated.¹²⁴ The threats were from both the right and the left. The threat from the right was articulated by Representative John Nelson (R-WI). Concentration of wealth, he said, needed to be broken up "for the good of the entire country,"¹²⁵ because it led to oligarchy. "[A]ll history proves that with the concentration of a nation's wealth goes also its political power."¹²⁶

at 671 (Dec. 10, 1925) (statement of Rep. McKeown). In 1925, President Calvin Coolidge spoke out against the estate tax, stating that "if we are to adopt socialism it should be presented to the people of this country as socialism and not under the guise of a law to collect revenue." *Id.* at 3678 (Feb. 10, 1926) (statement of Sen. Harris) (quoting President Coolidge's address to the National Tax Association in February, 1925); see also BLAKEY & BLAKEY, *supra* note 73, at 253. "Tax clubs" were organized to lobby for the repeal of the tax. *Id.* at 253-54; see also 67 CONG. REC. 2885-86 (Jan. 28, 1926) (statements of Sen. Norris and Sen. Simmons); *id.* at 949 (Dec. 12, 1925) (statement of Rep. Frear).

119. 61 CONG. REC. 5254 (Aug. 18, 1921) (statement of Rep. Knight).

120. *E.g.*, *id.* at 6581 (Oct. 21, 1921) (Senator William King (D-UT) stating, "[O]ur civilization is founded upon the right of private ownership in property."). Democrats recognized capitalism's right to "a fair return, but no more." *Id.* at 6782 (Oct. 26, 1921) (Senator Augustus Stanley (D-KY) continued: "Many of these profiteers . . . should have a sentence to Leavenworth.").

121. 67 CONG. REC. 749 (Dec. 12, 1925).

122. 61 CONG. REC. 5234 (Oct. 26, 1921) (Senator Henry Steagall (D-AL) stating that he wanted his children "to know enough [about the] hardships . . . of life to develop the strength of real character").

123. *Id.* at 5182-83 (Aug. 18, 1921) (statement of Representative William Oldfield (D-AR) favoring an inheritance tax). Senator Irvine Leuroot (R-WI) stated that wealth was good up to a point but fortunes in excess of \$100 million were "a menace to our social fabric." *Id.* at 6927 (Oct. 28, 1921). Moreover, great wealth (more than \$5 million) harmed the individual. *Id.* "Inherited wealth is a big handicap to happiness. It is as certain as death to ambition as cocaine is to morality." *Id.* at 7378 (Nov. 5, 1921) (statement of Sen. Kenyon) (quoting William Vanderbilt).

124. 67 CONG. REC. 706 (Dec. 11, 1925).

125. 61 CONG. REC. 6927 (Oct. 28, 1921).

126. *Id.* at 5192 (Aug. 18, 1921); see also 67 CONG. REC. 739 (Dec. 12, 1925) (Representative Thomas Connally (D-TX) stating: "We have done away with kings and nobles and princes, but, my friends, if we do not watch out we are building up here in these United States an aristocracy of wealth and of privilege that does not bode well for the Republic."); 65 CONG. REC. 3109 (Mar. 25, 1924) (Representative Melville Kelly (R-PA) stating: "What hereditary royalty has done for the rulers of the Old World money can be made to do in America. Royalty gives power to its possessors to control those

Congressmen found these historical examples in the Bible and in other descriptions of ancient civilizations, as well as in the American past. In one speech, Senator James Watson (R-IN), for example, mentioned Christ and the money changers, the downfall of the Babylonian Empire when 2% of the population owned 98% of the wealth,¹²⁷ and the basic division in American political theory which harkened back to Jefferson and Hamilton.¹²⁸

The Sixteenth Amendment also was viewed through the prism of wealth. According to Senator Gilbert Hitchcock (D-NE), the people's desire to restrain concentrations of wealth was "one of the inducements for the constitutional amendment giving Congress the power to tax incomes. It was not altogether to raise revenue. It was one of the reasons why Congress made the tax a graduated tax"¹²⁹

Concentrations of wealth also threatened democracy from the left: if the wealthy did not bear their fair share of the tax burden, the rest of the country would become restless and dissatisfied. If Congress unjustly burdened the common people it was "sowing the dragon's teeth of socialism and of red anarchy."¹³⁰ Representative Berger proclaimed that the surest way to defend property was to ensure that everyone had some.¹³¹

The conflict about wealth was expressed generally in the income debates and, more specifically in discussions about the rate structure, excess profits taxes, estate taxes, consumption taxes, and rate differentials between earned

who do not possess it. Money can give to its possessors here power over those who have it not."); 61 CONG. REC. 5176 (Aug. 18, 1921) (statement of Rep. Oldfield); *id.* at 5145 (Aug. 17, 1921) (Representative Meyer Londen (Socialist-NY) stating that 2% of the population owned 65% of the wealth which was a danger to democracy because that 2% controlled banks and shaped public opinion).

127. 61 CONG. REC. 6668 (Oct. 24, 1921) (noting that a similar concentration of wealth existed in America). References to ancient civilizations' concentration of wealth and their downfall recur. *See, e.g.*, 67 CONG. REC. 944 (Dec. 16, 1925) (statement of Sen. Rankin); 26 CONG. REC. 1674 (Jan. 30, 1894) (statement of Sen. Talbert); *infra* note 148.

128. The "enthroned" money power was "exactly the same that was combated in Washington's cabinet by Edmund Randolph and Thomas Jefferson . . . [and] put upon the country by Alexander Hamilton." 61 CONG. REC. 6667 (Oct. 24, 1921); *see also id.* at 6747 (Oct. 25, 1921) (Senator Watson stating that wealth was too concentrated). Representative Bill Lowrey (D-MS) contrasted the two theories presented by Hamilton and Jefferson—the former wanting to align government and big business, the latter believing that the government must get "its chief support in the affections of its people rather than in the pocketbooks of its plutocrats." 65 CONG. REC. 2631 (Feb. 16, 1924) (quoting Thomas Jefferson). Representative Lowrey and others accused the wealthy of buying the Republican Party. *Id.* at 2633; *see also id.* at 2634 (Representative Mel Underwood (D-OH) speaking of the "widespread propoganda by the big wealth . . . attempting to coerce, browbeat, and intimidate this Congress into passing the Mellon Bill"); *id.* at 2709 (Feb. 18, 1924) (Representative Knud Wefald (Farm-Labor Party-MN), who labeled himself a "La Follette Republican," claiming that if the Mellon Bill passed, "the House of Representatives will forever have sunk to the level of . . . the Parliament of Italy under Mussolini").

129. 61 CONG. REC. 6633 (Oct. 22, 1921).

130. *Id.* at 7014 (Oct. 31, 1921) (statement of Sen. Reed). Senator James Reed (D-MO) suggested that Secretary Mellon, as the second richest man in the country, could only write a pro-big-business bill, despite his undisputed integrity. *Id.*; *see* 67 CONG. REC. 706 (Dec. 11, 1925) (Representative Ramseyer stating that concentrations of wealth led to the French and the Russian Revolutions); *see also* 65 CONG. REC. 3109 (Feb. 25, 1924) (statement of Rep. Kelly); *id.* at 2691 (statement of Rep. Davis); *id.* at 2676 (Feb. 18, 1924) (Representative Henry Rainey (D-IL) stating that a reasonable tax on the rich helped capitalists by warding off dangers).

131. 65 CONG. REC. 2627 (Feb. 16, 1924).

and unearned income. Many of these provisions also had been highly disputed in 1894, and most (excepting excess profits taxes) remain areas of high dispute even today.

For example, the rate structure was highly controversial. The debates were set against the economic depression which gripped the country in 1921.¹³² Many believed that high taxes were crippling business by causing the rich to invest their money in tax-exempt securities rather than business, by preventing sales of property because people did not want to pay tax on the capital gains, and by causing wasteful "business" expenditures. The issue of tax revisions was divided largely on party lines. The traditional Republican theme echoed the accumulation side of moral economic individualism: the ability, the energy, and the accomplishments of entrepreneurs were glorified.¹³³ Their wealth accumulation was desirable because it formed the basis for economic prosperity and growth which would provide progress for all. As Representative Nicholas Longworth (R-OH) so typically stated, "[T]he immense industrial depression from which we are suffering to-day is due to the lack of capital."¹³⁴ High taxes prevented the investment of capital in business either by diverting it to tax-exempt securities or by creating an "orgy of extravagance" in which taxpayers made useless "business" expenditures since the government took most of the money anyway.¹³⁵ Lowering taxes would unleash the energy and drive of America.

Thus, as Representative Willis Hawley (R-OR) said, decreased taxes would not only help business (and businessmen) but would help everyone—capitalist and laborer alike. He continued, "I believe this bill will materially aid in the rehabilitation of our industrial and economic life, so opening the door to the employment of millions, the market for our varied products, and will inaugurate a new era of prosperity."¹³⁶ Taxes were lowered not to help the rich, as the Democrats claimed, but to "invite the development of industry, the basis of our prosperity."¹³⁷ According to this theory, once taxes are decreased, businessmen would take their money out of hiding (in tax-exempt securities) and invest it in business. This investment would increase employment, once again putting money into the hands of the unemployed. The

132. For cites to sources regarding the economic situation, see Marjorie E. Kornhauser, *The Origins of Capital Gains Taxation: What's Law Got to Do With It?* 39 SW. L.J. 869, 905 nn.216-20 (1985).

133. Senator Charles Townsend (R-MI) stated that making money was a "gift" just like making music or art. "I have frequently wondered what would have happened to the world if there had been no men of great business genius and courage . . . [Through them] the world has been made richer and better and happier." 61 CONG. REC. 7165-66 (Nov. 2, 1921).

134. *Id.* at 5214 (Aug. 18, 1921).

135. *Id.* at 5226 (statement of Rep. Copley).

136. *Id.* at 5203; *see also id.* at 5242 (Representative Davison Fess (R-OH) stating that capital makes "possible the employment of people and their consumptive power").

