CAN WEALTH TAXES BE JUSTIFIED? (Draft of 03/28/00)

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I. Introduction

Draped across the ramshackle facade of the Ashkenaz dance club in Berkeley is an urgent, inelegant, slightly irritating injunction. "Tax The Rich, Feed The Poor" it orders (or pleads). Perhaps the reason why some locals find the banner annoying is that they consider it an unfair reproach. They own more than many people, to be sure, but they work hard, pay over a third of their earnings in taxes already, and surely bear no blame for the government's negligence or other people's failings or bad luck. Besides, food stamps will not solve inner cities' ills. Nor can the rich be pinched indefinitely. It's not that simple.

Of course they're right. But our consciences and theirs might still be roiled. Disparities in means and opportunity between the poor and the prosperous yawn too wide to be shrugged off as the unpleasant but tolerable byproduct of a market economy or individual license, let alone as the sort of cosmic misfortune that lies beyond human remedy. In 1992, the richest 1% of U.S. households accounted for 37.2% of overall net worth.[1] Their mean net worth in 1992 dollars was $7.925 million,[2]

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[1] Edward N. Wolff, Top Heavy: The Increasing Inequality of Wealth in America and What Can Be Done About It 67 (rev. ed. 1996). Including the present value of Social Security and pension benefits in household wealth brings the fraction of national wealth held by the richest 1% down to 21.2% as of 1989 (rather than 1992). Id. at 78 - 79.

with the shabbiest member holding assets worth $2.42 million.[3] The next 19% of households claimed another 46.6% of overall net worth, with a mean of $523,600 and a lower bound of $180,700.[4] At the same time, this country's median household net worth was just $43,235.[5] The least affluent four-fifths of households together controlled only 16.3% of the nation's wealth.[6] During the boom years of the mid-1990s, these numbers can only have grown more lopsided. The fact that income is spread more evenly than wealth and that people's earnings and fortunes wax and wane over a lifetime is some consolation,[7] but it cannot mask and in recent years certainly has not reduced the substantial differences in people's command of valuable resources.[8]

Wolff's numbers represent his own calculations based on data produced by the 1992 Survey of Consumer Finances commissioned by the Federal Reserve Board. Data from the Federal Reserve Board's 1995 survey are available now, but not in a form that permits ready comparisons with Wolff's numbers for 1992.

[2] Id. at 68. Bruce Ackerman and Anne Alstott claim that the median (not mean) net wealth of the top 1% of households was $4.6 million in 1995. Bruce Ackerman & Anne Alstott, The Stakeholder Society 103 & n.31 (1999).

[3] Wolff, note 1, at 63.

[4] Id. at 67, 68, 63. All dollar amounts are expressed in 1992 dollars.

[5] Id. at 65.

[6] Id. at 67. Wolff does not explain why the percentages of national wealth sum to 100.1% rather than to 100%.

[7] For example, the 1992 Survey of Consumer Finances reported that the highest-earning 1% garnered 15.7% of national income, the next 19% received 40.7%, and the bottom 80% acquired 43.7%. Id. at 67. Mean income for the three groups was $671,800, $91,700, and $23,300 respectively.

[8] Increases in national wealth in recent years have tended to flow to those who are already rich. According to Wolff's calculations, "[t]he top 20 percent of wealth holders received 99 percent of the total gain in wealth over the period from 1983 to 1992," with the top 1% enjoying 58% of wealth

Simple-minded though it may seem to ask the state to wear Robin Hood's raiment, these figures may nevertheless make the Ashkenaz's proposal tempting. Even if we look to an income or expenditure tax to furnish most of the means for keeping the navy afloat, the poor fed, and the elderly doctored, why not add a wealth tax as an accessory? Are not the rich better off even than their equal-earning contemporaries because they have more money to magnify their influence and renown, along with a greater sense of security should their businesses falter or their bodies betray them? Naturally, it is only because they elected to save rather than spend that they have more than their peers – an option that also was available to those who now have less. But there is no denying that they currently enjoy an advantage that is psychologically significant, indeed one that often is twinned with genuine sway over others and that generates benefits that never get netted by income tax collectors. Even if many (though too few) people slide back and forth across the wealth holding spectrum over the course of their lives, a wealth tax that funneled cash or benefits to those who own least at any given time by taking a small slice from the well-to-do might help narrow the numerous inequalities that stunt many people's chances. Even a light skimming, repeated regularly, could help transform equality of opportunity from a joke into a prospect.

Moreover, some would add, an annual wealth tax can at the same time be viewed as a fair charge for the many benefits the government bestows on those with the biggest wallets. If properly

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growth. Id. at 69. It is likely, of course, that class membership changed somewhat over this period, so that some who were in the top 1% or top 20% in 1983 ceased to be there by 1992. People typically earn and save more at some periods of their lives than at other times, and deaths, retirements, and the entry of new workers alters people's positions in the wealth and income distributions over time. One can safely say, however, that most people stay in the top 20% or the bottom 80% of the wealth and income distributions during most of their adult lives.

targeted, it might be thought to yield important economic and political gains as well, by encouraging people to use their assets productively and by checking the accumulation of vast fortunes that can warp markets and corrupt democratic politics. Perhaps we could even multiply those benefits by substituting a wealth tax for gift, estate, or inheritance taxes that bite unevenly across chains of succession and that, unfairly in the eyes of some, take less over time from families lucky to have long-lived members and grab more from those that, through misfortune or generosity, pass their possessions along more briskly. The introduction of a wealth tax could hardly pretend to be a panacea, but if it could be administered without undue expense, would it not at least be a boon?

No. My claim in this Article is that a wealth tax would not be desirable from the standpoint of justice. None of the justifications sketched above ultimately is persuasive, even when each is couched in its most attractive form. We live in a nation permeated with injustice – a society laudatory by historical measures, but still badly in want of reform. The maldistribution of property and financial assets in America is one sign of our default. But a wealth tax, I contend, is not the best means of repair, nor would it find a permanent place in a better world.

The plan of this Article is simple. Section II sets forth my assumptions and excludes from consideration a number of problems that would have to be faced were a wealth tax worth closer study. In particular, I describe a crucial part of the normative framework I use in evaluating proposals to take money, property, time, or effort from some people to benefit others. To keep my conclusions as general as possible, I avoid choosing for the purpose of this Article from among the many liberal egalitarian theories of distributive justice that call for some redistribution from those with greater means and opportunities to those with less but that differ on when and how much the more fortunate are

obligated to share. A large portion of my analysis should be acceptable to libertarians as well. Nevertheless, my argument cannot accommodate every view about what justice demands. I therefore cannot claim to show that wealth taxes may never be levied indefinitely within a just social order, whatever one's views of group justice might be. My analysis might not convince utilitarians and others who regard justice as the achievement of some pattern of resource holdings or individual well-being across a society's members, without regard to the wise or silly choices that people make except insofar as the welfare-maximizing or preferred consequentialist rule attaches rewards or penalties to those choices. For partisans of these views, my analysis might not so much be false as irrelevant.

Section III offers arguments. It considers in detail a number of possible justifications for wealth taxation that conceivably could be joined to the broadly nonconsequentialist premise I take for granted. These justifications for wealth taxation include: the erosion of accumulated financial might that threatens markets' efficiency and electoral fairness; the creation of a further incentive to extract high returns from private holdings, which profits not only individuals but the community over time by boosting investment yields; the pairing of citizens' burdens to the benefits they reap from public expenditures; the capture of rents from the use of natural resources and their redistribution to all in equal shares, reflecting our equal claims to a world we never chose but to which we have equal title; the perfection of the accessions tax, by rendering its rates more sensitive to how long recipients live or hold property before passing it on gratuitously to others; the improvement of a consumption or expenditure tax to restore neutrality as judged by the trade-offs people would face in a world without taxes; and the refinement of an income tax, to reflect in an approximate way the experiential benefits that wealth confers but that a tax on wages and capital income alone cannot capture. My conclusion is that none of these asserted

justifications for implementing a tax on the net worth of all or the wealthiest taxpayers is powerful enough to make a wealth tax appealing, even if it could be administered at a cost that did not consume a large portion of the tax's yield.

II. Assumptions and Exclusions

By "wealth tax" I mean a tax, levied annually or every few years, on the value at the time of assessment of a taxpayer's real and personal property, including financial assets, net of any liabilities. So long as a taxpayer holds an asset, its value minus associated debt will be taxed repeatedly, as often as the wealth tax is levied. A wealth tax as I am using the term omits from its base the value of human capital.[9] Increased earning capacity flowing from the acquisition of valued skills or from heightened

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[9] Richard Wagner suggests that a tax on non-human capital alone – a prototypical wealth tax – would be desirable if it were administrable (which Wagner doubts). In his view, a tax on physical and financial capital would help offset the United States income tax's unfavorable treatment of human capital, specifically, Congress's refusal to allow the costs of acquiring valuable skills in many instances either to be deducted when incurred or amortized. One wrong thus might approximately and acceptably balance out another. Richard E. Wagner, Death and Taxes: Some Perspectives on Inheritance, Inequality, and Progressive Taxation 5 (1973).

Even if one accepts the propriety of taxing income rather than consumption, and even if one believes that human capital is treated unduly harshly under the current U.S. income tax, Wagner's argument seems strained. If human capital is indeed taxed unfairly under the U.S. income tax – a claim that is more contentious than Wagner suggests – the sensible response is to improve the treatment of human capital directly, because the tax's alleged failings are easily corrected. For a fine analysis and discussion of the ideal taxation of human capital under income and consumption taxes, see Louis Kaplow, Human Capital Under an Ideal Income Tax, 80 Va. L. Rev. 1477 (1994); Louis Kaplow, On the Divergence Between "Ideal" and Conventional Income-Tax Treatment of Human Capital, 86 Am. Econ. Ass'n Papers & Proc. 347 (1996); Lawrence Zelenak, The Reification of Metaphor: Income Taxes, Consumption Taxes and Human Capital, 51 Tax L. Rev. 1 (1995); Louis Kaplow, Response: The Income Tax Versus the Consumption Tax and the Tax Treatment of Human Capital, 51 Tax L. Rev. 35 (1995).

demand for some rare natural talent may enhance a person's well-being, but it does not increase her wealth for the purpose of the tax I am considering.[10]

In addition, those who regard the income tax already as tilting unfairly against capital investment might well regard a second tax on physical and financial capital as a further evil, even if it reduced the inefficiency traceable to the differential taxation of human and nonhuman capital. From their perspective, two wrongs would not cancel one another, as Wagner suggests: they would sum to a greater wrong.

[10] People's abilities to command money for their services, to enjoy various experiences, to secure affection or admiration, or to obtain some other desired good plainly constitute valuable assets. Many theories of distributive justice assert that a person's possession of an above-average complement of abilities obligates him to share with others or that a poor set entitles him to a portion of what others naturally possess or by luck acquire, at least insofar as his comparatively poor abilities can be traced to genetic or environmental chance rather than to his choices. Virtually nobody advocates making a person's tax liability or his receipt of government expenditures turn directly on his abilities, however, for three chief reasons.

First, some welfare-increasing characteristics are so intimately bound up with a person's self, and so confusingly intertwined with his own decisions and the highly personal, associational preferences of others, that they seem unfit objects of redistributive taxation. Who would tax a puckish sense of humor, a lovable disposition, or a melting smile? Second, capacities often cannot be valued accurately, unlike income from their exercise. Imposing a tax on bare ability in the absence of both a market for capacities and some way to measure their possession would foster deception by the capacities' owners, rewarding dissemblers. Moreover, even if people were fairly truthful, an abilities tax would produce widespread overtaxation and undertaxation, because of imprecise measurements, possible errors in modeling a hypothetical market, and the biases, misestimations, or discriminatory motives of assessors. Third, it seems wrong to compel somebody to pay taxes on the value of his talents – capacities that came to him naturally or incidental to some voluntary activity and not by his design – if he chooses not to use them productively. Doing so would effectively enslave the able, by forcing them to put their highly taxed talents to some lucrative employ on pain of sitting in a debtors' prison, however unpalatable the person found richly compensated work.

If it were possible to charge people in proportion only to those of their talents they valued and only insofar as they valued those talents, the third difficulty would fall away, except insofar as their valued capacities did not or could not add to their material wealth and they could meet their tax liability only through involuntary labor. The first difficulty might also be met, by not taking into account certain personal attributes such as physical allure, charm, or charisma. But the second difficulty would still remain. Together, these concerns feed the consensus belief is that the best course is to tax people on their fortunate human capital only indirectly and approximately, as that capital in conjunction with other

That omission doubtless makes a wealth tax less comprehensive than it might be and for some renders the definition less attractive,[11] but it aligns my use of the term with standard conceptions of a wealth tax,

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factors generates monetary income that can be redistributed if appropriate.

Convincing as these arguments are in most cases, they appear weak with respect to at least some people who do not enter the labor market at all or who work much less long or hard than average, in contrast to those who work for lower wages or returns than they might. Admittedly, some non-workers or minimal laborers have a strong claim to an exemption from taxation. Some people are unable to work and have far fewer desirable opportunities than the norm, and so ought to receive assistance beyond whatever benefits freedom from toil yields; others have paid their full, fair share of taxes over a lifetime of productive labor and have retired from the labor force in a normal way, so that they cannot stand accused of free-riding. There are, however, many persons who, through someone else's generosity, devote their considerable abilities to performing non-market domestic tasks (that do not produce imputed income currently subject to tax) or to leading a life of leisure. If the funding of government services should be matched with the receipt of whatever benefits those services confer, there is no reason to exempt members of this fortunate group from taxes designed to pay for those services. But there also is no reason to exempt them from taxes that attempt to redress imbalances in people's undeserved opportunities, unless one assumes that their unchosen capacities are worth less than the mean.

No doubt collecting tax from some members of this group would prove impossible. The tax bills of many others, however, could be tacked onto their benefactors' tabs if they themselves lacked means to pay because they depended on a stream of small presents from their spouse, friend, or parent for survival. For example, these additional payment obligations might in the case of married couples be incorporated into the rate schedule, thereby making them default responsibilities, and blunted by a tax preference for two-earner couples or, equivalently, different rates for primary and secondary earners that were calibrated to leave pairs no better or worse off by marrying. Most unmarried people who are able to avoid working without collecting public assistance have assets or sources of help that would permit them to pay the tax they would owe, though choosing rates would require some thought. Thus, the case against taxing human capital directly to avoid undue intrusion or slavery, though generally strong, lacks punch as concerns most able but idle people in their prime. Some unfairness might persist if a tax were imposed, however, due to inescapably inaccurate judgments about the influence of luck on people's capacities.

[11] The Carter Commission Report, for example, stated that if wealth included the value of human assets and if they could be traded on a market and thus valued accurately, in the same way as other goods, wealth would be a good measure of economic power at a given point in time. The Commission nevertheless rejected the suggestion that a wealth tax that included human assets would be desirable. It did so not on the ground that human assets (if they could be valued accurately) ought not

placing outside the purview of this Article only imaginary tax systems that nobody finds practicable. Likewise, the value of leisure is excluded from my definition of wealth. Leisure resembles a paradigmatic capital asset even less than acquired skills do, and proponents of a wealth tax have never urged its direct taxation. A partial explanation for their restraint may be that even those who believe an optimal tax includes leisure in its base are content to tax more easily valued complements to leisure; durable goods used in leisure activities would be subsumed by a wealth tax on physical assets, even if services purchased in proportion to leisure would not be (though they could be reached by special levies if one thought them appropriate).

I make no assumption in advance about tax rates or about the tax's progressivity, proportionality, or regressivity with respect to wealth. Rates perforce would vary with the justifications offered for the tax. It seems unlikely that a wealth tax levied every year or two could be imposed at high marginal rates except on immovable assets such as land without pushing some capital offshore and prompting at least a subtle aggregate shift from labor to leisure or from saving to immediate consumption among those facing the highest rates.[12] In assessing the appeal of a wealth tax I therefore

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to be part of the tax base, but because human capacities cannot be liquidated to satisfy a person's tax liability if that person failed to earn or keep on hand sufficient transferable resources to pay the tax. The Commission also concluded that a wealth tax that fell repeatedly on saved income would discriminate against savers and in favor of people who consumed their income as they earned it. A wealth tax would charge immediate consumers with a lower tax liability over time even if their earnings equaled those of savers and thus left them as able to pay taxes as those who salted their money away for future spending or giving. 3 Report of the Royal Commission on Taxation 27 - 28 (1966).

[12] Wolff notes that eleven OECD countries have wealth taxes but that they are not major revenue sources anywhere: "The international mobility of financial wealth and widespread concern about the incentive effects of wealth taxation – incentives against saving and for capital flight – as well as the power of affluent elites all work to reduce the level of effective taxation." Wolff, note 1, at 3.

have in mind a tax similar to broadly based European net worth taxes with marginal rates that never rise above 2%. Most commentators reasonably take these wealth taxes as paradigms as well, but my analysis will proceed as though there need not be an upper bound on rates. Likewise, I suppose nothing in advance about the proper taxpaying unit if a wealth tax used something other than proportional rates that applied to the first dollar of wealth. Different justifications for a wealth tax may have different implications for whether it ought to be levied on the net worth of each individual person, on the combined wealth of married or cohabiting couples, or on the wealth held by larger family units, such as parents and their children together.[13]

My appraisal of the justice of a wealth tax abstracts from a number of issues that would attend its adoption by the United States or other countries with well-developed tax collection systems.

First, it ignores the possible illegality of a national wealth tax under the American Constitution. Many scholars believe that a wealth tax constitutes a "direct" tax under current case law and thus that it could not survive constitutional review if enacted by the federal government, because direct taxes must be levied according to states' populations.[14] Two careful investigations of the constitutional meaning of

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[13] The United States income tax, for example, generally adds the net unearned income of a child under fourteen years of age to the parents' income, effectively treating all of them together as a single taxpaying unit. IRC § 1(g). A wealth tax could be applied to family wealth in the same way.

[14] Article I, Section 2 of the Constitution declares in part that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by . . . the whole Number of free Persons." The Sixteenth Amendment exempts income taxes from this requirement but says nothing about wealth taxes, which many believe cannot sensibly be viewed as tantamount to income taxes for this purpose. See, e.g., W. Leslie Peat & Stephanie J. Willbanks, Federal Estate and Gift Taxation: An Analysis and Critique 8 - 9 (1995) ("[W]hile students of constitutional history cannot agree on the scope of the phrase 'direct tax,' they all pretty much know one when they see it, and it would be hard to come up with a better example than a wealth tax. It would undoubtedly take a constitutional amendment to

the adjective "direct" reach the opposite conclusion, however.[15] A court might reasonably decide the issue either way, depending upon the theory of constitutional interpretation it embraced and its conception of the weight and point of relevant precedents.

Second, my analysis does not attend to a wealth tax's practical drawbacks. These include the expense and trouble to both taxpayers and the government of valuing assets when the tax is introduced and regularly thereafter,[16] the difficulty of extracting payment from taxpayers whose wealth is almost all

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make a wealth tax viable . . . ."); Joseph M. Dodge, The Logic of Tax 96 (1989) ("a periodic tax on the value of wealth would probably be unconstitutional"); George K. Yin, Accommodating the "Low-Income" in a Cash-Flow or Consumed Income Tax World, 2 Fla. Tax Rev. 445, 465 (1995) (finding a periodic wealth tax "of questionable constitutional validity in the absence of state apportionment"); Barry L. Isaacs, Do We Want a Wealth Tax in America?, 32 U. Miami L. Rev. 23, 30 (1977) (concluding that "the case law and the commentators are in general agreement that the constitutionality of a wealth tax would be doubtful"). Following a detailed examination of historical materials and Supreme Court decisions, Erik Jensen claims to show that most consumption taxes are "direct" taxes that are unconstitutional in the absence of apportionment. His reasoning applies equally to wealth taxes. See Erik M. Jensen, The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?, 97 Colum. L. Rev. 2334 (1997).

[15] See Calvin H. Johnson, The Constitutional Meaning of "Apportionment of Direct Taxes," 80 Tax Notes 590 (Aug. 3, 1998); Bruce Ackerman, Taxation and the Constitution, 99 Colum. L. Rev. 1, 51 - 58 (1999) (urging a narrow reading of the adjective "direct" because of this constitutional provision's inclusion as part of a compromise over slavery and because of what Ackerman considers the inappropriately restraining effect of a broad construction). See also George Cooper, Taking Wealth Taxation Seriously, 34 Rec. Ass'n B. City N.Y. 24, 43 - 46 (1979) (arguing that a wealth tax that applied only to gratuitously received wealth or that was limited to income produced by wealth would be constitutional, but expressing no view as to the constitutionality of a periodic tax on all net worth that exceeded or might exceed the income produced by a taxpayer's wealth).

[16] Some proponents of wealth taxation advocate radical changes to envelope all wealth in this newly spun web. For example, Mortimer Lipsky suggests that all paper currency be recalled and replaced by a new currency, with records kept of how much money each person received in the exchange to make evasion more difficult, that bearer and street-registered securities be outlawed, that citizens not be permitted to own precious metals, that all property be owned by or transferred to identifiable individuals, and that all purchases over $10,000 (in 1977) be reported to the government. Mortimer Lipsky, A Tax on Wealth 173 - 76 (1977).

in illiquid form and the cost to them and the economy if they do liquidate part of their holdings to pay the tax, the ease with which the tax might be evaded and the likelihood of highly imperfect compliance, the inclusion of purely inflationary price adjustments within the tax base if rates are progressive, and the need to exclude certain assets (such as much personal property) and most citizens from the tax's reach to make it workable and equitable in its application.[17] These impediments to implementation would lead unavoidably to the unequal treatment of similarly situated taxpayers in many circumstances. Some believe that these difficulties, together with the risk of throttling hard work and investment, anchor

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[17] Some also worry that a wealth tax that fell heavily on the richest citizens would seriously retard the development of culture or even imperil its preservation. In this view, civilization and artistic progress require the existence of a wealthy leisured class; equality produces barbarism or, at best, mediocrity. See, e.g., Bertrand de Jouvenal, The Ethics of Redistribution 42 (1952).

These worries will strike many as hyperbolic, but if they were warranted, the threat could be met in several ways. Cultural activities could be funded by the state with general tax revenue, or private expenditures for the benefit of cultural institutions might qualify for tax breaks or subsidies. Alternatively, taxes on gifts and bequests might be lowered if high wealth taxes were imposed, to leave people with more money to devote to collectively valued cultural pursuits. The danger that a new tax poses often can be averted by means other than the tax's repeal, and that certainly is true with respect to cultural consolidation or stimulus.

But one possible danger cannot be avoided without eviscerating a wealth tax. One might find a corrosive wealth tax worrisome because it would prevent the super-rich from living ostentatiously luxurious lives and serving as objects of envious curiosity to people who struggle with much less. For example, Thomas Nagel believes that even in a more egalitarian society than ours, "it would be desirable to permit . . . the enjoyment of life at its upper boundaries by a few" because "vicarious pleasure in contemplating the enjoyment by others of beautifully landscaped estates, grand houses, high fashion, exquisite furnishings, private art collections, and so on is an undeniable and widespread fact of life which has survived the disappearance of aristocratic societies" and which ought to be made available to the masses by allowing at least some people to live as lords. Thomas Nagel, Equality and Partiality 138 (1991). One who accepts Nagel's view could not support a wealth tax that cut deeply into wanton wealth accumulation, at least if it did not leave enough glitterati to sate our desire for icons, fantasy, and entertainment.

decisive objections to a wealth tax.[18] I am less pessimistic, partly because the experience of European countries with wealth taxes seem to show that they can be administered tolerably well and partly because it seems doubtful that low-level wealth taxes would have much effect on people's work ethic or frugality or alter significantly the mix of assets they hold. State and local real property taxes in the United States are not widely viewed as administratively troublesome or as powerful determinants of work effort or saving. I do not offer an opinion, however, on what the actual effects of introducing a wealth tax would be or on how much unfairness in practice would be acceptable. If one could show that a wealth tax in fact could not be administered without grave injustice, that it would discourage socially productive activity far more than other sources of funding, or that it would lead to rampant, publicly dispiriting attempts to avoid payment, then one could immediately dismiss the idea of introducing a wealth tax. But the inevitability of those evils has not been demonstrated, and they seem unlikely to prove debilitating if the tax burden were light. My argumentative strategy is therefore the reverse of those who reject a wealth tax as impracticable: I try to show that a wealth tax would be

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[18] For example, Joseph Dodge contends that an annual wealth tax would encounter "[f]undamental problems" in that it would be "difficult to administer in a satisfactory manner; moreover, it would be highly susceptible to evasion by concealment and fraud." Joseph M. Dodge, The Taxation of Wealth and Wealth Transfers: Where Do We Go After ERTA?, 34 Rutgers L. Rev. 738, 752 (1982). Dodge argues that once one admits that an administrable exemption level would leave untaxed too many citizens to make a wealth tax double for an income tax geared to a person's ability to pay the costs of government, and once one sees that it would, inefficiently, make certain types of investment less attractive and bump up against constitutional constraints, one sees that only a proxy wealth tax – a wealth tax imposed only when wealth is acquired or disposed of – warrants consideration. Id. at 753, 760 - 68. Others dismiss worries about how a wealth tax might be implemented as excessive or altogether misplaced. They note that much wealth held by the very rich is easily convertible into cash and that those concerned about liquidity apparently assume that it is unfair to make highly affluent people plan to have enough assets available to pay a tax they know will be levied. That assumption is hard to accept. See, e.g., Lester C. Thurow, Net Worth Taxes, 25 Nat'l Tax J. 417, 421 - 22 (1972).

morally unappealing, so that the question of how it might be collected most fairly and cheaply can be set aside.

Third, I abstract from the hard choices that would attend the introduction of a wealth tax into a tax regime that had none before. Certain questions of justice and efficiency are common to all tax transitions. One must ask, for example, whether the state may justly tax gains from decisions made in the reasonable expectation that no new tax would burden those who made them, whether exempting those gains would be feasible, what future costs resulting from investor timidity, insurance strategies, or political intervention would follow from denying relief to disappointed investors, and whether any tax exemption for old investments inevitably would introduce further, worse injustices.[19] Each tax, however, raises more particular concerns as well.[20] A new wealth tax forces one to ask whether wealth accumulated prior to its adoption should be taxed fully, partly, or not at all. That question is especially pressing if the earnings or gratuitous receipts that were saved were taxed more heavily when they accrued than similar earnings or gifts would be taxed after a wealth tax was introduced. One also

[19] For general discussion of the problematic nature and efficiency of transition relief, see Daniel N. Shaviro, When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity (2000); Saul Levmore, Changes, Anticipations, and Reparations, 99 Colum. L. Rev. 1657 (1999); Kyle D. Logue, Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment, 94 Mich. L. Rev. 1129 (1996); Saul Levmore, The Case for Retroactive Taxation, 22 J. Leg. Stud. 265 (1993); J. Mark Ramseyer & Minoru Nakazato, Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow, 75 Va. L. Rev. 1155 (1989); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509 (1986); Michael J. Graetz, Retroactivity Revisited, 98 Harv. L. Rev. 1820 (1985); Michael J. Graetz, Legal Transitions: The Case of Retroactivity in Income Tax Revision, 126 U. Pa. L. Rev. 47 (1977).

[20] For detailed discussion of the special issues involved in adopting a tax on consumed wealth with a deduction for saving, see Michael J. Graetz, Implementing a Progressive Consumption Tax, 92 Harv. L. Rev. 1575 (1979); Joseph Bankman & Barbara H. Fried, Winners and Losers in the Shift to a Consumption Tax, 86 Geo. L.J. 539 (1998).

might worry that a new wealth tax would prove a hardship to older people who saved for retirement not anticipating the tax – unless prices fell sufficiently to offset the new tax liability, which is unlikely – or whether there was some way to remove this fear without undue cost. Or one might be concerned that a new wealth tax would burden married couples excessively if rates were progressive and couples were taxed on their combined wealth rather than taxed individually.[21] I sidestep these issues by asking whether a wealth tax ought to have a place in an ongoing scheme of taxation if no injustice or undue cost marred its birth. If the answer is No, then we need not ponder how to lessen the severity of any congenital defects it might have.

Because I focus on the place of a wealth tax within a just, ongoing tax system, I also put aside arguments on behalf of a one-time or temporary wealth tax designed to bring about within a brief period of time a more just distribution of assets and opportunities than now exists. This omission is not significant, in my opinion, because a wealth tax generally cannot play a temporary, corrective role more justly than other taxes unless a wealth tax is justified as a permanent source of revenue.

Consider, for example, Bruce Ackerman and Anne Alstott's recent proposal for a wealth tax of indefinite though apparently finite duration. They suggest that the United States government immediately impose a 2% tax on every citizen's net worth to obtain the wherewithal to give each young

[21] Making the rate bands for married couples twice the width of those applicable to unmarried individuals would eliminate this discrimination but only by introducing an incentive to marry that arguably treats single people unfairly. The problems here parallel those that confront the income taxation of married couples. One cannot tax income (or wealth) progressively while holding to the principle that all couples with equal combined income (or wealth) should be taxed the same amount without creating an incentive or a disincentive to marry.

adult a cash grant of $80,000 to invest or spend as she deems wise.[22] After the tax has been in place

[22] Ackerman and Alstott's plan would exempt up to $80,000 of each person's holdings from tax, thus limiting its reach by their estimates to the richest 41% of the population (as of 1995), with 93% of the tax's total revenue coming from the wealthiest 20%. Ackerman & Alstott, note 2, at 95, 103.

Ackerman and Alstott's basic proposal is that the $80,000 grants be paid to high school graduates in four equal installments between their 21st and 24th birthdays. Id. at 39. Oddly, it appears that nobody actually would come within the terms of the basic proposal. Young adults who chose to attend college could withdraw up to $20,000 annually once they reached 18 years of age, using their stakes to finance their college educations. Id. at 51 - 52. Given a positive interest rate, they thus would receive stakes worth more than four annual $20,000 payments beginning at age 21. High school graduates who did not go on to college would have to wait until age 21 to collect their stakes, but because their college-bound peers claimed their stakes earlier, Ackerman and Alstott propose paying interest to those forced to wait, to equalize their position with that of college students. They therefore would receive payments totaling $84,900, beginning at age 21. Id. at 57. Students at two-year colleges would be able to withdraw $20,000 per year while in school and then have to settle for two $20,000 annual payments – plus interest – on their 23rd and 24th birthdays. Id. at 71 & n.25.

Young adults who failed to graduate from high school would not qualify for the basic proposal either. Ackerman and Alstott would not entrust them with large cash grants, but instead would give them $4000 each year throughout their lives – interest on their $80,000 stakes held by the government in something like a trust. High school drop-outs, however, would be allowed to invade the principal amount to buy a house, attend school, or pay extraordinary medical bills. Id. at 38. (These invasions presumably would lower the subsequent annual interest payments they would receive to 5% of any remaining principal.) Because Ackerman and Alstott appear to recommend that these $4000 annual payments to high school drop-outs begin at age 21, the present value of their receipts would be lower than the present value of the stakes offered to high school graduates. Either this disparity results from an oversight on their part, so that the annual payments received by high school drop-outs should be increased to $4,121.75, or 5% of $82,435. See id. at 57 n.26. Or Ackerman and Alstott wish to create an additional incentive to finish high school, one that surely would be ineffective because its value – an extra $121.75 per year – would be regarded by most wavering high school students as trivial.

Ackerman and Alstott further argue that the payment of stakes might be conditioned on refraining from criminal activity. Id. at 49 - 51. In their view, however, taking away a young adult's stake would be appropriate only if the offense were serious and an economic deterrent seemed likely to be effective at suppressing criminal conduct. Even then, wrongdoers should in their view be able to reclaim their stakes if they avoid criminal activity for a specified period.

for a long while, grant recipients will keep the plan afloat by paying back their grants with interest,[23] thus rendering the wealth tax no longer necessary, but Ackerman and Alstott would have us look to the wealthy initially for the money to fund the $80,000 stakes. Their plan has an undeniably urgent appeal, given the highly unequal distribution of wealth in America today and its disturbing effects on people's earnings, well-being, and self-confidence.[24] An average man who grew up in the richest 20% of

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[23] Grant recipients would be required to pledge to pay back any principal they received with interest when they die, to the extent that their assets are then sufficient to cover that obligation after they have exhausted their lifetime exemption of $50,000 for gifts to friends or relatives. Ackerman and Alstott speculate that an actuarially average grant taker of today would owe around $250,000 at death, before adjusting upward for inflation over the intervening years. Ackerman & Alstott, note 2, at 83, 90. Whether enough people would leave estates large enough to keep the lending machinery churning is impossible to say, though many forecasters would evince more pessimism than Ackerman and Alstott do. An additional tax might well be needed to plug a running revenue shortfall. Ackerman and Alstott do not say how they would stop people from giving away more than $50,000 over a lifetime before they have met their payback obligation. To be sure, noncompliance with the federal gift tax already is a problem, but the number of people subject to the payback obligation would be much greater than the number of people currently subject to the gift tax, and thus the problem would be multiplied manyfold.

[24] As Ackerman and Alstott recognize, their proposal has a great many intellectual antecedents. Some of the most prominent, such as François Huet and Hippolyte Colins, come from the European socialist tradition. One of their earliest American forebears was Thomas Paine, who recommended that the government pay a lump sum of fifteen pounds to every citizen who attained the age of twenty-one years, "as a compensation in part for the loss of his or her natural inheritance by the introduction of the system of landed property." See Thomas Paine, Agrarian Justice (1797), in Eric Foner, Collected Writings of Thomas Paine 396, 400 (1995) (1797). Paine also favored paying ten pounds per year to blind and lame persons who are "totally incapable of earning a livelihood," id. at 405, and to every person age fifty and over, so that no elderly person need live out his last days in poverty. Id. at 400. Although Paine claimed that "[i]t is not charity but a right – not bounty but justice, that I am pleading for," id. at 405, his proposal to aid the disabled and elderly at collective expense appears motivated by a desire to alleviate misery, see id. at 405 - 06, rather than by the idea that each person denied his equal share of the world's natural resources by people born before him is entitled to compensation for what they took. Paine proposed financing these payments by taxing inheritances, with heavier levies on property passing to collateral heirs than on property passing to direct heirs. Id. at 403 - 04. (Jeremy Bentham and John Stuart Mill also favored heavy taxes on inheritances by collateral heirs, though not to fund large lump-sum transfers to all young adults. See Jeremy Bentham, Supply Without Burthen or Escheat Vice Taxation, in 1 Jeremy Bentham's Economic Writings 283 (W. Stark ed., 1952) (1795);

households earns $10,000 more per year, they report, amounting to $600,000 over a normal lifetime of work (assuming the $10,000 difference is saved each year), than an average fellow from the lowest quintile.[25]

While this dramatic disparity is indeed bracing, the bare fact of inequality in abstraction from its origin does not imply that one person owes anything to another, except perhaps for a crude utilitarianism nobody accepts. Ackerman and Alstott's reason for charging large wealthhholders with the responsibility for inaugurating the payment of $80,000 stakes, rather than passing the bill to other payors, therefore has to go beyond patent need and easy pickings. After all, there are many other ways to collect the cash needed to put their plan in motion. For example, one could finance the $80,000 grants by borrowing the money and shifting the repayment obligation to the next, presumably richer, generation. Or why not lift income tax rates, so that the burden is borne by everyone who is lucky and talented enough to enjoy high wages or profits, not just by that subset of past and future high

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John Stuart Mill, Principles of Political Economy, bk. V, ch. II, § 3 (Donald Winch ed., Penguin Books 1988) (1848).