137. *Id.* at 5244 (statement of Rep. Fess); *see also* 65 CONG. REC. 2448 (Feb. 14, 1924) (statement of Rep. Kearns). Other, similar sentiments were also offered. 61 CONG. REC. 6091 (Oct. 7, 1921) (statement of Sen. McLean) ("Surplus or saved capital is the lifeblood of the Nation."); *id.* ("The interdependence of labor and capital is clear."); *see also id.* at 5135 (Aug. 17, 1921) (Representative Isaac Bacharach (R-NJ) stating that anything that interferes with industrial progress hurts labor); *id.* at 5242 (Aug. 18, 1921) (statement of Rep. Fess) ("Capital makes possible the employment of people and their consumptive power.").

money would increase purchasing power which would increase demand. This demand would cause production to increase which in turn would provide more employment. Thus, an unending spiral of economic growth and prosperity for all would occur.¹³⁸

In short, while a reduction in taxes on the rich helped the rich, it was also the only way to help the common people. Without such wealth at the top, none would trickle down to the bottom. Not surprisingly, not everyone agreed with this theory, as was stated most graphically in 1924 by Representative William Lankford (D-GA):

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

. . . It takes a very large amount in the hands of the big rich for the drippings to do the common folks much good. The greedy corporate interests do not let much ooze through for those below.¹³⁹

Senator James Reed (D-MO) pointed out that the argument of the “ooze-through” theory—that taxes on the rich should be *reduced* to help the remainder of the country—logically led to the conclusion that taxes on the rich should be *eliminated* entirely.¹⁴⁰

While a reduction in income surtaxes would increase investment, the lost revenues would have to be made up somehow. Many looked to consumption taxes, which were widely discussed in 1921. Some people even accused the Republicans of wanting to remove the surtax on income and replace it with a sales or turnover tax.¹⁴¹ Few people paid income taxes in 1921, but all paid excise taxes and other miscellaneous taxes—for example, luxury taxes and admissions taxes—which the average person bore quite heavily. Thus, many groups such as the Democrats, the Farm-Labor Bloc, and some experts, such as Professor Edwin Seligman, opposed a general sales tax.¹⁴² The tax

138. 61 CONG. REC. 6536 (Oct. 20, 1921) (statement of Sen. Edge).

139. 65 CONG. REC. 2570 (Feb. 16, 1924) (statement of Rep. Lankford). Senator Reed stated that those who claimed that easing the tax burden for the rich would help the average man ought to bear the burden of proving this mere assertion. 61 CONG. REC. 6632 (Oct. 22, 1921). Senator Hitchcock thought this theory an “incandit argument” since it always was suggested by those who would benefit from it. *Id.* at 6632. He stated that if the steel combinations were relieved of \$1 million in taxes, he doubted that he would even get 5 cents. 65 CONG. REC. 7013 (Oct. 31, 1921). The “trickle down” theory of the 1980’s was clearly the 1920’s “ooze through” theory dressed up in a nicer metaphor.

140. 61 CONG. REC. 6633 (Oct. 22, 1921). Professor Martin MacMahon observed the same “logical” reasoning in the 1990’s. Martin MacMahon, Jr., *Individual Tax Reform For Fairness and Simplicity: Let Economic Growth Fend for Itself*, 50 WASH. & LEE L. REV. 459, 464 (1993). Indeed, following this logic, many Republicans stressed the need for sales and consumption taxes. See *infra* notes 144-53 and accompanying text.

141. See, e.g., 61 CONG. REC. 5132 (Aug. 17, 1921) (statement of Rep. Garner).

142. See, e.g., BLAKEY & BLAKEY, *supra* note 73, at 218; *Internal Revenue Revision: Hearings Before the U.S. Senate Finance Comm.*, 67th Cong., 1st Sess. 457-59 (May 9 & 27, 1921) (testimony of Professor Edwin R.A. Seligman), reprinted in 1 INTERNAL REVENUE ACTS OF THE UNITED STATES 1909-1950: LEGISLATIVE HISTORY, LAWS AND ADMINISTRATIVE DOCUMENTS (Bernard D. Reams, Jr.

was eventually rejected.¹⁴³ Nevertheless, the issue was still alive in 1924 and in 1926, with some congressmen believing that the wealthy and powerful still favored the replacement of the income tax with a sales tax.¹⁴⁴

In 1921, another radical proposal surfaced: the replacement of the income surtax with a personal tax on expenditures. Such a tax was to be based on a taxpayer's income minus his savings. As early as 1888, the noted American economist Francis Walker had considered and rejected an expenditure theory of taxation as the best measurement of the ability to pay.¹⁴⁵ Walker stated that such a theory of taxation was premised on the steward or trustee-of-capital theory (à la Carnegie): so long as the wealth was invested, it was being used for the benefit of society, not the individual, and therefore that wealth did not increase the taxpayer's ability to pay. A holder of wealth, however, was an owner, not a trustee, because "[t]he pride of ownership, the social distinction which attends great possessions, the power which wealth confers, [were] additional to the merely sensual enjoyment to be derived from personal expenditure."¹⁴⁶

The biggest advocate of an expenditure, or spendings, tax was Representative Ogden Mills (R-NY). Citing John Stuart Mill as an early supporter of a spendings tax, Representative Mills stated that money which was saved and invested should be subject only to a flat rate of income tax, whereas "money extravagantly and uselessly spent should be taxed at a constantly increasing rate."¹⁴⁷ Representative Ira Copley (R-IL) also supported a spendings tax. Although he stated that it was probably the only way to tax the rich in a manner that prevented them from shifting the burden, he emphasized the importance of savings. A spendings tax imposed a tax on extravagance and put a premium on thrift, and thrift was "the only thing which stands between

ed., 1979) [hereinafter INTERNAL REVENUE ACTS]; *id.* at 373 (testimony of Western Starr).

143. See *Senate Again Votes Sales Tax Down*, N.Y. TIMES, Nov. 5, 1921, at 15.

144. 65 CONG. REC. 2449 (Feb. 15, 1924) (statement of Rep. Dickinson); see also 67 CONG. REC. 3093 (Jan. 28, 1926) (statement of Sen. King); 65 CONG. REC. 2572 (Feb. 16, 1924) (statement of Rep. Lankford). Recent calls for a value-added tax or an expenditure tax again raise the possibility of increasing consumption taxes and decreasing reliance on income taxes.

145. FRANCIS A. WALKER, POLITICAL ECONOMY 488-505 (1888), reprinted in LEMAR T. BEMAN, CURRENT PROBLEMS IN TAXATION 18, 22-23 (1921).

146. *Id.* at 23. The economist Irving Fisher, in contrast, believed that only an expenditure tax was correct because savings and unrealized appreciation were not income. See, e.g., Irving G. Fisher, *Are Savings Income?*, 9 AM. ECON. ASS'N Q. 21, 40-47 (1908); Irving G. Fisher, *Communication: Comment on President Plehn's Address*, 14 AM. ECON. REV. 64, 65 (1924).

147. 61 CONG. REC. 5138 (Aug. 17, 1921) (Representative Ogden Mills received applause for this statement). Mills also noted that such a tax on spending would retain progressivity as opposed to a sales tax. A spendings tax had been discussed in the Ways and Means hearings, most notably the tax proposed by Chester Jordan, an accountant. See *Internal Revenue Hearings on the Proposed Revenue Act of 1921: Hearings Before the U.S. Senate Finance Comm.*, 67th Cong., 1st Sess. 487-97 (1921), reprinted in 1 INTERNAL REVENUE ACTS, *supra* note 142. See 61 CONG. REC. 6645 (Oct. 22, 1921) (Senator Walter Edge (R-NY) stating that he favored an expenditure tax rather than a "tax on energy and thrift").

civilization and the annihilation of civilization."¹⁴⁸ In agreement, Representative Alanson Houghton (R-NY) asked rhetorically:

Which renders the greatest service to the State, the man that saves and puts his money into a productive investment or the man who spends his money freely in unproductive ways?

...
 . . . Would you put a tax on a man who by saving increases the total funds of investment money in the country and so develops business, industry, and farming, or would you put the burden on the man who spends it on flowers, in yachting, and a thousand and one ways that do not produce a permanent increase of revenue?¹⁴⁹

Several governmental officials also proposed expenditure taxes or reduced rates on savings. In 1920, even Secretary of the Treasury Houston, a Democrat, believed that the most practical way to lessen the penalty on savings and investment was to reduce to twenty percent the surtax on income which was "saved and reinvested in business or property yielding taxable income."¹⁵⁰ Dr. Thomas Adams, tax advisor to the Treasury, also favored an expenditure tax.¹⁵¹ While the Republican Secretary of the Treasury Andrew Mellon did not propose exempting savings from tax, he did favor a maximum rate of 28% (8% normal tax and 20% surtax).¹⁵² In 1924, Mellon actually stated that he believed capital gains should not be taxed at all.¹⁵³

In 1921, Congress partially complied with Mellon's wishes by enacting the first capital gains preference¹⁵⁴ and the deferral of tax on certain transactions such as like-kind exchanges and reorganizations.¹⁵⁵ Part of the

148. 61 CONG. REC. 5227 (Aug. 18, 1921). Senator Joseph Frelinghuysen (R-NJ) stated that "civilization is expressed not merely in the schoolroom but in the telephone and the electric light, [and] in the steam engine." *Id.* at 6908 (Oct. 28, 1921). Representative Copley referred to ancient civilizations which declined when wealth accumulation failed. There was only one "sane" way to accumulate wealth and push back the hordes of barbarianism: "Work, produce, and save a little of what you produce." *Id.* at 5228. Copley claimed that the Republican members of the Committee on Ways and Means were "very much interested in Mills' spending tax but" there was not time to work it out. *Id.* at 5226-27. Macy's president also supported a graduated tax on expenditures to supplement the income tax. *Expect Price Cuts to Increase Prices*, N.Y. TIMES, May 28, 1920, at 26.