Philippe Van Parijs is the most sophisticated defender of an alternative plan to have the state pay citizens a basic income throughout their lifetimes, in preference to Ackerman and Alstott's suggestion that the government make substantial payments to people at the onset of adulthood but not afterwards. See Philippe Van Parijs, Real Freedom for All 45 - 48 (1995). Van Parijs notes the superiority of a lump-sum payment early in life, of the sort that Ackerman and Alstott prefer, for maximizing a person's lifetime freedom and for its greater fairness to those who die young. But he believes that a lump-sum payment to young adults is inferior to a basic income payable by the state throughout people's lives, because a lump-sum payment provides inadequate protection to people who make bad choices or have weak wills and who leave themselves in desperate circumstances late in life. Id. at 47 - 48. Ackerman and Alstott seem to share Van Parijs's worry with respect to high school drop-outs but not with respect to those who earn a high school diploma. Van Parijs does not endorse the repayment obligation and other funding mechanisms that Ackerman and Alstott recommend.

[25] Ackerman & Alstott, note 2, at 97.

earners who chose or choose to save rather than indulge their desire for immediate consumption? Or why not charge parents with the responsibility for giving their children a bankroll when they become adults, insofar as they can do so or can pay the government for lending them this sum, given that they, rather than affluent citizens generally, brought these people into existence and thereby made the payment of stakes necessary?

Ackerman and Alstott offer two "pragmatic" rationales for enacting a temporary wealth tax rather than an income tax or some other levy as a bridge to a better society, besides their dubious "principled" claim that savers ought to pay more than equal-earning spenders because of "the peace of mind and real power that accumulation alone can confer"[26] – a justification I discuss and reject below for fusing a wealth tax permanently to an income tax.[27] First, they say, the rich should be tapped because "the income and estate taxes today are riddled with loopholes that benefit the wealthy."[28] That may be true, but how that can justify a transient wealth tax is obscure. Ackerman and Alstott offer no evidence that unwarranted income and estate tax breaks (whatever they believe falls into that category) increase in some uniform way with a person's wealth, so that a deficit in income and wealth transfer tax revenues can be corrected by a surcharge on wealth. In addition, there seems no reason to favor an

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[26] Id. at 98. Ackerman and Alstott assert that, "[o]n the principled side, the opportunities that wealth confers are simply different from those that high income brings." Id. But they do not say what that difference consists in. If income is the source of wealth, then the opportunities it affords include those that wealth brings. That would seem to make it a better "principled" candidate for taxation, because there is no obvious reason to single out those who choose to save if one is aiming a tax at all the beneficiaries of unjustly unequal opportunities.

[27] See infra Subsection III.G.

[28] Ackerman & Alstott, note 2, at 98.

epicyclic solution to the problem they identify. If we want to remedy harm as justice demands, then the way to repair leaky income and estate taxes is to plug their holes, not seek inexact recompense from only a select band of profiteers. A wealth tax seems a desperately imprecise corrective. Ackerman and Alstott might think that a wealth tax could be enacted more easily than a revenue-constant corrective to imperfect income or estate taxes. If this is their belief, however, they offer no support for it, and with good reason: the rich would have to be wondrously dull to be outflanked by this maneuver. Finally, if improper income and wealth transfer tax preferences can best be negated by a wealth tax rather than by means of a more direct remedy, then a wealth tax of indefinite duration would be the solution, not a passing levy to launch an opportunity-equalizing initiative that bears no apparent relation to loophole exploitation by those forced to pay for it. Justice would demand that the preference be eliminated straightaway and for ever. The question would then arise whether a further wealth tax should be added, on top of the wealth tax enacted to offset existing unfair tax breaks for the rich, to help fund $80,000 stakes for young adults until the program becomes self-sufficient. An affirmative answer must be based on some characteristic of wealth held now and in the near future that permits its owners to be singled out for this burden, not on imperfections in current income and wealth transfer taxes.

Ackerman and Alstott's second "pragmatic" reason appeals to just such a characteristic. They maintain that Americans over the age of fifty or sixty, whom they expect to bear the brunt of the tax, ought to carry the first wave of young stakeholders on their backs because they "participated fully in the great post-war economic boom,"[29] flexing their economic muscle at "an especially lucky moment in the

[29] Id. at 98.

history of the Republic."[30] It was they who reaped not only the bounty of "an American in an American age" but the considerable benefits of their elders' sacrifices in fighting tyranny and establishing Medicare and Social Security.[31] What Ackerman and Alstott neglect to explain, however, is how B's debt to A can oblige B to benefit C when A never appointed C to collect in A's place. They neglect to explain, that is, how the debt that members of today's older generation owe to their parents – if there is a genuine debt, not just cause for gratitude for a gift made altruistically – can obligate them to sacrifice for a later generation. This is a common difficulty for theories that attempt to predicate duties to future generations upon our inheritance from the past.[32] Debts are owed to those who lend, and the plain fact is that posterity can never have given us anything. We might decide to ply our successors with gifts, hoping to transcend our mortality through posthumous appreciation. Or pure generosity might move us to help those who come after us. But it is elusive why Americans in late middle age or older who have amassed some possessions have a duty now to share what they put away for themselves or those they love, when the next generation or two also have benefitted or will have profited from the sacrifices of our forbears and probably will live materially more comfortable lives than the targeted group by dint of further economic growth, technological progress, and increased knowledge. Ackerman and Alstott's case for a temporary wealth tax hangs on a rhetorical appeal to intergenerational solidarity that cannot

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[30] Id. at 99.

[31] Id.

[32] Two prominent examples of theories of justice that encounter this problem are those of John Rawls and David Gauthier. See John Rawls, A Theory of Justice 284 - 93 (1971) (describing and defending a "just savings principle"); David Gauthier, Morals by Agreement 298 - 305 (1986). For criticism, see Eric Rakowski, Equal Justice 150 - 55 (1991) [hereinafter Equal Justice]; Brian Barry, Theories of Justice 189 - 203 (1989).

bear the weight of a moral imperative, however inspiring it might be to those predisposed to give voluntarily.

This conclusion holds as well if the case for a short-lived wealth tax rested not on the perceived good fortune of the old but instead turned (a claim that Ackerman and Alstott do not make) on the allegedly unjust conduct of aging wealthy people. Injustices ideally are corrected by forcing those responsible to compensate victims, including people who were not injured directly but whose position was made worse than it would have been in the absence of those misdeeds. Ideal solutions, however, are rarely available. In the case of large-scale injustices, attempts to trace wrongdoing and resulting disadvantages often are quixotic. Sometimes, even if malefactors can be found, recovery is impossible. Few politicians, even those who batten on bribes and graft, can restore the fortunes of millions ground down by unfair laws, inadequate social assistance, and excessive taxes. No doubt some injuries now remote in time, even some grievous wrongs, may be superseded by the later just treatment of the injured parties' successors in interest.[33] More commonly, however, claims to compensation for past wrongs retain vitality. Present penury or constraint originated in acts of recklessness or knowing injustices that cannot be undone precisely, that have lingering effects, and that frequently established institutions that favor their continuation. Rectifying those offenses typically entails substantial legal changes, and given the blunt instruments available to policymakers, those changes usually spawn new injustices. Nevertheless, lesser wrongs at times may justifiably be committed to effect a wider conciliation. The goal is to concentrate the cost of correction on those who gained most from past

[33] For one account of how this might occur that focuses on the seizure of indigenous peoples' lands by colonists, see Jeremy Waldron, Superseding Historical Injustice, 103 Ethics 4 (1992).

harms while minimizing incidental injuries.

Current wealthholders, or the richest members of that class, might well be among those who garnered unwarranted benefits in the recent past. Nevertheless, they seem poorly cast as the exclusive agents of redress for America's failure to make equality of opportunity a robust reality unless they alone can be compelled to pay compensation, only they benefitted unjustly, or all more just assignments of the burden of rectification carry larger costs that outweigh their apparent advantage as instruments of justice. None of these propositions seems true. Many combinations of government borrowing, state spending, and tax reforms are available to allocate liability for redress in a nation like the United States if redress is due. Moreover, it seems highly unlikely that the sole or chief beneficiaries of recent societal injustices are those who invested wisely or who earned well and saved up until the advent of the new wealth tax, rather than all those who prospered under an inequitable system. The possibility of funding Ackerman and Alstott's $80,000 stakes by taxing retroactively all who earned large amounts in prior years or of shifting the payment obligation to future high earners or consumers (who likely will be even better off as a group than today's wealthy) makes a temporary wealth tax a poor cure for some of today's inequalities unless the alleged injuries to young adults flowed and continue to flow from the unjustified absence of a wealth tax. Perhaps on close examination every alternative to a wealth tax would on balance prove less attractive, but it certainly seems that the wealthy properly are asked to fork over the funds for a limited period of time to make possible large-scale rectifying changes of the sort that Ackerman and Alstott advocate only if a wealth tax is independently attractive as a matter of justice and if its prior absence is at least partly responsible for the lowly position of those whom the government plans to help and for the fortunate position of the current and future wealthy. Even then, a

current wealth tax would not make up perfectly for the unjustified absence of a wealth tax in the past, because not everyone's wealth would have waxed or waned in unison in the meantime. Whether a wealth tax has a place in an overall just scheme of taxation is what this Article's subsequent analysis seeks to determine. The lesson of this preliminary foray into corrective justice is that, in a modern state with a sophisticated tax-collection and borrowing capacity, it is very unlikely that a wealth tax can be justified as an interim road to a more just order unless it also has a place, perhaps with lower or differently configured rates, in the city on the hill.

The fourth topic I exclude from my analysis is closely related to the third. I ignore proposals for a modest wealth tax that make no claim that wealth ideally is the right basis, or part of the right basis, for assessing people's just contributions to the cost of government or for calculating people's redistributive obligations, but that justify its adoption to some degree by reference to its expediency as a corrective. One might believe, for example, that because the distribution of wealth in the United States is appallingly unequal, we ought to embrace an unobtrusive wealth tax immediately to channel more resources to those who have least, regardless of whether a wealth tax is morally superior to a new or stiffened income, consumption, or wealth transfer tax. Even a slight annual tax on the net worth of the affluent to benefit those at the economic bottom would help close the chasm that unfairly divides them without, one may safely assume, frightening the rich into decamping for tax havens, idling their factories, or pouring their bank accounts into cruises and skyboxes.[34]

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[34] The impetus behind Edward Wolff's proposal to inaugurate a progressive wealth tax starting at a marginal rate of 0.05% on assets of $100,000 and rising to a marginal rate of 0.3% on assets of $1 million and above has this character. See Wolff, note 1, at 51 - 52, 55. Although the rates he suggests would be so low that the resulting revenue would be "too small to have much distributional impact," id.

Properly qualified, this argument has considerable force. If a wealth tax could be introduced when more just reforms could not and if the very wealthy were among the biggest undeserved beneficiaries of an unjust social order, then one might justifiably target their wealth for redistributive purposes so long as a more comprehensive levy on the unjustly privileged remained elusive and the overall economic costs of the wealth tax were relatively small. Nevertheless, I shall not discuss at length second-best justifications for taxing wealth rooted in the terrible predicament of the poor. These arguments may be persuasive in some instances, but their force inevitably is tied to political judgments that shift with time and locale, making any examination of a particular proposal somewhat parochial. That is not to say that examining the appeal of a wealth tax as a second-best measure in the United States or any other country is pointless. It might repay study, but it is not among my objects here. One reason for not carrying the project forward is that one of its chief empirical presuppositions is almost always false. A second-best measure is attractive only when a better solution escapes one's reach. To seek enactment of a wealth tax, however, when by hypothesis only the fatuous would attempt to win a similar-yield, similar-burden increase in a more just tax, generally would be Sisyphean. I therefore confine my argument to the place of a wealth tax in a more nearly ideal world than ours.

Fifth, I make no attempt to ascertain whether a wealth tax is part of the optimal tax and

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at 52, even a shallow skimming of wealthy people's holdings would raise $40 billion, according to Wolff's estimates, id. at 57, and help satisfy some of the poor's pressing needs without any serious deleterious effect on personal saving or overall economic growth. To be sure, Wolff reports two other rationales for taxing wealth – that wealthy people have more capacity to pay taxes just because they have the means to hand and that an annual wealth tax might encourage people to invest their money in assets yielding higher returns – but these added rationales do not seem the main engines behind his proposal. See id. at 52 - 53.

spending regime for the United States or any other nation today if the justice of a community's laws, practices, and institutions is properly judged by reference to the aggregation of all or some citizens' well-being, opportunities, or resources. I therefore offer no view on whether a utilitarian should favor a wealth tax or indeed whether anyone who regards the justice of a society as a function of the quantity and distribution of welfare within it ought to do so.[35] Perhaps a wealth tax that funded monetary transfers would be a more effective means for enhancing the well-being of whatever group is thought to matter crucially for a theory of social justice than every rival source of revenue, notwithstanding the economic distortions it would occasion by altering the trade-off between current and future consumption and between work and leisure in a world that lacked this tax and spending program. Other workable taxes would cause one or both of these distortions, too. Likewise, from a utilitarian point of view, it is possible (if unlikely) that there is no better way to collect the revenue for transfer payments or public projects that benefit the relevant class of utility generators – from lowering the threshold at which income, consumption, wealth transfer, or excise taxes apply to hiking their rates or tinkering with some other feature of one or more of these taxes, such as the rule that postpones the taxation of appreciation until a capital asset is sold. Perhaps a variety of taxes with low marginal rates, including a tax on net worth, can fund desired state projects with fewer distortions and less overall loss of utility than a smaller complement of taxes with stiffer rates, even when higher compliance and

[35] For a thorough description and discussion of different possible ways of measuring the badness of undeservedly unequal distributions of some good, see Larry Temkin, Inequality 19 - 52 (1993). Although Temkin's measures can be used to assess different distributions of opportunities, income, or the satisfaction of people's needs defined objectively, id. at 8 n.12, they apply most naturally to comparisons of people's welfare and are most likely to form part of a consequentialist theory of distributive justice that is concerned foremost with people's actual well-being.

administrative costs are reckoned in. I offer no opinion as to whether wealth taxes are part of the best mix of taxes and expenditures for a utilitarian or other type of consequentialist with respect to any particular country.

This exclusion might seem to limit significantly the value of this Article's analysis, because utilitarianism and more complicated consequentialist theories that take aggregative measures of human well-being as their desiderata are still very widely discussed. The omission is concededly a drawback. But its importance can easily be overstated. Utilitarian and welfare-consequentialist theories all attract far more talk than they do adherents.[36] In addition, deriving concrete implications for tax and expenditure policies from utilitarianism or a kindred form of consequentialism is notoriously difficult.

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[36] Many economists writing about tax policy refer, to be sure, to an almost always unspecified "social welfare function" which determines the optimal combination of taxes and expenditures. That phrase, however, typically denotes a highly abstract maximand that entails no commitment to the thesis that the justice of a particular distribution of resources depends solely upon the happiness or satisfied preferences of people affected by the distribution, without regard to their responsibility for their welfare. The best proof of this claim is that writers on optimal tax policy do not fill journal pages arguing about whether people's potential happiness or preference satisfaction should figure in the social welfare function even when that happiness or preference satisfaction does not flow from the morally permissible choices of themselves or others. They leave it to others to determine what makes a distribution better or worse and consider the comparative efficiency of different means for achieving it. This strategy certainly reduces controversy. Efficiency or the minimum frustration of people's desires is an unquestioned good for welfare consequentialist theories of distributive justice as well as for those that give desert and blame greater due, except insofar as some people's gains must be given precedence over others'. Thus, economists writing in this vein should not be considered closet utilitarians or adherents to the view that society's well-being is an additive function of the happiness or preference satisfaction of its members. The "welfare" in "social welfare function" refers to a theory for ranking states of affairs that economists do not supply and that need not be a function of individuals' subjective satisfactions or sense of well-being at all. For an account of tax economists' methodology, see, e.g., Herbert Kiesling, Taxation and Public Goods: A Welfare-Economic Critique of Tax Policy Analysis 4 - 28 (1992). As for academic moral philosophers, it is no secret that utilitarianism and similar welfarist accounts of justice command the allegiance of a small minority, though no sensible moral theorist denies that individual welfare is a good and that its advancement is an important objective.

The derivation is indeed so challenging that no contemporary utilitarian has produced anything close to a detailed account of which taxes and government programs would realize that ideal.[37] Given the number

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[37] Richard Hare contends that a utilitarian state would strive for a "moderately egalitarian" distribution of wealth and income. R.M. Hare, Moral Thinking: Its Levels, Method, and Point 164 (1981). He believes that the declining marginal utility "of money and of most goods," together with people's propensity to envy those who are better off than they are – an unpleasant feeling best eliminated by removing its cause – argue for substantial material equality. But, he adds, "[t]here are perhaps good arguments for some inequalities (e.g., the need for differentials to provide incentives, which are inseparable from a certain amount of envy; the need for a spread of capital accumulation to all those willing to save, and of patronage of the arts and education, both of them in order to avoid too much concentration of the power of investment and patronage in the hands of officials, as tends to happen in too radically 'egalitarian' societies)." Id. at 166. Hare offers no more precise advice, either about the goal to be sought or the tax and spending policies that might best achieve it. He notes, furthermore, that even his general prescriptions are based on empirical conjectures about what people are like and what they would prefer that might well be false. Id. at 166 - 67.

Richard Brandt argues that after-tax incomes would be equalized in a utilitarian state, except for supplements to meet the needs of the ill and handicapped, higher incomes to the extent necessary to provide incentives to take difficult or demanding jobs and to allocate social resources effectively, and minor modifications to achieve socially desirable ends such as population control. Richard B. Brandt, A Theory of the Good and the Right 310 (1979). Brandt assumes that the main mechanism for realizing these aims should be an income tax on moderate or high earners coupled with cash benefits for those who earn little. Id at 320, 323 - 24. He never considers using other possible taxes or benefit mechanisms to redistribute goods or opportunities.

Neither of the two great nineteenth century utilitarians – Jeremy Bentham and John Stuart Mill – advocated a tax on people's net worth. Indeed, Mill expressly rejected the notion that a progressive property tax should be used to mitigate inequalities of wealth, because such a tax would "relieve the prodigal at the expense of the prudent." Mill, note 24, bk. V, ch. II, § 3. "A just and wise legislation would abstain from holding out motives for dissipating rather than saving the earnings of honest exertion," he said. Id. Mill went on to argue that an <u>income</u> tax ought to exempt the return to saving, to avoid the double taxation of earnings: "if he has the interest, it is because he abstains from using the principal," and taxing that interest would create a "disadvantage to prudence and economy, . . . not only impolitic but unjust." Id. at § 4. Mill therefore appears to have ruled out a tax on wealth at least insofar as it originates in saved earnings that already have been taxed, with at least two thinly defended exceptions: Mill favored taxing increases in landlords' rents that are traceable to rises in property values for which landlords are not responsible, id. at § 5, and in some minor writings he argued for an ad valorem tax on housing beyond some minimum amount because past that point lodging is a luxury.

of policy variables and weak empirical evidence of the likely impact of different taxes or spending programs on people's behavior and well-being, arguing that a wealth tax would not be part of the optimal tax scheme under a range of consequentialist theories therefore would be like fencing with the fog. Because I believe it is a profound error to tie the justice of a state of affairs wholly or mainly to people's welfare,[38] rather than to their non-welfare-based entitlements to resources, opportunities, or capabilities in consequence of their choices and of their natural and social fortune,[39] I leave to others the task of teasing out the implications of utilitarianism or other consequentialist theories for wealth

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Takuo Dome, Bentham and J.S. Mill on Tax Reform, 11 Utilitas 320, 333 (1999). Mill favored taxing gratuitous wealth transfers – gifts and bequests – above a certain amount, because they are largely unearned by recipients, but he did not call for taxing wealth held prior to transfer. Principles of Political Economy, note 24, at § 3 and bk. II, ch. II, § 4. It may be that Mill misjudged the implications of his utilitarian premises. Certainly, his stated views on some matters of taxation are inconsistent and poorly reasoned. See, e.g., Barbara H. Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement 300 n.261 (1998) [hereinafter Progressive Assault]. But no scholar, so far as I am aware, has yet tried to show that Mill betrayed his principles by not embracing a periodic tax on all wealth.

[38] See Rakowski, Equal Justice, note 32, at 23 - 64; for further, sometimes overlapping arguments against welfare-based accounts of distributive justice, see Ronald Dworkin, What Is Equality? Part 1: Equality of Welfare, 10 Phil. & Pub. Aff. 185 (1981) [hereinafter Equality Part 1].

[39] Theories of justice couched in terms of people's capabilities often include an objective ranking of activities or of forms of satisfaction that most people are assumed to want, which at least some opportunity-based or resource-based theories do not. Neither set of theories gives welfare itself a leading role in determining the desirability of a particular distribution of goods or opportunities. For discussion of the pros and cons of capability-based accounts, pioneered by Amartya Sen, see, e.g., Amartya Sen, Capability and Well-Being, in The Quality of Life 30 (Martha Nussbaum & Amartya Sen eds., 1993); Amartya Sen, Equality of What?, in 1 The Tanner Lectures on Human Values (Sterling M. McMurrin ed., 1980); John E. Roemer, Equality of Talent, 1 Econ. & Phil. 151 (1985); Norman Daniels, Equality of What: Welfare, Resources, or Capabilities?, 50 Phil. & Phenomenological Res. 273 (Supp. 1990); G.A. Cohen, Equality of What?: On Welfare, Goods, and Capabilities, in The Quality of Life, supra, at 9.

taxation.[40]

For a similar reason, I shall not try to determine whether John Rawls's highly abstract "difference principle" or maximin standard of distributive justice entails a wealth tax under contemporary conditions.[41] As constrained by Rawls's prior commitment to maximize the basic liberty

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[40] Counting in favor of a progressive wealth tax for many utilitarians or welfare consequentialists, one would think, is its disproportionate payment by the rich, who many assume derive less utility or satisfaction from marginal additions to their wealth than do poorer people. Of course, a progressive wealth tax would advance utilitarian ends only if a more complicated calculation produces that answer. The proceeds of the tax would have to benefit people who were less wealthy than the payors, and the net gain to them would have to take into account the fact that taking possessions away from somebody usually causes more dissatisfaction than giving those possessions to the same person produces satisfaction, other things equal. Recipients' net benefit, once the diminution in payors' welfare was subtracted, would have to exceed any negative impact on recipients' and payors' welfare as a consequence of the tax's inhibiting effects on work effort or productive investment by both recipients and payors. Finally, that resulting aggregate change in welfare, if it were positive, would have to outweigh the welfare cost of complying with and administering the tax and operating the transfer machinery. Complicating this calculation is the difficulty of obtaining good evidence of people's welfare levels and the necessity of offering reasonable assumptions about other taxes, government programs, economic and social institutions, and other variables that would serve as baselines for assessing the changes that a wealth tax would work.

Some also might believe that savers generally derive less zest from material goods than those who spend more liberally. That would count in favor of taxing them to give to people with a greater propensity to spend. This empirical supposition is highly speculative, but it would, if true, make a progressive levy on wealth, that is, on saved income, easier to justify on utilitarian grounds than a tax on all income or on consumption as a source of transfer payments to the poor. Nevertheless, it would be very hard to aim the tax away from people who save specifically for future consumption and to target only those who save less purposefully and an indiscriminate wealth tax on all savings would be much less effective from the standpoint of somebody who believes this empirical assumption to be true. Moreover, it would be no small matter to show that any fully implemented wealth tax would carry a lower utility cost than an equal-yield combination of income, estate, or accessions taxes (or marginal additions to one or more of them), given a complete range of other social programs, taxes, economic conditions, and induced responses by taxpayers and beneficiaries. (Admittedly, it might be equally hard to show that the utility costs of one or another of these alternative taxes would be smaller than a wealth tax if an alternative were included in the baseline.)

[41] Rawls, note 32, at 60 - 83.

that all citizens may enjoy equally and to fair equality of opportunity, the difference principle has no obvious implications for the justice of wealth taxation.[42] It is impossible to say with a scintilla of confidence whether a wealth tax, tagged onto a gaggle of other taxes, market regulations, and government spending programs, would advance the position of a representative member of the least advantaged class more than some other, slightly different constellation of taxes, rules, and government undertakings, given people as they are now or as they will be in the near future once a just regime is in place.

Of course, if one were convinced of the truth of utilitarianism or some other theory that bid policymakers attain some overall distribution of social welfare measured in terms of personal satisfaction or preference fulfillment, one would have no choice but to perform this collective calculus as best one could. Likewise, if one thought that Rawls's theory was the correct account of distributive justice, one would have to make one's best guess as to which taxes and state programs would together be best for a representative member of the worst-off class without sacrificing the principles of equal basic liberty and equality of opportunity. I hold neither of these views, however, and take up neither of these challenges.

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[42] Rawls himself says that a tax on wealth transfers – probably an inheritance or accessions tax rather than an estate tax – and a proportional or progressive consumption tax likely would come closest, in tandem, to satisfying the difference principle, consistent with meeting the sometimes conflicting and prior demands of a principle of equal basic liberty, including the right to democratic political participation, and of honoring the ideal of fair equality of opportunity. Id. at 277 - 80. Rawls emphasizes, however, that exactly what form taxes should assume, and how steeply marginal rates should rise with receipts or expenditures, are "a matter of political judgment guided by theory, good sense, and plain hunch, at least within a wide range." Id. at 278. "On this sort of question," Rawls avers, "the theory of justice has nothing specific to say." Id.

Instead, in this Article I consider the compatibility of a wealth tax with theories for allocating social burdens and benefits that hold people responsible for the effects of their choices, preferences, and allegiances on their opportunities and on the material goods they come to own. By setting utilitarian and other choice-independent theories of justice aside, I effectively deny that a wealth tax is a proper vehicle for accomplishing any redistribution that justice requires on account of people's unequal capacities, property, or well-being, except insofar as the unequal possession of wealth itself, originating in people's choices to labor and save at different times and in different ways, itself grounds a valid claim to redistribution. Justice may or may not demand that people who are significantly more fortunate than their fellows – because of their coveted genes, their physical allure, their natural abilities, the nurture and education they received, the opportunities that came their way, or the happy consonance of their own tastes and others' preferences – share with those whom nature, their parents, or the confluence of social forces has slighted. Liberal egalitarians like myself believe that justice asks a good deal of beneficiaries of certain types of luck; people with more libertarian leanings see their duties to the less fortunate as more limited. For the purpose of appraising wealth taxes, however, one need not settle the question of which of these views about distributive justice is correct. If justice prescribes compensation for specific imbalances in people's fortunes, then those inequalities themselves should serve as triggers for redistributive taxation, unless some principle or practical impediment blocks reliance on them.

For example, some people's greater natural talent may constitute an advantage that obligates them to alleviate the psychic or material deficit that the less talented possess directly or that accrues to them indirectly as a result of their more limited capacity to please, create, or accomplish. If justice does have this implication, then the talented ought ideally to be taxed straightaway, with taxes limited only by

our commitment to not forcing people to labor at their most productive pursuits if they prefer other work, by privacy and administrative concerns, by the value of the assets they hold or will in time acquire, and perhaps by some proportionality principle linking one person's gain to another's loss, so that transfers that hurt the transferor much more than they help the transferee would not be morally demanded even if the transferee were badly off. To be sure, a tax on the value of talents, so constrained, probably would not be workable. But it is hard to imagine a tax on wealth as a good substitute by contrast, say, with a tax on earnings or spending. Likewise, if the receipt of exceptionally large gifts, bequests, or inheritances by virtue of birth into a rich family impairs equality of opportunity, then that evil seems best tackled by taxing wealth transfers, not by a tax on every person's net worth, unless the latter is a good proxy for the former.[43] At any rate, my assumption throughout the Article is that the best means for meeting any imperative to compensate people for their unchosen disadvantages are income, consumption, or wealth transfer taxes, alone or as allies.[44] For purposes of this Article, I assume that a tax on wealth itself can be justified only if unequal wealth remains offensive to justice after other grounds for redistribution have been addressed; or if a wealth tax would on balance prove a more efficient or fairer alternative to a different tax that justice prima facie requires; or if wealth is at least one of the proper bases for apportioning the costs of government independent of some people's moral claims to the assistance of others.

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[43] I consider below, in Subsection III.E, whether a wealth tax can take the place of, and perhaps improve upon, a wealth transfer tax designed to make people's opportunities more equal.

[44] I do not mean to suggest that these taxes are not in need of a justification that wealth taxes are. They do require justification, of the same sort. But no article can take on every tax policy question.

Because in this Article I do not argue that an income tax is superior to a consumption tax, or vice versa, for redistributive purposes or to finance government services – I leave that question open and assess the propriety of a wealth tax assuming first that consumption is the right base and then that income is the right base – I shall have nothing to say about the desirability of enacting a wealth tax to take the place of a tax on capital income if one assumes that an income tax is justified for some purpose. Scholars often have noted that an income tax can be decomposed into a tax on wage income and a tax on capital income, and that under certain assumptions a tax on capital income is equivalent to a tax on the value of that capital itself.[45] A wealth tax therefore might appeal to proponents of an income tax if it were an efficient replacement for a tax on capital income or if it were designed to achieve more nearly ideal taxation of income than a tax on capital income itself, given the perceived need to await the realization of gains before taxing the return to many capital assets.[46] Naturally, some defenders of an income tax might reject the substitution of a wealth tax for a tax on capital income when

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[45] As Richard Wagner notes:

> In principle, of course, a wealth tax is indistinguishable from an income tax, for any income flow can be assigned an equivalent capital value. If an asset yields an annual income of $10,000, and if the rate of return on capital (the interest rate) is 10 percent, the capital value of the asset will be $100,000. An annual tax of 10 percent on the income is then identical to an annual tax of 1 percent on the capital value. Since a capital value is simply a present discounted value of a future income stream, income taxation at t percent would be equivalent to capital taxation at tr percent, where r is the rate of interest.

Wagner, note 9, at 4. See also Louis Kaplow, Taxation and Risk Taking: A General Equilibrium Perspective, 47 Nat'l Tax J. 789, 792 - 93 (1994) (noting that a proportional income tax is equivalent to a wage tax (which itself is equivalent to a consumption tax) plus an ex ante wealth tax).

[46] See, e.g., Deborah H. Schenk, A Realization-Based Income Tax and the Taxation of Capital, 53 Tax L. Rev. ___ (2000); Alan J. Auerbach, Retrospective Capital Gains Taxation, 81 Am. Econ. Rev. 167 (1991).

it is realized. The burden of the two taxes will diverge if the actual return earned by capital assets is greater than the assumed return implicit in the choice of the wealth tax rate and no correction is made upon the sale or exchange of those assets; people who invested wisely and who consumed their unusually high profits each year, so that their returns were not included in their wealth at whatever time wealth were measured, would be better off under a wealth tax than under a capital income tax. Likewise, the burdens of the two taxes will prove unequal if a person's wealth earns a lower return than the wealth tax rate assumes – perhaps her assets decline in value or she keeps her wealth in cash or her land unrented – and if a supporter of an income tax considers it inappropriate to impute a return to uninvested or low-yielding assets equal to the difference between the assumed return that underlies the wealth tax and an asset's actual return. In that case, a wealth tax would cut away at an owner's capital, though no capital income tax would be payable. If one believes an income tax to be justified and considers these divergences less than damning, however, one might propose a wealth tax as a partial proxy for an income tax if the additional administrative and compliance costs did not outweigh the perceived advantages of taxing wealth rather than realized income. This Article does not assess arguments of this kind, but instead asks whether a wealth tax can be justified on top of a consumption tax, taking for granted the best justification for preferring a consumption tax, or whether it can be justified in addition to a tax on both wage and capital income, in this case taking for granted the best justification for preferring income as a tax base.

The preceding exclusions still leave a wide scope for defending a wealth tax and the state spending it makes possible. After reviewing the ways in which taxes might be justified, I turn in the next Section to a diverse array of possible justifications for a wealth tax, ranging from its utility in curbing

threats to collectively beneficial institutions to its propriety as a gauge for allocating certain governmental costs to its suitability as a basis for redistribution in lieu of or in collaboration with wealth transfer taxes, a consumption tax, or an income tax, depending on which of those taxes best advances justice in the absence of a wealth tax.

III. Potential Justifications for Wealth Taxes

Governments typically collect revenue from a variety of sources and spend the proceeds on an even broader array of projects, usually without linking a fee or tax to a specific expenditure. Money flows in, extracted from citizens or business entities according to vague principles of contribution few (if any) politicians could explain or justify with even a modicum of persuasiveness. The money then goes to pay for whatever ends legislators or administrators deem paramount, in accordance with some nebulous notion of the public good or a hazy understanding of an agency or government's charge that almost always goes undefended by contrast with potentially rival public purposes. Experience teaches us to expect nothing more from government policymakers. To assess the justice of the state's collecting and spending, however, one needs to draw distinctions and trace connections that politicians' speeches routinely blur or ignore.[47]

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[47] To be sure, some theories of distributive justice judge the overall justice of taxes and outlays by their collective success in advancing a single goal. This is true of utilitarianism, which bids officials maximize the relevant population's overall well-being. It also is true of John Rawls's theory, which calls for whatever social and economic arrangements give a representative member of the worst-off class the largest possible stock of what Rawls terms primary goods (rights, liberties, powers, opportunities, income, wealth, intelligence, health, the bases of self-respect). See Rawls, note 32, at 62. Tying a tax to a particular expenditure before assessing its justice is for these views unnecessary. However, if one abstracts from these theories because of the inexact guidance they supply or because of their weakness

Taxes may serve at least four distinct goals. In a liberal state, the first two are capable of vindicating much less taxation than the second pair.

First, governments sometimes attach monetary penalties to activities they seek to discourage. Frequently, though certainly not always, their announced aim is to benefit the actor by deterring but not absolutely preventing him from behaving in some way or by reducing his consumption of some allegedly harmful product. Excise taxes on cigarettes, alcoholic beverages, or luxury items have been defended in this manner. In actuality, this paternalistic defense often is pretextual, a cover for preserving a reliable revenue source that achieves little useful deterrence. Prohibition or rationing might provide better safeguards, but in many cases these alternatives receive no serious consideration because they would be less lucrative for the state and anger voters even more than taxes. Ostensibly deterrent taxes also may be unfair in application, if they manage only to further impoverish the poorer members of the class at which they are vainly directed. Finally, most liberals look askance at fines that are fashioned to curtail showy consumption or that limit individual liberty according to some politician's mock-parental judgment about what is good for people.[48] But deterrent taxes might have non-paternalistic goals as well, which worry liberals less. A deterrence justification for levying taxes appears to underlie two rationales for a wealth tax that I discuss below: reducing the threat posed by the very rich to political democracy or free markets, and inducing them to invest their fortunes in ways that produce positive

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as accounts of justice, one faces the task of justifying a variety of compulsory contributions for particular purposes. Who may justly be taxed, and how much they may be taxed, generally depends on what the government does with the money it collects.

[48] For further discussion of misplaced paternalism in liberal tax theory, see Eric Rakowski, Transferring Wealth Liberally, 51 Tax L. Rev. 419, 432 - 36 (1996) [hereinafter Transferring Wealth]..

spillovers, in each case not for their benefit but for society's.[49] Unlike the three succeeding rationales for taxation, the ultimate use to which a penalty tax's yield is put is not important in judging its propriety, though there might be independent grounds for criticizing certain uses – for example, if the revenue is used wastefully or lines tax collectors' pockets.

The second way in which a tax might be justified is by showing that it forces an individual or a business enterprise to pay for costs that its activities impose on others but with respect to which those who are injured cannot feasibly sue for damages because of the expense or trouble of organizing and bringing suit. Taxes on noxious emissions from chemical plants are an example. Whether a tax of this sort is just depends on whether those who are adversely affected by some activity have a moral right to compensation for harm that they suffer but no right to enjoin the activity altogether. In most though perhaps not all cases, justice demands that those who are wronged receive the tax proceeds to make them whole. No wealth tax slips smoothly into this second category. One might claim that wealthy individuals commonly generate negative externalities by using their economic clout to manipulate markets or unfairly skew political outcomes and that a tax on wealth would return these costs to their creators. But that unconventional labeling seems badly forced. Wealth taxes motivated by a desire to restrain socially harmful conduct are not calibrated to equal the supposed damage but rather to halt the harm. This restraining justification for wealth taxation therefore belongs under the first heading – deterrence.

Third, governments may tax beneficiaries of public projects to cover their costs. Those

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[49] See Subsections III.A and III.B.

projects range from policing the streets to schooling children, from putting judges in courtrooms to aiding foreign countries. Expenditures may be made directly by the state or tucked away in a tax code as exceptional deductions, exemptions, or credits. What relationship justice counts as acceptable or ideal between a person or entity's receipt of government benefits and its tax burden is a difficult issue about which little has been written recently, even though this third pairing of taxes and public programs dominates its neighbors.[50] To what extent a tax on wealth might be warranted in virtue of benefits the government provides to wealthholders is a question I discuss below.[51]

Fourth, some citizens may be taxed so that the state can help others who are in need or who are owed compensation for disadvantages they suffered through no fault of their own. Disputes over distributive justice center on the ground and scope of this obligation to aid or compensate. Even if the obligation to assist inheres in individuals, few question the propriety of government efforts to compel people to do their share by organizing the collection and distribution of money that morality or justice requires be transferred. That wealthholders have a duty to help others simply in virtue of the greater means at their disposal is an assertion I take up below in assessing the justice of burdening wealth in

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[50] It is not clear whether payroll taxes that do not redistribute income or wealth but that are wholly tantamount to forced saving for health insurance or the anticipated needs of old age should be grouped under this third heading. Perhaps they are best thought of not as taxes but as possibly justifiable paternalistic restraints on individual liberty, like rules requiring automobile makers to install safety devices for which consumers must pay. In their actual functioning, of course, United States payroll taxes have all had a redistributive component, both intergenerational (from later taxpayers to early beneficiaries) and intragenerational (under Social Security from single individuals and dual-earner married couples to single-earner married couples and from shorter-lived to longer-lived recipients), and so at least straddle the fourth category of taxes and related expenditures that are aimed at reallocating resources and opportunities.

[51] See Subsection III.C.

addition to a taxpayer's consumption or income.[52] First, however, I review the claim that at least some wealthy people are obligated to pay taxes as a form of rent for their use of natural resources that by right belong to all people equally in common.[53] I then ask whether duties to share gifts and bequests with those who are less well off are better embodied in taxes on wealth itself than in estate, inheritance, or other wealth transfer taxes.[54]

This Section therefore evaluates arguments that have been or might be advanced on behalf of a wealth tax and some associated use of the funds it brings in. This inquiry might be summarized as follows. I focus initially on justifications of the first sort: assertions that a wealth tax may advance important public objectives by dampening undesirable activity, such as political corruption, market distortion, or the unproductive use of assets. When probed, these defenses are almost risible. I then turn to justifications of wealth taxation that link taxes to government-provided benefits received by wealthholders. One type of justification tries to show that the value of some publicly supplied services varies in a positive way with wealth ownership. A second type regards wealth taxes as rents for the use of what is properly understood to be a collective asset. These purported justifications are more plausible, but neither can sustain a wealth tax as usually conceived. Finally, I ask whether wealth taxes might be justified as useful additions to or substitutes for other taxes that seek to redistribute resources or that serve to fund public enterprises. I look first at their possible role in replacing or rounding out wealth transfer taxes. Here, they hold some appeal if wealth taxes are viewed as narrowly

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[52] See Subsections III.F. and III.G.

[53] See Subsection III.D.

[54] See Subsection III.E.

circumscribed companions to an accessions tax. I then consider arguments that they are needed to fully achieve the purposes of consumption taxes and income taxes – purposes that these taxes supposedly cannot achieve on their own. In both of these cases, I conclude, the adoption of supplementary wealth taxes would be a blemish, not a blessing.

A. Protecting Representative Democracy and Efficient Markets

Many writers maintain that a salient supporting rationale for a wealth tax is that two important public institutions – democratic politics and a market economy – are imperiled by large personal fortunes.[55] The very rich, it is feared, will exert disproportionate and baneful sway over legislation, executive decision making, or other government actions unless their fortunes are forcibly diminished. They will do so in at least two ways: by projecting their views in public forums at substantial personal expense and with great volume or panache, thereby garnering popular support for their favored

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[55] Barry L. Isaacs, Do We Want A Wealth Tax in America?, 32 U. Miami L. Rev. 23, 33, 37 (1977) (noting arguments that economic power can threaten democracy but also that wealth concentrations might be controlled rather than broken up by taxes); Cooper, note 15, at 31 (viewing a wealth tax as superior to estate and gift taxes at splintering large private accumulations of wealth and calibrating taxes to people's ability to pay them); Joseph M. Dodge, note 18, at 741, 755 (arguing that a wealth tax might be part of a system for funding government activities according to taxpayers' ability to pay taxes and asserting that a wealth tax might be helpful in dissolving potentially insidious concentrations of economic and political power); Richard Goode, The Superiority of the Income Tax, in What Should Be Taxed: Income or Expenditure? 49, 56 (Joseph A. Pechman ed. 1980) ("In the United States, the power of the rich to make investment decisions affecting the location of industry and employment, their political power, and their influence on nongovernmental educational and cultural institutions seem to me to present far more sensitive issues than their conspicuous consumption does. Power is reflected in wealth as well as in income and consumption. A case exists for an independent tax on wealth as a supplement to an income tax and a strong case for combining it with an expenditure tax.").

initiatives when their poorer opponents cannot; or by securing the partiality of officials, whether by helping them win power, by giving them privileged access to social opportunities, or by offering employment to them or their friends. Likewise, the very rich, if permitted to enjoy their glittering fortunes in full, may use their financial clout to manipulate markets and reap supercompetitive returns at the expense of less muscular market actors, injuring some consumers and producers through the resulting price distortions and inefficiencies in resource allocation. How would a wealth tax tame these threats? Its partisans claim that it would siphon off the fuel for these publicly hurtful ventures, dramatically lessening the communicative edge of the wealthy and their ability to buy votes, influence, or excessive market power.

If it were persuasive, this argument for a periodic levy on the wealthy to safeguard political and economic institutions could justify only a wealth tax with a tiny range. In 1992, a family needed $2.42 million to break into the top 1% of wealthholders in the United States.[56] One would, however, need much more than a few million dollars to pose a genuine threat to the representativeness of democratic political outcomes or to the functioning of America's economic institutions. A wealth tax aimed at curbing these dangers would therefore have to apply only to a small fraction of the population – considerably less than one percent – unless one were satisfied with a tax that was hugely overbroad relative to its justification. Even limited to a sliver of the top hundredth, the tax inevitably would take from many wealthy persons who had no designs on politics or markets but who quietly enjoyed their private holdings. In practice, therefore, a wealth tax would seize property from many more taxpayers

[56] Wolff, note 1, at 63.

than this democracy- and markets-protecting purpose could justify. And insofar as the most serious threat to democratic politics and free markets comes from business entities rather than from rich individuals, it would do almost nothing to keep the lions from the lambs.

Another drawback to a net worth tax enacted for this purpose is that it would fail to achieve its goal unless the tax was levied at rates so high as to be confiscatory over the span of a few years. A wealth tax of just a few percent annually on the grandest fortunes would not stop people of immense means from using their money to shape public debates, influence political choices indirectly, or massage markets if they were so inclined. The advent of a stiff tax, however, likely would galvanize the most fearsome elements of the economic elite to attempt to do precisely what a wealth tax of this kind was engineered to prevent – the buying of politicians' votes or the unequal influencing of other citizens' opinions. Imposed at dauntingly high rates, a wealth tax also would offer a powerful incentive to avoid payment through deception or emigration. If the disproportionate political influence of the well-to-do is indeed a problem in the United States – and many would question this claim as it relates to the publicly persuasive communication of ideas by the rich, which they view as a rightful use of their money and mouths – then the most sensible remedy would be to limit that influence directly. One could do so by regulating campaign spending,[57] the organization of interest groups, lobbying, or gifts to government officials, or by subsidizing candidates or campaigns with less cash, instead of attacking the problem

[57] In the Supreme Court's view, the First Amendment prevents the federal government from limiting certain types of political expenditures, such as a candidate's use of her own fortune to voice her political messages. Buckley v. Valeo, 424 U.S.1 (1976). Although expropriating all large fortunes could achieve the same end without offending this constitutional stricture, it would be an inordinately sweeping remedy – rather like cutting off scores of workers' hands because one of them steals.

indirectly, in a way that unavoidably would injure harmless bystanders and cause economic dislocation through flight, deceit, or idleness in direct proportion to the tax's effectiveness.

Likewise, anticompetitive business practices can be proscribed or cabined – as in fact they would have to be to halt them, given that the gravest threats are posed by business enterprises rather than by rich individuals. Taking away a large fraction of the wealth of those who were fortunate, skillful, or prudent enough to acquire and save that money would do little to make markets breathe easier, except, I suppose, if their holdings were concentrated in monopolistic or oligopolistic businesses and lowering their stakes managed to weaken the businesses instead of making room for other investors with the same noisome intentions. And that gain, if real, might come at the expense of saving and investment by the very wealthy that fosters economic growth – unless, contrary to our experience, the government were to use the tax revenue as productively as they would have used it. Thus, a draconian tax on assets held by the richest individuals probably would do little to improve politics or markets, and any improvements likely would come at prohibitive cost.

B. A Goad to Productive Use

A number of writers contend that a wealth tax would encourage people to invest their assets more productively than they now do, to offset the tax's eroding effect. Edward Wolff, for example, thinks that "a wealth tax based on the market value of property might induce neglectful owners to seek to realize potential returns through development, renovation, or sale."[58] Similarly, he says, "a wealth tax

[58] Wolff, note 1, at 53.

might induce individuals to seek more income-generating assets in place of conspicuous consumer durables such as luxury cars and yachts."[59] These changes are desirable, apparently, because they are thought – though proponents of this argument rarely spell out their reasoning completely – to yield benefits to people other than the wealthholder that outweigh any detriment the wealthholder would suffer (unless he was acting irrationally before) from shifting his assets to uses he values less than the uses to which he put those assets before a wealth tax was introduced.

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[59] Id. Wolff refers to luxury cars and yachts, apparently for the rhetorical purpose of persuading his readers that uses they especially resent will be replaced by uses they are more inclined to approve. But whether a wealthholder's assets are displayed conspicuously is irrelevant to Wolff's argument. He does not urge the adoption of spending restrictions designed to reduce or end ostentatious expenditures, nor does he argue for excise taxes solely on eye-catching luxuries. Wolff's argument against unproductive holdings applies equally to wealthy people who keep precious artwork at home for their enjoyment, who leave their forests uncut and streams undammed, or who store cash in their office safes. People who quietly preserve rather than flaunt their justly acquired wealth, however, elicit little popular disdain. Wolff's worry about rich peacocks apparently could be met better by a tax on expensive toys or by a consumption tax that is steeply progressive at its high end. See, e.g., Robert H. Frank, Luxury Fever: Why Money Fails to Satisfy in an Era of Excess (1999).

Wolff also contends that a direct wealth tax "has the added feature that it may inhibit the avoidance of income taxes by encouraging investors to switch assets into income-yielding forms." Id. Why avoiding income taxes by not earning income is wicked or eligible for social sanctions is unclear. Perhaps by "avoidance" Wolff has in mind investments in assets that appreciate in value without generating current monetary returns. In that case, his argument appears to be that a wealth tax can compensate for the deviation from ideal income taxation inherent in the realization requirement for taxing gains – not, as one might expect, by substituting for an annual tax on unrealized gains, but by encouraging investors to make more of their gains subject to the current income tax notwithstanding its realization requirement. That a wealth tax would affect asset choice significantly, however, seems doubtful.

For similar arguments on behalf of a wealth tax based on its alleged tendency to spur useful investment, see, e.g., C.T. Sandford, J.R.M. Wills, & D.J. Ironside, An Annual Wealth Tax 7 - 9 (1975); G.S.A. Wheatcroft, The Administrative Problems of a Wealth Tax, 1963 British Tax Rev. 410; Institute for Fiscal Studies, The Structure and Reform of Direct Taxation 318 (1978) [hereinafter Meade Report].

Although this argument offers the same type of justification for taxation as the first (that the rich threaten economic and political democracy) and usually is offered in tandem with it by proponents of wealth taxation, there is an apparent tension between the two. This argument assumes that the rich are likely to use their wealth in ways that on balance benefit others whom it would be good to help if they are prodded gently by periodic taxes on their holdings. Higher-yielding investments might create jobs for these people, lead to valuable new products, or make available for rent property that otherwise would remain empty or fallow. In contrast, the first argument assumes that the rich will use their wealth destructively rather than constructively unless they are shorn of it. The second argument turns on the collective benefits of goading the rich to put their money to work, whereas the first assumes that the community would be better off if they were deprived of the means to act. This tension might be only superficial. Both arguments assume that the rich will behave self-interestedly and that wealth taxes will moderate their tendency to use their money in politically, socially, or economically unprofitable ways. They do, however, at their extremes rest on different images of the very rich: economically rapacious, politically aggressive manipulators of their bulging assets in the case of the first argument, somewhat lazy, placid investors in the case of the second who at a minimum value the psychic returns to possession over economic profits or rents more than the community thinks suitable.

However deep or shallow this tension, the weakness of the first argument does not imply that the second argument is any stronger. In fact it is not. A wealth tax on this foundation fails the twin tests of efficacy and morality. As concerns utility, it seems extremely doubtful that a modest shaving of their wealth would alter most people's investment decisions. Outside the top few percent, the vast majority of those with valuable holdings have them concentrated in their homes and their pensions, and so far as

I am aware there is no evidence to suggest that the introduction of a low-level tax on wealth would lead people to spend less on their residences and more on successful business ventures, or that it would cause them to change their minds about the best mix of investments for their future retirement. As to the wealthiest individuals, most have sufficient assets that are liquid or easy enough to liquidate to meet their wealth tax liability without changing their behavior much, if at all. Although cross-border comparisons are tricky, if one compares the United States to nations that have a wealth tax, such as Spain and France, it is difficult to conclude that a wealth tax results in more equity investment or less waste of inanimate resources. If it had any effect at all, a wealth tax might just as plausibly be thought to push people to spend their earnings currently to escape the tax altogether or to reduce their work effort at the margin if their earnings would eventually become taxable savings. Both of these responses would harm the interests of non-wealthholders who, according to this second argument, would benefit from altered work and investment behavior.

Those who see in the wealth tax a helpful spur to socially productive asset use generally fail to explain, moreover, why a wealth tax is the most effective means for attaining this objective, even if it were marginally beneficial. Why would tax relief for certain types of investment income, credits for some investments, or accelerated depreciation for selected assets – carrots rather than sticks – be less successful? To be sure, these alternatives would all cost money, whereas a wealth tax would raise revenue (to the extent it did not reduce taxable work effort or saving), so that if government revenues were to remain level, these tax preferences would have to be made up elsewhere. It nevertheless seems doubtful that a wealth tax would motivate more socially beneficial investment than market returns now do on their own or that, if a wealth tax did have a small positive effect, the same enhancement

could not be obtained in a less costly way – especially if the unpopularity of a wealth tax were counted among the tax's costs.

One reason why a wealth tax might be especially unpopular stems from the dubious normative premise underlying this second argument. This justification supposes not only that it is permissible for the state to impose a special charge on people who choose to save rather than spend their after-tax earnings. It supposes that the state may permissibly do so not because the rich have a duty of justice to contribute to the well-being of others, nor because wealth is the right basis for assessing at least some contributions to the cost of government – I consider these two rationales below – but because a tax would spawn investments that would profit other people in the form of new jobs, higher wages, or cheaper or better products. These incidental beneficiaries presumably would be the present poor or people who will live in the future. Why, however, should the state be thought to have this authority? Unless the rich are myopic and invest their funds in ways that fail maximally to achieve their chosen ends, and unless their vision can be corrected by a tax that regularly abrades their holdings, they already have arranged their investments to maximize their satisfaction, given their aims, their aversion to risk, and any taxes that properly apply to income, consumption, or wealth transfers. Moreover, by hypothesis – I turn to these possible justifications in subsequent Subsections – they already have done their part to help the needy or those who unjustly are worse off, and they already have done their part to pay for the non-redistributive functions of government. Given these assumptions, it is hard to see with what right the state may demand more of them.[60] If one rejects the notion, as liberals do, that a

[60] At the outer bounds of possibility, one might see the indirect benefits of a wealth tax to non-payors as partially fulfilling payors' obligation to share their resources with the less fortunate, provided

national majority may constrict or burden people's personal or property rights beyond what justice licenses or requires, not for the sake of those they are restraining but for the good of other individuals, then this second justification cannot shore up the case for a tax on wealth.

C. Government Service Fees

Existing governments all provide a vast array of services to their citizens. Roads, national defense, police protection, utility regulation, education, health care, poverty assistance, and immigration control are just some of the many benefits supplied by governments without a direct charge or at a subsidized price. These services do not come free, however. Since nothing springs from the void, citizens and other residents must pay for them indirectly, through taxes, forced labor, or inflation (if the state prints money to cover its expenses). How may these costs be apportioned justly?

This deceptively straightforward question opens up several more, some of which are difficult to answer with assurance. To make the task of analysis easier, I adopt one simplifying assumption. I assume that no further transfers between members of the relevant class of citizens or residents are demanded by the true theory of distributive justice. What the true theory is, I leave unexplored. Thus, the distribution of property, opportunities, talents, and other goods and capacities is assumed to be just prior to the introduction of government services and the tax rules and mechanisms necessary to fund them. Different theories of distributive justice offer conflicting accounts of which transfers are essential

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one accepts the existence of that obligation. But a wealth tax aimed at satisfying this assumed obligation in this roundabout and haphazard way would have little to commend it, because it would track that obligation so poorly.

to achieve this state, of course. Some egalitarian accounts appear to require large payments by those who are naturally talented, educationally advantaged, socially privileged, or otherwise better off through no merit of their own to those who do not enjoy the same means or who did not receive the same unearned opportunities. Libertarian theories prescribe much smaller exactions from those blessed with generous parents or profits to sugar the gruel their poorer neighbors eat. For the purpose of this Subsection, I ignore the profound differences between these theories and offer no opinion about their correctness. Taxes and expenditures aimed at reshuffling resources and opportunities to achieve a just allocation are set aside, to isolate the problem of specifying how free individuals with no outstanding claims of justice to one another's possessions or prospects may fairly allocate the expenses of their collective endeavors.[61]

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[61] Utilitarians and other consequentialists do not distinguish between these two functions of government – providing services to citizens and redistributing goods and opportunities to achieve justice – because for them the same evaluative principle applies to both. Regardless of their official purpose, tax collection and associated spending are justified if they increase overall utility (or, in the case of some non-utilitarian consequentialist theories, if they do so subject to certain distributional constraints or in conformity with rules for ranking consequences or assigning different weights to different people's welfare). These theorists would regard this Subsection's focus on only one class of government activities as pointlessly limited.

So would some non-consequentialist philosophers. David Gauthier, for example, believes that his favored principle of "minimax relative concession" or "maximin relative benefit" justly apportions the benefits of all cooperative activity. That principle holds that the each person's net gain from some cooperative activity, measured in terms of individual utility, should be the same proportion of his baseline pre-activity level of well-being and, further, that the equal proportionate gain of each participant should be maximized as a fraction of participants' baseline levels of well-being. That principle thus furnishes a guide for fixing state-mandated transfer payments no less than the fees associated with government services. Gauthier, note 32, at 268 - 80. None of these theorists should regard the Subsection's division of attention as harmful, however. For them it is at worst needlessly duplicative, because for them the same analysis applies to the other main class of government activities, too.

The question of which allocations would be just under these circumstances may seem artificial. Some find it hard to conceive of people owning property in the absence of laws that give shape to property rights or state actors that protect them.[62] But however unrealistic the idea may be of people recognizing one another as having complicated sets of claims and liberties with respect to material objects in the absence of government,[63] this thought experiment usefully focuses attention on those government activities that a group of people might choose for the benefit of some or all of the group's members, separate from any intra-group transfers that justice demands. This familiar starting point for contractarian theories of the basis and bounds of government authority enjoys a long pedigree and is for most people unexceptionable, though different theorists fill out the conditions for fair procedures and just outcomes differently. The fact that any existing person's preferences for one or another government policy, indeed even that person's talents and capacities, have been sculpted by government policies that antedate any hypothetical collective choice should not be unsettling, so long as one believes that people generally are able to select and alter their ambitions and to order their lives freely against the backdrop of any tax and spending regime already in place, that they bear responsibility for meeting the costs of their convictions even when those beliefs cannot be said to be chosen so much as recognized

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[62] For a description of some nineteenth-century and subsequent realist attacks on the notion that property rights are in some sense natural and that property can exist apart from positive legislation, see Fried, Progressive Assault, note 37, at 76 - 81.

[63] Less complicated property arrangements might well be reached independently of rules imposed by a central authority, though a complex system that consisted entirely of informally accepted rules almost certainly could not be. For one example of how informal property and liability norms can develop without law, see Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes (1991).

as true,[64] and that they can abstract from their narrow self-interest sufficiently to reach a fair agreement on collective matters.

Theories of the state (or of any formal political authority) typically have two main components. One is procedural, the other is substantive. The procedural half is a theory of how collective decisions may be taken fairly. The substantive half offers an account of those activities a government may morally undertake and of just means for funding them. Both components may be highly controversial. Many communities are marked by widespread disagreement over the fairness or representativeness of political institutions or over what the government ought to do and at whose expense it ought to do it. For good reason, no prominent political theorist this side of the seventeenth century has asserted the absolute preeminence of proper procedures, to the extent of claiming that whatever emerges from fair political institutions perforce is just. Nobody believes any longer that kings rule by divine right, and contractarians who succeeded Hobbes were spared the wild fears that bred his paranoid notion of concentrated sovereignty. Thus, the procedural and substantive parts of any plausible theory of state power may come into conflict, because even the fairest procedures may yield unjust outcomes. When that occurs, the question citizens face is whether some injustice is sufficiently grave to justify disobedience or insurrection and, if it is, whether they personally are willing to run the risks associated with illegal opposition.

My concern here is with one small slice of the substantive portion of any theory of the state.

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[64] For defense of the claim that people are not entitled to a larger share of resources just because their religious or ethical convictions make their lives more expensive than the lives of people who lack those convictions, see Rakowski, Equal Justice, note 32, at 46 - 52, 58 - 64.

Political philosophers and ordinary citizens disagree sharply among themselves about which government activities are legitimate. Those with libertarian convictions see no role for the state beyond the provision of pure public goods, the enforcement of curbs on anticompetitive practices, and the protection of people's strong pre-political property and personal rights. Many others believe that the government may and should undertake a wider range of projects that yield some collective benefit, though it is impossible to find perfect agreement on how far the government may or should go. My purpose is not to articulate a theory of the acceptable reach of legislation for collective benefit but to ask whether any significant part of the government's activities ought to be funded by a tax on wealth, on the assumption that those activities aim to provide a collectively beneficial service or resource and not to effect a just distribution of goods or opportunities.

Theories about how the costs of these state activities should be apportioned fall into two main categories, the relative popularity of which has waxed and waned over the last two hundred years. The first category encompasses views that hold that mandatory payments for government services should be proportional to the benefits that payors receive from them. Theories of the second sort declare that the size of people's tax bills should depend on how much sacrifice that payment would cost them.[65]

[65] For good summaries of these competing approaches to assessing taxes for government services, see John G. Head, Tax-Fairness Principles: A Conceptual, Historical, and Practical Review, in Fairness in Taxation: Exploring the Principles 7 - 14 (Allan M. Maslove ed. 1993); Fried, note 37, at 149 - 57.

1. The Benefit Principle

Suppose that the government provides only two sorts of goods. First, it supplies pure public goods. By definition, the consumption of public goods is non-rival. One person's enjoyment does not interfere with others' partaking of the good. Second, the government makes available what are sometimes called "mixed" goods. These are goods that chiefly yield personal benefits to people in a way that precludes other consumers from obtaining the same benefits but that also produce "external" benefits – benefits that flow to other people indirectly and thus make the goods consumed by the direct beneficiaries more valuable to the community as a whole than they are to the direct recipients alone.[66] These classifications are not perfectly neat at their edges. Disagreements abound over whether a good such as primary education is essentially a private good that overwhelmingly benefits children and their parents and therefore ought to be paid for by them or whether it benefits the wider community substantially enough to count as a mixed good possibly deserving of a public subsidy. There is little dispute that goods and services that are essentially private in character, which the government might nevertheless provide in preference to the market because it can do so most efficiently (especially if supply of the good is or tends towards a natural monopoly) should be paid for by those who benefit. Fees and license charges to cover the costs of government provision or regulation plainly are appropriate in these cases. Where disagreement mainly arises is over how to allocate the costs of pure public goods or any cash or in-kind subsidy the government furnishes to mixed goods.

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[66] For mainstream accounts of pure and mixed public goods and tax policies associated with them, see Harvey S. Rosen, Public Finance 61 - 84 (5th ed. 1998); Richard A. Musgrave & Peggy B. Musgrave, Public Finance in Theory and Practice 50 - 61 (2d ed. 1976).

The benefit principle holds that these expenses ought to be paid by beneficiaries of these state activities in proportion to the benefits they receive. Lately, there has been no serious discussion of whether these benefits should be measured by a recipient's subjective assessment of their value or by some objective measure of their worth to him, mainly because in practice neither is susceptible of accurate or normatively uncontroversial measurement.[67] Aside from advocates of theories such as utilitarianism that treat all state actions as inherently redistributive and as subject to review under a single, comprehensive standard, partisans of the benefit principle are likely to affirm that nobody should be forced to contribute more to some government activity than its benefit to him.[68] That limitation, however, leaves many important questions unsettled, because all or most people may derive benefits from some government activity that collectively dwarf the cost of providing that service. In these cases, should we allocate the cost of each unit of a government good (if the good can be divided in some way) according to each beneficiary's relative willingness to pay for that unit (or the objective analogue of that subjective measure) if it were marginal, then add those cost fractions together to arrive at somebody's

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[67] For a description of some earlier proposals to measure the benefits people receive from government services, see Kiesling, note 36, at 32 - 33.

[68] This simple rule of justice is sometimes attributed to Knut Wicksell, but in a marginalist form: "[N]o individual should pay more for public services than his or her marginal valuation of them or marginal willingness to pay." Head, note 65, at 8. It is, however, far from clear that this principle is correct. To the extent that the supply of a government good can be divided into units, why should people's valuation of the marginal unit of a government good dictate their relative contributions to the provision of inframarginal units? In the case of a pure public good, contributions to the marginal unit should equal each beneficiary's valuation of that marginal unit. But if people's valuations of inframarginal units vary dramatically, so that one person's valuation of the entire government supply of a particular good is twice what another person's is, it is unclear why one would believe that justice requires them to contribute to the inframarginal units in proportion to their valuation of the marginal unit rather than to their average valuation of the inframarginal units or according to some other formula.

tax bill? Should we instead allocate the net gains from collective activity in an alternative way that likewise would produce different prices for different people – for example, in conformity with David Gauthier's principle of minimax relative concession (if, impossibly, we had enough information about taxpayers' welfare profiles to transform theory into practical policy)?[69] Or should we treat government goods the way we do those provided by the marketplace and charge each person the same price for those goods or services regardless of how important they are to the recipient, subject only to the qualification that nobody be made to pay more for marginal units of a good than their value to her?[70]

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[69] According to Gauthier, the fair and rational way to divide the costs of producing a pure public good is to determine, first, how large a gain in personal utility each contributor would experience if the good were produced to the greatest possible degree without that contributor paying anything and with every other contributor experiencing no utility loss on balance, once the benefits of the good and the costs of that person's contribution have been set against one another. Then one must choose a level of production and an assignment of costs so that each person's proportionate reduction in utility from that maximum possible gain is equal and is as small as possible. Gauthier, note 32, at 271 - 72. Because Gauthier's metric is utility and because he assumes that a person's utility increases with the value of the resources he owns, Gauthier concludes that people who are better off should pay more for public goods than those who are worse off if they value them equally. Gauthier says that "[i]t may then be plausible to suppose that a flat rate tax yields equal relative benefits," id. at 272, though he neglects to say whether the tax would be levied on income, consumption, wealth, or some other variable. In a world in which all are equally talented and a just distribution of wealth and income prevails, it therefore is unclear whether Gauthier would say that taxes to pay for public goods should be equal in amount because people really are equally well off even though some earn or save more than others, or whether he believes that high earners or savers should pay more than those who earn or save less. Barbara Fried fairly assumes that Gauthier favors proportionate income taxation, which she concludes is "such an implausible expression of Gauthier's view of distributive justice that his enthusiasm for it, like Rawls's, is interesting chiefly as an illustration of the strength of the irrational pull proportionality exerts on the imagination." Barbara H. Fried, The Puzzling Case for Proportionate Taxation, 2 Chapman L. Rev. 157, 173 n.46 (1999). Fried's discussion of the implications of a nonredistributive benefits theory of taxation is exceedingly clear and, with regard to the announced conclusions of a broad set of libertarian thinkers, analytically devastating. See id. at 159 - 81.

[70] The standard solution to this pricing problem in optimal tax policy analysis affirms that each taxpayer should face a constant per-unit charge for public goods (if a particular good can be divided in this way) but that the price per unit should be different for different people, given their differential

These are difficult questions. In answering them, our intuitions about justice in cooperation offer only shaky guidance. In actuality, of course, even if some version of this benefit principle were to be applied, perfect justice would be impossible to achieve. Political decisionmakers could never gather accurate information about people's preferences or values with respect to a range of existing and possible government programs, and taxes could never be levied on an individual basis in a practicable manner. Rough, generalized assessments of benefits are unavoidable, with some arguable injustice in the assignment of burdens.[71] Without choosing one approach to benefit taxation over its rivals, however, we may nevertheless ask whether any government service produces benefits for people approximately in proportion to their wealth, so that wealth would be a just basis for assessing their

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marginal willingness to trade off public goods for private ones. See Musgrave & Musgrave, note 66, at 74 - 78. The importance of differential pricing if taxes to supply public goods are not to result in changes in people's pre-tax behavior, with a concomitant redistributive effect, is reviewed, and a compensatory mechanism is described, in Louis Kaplow, The Optimal Supply of Public Goods and the Distortionary Cost of Taxation, 49 Nat'l Tax J. 513 (1996); Louis Kaplow, A Note on the Optimal Supply of Public Goods and the Distortionary Cost of Taxation, 51 Nat'l Tax J. 117 (1998). From some non-consequentialist perspectives, the distortionary effects that optimal tax theory seeks to avert are of little concern, even though they can be highly significant to utilitarian or other welfare-consequentialist theories of social justice.

[71] The acceptance of merely rough justice raises what might seem a problem in evaluating the adoption of new programs or the cancellation of existing ones. In each case, a marginalist assessment of that proposed change is essential. But if approximate justice suffices, then the chance that a small alteration of the sum of government programs in either direction would tip the mix from justice to injustice is slight. So a marginalist assessment using this assumption of rough justice is apt to be unhelpful.

Although this difficulty is genuine and requires decision makers to look to broad principles of the scope of public activity and to make nuanced judgments about the effects of any particular change, this problem is hardly crippling. No notion of justice specifies precisely the right government action in every instance. Some freedom to experiment and err in setting policies without lapsing into injustice is compatible with all reasonable conceptions of responsible government.

contributions to that service.

The most basic government function is the protection of its citizens against death, injury, enslavement, and depredation. Indeed, some believe that the government's legitimate authority ends there, with the establishment of a "night watchman" state.[72] If all are regarded by their government as entitled to equal respect and if, as I assume, all own a just share of resources and have equal abilities and opportunities,[73] what justification could there be for charging the wealthy more for the protection

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[72] See, e.g., Robert Nozick, Anarchy, State, and Utopia 26 - 28, 88 - 119 (1974); Jan Narveson, The Libertarian Idea 217 - 24 (1988) (questioning whether even a "night watchman" state can be justified, as opposed to wholly voluntary protective associations from which people may depart at any time); Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 331- 38 (1985) (summarizing his "eminent domain approach" to fixing the boundaries of state power and distinguishing his conception from Nozick's "minimal" state).

[73] The importance of assuming that people's abilities are equal depends on one's conception of the state of nature in the absence of government and whether one believes that justice mandates correction for unmerited disadvantages. The point is illustrated by John Stuart Mill's attack on the benefit principle as a basis for apportioning taxes:

> It cannot be admitted, that to be protected in the ownership of ten times as much property, is to be ten times as much protected. Whether the labour and expense of the protection, or the feelings of the protected person, or any other definite thing be made the standard, there is no such proportion as the one supposed, nor any other definable proportion. If we wanted to estimate the degrees of benefit which different persons derive from the protection of government, we should have to consider who would suffer most if that protection were withdrawn: to which question if any answer could be made, it must be, that those would suffer most who were weakest in mind or body, either by nature or by position. Indeed, such persons would almost infallibly be slaves. If there were any justice, therefore, in the theory of justice now under consideration, those who are least capable of helping or defending themselves, being those to whom the protection of government is the most indispensable, ought to pay the greatest share of its price: the reverse of the true idea of distributive justice, which consists not in imitating but in redressing the inequalities and wrongs of nature.

Mill, note 24, bk. V, ch. II, § 2. Mill's vision of life without a state might well be wrong, even given his assumptions about people's unequal abilities. As Herbert Kiesling notes, if there were not a high probability that the majority of poor or weak persons would overrun the rich minority, notwithstanding

afforded by the armed forces, the police, associated civil and criminal regulatory bodies, and the administration of justice?[74] The natural implication of the benefit principle against the backdrop of a just distribution of resources seems to be a head tax.[75] Each

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their walls and mercenaries, it is unclear why the institutions of government would come into being at all. Kiesling, note 36, at 203. Deciding between these competing conceptions of the outcome of strife and cooperation in the absence of government might be necessary for some theories of taxation, but not for all. Liberal egalitarians who believe that compensation for unequal abilities in required by justice can ignore any differences in people's pre-institutional needs stemming from their unequal powers. Even those who dissent from this view might see state membership, as Mill did, as premised on a normative assumption of equal respect that is blind to at least most differences in people's natural or pre-institutional capacities.

[74] An early statement of this view came in Leviathan:

> For the Impositions, that are layd on the People by the Soveraign Power, are nothing else but the Wages, due to them that hold the publique Sword, to defend private men in their exercise of severall Trades, and Callings. Seeing then the benefit that every one receiveth thereby, is the enjoyment of life, which is equally dear to poor, and rich; the debt which a poor man oweth them that defend his life, is the same which a rich man oweth for the defence of his; . . . . For what reason is there, that he which laboureth much, and sparing the fruits of his labour, consumeth little, should be more charged, than he that living idly, getteth little, and spendeth all he gets; seeing the one hath no more protection from the Common-wealth than the other?