149. *Internal Revenue Revision: Hearings Before the Comm. on Ways and Means*, 67th Cong., 1st Sess. 86 (July 26 & 29, 1921), reprinted in 1 INTERNAL REVENUE ACTS, *supra* note 142.

150. Letter from D.F. Houston, Secretary of the Treasury, to the Chairman of the House Ways and Means Committee, *Internal Revenue Revision: Hearings Before the Comm. on Ways and Means*, 67th Cong., 1st Sess. 9 (Mar. 17, 1920), reprinted in 95 INTERNAL REVENUE ACTS, *supra* note 142. This would have equalized taxes on savings and investments whether they were made by individuals, corporations, or partnerships. If necessary, the lost revenue could have been "made up by increasing the normal tax or that portion of the surtaxes attributable to income spent for purposes of consumption." *Id.*

151. Thomas S. Adams, *Fundamental Problems of Federal Income Taxation*, 35 Q.J. ECON. 527, 539 (1921).

152. *Internal Revenue Revision: Hearings Before the Comm. on Ways and Means*, 67th Cong., 1st Sess. 12 (Dec. 30, 1920) (statement of Dr. Thomas S. Adams), reprinted in 1 INTERNAL REVENUE ACTS, *supra* note 142. This 28% is the same rate suggested by Houston (20% surtax, 8% normal tax) and equal to the present 28% tax on capital gains! See 26 U.S.C. § 1(h) (Supp. V 1993).

153. ANDREW W. MELLON, TAXATION: THE PEOPLE'S BUSINESS 59 (1924).

154. Revenue Act of 1921, ch. 136, § 206(b), 42 Stat. 227, 233.

155. *Id.* § 202(c) at 230.

rationale for these provisions was that business, which was in the midst of a depression, needed lower taxes so the economy could grow.¹⁵⁶

In contrast to those who wanted to favor savings and investments were those who wanted to favor earned income over unearned income. The sentiment that favored an earned income preference also existed in earlier years but resulted in no legislation.¹⁵⁷ In October, 1921, Senator William Harris (D-GA) offered an amendment to tax the first \$8000 of earned income at lower rates than unearned income because of the precariousness of earned income—earned income depends on such unpredictable factors as the earner's health.¹⁵⁸ Senator Boies Penrose (R-PA) responded that both the Senate Finance Committee and the Treasury had "most exhaustively considered" the issue, each ultimately deciding that such a preference was impossible to administer due to the difficulty of distinguishing between earned and unearned income.¹⁵⁹ Although the amendment ultimately did not pass, it spurred a fair amount of debate ranging from discussions about the difficulty of administration to more moral statements in favor of earned income because they "represent[ed] the sweat and life and strength of the individual."¹⁶⁰

By 1923, the Treasury had apparently overcome whatever administrative misgivings it had about an earned income preference and recommended a differential rate because of the precariousness and limited duration of earned income due to sickness, death, and old age.¹⁶¹ Both the 1924 House and Senate Reports claimed that the "fairness" of an earned income preference "has long been recognized, and seems to be generally admitted without regard to political divisions."¹⁶² The Reports stated that ability-to-pay concepts required such a preference since the wage earner must save some of his income each year to provide for old age, sickness, and death; whereas a

156. See, e.g., 61 CONG. REC. 5836 (Sept. 28, 1921) (Senator King stating that a tax on the sale of real estate is harmful to business); *id.* at 5135 (Aug. 17, 1921) (Representative Bacharach stating that a tax drives money out of business). The Supreme Court's decision earlier in the year holding that capital gains were income also spurred the decision to enact a preference. See *Merchants' Loan & Trust Co. v. Smietanka*, 255 U.S. 509 (1921).

Both the exemption of capital gains and an expenditure tax fit within a *res* theory of capital which had a great deal of currency at the time. Basically, the *res* theory holds that the increase in value of an asset is capital, not income. See Kornhauser, *supra* note 132, at 887-89.

157. See *supra* notes 101-02 and accompanying text.

158. 61 CONG. REC. 6669 (Oct. 24, 1921).

159. *Id.* at 6670. Senator Furnifold Simmons (D-NC) pointed out that in 1918 the Finance Committee had been "sympathetic" to the issue out of "fairness" and "justice" but had not really had time to fully consider the issue due to the rush in which the 1918 Act was passed. *Id.*

160. *Id.* (statement of Sen. Ashurst); see also *id.* at 6669-75. As to the administrative difficulty of such a provision, Senator Thaddeus Caraway (D-AR) noted that if the Treasury could determine the amount of revenue lost from such a provision in ten minutes, it should be able to differentiate between earned and unearned income with sufficient ease to administer a preference. *Id.* at 6674.

161. See MELLON, *supra* note 153, at 56-57; see also *Hearings on H.R. 6715 Before the Comm. on Finance*, 68th Cong., 1st Sess. 8-9 (1924) (statement by A.W. Gregg, special assistant to the Secretary), reprinted in 2 INTERNAL REVENUE ACTS, *supra* note 142.

162. H.R. REP. NO. 179, 68th Cong., 1st Sess. 5 (1924), reprinted in 96 INTERNAL REVENUE ACTS, *supra* note 142; S. REP. NO. 398, 68th Cong., 1st Sess. 7-8 (1924), reprinted in 96 INTERNAL REVENUE ACTS, *supra* note 142. Even the minority view of 11 House Republicans who filed a separate report was in agreement. VIEWS OF ELEVEN REPUBLICANS: THE REVENUE BILL OF 1924, H.R. REP. NO. 179, 68th Cong., 1st Sess. 36, 43 (1924), reprinted in 96 INTERNAL REVENUE ACTS, *supra* note 142.

person may spend all of his investment income because he has the capital to provide for those contingencies.¹⁶³ Given the widespread support for the provision, it passed with little discussion.¹⁶⁴

The foregoing discussion has shown that the early 1920's income tax provisions and debates reflected the division within moral economic individualism. Echoing the Gilded Age, people had divided views about wealth. On the one hand, the accumulators of wealth were considered admirable people who ought to be encouraged because they were the means to progress and economic growth for everyone. On the other hand, accumulated wealth, particularly unearned wealth, endangered not only the individual's character but the very social and political fabric of the United States.

Although both sides believed in the right of property and therefore wealth, their emphasis was distinctly different. For the one side, wealth, as the engine that drove civilization, became a sanctified end in and of itself. To the other side, property and wealth were, as Senator William King (D-UT) said, merely means to "serve humanity. . . . If wealth develops class distinctions, creates chasms in the social structure, separates the people . . . then its usefulness may be questioned."¹⁶⁵ He saw that "[p]olitical and civil liberty are the concomitants of industrial and economic liberty. If the sources of production and distribution are controlled by a few, political freedom will be impaired and in time destroyed."¹⁶⁶ Americans believe, Senator King continued, "in the democratic principles which grant equal rights to all and special privileges to none. They want a free field and equal and free opportunity in the field of life."¹⁶⁷

Senator King's view of equality envisioned not just a formalistic procedural equal opportunity but a more level field—a "free field" which provided equality of resources. The danger of wealth concentration was that it foreclosed true equality of opportunity by precluding equality of resources. Concentrations of wealth lead to power and special privileges that either limited and/or excluded the average person's access to resources and opportunity. The playing field was neither level nor free.

163. H.R. REP. NO. 179, 68th Cong., 1st Sess. 5 (1924), *reprinted in* 96 INTERNAL REVENUE ACTS, *supra* note 142; S. REP. NO. 398, 68th Cong., 1st Sess. 8 (1924), *reprinted in* 96 INTERNAL REVENUE ACTS, *supra* note 142. This reasoning echoed that of John Stuart Mill, who had proposed an earned income preference for these very reasons as a more practical solution to the problem than the theoretically better solution of exempting some savings from tax entirely. JOHN STUART MILL, 2 PRINCIPLES OF POLITICAL ECONOMY 553-61 (1884). Both the House and the Senate Reports noted that Great Britain had an earned income preference.

164. Revenue Act of 1924, ch. 234, § 209, 43 Stat. 254, 263-64 (repealed 1925). Most of the discussion centered on the definition of earned income, especially the fact that a taxpayer's first \$5000 of income was presumed to be earned. *See, e.g.*, 65 CONG. REC. 2490 (Feb. 15, 1924) (statement of Rep. Collier); *id.* at 2849-51 (Feb. 20, 1924).

165. 67 CONG. REC. 3092 (Feb. 1, 1926) (statement of Sen. King).

166. *Id.* at 3612.

167. *Id.* at 3606. Senator Stanley also stressed the importance of equal opportunity: "The purpose of government is not to make men rich; it is to make men free. It is not to insure an excessive income to any particular business, but to give every business an equal opportunity in the race for life." 61 CONG. REC. 6781 (Oct. 26, 1921).

Senator King recognized a basic truth about taxation which is often hidden behind talk of "scientific" taxes in the 1920's and economically efficient taxes in the 1980's and 1990's. "The character of government determines largely the nature of taxes . . ." ¹⁶⁸ He saw the income and estate taxes as outgrowths of democracy because men with the "desire to promote justice and liberty" enacted laws which furthered that end by requiring all to bear their fair share of the burden of government based on an ability to pay. ¹⁶⁹ Thus, Senator King, his fellow Democrats, and Insurgent Republicans supported provisions such as high surtaxes, the estate tax, publicity of returns, and an excess profits tax because these provisions supported their visions of democracy and equality. They argued for these provisions in rhetorical terms which emphasized their visions because these phrases resonated with a deep strain of equality within the American people.

Similarly, the conservatives who supported provisions such as lower taxes, the elimination of estate taxes, and excess profits taxes, also argued their position in the democratic terms of an equality of opportunity which also echoed within the people. Both viewpoints were clothed in religious and patriotic rhetoric designed for the masses. It is amazing how constant this rhetoric has remained over the years. As this Article will argue, the debates in the 1980's and 1990's replay, yet again, the same arguments. On the one side are those (mainly Republicans) who argue the trickle down or ooze-through theory. This argument is allegedly supported by scientific (economic) data as well as appeals to morality and visions of the political nature of the state. As the scientific data gets more shrill in the 1980's, it suggests that the real issue being debated is a view on the morality of money: its meaning to individuals and its place in differing conceptions of the relationship between the individual and the state.