Thomas Hobbes, Leviathan ch. XXX (1651).

[75] One might argue that a head tax would be unjust because not everyone values his or her life the same or derives the same benefit from government protective services. Perhaps some people would prefer to run more risk than others. Or perhaps they care less about living than others do if the alternative is to pass more property on to their survivors, as might be true of some older people. Or perhaps some people live in remote areas where it is specially costly for the government to guard them. In all these cases, one might argue, differential payments for government benefits are preferable to a head tax.

These arguments nevertheless seem unpersuasive. While it is possible that some people do not value their lives very much, the overwhelming majority would value them at much more than their share of the cost of the state's protection in a nation blessed with a just distribution of income and wealth. If that nation were committed to the equal worth of its citizens from a public perspective, then an equal fee payable by all, the frightened and the confident alike, seems the proper course. There might be

person would be assessed an equal amount for these government services.[76] Only two rationales for

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disagreement over how much protection the government should provide, even after a representative political decision has been taken, but that raises a very different set of questions. I suppose that it is possible that people who are unusually rich because of hard work or successful gambles might be willing to pay more on average to protect their lives than others do, so a resolute defender of the willingness-to-pay rule for measuring benefits might insist that they be taxed more heavily for this protection. But when people have equal opportunities and are equally well endowed to start with, it is hard to imagine how that principle might be defended as a principle of just contribution, outside of a utilitarian framework or one akin to it. How can we imagine equally situated people agreeing to a rule of this kind? In any event, it may be, as Richard Epstein notes, that "[the] interest in bodily security . . . is probably not linear with income, for people with taxable low incomes may tend to value bodily security highly, especially if they are young with extensive human capital or imputed income." Epstein, note 72, at 298. A tax based on benefits conceived in terms of people's willingness to pay for them might be regressive or proportional rather than progressive.

As for older people who put a low price on their lives because they believe they are near death and want to pass on what they have to others, one might argue that they probably would be willing to pay to increase the protection afforded to their survivors, so that the combined benefit to both groups or their combined willingness to pay for protection approaches the average for a pair of people. Or one might plausibly maintain that the uniform price works out fairly over a lifetime, flattening a slope that begins with above-average estimations of the benefits of survival and ends with below-average assessments as the likely length and quality of a taxpayer's remaining life declines. In any event, as so often happens with matters of tax policy, administrative concerns – simplicity in collection, probable fraud in self-reporting – shove these fine points aside and push powerfully towards an equal tax.

People who live in far-flung areas present an interesting problem if in fact their personal security is more costly to preserve, given a nation's geography and its neighbors. Local differences in risks and associated police costs are in many nations reflected appropriately in varying local taxes, but that solution cannot work in the case of national defense or, if one exists, a national police force. Perhaps the way to think of these situations is the following. A nation committed to protecting its citizens as equals will attempt to maintain its borders and to supply people living throughout its territory with basic protection. But it cannot fully equalize protections throughout, at least not if it taxes all the same, so that those who choose to live in certain places know that they take on some risks and costs, perhaps including private protection, as the price of their decisions. Privately purchased protection or the assumption of additional risk, coupled with equal taxes, is tantamount to equal protection with unequal tax payments.

[76] For a defense of the view that, "as equals before the state, each of us ought to be required to pay the same absolute amount of tax to it," see Jeffrey A. Schoenblum, Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals, 12 Am. J. Tax Pol'y

taxing wealth to provide these benefits suggest themselves, and neither carries the argument very far.

The first is that wealthy people have more valuable possessions to protect, even if each has only one life, and that at least with respect to the property portion of the protective benefit that government provides, the proper basis for taxation is wealth because the benefit of safeguarding wealth varies with its amount. Some dismiss this rationale out of hand. Mark Kelman says that "it seems strained, to put it mildly, to argue the benefit one derives from defense against foreign invasion varies proportionately with the worldly goods one has that need protection from the invaders."[77] But perhaps there is more to be said for this claim. Most people surely regard the government's protection of their persons as far more important than its protection of their property, since life is the precondition to most of what we value and property can in many instances be insured against theft, damage, or loss whereas life, once forfeit, cannot be replaced. There is no obviously correct formula for dividing the value of the various protective benefits of government, but if life and limb count for much more than cash and cars, it is easy

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221, 270 (1995).

Some people might not share the majority's view of how much should be spent on defense or other protective measures. Typically, there is no workable way to exempt them from payments, given the risk that any voluntary withdrawal system would lead to widespread fraud. Taxpayers then have to face the question of whether disobedience is warranted or wise under the circumstances, given their disagreement with the government's policies and the other benefits and costs flowing to them from government activities.

A different problem is that some might not have the means to pay a head tax because they refuse to earn more than they need to pay for life's essentials, favoring a life with few material possessions. If forced service is to be avoided and they lack spouses, friends, or relatives who justifiably could be made to pay their share, see note 10, their bill would have to be transferred to other taxpayers, resulting in some free riding and injustice. The extent of that injustice is likely to be negligible in a rich industrialized nation.

[77] Mark Kelman, Time Preference and Tax Equity, 35 Stan. L. Rev. 649, 667 n.45 (1983).

to share Kelman's dismissive attitude towards this rationale. The major benefit most people derive from government protection is in this view independent of how much they own. Yet insofar as the state's protective benefits are limited to worldly goods, one might think that it makes sense for the tax to vary with the value of those goods, just as the cost of insuring them does.[78]

Nevertheless, supporters of a wealth tax are unlikely to draw much comfort from this first rationale. Suppose that one ignores the evident fact that the cost of providing police and military

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[78] Klaus Tipke raises several objections to regarding a wealth tax as a justifiable charge for the state's protection of property. None of them, however, is damning if the tax is tailored to cover only part of what governments do.

Tipke notes, first, that the state protects citizens' lives and liberties, irrespective of whether they pay taxes. Klaus Tipke, 2 Die Steuerrechtsordnung 773 - 74 (1993). That is true as a description of the current political reality, but it does nothing to show that, in a just state, it would be inappropriate to levy a tax on wealth to cover the cost of protecting that wealth, even if the additional cost of furnishing property protection (if the protection of life and limb came first) were small and therefore could justify only a tiny tax.

Tipke also points out that the state's protection often falls short of what people want, that they frequently buy private insurance against theft or damage, and that the state may (as Germany did) tax insurance without allowing taxpayers to credit the insurance tax they paid against their wealth tax liability. Id. at 774. The failure of Germany's defunct wealth tax to provide a credit for any insurance tax paid, however, is no objection to a wealth tax itself. A credit could be allowed if appropriate. Moreover, the fact that some taxpayers choose to supplement the basic provision of public goods from their own resources does not show that the government should have supplied those extra goods itself, nor does it demonstrate that a wealth tax was the wrong way to cover the cost of the goods it did supply.

Finally, Tipke says that there is no discernible relation between the amount of wealth tax the government collects and the amount of wealth protection it provides. Id. Even if Tipke's claim about actual wealth taxes is true, however, it constitutes no objection to a tax that did achieve whatever correlation Tipke believes justice demands. Perhaps Tipke thinks that it is impossible in practice even to approximate the correct correlation. To prove that point, however, Tipke would first have to show what the correct correlation is and then show why it cannot be realized with sufficient precision. Tipke's rejection of the benefit rationale for wealth taxation makes neither showing.

protection for a person's possessions is not related to their value in any uniform way.[79] No administrable tax will track variable benefits perfectly, and so the complaint that a tax fails to do so cannot be a disqualifying drawback. Even if one concedes this point, the first rationale for wealth taxation confronts two further problems. The first is explaining why the value of these benefits should matter in assessing taxes if they are only incidental to the protection of people's lives and bodily integrity, for which alone people would pay all that is needed to fund an army and police and which would take precedence over property protection in almost everyone's hierarchy of values. Perhaps safeguarding property increases the cost of police services or national defense beyond the expense of protecting individuals, but that increase is apt to be small. It might well be too negligible to warrant a special tax.[80] Second, this rationale is likely to justify only a regressive or proportional tax, which is not

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[79] Fertile farm land may be spread out geographically whereas a bag of gems takes little space. Some property is closer to borders or harder to defend than other types of wealth. Some people pay for private protection that makes the police almost redundant while others do not. Weakness and vulnerability vary widely.

[80] Walter Blum and Harry Kalven make a similar point in the course of casting doubt on the case for progressive property taxation:

> The only services of government which seem to be correlated with the quantity of property owned by an individual are the police, fire-fighting and military forces; and even as to these the correlation seems to be grossly inadequate. A military establishment adequate to protect persons would necessarily be large enough to protect property from exterior violence. To a somewhat lesser extent this is probably also true of internal police and fire-fighting establishments. Further, even granting that there is some additional benefit to property owners from both such establishments, it surely does not vary with the value of the property which is being protected. Especially is this true in a society in which a large portion of property is in the form of intangibles. And in any event, in the modern state the maintenance of police and fire-fighting forces is likely to be only a small fraction of the total services performed by government.

Walter J. Blum and Karry Kalven, Jr., The Uneasy Case for Progressive Taxation 36 - 37 (1953) (footnote omitted).

what most advocates of wealth taxes favor. Generally speaking, the public cost of protecting property does not rise proportionately with its value, partly because much valuable physical property is inside of structures and owners often provide protection at their own expense as value increases, through capital expenditures or security services. Nor does the benefit to the owner of protecting property increase proportionately with the property's worth in most cases. The likely fractional loss of value from theft or destructive act or occurrence tends to fall as the size and worth of the whole increases. And the subjective and objective benefit that people derive from additions to their wealth declines as their wealth grows, indeed perhaps quite sharply after a certain point is reached, so that the value of protection might not rise proportionately with wealth – though both the subjective and objective detriment to paying taxes might fall equally fast or faster, perhaps canceling this final point. In the end, even if this first rationale is persuasive and even if it is able to justify a slight wealth tax in addition to a head tax – questionable assumptions both – that wealth tax might well have diminishing or flat marginal rates, unlike all wealth taxes currently in existence.

The second possible rationale for a wealth tax atop a head tax to pay for state protective services is that the rich evidently benefit most from economic activity in quantitative material terms and that, speaking very generally, economic flourishing depends on a nation's security and its suppression of criminal activity.

This rationale is no stronger than the first. Even if there is a causal relationship between a government's might and the economic success of its citizens, the case for a wealth tax to pay for the government's power is infirm. Its first difficulty is the same as that facing the first rationale: separating the cost of protecting property from the cost of protecting personal rights and showing that the cost of

protecting property is comparatively noteworthy rather than puny. The second problem is that economic success and wealth are not the same. Were one convinced that protection yields profits with enough constancy to bill the affluent proportionately more for its cost, the right tax would fall on earned income or consumed income, not wealth. For this rationale, there should be no difference between the tax liability of those who spend what they earn and those who lock it away. Furthermore, the tax would have to be regressive or at best proportional, depending on how benefits are to be measured. A progressive wealth tax could find no foundation in this avatar of the benefit theory.

These points are important, because they apply with equal force to all attempts to pin the bill for government services on those whose economic well-being they advance, where no sufficiently close correlation can be shown between a particular service and some benefit to justify a specific user fee rather than funding by a broad-based tax. In those cases in which a government-funded service can be shown to produce public or mixed goods offering economic benefits to a group of people whose shares of the total benefit cannot be ascertained, the benefit principle might plausibly be thought to point to a tax on beneficiaries proportional to what they reasonably can be assumed to receive (though it does not strictly imply this relationship or any other). If the benefit is economic, however, this approach yields either a proportional tax or, if benefits are measured from the perspective of the beneficiaries, a tax that is a sinking fraction of the pecuniary value of those benefits, reflecting the decreasing marginal value of additional profits using either the subjective utility of those benefits or their allegedly objective value to a person's life as one's scale.[81] In either case, the tax to pay for these economic benefits ought to fall on

[81] If contributions are measured in these ways, however, the declining marginal value of monetary profits might be offset by the declining marginal cost of parting with money when taxes come

income or consumption, not on wealth.[82]

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due. It is unclear which way the balance would tip.

[82] What bearing does this argument have on the legitimacy of local property taxes? Some economists argue that ad valorem taxes on real property located within a defined geographical area can be justified as appropriate charges for the services that the taxing jurisdiction provides. See Rosen, note 66, at 492 - 93, for a statement of the Tiebout hypothesis and some of its presuppositions. People choosing a residence are aware of the combination of services and tax rates that characterize different localities; thus, there can be no unfairness to them when they implicitly agree to a package of benefits and tax costs by choosing to live in a certain area, and those who already owned property when the tax and service package was adopted cannot cry foul so long as the way in which this combination became law was procedurally fair.

There are imaginable circumstances in which this argument might be convincing. Unhappily, they cannot be found in actual U.S. communities. For historical reasons, many localities have little choice but to tax real property and retail sales within their jurisdictions to fund many of the services that localities traditionally have provided. While they hardly can be blamed for doing so, the property taxes they impose do not escape criticism merely because the taxing entity has no better means at its disposal for raising revenue. There are several substantial impediments to justifying local property taxes on a benefit rationale.

First, local property taxes often pay for all or most locally provided public services, such as police protection, the administration of city government, local regulatory programs, fire fighting, and primary education, albeit sometimes with the help of state or federal subsidies. On a pure benefit rationale, however, many of these services ought to be funded by a head tax, not by a property tax, if income or wealth redistribution is not an aim. Only the expense of fire fighting arguably is related to real property values, and even there the correlation might be too rough for moral comfort, if fires are concentrated in poor neighborhoods or the risk is greatest for the residents of crowded areas, such as tenants in apartment buildings. A property tax to pay for this service might unfairly burden wealthier home owners. This injustice might be repeated in some areas with regard to funding for public parks and libraries, if one assumes that they rightly are treated as public goods and ought not to be thought of as private goods for which users should be made to pay and if they are used disproportionately by those with little property, who cannot afford to buy their own private space or their own books. (Because the amounts at stake here generally are small, this hardly seems a significant worry, especially because the underlying empirical claim about differential use has not to my knowledge been proven.)

Second, one of the most important goods supplied by the majority of local governments – primary education – would be considered predominantly a private good by many and thus an unfit activity of government. At a minimum, one might maintain, it ought not to be funded by a tax on all property owners, because many property owners, especially businesses, have no children who use the

2. Fair Sacrifice Principles

The chief rival (or back-up) to the benefit principle as a standard for apportioning the cost of public goods has been the fair sacrifice principle. Like the benefit principle, the fair sacrifice principle can and has been developed in numerous ways. Insofar as it is viewed as an accessory rather than a straight competitor to the benefit principle, its core notion is that if the beneficiaries of government actions and the size of their respective benefits cannot be ascertained with reasonable accuracy, making the benefit principle impossible to apply, the benefits should be viewed as flowing indivisibly to all and a fair contribution should be exacted from each for this collective good. The controversial question is what counts as a fair contribution. If all taxpayers enjoy equal talents and opportunities and if a just distribution of income and wealth forms the background against which taxes are determined, it might seem hard to imagine anything other than an equal nominal division of the burden being just. The fair sacrifice and benefit principles by this analysis seem to converge in their prescriptions if all have the same chance of prospering and if we hold people responsible for their preferences and their occupational, investment, and consumption choices.

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schools and homeowners whose children do use them do not utilize this service in proportion to the value of their houses.

Third, many localities use property tax revenue to fund transfer payments to the poor, sometimes in partnership with the state or federal government. These policies usually jibe with a benefit theory of taxation. To say that they represent a decision to buy off the poor to forestall the theft or destruction or property and thus yield a benefit to property owners in proportion to their holdings strains credibility.

Fourth, rarely do people have a wide range of choice in picking a set of services and taxes, given the limited availability of different sorts of employment. The empty prospect of emigration can never remove a community's unjust laws from moral scrutiny.

What ordinarily are classified as fair sacrifice principles, however, are the intellectual and historical progeny of utilitarianism, and they bear the signet of a conception of justice that is pervasively redistributive whenever people's means or preferences differ, regardless (except insofar as it affects incentives and long-run utility totals) of how those differences emerged. Fair sacrifice principles also may appeal to those with strongly communitarian conceptions of the ideal state, who regard citizens as joined in a common endeavor to which they may be asked to contribute according to their means, at least to a far greater degree than would be claimed by those who favor a more individualistic, contractarian point of view.

At least four principles cluster under the fair-sacrifice banner.[83] All might be thought of as basing taxpayers' contributions on what, in that wooly catch phrase of modern tax policy analysis, is termed their ability to pay taxes – "a basic 'principle,'" as Henry Simons said, "from which, as from a conjurer's hat, anything may be drawn at will."[84] Upon inspection, not one of the four supports a tax on wealth rather than some other base as fodder for Leviathan.

The first principle holds that taxpayers should all make the same absolute sacrifice to pay for public goods. Henry Sidgwick and less clearly John Stuart Mill were advocates of this view, measuring sacrifice not in nominal terms – which would lead to a head tax, as under the benefit principle – but in terms of the utility lost to individual taxpayers.[85] Each person should contribute to the point where his

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[83] For a diagrammatical explanation of the differences between three of these versions, see Kiesling, note 36, at 44 - 46.

[84] Henry C. Simons, Personal Income Taxation 17 (1938).

[85] For a perceptive discussion of this and other fair sacrifice principles, with abundant citations to sources, see Fried, Progressive Assault, note 37, at 153 - 56, and the extremely useful endnotes

happiness suffers the same reduction as the bite that taxes take out of every other taxpayer's happiness, presumably (though puzzlingly) without taking account of the additions to their happiness from programs funded by these taxes. This view is hard to square with utilitarianism's master standard, notwithstanding the credentials of its proponents. Collecting taxes so that each person loses the same amount of utility need not produce the needed revenue with the smallest overall loss of utility, for not everyone's welfare is reduced to the same degree when he pays a dollar in tax. And there is no reason to confine attention to sacrifices without looking at benefits as well. If this principle were nonetheless attractive, however, it would seem to point to a tax on income or consumed income, rather than wealth, unless everybody saved the same fraction of their income, and for the same length of time. Otherwise, those who saved rather than spent would in general be forced to make larger rather than equal absolute sacrifices, because they would bear the burden of a wealth tax.[86] A person's welfare is likely to be much more

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accompanying the text. As Fried notes, Mill's writing on this issue is confusing and leaves unclear exactly which notion of fair sacrifice he accepted, although his policy preference is plain. Mill recommended the adoption of a proportionate tax on income above a subsistence level, that is, a flat rate tax on income once the exempt amount had been subtracted from total income net of expenses. See Mill, note 24, bk. V, ch. II, § 2.

[86] To minimize overall sacrifice in funding public goods while securing the same absolute sacrifice from everyone, followers of Jeremy Bentham and John Stuart Mill might wish to begin gathering tax revenue by imposing a heavy charge on some wealth transfers at death, such as inheritances received by collateral heirs, rather than by a parent, spouse, or descendant, before turning to a tax on income or consumption. Taxing those to whom an inheritance is likely to be a windfall, in their view, frustrates few expectations, rarely alters behavior, and generally occasions little unhappiness or resentment, certainly less than positive welfare addition it can make when placed in the hands of more efficient utility producers. Thus, raising revenue in this manner typically carries low costs. See Bentham, note 24 (proposing the complete confiscation of inheritances passing to collateral but not direct heirs); Mill, note 24, bk. II, ch. II, § 3; bk. V, ch. II, § 3 (seconding Bentham's proposal). Unfortunately, a tax on inheritances passing to collateral heirs would yield little revenue even at very high rates, so a different base also would be needed unless the supply of public goods was extraordinarily meager.

closely tied to her income over time than to the wealth she has at any one time.

Consider one simple example. Suppose that Ann has income of $100,000 in Year 1 and $100,000 in Year 2, all of which she consumes in those years. Brian's income in both of those years is the same, but he saves $50,000 of his income from Year 1 and consumes $150,000 in Year 2. Carol's income (thanks to good luck, not more onerous work) is $150,000 in both years, but she consumes only $100,000 in Year 1, carrying $50,000 forward to consume in Year 2, along with the $150,000 she earns and consumes in that year. If a tax to pay for public goods were levied on wealth held at year's end, the entire bill for state services would be paid by Brian and Carol in equal proportions, with Ann escaping tax entirely. In the absence of more particular information about their experiences and preferences, however, one can only assume that Ann is no worse off than Brian, and that Carol is better off than both. Under an equal sacrifice principle, Carol should have to pay more in tax than either Ann or Brian, who in turn should pay the same. The equal absolute sacrifice principle, coupled with a utilitarian metric, entails a base other than wealth if one supposes that tax rates will apply generally and not be assessed taxpayer by taxpayer based on individualized information.[87]

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[87] Alan Gunn believes that the necessity of making simplifying assumptions about the relation between a person's income and his utility vitiates attempts to defend an income tax on an equal sacrifice rationale. For him, these generalizations apparently conceal too much variation to be just bases for tax policy. Gunn writes:

> If "sacrifice" notions really are central to a concept of "ability," that concept is indeed useless. We surely cannot say that a twenty percent tax on the identical incomes of A and B causes each an "equal sacrifice" or leave each in the same position, relative to the other, as if there were no tax. A may care little about money. He may derive great nonpecuniary satisfactions (not available to B) from leisure, or watching sunsets, or attending free concerts or museum exhibits. A may even be employed by an organization that determines his salary on an "after-tax" basis, so that the tax "on" his income is actually borne by his employer. Or he may have

The second fair sacrifice principle is formally identical to the first, but it measures citizens' contributions using a different scale. Instead of insisting that they sacrifice equal amounts of utility or welfare, it demands that they sacrifice equal amounts of their labor time to supply public goods, on the model of universal military conscription.[88] The rule is one of proportionality, not progressivity.

> planned to give most of his income to his relatives, in which case they are hurt by the tax more than he. If "equal sacrifice" is the only possible foundation for trying to tax people fairly we may as well abandon the attempt at fairness and tax whatever can be most easily policed, such as sales.

Alan Gunn, The Case for an Income Tax, 46 U.Chi.L. Rev. 370, 382 - 83 (1979) (footnote omitted). Many tax theorists who are sympathetic to utilitarian or other consequentialist accounts of justice would consider Gunn's reaction too sharp. Conceding that people may value income or any other good unequally, they would assert that there is a sufficiently tight link between income and individual welfare to let the first stand in for the second.

[88] Gunn relies on this rationale in defending an income tax, even though it might be thought to yield a flat tax on wage rates (regardless of the number of hours actually worked) and even though a proportional income tax and a proportional tax on wage rates are equivalent only if everyone provides the same amount of market labor each year, which of course would never occur. Gunn rejects wealth taxation on the idiosyncratic grounds that it might "bring about drastic and undesirable changes in society" (but only if rates were high) and that it would take away from people something to which they have been thought, for no very good reason in his view, to have a stronger social claim than they do to income when it is first earned, before time and possession transform it into owned property. Id. at 380 - 81 (footnote omitted). In a defense of an income tax that seems better suited to supporting this second version of the fair sacrifice principle of taxation, Gunn writes:

> The equality achieved by an income tax is not an equality of sacrifice, but of contribution. An income tax is fair in the sense in which a compulsory uniform military service requirement is fair. Each taxpayer is required to devote an equal (under a proportional income tax) amount of each year's income-producing efforts to the government. This concept is sometimes better captured in popular descriptions of the income tax than in the academic literatures. When we read, for example, that the average taxpayer "works for the government" for so many months per year we see not only a vivid description of the size of our tax burden, but an insight into the nature of an income tax.

Id. at 384 - 85. As Gunn is aware, an income tax leaves untouched people who earn no income; unlike universal conscription, which makes everyone serve, an income tax allows some to shift the

Plainly, this principle cannot justify a tax on wealth, because how much people own bears no uniform relation to their wage rates, because people save different fractions of what they earn, and because people devote different amounts of time to income-producing activities. It also seems unattractive as a principle of justice for allocating the costs of public goods. From a non-consequentialist perspective, if people are equally able and have the same range of opportunities, fair and equal treatment seems to imply that they be asked to make equal nominal contributions to the cost of supplying public goods if benefits cannot be traced to particular people. Nobody earns less than another person except by choice or bad fortune attending a decision taken with known risks, and by hypothesis all enjoy the same benefits from government undertakings that must be paid for through their contributions. To set equal labor time as the measure of equal contribution is effectively to say that, although all could pay equal amounts because all have the same opportunities, those who choose to work at less lucrative pursuits (or not at all) or who have less than average success in risky undertakings can, through these choices, pass part of the cost of the equal benefits they receive to those who do better. But with what right can they shift their share in this way? If all are equally well situated and bear responsibility for their convictions and choices, then one might sensibly maintain that they should be seen as choosing a profession, idleness, or investments against the backdrop of their known obligation to hoist their share of the load of government activities from which they benefit as much as everyone

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burden of service entirely onto others by not pulling on their boots. So, too, would a tax on wage rates that did not impute wages to domestic labor or, for those who do no work at all, to their leisure. Unlike a tax on wage rates, an income tax would demand larger contributions to the public fisc from people who labor longer at income-producing tasks and not be insensitive to their chosen trade-off between market labor and other activities, as a tax on wage rates would be (except insofar as people labor too little to afford the tax).

else. And though welfare consequentialists deny that people may be held materially responsible for their choices in this regard and would not be upset by a rule requiring people to make unequal contributions according to their earnings or their income over a fixed period of time, they would reject the second principle too. For them, the standard ought not to be the equal loss of time, but the minimum aggregate loss of utility (holding some spending scheme constant), and there is scant reason to believe that the same number of days' worth of work given up to the state by everyone would cost each the same.

The third version of the fair sacrifice principle holds that people ought to make equal proportional sacrifices to fund government endeavors, with each person's sacrifice being measured, as with the first version, by the amount of utility or welfare he surrenders in return for the greater goods provided by the state. As with the earlier versions, this one cannot buttress a tax on wealth rather than income, because people's saving patterns differ. If those who consumed great sums as they earned them could duck taxes altogether while people with humble incomes were constrained to save for old age and adversity and thus also expose themselves to carrying the cost of government, proportional sacrifices would not be demanded. Not surprisingly, this version of the principle originally was proposed as a tax on income instead of wealth, perhaps prompted by the judgment that the principle of equal absolute sacrifice would not tax the rich sufficiently more than it taxed the lowly and that this modification would shift part of the burden towards the more prosperous.[89] A proportional sacrifice rule is impossible to defend on utilitarian grounds and it is unappealing on other grounds. The idea

[89] See Fried, Progressive Assault, note 37, at 154 and accompanying notes.

seems to be that it is intuitively just that everyone make the same proportional sacrifice to fund government activities because that would preserve their relative pre-tax positions and not alter this presumably just or natural distribution of well-being. But if government activities are assumed to benefit each person equally – a premise of fair sacrifice views, at least of the non-consequentialist sort, else the benefit principle could be applied to match fees to pay-offs – then the overall effect of taxes together with the state's provision of public goods would be to alter people's relative pre-tax positions. Why anyone would want to keep relative positions the same with respect to contributions but not with respect to benefits, and thus perforce not with respect to the sum of contributions and benefits, is obscure.

The fourth fair sacrifice principle requires that taxpayers' marginal sacrifices, measured in utility terms, be equal. Although clearly an unsuitable base for a tax on wealth rather than income, for the same reason that the first and third versions of the fair sacrifice principle fail, this principle has impeccable utilitarian credentials. Taking from each until marginal sacrifices are equal would minimize taxpayers' total sacrifice if their utility curves were continuous. This fourth version also has an obviously problematic implication: given steadily declining marginal utility curves for all taxpayers, it would require confiscating the top income (if income is the right base) until it was reduced to the next highest income level, then taxing that next highest income at a rate of one hundred percent until it was cut down to the highest income level below it, and so on until enough income was collected to pay for all public goods.[90]

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[90] Id. at 154 - 55; Head, note 65, at 11. As a utilitarian principle of contribution, this principle's scope cannot be limited to the funding of public goods in any evident way. It would sustain taxes on high earners for redistribution to the poor as well, except as constrained by adverse incentive effects.

High earnings would be leveled from the top down to fund public goods, with no citizen owing tax until all incomes above his were shaved down to his level. This draconian levy would bleed incentives to earn more than the sum at which taxes were first owed. Inevitably, it would have to be modified to ameliorate incentive problems. Rates on top incomes would have to be brought below one hundred percent to induce people to labor rather than loaf once their income came within range of the tax. Although a rate reduction might well comport with the utilitarian principle once the collectively beneficial long-term effects of the lower tax are factored in, it reveals that the equal-marginal-sacrifice view cannot be sustained as an independent guide to setting taxes to pay for public goods.

Regardless of the possible merits of the various fair-sacrifice views as rules for income taxation, none supports a tax on wealth as a just mechanism for paying for public goods. Nor, as we have seen, can a powerful case be built atop the benefit principle. A wealth tax can be justified on this principle only if the benefit of protecting property can be sundered from the benefit of protecting its owner's life and freedom, if the magnitude of that benefit does not vary unacceptably widely with respect to a person's net worth, and if its size is large enough to justify the creation of a special tax on wealth in view of the administrative costs it would entail. These conditions would be difficult to fulfill. Even if they could be, the tax probably would have to be imposed at marginal rates that decline or remain constant as total wealth increases and its yield would likely be low. If a tax on wealth were a justifiable means of paying for a small wedge of government services, it would not bear the visage of any wealth tax considered or adopted by any actual legislature.

D. Resource Rents and Redistribution

If the most compelling principles of justice for allocating the non-redistributive burdens of government cannot vindicate a wealth tax, might a wealth tax nevertheless be implied by some fundamental notion of distributive justice?

1. Left Libertarianism and Collective Ownership

A number of non-consequentialist theories of justice contend that a wealth tax flows fairly directly from one popular bedrock conception of equality in distribution. These theories disagree about the breadth of the tax base and about how the proceeds of the tax ought to be redistributed. But they share a common starting point.

Their chief premise is that every intelligent human being capable of acting reasonably and morally is the equal of every other so far as social justice is concerned, and that as moral equals people have two sets of ownership rights. First, they own themselves. Roughly, this means that they are free to lead their lives as they choose as long as they do not infringe others' rights, that they may not be forced to labor for the good of others, and that they may not be injured or their bodies used by other people without their consent. Second, they are entitled to equal shares of the world's unowned, or commonly owned, resources. The root idea is that people are born as equals into a world of valuable entities, none more deserving than the next, and that as equals they naturally have equal claims to those entities. The fact that some are born early and some are born late is morally irrelevant, just as it is irrelevant that some first experience life amidst natural plenty whereas others enter a world of bracken and sand. People may, indeed they must, use the resources that surround them to live. But they may

not simply seize what they desire and turn it to their purposes, regardless of what others have or want.[91] None is entitled to more than others.

According to these theorists, we may think of private appropriation in one of two apparently equivalent ways. Either everyone owns the Earth in common, so that those who use valuable resources must pay their co-owners for what they remove from the common store. Or nobody owns the world's resources initially but any private use today necessarily would violate John Locke's proviso that private appropriation is permissible only if the appropriator leaves "enough, and as good," for others.[92] Private use would violate the proviso because the removal of any part of the whole leaves one's contemporaries – and often more obviously later generations, if the property stays in private hands as the population increases – with less than an equally valuable share of the bundle. To be sure, a system of private ownership that gives exclusive possessory, use, and transfer rights to first takers yields collective benefits, but those benefits are insufficient, in the view of these theorists, to win collective consent. At least they compare unfavorably to the benefits of requiring first and subsequent takers to compensate their moral equals for what they have taken. Likewise, as a different though potentially convergent approach would have it, the benefits of letting people keep what they grab are too small to

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[91] This assertion may be false if resources are too scant to sustain all who lay claim to them and the claimants are unable to bring more resources to their locale or to move to areas of unclaimed surfeit. In that case, equal shares for each would mean death to all. But the focus of the theories of distributive justice under discussion is not on desperate circumstances rarely seen outside the fictional or long-forgotten state of nature, but on the common, modern situation of material abundance, where the question usually is not "Who will live?" but rather "Who will get how much of what when all have enough to survive?"

[92] John Locke, Two Treatises of Government, Second Treatise, ch. v, paras. 27, 33 (Peter Laslett ed., Cambridge U.P. 1960) (1690).

be part of a set of principles that no participant could reasonably reject as a basis for informed, unforced general agreement.[93] The rule would be unfair. Many libertarians question this last claim and would impose no compensation requirement on first appropriators or would hold them subject only to an anemic form of Locke's proviso,[94] but the claim's acceptance is what gives self-labeled "left libertarian" theories a family resemblance.

Which resources count as "unowned" or "commonly owned" for the purpose of determining contemporary entitlements, how earlier appropriators should be charged for the use or destruction of these resources, and how the revenue collected from these appropriators should be distributed to those with smaller-than-average shares of the common stock, are questions that divide these related theories. One venerable view holds that land and what is on it (apart from people) or under it are the only natural resources owned by humankind in common, and that those who never were given shares as valuable as their fractional interests in the aggregate value of all land, minerals, and naturally occurring flora and fauna are entitled to compensation from those who received more than their share, whether in a lump sum upon attaining majority[95] or by means of payments over time that are tantamount to rental

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[93] T.M. Scanlon's version of what he terms "contractualism" holds that "[a]n act is wrong if its performance under the circumstances would be disallowed by any set of rules for the general regulation of behavior which no one could reasonably reject as a basis for informed, unforced general agreement." T.M Scanlon, Contractualism and Utilitarianism, in Utilitarianism and Beyond 103, 110 (Amartya Sen & Bernard Williams eds., 1982). For Scanlon's latest, detailed elucidation of this idea, see T.M. Scanlon, What We Owe To Each Other 189 - 247 (1998).

[94] See, e.g., Nozick, note 72, at 174 - 82.

[95] Thomas Paine contended that "the first principle of civilization ought to have been, and ought still to be, that the condition of every person born into the world, after a state of civilization commences, ought not to be worse than if he had been born before that period," and since every person originally "would have been a joint life-proprietor with the rest in the property of the soil, and in all its natural

payments from those using those resources or that are equivalent to restitutionary payments from those who destroy them (perhaps because they are consumed by use, as when gas is burned).[96] One contemporary left libertarian, Hillel Steiner, conceives of the common pool of resources more capaciously. He adds to this list property owned by decedents at the time of their deaths, cadavers, and the germ-line genetic information embodied in children. These items, or the proceeds from their sale if relatives of a decedent assert their right of first refusal and purchase goods left at death, plus the rental value of a child's germ-line genetic information payable by its parents, comprise what Steiner calls

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productions, vegetable and animal," each is entitled to his share of the ground rent owed by every person who uses these naturally jointly owned resources. See Paine, note 24, at 398. For further discussion of Paine's view, see note 24.