C. The Platinum Era: Late 1970's to the Present

If the 1880's were the Gilded Age, then the 1980's were the Platinum Era. ¹⁷⁰ This third capitalist heyday began in the late 1970's and allegedly

168. 67 CONG. REC. 3091 (Feb. 1, 1926).

169. *Id.* at 3613.

170. Labeling this era the Golden (or Gilded) Age Revisited seemed inadequate. Thus, following the credit card example, I have created the Platinum Era.

peaked during the Reagan Revolution of the 1980's.¹⁷¹ If it did peak in the 1980's, it has only waned; it definitely has not disappeared in the 1990's.

Under the Reagan Revolution, the accumulation aspect of moral economic individualism once again triumphed, submerging but not erasing the push for equality. Reaganism's celebration of individual economic activity and the belief that economic progress for all will result from economic growth merely restates the elements of moral economic individualism: (1) individuals have a moral right to property; (2) the state's role is minimal—to protect property so that through individual effort economic growth would occur; and (3) the resulting economic wealth of the few will trickle down to the many.¹⁷² Like the Protestant Ethic and the *Gospel of Wealth*, the most recent reincarnation of moral economic individualism—or "Reaganism"—has a philosophic and religious strain.

Under Reaganism, individual freedom and individual property are closely intertwined. The right to own property is based on one's ownership of the self and thus predates society. Property is the foundation of freedom. It is not freedom itself but "the source of freedom . . . For a person can be free only within the limits of a right that excludes the rights of all others."¹⁷³ Thus, to some extent, how one obtains the property—whether earned or inherited—is immaterial so long as the procedure is legitimate.¹⁷⁴ Nevertheless, earned income, specifically entrepreneurial wealth, is glorified because it creates the economic growth that enriches all of society. Echoing earlier times, Jude Wanniski, high priest of the new moral economic individualism, extolled capitalism and entrepreneurship: "[T]he driving force of civilization is a quest

171. *Habits of the Heart* describes this period as the clash of the "Administered Society" versus "Economic Democracy." BELLAH ET AL., *supra* note 11, at 257. The exact starting date of the Platinum Era is hazy. Robert L. Bartley, the editor of the *Wall Street Journal*, dates it to April 20, 1978, when Representative William Steiger (R-WI) proposed a cut in the capital gains tax. JUDE WANNISKI, *THE WAY THE WORLD WORKS* ix (3d ed. 1989). Compare a statement by Jeffrey Birnbaum and Alan Murray:

The defeat of President Carter's tax-reform efforts [in 1978] signaled a new era in tax policy, the triumph of a broad coalition of business lobbyists who came together under the rubric of "capital formation." These lobbyists argued that the best medicine for the faltering U.S. economy was to create new tax breaks for businesses and investors.

JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH* 16 (1987).

The popular press contrasts the greedy 1980's with the nesting 1990's. However, as this part will show, strong accumulation tendencies still exist in the 1990's.

172. Kevin Phillips lists the five key elements of Reagan theology as: (1) nurturing wealth as a prerequisite for a healthy economy; (2) emphasizing Say's Law that production drives the economy because supply creates demand; (3) reducing the size of government; (4) glorifying the entrepreneur as the creator of supply; and (5) cutting taxes on the wealthy as the means to help the lower and middle classes. PHILLIPS, *supra* note 1, at 62.

173. Leopold Kohr, *Property and Freedom*, in *PROPERTY IN A HUMANE ECONOMY* 47, 50 (Samuel L. Blumenfeld ed., 1974).

174. James A. Sadowsky, *Private Property and Collective Ownership*, in *PROPERTY IN A HUMANE ECONOMY*, *supra* note 173, at 85, 88. Under this theory of procedural justice, whether the property owner acquires the property via her own labor, gift, purchase, or inheritance is immaterial. So long as she has obtained the property legally, she has full rights in it. A theory of substantive distributive justice would take notice of the claims of others to the property (despite its legal acquisition) based on some other factor(s), such as need or equality.

for a system that will maximize capital, for only when capital is maximized can welfare be maximized."¹⁷⁵

Again, morality lent its weight to this doctrine in two now-familiar ways. First, economics became a secular morality mandating individualism. Just as the science of evolution dictated the rugged individualism and the laissez-faire government of the Gilded Age, the science of economics dictated the same policies in the 1980's. Economic growth would occur most efficiently by giving free play to the individual: the greatest growth at the lowest cost. Only through this growth would the lower rungs of society improve.¹⁷⁶ By doing good for one's self, a person would thus do better for others—"in a sense saving for capital formation is the epitome of 'doing good for others.'"¹⁷⁷

Second, the connection of property to freedom also strengthens the moral quality of ownership. One's ownership of property is not a personal expression of greed, or sloth, or vanity but is a bulwark of the very freedom upon which American society is built. Some property yields more freedom than others: since the connection arises from the freedom of action that property yields, the larger the scope of action, the larger the freedom. Thus, consumer goods—examples of "passive" property—give less freedom than goods used to earn a living—"active" property. The former are used up through the single act of consumption while the latter "make the exercise of freedom a daily experience."¹⁷⁸

More overt connections with more traditional morals and religion also existed. The emphasis on voluntary charity¹⁷⁹ recalls the earlier religious tradition of stewardship and the duty to use one's wealth for the benefit of others. George Gilder's paean to the entrepreneur recalls the concept of a special calling: "It is the entrepreneurs who know the rules of the world and the laws of God. . . . They are the heroes of economic life. To them this book is devoted, in the hope that the entitled children . . . [will] follow their example and earn their redemption and their happiness"¹⁸⁰

The link between religion and the right to private property has been reemphasized in the Platinum Era. For example, Carl Henry, editor of *Christianity Today*, believed that God sanctioned private property because through the ownership and use of property, a person can use his freedom to develop himself and aid others: "In the free use of his property, man as a

175. WANNISKI, *supra* note 171, at 55; see also GEORGE GILDER, *WEALTH AND POVERTY* 74 (1981) (stating that work, family, and faith are the "pillars of a free economy and prosperous society"). For earlier statements to the same effect see *supra* notes 50, 138 and accompanying text.

176. See, e.g., PHILLIPS, *supra* note 1, at 62 (citing various quotes in GILDER, *supra* note 175).

177. Lowell Harris, executive director of the Academy of Political Science, testimony before the House Ways and Means Committee on September 27, 1984, quoted in 25 TAX NOTES microfiche doc. no. 84-6626, at 5 (Oct. 8, 1984).

178. Kohr, *supra* note 173, at 68.

179. Or, as Reagan's acolyte George Bush called it, "Points of Light."

180. GEORGE GILDER, *THE SPIRIT OF ENTERPRISE* 19 (1984). In an earlier book Gilder stated that successful capitalism needs faith in man, the future, "rising returns of giving, faith in the mutual benefits of trade, [and] faith in the providence of God." GILDER, *supra* note 175, at 73; see also PHILLIPS, *supra* note 1, at 62-63 (calling Gilder's *Wealth and Poverty* the "comprehensive theology of the Reagan era").

bearer of God's image himself becomes a maker, a creator"¹⁸¹ Although a person has legal title to property, he is but a steward of it and has a moral and a spiritual duty to use his wealth in the service of others.¹⁸²

This connection between religion, wealth accumulation, and taxation—earlier expressed by the “Protestant Ethic” and the *Gospel of Wealth*—is ecumenical by now. Rabbi Daniel Lapin cited *The Bible* and earlier rabbinic sages in a *Wall Street Journal* column opposing high taxation.¹⁸³ Michael Novak quoted Pope John Paul II's *Centesimus Annus* at length not only for the Pope's recognition of the connection between religion and work but also for his recognition of the link between Christianity and capitalism. Novak first quoted the section in which the Pope made a crucial link between worldly work and godly work (echoes of the Protestant Ethic):

“The earth, by reason of its fruitfulness and its capacity to satisfy human needs, is God's first gift for the sustenance of human life. But the earth does not yield its fruits without a particular human response to God's gift, that is to say, without work. It is through work that man, using his intelligence and exercising his freedom, succeeds in dominating the earth and making it a fitting home.”¹⁸⁴

Free enterprise and entrepreneurial talent are good because they best help man satisfy his needs.¹⁸⁵ The Pope continued: “When a firm makes a profit, this means that productive factors have been properly employed and corresponding human needs have been satisfied.”¹⁸⁶

181. Carl F.H. Henry, *Christian Perspective on Private Property*, in PROPERTY IN A HUMANE ECONOMY, *supra* note 173, at 23, 33.

182. *Id.* at 34. Pat Robertson believes that the free enterprise system best accomplishes the “God-given need for freedom,” and Jerry Falwell has expressly and repeatedly stated that private property and free enterprise are biblically sanctioned. JAMES D. HUNTER, CULTURE WARS 111 (1991).

183. Daniel Lapin, *A Higher Authority on Taxes*, WALL ST. J., Aug. 31, 1993, at A10 (noting that *Proverbs* 12:24 states “the hands of the diligent shall produce wealth but the lazy will be subject to taxation.”).

Rabbi Lapin received quite a response. On September 21, 1993, the *Wall Street Journal* published three letters in response. Two of them provide further biblical support for low tax rates. The third letter provides support from the *Book of Mormon. How Pharaoh Taxed His Wage Slaves*, WALL ST. J., Sept. 21, 1993, at 23.

Of course there are many proponents of a more equality-of-resource tax system who justify their positions (at least in part) on religious grounds. *See, e.g.*, RONALD PASQUARIELLO, TAX JUSTICE (1985) (addressing the need for a redistributive tax system as a means to help achieve distributive justice, which is part of God's mandate).

184. NOVAK, *supra* note 21, at 131 (quoting POPE JOHN PAUL II, CENTESIMUS ANNUS, ¶ 31 (1991)). The *Centesimus Annus* “commemorates the hundredth anniversary of Pope Leo XIII's 1891 encyclical *Rerum Novarum*, considered the beginning of modern Catholic social teaching.” *Id.* at 267 n.1.

185. *Id.* at 131. A Paulist father recently celebrated the commercial spirit of Christmas by emphasizing that both Judaism and Christianity “embrace the goodness of the physical world.” Robert A. Sirico, *God's Gift, a Commercial Christmas*, WALL ST. J., Dec. 21, 1993, at A12 (“The economic boom experienced during December every year is the best kind of commerce there is. As the Word became flesh, our sentiments become gifts . . .”).

186. NOVAK, *supra* note 21, at 132. The Pope's capitalism is not an unbridled one of laissez-faire but one that is tempered by moral and social concerns: one that recognizes the need for some state intervention and places moral limits on the extent of the free market. *Id.* at 132-36. There are three “clear” moral limits: (1) some human needs are nonmarket needs; (2) some goods are not commodities; and (3) some groups need nonmarket aid because they are otherwise unable to enter the market. *Id.* at 135. The advantage of capitalism is that it can best unleash the moral, intellectual, and spiritual potential

While Reaganism reigned supreme, the more communal and egalitarian traditions withered but did not die. In fact, a rebirth occurred in both the academic and the popular press.¹⁸⁷ Some critics questioned the glorification of wealth maximization—proclaimed by advocates such as Richard Posner—which assumed that more wealth was better than less.¹⁸⁸ Even the connection between self and property was reevaluated so as to question the free reign of the market: some objects are so closely aligned with the self that they become part of a person's identity. These objects should be treated differently (subjected to different market rules) than more objectified property.¹⁸⁹ In the political arena, the 1992 presidential election campaign evidenced a revolt (to some extent) against favoritism, trickle-down economics, and the widening gap between the very wealthy and the rest of the population.¹⁹⁰ Because Americans are in the midst of this period and memories are not so short term as to have forgotten the earlier years, I will simply summarize the highlights.

As Birnbaum and Murray stated in *Showdown at Gucci Gulch*, the defeat of President Carter's tax reform proposals ushered in an era of a loophole-ridden Code in which tax lobbyists abounded, all arguing that the best way to jumpstart the economy was to give businessmen and investors tax breaks.¹⁹¹ The apogee was the Economic Recovery Tax Act of 1981¹⁹² with its accelerated depreciation, investment tax credit, and further cuts in capital gains rates.¹⁹³ Following the 1981 Act, dissatisfaction among both the public and the experts grew. The tax code was too riddled with loopholes that either favored one

of people in general and the poor in particular. *Id.* at 140-41, 278-79 n.55. Capitalism is not the sole solution to all problems, nor is it necessary to be a capitalist to be a good Christian. *Id.* at 142. Rather, a balanced capitalism, tempered by morality, is simply the best economic way to help achieve man's potential. In fact, because of Catholicism's long history of concern for the poor and the working class, Hunter says that Novak's strong Catholic support for free enterprise is something of an anomaly. HUNTER, *supra* note 182, at 111.

187. Examples in the legal field are civic republicans such as Suzannah Sherry and Cass Sunstein and theorists such as John Rawls; in the economic field scholars such as Amartya Sen have explored the meaning of equality. For an example of such writing in the popular press, see BELLAH, *supra* note 11.

188. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985). Dworkin explores this issue and concludes that social wealth is neither a component of social value nor an independent value. As to the latter, he states that if wealth is independent of happiness (utility)—as Posner concedes that it is—then as the fairy tales show us, wealth does not necessarily improve a person's welfare. *Id.* at 245.

189. Examples Margaret Radin has done extensive research on the connection between property and personhood. See, e.g., Margaret J. Radin, *Justice and the Market Domain*, in *MARKETS AND JUSTICE: NOMOS XXXI* 165 (John W. Chapman & J. Roland Pennock eds., 1989); Margaret J. Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987); Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982). For a critique of Radin's theory, see Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 *STAN. L. REV.* 347 (1993).

190. KEVIN PHILLIPS, *BOILING POINT* xix, 17 (1993) (contrasting periods of greater equality and economic growth with the current disparity). The campaign speeches of both Bill Clinton and Ross Perot attacked the Reagan-Bush legacy of trickle-down economics, which concentrated on the rich and ignored the middle and the lower classes. Phillips compares the 1990's middle class frustrations with those of the Gilded Age and the 1920's. *Id.* at 228; see also John Lee, *'Death and Taxes' and Hypocrisy*, 60 *TAX NOTES* 1393, 1397 (1993) ("The ultimate triumph of this rhetoric [against the Republican Party's trickle-down economics] was the successful 1992 [Bill] Clinton presidential campaign."). *Id.*

191. BIRNBAUM & MURRAY, *supra* note 171, at 16.

192. Pub. L. No. 97-34, 95 Stat. 172.

193. BIRNBAUM & MURRAY, *supra* note 171, at 18.

group over another or attempted to further some social or economic policy. The result was a system that was unfair from the standpoint of both vertical and horizontal equity. Horizontal equity was violated because two taxpayers with equal incomes paid different amounts of tax; vertical equity was lost because wealthy taxpayers could pay less tax than poorer taxpayers by taking advantage of tax shelters. The loopholes and shelters created complexity as well as unfairness. Moreover, tax rates were driven up because the loopholes and tax shelters narrowed the tax base.

The drive to reform the Code which culminated in the Tax Reform Act of 1986¹⁹⁴ really began with Senator Bill Bradley's (D-NJ) quest for tax reform in 1981, and in the Bradley-Gephardt Fair Tax Plan¹⁹⁵ which cut both loopholes (deductions) and rates. This plan "melded [the Democratic] party's concern for fairness with the new drive among Republicans to promote economic opportunity. It offered a rare chance for the goals of social equity and economic efficiency, which usually were in conflict, to work hand in hand."¹⁹⁶

The plan offered, in short, a rare opportunity for both strands of moral economic individualism to work in tandem. The reform seemed doomed to failure, but through perhaps an even rarer combination of personalities, timing, and politics, the pro-growth, pro-business President, Ronald Reagan, endorsed tax reform in his State of the Union message to Congress on January 25, 1984.¹⁹⁷ Reagan's endorsement of tax reform—done largely to revive sagging second-term popularity—resulted, two and one-half years later, in the Tax Reform Act of 1986.¹⁹⁸

The two philosophical strands of moral economic individualism, a pro-growth accumulationism and egalitarianism, which have battled each other in prior tax debates, came together in 1986. The title of Reagan's plan epitomized this merger: his plan was a proposal for "Fairness, Growth, and Simplicity." President Reagan's May 28, 1985, speech to the American people clearly (and cleverly) melded together the ideal of political equality with

194. Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in 26 U.S.C.).

195. Fair Tax Act of 1982, S. 2817, 97th Cong., 2d Sess. (1982); see also BIRNBAUM & MURRAY, *supra* note 171, at 31.

196. BIRNBAUM & MURRAY, *supra* note 171, at 23; see also David Ignatius, *The Real Hero of Tax Reform*, WASH. POST, May 18, 1986, at F5 (stating that Bradley, "the man who launched the great tax-reform crusade of 1986," proposed a plan that "offered Democrats a way to shed their anti-growth, tax-and-spend image by allowing them, as Bradley said, 'to advocate economic growth and fairness simultaneously'"); Dan Balz, *Simplification Gets Complicated*, WASH. POST, Apr. 23, 1985, at A3 (Democratic National Chair Paul G. Kirk, Jr., stating that tax reform can both be more fair and stimulate the economy).

197. "Let us go forward with an historic reform for fairness, simplicity and incentives for growth. I am asking Secretary Don Regan for a plan for action to simplify the entire tax code, so all taxpayers, big and small, are treated more fairly." President Ronald Reagan, The State of the Union, Address Before a Joint Session of the Congress, in 20 WEEKLY COMP. PRES. DOC. 87, 90 (Jan. 25, 1984).

198. See, e.g., Lou Cannon, *Second-Term Boost Sought*, WASH. POST, May 29, 1985, at A1, A14 (noting that Reagan's tax-reform speech of May 28, 1985, was seen as "his best chance to revitalize a second term." Administration officials wanted "Reagan to don the mantle of 'populism' and campaign for 'fairness,' until now the battle cry of the president's opponents."). For an outstanding account of the story, see generally BIRNBAUM & MURRAY, *supra* note 171.

moral economic individualism's view that economic incentive and growth was the best way to achieve that democratic ideal:

The first American Revolution was sparked by an unshakable conviction—taxation without representation is tyranny. Two centuries later, a second American Revolution for hope and opportunity is gathering force again . . . The proposal I'm putting forth tonight for America's future will free us from the grip of special interests and create a binding commitment to the only special interest that counts—you, the people who pay America's bills. It will create millions of new jobs for working people, and it will replace the politics of envy with a spirit of partnership—the opportunity for everyone to hitch their wagon to a star and set out to reach the American dream.¹⁹⁹

The ultimate passage of the Bill by almost universal acclaim obscured the large amount of criticism directed at it by proponents, opponents, and fence-sitters. Those who favored it, as well as those who opposed it, saw both good and bad in it. Each group saw, however, different virtues and vices. It is in these differences that one can see that the alliance of the two dueling components of moral economic individualism inevitably would be only temporary.