[96] The leading exponents of this view were progressive nineteenth-century thinkers, such as Herbert Spencer and Henry George, attempting to justify wealth redistribution to the poor and landless. For a taxonomy of libertarian views with common-ownership starting points, see Peter Vallentyne, Critical Notice: G.A. Cohen's Self-Ownership, Freedom, and Equality, 28 Can. J. Phil.609, 618 - 25 (1998). Vallentyne is one contemporary left libertarian who accepts this view, though he disagrees with most others on one important point. Vallentyne rejects an equal distribution of the rents paid by all users of natural assets and of the amounts they paid for resources they harmed or destroyed. He believes that people who are worse off through no fault of their own should receive larger shares of these rental or destruction payments. Peter Vallentyne, Self-Ownership and Equality: Brute Luck, Gifts, Universal Dominance, and Leximin, 107 Ethics 321, 327 - 32 (1997) [hereinafter Self-Ownership]. Vallentyne rejects the claim shared by many liberal egalitarians today that people who are able to earn more or live better thanks to personal endowments for which they are not responsible have a duty to share their higher incomes with those who are blamelessly less fortunate. See, e.g., Rakowski, note 32, at 120 - 48; Ronald Dworkin, What Is Equality? Part 2: Equality of Resources, 10 Phil. & Pub. Aff. 283 (1981) [hereinafter Equality Part 2]; G.A. Cohen, On the Currency of Egalitarian Justice, 99 Ethics 906 (1989) [hereinafter Currency]. Vallentyne does so because he espouses a strong view of self-ownership that encompasses not just a person's body but her talents as well. He maintains, however, that inherently social resources, such as land, should not be seen as owned equally by all self-owners, but as available means for reducing inequalities traceable to chance events against which people could not fully insure and the risk of which they did not choose to run.

the "global redress fund" from which equal payments ought to be made to all living persons.[97]

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[97] Hillel Steiner, An Essay on Rights 229 - 82 (1994) [hereinafter Essay on Rights]. Steiner's view prompts a number of questions I cannot pursue here. For example, Steiner makes the controversial claim that a person may give property to another while she is alive without having to contribute to the global fund and thus without having to share her gift with people other than the intended donee, but that she has no equivalent right to leave that property to a chosen donee at her death. Id. at 250 - 58. Her property becomes a collective resource when she dies. A society might find it advantageous to permit people to transfer part of their property to selected others when they die by means of wills or some default rule of intestate succession, to preserve incentives to earn, save, and maintain property that benefit the majority of people over time. But neither donors nor donees have a right to any particular rule.

Steiner's contrast between the moral efficacy of inter vivos and testamentary gifts is striking and puzzling. Why is a gift seconds before death morally protected, so that social interference with the gift would wrong, whereas a gift intended to pass property the instant after death only achieves its purpose if the community decides to permit it? Steiner's answer is that the "choice" theory of rights allows the transfer of property only by its rightful owner, and that having an ownership right requires that the person be able to press a claim against anyone who invades his property or impedes its transfer to another. A dead person cannot press a claim in this way, however; he lacks volition. And one cannot legitimately imagine the decedent passing on his right to press a claim to his property at the moment of his death, because that transfer of an enforcement right would require exactly the same sort of post-mortem volition that prevents him from transferring property after death.

The "choice" theory is controversial, as Steiner admits. But even if his claim about the discontinuity that death introduces were true, it would seem a simple matter for people to avoid having their property confiscated at death without divesting control prior to death by putting it in a private express trust while they are alive. An inter vivos trust naming the settlor as the principal beneficiary would allow the settlor to use the property until his death or to consume it during his lifetime, while passing any property remaining at his death automatically, by the terms of the trust, to a named beneficiary. Trusts of this kind are common in the United States and Britain, because they allow people to escape the expense, delay, and publicity of probate proceedings.

In an article published in advance of An Essay on Rights, Steiner asserts that "a case can be made that the institution of legal 'trusts' . . . is incompatible with the Choice Theory of rights embraced by libertarianism." Hillel Steiner, Three Just Taxes, in Arguing for Basic Income: Ethical Foundations for a Radical Reform 81, 89 (Philippe Van Parijs ed. 1992). A footnote appended to this sentence reads: "The argument here would be that the notion of 'trusteeship,' both historically and conceptually, is more at home in the Interest Theory of rights, owing (as with bequest) to the non-bilateral character of the sets of jural relations constituting it and their ineliminable reference to the state." Id. at 90 n.16.

This is at best a gesture at an argument, not an argument itself. From these brief remarks, it is hard to see Steiner's point. If a person puts property in trust, perhaps reserving certain benefits or powers to himself but in any case making one or more other people or entities beneficiaries of the trust in the event that he dies or certain other events occur, where is there a violation of the rule that rights be bilateral in character? There always is somebody – the settlor of the trust or a specified beneficiary – who has a claim against the trust corpus and can hold the trustee to account, where the claim is either original to the settlor or given to a beneficiary while the settlor is alive.

Is the problem, in Steiner's view, that the settlor retains the power to alter the disposition of trust assets prior to his death, just as when he owns property outright? It is hard to see why this would be a problem, so long as there always is somebody or some entity that can enforce a claim to the property placed in trust against a trustee's misfeasance and that, singly or together, can terminate the trust and take full possession of the assets. That a beneficiary's identity might be changed seems unimportant, so long as at least one besides the settlor exists – and one has to exist for a trust to come into and remain in being. Perhaps, though, Steiner's concern is that a revocable trust that allows the settlor to use the trust assets freely for himself while alive and that benefits others only upon his death is tantamount to the settlor's outright ownership of the property, with some other owner taking over only upon his death, as through a will, and having very few enforcement powers and no right to sell or transfer property before the settlor dies. Although a trustee is the legal owner of the property, an important element of the contingent beneficiary's claim only springs into being at the settlor's death, just as a devisee's does under a will.

If this is the problem, it can to some extent be solved, though this solution would make an inter vivos trust less attractive to many potential settlors. The settlor could create an <u>irrevocable</u> inter vivos trust providing for himself or others while he is alive and for others on his death, so that he parts with this potentially objectionable aspect of ownership while he still breathes. There seems nothing improper about the sets of rights this structure creates, if I understand Steiner's position. If there is a problem with the settlor's also acting as the sole trustee, because upon his death there would be no person holding legal title to the trust assets except in virtue of the trust document (though that document became effective prior to the settlor's death, unlike a will), that problem can be removed by appointing somebody other than the settlor as trustee or by appointing a co-trustee.

If Steiner would object even to an irrevocable inter vivos trust, then his position has truly sweeping consequences which he nowhere mentions. Any complaint Steiner might make to inter vivos trusts that are irrevocable or that have somebody other than the settlor as a trustee would render impossible as a matter of natural right – though they could exist by community choice – not just inter vivos trusts but also life insurance contracts, pay-on-death provisions relating to money in pension funds or investment accounts, partnership agreements providing for a partner's death, and all joint tenancies (which give to the surviving joint tenant or tenants whatever interest in the property belonged to the

deceased joint tenant immediately upon his death). Are these essentially contractual agreements really unimaginable in a state of nature?

Suppose for some dark reason they are. In that case, a would-be testamentary donor still could attain his end in some cases, effectively sidestepping Steiner's objection that a dead person lacks the volition that natural rights presuppose (and, I assume, the objection that written commands cannot effectively be given to take effect a split second before a person expires because that moment cannot be identified until after it has passed). He could do so by entering into a contract with his intended beneficiary. In exchange for an inter vivos transfer of property by the would-be testator, the other party would agree to pay the would-be donor a regular income or some other stipulated support while he is alive, with the beneficiary keeping the remainder at death. This would be tantamount to a standard annuity contract, which is strictly bilateral and which surely could be entered into in a state of nature. Many U.S. donors make such arrangements now with charitable beneficiaries by creating charitable remainder unitrusts or annuity trusts. See IRC § 2055.

While it might at first be thought that private or charitable annuities are much more limiting than wills and revocable trusts because the eventual beneficiary must be chosen some time in advance of a person's death, one can imagine that limitation falling away in a state of nature too. People might begin turning over their money to companies that promised to invest the money that the companies then owned in whatever way the contributor specified and to make any payments that he demanded while he was alive or at his death in return for an administration fee. In addition, we can imagine that the donor would have the power to alter the designation of post-death beneficiaries at any time prior to his death. To be sure, the companies' promises would not be enforceable at law. But one can suppose that companies would find it commercially prudent always to fulfill their promises – their management fees would depend on their doing so – and not keep the money they were given lest business dry up. At the same time, contributors could make outright gifts to potential beneficiaries enabling them to purchase private insurance against companies' breaching their promises (as contributors could buy insurance against the companies' doing so while a contributor was alive). This web of agreements and protections could achieve roughly the same objectives as revocable inter vivos trusts, albeit at higher transaction costs. It could be that Steiner would propose outlawing all private express trusts, as the legal systems of Continental Europe traditionally have done, and prohibiting all potentially equivalent devices such as life insurance, annuity contracts, and joint ownership with right of survivorship, as those legal systems have in most cases not done. But it is not clear on what ground Steiner could defend this blanket proscription consistent with his views. If people are free to dispose of property while they are alive, what moral principle prevents them from transferring legal title to a trustee and binding the trustee's later disposition of the property by contract, or transferring legal title to a beneficiary and contractually limiting the beneficiary's use of that property while the donor is alive?

Other doubts surface in respect to Steiner's confessedly diffident approach to germ-line genetic

information. Steiner argues that people need not pay into the global compensation fund the rental value of their germ-line genetic information while they are adults, because people own themselves. But he says that parents are required to pay into the fund the value of the genetic information contained in their children while the children are minors, because the parents received that genetic information from their ancestors and did not create it through their own efforts. Steiner, Essay on Rights, at 247 - 48, 274 - 80. One fundamental question, which Steiner does not answer squarely, is why we should view genetic information as collectively owned but rented by parents up to the moment a child becomes an adult. Why should we not regard Adam and Eve (or whoever the first progenitors were) as complete owners of their genetic codes who made non-taxable gifts of the information contained in them to their children, and so on to each succeeding generation?

It also is unclear how the value of genetic information can be teased apart from the value of a child's realized talents, which as Steiner recognizes depend on much more than its genes. Steiner does not suggest how that might be done, nor does he say what price we might realistically place on that information today in the case of an average child and how he would calculate that figure. Because the value of a child's genetic capacity depends on the environment in which it develops and because in Steiner's view parents are largely responsible for that environment and may not be taxed on the benefits they give to their children, it is obscure how he wishes to value genetic information over a typical childhood. One wonders whether this approach would make childbearing fantastically expensive, producing something akin to slavery for parents with very fortunate children (unless private insurance to cover parents' tax liability became available and those with assets to protect bought it before having children). One also wonders what for Steiner counts as a set of valuable traits in children. Are those traits that make the children, as children, specially lovable? Or are they traits that enable them to earn fortunes on television? Or does Steiner have in mind genetic characteristics that will benefit children only after they have become adults? If the latter is what he has in mind, how can parents be required to pay when their children are small for benefits that the parents do not themselves receive and which cannot be valued even approximately for decades to come?

Lastly and in my view decisively, there seems no basis within Steiner's theory for taxing parents on the value of genetic information, as Alan Carling has pointed out, because that information is not used up or otherwise expropriated when children are born. The information implicit in a genetic code is not a destructible resource like land or trees, or a piece of intellectual property which temporarily is withheld from others; it is a public good, like knowledge, which in no important sense (unlike, say, trade secrets) is taken from the pool of information available to all. Because there is no preclusive use, no compensation is due. Alan Carling, Just Two Just Taxes, in Arguing for Basic Income, supra, at 93.

Accepting Steiner's claim appears, moreover, to have odd consequences. If parents had to compensate others when they used genetic information in bearing children, all property owners apparently would owe compensation when they used or destroyed any physical object, on account of

Michael Otsuka's attempted reconciliation of a Lockean principle of justice in acquisition with an egalitarian gloss on Locke's proviso produces a different result. Otsuka believes that all "worldly resources" (an undefined term that does, however, exclude a person's body) are available for allocation, but that ideally they should be allocated so that each person has the same opportunity to achieve an equally high level of welfare, which generally would mean giving more worldly resources to people who are less able to earn high monetary and experiential returns from their labor.[98] Finally, Philippe Van Parijs's approach starts from an assumption of equal entitlement but marks the divide between common and private ownership differently. Van Parijs shares the belief that the value of all external assets, fixed by what people would be willing to pay for them in a market in equilibrium, ought to be divided equally, with those who use more than their share compensating those who appropriate less.[99] But Van Parijs argues that <u>everything</u> of value in the world into which people happen to have been born, apart from other people and what those people have earned the right to possess during their lives, is a common asset available for division. In effect, people all have equal claims to the aggregate

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the information embodied in its molecular structure, atomic properties, and conscious design (however any of those components might be valued). That makes no sense. And if the problem with children is parents' nondisclosure of the genetic information they are using, then parents presumably could escape their payment obligation by making available their offspring's genetic blueprints, at least once that becomes possible. (Before it does, the state could never know how much to charge them, which is a different problem.) It hardly seems reasonable to make parents' rental payments depend upon how much they are willing to tell the world about their children's genes.

[98] Michael Otsuka, Self-Ownership and Equality: A Lockean Reconciliation, 27 Phil. & Pub. Aff. 65, 77 - 91 (1998).

[99] Van Parijs, note 24, at 99 - 100.

value of all property given away during a person's lifetime or left by her at death.[100]

These left libertarian views appear to entail wealth taxes of differing sorts, in most cases in conjunction with other types of taxes. Wealth taxes would be the equivalent of rental charges for the use of resources owned equally by all, and their proceeds would be distributed equally to everyone in their role as lessors.[101] They might be supplemented, of course, by other taxes to pay for government services; for these theories, wealth taxes substituting for rents are a means to achieve distributive justice, not a way to allocate the costs of government fairly. If, however, people were thought obligated to pay equal amounts for government services and if they had no redistributive obligation beyond that

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[100] If people are equally talented, Van Parijs says, then what matters

> is of course the whole set of external means that affect people's capacity to pursue their conceptions of the good life, irrespective of whether they are natural or produced. External endowments, in other words, include whatever usable external objects in the broadest sense individuals receive access to. Such material objects as factories and stamp collections, private houses and public bridges, such immaterial objects as nursery rhymes and computer programmes, the work ethic and nuclear technology constitute external assets on a par with beaches, pumpkins, and parrots. The relevant pool coincides with the external wealth with which people are endowed. An equal distribution of their value therefore amounts to taxing the value of all gifts and bequests at 100 per cent and distributing the proceeds in the form of a uniform basic income.

Id. at 101. Van Parijs goes on to argue that gratuitous transfers ought not to be confiscated completely, because the disincentive effects of that policy would bring tax collections below what they would be if the rate were lower. Because people can be assumed to want policies that maximize the per capita basic income paid to all, he argues, they would have to favor a tax on gratuitous transfers that fell short of one hundred percent. Id. at 101 - 02. Van Parijs does not speculate as to what the rate structure would have to look like to achieve that end.

[101] As already noted, this would not occur under Vallentyne's theory, because he believes that naturally occurring assets are not held equally by all but rather that they ought to be used first to ameliorate the plight of those who suffered from specially bad luck which they could not guard against. See Vallentyne, Self-Ownership, note 96, at 327 - 32.

represented by the equal distribution of wealth tax revenue, the proceeds of the wealth tax could be shunted to pay for government undertakings, perhaps making supplementary taxes unnecessary.

The wealth taxes these theories entail would not be net worth taxes. Nor would they resemble any extant wealth taxes. Most of these views would limit the wealth tax base to natural resources, such as land,[102] and indeed only to the value of the resource apart from human improvements to it. The tax rate applicable to that portion of a natural asset's value apparently would be higher than any country imposes today by way of a tax on wealth. The tax would be set equal to the rental value of the taxed resource, and the ratio of annual rental value to price generally is more than two or three percent, especially if the price does not take into account the asset's potential future appreciation.[103] The rates would not be progressive or vary in any regular way with the taxpayer's income or her total wealth. The only large exception to these generalizations is supplied by Van Parijs's view, which arguably supports a perfectly general, proportional tax on wealth. That is not, however, the conclusion that he himself draws from his premises.[104]

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[102] Natural resources that are destroyed by use, such as oil and gas, would be sold rather than rented. The sales revenue would then be shared by all, either equally or according to whatever formula the theory specified.

[103] This exclusion seems warranted because these theories appear to contemplate a change in the tax or rent whenever an asset appreciates in value, thereby reserving to the government, and ultimately to the people who share its fortunes, the gain from increases in the value of natural resources. For further discussion of this point, see text accompanying notes 109 - 111.

[104] Van Parijs claims that giving everyone an equal share of the overall value of both artificial and natural assets is equivalent to confiscating all property passing between people gratuitously and then distributing the proceeds equally over time by means of a basic income payable to rich and poor alike. Van Parijs, note 24, at 101. He does not defend a confiscatory accessions or unified estate-and-gift tax on balance, because the chief objective, he believes, is to maximize the yield from the tax and thus the basic income dependent on it. Rates below 100% would raise the most revenue. Id. at 101 - 02.

2. Objections to Left Libertarianism

There are numerous reasons one might reject left libertarian theories. Those to the right contend that the Earth does not belong equally to all, at least not since land and other resources were

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Nor would this wealth transfer tax be the only or indeed the primary funding source for a basic income, because employment itself, at a wage that typically exceeds the amount necessary to induce people to take the jobs they have, should in Van Parijs's view be considered an asset that properly may be taxed for redistributive ends. Id. at 106 - 30.

Van Parijs does not justify his claim that confiscating all wealth transfers and dividing the proceeds equally is equivalent to giving people equal shares of all external assets. Although the equivalence claim would offer a neat solution to some of the valuation problems that plague other left libertarian theories, there are at least two reasons to question it. First, natural assets can change considerably in value over time, benefitting or harming their owners in ways that the owners do not eventually pass on to others. For example, a landowner might see the value of his plot skyrocket, leading him to increase the rent he charges and permitting him to live lavishly. The land's value might then plummet when he grows old, so that he leaves at death a plot worth no more than when he acquired it. Nevertheless, he has had a life of greater welfare and opportunity than somebody whose land's value never changed, even though the two were in other respects the same. Van Parijs's scheme would tax the two equally, it appears, but his abiding ambition to redistribute the differential rents people earn seems to require that the lucky landowner compensate the unlucky one. The same might be said of other consumed gains from the speculative buying and selling of natural resources. The only way to redistribute these gains is by routinely valuing privately held assets and taxing them, instead of waiting until the owner's death or her transfer of the assets to others. It is conceivable that Van Parijs recognizes this point but does not advocate a wealth tax because he believes that the marginal gains it offers over a wealth transfer tax could not justify its extra costs. If this is his view, however, he never states it.

Second, Van Parijs's scheme does not take into account the variable length of people's lives. Some people hold onto land or other natural resources for longer periods than others just because they live longer; if longer life is a benefit, they enjoy more of a good that Van Parijs puts under the heading of "freedom." But an accessions tax that does not depend on the length of time that somebody holds property would not be sensitive to these differences in longevity. I explore in the next Subsection whether a wealth tax can be justified as a holding-period-dependent instantiation of a morally justified wealth transfer tax. For now, I merely note the inability of Van Parijs's proposal to account for this difference in people's assets when his master principle seems on its face to require it. A wealth tax would make good this shortcoming (if it is one) of a wealth transfer tax.

first appropriated in a way that benefitted even those who were too slow or who were born too late to seize their own shares. They deplore wealth taxes as a means for funding government services and doubly so as instruments for unwarranted redistribution. On the other side, many liberal egalitarians would fault left libertarians for championing too robust a notion of individual self-ownership. In their view, left libertarians do not endorse sufficient wealth or income redistribution from people who are able to thrive materially by dint of talents for which they are not personally responsible to people with more modest natural capacities. Unlike critiques by leaner forms of libertarianism, this egalitarian challenge does not imply that any wealth tax and redistribution program entailed by a left libertarian theory would be misguided. Instead, it implies that a wealth tax and redistribution program would have to be supplemented by other tools for reallocating resources or opportunities. If liberal egalitarians are to show that left libertarian theories err in recommending these anomalous forms of a wealth tax, they need different criticisms. I think that compelling criticisms exist, but cannot offer a full refutation of left libertarian views here. Showing that any longstanding, comprehensive theory of distributive justice is mistaken is a large task. Nevertheless, it is worth reviewing some outstanding difficulties of left libertarian theories that bear on the desirability of taxing wealth.

First, like all theories of distributive justice that bless a world very different from the one we live in, left libertarian views confront the problem of getting from here to there. Because people have purchased land in highly unequal amounts in the belief that they were buying temporally unlimited ownership rights and because they have ordered their professional and personal lives on that assumption about property rights, the transition to a world in which all owners became renters is far from easy. It might be so disruptive and unavoidably unjust as to render some second-best solution

more desirable. Making all land available for rent to the highest bidder at tomorrow's auction would be massively unfair to those who invested in land rather than other assets, reasonably expecting that they would not have to pay for their purchase a second time via a second set of installment payments labeled "rent."[105] Perhaps some type of creeping state appropriation of land and other natural resources can be imagined that spreads the unavoidable injustice of acquisition over a long period and over many victims in a way that makes the gains worth the transitory economic and moral costs, but nobody has yet offered a carefully drawn plan.

Second, except for Van Parijs's theory,[106] these views give rise to difficult valuation problems

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[105] How present-day owners who paid for greater property rights than these theories would allow anyone to acquire should be compensated in moving to a world in which all resource users pay rents, and how those who made personal choices and investments in human capital in the expectation that the present regime would continue should be redressed, are questions that most left libertarian theories sidestep. It hardly suffices to assert, as Hillel Steiner does, that when land and other natural resources are seized by the state, "current owners may well be entitled to compensation – but, if so, it's owed by their vendors and not the global fund, since it's those vendors who have sold what wasn't justly theirs to sell." Steiner, note 97, at 273 n.13. Because vendors could raise the same claim against those who sold the property to them and so on back until no seller (or legally liable successor in interest) in the chain of title who is able to pay compensation could be found, Steiner's proposal would spread the costs of transition around in a morally haphazard fashion. Who would have to pay would depend on how successfully title could be traced, who was alive at the time of transition, what assets they then had, and which entities should be forced to shoulder the liabilities of predecessor entities. There is no reason to expect the pattern of losses to approximate an intuitively just sharing of the burdens of transition.

[106] Van Parijs believes that his theory escapes the problem of valuing natural resources on a regular basis, which other left libertarian theories require for the purpose of fairly setting the rent or tax that fills the pool available for equal or misfortune-compensating redistribution. Because he does not distinguish natural assets from those produced by people's labor, as both augment people's real freedom to pursue their aims, Van Parijs, note 24, at 262 n.20, Van Parijs claims that everyone is entitled to the largest sustainable equal share of the overall value of both artificial and natural assets. Id. at 100 - 01. Van Parijs asserts that this aim can be met by means of a wealth transfer tax and the redistribution of its proceeds in equal portions to all. Note 104 offers two reasons to question Van Parijs's claim.

in setting the rental price for indestructible natural resources and the purchase price for those destroyed by use. The standard view, in Hillel Steiner's formulation, contends that the titular owner of a plot of land "owes to the global fund a sum equal to the site's rental value, that is, equal to the rental value of the site alone, exclusive of the value of any alternations in it wrought by labour."[107] Steiner adds that "these values vary with changes in the most valuable uses to which these sites can be put: uses which themselves vary with changes in technology and persons' preference functions."[108] Not only would the establishment of this tax system require frequent, regular assessments to work fairly. It seemingly also would undermine the twin goals of increasing people's well-being and rewarding productive initiative by erasing speculative gains as soon as they accrued, thereby removing existing market incentives to buy or develop land for profit.[109] Those who chose their plots well and who apparently could sell them for a healthy profit would soon see the government hike their rents, erasing all but transient gains and enfeebling their incentive to buy or develop land for profit so long as the profit were to come from the land itself, rather than from the structures erected on it.

One might try introducing a looser fit between the rent payable to the state and a plot's value, as Peter Vallentyne suggests could be done if owners were permitted to retain "good brute luck relating

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[107] Steiner, note 97, at 272 - 73.

[108] Id. at 272.

[109] Even rights-based, egalitarian theories of justice treat improvements in people's well-being as a derivative goal, either because the benefits of achieving what justice apparently requires must be weighed against the costs of realizing those benefits in determining what justice in fact demands or, alternatively and maybe more perspicuously, the demands of justice may be overridden in certain instances either by improvements in some people's well-being or (what often amounts to the same thing) by actual or imagined collective consent by a sufficiently large fraction of those subject to justice's requirements to alter some rule of justice to better their lot.

to the natural resource" just so long as they paid a higher rent than if they lacked that right.[110] This approach might encourage some speculation because it would be possible for speculators in particular cases to beat the odds embodied in the higher rent they were required to pay. If one sets aside potential personal and public gains from gambling, however, this suggestion offers no advantage over Steiner's, because the prospective rewards to speculation would be offset fully by the rent increase. Some might welcome this result,[111] but the inefficiencies introduced into the market by taxing the profits from the rental or sale of land and natural resources more stiffly than other profits should be unwelcome to Steiner and other left libertarians. The uncertainty introduced into investments when the price of leaseholds could not be fixed in advance – all leases from the state would have market adjustment clauses – also would be undesirable, though perhaps private insurance against extraordinary increases (not discussed by left libertarians) would become available and lessen the harm.

Third, most of these left libertarian views leave unspecified the duties that current users of natural resources have to future people. (Unless one believes that we can benefit the dead posthumously, there is nothing to be done for those who went before.)[112] With respect to the Earth's

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[110] Vallentyne, Self-Ownership, note 96, at 330.

[111] John Stuart Mill, for instance, advocated a tax on increases in land values due to "natural causes," such as population growth, exempting only "any increase of income which might be the result of capital expended or industry exerted by the proprietor." Mill, note 24, bk. V, ch. II, § 5. If the exercise of speculative acumen amounts to "industry," then Mill's proposal would not have any dampening effect on the market in land, but Mill's discussion of his proposal suggests that he did not intend so broad an exception to a tax on increased land values.

[112] Several philosophers have defended the idea that people can be harmed by what happens to them after their death, either because the frustration of their earlier existing preferences is morally undesirable or because their identity is best thought of as encompassing or sharing in the outcomes of their projects even after they have died, so that post mortem disrepute or failure worsens a person's

surface, most writers assume that all existing people are entitled to share in its current value, whether equally or according to their comparative misfortune. If the population grows so that each person's share is worth less in the future, that is bad luck for the future people but not a failing for which their predecessors owe compensation.[113] By contrast, if land becomes more valuable due to technological changes or if the population declines and each person's stake rises in value, then future people can count themselves lucky; nevertheless, the expected good luck of future people does not excuse their forebears if they destroy a large share of the resources they themselves inherited to make sure that later generations were no better off than they were.

These positions are more often assumed than argued for, and there is little discussion of when people may destroy natural assets that cannot be replaced, leaving future people with less of these goods or entirely bereft of them. The issues are more complicated than may first appear, however, and in a way that has consequences for a wealth tax designed to achieve justice by left libertarians' lights. Suppose that some group ravages its territory, burning coal dug from scarified hillsides, pumping oil to run smoky motors, polluting rivers, turning gorgeous vistas into waste dumps, and making large stretches of land unusable through radioactive contamination. Have they breached any duty to those

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life. See, e.g., Barbara Baum Levenbook, Harming Someone after His Death, 94 Ethics 407 (1984); George Pitcher, The Misfortunes of the Dead, 21 Am. Phil. Q. 183 (1984). For criticisms of this view, see, e.g., Ernest Partridge, Posthumous Interests and Posthumous Respect, 91 Ethics 243 (1981); Joan C. Callahan, On Harming the Dead, 97 Ethics 341 (1987).

[113] Thus, Steiner contends that people can have rights only against living people, so that future people have no rights against their predecessors after their predecessors have died. Each person's entitlement to natural resources depends on who happens to be alive each time those resources are valued and their worth allocated by population, and not at all on how many people had claims to those resources in the past or how many will have claims in the future. Steiner, note 97, at 259 - 61, 272.

who will follow them?

The answer might be No. If the identities of future people are affected by the policies chosen, then nobody who eventually was born can say that she was wronged by the despoliation that occurred before her birth. Had those environmentally unfriendly policies not been adopted, people would have lived different lives, copulated with different partners or at different times, and given birth to different children, so that they, the people looking back, would never have been conceived had the Earth been exploited less viciously. Thus, they cannot claim that they have been made worse off by the policies and, many would therefore conclude, no wrong has been done, certainly not to them.[114] If this restricted conception of possible wrongs is correct, then left libertarian views limiting ownership and redistributive obligations to the set of people existing at a given time might make sense. (This approach would sit a little uneasily, though, alongside Locke's proviso, with its objective of securing justice for latecomers who entered the race for possession after the sweetest plums had been plucked.) Suppose, however, that we bury these worries about personal identity and stifle any impulse to limit the class of wrongs to those that harm people whose existence is independent of the action being appraised. Suppose that we assert instead that those who use up minerals and damage the natural environment harm future people by depriving them of valuable natural resources. Left libertarians might offer two incompatible lines of response to the problem posed by the purposeful contraction of the stock of

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[114] The difficulty of condemning harmful acts that affect the identities of future people was first set out by Derek Parfit, whose work on harms to future generations has spawned an enormous literature. See, e.g., Derek Parfit, Reasons and Persons 361 - 79 (1984); Gregory S. Kavka, The Paradox of Future Individuals, 11 Phil. & Pub. Aff. 93 (1982); James Woodward, The Non-Identity Problem, 96 Ethics 805 (1986); Matthew Hanser, Harming Future People, 19 Phil. & Pub. Aff. 47 (1990).

natural resources, both of which make the levying of wealth taxes more difficult.

First, they might contend that the wrong inflicted on future people can be counterbalanced by benefits passed on to them, in the form of sleeker technology, physical capital, knowledge, artistic creations, better political and social institutions, and so forth. If this reply is generalized, however, it is not clear that any natural resources should still be considered equally owned by all and the proper basis for a just tax, because the aggregate benefits left or bequeathed to us from the past are immense. If conferring small benefits reduces our duty to leave natural resources intact for future users, or at least only depleted in proportion to the size of our segment of this transtemporal group – an amount that would be impossible to measure if the set of future lives were indefinitely large because indefinitely long, as all groups of contemporaries would then become vanishingly small – then the large benefits that accumulate over time might negate altogether that duty to pass on resources undiminished, or at the very least render it significantly less stringent. Measuring any reduction in its force would be difficult and require a new theory of cross-generational compensation. It also might undermine the legitimacy of a wealth tax. Certainly it would lead to implications radically different from those that left libertarians believe their premises entail.

Second, left libertarians might take the opposite tack and argue that earlier wrongs cannot be canceled by diffuse benefits, but only by more specific, matched reparations. If they take that view, however, then left libertarians need to fix a baseline against which to measure excessive consumption or injury by individual users or a generation of users. Equally important, while government policies might extract full compensation from contemporary and future users of these resources, there has been no systematic correction for past excesses. Some left libertarian theories might therefore be pushed to

conclude that a tax levied on the unimproved value (however that is measured) of existing natural resources would be applied to too narrow a base. If that is so, then perhaps those theories imply a more broadly based wealth tax than they at first appear to do or may entail some non-wealth-based tax to swell the pool of resources available for redistribution.[115] As none of these theories has, to my knowledge, acknowledged this difficulty, it is unclear what their proponents would recommend.

The final difficulty I shall mention is also one that generally goes unexamined. Left libertarian theories assume that everyone has an equal claim to the value of some class of external assets, whether all natural objects or all man-made assets that subsist outside of human capacities and people's bodies. They assume, in effect, that the preferred class of assets is commonly or collectively owned, held ideally in a kind of trust by the state for the benefit of all who ever live. As people are born, they join the ranks of owners and can insist on their share of this good. If the population expands, shares dip; if it decreases, they wax accordingly.

Why think this? The impetus for this view is that no person deserves less of a share of these assets because he was born early or late; all come into the world unaccountable and equal, so each is entitled to an equal share of all but those resources to which others' choices or labor have earned them sole ownership. What this view overlooks, however, or pretends to ignore, is individuals' responsibility

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[115] If a left libertarian asserts, as Van Parijs does, see Van Parijs, note 24, at 101 - 02, that any redistributive tax imposed on natural resource use (or a wider base) should be designed to maximize the tax's yield, then the difficulties noted under this third heading might dissipate, if, for example, there is no way to trace past injustices or attempts to expand the tax base would slow the flow of cash to beneficiaries. Maximizing yield would be a reasonable constraint to impose on <u>any</u> redistributive tax that benefits all recipients equally, because one can safely assume collective consent to the modification of any justified imposition that would leave everyone at least as well as before and some people better off.

for the existence of new claimants. People do not spring into existence spontaneously, through some mechanism beyond our understanding or control; they do not join us as involuntary immigrants from a celestial realm we cannot influence, castaways no less deserving of an opportunity to lead meaningful and comfortable lives than we are. Children gain life through the voluntary actions of other people. The question left libertarian theories must answer is how some people, through their intentional or negligent conduct, may compel everyone else to sacrifice a portion of their entitlement to a newcomer they did not invite and might not want.[116]

If the burden of providing a child with its just share of resources rests with its parents, rather than with the community at large, then left libertarian theories must be substantially reconceived. However appropriate an equal sharing of natural assets might be among a community of adults who happen on new territory and resolve to divide it justly among themselves, the principle of awarding equal shares to each at the expense of everyone else loses its foundation when the population expands through the choices of some of its members. If one person's willful destruction of half of his initial share of the commonwealth does not obligate others to give him more from the shares they acquired and guarded, how can his creation of an equally large shortfall by creating a new person compel others to enrich his baby?

If this question lacks a persuasive answer, parents might be required to supply their offspring with whatever basic stipend justice requires, either in a lump sum or (via a different, more paternalistic

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[116] For additional discussion of this challenge to theories of justice that implicitly assume community responsibility for procreative decisions and an attempt to sketch the obligations that parenthood implies, see Rolf George, Who Should Bear the Cost of Children?, 1 Pub. Aff. Q. 1 (1987); Rakowski, note 32, at 150 - 55, 164 - 66.

tax-and-transfer program) in the form of regular payments over a lifetime or some part of a life that could yield something like the basic income that many left libertarian theorists take their views to imply. But the revenue for these payments would not be furnished by a tax on wealth or natural resources, and the tax would not apply generally, but only to those who assumed the obligations that come with childbearing. Nor would the tax be of indefinite duration, as a wealth tax that substitutes for rents must be; liabilities would be fixed by the number of children for which a person was responsible, not how long that person lived or owned property that was subject to tax. To vindicate wealth taxation, left libertarians therefore must solve not only the transition, valuation, and intertemporal compensation problems. They also must explain why the expensive choice that some people make in having children is in justice an expense each member of the community must help carry in equal measure, not one for parents alone.

E. An Improved Wealth Transfer Tax

In a fundamentally just, liberal state, a wealth tax is an unacceptably clumsy means of thwarting the acquisition of undue political or economic power by rich individuals, as well as an unwarranted and likely ineffective prod to put saved earnings and gratuitous receipts to whatever use promises the highest monetary return. A wealth tax likewise is an unjust mechanism for funding most collectively beneficial government services, because most of the benefits from those services, by any reasonable measure, do not accrue to people in proportion to their wealth. In many cases, a wealth tax enacted to pay for government services would fall unfairly heavily on those who favored postponed consumption over immediate consumption, and the same can be said for a wealth tax designed to accomplish a just

redistribution of resources and opportunities. Even a wealth tax circumscribed to provide people with what some left libertarian theories of distributive justice consider their equal entitlements to nature's bounty face serious moral and practical impediments. A wealth tax therefore appears unable to stand on its own as a vehicle for curbing socially menacing behavior by the rich, for supplying public goods, or for achieving a just allocation of the world's goods. One might yet wonder, though, whether a wealth tax could usefully supplement some other tax that justly apportions the costs of government or of material redistribution. The last three Subsections of this Article consider its possible subsidiary contributions to an accessions tax, a consumption tax, and an income tax, in each case on the undefended assumption that those taxes are morally justified for one or another end.