Some opponents of the Bill stressed the economic accumulation aspect. For example, Representative Bill Archer (R-TX) complained that the "bill is anti-growth. The bill is anti-savings. The bill is anti-capital formation, anti-manufacturing, anti-export, anti-budget, anti-housing, anti-education, anti-charity and the bill is lots more things as well."²⁰⁰

In criticizing the conference bill, Senator John Danforth (R-MO) stated that everyone had his own standard for a "good" tax bill: "Some people say the basic criterion should be fairness. Some people say . . . low rates. . . My test has always been, what would the bill do for the economy of our country?"²⁰¹ Nevertheless, in an attempt to sway opinion, Danforth appealed to

199. President Ronald Reagan, Tax Reform, Address to the Nation, in 21 WEEKLY COMP. PRES. DOC. 703-04 (May 28, 1985). Professor Bittker states that the passage of the Tax Reform Act of 1986 was a paradox for political reasons as well as from the standpoint of the intellectual history of tax reform. Boris I. Bittker, *Tax Reform—Yesterday, Today, and Tomorrow*, 44 WASH. & LEE L. REV. 11, 13 (1987). Politically the Act was paradoxical, not only because it had bipartisan support, but also because many Democrats voted for it only because they did not want to be blamed for killing tax reform; and many Republicans voted for it hoping it would eventually be revised. *Id.* From an intellectual tax history standpoint, the Act brought together two branches of tax reform: the "equity" branch which wanted a broad-based, progressive income tax with some provision for social policy expenditures and the "efficiency" branch which wanted to close loopholes because they interfered with the efficient working of the marketplace and, therefore, retarded growth. *Id.* at 13-14. These two branches coincide with the two traditions of moral economic individualism: individualism and equity. See Albert R. Hunt, *Introduction to BIRNBAUM & MURRAY*, *supra* note 171, at xv ("Merging the lower rates of the supply-siders with the base broadening of the liberal tax reformers was the glue that held the 1986 tax bill together."); see also *id.* at 23.

200. David E. Rosenbaum, *Sweeping Tax Bill Approved in House*, N.Y. TIMES, Sept. 26, 1986, at A1 (quoting Representative Archer); see also 132 CONG. REC. 26,248-51 (Sept. 25, 1986) (statement of Rep. Frenzel); Lloyd Grove, *John Danforth, Tilting at the Tax Bill*, WASH. POST, Sept. 27, 1986, at C1.

201. 132 CONG. REC. 26,484 (Sept. 26, 1986). Senator Danforth then contrasted his test with the "fairness" test stated by Representative Rostenkowski a few weeks earlier. *Id.* at 26,488-90; see also *infra* note 208 and accompanying text.

the equity side of moral economic individualism. He stated that the bill was unfair for a variety of reasons, asking "What is fair about taxing rich people at a lower rate than people in a much lower income bracket?"²⁰² On the other side of the philosophical fence, the three negative votes on the Senate bill came from Senators Paul Simon (D-IL), John Melcher (D-MT), and Carl Levin (D-MI), "who argued that the bill would heap too much tax relief on the wealthy and too little on the middle class."²⁰³

Supporters of the Bill blended both sides of moral economic individualism, but emphasized different aspects. Senator Bradley, for example, used the old rhetoric of equality and opportunity (as opposed to privilege) but tempered it with appeals to economic growth: "[Enacting reform] will show commitment to a tax system that . . . responds to demonstrated need, not one that enshrines the status quo, subsidizes the politically powerful and shortchanges our potential for growth."²⁰⁴

Representative Jack Kemp (R-NY), on the other hand, appealed more traditionally to the accumulation side of moral economic individualism. Citing Thomas Jefferson (the traditional spokesman of the republican-egalitarianism side), he envisioned an America "that liberates people, enterprises, and human capital through a continuing revolution of Democratic capitalism . . . More and more Americans see that only by waging a continuing revolution for liberation, will we win a true victory of economic opportunity and justice for all Americans."²⁰⁵

Some voted for the Bill despite its unfairness;²⁰⁶ others voted for the Bill despite its antigrowth positions.²⁰⁷ House Ways and Means Chairman Dan Rostenkowski (D-IL) described how the new law "defined the test of fairness and economic balance," but he spoke of "fairness as [Congress'] fulcrum."²⁰⁸ Upon signing the Bill, President Reagan once again wedded economic and political freedom:

It wasn't too much to call [the old Tax Code] "unAmerican." . . . [T]he steeply progressive nature of the tax struck at the heart of the economic life

202. *Id.* at 26,489 (apparently referring to the 'bubble' in the tax rates). Senator William Roth (R-DE) also criticized the Bill for its economic disincentives (increasing capital costs and decreasing savings), and its unfairness to the middle and upper middle classes. *Id.* at 26,491-93.

203. Dale Russakoff & Ann Swardson, *Senate Approves Tax-Overhaul Bill*, WASH. POST, June 25, 1986, at A1.

204. 131 CONG. REC. H12431 (daily ed. Dec. 17, 1985) (reprinting William Bradley, *Excuses, Excuses: This is Real Progress*, WASH. POST, Dec. 8, 1985).

205. Representative Jack Kemp, Remarks Before the National Conference of State Legislatures (Aug. 4, 1986), reprinted in 132 CONG. REC. H2855 (daily ed. Aug. 13, 1986).

206. *See, e.g.*, 132 CONG. REC. 26,493-96 (Sept. 24, 1986) (Senator John Mitchell (D-ME) stating that he was "deeply disappointed" that the Bill "abandon[ed]" progressivity; he favored low rates but felt that 28% on the wealthiest taxpayers was just too low).

207. *See, e.g., id.* at 26,246 (Sept. 25, 1986) (Representative Kemp stating that lowering the personal income tax would offset the removal of the investment tax credit).

208. Dan Rostenkowski, *Give It a Little Breathing Room*, WASH. POST, Oct. 22, 1986, at A25. After the Conference Committee hammered out an agreement, Rostenkowski emphasized the equity aspect, stating: "Tonight we will put our names to a new tax code for America. It brings a sense of justice to the way we tax income." Anne Swardson, *Hill Conferees Approve Tax-Code Overhaul*, WASH. POST, Aug. 17, 1986, at A1 (quoting Representative Rostenkowski).

of the individual, punishing that special effort and extra hard work that has always been the driving force of our economy. Throughout history, the oppressive hand of government has fallen most heavily on the economic life of the individuals. And, more often than not, it is inflation and taxes that have undermined livelihoods and constrained their freedoms.²⁰⁹

President Reagan equated economic good with the general good: "I believe it is in the overall economic interest of the country. In short, it's good for the economy and good for the taxpayer."²¹⁰

As stated previously, the Act itself was the result of the rare convergence of political and social phenomenon. It resulted from widespread dissatisfaction with and distrust of the then-current tax code and the attempts of both political parties to capitalize on those sentiments.²¹¹ The Act combined elements of both the equity and the accumulation aspects of moral economic individualism. From the equity standpoint, some of the tax burden was shifted from individuals to corporations, the poor were taken off the tax rolls, and loopholes for the rich were closed so that they would pay their fair share. From the accumulation standpoint, the taxes on the rich decreased more than the taxes on the less wealthy, and the commitment to progressivity was substantially weakened with the flattening of the rate schedule. Moreover, the new tax law was most favorable to entrepreneurial activity.²¹² Reaganism, like earlier manifestations of the accumulation aspect of moral economic individualism, glorified the work efforts of entrepreneurs, seeing them as the moral (and economic) backbone of America.²¹³

The fragile nature of the alliance that created the Tax Reform Act of 1986 meant that its continued existence was at risk from the very moment of its enactment. For example, before President Reagan had even signed the bill, Senator Danforth vowed to press for repeal of reform provisions even if an

209. President Ronald Reagan, Remarks During Tax Bill Signing Ceremony (Oct. 22, 1986), reprinted in 33 TAX NOTES 413, 413 (1986).

210. Rostenkowski, *supra* note 208 (quoting President Reagan). In other words, if it is good for General Motors, it is good for the country. Although this adage has entered the public domain, I believe Walt Kelly said it first in "Pogo." See also 132 CONG. REC. 26,057 (Sept. 24, 1986) (Representative Richard Ray (D-GA) stating: "If business doesn't do well . . . [t]hen, America will not do well.")

211. As a result, in the words of one commentator, the Act was "less a blend of Republican conservatism and Democratic liberalism than a Reagan variation on Theodore Roosevelt's reformist populism." Peter T. Kilborn, *A Reagan-Style Bill*, N.Y. TIMES, Aug. 18, 1986, at A1, B11. Perhaps what ultimately led to the Bill's enactment was politics and the low tax rates. As economist Walter Heller said, "What really drove home tax reform was not only the appeal to fairness but the appeal to venality. These lower rates seem awfully good to people." *Id.* at B11. Even more telling, perhaps, was Representative Norman Lent's (R-NY) suggestion that neither the Democrats nor the Republicans wanted to take the responsibility for the failure of tax reform. 132 CONG. REC. 26,235 (Sept. 25, 1986).

212. See, e.g., Kilborn, *supra* note 211.

213. PHILLIPS, *supra* note 1, at 68 (citing entrepreneurial activity as the "dominant form of wealth accumulation" in the 1980's) (emphasis in original). The tax debates frequently included references to fairness, small businessmen, and entrepreneurs when participants spoke of economic growth. See, e.g., 132 CONG. REC. 26,234 (Sept. 25, 1986) (Representative Richard Arney (R-TX) discussing small businesses and "burgeoning young entrepreneurs"); *id.* at 26,057 (Representative Ray discussing the Act's negative impact on farmers).

economic recession occurred.²¹⁴ The still looming deficit also frayed the fragile accord between the two philosophies. Speaking from the equity position that the wealthy had a better ability to pay taxes, Representative Rostenkowski had already gone on the record as favoring tax rate increases should additional revenue be needed; whereas many Republicans, including President Reagan, had pledged not to increase rates.²¹⁵

Economic and political pressures quickly sundered the coalition. Revenue needs and a weak economy soon caused both an increase in marginal tax rates and a renewed demand for tax incentives for economic growth. The pro-accumulation side of moral economic individualism reasserted itself in the late 1980's and 1990's—despite the much heralded “death of the eighties”—as economic growth and entrepreneurship once again were heralded as saviors of the country. Similarly, the equity aspect gathered force as it confronted the ever-widening gap between rich and poor;²¹⁶ some even questioned the value of growth itself—perhaps bigger was not necessarily better.²¹⁷ Others noted that the economic growth rhetoric was “a smokescreen for the Republicans’ real agenda—taking care of the rich.”²¹⁸ The equity side proposed provisions such as an expanded earned income credit and limitations on excessive executive compensation; the accumulation/growth side proposed investment tax credits, expanded IRA's, relaxation of passive-loss rules, enterprise zones, consumption taxes, and capital gains cuts. Some of these provisions, on both sides, were enacted in 1993²¹⁹ amid rhetoric that harkened back to earlier

214. Hobart Rowen, *The Tax Reform Payoff Will Come*, WASH. POST, Sept. 28, 1986, at H1. Various private groups were also interested in amending certain provisions, such as the corporate minimum tax or simply “go[ing] after changes as the opportunity arises.” Timothy B. Clark, *The Next Chapter*, 18 NAT'L J. 2360-61 (Oct. 4, 1986) (quoting Dirk Van Dongen, president of the National Association of Wholesaler-Distributors).