Suppose that justice requires that people who receive valuable property gratuitously, beyond any basic provision to which they are morally entitled,[117] have a duty to share their good fortune with others insofar as their luck exceeds the norm. Those who reject this assumption probably believe that wealth transfer taxes are unjust and a fortiori that wealth taxes cannot morally serve as their auxiliaries; they need not read this Subsection. Even those who accept this supposition might disagree about a wide range of issues: about which receipts are purely the result of luck and therefore subject to redistributive claims and which are products of people's choices and thus more in the manner of

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[117] The basic stipend to which all people are entitled might equal their share of the world's natural resources or of some larger set of assets. As the preceding Subsection suggests, different theories of justice imply different entitlements, and these theories differ as well in their judgment as to whether these entitlements are owed to people by their parents or by the community, over when they are payable, and over how they are payable. These differences bear careful scrutiny in determining what policies a state ought to adopt, but they have no bearing on whether a wealth tax is a useful complement to or substitute for an accessions tax. I therefore ignore these differences in this Subsection.

earnings they need not share;[118] about whether donors have a moral right to confer their after-tax earnings on others and to substitute another's consumption for their own that overrides at least partially the recipient's duty to share;[119] about the degree to which people who have a just claim to share in gifts

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[118] One might maintain, for example, that gifts received from spouses or friends typically result from the recipient's free choices, initiative, and earned trust or affection. Because they are not primarily products of luck (though luck does of course influence whom we meet and the circumstances in which we meet them), one might argue that these gifts issue in no duty to share, or at most a weak duty to do so. This point is reinforced by a common worry about the social and individual costs of fostering envy regarding personal relationships and of encroaching upon profoundly private decisions, which might be the consequence of attaching tax tags and subsidies to gifts between friends or lovers and then licensing government snooping. Through the medium of hypothetical general consent, this worry could buttress claims that these gifts ought not to be taxed within a contractarian account of justice.

In contrast, gifts that children receive from their parents and relatives far more commonly result from the happenstance of their birth. Some come to consciousness in leafy suburbs, others in slums. Many theories of justice that pivot around unchosen differences in material goods or opportunities regard these gifts as fit objects for redistribution if they exceed average gratuitous receipts.

[119] For one description of this view as a counterweight to a principle for sharing good brute luck, see Rakowski, note 32, at 162 - 63. Some writers distinguish between the original acquirer's right to substitute another person's enjoyment of acquired property for his own, which they take to be strong, and the right of the person he benefitted to pass on that benefit to a third person, which they consider weaker or non-existent. Eugenio Rignano was perhaps the most influential proponent of the idea that the community has a stronger claim to share in gifts of property that the donor received gratuitously than to share in gifts of property that was acquired by the donor's own efforts. Eugenio Rignano, The Social Significance of Death Duties (ed. Josiah Stamp 1926). For an account of Rignano's wealth transfer tax proposal and similar plans to tax the successive transfer of inherited wealth more heavily than gifts of earned wealth, see Alan A. Tait, The Taxation of Personal Wealth 106 - 23 (1967); C. Ronald Chester, Inheritance and Wealth Taxation in a Just Society, 30 Rutgers L. Rev. 62, 72 - 78 (1976).

Robert Nozick now endorses this view in preference to the orthodox libertarian view he once held. He argues that gifts and bequests of property that the owner received by way of gift rather than earned may be confiscated by the state and redistributed to those who are less fortunate, to bring about greater equality in people's starting points. Robert Nozick, The Examined Life 30 - 32 (1989). Nozick's opaque explanation of this distinction is that "[w]hen the original creator or earner passes something on, a considerable portion of his self participates in and constitutes this act, far more so than when a non-earner passes on something he has received but not created." Id. at 31. Stephen Munzer,

to undeserving donees would forgo their claims so as not to discourage gifts altogether and thereby secure the most revenue from a tax on gratuitous transfers they could bargain for;[120] about whether any

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defending one of several potentially conflicting claims to possession he calls the "labor-desert principle," adopts this view, too, without additional elucidation. Munzer writes:

> [T]he labor-desert principle can support at most a one-time power of gift or bequest. Assume arguendo that the laborer (the original owner) can gratuitously transfer certain property to someone else. It does not follow that the transferee in turn can do so. For the transferee did not work to produce the property . . . .

Stephen R. Munzer, A Theory of Property 395 - 96 (1990); see also Vallentyne, Self-Ownership, note 96, at 333.

Neither Nozick nor Munzer offers a full explanation for restricting to the property earner alone the right to give unimpeded, rather than extending it to all objects of his or his donees' largess. If a property earner is free to substitute another person's ownership for his, why does that right to confer untaxed end with the first recipient? A property earner might well intend not just that the first object of his bounty use and consume the gift, but that the first recipient or any person designated by the first recipient benefit from the gift. If the scope of the donor's intention is that broad – and typically it would be, if the alternative is to intend that the community grab a share of whatever the original or a subsequent donee passes on rather than consumes – then why is the state required to give effect only to that portion of the intention that concerns the first donee? There is no obviously special connection between the labor that creates property that is given away and the first person to whom it is given. What unites donor and donee is the donor's benefaction, and there is nothing in the act of earning property that links up with an intention to benefit only one donee, specifically through the donee's consumption of the gift, but not an intention to benefit the donee by giving him a choice between consumption and further gift to a person chosen by the donee or by a subsequent donee.

[120] Bruce Ackerman begins from the proposition that gifts from a parent to a child must be shared equally with all other members of the child's generation, because the child did not earn the gift but received it through his good fortune in having parents willing to give. But, says Ackerman, if a parent could leave only a small fraction of each intended gift to his child, the rest to be gobbled up by others, he would threaten to consume or destroy his possessions and leave nothing for his child. The other children, seeing that a large share of nothing buys exactly that, rationally would agree to accept less than they were entitled to claim to induce donors to leave gifts in which they might share. At what tax rate the bargain would be struck is unclear and ultimately to be decided by majority vote, Ackerman says, but this, he suggests, is how we should reason towards it. Bruce A. Ackerman, Social Justice in the Liberal State 205 - 07, 259 - 61, 294 - 95 (1980).

rule that justice appears initially to entail would be softened by collective agreement (if only people were consulted and chose responsibly), either to lend individuals greater control over property they give away, or to bolster family ties by permitting larger intra-family gifts to be made net of tax, or to advance other values that justice alone neglects; and about how state officials reasonably can measure a person's brute luck over a lifetime relative to others' luck and then take from him or give to him to iron out disparities as they emerge. Disagreements over these issues can run deep, producing a kaleidoscope of competing prescriptions. Nevertheless, these differences should not be allowed to mask a consensus of liberal egalitarian opinion that wealth transfer taxes of some sort are warranted. Because their chief concern is that individuals not be advantaged fortuitously, they logically tend to favor redistributive taxes on abnormally large accessions by donees – inheritances and gifts – rather than taxes on the sum of a donor's lifetime gifts and transfers at death.[121] Receipts from certain sources might escape tax or qualify for lighter levies, for reasons just mentioned, but the common aim of these theories is to reduce recipients' unearned advantages by compelling them to share their luck with people who are less fortunate. Donees stand suspect, not donors.[122]

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[121] Important defenses of this recipient-centered perspective include William Andrews, The Accessions Tax Proposal, 22 Tax L. Rev. 589 (1967); Edward C. Halbach, Jr., An Accessions Tax, 23 Real Prop., Probate & Trust J. 211 (1988); Mark Ascher, Curtailing Inherited Wealth, 89 Mich.L. Rev. 69 (1990); Munzer, note 119, at 395 - 418; David G. Duff, Taxing Inherited Wealth: A Philosophical Argument, 6 Can. J.L. & Juris. 3 (1993). Proposals to tax gifts and other gratuitous transfers as income to the recipient, rather than under a special set of transfer tax rates, adopt this perspective as well. See, e.g., John K. McNulty, A Transfer Tax Alternative: Inclusion Under the Income Tax, 4 Tax Notes 24 (June 28, 1976); Joseph M. Dodge, Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income, 91 Harv. L. Rev. 1177 (1978).

[122] This approach has not found favor with the United States Congress, which continues to tax donors on the sum of their inter vivos gifts and transfers at death, rather than tax donees on their receipts. All states except Nevada impose death taxes designed to capture for the state the amount of

1. The Meade Committee's Proposal

A tax on wealth seems inconsistent with the standard justification for an accessions tax, because saved earnings, after any redistributive tax has been paid on their acquisition, do not constitute a lucky accession to which others also may lay claim. Britain's distinguished Meade Committee suggested, however, that a tax on one form of wealth – on gratuitously received wealth, not on all wealth – would improve on a straightforward accessions tax or separate taxes on gifts and estates.[123] This special sort

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the maximum credit allowed by the federal government against the federal estate tax, although less than a dozen states impose gift taxes. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 1078 (6th ed. 2000). Most states that impose taxes in excess of the creditable amount base their taxes on what recipients obtain by way of inheritance or gift, rather than make taxes turn on the overall size of an estate or of an estate plus lifetime gifts. Id. at 1079. Rates are well below those used by the federal government.

[123] Meade Report, note 59, at 317 - 49. George Cooper offered a similar though considerably more suggestive proposal which lacked the elaborate detail of the Meade Committee's. Cooper, note 15. Mortimer Lipsky proposed a queerer hybrid: an annual wealth tax that would substitute for a tax on the decedent's holdings at death, with the exception of a levy on unrealized capital gains at death, plus a tax on a recipient's gratuitous and earned receipts taken together. Lipsky, note 16, at 177, 182. Depending on the rates chosen for the wealth tax and the receipts tax, this combination could produce a powerful incentive to consume rather than leave property for non-charitable purposes.

Lester Thurow regarded net worth taxes and wealth transfer taxes as substitutes that differed importantly only in the frequency of their collection. In his view, the choice between them reduces "to a choice between whether society just wants to affect the general shape of the wealth distribution, or whether it want to prevent individuals from having massive net worths and the economic power that goes with large fortunes." Thurow, note 18, at 421. If society wants the latter, then a wealth tax is the better instrument, Thurow said, though it would be necessary to offset any wealth tax, he insisted, with "carefully balanced consumption taxes to avoid distortions in economic activities and to avoid excess burdens." Id. at 422. "With such a countervailing tax, an individual would pay exactly the same sum in taxes regardless of whether he decided to consume his net worth or whether he decided to maintain his current investments." Id. Thurow did not mention that a countervailing consumption tax, while reducing one distortion by restoring a prior exchange rate between consumption and saving, would accentuate another distortion, by making paid labor even less attractive relative to leisure or uncompensated self-help than formerly because none of the uses of paid labor's fruits could then escape tax. It is unclear whether the overall effect of tacking on a consumption tax would be desirable, given Thurow's vague

of wealth tax would little resemble the broad-based net worth taxes adopted by many countries. It bears examining, though, as one potentially justifiable tax on wealth rather than its transmission.

The Meade Committee's specific recommendation was that gift, inheritance, estate, and capital transfer taxes be replaced by a Progressive Annual Wealth and Accessions Tax (PAWAT).[124] As with

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desiderata. Nor is it clear why Thurow believed that some notion of justice in distribution or justice in the apportionment of government costs licenses the imposition of an offsetting consumption tax. The same questions apply to Ronald Chester's lightly defended assertion that "[a]n important facet of any viable wealth taxation policy would be a consumption tax that is more highly progressive than wealth and inheritance taxes." C. Ronald Chester, note 119, at 69.

[124] The Committee also provided careful descriptions of two alternatives to a PAWAT. See Meade Report, note 59, at 330 - 35. The first alternative tax has the same structure as a PAWAT but is imposed at a flat rate on gratuitous accessions. When a gift is made from gratuitously received wealth, the donee owes a tax based solely on the difference between the donee's age and the donor's age. The donor would have paid tax on the assumption that she would hold the gift until her 85th birthday, and the donee would pay on the same assumption about himself, while the donor received an offsetting tax credit at the same rate covering the period between the time of the gift and the donor's 85th birthday. In effect, the donee would pay a net tax only to extend the tax's coverage from the donor's 85th birthday to the donee's 85th birthday (if the donee were younger), making the tax depend on their age difference.

This alternative tax's advantages are that taxpayer recordkeeping and state administration both would be easier. As drawn by the Committee (though this feature could be altered), it also would make the timing of gifts out of saved earnings irrelevant to the tax owed. The donee would pay the same tax, based on how many years younger the donee was than the donor, regardless of whether the donor passed on her savings when the donee was young or when he was old. Under the Committee's PAWAT, by contrast, the earlier in his life a gift reaches a beneficiary's hands, the more the beneficiary would owe in tax. The first alternative thus would offer a slight incentive to accelerate the dispersion of wealth, which the Meade Committee considered desirable. The Committee nonetheless rejected a flat rate tax as insufficiently redistributive and as unable to cope well with changes in accessions tax rates over time, which it assumed that legislatures would move up and down.

The Meade Committee also sketched a second, more complicated, up-front transfer tax that approximated the yield of a progressive annual wealth tax that varied with the age gap between donor and donee and that could accommodate rate changes over time. Id. at 333 - 35. It considered this alternative inferior to a PAWAT because it unavoidably would lead to arbitrary results in some cases, because it could be evaded easily in many instances, and because it would furnish even more incentive

any accessions tax, the donee of a gift would pay a tax that depended on the sum of gifts, bequests, and inheritances (in excess of an exemption for small gifts) he had already received. Marginal rates would increase as total accessions grew. Distinctively, marginal rates also would vary inversely with the recipient's age at the time he received a taxable gift. The tax would be set equal to the present value of a wealth tax imposed annually on the amount of the gift between the time the recipient received it and some specified future date, such as the recipient's eighty-fifth birthday.[125] If the donee passed any part of the gift on to another person prior to reaching his eighty-fifth birthday, either by means of an inter vivos gift or by virtue of his death before eighty-five, he or his estate would receive an inflation-adjusted rebate of the prepaid annual wealth tax on the amount of his gift or deathtime transfer between the time it was made and the year of his eighty-fifth birthday.[126] The PAWAT, net of any rebate paid, therefore

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to delay handing on wealth to poorer beneficiaries than a PAWAT, which the Committee thought undesirable. My discussion ignores these alternatives and focuses exclusively on the Committee's preferred PAWAT.

[125] Id. at 321. The Committee's choice of age eighty-five as the terminal point for the present-value calculation was based on a number of factors that need not be set out here. See id. at 339.

[126] The Committee recommended treating gifts made by a donee as coming not from the most highly taxed slice of his accessions, which would maximize rebates for gifts passed on rather than consumed, but rather as comprising a pro rata share of all the slices of his accessions that were taxed at different rates. The refund therefore would be assessed at his average PAWAT rate. Id. at 324. The Committee also favored a simple stacking or tracing rule: gifts would be deemed to come first from prior gifts, bequests, or inheritances received by the donor; consumption would come first out of earnings. Id. at 326.

The Committee's Report does not say how to determine the source of gifts that are less than the total amount of a donor's accessions but that could not in fact have come entirely from those accessions. For example, suppose that a donor received a gift of $100,000 in Year 1, when the donor had no savings and consumed all he earned, spent $50,000 more than he earned in Year 2 by dipping into his gift, saved $100,000 from his earnings in Year 3, and then made a gift himself of $100,000 in Year 4. Would he be treated as passing on $100,000 of his earlier gift (on the theory that he took out

would be equal to a wealth tax on accessions, imposed at higher rates as accessions increased, for however many years the donee held gratuitously received property.[127] One significant exception to this rule would cause the prepaid wealth tax to diverge from an actual wealth tax, however. A donee who consumed a gift – spent it all on a luxury vacation or education for his children – could not obtain a refund of that portion of the PAWAT covering the period between the time he spent the money and his eighty-fifth birthday, even though presumably he would not have had to pay a wealth tax on property that he no longer owned.[128]

Why would it be desirable to make an accessions tax depend not just on how much a recipient receives, but on whether he passes the gift on unconsumed and on how long he holds it before passing it on? Why merge a standard accessions tax with an annual wealth tax in this way, rather than eschew a wealth tax altogether? And if the adoption of a wealth tax limited to inherited wealth is in fact justified, why insist on its prepayment, making rebates available if that wealth is passed on, rather than collect it each year?

The Meade Committee's reply to the first two questions was that a special tax on gratuitously

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a nonrecourse, undocumented loan against the total when he consumed $50,000 in Year 2 and then replenished that amount) or only $50,000, with the other $50,000 coming from his savings and thus not eligible for a PAWAT rebate? Two obvious difficulties with the second approach are that it would increase administrative and compliance costs as well as fraud and that it would reduce recipients' incentives to invest their inheritances wisely, because squandered gifts would decrease their potential future tax liability.

[127] Under the Committee's formula, no additional wealth tax would be payable by donees who kept the property beyond their eighty-fifth birthdays. Id. at 321 n.2. In addition, the Committee proposed indexing the PAWAT calculations for price inflation. Id. at 325 - 26.

[128] Id. at 321.

received wealth is justified "on grounds both of fairness and of economic incentives,"[129] and that a standard accessions tax, though properly keyed to a donee's receipts rather than a donor's aggregate giving, is "undesirable" because "it levies the same tax whether the wealth is held for a long time or for a short period."[130] According to the Committee, "an accessions tax is deficient in that it taxes only the occasion of transfer and does not distinguish between inherited wealth which is held for five years and inherited wealth which is held for fifty years."[131] The Committee said nothing more than that it would be "inappropriate" for a tax to ignore how long somebody possessed inherited wealth,[132] although its earlier statement that "the ownership of wealth confers benefits upon the owner," including "independence, security and influence,"[133] might explain why it believed an accessions tax should be proportional to the recipient's holding period and thus become a species of wealth tax. In addition, one of the Committee's criticisms of capital transfer taxes – that they encourage the use of trusts and generation-skipping gifts to reduce the number of formal, taxable transfers – evidently applies to simple accessions taxes as well.[134] Rebating part of the prepaid wealth tax when a gift was passed on by the

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[129] Id. at 318. Wealth acquired through "effort and enterprise" was said by the Committee, without elaboration, to "deserve better tax treatment" than wealth acquired through an accident of birth. Id. A tax that falls especially heavily on the latter will impede hard work and saving less, presumably, than an equal-yield tax that applies equally to all wealth.

[130] Id. at 320.

[131] Id.

[132] Id.

[133] Id. at 317 - 18.

[134] Id. at 320 - 22.

original donee would ensure that the total tax paid over time with respect to some asset that went unconsumed would not vary with the number of times it was transferred gratuitously. The Committee's proposal thereby obviates the perceived need to enact ad hoc modifications to an accessions tax or to estate and gift taxes, such as tax credits when property ownership turns over rapidly through gifts in quick succession or generation-skipping transfer taxes.[135] Why the Committee thought it unjust to impose a fresh tax whenever wealth was passed to new owners, it did not say. Nor did it explain why

[135] The United States presently employs both of these corrective mechanisms, though neither achieves precisely the same effect as a PAWAT. Currently, a credit is available against a decedent's estate tax for estate tax that was paid on property transferred to the decedent by a transferor who died within ten years before or two years after the decedent's death. IRC § 2013. The size of the credit is 100% if the two deaths occurred within two years of each other, 80% if the transferor predeceased the transferee by more than two but no more than four years, 60% if the gap was more than four years but no more than six years, 40% if it was more than six years but no more than eight years, and 20% if the gap was between eight and ten years. Id. This credit moderates what many perceive as the meanness of taxing property at death twice in a brief span of years, because the first recipient had the bad fortune to die shortly after receiving a valuable legacy; many believe that the ill luck of an abbreviated enjoyment of the property ought not to be compounded by a heavy tax burden when the government took its cut a short while before. Nevertheless, if deaths are widely spaced, the credit does nothing to ensure that two families that pass property from parents to children will pay equal taxes over time. If the members of one family bear children at a later age than members of another family and both sets of parents pass property to their children when the children reach the same specified age, the first family will pay less in taxes over the centuries even if members of both families enjoy lives of equal length. The PAWAT would prevent this from happening, which some find intuitively congenial.

In addition, the generation-skipping transfer tax ensures that gifts that jump a generation and that exceed the $1 million aggregate exemption for each donor are taxed at the high rate of 55%, thus reducing the extent to which families that pass property regularly from parents to children pay more tax over time than those that pass property from grandparents to grandchildren. IRC § 2601 - 2663. In many cases, however, the generation-skipping-transfer tax does not equal the amount that would have been paid in tax had the gift not leapt a generation but had passed through a member of an intermediate generation, because that intermediary might have been in a marginal tax bracket other than 55% and the timing of the taxes could well differ, altering their present value. Any consonance between the generation-skipping transfer tax and the PAWAT in a particular instance would be purely accidental.

a prepaid wealth tax would be preferable to one imposed every year on gratuitously received wealth.[136]

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[136] George Cooper thought the opposite was true and argued for a yearly levy on wealth that originated in a gift or inheritance. He argued that clever tax reduction techniques eviscerated estate and gift taxes. If a tax on gratuitously received wealth were collected annually, however, he speculated that taxpayers would not try as hard to avoid paying it or fight over valuations as doggedly, because the tax rates would be much lower. An annual wealth tax also would be fairer, he said, because it would reflect changes in the value of the property over time and not make the tax liability depend on the year in which a gift just happened to be made or a donor chanced to die. Cooper, note 15, at 34 - 36. Moreover, the problem of having to liquidate assets to pay a transfer tax would shrink, because the amount payable in tax each year would represent just a sliver of the assets' value. Id. at 41.

Cooper's proposal prompts a number of doubts his lecture did nothing to allay. First, and most crucially, if a wealth tax were to collect the same revenue in present-value terms as wealth transfer taxes now do or are intended to raise, and if taxpayers were aware of this equivalence, why would they not fight as hard to establish a valuation precedent that would lower their tax bills over time as they currently fight to lower the taxable value of property transferred by way of gift or bequest? Unless taxpayers were myopic, they would see that reducing asset valuations offered the same pay-off under both regimes, which should make them as tenacious fighters under one tax regime as under the other.

Second, Cooper's sketchy stacking rule appears to treat inter vivos gifts as made first from saved earnings and only later from saved gifts that the donor received, because the donor's wealth tax liability could be reduced only by showing that his total wealth – saved earnings plus gifts received – had fallen below the amount of his lifetime gratuitous accessions. See id. at 51. If a donor had $100,000 in saved earnings and another $500,000 in gratuitous accessions on which he was paying wealth tax, and if he then gave $100,000 to his child, the donor's wealth tax liability would remain the same but the child would now be liable to pay additional wealth tax on $100,000. A standard accessions tax would have the same effect, but a PAWAT would not (at least using the Meade Committee's stacking rule). If the mere possession of inherited wealth is the evil Cooper believes a wealth transfer tax should seek to stem – and that is by no means the only way to justify transfer taxes – then the justice of his stacking rule is open to question. On this rationale, it is quite natural to look on $100,000 of the total $600,000 owned after the transfer as saved earnings that ought not to be subjected to tax.

Third, Cooper's proposal would exempt from tax unearned accessions to wealth that were spent immediately on non-capital assets. A donee who by good fortune received $1 million and squandered it within a few months could escape tax altogether; more generally, recipients who consumed rather than saved, and who therefore enjoyed what most would consider far larger benefits from the gifts they got than those who garnered the often etiolated rewards of mere possession, would pay less in tax; and the faster they spent, the less they would have to share. This implication of

Perhaps a desire to lower administrative costs led the Committee to favor prepayment, though its choice might have originated instead or as well in a desire to ensure that donees who consumed their gifts be taxed the same as those who held onto them throughout their lives. A wealth tax levied each year would burden the profligate less than the acquisitive.

2. Shortcomings and Strengths

The Meade Committee's defense of its proposal almost certainly is too curt to persuade somebody not already convinced of its soundness. Can more be said to justify this strange wealth tax? Or does it lack a stable foundation?

As it stands, the PAWAT implicitly endorses claims that no sensible person would hold, though the Committee seemed unaware of these implications. Most significantly, the PAWAT assumes that the older a person is when she consumes some good, the less valuable her consumption is, and therefore the less heavily a gift to her of that consumption should be taxed. For example, suppose that A and B, who in the past received identical gifts, each receives a gift of $100,000 in the current year, which each consumes immediately. Suppose that A is 20 years old and B is 50 years old at the time of the gift. Because the PAWAT's rate varies inversely with age, and because there is no rebate when a gift is consumed, A would pay considerably more in tax than B – probably more than twice as much, using normal interest rates. Yet each consumed, immediately upon receipt, a gift of equal value. A standard

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Cooper's view, though consistent with the premise that the evil to be combated is the bare holding of wealth received by way of gift, will to many seem morally unattractive. If the proper aim of an accessions tax is to reduce differences in people's fortunes for which they cannot be deemed responsible, Cooper's plan makes little sense.

accessions tax would charge A and B the same. That seems the correct result if the purpose of the tax is to compel A and B to share their unearned good fortune with others, because the two of them were identically advantaged on this occasion and in the past. But that is not what the PAWAT implies. Perhaps one could argue that A's consumption will yield a greater good to A than B's will to B, because A is likely to live longer and A will have that many more pleasant memories of the consumption or might derive some larger long-term benefit from it than will B. Or maybe one could claim that enjoyment typically is sharper when a person is young than when she ages and her perceptual powers flatten or her will to discriminate grows jaded, so that if pleasure is the measure, A has been advantaged more than B. These rationalizations, however, seem strained with respect to a great many people and pleasures, and they surely cannot account for the large disparities in tax treatment that the PAWAT would produce.

The same point can be seen from a different perspective. If a person receives a gift at age 20, he pays the same tax whether he consumes the gift at 20 or he holds it until 85 and passes it on at death. So the PAWAT implicitly equates the benefit from consumption of a sum at 20 and the benefit of holding the sum untouched for 65 years.[137] But that person also pays the same tax if he holds the gift for 30 years and consumes it at age 50. If holding wealth is a genuine benefit, as the PAWAT assumes, and if that benefit is commensurable with consumption, as it also assumes, then the only way to square an equivalent tax on the person who consumes a gift at age 50 and one who consumes it at age 20

[137] I assume that any income the property generated would be taxed under an income tax or be subject to tax under a consumption tax if and when it was consumed. The value of holding the property is its value apart from its income-producing capacity.

when both received the gift at 20 is to assume that identical forms of consumption at 20 and 50 are unequally valuable. Consumption at 50 must be worth less, by whatever is the value of holding wealth for 30 years. Again, there seems no way to justify this claim, especially given the swift pace with which consumption value falls away using the PAWAT's discount rate, and the Meade Committee made no attempt to do so. It seemed not to notice the problem.

It is possible, however, to gather up most of the separate strands of justification underlying the Committee's proposal and to re-weave them to produce a more attractive recommendation. The core reason for imposing an accessions tax is that some people receive unmerited advantages by way of gift, bequest, or inheritance that others do not. If justice requires that good luck of this kind be shared, then a tax aimed at taking from the unusually fortunate to boost those whose luck is shoddy is justified so long as it fairly reflects competing claims, such as (in many theorists' view) the right of people who save their earnings to substitute a donee's consumption for their own.[138] An accessions tax that falls on gifts when they are received and that ignores the uses to which the donee puts them – consumption or further giving by the donee are on a par – supposes that what matters, for the purpose of calculating a recipient's unearned good fortune, is the opportunities those gifts confer on the recipient. A gift of a certain amount confers the same opportunity (when added to earlier accessions) to consume, to save for projected or possible future consumption, or to donate, regardless of who receives it. From this perspective, an age-sensitive tax like a PAWAT is misguided, unless perhaps a recipient outlives the gift for so little time that he does not, realistically, have the same opportunity as other recipients to use his

[138] See note 119.

gift.[139]

But there is another vantage point from which accessions might be regarded, one that gives an essential feature of the PAWAT a more lustrous sheen. One might acknowledge that a gift opens the same opportunity to all recipients, but see the later disposition of that gift, unconsumed and intact, as a relinquishment of that unearned opportunity that should free the recipient-turned-donor from tax. He need not share with others, in this view, because he has made himself into a bare conduit for a gift to the donee he chose. Thus, any tax he paid on the receipt of that opportunity should be refunded to him, as a new tax liability attaches to the new donee. An illuminating analogy here is that of a person blessed with extraordinary talents who chooses not to use them because he does not value them as others do. Liberal egalitarians believe it wrong to tax somebody for special capacities and the opportunities they create if he does not exercise those capacities. In the same way, one might maintain, a donee who passes on a gift to somebody else forgoes an opportunity and ought not to be taxed. It might make sense administratively to impose an accessions tax up front, but on this rationale a rebate of the sort provided by the PAWAT should be available if a gift is passed on to another. It is the new donee who in this view must then share with those who fare less well.

This analogy is imperfect, however, and its failure to mirror the status of personal capacities valued less by their possessor than by other people is one reason why wealth transfer taxation incites controversy. The parallel is inexact because the recipient-turned-donor is more than a conduit. He is

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[139] This way of thinking might justify something akin to the shrinking credit rule of IRC § 2013 for estate taxes paid as a modification of a straight accessions tax. It would not justify the exact rule of § 2013, because what would matter is how soon after a gratuitous accession of any kind a person died, not what the temporal gap was between the donee's death and the donor's death.

not merely a straw employed by the originating donor, a roundabout way of shunting property to the second donee. As owner of the donated property, he chooses the second donee. The question then arises whether this power to choose, itself a valuable opportunity that is independent of the consumption value of the property, should be taxed as a valuable accession to the recipient-turned-donor.

There is no disputing that the power to pass on property to another person generally is desirable. We all derive satisfaction from benefitting people we care about. Indeed, we often benefit in turn from their gratitude, usually in greater measure than we suffer from the ingratitude of those we pass over. The property itself, however, comprising its consumption value along with the possibility of making a future gift of it, is undiminished when it is given away, and the gift leaves behind no means for paying a tax on the exercised opportunity to choose a recipient. Of course, this way of putting the point is tendentious, because part of the gift could have been held back to cover any tax deemed appropriate on the second gratuitous transfer. But the prospect of an epidemic of generosity makes treating the choice of a new beneficiary as tantamount to consuming a gift seem mildly ludicrous: if A passed the property to B who donated it to C who gave it to D who left it for E, the value of the original gift might be exhausted by taxes without anyone actually enjoying the transferred property except as an advertisement of good intentions. Perhaps some would regard the psychic and collateral benefits from displaying generosity as considerable enough to justify the complete redistribution of the donated property to people other than the intended beneficiaries. But this seems to me, as I expect it will to

most others, a misjudgment.[140]

One therefore might defend one of the PAWAT's pieces – a transfer tax rebate for gratuitously acquired property that is later given away – by conceiving of the opportunity to redirect a gift as not among the set of opportunities that matter from the standpoint of justice. No doubt some would reject this defense, but those convinced by it would favor a transfer tax scheme that taxed only the use of donated property by a recipient.[141] The salient questions then would be: what constitutes use of gratuitously received property and how should that use be valued?

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[140] One might see, in this sweep of reasoning, a defense of the Internal Revenue Code's refusal to impose a transfer tax on the donee of a special power of appointment when the donee exercises that power and thereby channels donated property to the recipient of her choice, just so long as she may not claim the property for herself or her estate. But taxing (with minor exceptions) the exercise or lapse of a general power of appointment runs contrary to this argument. See IRC §§ 2041, 2514. The Code's treatment of general powers of appointment is consistent with its imposition of a transfer tax each time property is passed on gratuitously, regardless (with the limited exception of § 2013's variable credit applicable to estate taxes levied in close succession) of how often the gift, like unwanted fruitcake, changes hands. Consistency, however, is no synonym for correctness. The question is whether the Code's uniform treatment of re-transferred gifts and of the exercise or lapse of general powers of appointment is proper when one person passes a gift along to another intact, without nibbling on it while it lies within reach.

[141] One who accepts the argument to this point might favor something like Edward McCaffery's "consumption-without-estate tax," which would tax gifts and bequests only when a recipient consumed them, probably (but not certainly – McCaffery vacillates) at higher rates than would apply to a person's consumption of wealth she earned herself. If what matters for distributive justice is how much people consume in virtue of their good fortune rather than as a result of their decisions and efforts, then it makes sense to tax gifts and bequests only when they are used and not when they are passed along further. See Edward J. McCaffery, The Uneasy Case for Wealth Transfer Taxation, 104 Yale L.J. 283 (1994); Edward J. McCaffery, The Political Liberal Case Against the Estate Tax, 23 Phil. & Pub. Aff. 281 (1994). For criticisms of certain aspects of McCaffery's argument for taxing only the consumption of gifts by their recipients, see Rakowski, Transferring Wealth, note 48; Deborah M. Weiss, Commentary: Liberal Estate Tax Policy, 51 Tax L. Rev. 403, 407- 10 (1996). Unlike the Meade Committee, McCaffery does not suggest taxing people in proportion to how long they hold gifts before they consume them or pass them on.

3. Taxing Consumed and Unconsumed Accessions Separately

What is valuable in the Meade Committee's proposal can be salvaged and recast as two distinct taxes: one on the consumption of gratuitous receipts, and another on the holding of gratuitous receipts until they are consumed or passed on to others.

The PAWAT's weaknesses stem from its unequal taxation of donees of different ages who consume donated property at the same pace or time, as well as from its identical treatment of three categories of donee: (a) those who hold donated property until death at or after 85 without consuming it; (b) donees who hold it for some years and then consume it; and (c) donees who consume it immediately. These deficiencies can be mended by separating the value of consumption (resulting in the destruction of a donated asset or the destruction of its replacement) from the value of holding the asset. The PAWAT therefore might be modified to meld two distinct taxes: (1) a tax that varies directly, probably progressively, with the value of accessions consumed by a donee, but that does not vary with the length of time that the donee retains the property before consuming it; and (2) a wealth tax that varies with the length of time that a donee holds donated property prior to consuming it or giving it away during life or at death.

The first of these taxes – a consumption tax on gifts, bequests, and inheritances – would ensure that two donees of greatly differing ages would incur the same wealth transfer tax if they spent identical gifts as soon as they received them or at any time equally distant from the date of receipt, provided that their consumed accessions to the date of its consumption were equal. The tax rate schedule would depend on which theory of just distribution one accepted and the importance one assigned to the competing values of donor freedom, majority preference, and the creation of incentives to conserve

capital, labor, and save. A tax solely on the consumption of donated property could not easily be levied up front, which the Meade Committee considered one of the chief virtues of its proposal. Because recipients might well spend their gifts more quickly or slowly than their counterparts, the present value of the gift's consumption frequently would not be known when the gift was made. A tax could be imposed, I suppose, on the assumption that all gifts would be consumed in the year they were received, with the burden on taxpayers to claim a rebate if they did not consume the gifts until later or they did not consume the gifts at all. But that approach might make rebate claims hard to figure and monitor and, depending on the stacking rule used, require the valuation of all of the claimant's other assets;[142] administrative and compliance costs would depend on how frequently rebates were made available as consumption was postponed. The attractive simplicity of the Committee's proposal would be lost unless rebates were barred until donated property was consumed or given away again, and even then the tax would be more costly to implement than the PAWAT because of the new rebate for consumed gifts based on the length of time their consumption was deferred and, under a progressive accessions tax, on what other gifts had been consumed beforehand.