215. Clark, *supra* note 214. The Act seems to fit within Stanley's history of the income tax as evolving from a centrist influence. Stanley states that income tax remains centrist in that it is more symbolic than actually redistributive: tax expenditures replace tariffs as the means of “compromising progressivity and channelling benefits primarily to the powerful.” STANLEY, *supra* note 46, at 255. Stanley proceeds to state, however, that because the income tax now affects everyone, it is no longer centrist's “primary rhetorical answer to class anxiety.” *Id.* The entitlement system now serves that purpose by providing “a small stipend to a very few at the very bottom.” *Id.* at 256.

The public focus on the 1986 income tax debate as well as the continuing furor over issues such as capital gains belies Stanley's statement. The income tax area remains a prime arena in which the battle over wealth and the nature of America continues.

216. *E.g.*, Paulette Thomas, *Poverty Spread in 1992 to Total of 36.9 Million*, WALL ST. J., Oct. 5, 1993, at A2.

217. *E.g.*, Herbert Stein, *Growth Isn't Everything*, WALL ST. J., Apr. 1, 1993, at A14. (“Accelerating growth may not be one of our most critical needs.”)

218. Lee, *supra* note 190, at 1399 (Sept. 6, 1993) (citing 136 CONG. REC. H8057 (daily ed. Sept. 26, 1990) (statement of Rep. Boxer)); *see also* Thomas B. Edsall & E.J. Dionne, Jr., *Democracy at Work: The Tax Revolt of the Masses*, WASH. POST, Oct. 14, 1990, at C2). The economist John Kenneth Galbraith had seen much earlier how neutral economic incentives benefitted the rich. *See* John K. Galbraith, *Are the Rich a Dirty Secret?*, in A VIEW FROM THE STANDS 179, 180 (Andrea D. Williams ed., 1986) (stating that the three central Reagan policies—supply-side tax cuts, strict monetary policies, and increased military spending—were marketed as good for the country but in fact were “wonderfully favorable” to the rich).

219. The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, enacted, for example, an expanded earned income credit, § 32, limitations on executive compensation, § 162(m), less restrictive passive-loss rules for real estate, § 469(c)(7), and a capital gain exclusion, and/or deferral for certain small business investments, §§ 1044, 202.

debates. For example, the 1993 increase in rates brought renewed cries from the pro-wealth accumulationists that the high rates encouraged the rich to take their money out of active investment and to put it in tax free securities²²⁰—a common criticism of the 1920's. This results, said one commentator quoting Andrew Mellon, in ““deadening America's entrepreneurial spirit.””²²¹

The polarization between the two sides is evident in current (and recurrent) discussions on investment tax credits, IRA's, lowered rates, and other tax incentives for growth. More basically, the polarization is reflected in debates over the role of the income tax in the revenue system. As in the 1890's and the early 1920's, there are many people in the modern era who wish to minimize, if not eliminate, the income tax and increase the use of consumption taxes.²²² Perhaps the best illustration of the polarization is the capital gains debate. This debate has been heated and includes both a pure economic aspect and an equitable one.

The economic argument states that lower tax rates and other tax incentives will increase savings, which will increase investment, which will lead to economic growth, which will benefit everyone—the bigger the pie, the bigger the slice each person gets. Each of these assumptions rests on moral economic individualism's favorable view of savings and investments; yet each is problematic. Whether savings are sensitive to tax rates is not clear; however, there is a large body of data from the 1980's which indicates that the responsiveness of savings is minimal and that other factors such as culture are more influential.²²³ Even assuming that tax incentives increase savings, the

220. Alan Walters, *Clintons' Taxes: Secret Bonanza for the Idle Rich*, WALL ST. J., Aug. 24, 1993, at A12.

221. Raymond J. Keating, *Andrew Mellon Was Right: Foolish Bias in Tax Code*, WALL ST. J., Sept. 30, 1993, at A18 (quoting Andrew Mellon on the ill effects of high rates and tax exempt securities).

222. There was a flurry of articles in the mid-to-late 1970's on consumption taxes. See, e.g., William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974); William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947 (1975); Alvin C. Warren, Jr., *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931 (1975). In 1977, David Bradford and the United States Treasury Tax Policy Staff issued *Blueprints for Basic Tax Reform*. A second edition was issued in 1984. The early 1990's have shown another surge of interest in consumption taxes—both of the cash-flow and value-added types. See, e.g., SOCIALISM IN AMERICA, *supra* note 14, at 961; James M. Bickley, *Value-Added Tax: Concepts, Policy Issues, and OECD Experiences*, 93 TNT 56-46, Mar. 11, 1993, available in LEXIS, FedTax Library, TNT File; Jane G. Gravelle, *New Tax Proposals: Flat, VAT, and Variations*, 92 TNT 91-8, Apr. 29, 1992, available in LEXIS, FedTax Library, TNT File; William H. Morris, *A National Debate on VAT: The Gibbons Proposal*, 60 TAX NOTES 1259 (Aug. 30, 1993).

Early in his 1992 presidential campaign, Jerry Brown proposed a complete revision of the revenue system: a flat 13% tax on an individual's gross income and a 13% value-added tax. See Allen D. Manvel, *A CBO Study on Value Added Taxation*, 55 TAX NOTES 849 (May 11, 1992). The Congressional Budget Office, at the request of Senator Lloyd Bentsen (D-TX), reported on the effects of his proposal. Congressional Budget Office, *Distributional Effects of Substituting a Flat-Rate Income Tax and a Value-Added Tax for Current Federal Income, Payroll, and Excise Taxes*, 92 TNT 74-52, Apr. 7, 1992, available in LEXIS, FedTax Library, TNT File.

223. For a general overview of savings and tax policy, see PERSONAL SAVING, CONSUMPTION, AND TAX POLICY (Marvin H. Kusters ed., 1992) [hereinafter PERSONAL SAVING]. For a discussion that focuses on the capital gains debate see, THE CAPITAL GAINS CONTROVERSY: A TAX ANALYSTS READER (J. Andrew Hoerner ed., 1992); see also Harold Pepperell, *Should Capital Gains Taxes Be Raised?*, 62 TAX NOTES 379, 379 (Jan. 17, 1994) (stating that taxes have “essentially no direct impact on investment” because new equity issues are a “very minor source of funding for corporate investment,” and almost 90% of funding for new corporations comes from individuals or entities that do not pay capital gains tax).

next assumption is that savings increase investments. This is not necessarily true due to the inevitable connection in a capitalist society between investment and consumption. As discussed earlier, mass industrialization requires mass consumption. To some extent, therefore, earlier attitudes about the immorality of spending are inappropriate, and some modification of those attitudes has occurred.²²⁴ But still the rhetoric exhorts us to consume less and save more. Yet, as the economist Robert Eisner has asked, will the “decision to ‘consume’ less by not buying that new Chrysler . . . induce Mr. Iacocca to invest more—or less[?]”²²⁵ Indeed, the recent recession seems to have been prolonged by a lack of consumer confidence (and hence a lack of spending) just as the prolongation of the current recovery has been affected by consumer spending. Thus, savings are not unequivocally good, just as consumption is not unremittingly bad. The two are intertwined, and a healthy economy requires a proper mix of the two.

The equitable side of the capital gains debate reflects not only views on the nature of wealth distribution but on the nature of America. Opponents of capital gains preferences argue that most capital gains are earned by the top income groups. Thus, a preference unfairly helps the rich and only increases the widening gap between rich and poor. Proponents of the preferences urge them not merely to enrich certain individuals but to help society: “As long as there is economic growth, people can somehow get along with each other. And economic growth can occur only if people are allowed to become rich”²²⁶

The chairman and four members of the United States Commission on Civil Rights, in an August, 1993 letter which appeared in the *Wall Street Journal*, even intimated that the solution to race issues lay in a capital gains preference: “The best hope of getting critically needed seed money into Los Angeles and other tense urban areas is by reducing the capital-gains tax.”²²⁷

Most broadly, proponents of a capital gains preference appeal to the foundation of the republican ideology, that which made the American Revolution a revolution: the abolition of hierarchy and privilege and the assertion of the equality of man.²²⁸ “Our parents and grandparents came to this country because it was the only place in the world where youthful potential was not limited by blood, kinship or social status.”²²⁹

This appeal to republican ideology may seem at best ironic, at worst cynical: an intentional rhetorical use of language by the establishment to appease the dissenters in form but not substance (Stanley’s centrist thesis, in short). The rhetoric, cynical or not, is nevertheless authentic at a basic level.

224. See *supra* notes 40-45 and accompanying text.

225. Robert Eisner, *Some Measurement and Policy Issues of National Saving and Investment*, in PERSONAL SAVING, *supra* note 223, at 121.

226. Jude Wanniski, *Restore Growth—Cut the Cap-Gains Tax*, WALL ST. J., May 11, 1993, at A14.

227. Arthur A. Fletcher et al., *Help the Poor, Cut Cap Gains Tax*, WALL ST. J., Aug. 25, 1993, at A8. Wanniski admitted that both he and the American Council for Capital Formation were behind the letter. Viveca Novak, *They’re Back!*, 25 NAT’L J. 2245, 2248 (Sept. 18, 1993).