The second tax would be a tax on wealth, but limited to wealth acquired gratuitously. Unlike the PAWAT, it would cease once a taxpayer consumed the gift; both passing on a gift to another donee and extinguishing the gift would end wealth tax liability. The justification for the tax offered by the Meade Committee is that holding wealth confers advantages on the holder, such as financial security

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[142] For example, if one assumed that a donee consumed gifts only after other income and savings were consumed, a donee would have to show that the aggregate value of her assets exceeded the inflation- or market-return-adjusted amount of the original gift to show that she had not consumed it and therefore was entitled to a refund for that year.

and influence over others, even if the wealth is never spent and independent of any income it earns, which presumably would be taxable under a tax on income or consumed income. Some have argued that these advantages of ownership justify a wealth tax as a complement to a broad-based consumption tax or income tax – arguments I consider and reject in the next two Subsections. But the argument has considerably more force when its scope is limited to gratuitous transfers of wealth. Regardless of whether one favors an income tax or a consumption tax on earned income, one might maintain that a gift of property or money that the recipient never spends is nonetheless a valuable accession to his set of resources and opportunities, as an insurance policy or a financial guarantee would be. Taxing this benefit so long as a recipient holds the donated property makes sense if this thesis is correct.[143] Moreover, a wealth tax on gratuitously acquired property would never result in a swarm of levies that conceivably could devour the successively donated property in a few months or years, as a tax imposed on the mere transfer of title could, because the wealth tax would be a function of the holding period alone and not depend on the number of times that property changed hands. Prepayment of the tax with a rebate payable by the government when the property was passed on or consumed would be possible. That approach would encounter the same problems as the PAWAT, including the choice of a

[143] A wealth tax on unconsumed accessions would take more from someone who was given valuable property and then left it for another at death than from somebody who received equally valuable property at the same age but who died earlier, leaving her property for others. If one believes that the most valuable of opportunities is time itself, one might smile on this result, because it appears to redress, in a small way, an imbalance in people's opportunities to lead rewarding lives. Those who died sooner and so were worse off (other things equal) would have to share less with the community. Nevertheless, if the differences in the lengths of people's lives provide a fitting ground for redistribution to the shorter-lived – a difficult question I shall not pursue – one might prefer a more comprehensive solution than this slight correct would supply. For example, one might make accessions or inheritance tax rates vary directly with the duration of the donor's life.

workable stacking rule. Alternatively, the tax could be collected annually or every few years, as George Cooper suggested.[144]

If the PAWAT were reformed along these lines (and many details would need to be worked out),[145] it would in effect become a pair of separate taxes operating in tandem, each with a different

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[144] Cooper, note 15, at 34 - 36. Gifts in trust might entitle the donor to a rebate at the time of the gift, with each trust beneficiary paying an accessions tax when payment was made from the trust that was a function both of his age and of the period of time that property was held in trust. In offering this suggestion, the Meade Committee noted that it would make possible a substantial delay in the payment of tax on property placed in trust and that this delay might prove unacceptable to the government. If it did, an accessions withholding tax could be imposed on property placed in trust or, alternatively, the rebate owed to the settlor could be added to the trust's assets to deter people from creating trusts in part to secure the rebate while deferring payment of the recipient's tax. See Meade Report, note 59, at 329 - 30, 348 - 49.

[145] Most obviously, a tracing rule would be needed to ascertain whether a taxpayer's gifts or consumption came from saved earnings or from gratuitous accessions to his wealth. Would gifts or consumption be deemed to come first from earlier gratuitous receipts, from earnings, or (as with the Meade Committee's proposal) from some average of the two? In addition, a rule would be needed (or its omission justified) for adjusting accessions totals for price inflation when determining the source of later gifts or consumption. And a rule for calculating rebates of any prepaid accessions tax that was sensitive to inflation and to a normal investment return would be needed as well. Moreover, transition rules would be essential. If the tax owed upon consumption of a gratuitous receipt were higher than the present value of a wealth tax imposed on that amount until the recipient's death, taxpayers would have an incentive not to report consumption until, with their deaths, they could no longer hide their earlier consumption. Penalties might be imposed for failure to report their consumption of the gift when the consumption occurred. For example, treating consumption as having occurred in whatever year would maximize the tax's yield unless a taxpayer reported it as occurring at some other time would be a spur (however imperfect) to honest reporting.

Married couples present a special problem if interspousal transfers are not taxed, as under current American law. The Meade Committee's proposal included a complex averaging scheme designed to achieve rough justice, but administration and compliance with that scheme likely would be highly imperfect, as the Committee recognized. See Meade Report, note 59, at 327 - 29. It is hard to find any satisfactory solution to the problem of taxing married couples fairly under a tax that is sensitive to the individuals' ages, and both divorce and the different amounts of wealth that spouses bring to a marriage make the problem even less tractable.

object. A prepayment system which imposed a levy on accessions when they occurred could be instituted for both simultaneously, with the tax dependent on the recipient's age and the sum of his prior gratuitous receipts. A rebate could then be collected when a taxpayer consumed the gift or passed it along to someone else, that rebate depending on whether the gift was consumed or given away and on how much time elapsed between receipt and consumption or new donation. Whether this twin-barreled tax would be workable and whether it would improve on alternative proposals for accessions taxes are questions I leave untouched. In my view, however, an accessions tax with these features would offer the strongest justification yet propounded for a wealth tax, albeit a tax restricted in scope to wealth obtained by way of gift, inheritance, or devise.

F. An Improved Consumption Tax

How should the state collect the cash it needs to redistribute material resources as justice mandates and to fund the government's own services, insofar as the benefit or fair sacrifice principle fails to yield a clear rule for allocating those costs? The two serious rivals for this role are a tax on

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Would a generation-skipping transfer tax be a desirable addition? The PAWAT dispensed with one, and the rationales for the tax I have outlined militate against a generation-skipping transfer tax, too. Gifts would be taxed to recipients for as long as they were held prior to consumption or donation, so that the only advantage to skipping a generation would be that the donee who is more than one generation removed from the donor has a lower accessions total and faces a lower rate. (Because that donee is younger than a person one generation ahead, that tax advantage might be short-lived, if it means that later gifts from the donee's parents are pushed into higher brackets than they otherwise would be.) The major part of the tax, imposed on the ultimate private consumption of donated property, would vary with the consumer's accessions total as well, but because no part of the tax depends directly on the frequency with which gratuitous transfers are made, one need not worry about the strategic behavior for which a generation-skipping transfer tax attempts to compensate.

consumption or expenditures and a tax on income. They alone among administrable taxes can plausibly base people's contributions on fairly comprehensive measures of what matters to us materially – the resources that open up opportunities for experience or achievement or the use of those resources in pursuit of experiences or other ends. And they alone can be tailored to reduce in at least rough fashion some people's unearned advantages if we believe justice so requires, without compelling people to labor – that is, without making idlers into involuntary servants[146] – to satisfy a tax liability that is independent of their earnings or the property available for their use. My aim here is not to assess the justifiability of either tax as part of a scheme for apportioning the costs of government or for redistributing resources or opportunities. Perhaps neither tax has a role to play, though I think that at last one of them does. Rather, my goal in this Subsection and the next is to evaluate the thesis that a wealth tax is a desirable supplement to a consumption tax and to an income tax <u>if</u> tax either is justified.

What is at stake in choosing between these two tax bases? The long answer to that question, as Alvin Warren, Nöel Cunningham, and others have shown, is that how far their results diverge depends on one's assumptions about a taxpayer's available investment opportunities under the two taxes and about his ability and willingness to modify his investment portfolio to offset the effects of taxation on risky investments.[147] Suppose that the following assumptions all are true: taxpayers can borrow money at no cost; they are able and inclined to borrow to increase their pre-tax investments so as to create, after tax, the same matrix of probable gains and losses that they had before any taxes were

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[146] For further thoughts on the relation between duties of justice and slavery, see note 10.

[147] Alvin C. Warren, Jr., How Much Capital Income Taxed Under an Income Tax Is Exempt Under a Cash Flow Tax? 52 Tax L. Rev. 1 (1996); Nöel B. Cunningham, The Taxation of Capital Income and the Choice of Tax Base, 52 Tax L. Rev. 17 (1996).

levied; the same chances to invest profitably arise when they increase their investments in the face of new taxes as before they did so; their losses are fully deductible when incurred; and administrative costs and irrational aversions to leveraging investments or amplifying antecedent investment risk can be set aside. If these assumptions hold, then the sole difference between income and consumption as a tax base is the way in which they treat the risk-free return on capital assets. Because an income tax snares all income, it captures this portion of the return on investment, whereas a consumption or expenditure tax exempts the riskless rate of return.[148]

Is the riskless rate of return an important component of investment yields? According to Joseph Bankman and Thomas Griffith, it is not. The most recent empirical study they cite, which they also regard as the most accurate, measures the interest paid on short-term Treasury bills over more than half a century and concludes that the average riskless real rate of return in the United States between 1926 and 1989 was just 0.5%. Therefore, Bankman and Griffith reason, "the taxation of interest, desirable or not, should be no more than a minor consideration in selecting a tax base."[149] Even if one believes

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[148] See Joseph Bankman & Thomas Griffith, Is the Debate Between an Income Tax and a Consumption Tax a Debate About Risk? Does it Matter? 47 Tax L. Rev. 377 (1992); Warren, note 147, at 6 - 14; Cunningham, note 147, at 29 - 43; Bankman & Fried, note 20, at 540 - 46. The two taxes also produce different results if an income tax makes no adjustment for price inflation and so taxes that portion of an investment return that merely reflects the general rise in prices. Bankman & Fried, id. at 540 - 46; Cunningham, note 147, at 29 - 43. An ideal income tax would so adjust, removing this difference, but actual income taxes do not. Defenders of a consumption tax consider this drawback, and the difficulty of building workable inflation adjustments into an income tax, to be a strong point in their favor. See, e.g., Cunningham, id. at 18.

[149] Bankman & Griffith, note 148, at 387 (footnote omitted). They report that a similar study from 1977 put the real, riskless rate of return at 0.7%. By contrast, one study from the 1960s that used long-term corporate bonds as a baseline concluded that the real, riskless rate of return was 3-4%. Bankman and Griffith dismiss the latter study as poorly constructed, because part of the return on corporate bonds, once inflation has been subtracted from actual returns, is compensation for financial

that a more generous benchmark for the real, risk-free rate of return is warranted and even if one considers the assumptions on which income and consumption taxes are compared to be highly unrealistic – because borrowing has costs, because full loss offsets are not available to individual investors, and because the failure of actual income taxes to adjust properly for inflation widens the gap – Bankman and Griffith's fundamental conclusion appears unscathed: the sharp debate over the greater or lesser justice of income and consumption taxes is of far less consequence in a world of low inflation than many participants seem to have assumed. The choice between these two bases surely is less critical than the contour of marginal rates and other features of whichever base is chosen.

Nevertheless, the two tax bases do differ in at least this one respect, and the case for adding a wealth tax to either is independent of whichever rate structure is chosen to best promote distributional goals or to divide the costs of government fairly. I therefore review the two bases separately and examine the arguments that have been offered for appending a wealth tax to each to realize the aims that allegedly inhere in taxes on consumption or income.

The debate between advocates of consumption taxation and proponents of income taxation is complicated, ranging over questions of distributive justice, administrative feasibility, transitional difficulties, and the normative significance of practical deviations from their competing ideals. I will not join the fray here, but a few points need reviewing to understand the case for fusing a wealth tax to either base. The principal argument on behalf of the greater justice of a consumption tax – I leave other considerations bearing on the choice of a base out of account here and in what follows – begins from

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risk and potential corporate default. Hence, the reported 3-4% post-inflationary return includes what they consider a risk premium. Id. at 388 & n.31.

the premise that it preserves, after taxes have been introduced, the trade-off a person faces between the consumption of his income immediately and his consumption of that income at some future time. An income tax does not maintain that trade-off, at least so far as the risk-free rate of return on investment is concerned.[150]

Caveats apply. If a consumption tax is imposed periodically and is progressive over each period, then deferring consumption might push somebody into a higher tax bracket, either because the savings earn interest which increases the amount later consumed or because the saved amount is consumed along with later earnings. A progressive consumption tax thereby could reduce rather than maintain the pre-tax benefit of deferring consumption. In addition, the saved funds must be invested at the risk-free rate (or a higher, risk-adjusted rate that includes the risk-free rate) both before and after the enactment of a tax on income or consumption for the choice of the tax base to make a difference. Somebody who deferred consumption by putting cash in a safe would be no worse off under an income tax than under a consumption tax. Lastly, a difference between the two taxes arises only if an income tax does not allow borrowers to deduct their interest payments and if, were they allowed to deduct

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[150] A simple example suffices. Suppose that, in a world without taxes or inflation, a person earns $100 in Period 1. He may either consume his income then or invest it, risk-free, until Period 2, at which time his savings will be worth $105. Thus, the trade-off he faces between immediate and future consumption is 100/105. If a consumption tax were introduced at a flat rate of 20%, his choice would be between consumption of $80 in Period 1 and consumption of $84 in Period 2 – the same ratio as before. But if an income tax were introduced at a flat rate of 20%, his choice would be between consuming $80 in Period 1 – his income minus the tax – and consuming only $83.20 in Period 2. He would have only $80 left after paying the 20% income tax in Period 1 which, invested at an assumed (too high) risk-free rate of 5%, would produce $4 of income in Period 2, which itself would be subject to tax at 20% ($0.80). The trade-off he faced before taxes were levied has been skewed towards immediate consumption.

their interest payments, the after-tax returns to savers would be the same as their returns prior to the introduction of a tax.[151]

These qualifications aside, why think it significant that savers are hurt by an income tax more than they would be by a consumption tax? Otherwise phrased, why regard the trade-off between present and future consumption in a world without taxes as normatively privileged, so that deviations from it ought to be condemned unless redeemed by some larger, offsetting benefit?

This question cannot be answered both quickly and convincingly, and the problem it raises is anyway extraneous to my project in this Article. In my view, this question has not yet been answered in a careful, forceful way in the scholarly tax literature, where the undesirability of tilting pre-tax incentives away from saving and towards immediate consumption is more often assumed than defended. But it must also be said that supporters of the income tax, acute in criticizing sometimes airy arguments for the moral preferability of a consumption tax, have been less deft in constructing a positive case for their favorite. They frequently neglect to articulate, then refute, the most powerful objections to their own

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[151] Alvin C. Warren, Jr., Fairness and a Consumption-Type of Cash Flow Personal Income Tax, 88 Harv. L. Rev. 931, 937 (1975); Barbara H. Fried, Fairness and the Consumption Tax, 44 Stan. L. Rev. 961, 1000 - 1003 (1992) [hereinafter Fairness]. People who save current earnings for future consumption will be disadvantaged under an income tax relative to people who consume their earnings immediately if consumers who borrow from the savers cannot deduct their interest payments and, consequently, the new equilibrium rate of interest leaves saver-lenders with lower returns after tax. Fried points out that this group of savers might not be hurt more by an income tax than people who borrow to accelerate consumption, since the latter will find themselves disadvantaged as well by comparison with their situation in a no-tax world if after-tax interest rates go up when an income tax is introduced. Fried, id. at 1003 - 06. So it is too simple to say that an income tax hurts savers more than spenders, in a way that a consumption tax does not. If real interest rates change, an income tax likely hurts people who save current earnings for future consumption relative to people who consume current earnings. And it likely hurts people who borrow to support consumption in advance of their earnings.

account. Debates about which position bears the burden of proof are, as usual, unedifying. In this Subsection and the next, I set out only what I take to be the core of each side's best argument, to explain the case for supplementing each tax with a wealth tax on the assumption, first, that one side's best argument is decisive and then that the other side's best argument wins.

The argument for consumption as a tax base for redistributive and public funding purposes begins, as I noted, from the observation that a consumption tax has no effect on the rate at which present consumption can be traded for future consumption via the return to saving, whereas an income tax does. Of course, the introduction of any tax alters the array of options people face in a world devoid of taxes. In particular, it alters the desirability of laboring to earn transferable resources, such as cash, if that is the medium for paying taxes. But some transformations of that pre-tax set of choices are demanded by justice or by a principle of fair contribution to collective enterprises, whereas others are not.

Consider a world in which everyone is equally well endowed, a world in which nobody is disadvantaged in virtue of her lesser talents, poor upbringing, childhood injury, or disease. And put aside for now, as most rights-based, contractarian moral theories do, the problem of creating a state and settling on its powers, on procedural rules, and on whom to bill for its activities. In this world, many liberals contend, no redistributive taxation would be justified if everyone began with equal shares and equal capabilities. We might further imagine that productive activity and exchange are regulated by well-functioning markets.[152] Fair, collective consent to markets can be inferred, in this view, from their

[152] In the real world, policing markets to stifle anti-competitive practices costs money, which must come from taxes or charity – a problem I ignore.

efficacy at enhancing the well-being of all who participate in them. To be sure, in this world some people will be happier than others. They will be lucky in their friends, in their professional and personal gambles, in their tastes and in the smorgasbord of goods and opportunities that other people's preferences and convictions together make available to them. Others will fare less well. From the standpoint of a wide range of nonconsequentialist theories of justice, these differences in people's success and well-being trigger no duties on the part of the lucky to aid the unlucky. Expensive tastes do not entitle one person to a larger share of the commonwealth, any more than cheap tastes mean that somebody is obliged to make do with less because she is so easily pleased. Pouting aesthetes do not qualify for public subsidies while Tiny Tim shudders beside the hearth unaided, buoyant despite his infirmity. Likewise, costly moral or religious convictions, not an indulgence but a felt necessity for those animated by them, ground no claim to the resources of those who reject those beliefs as deluded or heretical. Poor choices are not, as a matter of justice, underwritten by what is tantamount to universal insurance against imprudence, bad luck, or fickle fads. So long as people do not regard their divergent, or convergent, preferences as afflictions visited on them independent of their decisions, and so long as people are reasonably able to shape their ambitions and tastes over time against the backdrop of others people's aims and desires, justice does not demand a reshuffling of resources to aid those whose mistakes or ill fortune leaves them less well off than most. The benefits that people reap from valuing certain goods more than their price, from working at tasks that earn them more money, attention, or respect than they would need to continue laboring in that way, or from meeting the right intimates or associates at the right times, lie beyond justice's notice, given certain undemanding assumptions about the plasticity of people's tastes and desires, the importance of autonomous choice to people's lives, the

mutual respect they owe one another's convictions, and the constraint on fulfillment imposed by a scarcity of resources and human effort. The surplus value that many market participants enjoy is not a collective good, which the state may appropriate by confiscating rents or consumer surplus and turning either to public ends. Surplus value is simultaneously a spur and a reward for choosing one's ends prudently and in a way that is sensitive to the desires of other people. In some contexts, one might see it as an artifact of the confluence of people's convictions and commitments for which they bear responsibility and which the state is powerless to alter without taking sides in disputes over personal goods towards which it ought to remain neutral.[153]

This is a composite view of distributive justice in a hypothetical society of equals, not a report of any particular thinker's work. It is not immune to criticism. Perhaps most crucially, its assumption that all returns to risk-taking are exempt from redistribution because all were equally able to reach for the brass ring might be challenged on two scores: first, that allowing people to keep extraordinarily large returns for themselves, when nobody realized that so gargantuan a pay-off was possible from some activity and people cannot reasonably be thought to have had the same opportunity to strive for it, yields too much to the sovereignty of fortune,[154] so that a principle that requires that good brute luck be

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[153] The major elements of this view figure not only in the thought of prominent libertarian writers, such as Robert Nozick and Jan Narveson, but in the work of leading liberal egalitarians. For representative accounts, see Dworkin, Equality Part II, note 96; Ackerman, note 120; Rakowski, note 32, at 19 - 148; Richard Arneson, Equality and Equality of Opportunity for Welfare, 56 Phil. Stud. 77 (1989); G.A. Cohen, Currency, note 96; Van Parijs, note 24. For a recent critique of this family of liberal egalitarian views, see Elizabeth S. Anderson, What Is the Point of Equality?, 109 Ethics 287 (1999).

[154] Lester Thurow argues that virtually all extremely large fortunes are the product of rapid entrepreneurial success magnified by the capitalization of what are expected to be above-average future profits, sometimes further enhanced or protected by high barriers to entry or anticompetitive practices.

spread around if possible applies, and indeed applies without any real threat to effort or efficiency; and, second, that people could reasonably be expected to endorse with something near unanimity a principle of collective sharing in exceptionally large windfalls as a modification of a background rule of letting luck lie, so that a community might responsibly gild that hypothetical assent with legal force. Putting this and other qualifications aside,[155] however, in my opinion the nonconsequentialist case for a consumption tax is made most compellingly on the supposition that a conception of justice resembling this one is true.

Consider the implications of introducing unmerited personal inequality into this utopian society. Libertarians might see no cause to begin taxing people who thrive as a result of capabilities for which they cannot claim credit, but liberal egalitarians would. Ideally, they would tax or reward people according to how fortunate or unfortunate their natural endowments and unearned opportunities were, valuing personal endowments not as a market – other bidders – would, but at the value attached to them by their possessors, because endowments are not transferable and it would be wrong to charge people for what they do not want but cannot shed. An endowments or opportunities tax is impossible to levy, however. Even honest people would find it hard to ascertain and value their capacities and chances relative to others' means and prospects, not singly but as a myriad, and it is inconceivable that

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This success, he maintains, owes a tremendous amount to luck – luck that has little to do with carefully calibrated risk-taking. Some entrepreneurial ability is necessary to earn colossal returns, but who among equally able entrepreneurs walks away with the big prize is not much less random than the selection of a lottery winner. See Lester C. Thurow, Generating Inequality 142 - 54 (1975).

[155] For a discussion of other conditions that might be placed on the operation of markets to achieve justice, on account of the irrationality of some people's preferences, the inauthenticity of other preferences, the propriety of basing legislation on objective accounts of human well-being, and the radiating costs of commercial and financial speculation, see Colin M. Macleod, Liberalism, Justice, and Markets 27 - 78 (1998).

probity would prevail if taxes and benefits turned on self-assessment. In addition, an aversion to forcing fortunate people to work if they would rather not turn their talents to materially productive activities would lead many liberal egalitarians to prefer taxes on earnings, spending, or wealth rather than the more theoretically proper, but for them practically repellant, base of lucky individuals' endowments and opportunities.[156] Liberal egalitarians therefore typically endorse, as the best means of achieving rough distributive justice, some method for taxing people's acquisitions that is correlated approximately with their unchosen advantages and for channeling that revenue to those who blamelessly are worse off.

With this stage-setting, it is easy to see why liberal egalitarians might favor a consumption tax. There are a variety of means, imperfect in various ways, for getting at the return to brute luck while leaving the return to effort and choice untouched. Most crudely, one might tax labor and risky investment income on a progressive basis on the usually true (but sometimes false) supposition that differences in people's unchosen capacities run parallel to differences in their earnings and indeed often outstrip them as their earnings rise. What should be clear, however, is that in this unequal new world there can be no justification in the account developed above for taxing the riskless return to investment that people receive just because their consumption preferences – not their exceptional abilities or opportunities – lead them to wait a while before consuming, provided that a new redistributive tax can avoid burdening this return. By enacting a consumption tax rather than an income tax, that burden can be avoided. There might be other reasons for preferring an income tax that outweigh the importance of avoiding a tax on non-risky returns to investment. But if a consumption tax and an income tax were in

[156] For doubts about this commonly asserted liberal position, see note 10.

other respects equally attractive, this point pushes towards the former.

Perhaps it is worth emphasizing that this narrow argument for a consumption tax – it is hardly the whole story – does not turn on any assumption about investors deserving at a minimum the riskless rate of return because of the pain of abstinence, as though the effort they must make in leashing their appetites and the suffering they consequently endure entitles them to a treat when the wait is done. The riskless return is not something earned by suffering the pangs of postponed gratification. The justification for taxing consumption comes, rather, in two steps: first, from the existence of the riskless return in a just world populated by equally well endowed individuals with equal opportunities – a world in which inframarginal consumers, producers, and savers all enjoy different types of surplus by not being at the margin of their respective classes without becoming subject to a duty to redistribute their gains (except perhaps in the case of extreme windfalls), because of the advantages to all from a market, because of the collectively helpful incentives that the existence of inframarginal gains create, and because of a sufficiently close dependence of desires and abilities on choices and convictions; and, second, from the absence of any reason to reduce these inframarginal returns and alter the relation between immediate and deferred consumption when an important source of inequality between people – differences in native talents and pre-adult opportunities and influences – upsets that utopia.

This justification can be challenged. The most interesting and persuasive challenge would assail the first of these two steps byshowing that, even in a society composed of people who were as equal in their talents and opportunities as we can imagine, inframarginal savers would have a duty of justice to accept less than the market return (as, arguably, would inframarginal workers and inframarginal

consumers).[157] They would have that duty, presumably, because their choices regarding the timing and

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[157] Some scholars have tried to show that people are not entitled to full market returns for their labor, but their efforts have concentrated almost entirely on the large rents that some people are able to extract thanks to special capabilities for which they cannot claim sole or primary responsibility. Typically, they have not focused on the problem of surplus value in a world populated by equally talented people. One exception to this generalization is Philippe Van Parijs's complaint that, in an advanced capitalist economy, rents tend to accrue to everyone who finds employment even if everyone has equal talents; those who secure employment therefore ought to be made to share their employment rents with the rest of the community, by using those rents to fund an unconditional basic income payable to everyone equally that will protect both the insouciantly idle and the involuntarily unemployed from destitution. Van Parijs, note 24, at 106 - 25. David Gauthier's contractarianism, at least in his eyes, yields the conclusion that economic rents are gains from cooperation that are subject to reallocation among market participants according to his master principle of minimax relative concession, regardless of the natural or otherwise unchosen differences among workers. See Gauthier, note 32, at 272 - 76.

A very different objection offered against Rawls could be, but so far has not been, modified to attack the retention of labor rents in a world of equal capacities. Rawls asserts that workers in a just state – one that satisfies his two principles of justice and in particular the difference principle, by ensuring that the primary goods enjoyed by a representative member of the least advantaged class are as valuable as possible – may keep whatever they earn, subject to the constraints imposed by tax and transfer policies designed to achieve overall justice. How can workers remain committed both to maximizing the resources and opportunities of the poorest and to garnering the biggest salaries they can for themselves once the tax system is in place, however, especially when they would willingly do their jobs for less and therefore could transfer the difference between their after-tax wage and the minimum they would work for to the poorest without changing jobs or sinking to the low level of welfare the poorest experience? See, e.g., G.A. Cohen, The Pareto Argument for Inequality, Soc. Phil. & Pol'y, Winter 1995, at 160 (criticizing Rawls); Nagel, note 17, at 116 - 17 (describing laborers' motivations in a Rawlsian world as incoherent); but see Andrew Williams, Incentives, Inequality, and Publicity, 27 Phil. & Pub. Aff. 225 (1998) (defending Rawls against Cohen's criticisms). A similar objection could be brought against those who fare well in a world of equal talents, though it would presuppose acceptance of both the difference principle (or some similar principle of distributive justice) and of Rawls's arguably cramped notion of individual responsibility for ambitions, effort, and personal preferences.

Whatever the merits of these arguments, they do not translate readily into justifications for reallocating consumer surplus, as opposed to labor rents. The reason they do not is that people are seen as more fully accountable for their convictions and consumption preferences, coupled with the general sense that differences in people's tastes are comparatively unimportant from the standpoint of justice. The decision whether to postpone consumption or consume immediately is in most instances

content of their consumption purchases and their choices regarding their productive activity originated in preferences for which they were not wholly responsible or which did not express their normative or religious commitments, or because the market returns to some freely taken decisions about savings, consumption, or work were radically unpredictable or bore an insufficiently tight connection to the decisions people reasonably made. Showing that people have a duty to accept no more of a return than would be needed to cause them to work or save, or that people should have to spend on a good whatever they would be willing to pay, is very difficult, especially with respect to both the objects and the timing of consumption, which is what bears most crucially on how risk-free returns should be taxed.[158]

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quintessentially an issue of sovereign choice, at least in a just world where unfairly straitened circumstances do not mock the freedom to choose.

[158] The last section of Barbara Fried's insightful dissection of attempts to justify a consumption tax focuses on its claims to superiority because it preserves the relative positions of savers and spenders in a no-tax world. Fried, Fairness, note 151, at 1006 - 16. Fried concentrates on conceptions of distributive justice couched in terms of people's comparative utility and, within that framework, many of her objections to arguments for preserving the relative positions of savers and spenders are incisive. But Fried's arguments have less force against a variety of what seem to me more plausible accounts of justice. Mainstream liberal egalitarians do not – certainly they ought not – claim that because inframarginal savers and consumers reap a pre-tax surplus that owes nothing to their own efforts, they have no moral claim to that surplus and indeed that it would be best to strip it from them and redistribute the surplus value equally to all. See id. at 1015. One can just barely imagine a society in which rewards were proportioned to effort and choice (including risk-taking?), at least so long as those efforts and choices satisfied the desires of other people (no subsidies for diligent but lousy poets), but this is not what I take liberal egalitarians to urge. Their concern is that people have equal resources, capabilities, and opportunities, subject to whatever constraints are imposed by values other than justice, not that they enjoy equal welfare. Once a just initial distribution has been completed (the contemporary analogue of which admittedly is hard to specify), they endorse markets as devices for allocating goods and services. In a market economy, inframarginal consumers, savers, and workers enjoy a surplus of money or well-being for many reasons, including the way they shaped their desires, their convictions about how best to lead their lives, their commitments, and the preferences of other people which they must always keep in view. These determinants of people's wealth and welfare supply no ground for

The same argument can be made if taxes must be imposed to pay for government services. For reasons considered earlier,[159] a benefit principle or some other measure might be appropriate for apportioning at least some of the costs of government. But insofar as it is not, or insofar as it cannot be put into practice sufficiently accurately, a different formula will be needed. Just as wealth cannot furnish the base for whatever schedule of taxes is preferred, in part because a wealth tax falls more heavily on savers than immediate consumers despite the fact that decisions to postpone consumption are irrelevant to the cost of providing government services or to any other notion of justice in distributing the costs of maintaining a state, so too income would be inferior as a base to consumption, because the decision to consume now or later has no significant bearing on the degree to which a person benefits from

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redistribution. Moreover, the signals that surplus value provides help the market fulfill people's desires more effectively, which an overwhelming majority can agree is desirable. One has only to try envisioning a community in which, impossibly, all consumer, worker, and saver surplus was confiscated and redistributed to see how stultifying and constricting that dystopia might be.

Fried also notes that the government in fact influences interest rates, and therefore affects the risk-free rate of return. Id. at 1007 - 08, 1015. But it is unclear why this might matter. Rights-based theories of justice that point towards a consumption tax reason as follows, as I understand them. If people have unequal resources, capacities, and opportunities, then redistribution to correct these inequalities is imperative. The duty to redistribute holds independently of the state's existence, though in reality redistribution could not be accomplished without a state. Once any redistribution commanded by justice has been effected, people must decide what activities the state may undertake, with what principles of contribution. State actions will affect people in a variety of ways. These actions make jobs available, shift prices, alter work incentives, and bring about many other changes. But these collateral effects of policies adopted for other, legitimate purposes are facts of life brought about partly by collective choice, against the background of which people must make their own decisions, mold their ambitions, and set their priorities. That the government's policies have incidental effects surely does not license the state to deliberately eliminate the riskless return to investment for savers if justice initially counsels otherwise, any more than the unequal racial impact of some permissible government policies gives moral license to apartheid.

[159] See Subsection III.C.1.

government or may fairly be expected to assume its costs. If a tax of general application must be imposed, tied to income or consumption, then this reasoning gives the nod to consumption in the absence of more powerful reasons adduced on the other side.

One may not be convinced by these arguments, in part because one may not accept the nonconsequentialist account of justice on which they are built. My objective in this Subsection is not to defend the consumption tax or its normative ground, but to outline the major arguments for adding a wealth tax to a consumption tax if one believes a consumption tax to be justified. One reason for laying out the best justice-based argument for a consumption tax is to render it more apparent why these supports for a wealth tax are watery.

1. Wealth and Easy Money

The first argument offered for combining a wealth tax and a consumption tax is that wealth yields income (and thus potential consumption) effortlessly, without the sacrifice of leisure, perspiration, or attention. Taxpayers whose consumption is financed through their investment returns are better off than those who labor for their dinner and ought, in fairness, to pay more to keep the state running or to assist those who are less able.[160]

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[160] For one example of this argument, see Meade Report, note 59, at 351 ("Investment income is more valuable to the recipient than an equal earned income [because] . . . it is obtained without the sacrifice of leisure. Under an income tax regime there is therefore a powerful case for taxing investment income more heavily than earned income."). Other statements of this view are criticized in Tipke, note 78, at 781 - 82.

John Stuart Mill's statements about this matter are muddled, as with much that he says about taxation. Mill maintained that "[t]o tax the larger incomes at a higher percentage than the smaller, is to

This argument is not worth lingering over. If one ignores gratuitous receipts, income-producing property exists only because a taxpayer elected to defer consumption of earlier earnings or his equal share of the world's unearned resources. If taxpayers have equal abilities, those who choose to invest safely and who subsequently have more to consume or give away are not unjustly better able to satisfy their wishes. They have merely made a choice open to all, given the array of alternatives for the immediate and later use of their funds that other people's desires and decisions together have created. That the returns on some investments (which are taxable when consumed) come with little effort has no bearing on how they ought to be taxed: everybody had the same chance to realize or forgo them. Assuming that people's unearned capabilities and opportunities are not equal does not amend this conclusion, because redistributive programs ought not intentionally to impinge (though they might have an indirect impact) on the risk-free return to saving.[161]

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lay a tax on industry and economy; to impose a penalty on people for having worked harder and saved more than their neighbours." In his view, "[a] just and wise legislation would abstain from holding out motives for dissipating rather than saving the earnings of honest exertion." Mill, note 24, at bk. V, ch. II, § 3. Mill therefore inveighed against taxing investment income, claiming that "the proper mode of assessing an income tax would be to tax only the part of income devoted to expenditure, exempting that which is saved." Id. at § 4. "Unless . . . savings are exempted from income tax, the contributors are twice taxed on what they save, and only once on what they spend." Id. Interest on investments must therefore be exempt from tax. Id. Yet Mill also called for a tax on real property rents, because owners of rent-yielding property grow fat without exertion or sacrifice. Id. at § 5. They sometimes profit from population movements or increases, for which they cannot take credit. What Mill seems to overlook is that the returns to investment in assets other than real estate often depend as well on societal changes, including demographic changes, which investors cannot control. It makes little sense to treat land or structures differently from other capital assets, and no sense at all to tax landlords on rent increases because "[t]hey grow richer, as it were in their sleep, without working, risking, or economizing," id., as if bond holders were paragons of industry and daring.

[161] Klaus Tipke also notes that a wealth tax ravages all wealth, not just wealth that yields income. Its bite therefore is bigger than this rationale permits – though one could imagine a wealth tax on income-producing wealth alone. In addition, as he says, there frequently is no close correlation

2. Wealth's Advantages

The second argument maintains that a consumption tax necessarily is incomplete, because it fails to account for advantages that wealth confers above the benefit of its eventual use. Richard Musgrave regards a consumption tax as derelict because it "assumes that consumption, current or future, is the only benefit that income provides. This overlooks the benefits derived from the accumulation and holding of wealth, whether in terms of security, power, or social standing. To account for these gains, fairness calls for a supplementary tax on wealth."[162] Musgrave does not say what conception of fairness voices this demand, and the omission is telling. Imagine two people, alike in ability, who have earned the same sum of cash. Both of them, looking forward, see the same possibilities. Each can consume his earnings, leaving for the morrow nothing but what the morrow brings. Or he can invest his earnings so that he can consume more in the future while simultaneously, if Musgrave is right, enjoying

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between effort and income, or labor time and income, even among people of like ability, and the link between any of these variables and psychic discomfort likewise is so loose as to make any tax that sought to impose the lightest burden on arduous, unliked, protracted work impossible to implement. Tipke, note 78, at 781. It might be worth adding that such a tax also would be wrongheaded. The theories I have been discussing do not hold that justice requires that people be made equal in their satisfactions; they hold, instead, that justice requires that they be given equal opportunities, though that goal might have to yield at times to important rival values.

[162] Richard A. Musgrave, Clarifying Tax Reform, 70 Tax Notes 731, 733 - 34 (Feb. 5, 1996) (footnote omitted). The same claim is made in Meade Report, note 59, at 352 ("[E]ven with an expenditure tax regime the case for some special tax on investment income or on the wealth from which it proceeds is not completely met, [because] . . . [t]he holding of wealth itself . . . can confer on the owner benefits of security, independence, influence and power, quite apart from any expenditure which the income from it may finance . . . ."). William Andrews shares this view. He writes: "It may well be unacceptable to rely solely on consumption as a personal tax base because for some people wealth has a welfare value above and beyond the deferred consumption it may operate to support, and a consumption tax will reach consumption only in its tangible forms. This is the strongest argument against sole reliance on a personal consumption tax." William D. Andrews, Fairness and the Personal Income Tax: A Reply to Professor Warren, 88 Harv. L. Rev. 947, 956 (1975).

greater safety, influence, or social status until he chooses to spend or donate his holdings. If one of these people expends his earnings immediately and the other invests, why is it unfair for the second to enjoy all the rewards of saving – rewards foreseeable and available to both – without sharing some of them with his impatient neighbor? How can it possibly be unfair if both had the same opportunity?

Musgrave offers no response, and indeed the question seems unanswerable. Perhaps his rhetoric is inspired by the belief that only the rich are able to save, that the poor really have no choice but to consume what they earn, so that they do not in fact face the same options as the wealthy. If that picture motivates Musgrave's claim, however, his complaint is misjudged. Either it is inspired by his indignation at the currently unjust distribution of wealth and income, in which case his complaint seems irrelevant to assessing the desirability of taxing consumed earnings alone in a world that is substantially just. Or Musgrave's complaint is directed at what he expects will be a continuing and unfortunate disparity in people's chances in a better but not yet perfectly just world, in which case he should be assailing the justice of people's initial shares in that world or whatever redistributive tax and spending program he imagines it uses. What Musgrave cannot plausibly claim is that if two people are similarly situated and owe no unfulfilled duty of justice to one another, and if they have the same opportunities to spend or save their earnings, it is unfair for one to save and reap all the mutually acknowledged rewards to saving without sharing those rewards with the person who spent his earnings sooner. Some people prefer immediate gratification or the reputation and friendships that come from spending freely, dressing well, and living more expensively in the moment; others forgo these goods for security or wealth's other comforts, or postpone their enjoyment until a later stage in their lives. A liberal state may not fault either

choice if people satisfy their obligations to their families and their community.[163] It surely cannot condemn saving without sharing as unfair, while treating spending without sharing as beyond reproach. So long as spenders and savers are responsible for their decisions – I assume that spenders are not in the grip of a compulsion from which they wish to be freed and so are not to blame for their prodigality – there is no unfairness in leaving them to harvest what they sow.

Geoffrey Brennan and David Nellor set forth a related but subtly different argument for tacking a wealth tax onto a consumption tax.[164] They start from the assumption that a consumption tax is preferable to an income tax because it preserves the ratio of future to present consumption that people would face in a world bereft of taxes. They then compare two taxes: a tax on labor income that leaves the investment return on after-tax earnings untaxed, and a tax that leaves labor income untaxed until that income and any investment returns earned on it are consumed. In their simple case of a wage earner who saves part of his earnings for consumption at a future time, the two taxes are, they say, formally equivalent. In the first case, X earns $1000, pays tax of $400, then invests the remaining $600, which

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[163] As Louis Kaplow notes:

> [A]dvocating heavier taxation of future consumption because such consumption produces utility directly and indirectly (the latter referring to the benefits of holding the wealth before consuming it) seems inconsistent with ignoring the number of sources or dimensions of utility produced by other activities. Thus, expenditures on exclusive club memberships are not taxed more heavily even though members get both use of the club's facilities and the prestige associated with membership. Nor are roller blade purchasers subject to greater tax because they derive both pleasure and improved health. The standard view is that an expenditure may produce single or multiple benefits of varying magnitudes. The value is assumed to equal what individuals pay.

Kaplow, Human Capital Under an Ideal Income Tax, note 9, at 1504 n.61.

[164] Geoffrey Brennan & David Nellor, Wealth, Consumption and Tax Neutrality, 35 Nat'l Tax J. 427 (1982).

grows to $3000 by some future date, at which point X consumes it; in the second case, Y earns $1000 and invests it equivalently, so that it grows to $5000 at the specified future date, at which point she consumes it, paying consumption tax at the same rate of 40% and leaving her with $3000 to spend. In actuality, however, Brennan and Nellor conclude that there is a difference between yield-exempt and cash-flow consumption taxes, given an assumption they state but neither endorse nor reject in their analytical exposition. If holding wealth yields prestige, influence, and psychic benefits, they say, then Y enjoys a better ratio of future to present consumption than exists in a no-tax world, whereas X does not, because Y holds more wealth and garners more of these benefits than X. To preserve the trade-off that formerly existed, they conclude, either a wage income tax should be adopted, of the sort that X faces, or a wealth tax should be paired with a consumption tax to offset the neutrality-upsetting psychic and other benefits that savers would enjoy under a consumption tax alone.

Given Brennan and Nellor's stipulations, one can hardly quarrel with their analysis. But what should one conclude from it? One might conclude that a tax on wages – a yield-exempt consumption tax – is the only certainly neutral tax using the no-tax world as a baseline, and that this constitutes one argument, though by no means a decisive one, for its adoption in preference to other taxes. Brennan and Nellor mention this safety rationale at the end of their article and suggest that "it is perhaps time that the labor income tax received a little more serious attention in tax reform debate."[165] Maybe it should. But their analysis is unlikely to weigh heavily in its favor. A cash-flow consumption tax diverges from a wage tax in their model only if people subject to a cash-flow consumption tax are dim-witted or skilled

[165] Id. at 435.

at psychological denial. They have to believe that they have more usable wealth than they know they do. They would derive more psychic satisfaction from their holdings under a cash-flow consumption tax than they would from their savings after paying a wage income tax only if they lost sight of the fact that any expenditure of their untaxed holdings would trigger a cash-flow consumption tax that left them exactly as well off, after tax, as would the consumption of their savings after paying a wage income tax. Given the likely magnitude of that tax cost if the consumption tax were the main source of funds for redistribution or public goods – it would have to be levied at rates far higher than an easily overlooked sales tax – the myopia needed to drive a labor income tax apart from a cash-flow consumption tax would surely be rare. A scattering of shortsighted people, gladdened by an illusion of riches, does not supply a significant reason for favoring a tax on wages or for adding a wealth tax to a cash-flow consumption tax. The choice between forms of a consumption tax, for those who favor one, must turn on other considerations, and the argument for a wealth tax must seek a different foundation.

G. An Improved Income Tax

Would a wealth tax be any more attractive as an ally to an income tax? There are two ways in which it might act as a confederate. One is to replace a tax on certain types of income with a tax on the assets producing that income, to better accomplish the ends of income taxation in view of practical limitations on measuring changes in people's control over resources. Thus, a wealth tax might help overcome the deviation from ideal income taxation represented by the realization requirement. Showing that a wealth tax is the right tool for the job in a particular case might be challenging, but employing a wealth tax as a proxy for the income tax to advance that tax's goal must be uncontroversial for anybody

who accepts the income tax's legitimacy. I shall say nothing about this kind of proposed alliance, because the question it poses is one of efficacy rather than justice.[166] The second way in which a wealth tax might aid an income tax is by supplementing rather than supplanting it over some domain, because an income tax scoops only part of what should be collected in justly apportioning the costs of government services or of transfer payments.

Two justifications have been offered for taxing wealth alongside income, so that both the value of an asset and the income that it produces would be taxed simultaneously. The first appeals to what is sometimes called the additional taxable capacity or ability to pay taxes that wealth confers, while the second asserts that wealth always or typically yields benefits that properly are subject to tax but that escape a tax on monetary income alone.

1. Wealth's Addition to Ability to Pay

The first justification might be stated as follows. People's obligations to defray the costs of government projects should be seen as positively linked to how well they fare materially in a community that is shaped, pervasively and ineluctably, by government rules and undertakings and the intellectual and material residue of multifarious social actors.[167] Because the opportunities people have to lead

[166] See notes 41 - 43 and accompanying text.

[167] Edmund James famously argued that the state is a "silent partner" in any business enterprise, indeed the major partner: "To test the relative productivity of the state and the individual, compare the fortune accumulated by Cornelius Vanderbilt in America with what he might have accumulated had he been adopted when an infant by a family of Hottentots." Edmund James, The State as an Economic Factor, in Science Economic Discussion 24, 32 (1886). Of course, what James's argument also needs is a demonstration, first, that the state is responsible for Vanderbilt's opportunities or at least that it may appropriate some of his profits in the name of social or historical forces or institutions that served as

fulfilling lives are so largely a product of society's prior contributions, extant laws and institutions, others' preferences, and natural fortune, the community has a claim on their production that takes precedence over and defines the inferior claims of individual producers.[168] People reasonably may disagree about how the state, exercising this sovereign prerogative, ought to allocate burdens and subsidies – whether to maximize citizens' well-being, to give the poorest as good a life as possible, to establish incentives for publicly beneficial creations, or to achieve some other generally approved end. Because they often will fail to achieve consensus on how this confection should be made and cut, some procedural solution might be needed to resolve persistent differences. Regardless of the principles of allocation chosen, however, the essential point is that the state's superior claim to the community's product points to income, the sum of all additions to people's material resources over a taxable period, as the proper base for assessing their contributions.

A broader measure would be untenable, the argument continues. Both moral and practical grounds preclude taxing people on what they do not have or cannot transfer. So we cannot rightly

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their preconditions, and, second, that sharing is morally required of Vanderbilt and other business barons despite the fact (if it is one) that others had the same opportunities as they did. If Vanderbilt had become the richest Hottentot by introducing new principles of herd management, would the community have had a claim on most of his cattle?

[168] Alvin Warren argues, for example, that the state's claim on people's aggregate output "can be justified on the theory that a producer does not have a controlling moral claim over the product of his capital and labor, given the role of fortuity in income distribution and the dependence of producers on consumers and other producers to create value in our society – factors that create a general moral claim on all private product on behalf of the entire society." Alvin Warren, Would a Consumption Tax Be Fairer Than an Income Tax? 89 Yale L.J. 1081, 1091 (1980) (footnote omitted) [hereinafter Consumption Tax]. For variations on this theme, see, e.g., Michael J. Graetz, To Praise the Estate Tax, Not to Bury It, 93 Yale L.J. 259, 275 - 76 (1983); Ascher, note 121, at 86 - 87; Duff, note 121, at 54 -56.

make people pay according to their happiness or talents, but only according to their material resources. But it also would be wrong not to base their contributions on all the resources they come to control over the period during which policies must be devised and funded.[169] Moreover, it seems intuitively most attractive to make people's contributions vary with how well they actually do after their investments have gone awry or turned golden, not on whether they faced the same odds of becoming plutocrats or paupers. Their success or failure, once again, depends more on social or natural contingencies which they can influence only slightly than on their own desert, and both utilitarian principles and plausible ideas about what most people rationally and impartially would favor as a contribution rule support taxes keyed to what people in fact come to own, not what they merely might have had.

A great deal more could be said on behalf of income as a tax base, and there are many reasons to inveigh against it. My aim here is not to join the contest between consumption and income tax advocates. Rather, it is to see how wealth might become a further object of taxation if one accepts the

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[169] As Mark Kelman has observed, the plausibility of this claim with regard to the riskless rate of return on investments – the one item that perforce separates income and consumption taxation under ideal conditions – will for many depend on whether people's decisions to save are strongly elastic at the pre-tax price, so that saving entails a real psychological cost on account of the frustration of waiting, anxiety about dying before one can consume, or worry about changes in one's preferences that will make later consumption less satisfying, or whether people's decisions to save are mainly unaffected by these factors, making the riskless return a windfall for most savers. If saving is highly elastic over a broad range, then it might well seem unjust to tax people who have suffered the yearning and worry of deferral; if even the riskless rate of return generally is a fortuity for savers, their entitlement to pocket the proceeds might seem more wobbly. See Kelman, note 77, at 656 - 57. As I emphasized before, these motivations for saving are irrelevant to those who accept the justification for consumption taxation I sketched above. See Subsection III.F. Within the normative structure favoring income as a base, however, they acquire importance.

arguments in support of either. The step from taxing income to a wider base for social contributions seems to many writers disarmingly simple. If people can fairly be asked to shoulder social burdens according to increases in their material means over some period of time – because those who earn more can afford to pay more than those who earn less without that additional burden causing greater hardship, or because they benefitted more from the swirl of social forces than the poor – then those who just happen to have more when the hat is passed also can be asked to toss in more than their less wealthy neighbors. After all, they are better able to pay, in the sense that they have greater reserves and can pick up a bigger share of society's bills without feeling the pinch than somebody who has fewer means at her disposal. The most-cited statement of this view is Nicholas Kaldor's:

> The main argument in equity for the [wealth] tax is that income taken by itself is an inadequate yardstick of taxable capacity as between incomes from work and incomes from property, and also as between the different property owners. The basic reason for this is that the ownership of property in the form of disposable assets endows the property owner with a taxable capacity as such, quite apart from the income which that property yields. This is best shown if you compare a beggar who has neither income nor property with the position of a man who keeps the whole of his wealth of, say, Rs. 10,000,000 in the form of jewellery and gold. Judging their capacities by the test of income alone, the taxable capacity of both is nil. Quite apart from such an "extreme" case, it should be evident that as between people who possess property and income in different proportions, income alone is not an adequate test of ability to pay; nor can that capacity be assessed by a tax based on property alone. . . . [O]nly a combination of income and property taxes can give an approximation to taxation in accordance with ability to

pay.[170]

Does Kaldor's argument succeed? No, it does not, even if a wealth tax did not create socially undesirable incentives by deterring people from saving their earnings and pushing them to spend what they acquire before its value is eroded by a grasping government. Recall that the issue here is not whether to tax any return to invested wealth – an income tax necessarily would – but whether to tax bare deferral, the mere holding of property over time. If two people have equal earnings and pay equal income taxes, and if one chooses to spend her post-tax earnings presently while the other salts the money away in an investment that just manages to keep his principal in step with price inflation so that its real value does not increase, with what right may the community ask the saver – simply in virtue of his greater wealth and not his assumed receipt of more government protective services or his possession of greater unearned opportunities than others – to bear a larger portion of the cost of redistributing resources to the unfortunate or of buying public goods? What interest does the

[170] Nicholas Kaldor, Indian Tax Reform: Report of a Survey 20 (1956). For reiteration and endorsement of Kaldor's argument, see Lipsky, note 16, at 159 - 61. In this same vein, David Bradford notes that once one starts down the path of taxing alterations in people's economic power, it is not clear why some measure of change in economic power is preferable to some measure of the level of economic power. David F. Bradford, The Case for a Personal Consumption Tax, in What Should Be Taxed: Income or Expenditure? 75, 102 (Joseph A. Pechman ed. 1980). See also Wolff, note 1, at 52 - 53 (arguing that greater wealth in itself "confers on the affluent family a larger capacity to pay taxes," so that "in the interests of 'horizontal equity,' wealth should be taxed directly as well as income"); Boyd Kimball Dyer, The Relative Fairness of the Consumption and Accretion Tax Bases, 1978 Utah L. Rev. 457, 463 - 66 (contending that unlike consumption or wealth as tax bases, income "has no simple ethical maxim to support it" and, insofar as it aims at taxing in accordance with a person's ability to pay taxes, it points to a comprehensive wealth tax); Isaacs, note 14, at 33 - 34 (summarizing the argument for a wealth tax in addition to a tax on income).

community have in whether a person consumes post-tax earnings sooner or later, apart from any profits earned on investments? Kaldor and those who have broadcast his argument offer no answer to this elementary fairness objection, and I cannot write a convincing script for them.

2. Wealth's Psychic Return

The second justification for taxing wealth as well as income is more popular. It parallels the main argument for pairing a wealth tax with a consumption tax. The claim is that wealth yields benefits beyond the value of any consumption that it, or the income from it, might finance. The wealthy enjoy a greater sense of security and autonomy than people who worry about the permanence of their jobs or the precariousness of their slim savings. They bask in the deference, flattery, and helpfulness that others show them on account of their affluence. They can afford to take risks that people of lesser means cannot, because they have a cash-filled mattress to fall on if they trip, and those risks will in some cases produce for them grander returns than those with less money or borrowing power will ever have a chance to bid for. To be sure, any income they acquire will be taxed, but these other benefits of wealth-holding may be viewed as a species of psychic income that the income tax fails to trap. A comprehensive income tax, the claim runs, comprises a wealth tax too, at least on those who are sufficiently rich to enjoy the psychic benefits just described.[171]

Notice that this argument for hitching a wealth tax to an income tax is different from and possibly stronger than the parallel argument for adding a wealth tax to a consumption tax, though they

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[171] See, e.g., Meade Report, note 59, at 351; Warren, Consumption Tax, note 168, at 1122 - 23.

closely resemble one another. The justification for a consumption tax sketched above[172] expresses indifference towards inequalities in people's subjective satisfactions except when their preferences do not reflect their value judgments and take on the character of compulsions they would cast off if they could. Naturally, any defense of a wealth tax aimed at curbing some of these differences in psychic rewards – rewards largely or wholly traceable to choices people have made – would fall on unhearing ears. But the impetus for income taxation is importantly different in the view of many (though not all) of its defenders. The reason that a comprehensive notion of income is the proper tax base, in their view, is that the state and society are principally responsible for how well people fare, given the omnipresence of social, legal, and ethical norms, the store of knowledge and capital passed on by predecessors, and opportunities made possible by other people's desires and ambitions for which any individual actor can claim scant credit; and how well people fare – how much their preferences are fulfilled – depends in sizable part on how their control over resources changes over some measuring period. It is a small, but significant and contestable, step from this premise to the assertion that what tax policy ought mainly to be concerned with is how well people fare in a psychological or subjective sense, so that the state should not look only to people's material accessions in gauging their contributions to collective purposes, but to their satisfactions directly. Monetary income – the increase in somebody's control over property at market prices – should be supplemented by imputed income, most crucially from leisure. It might intrude overmuch into people's private affairs to make taxes depend on generalizations about how much satisfaction people derive from friendships, marriage, parenting, and other personal

[172] See Subsection III.F.

relations, but there is nothing untoward in making generalizations about the psychic returns to leisure or wealth, the thought runs. Taxing leisure might not be feasible, fair, or morally permissible, the argument continues, because people who do not work or do not work for money lack transferable assets with which to pay taxes, because they may not have stepped out of the market economy by choice and it is hard in practice to separate the lotus eaters from the involuntarily unemployed, and because compelling people to work to meet their tax burden is wrong or at any rate unpalatable. These objections do not apply, however, to taxing wealth in addition to income, on account of the psychological benefits it brings.

There are many ways to respond to this argument, but two strategies seem to me the most effective. One is to deny the argument's component claim about the special psychic benefits of wealth holding; the other is to contend that this justification for wealth taxation, applied consistently, leads to intuitively intolerable or incoherent results that can be avoided, if at all, only at the cost of grave injustice.

a. Doubtful Assumptions About Psychic Benefits

The first line of response is analogous to the main reason for not coupling a wealth tax to a consumption tax. Suppose that possessing wealth yields psychic benefits that go beyond those flowing from its future consumption and any investment gains it produces. Why should these benefits matter under a tax-and-expenditure scheme that cares about psychic satisfaction, given that those who did not choose to save part of their earnings instead chose to consume that part immediately, presumably because they thought that the sum of benefits from immediate consumption were more valuable to them

than the sum of benefits from wealth holding and later consumption? To consider the psychic benefits from the possession of wealth without counting the psychic benefits from the accelerated spending of income or wealth would be senseless in view of the underlying ambition of this scheme. It would be arbitrary to assume that those people who hold their wealth fare better, and therefore should be bound to contribute more to the community so that well-being is allocated more equally or the state remains solvent, than those who choose not to save when they have the same options in hand. Unless immediate consumers have no genuine choice, so that one cannot suppose that they do better, by their lights, consuming than saving (with whatever psychic pleasures it tows behind it), or unless immediate consumers consistently fail to appreciate the value they themselves would find in nesting their wealth and consuming it later, this argument for a wealth tax fails on its own terms. And there is no reason to think that either of these provisos would be true in a world where earnings, income taxes, and public projects and subsidies were approximately just.

b. The Undesirability of Using Psychic States as a Touchstone for Taxes

So far as I am aware, the first strategy for rebutting the case for adding a wealth tax to an income tax is puzzlingly absent from the academic literature, but the second strategy has many practitioners. Start from the proclaimed rationale for a supplementary wealth tax. The idea is that the state ought in principle to monitor and engineer the distribution of people's subjective sense of well-being, that wealth is strongly correlated with satisfaction, and that wealth therefore renders its owners subject to larger, satisfaction-sapping taxes. This is the same notion that underlies Oscar Wilde's quip that rich bachelors should be heavily taxed because it is unfair for some men to be vastly happier than

others. For just the reason that Wilde's suggestion is flippant, a wealth tax justified in the foregoing manner is silly, the second line of objection maintains. Taking the idea seriously would mean taxing or subsidizing people on the basis of all of their feelings of triumph and heartache, of sadness, serenity, and exaltation.[173] The wrongheadedness of this plan is apparent: we cannot peer into people's souls to take stock; it would be wrong to delve into people's friendships and family relationships, their sex lives, their crises of faith and struggles at work, which most wish to keep private, to determine who must help whom or how much people should pay to keep the government running; some people's happiness far outstrips their means, so that we might find ourselves raiding the purses of the poor to augment sullen misers' hoards. Indeed, some critics have said, a wealth tax seems to lead by this logic to a tax on earning capacity or human capital, since it, too, is in most cases a source of well-being, and that would be objectionable for a variety of reasons.[174]

A defender of wealth taxation might reply that these objections, though important qualifiers,

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[173] See, e.g., Tipke, note 78, at 779.

[174] For a description of those reasons for not taxing human capital, see note 10 and accompanying text. Warren relies on those reasons in defending a tax solely on transferable wealth:

> One response to this sort of argument for wealth taxation might be that there is no greater reason for collectivizing wealth than there is for collectivizing other forms of security, independence, and power. If the wealthy investor must share his wealth with less wealthy, should not the talented professional whose wealth is in the form of human capital have to do the same? This argument, like that in favor of measuring and taxing income invested in human capital, ignores the fundamental distinction between persons and things. If that distinction is accepted, it does not seem inconsistent to set social limits on other sorts of differences that might be substitutes for such wealth.

Warren, Consumption Tax, note 168, at 1123 (footnotes omitted). Not everyone would agree that the distinction between persons and things is strong enough to make the taxation of non-physical capacities or benefits immoral in all circumstances.

hardly quash his case. One could reasonably exempt many sources of subjective satisfaction from tax for the reasons just given while hitting wealth, because its possession occasions few doubts of these kinds. But then, as Alan Gunn points out, the specter of arbitrariness looms up:

> The ["equal sacrifice" theory of just taxation] is a product of the erroneous idea that income measures one's annual "satisfactions." We might say, pursuing this line, that a "true" measure of income would include all forms of imputed income from owning property or performing services, and all nonpecuniary "windfalls" like pleasant sunsets. Those who take this position concede its impracticality, and so are willing to fall back on the more conventional notions of income as a rough measure of the real thing. But this will not do. If "income" is truly measured by all of someone's satisfactions, the pecuniary aspects of income are so trivial in relation to the whole that taxing "measurable" income as a substitute for taxing "true" income would no more be acceptable than taxing people's earnings in January as a substitute for taxing their annual incomes.[175]

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[175] Gunn, note 87, at 383 - 84 (footnote omitted). In defending income as a tax base, Gunn rejects not the "equal sacrifice" view but the measurement of sacrifice in terms of subjective satisfactions, which traces back to John Stuart Mill's endorsement of the "equal sacrifice" theory in the context of his singular version of utilitarianism. Instead, Gunn favors a conception of equal sacrifice that is analogous to a military draft: "Each taxpayer is required to devote an equal (under a proportional income tax) amount of each year's income-producing efforts to the government." Id. at 385. Gunn notes that other considerations bear on the ultimate shape of tax rules, but this conception of equal burdens provides the core of his proposal. Unlike military conscription, which typically demand the same number of months of service from each conscript, Gunn's proposal would require people who choose to labor longer at an income-producing activity to work more hours for the government than those who labor less.

Whether imprecision traceable to a markedly narrowed tax base would produce unacceptably large injustices is impossible to say with confidence, in part because the problems of measurement offered as practical objections to a wealth tax preclude the comparisons that are essential to judge the extent and importance of resulting injustices. It is easy, however, to share Gunn's skepticism about the effects of patchwork coverage.

c. Some Problems with Using Well-being as a Metric for Justice

There remains a deeper set of objections to the second justification for taxing wealth in addition to all income, offered first by Ronald Dworkin in a related context.[176] These objections apply wholesale to any theory of distributive justice that grounds duties to give resources and entitlements to receive them in people's welfare, especially their subjective estimation of how well their lives have gone or are going. These objections apply equally to principles for dividing the cost of public goods and services that employ the same benchmark. I state them here abstractly rather than repeat analyses available elsewhere.

The first objection in this cluster radiates from what are sometimes called "external" preferences – preferences concerning the assignment of goods or opportunities to people other than oneself. Does the satisfaction of these preferences figure in a person's well-being for the purpose of fixing his tax burden or subsidy? Either answer generates difficulties. Not counting external preferences seems an affront to a theory of fair shares that makes the overall success or happiness of a person's life

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[176] Dworkin, Equality Part 1, note 38, at 196 - 224. For a restatement and elaboration of some of Dworkin's arguments, see Rakowski, note 32, at 39 - 43.

overwhelmingly important to that person's social obligations or entitlements, because many people's welfare depends very considerably on their sympathetic or ideological identification with others. Whether their spouses, friends, children, or causes prosper keenly affects the success of their own lives in their eyes. To ignore the satisfaction or frustration of external preferences therefore is to leave out of account a large part of what makes the lives of many people blossom or shrivel. It also would be impossibly difficult to isolate self-regarding preferences from other preferences and to base taxes solely on the former, given the complex interleaving of the two categories of preference in most people's lives. Then comes the rub: including external preferences in the calculus that yields tax burdens and government benefits would be even worse. It leads to a vicious form of double-counting, as people's popularity – the concern others have for them – affects their liabilities and public assistance. People's self-regarding preferences are multiplied in unequal measure through the places they occupy in friends' or relatives' or supporters' structure of preferences. How much one person would be taxed or gain in subsidies would depend not only on how well he is thriving but on the way in which that tax or assistance would impact others, too. Yet it seems profoundly unjust to treat two people who are alike in opportunities, talents, and initial resources differently, just because one has more allies or detractors. Welfarist theories are unable comfortably to accommodate external preferences without blatant injustice, but they also cannot jettison them without betraying the impulse behind welfare-based theories of just distribution, which is to look to <u>comprehensive</u> measures of how well each person's life is going.[177]

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[177] For elaboration of these points, with examples, see Rakowski, note 32, at 26 - 29, 35 - 36, 40, 45 - 47.

The second objection in this bundle contends that any theory of distribution framed in terms of welfare, enjoyment, or preference satisfaction – which this second justification for taxing wealth in addition to income presupposes – cannot stand on its own; it must instead rely on a more fundamental, resource-based account of distributive justice. Once that more fundamental resource-based account is identified, the objection concludes, the case for taxing income, or income plus wealth, will be badly weakened.

Imagine two people possessed of identical capacities and chances. One deems her lucrative professional life and considerable accomplishments puny, because she failed to achieve the soaring goals she set herself. She often wears a frown. Her peer never asked much from life; easily contented, she considers her materially unrewarding, experientially less rich life a solid success. She is proud and happy. It seems perverse to demand more money from the second, for the purpose of funding government programs or redistributive policies, or to accord her fewer benefits. The problem is not just that the second has less cash. The more basic difficulty is that taxes and expenditures are made to depend on people's ambitions and personal conceptions of success, however unreasonable or oblivious their goals and preferences are to social and natural constraints. Not just <u>any</u> measure of success or failure a person embraces but only metrics that are reasonable in view of people's circumstances, the desires and conduct of others, and the material and other limitations a social world imposes can fairly be used in assigning goods and duties according to people's successes or failures. But that is to say that some non-welfare-based theory of just distribution or contribution must be assumed, against the backdrop of which people are expected to form reasonable aims and preferences. Welfarist theories thus must rely, if they are to be intuitively attractive, on some other, more basic theory of justice that

measures people's shares in terms of resources and opportunities, not welfare. Once that point is conceded, it is hard to see how welfare-based theories, such as the one implicit in any scheme to tax wealth on account of the psychic benefits it often confers, can find any purchase at all, because they appear either otiose or incompatible with the resource-based theory that takes priority.

The third part of this trio of objections to taxing wealth because of the psychic benefits it can confer harks back to the principal reason for not wedding a wealth tax to a consumption tax. Welfare-based theories deny the significance of individual choice for people's material well-being and the success of their lives. That is a grave mistake. How well people fare depends, to be sure, on the conditions in which they live, the options their society offers them, and a broad range of influences they encounter rather than create. It depends as well, however, on what they make of themselves – on whether they decide to labor longer or more intensely than other workers, on the desires they foster or suppress, on the way they respond to opportunity and adversity, on how they cope with the demands and invitations of other human beings. Any theory of justice – and every justification for taxation necessarily embodies one – that makes people's duties and claims depend exclusively on their interior well-being affronts their autonomy by ignoring their responsibility for what they have achieved or lost. Even a theory of just distribution and of government contribution that is insensitive to differences in people's tastes and their subjective assessment of how fulfilled their lives are,[178] one that focuses

[178] The problems that expensive tastes pose for welfare-based theories of distributive justice have been widely discussed. See, e.g., Dworkin, Equality Part 1, note 38, at 228 - 40; Rakowski, note 32, at 37 - 38, 41 - 41, 54 - 58; Cohen, Currency, note 96, at 925; Van Parijs, note 24, at 69 - 72, 80 - 82, 93 - 94. An important statement of reasons for favoring objective notions of well-being in setting redistributive duties and entitlements in T.M. Scanlon, Preference and Urgency, 72 J. Phil. 655 (1975).

instead on objective marks of well-being such as monetary income and asset holdings, slights individual resolve and responsibility if it refuses to attend to the effects of people's choices that are independent of their capabilities and of social artifacts such as market returns to investing. A person's decision to put money aside for a later day is quintessentially a choice of this kind. Wealth might prove a burden for some, a warm blanket for most others. But the choice to retain rather than spend is not one for which society or less fortunate persons can impose a charge, because it is not a benefit to the saver for which the state, or the congeries of social forces, or an unfair nature can claim due.

IV. Conclusion

Wealth taxes cannot be justified by the arguments commonly advanced in their defense, notwithstanding their common use in Western European nations. As a tool for safeguarding markets or democratic politics from undesirable manipulation by the affluent, wealth taxes are ineffectual, unless perhaps they were to be levied on a scale that nobody contemplates, and far too broad in their reach, impinging on many people who pose no threat to economic or political institutions. Less bulky shields are available. Nor is there any warrant, in a liberal state, for taxing wealth to impel people to use their assets more productively. A weak tax on wealth will have negligible effects, when housing, retirement savings, motor vehicles, and insurance consume so large a fraction of most wealthholders' assets, and prodding people to obtain higher yields after they already have met their duties to alleviate injustice and fill the public purse abuses state authority. In addition, wealth is an unfit basis for assessing residents' or citizens' shares of the cost of providing government goods and services, whether contributions ought to track the benefits that people receive from the state or whether they ought to impose the same absolute

or relative sacrifices on taxpayers. Most government benefits do not accrue to citizens in proportion to their wealth, and those that do could at best justify only a slight, proportional or regressive tax on certain types of wealth, if they could justify any tax at all. Theories that instead assert the desirability of some tie between individual sacrifice and assigned contributions to non-redistributive government programs also cannot vindicate a tax on wealth, but instead point to a tax on income or consumption for that purpose.

A different sort of justification for wealth taxes appeals to the idea that natural resources belong equally to the planet's human denizens. Left libertarian theories of distributive justice in particular contend that a tax on all natural resources, including land in its unimproved state, should be imposed as a kind of rent for the use of a collectively owned entity. Several reasons to reject these theories appear above, but those who nevertheless endorse them cannot defend anything resembling wealth taxes as they ordinarily are conceived, because these theories typically imply very high taxes on only certain assets or fractions of assets, not low-level, comprehensive taxes on a person's net worth.

Another strategy for justifying wealth taxes is to argue that they form necessary complements to other taxes once the purposes behind those taxes are properly understood. Only one argument of this type might be persuasive. If wealth transfer taxes are required by justice or are wise social policy, and if the most attractive type of wealth transfer tax is an accessions tax that treats a gratuitous receipt as taxable only when a recipient consumes the gift, then there might be a sound reason to impose a tax on the value of the gift during and proportional to the time it is held by a recipient prior to its eventual consumption. This type of wealth tax would again be quite unlike existing wealth taxes, because the base would be limited to gratuitous accessions. As for consumption or income taxes, conjoining a

wealth tax to either to supply public goods or to redistribute resources would unjustly constrain people's freedom to choose how to use their earnings or basic allotment of goods over time.

These conclusions suppose that state institutions and people's possession of resources and opportunities are basically just. Would they change if one were convinced that serious and abiding injustice marred the distribution of goods and opportunities in the United States or elsewhere? They might. One could reasonably support the adoption of a wealth tax and the transfer of its proceeds to the ill-treated to help rectify assumed wrongs, even if a wealth tax were indefensible in a more just world. There is little reason to believe, however, that a wealth tax would be easier to enact than an equal-yield increase in income tax rates on high earners or whatever one considers a morally better alternative, because roughly the same, powerful interests would oppose both. A wealth tax is unlikely to be available as a second-best corrective.

The verdict of this Article therefore is unremittingly negative, if one sets aside the small role a wealth tax might have as part of a more comprehensive scheme for taxing gratuitous receipts. But proving a negative claim in matters of this kind is impossible. Someone, someday, might offer an unnoticed argument for taxing wealth, one that wins the support of reflective readers. This paper spreads a wide net, by considering a wealth tax's compatibility with a broad set of theories of distributive justice and of government funding. It is not, however, perfectly ecumenical. It does not consider the possibility that certain consequentialist or Rawlsian principles of social justice might sustain a tax on wealth. Many of the reasons for not adding a wealth tax to either a consumption tax or an income tax counsel against its desirability for utilitarian or kindred ends, because it seems doubtful that those who save income rather than spend it are, in virtue of that decision, happier or better off. But for

those drawn to consequentialist or Rawlsian views there is more to be said. Those who, like myself, accept a different account of justice should turn their tax collectors' gazes elsewhere, away from those who hold property. They should point them instead towards those whose earnings per hour, consumption, or gratuitous receipts exceed the norm, to gather funds to keep the state hale when the beneficiaries of its activities cannot be charged directly and to repair the deep injustices we have inherited and sustain.