228. See WOOD, *supra* note 28, at 96.

229. Wanniski, *supra* note 226, at A14.

It reflects the nation's real but contradictory attitudes about wealth and the meaning of America. If this were not true, the rhetoric would not be effective. And effective it is: the same rhetoric has resonated throughout a century of debate over the role of wealth and the income tax in America.

III. CONCLUSION

For the past one hundred years, the income tax laws and the surrounding debates have been incredibly repetitive, not only in broad themes but also in specific metaphors and references. Such repetition is not mere happenstance. Rather, it represents deep, abiding, and contradictory attitudes in this country toward wealth. Americans seek and admire earned wealth, yet fear its very power; we encourage saving as virtuous, yet worry about the ultimate consequences of great accumulations of wealth. We criticize profligate spending, but we need it to keep the capitalist engine running and to make the promise of democracy tangible. Consumption makes "every man a king" and allows one to reach for both spiritual development and self-development.

While some people characterize these contradictions as two opposing traditions, this Article holds that the two are, in fact, intertwined; they are two facets of one broad tradition which I have labeled moral economic individualism. In some historical periods, one facet dominates; in some people, one facet or the other is dominant. Yet, as this Article has shown, the recessive facet is ever-present, modifying the dominant one. Proponents of wealth accumulation honor it as a badge of merit and as a mechanism of economic growth which will help everyone. Proponents of a greater equality also value wealth (within limits) as a symbol of both merit and of equality of opportunity and hope for the chance to acquire it themselves.

The income tax reflects these contradictory attitudes. Today it is an amalgam of consumption and income provisions,²³⁰ of progressive rates and tax expenditures which undermine progressivity, and of various provisions which favor either earned or unearned income. This current state of the Code is neither accidental nor unusual. Because each of these areas of tension reflects the inherent conflict within moral economic individualism, their existences are endemic to the tax laws.

For example, the consumption/income conflict within the present tax laws reflects the central contradiction of moral economic individualism and questions the basic merit of the income tax. Fearing the moral and political corruption of concentrations of wealth, Americans want to tax all income. Yet, we wish to exempt savings and tax only consumed income because we disapprove of wasteful spending and believe that income should be saved because it is a prerequisite to individual and national spiritual and economic growth.

230. See Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145 (1992) (examining the hybrid nature of the current American tax system and noting the existence of a moral dimension).

This conflict has been greatly evident in the debates during all three historical periods examined. In the period from 1894 to 1913, the conflict helps explain the high exemption amount and the low tax rates. The conflict appears more concretely in the 1920's, when proposals were made for a spendings tax to partially replace the income tax. This tax would be levied on an individual's income which was spent, but not on income which was saved. There was also strong sentiment for a broad-based consumption tax such as a national sales tax. Although neither of these two more radical taxes passed, several major provisions were added to the tax law in the 1920's which favored saving over consumption. For example, the predecessors of § 1031 and the reorganization provisions which exempt certain income from taxation so long as it is reinvested were passed in 1921, as was the first capital gains preference. Today's Code, of course, continues to be a mix of consumption and income tax provisions. Not only have § 1031 and the reorganization provisions remained in the Code, but other consumption provisions have been added—most notably the retirement and the pension provisions which defer taxation of income until it is spent at retirement.²³¹

America's contradictory attitudes toward wealth play themselves out most noticeably in the area of progressivity. This battle occurs not just over the appropriate rates and the exemption amounts, but also in the area of tax expenditures or preferences, as well as in the favored rates for certain types of income. Debates over rates have always been heated—especially in the 1920's, again in the 1980's during the passage of the Tax Reform Act of 1986, and finally, once again in 1993. Perhaps the most heated battle currently raging is that over capital gains rates. The original capital gains tax was passed in 1921, just months after the Supreme Court ruled that capital gains were taxable. The preference was passed amidst much rhetoric about the need to facilitate investment and economic growth—the same rhetoric occurring today.

The capital gains provision is just one of the many provisions which reflect the underlying contradictory nature of American attitudes about wealth, savings, and consumption. An ideal comprehensive income tax based on a Haig-Simons concept of income would tax all income the same, regardless of its source. In other words, there would be no rate differentiation based on whether the income was earned or unearned. Nevertheless, the debates show great partiality for preferences, and the tax laws reflect this. Given the contradictory nature of American attitudes about wealth, some of the provisions favor earned income while others favor unearned income.

Since 1894, many people have favored a lower tax rate on earned income. Such a preference finally passed in 1924 and has remained in the Code in some form to date.²³² Today, for example, the Code contains not only an

231. *E.g.*, 26 U.S.C. §§ 219; 401-409 (1988 & Supp. V 1993).

232. An earned income deduction was first enacted in 1924. Revenue Act of 1924, Pub. L. No. 68-176, § 209(a), 43 Stat. 253, 263-64. The section provided for a 25% reduction of the tax rate on the first \$10,000 of earned income; the first \$5000 of income was presumed to be "earned" income. The preference was briefly eliminated in 1932 because of revenue needs. CONF. REP. ON REVENUE BILL OF

earned income credit, § 32, but also an exclusion for foreign earned income, § 911, and provisions deferring taxation on some earned income until retirement. On the other hand, several sections favor unearned income, such as the capital gains section and those provisions which are based on a consumption tax, such as § 1031. Other sections, such as accelerated depreciation and the (temporarily) extinct investment tax credit, also encourage savings and investment. The passive-loss rules of § 469 acknowledge differing tax treatment for income acquired from different sources. The overall effect is to increase taxation on earned income by preventing a taxpayer from offsetting earned income with passive losses. Nevertheless, § 469 is important for its broad recognition of the concept that different sources of income can be treated differently for tax purposes.

The Revenue Reconciliation Act of 1993²³³ added two new sections which are intended to further investment: § 1044 (rollover of publicly-traded securities gain) and § 1202 (50% exclusion for gain from small business stock). Both of these sections are notable in that the preference is limited to money invested in small businesses. This limitation captures an important aspect of moral economic individualism. It encourages the entrepreneurial aspect of wealth accumulation which emphasizes the moral and spiritual qualities derived from industriousness. Moreover, by not applying to large corporations, these sections appear to avoid the dangerous tendency of wealth accumulation to concentrate power.

Finally, § 162(m), also enacted in 1993, which limits deductions for executive compensation, is a microcosm of the contradictory attitudes Americans have toward wealth. The mere existence of the limitation shows an antipathy toward great accumulation. The magnitude of the permitted salary, one million dollars, shows that we do not oppose wealth per se, just vast accumulation thereof. The exceptions to the limitation concern commissions and performance-based compensation. In other words, the section

1932, 72d Cong. 1st Sess. at 13 (1932) [Amend. 36], reprinted in 99 INTERNAL REVENUE ACTS, *supra* note 142. See H.R. No. 704 to accompany H.R. 7835, Revenue Bill of 1934 at 6 reprinted in 100 INTERNAL REVENUE ACTS, *supra* note 142. The 1934 Act reinstated the provision. Revenue Act of 1934, Pub. L. No. 73-216, § 25(a)(4), 48 Stat. 680, 692.

In 1944 the preference was once again eliminated. Revenue Act of 1943, Pub. L. No. 78-235, 58 Stat. 21, 31 § 107 (1944). Secretary of the Treasury Henry Morgenthau, Jr., recommended the earned income credit be repealed in order to simplify the tax system. *Internal Revenue Revisions: Hearings Before the Comm. on Ways and Means, 78th Cong., 1st Sess. 6-7 (1943)*, reprinted in 40 INTERNAL REVENUE ACTS, *supra* note 142. Morgenthau did, however, acknowledge the need for revenue, which may have been a motivating factor for the provision's elimination.

From 1970 to 1984 the maximum tax on earned income was 50%. 26 U.S.C. § 1348 (repealed in 1981 when the top rate for all income was reduced below 50%). Although the primary goal was to prevent "tax gimmickry" such as deferred compensation and tax shelters, it also intended to encourage highly skilled taxpayers to work. See, e.g., Michael Asimow, *Section 1348: The Death of Mickey Mouse?*, 58 CAL. L. REV. 801, 865 (1970).

233. Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, Title XIII, § 13114(a), 107 Stat. 430.

differentiates between earned and unearned income;²³⁴ compensation is worthier if it is earned through one's personal efforts.

Contradictory tax provisions regarding wealth and consumption have existed for one hundred years (in one form or another) and will continue to exist. They are not simply the result of pressure groups or cynical use of rhetoric by the establishment to assuage the disaffected. The conflicting tax provisions and the conflicting rhetoric represent real contradictions within the collective psyche of America. It is not only millionaires who want low rates, but also working and middle class people who dream of becoming millionaires in the land of opportunity. Accumulation of wealth represents both the apotheosis of the American dream (anyone can achieve anything by dint of merit, rather than by class or privilege) and the seeds of its destruction (accumulation of wealth leads to the concentration of power, privilege, and corruption).

There is no question that the current income tax system is contradictory: it contains both income- and consumption-based provisions, it favors earned income at some times and unearned at others, and it has a progressive rate structure that can be more apparent than real. Some people interpret this state-of-affairs as an example of how those in power have manipulated the law to their benefit. They see the language I have quoted as smoke and mirrors. In their view, the language is mere rhetoric which, by assuaging the masses, allows the powerful to promise a lot and to deliver little.

This Article has shown that the ultimate shape of the income tax and its failure to achieve meaningful wealth distribution result from this country's powerful ambivalence towards wealth, not from the use of rhetoric to quiet the masses. The rhetoric is effective only because it reflects the strongly held beliefs of moral economic individualism which include both an admiration for and a fear of wealth. The income tax is contradictory because as a society, Americans possess contradictory attitudes about wealth.

234. It may seem like a contradiction in terms to speak of earned and unearned income in the context of executive compensation. Nevertheless, such a distinction exists. When vast amounts of money are paid to an individual and are not contingent on performance, that money has the flavor of unearned income. Perhaps it is due to a distorted market; perhaps it is a windfall. In any case, it stretches the meaning of "earned" income.