The Rich Get Richer and the Poor Get Taxes: Toward a Democratic Theory of Tax Reform

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Introduction

> If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual . . . .[1]

That time has now come. The only constitutional provision authorizing taxation is in Article I, section 8, which empowers Congress to tax in order to pay debts and to provide for defense and the "general welfare." One can view the defense and payment-of-debts provisions as subordinate categories, merely instrumental to the achievement of general welfare. Thus the authority to tax is premised on the notion that the tax system will provide for the well-being of all the people.

As we shall demonstrate, the existing tax system actually serves to undercut rather than maintain *general* welfare. Preference is given to the "haves" over the "have-nots." Special interest groups have long ruled the taxation roost. The system is in fact so regressive, both absolutely and relatively, that it is constitutionally suspect, and not merely "bad policy."

We do not attempt to fully argue the constitutional issues in this commentary, which is primarily devoted to a demonstration of the system's regressive quality. Rather, our intent is to note the issues that arise out of the facts we present and outline a constitutional analysis which it seems to us follows from those facts.

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1. Knowlton v. Moore, 178 U.S. 41, 109-10 (1900).

Several approaches suggest themselves. First, conventional present-day tax wisdom stands on the shoulders of *Knowlton v. Moore*,[2] *Flint v. Stone Tracy Co.*[3] and *Brushaber v. Union Pacific Railroad Co.*[4] These cases upheld progressive tax rates on the theory that since the legislative choices involved were not irrational, the court should not intervene. The door to intervention was not shut entirely nor permanently, however, as the quote with which we started this article makes clear. The key assumption in the cited cases was that progressive tax rates would *operate* in a fair and rational fashion. But as we shall demonstrate, the current tax system operates in anything but a rational manner. That being the case, the old decisions are ripe for reexamination.

The rationality argument is buttressed by certain developments in other areas of the law. A requirement of fairness has been found to be implicit in the constitutional structure in a number of cases. Where long-standing unfairness has produced inequity, the courts have found that affirmative action programs are constitutionally required to right the wrong.[5] Moreover, the concept of due process has been expanding[6]—sufficiently so, we think, to threaten a tax structure which operates in violation of its own stated purpose.

Our position is also supported by an increasingly wide range of cases which recognize the fundamental values of fairness and equality, and which have read an equal protection component into the Fifth Amendment.[7] The result in *Bolling v. Sharpe*,[8] for example, stemmed

2. *Id.*

3. 220 U.S. 107 (1911).

4. 240 U.S. 1 (1916).

5. For example, affirmative action programs have been ordered or upheld in connection with school integration and voters' rights cases. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

6. In the area of criminal procedure, due process has required that effect be given to Fourth, Fifth and Sixth Amendment rights as against the states. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964): Gideon v. Wainwright, 372 U.S. 355 (1963); Mapp v. Ohio, 367 U.S. 643 (1961). Procedural due process cases in which the reach of the doctrine has recently expanded include Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). *But see* Mitchell v. W.T. Grant Co., *mem.*, 411 U.S. 981 (1974) [restricting the doctrine of *Fuentes* where a magistrate has considered the *ex parte* petition].

7. *E.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); Reynolds v. Sims, 377 U.S. 533 (1964). Cases suggesting that there is an equal protection dimension to the Fifth Amendment include Truax v. Corrigan, 257 U.S. 312 (1921), where Chief Justice Taft stated that the due process clause of the Fifth

from the Court's proper sense that the federal government must practice the same fairness that the Constitution imposes on the states. Moreover, there have been cases holding that it is proper to use taxation to ameliorate undesirable social conditions, as long as some fisc is raised in the process.[9]

The body of this paper, to which we now turn, demonstrates just how inequitable, irrational and undemocratic our tax system is. The conclusion presents constitutional and other arguments for the overhaul of the system based on the facts set forth in the body of the article.

Wealth and Income Distribution

The Myth of Progressivity

America lives by a series of myths. One of the most pervasive (and false) of these is that American taxation is "progressive," and so causes the rich to pay more taxes that our wealth is redistributed. The myth of progressivity—the notion that because of the rate structure the rich are getting poorer while the poor are getting richer—has long been vulnerable to attack, but nonetheless dies hard. Thus the myth lingers—the special interest taxpayers have no incentive to make the truth known, and ordinary taxpayers themselves do not quite want to know the truth—the myth is more comfortable, and facing the truth that they have been cheated (or at least overcharged) would be hard to bear.[10]

Amendment "tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the Legislature may not withhold." *Id.* at 331. *See also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943), where Mr. Justice Stone stated that federal legislation may be so discriminatory as to offend the Fifth Amendment, and Korematsu v. United States, 323 U.S. 214 (1944), where the Court sustained a war measure directed against persons of Japanese ancestry. The majority opinion clearly indicated that the Fifth Amendment would normally bar discriminatory legislation, and Mr. Justice Murphy rested his dissenting opinion on the ground that the racially discriminatory feature of the law deprived "all those within its scope of the equal protection of the laws guaranteed by the Fifth Amendment." *Id.* at 235.

8. 347 U.S. 497 (1954) (barring segregation in schools in the District of Columbia).

9. *E.g.*, United States v. Kahriger, 345 U.S. 22 (1953); Sonzinsky v. United States, 300 U.S. 506 (1937). *See also* discussion and articles cited in connection with this question in E. GRISWOLD, FEDERAL TAXATION 52-53 (1966).

10. The term "myth" has been used by several commentators. *See* J. RUSKAY, HALFWAY TO TAX REFORM 6-7 (1970) [hereinafter cited as RUSKAY].

Determining whether or not we have a "progressive" income tax requires more than a mere examination of the statutory rates, which nominally range from 14 percent on taxable income of $1000 to 70 percent on taxable income over $200,000. One must look beyond the nominal rates to taxes actually paid.

First, rates under 20 percent bring in nearly 90 percent of the tax; the so-called "progressive" rates account for but 10 to 12 percent of income tax revenues.[11]

Second, individuals with incomes over $1 million pay an actual tax rate of 24 to 26 percent; individuals with $20,000 incomes pay at a 23 percent rate[12]—if *that* is progressivity, then the word has lost its meaning.

Third, the working poor (families not on income support programs) pay over 50 percent of their incomes in taxes of all kinds. No other group pays a percentage over 35 percent, except for a very few peculiarly invested or very large wage earners.[13]

Fourth, in the quarter century since 1950, the effective tax rates paid by high income groups have dropped significantly, while the rates for low and middle income families have risen. In 1950, for example, the middle 60 percent of American taxpayers bore 29.3 percent of the federal tax burden, while the richest 20 percent bore 69.8 percent. By 1962, the middle group's share had risen to 37.3 percent, while the top 20 percent had its share reduced to 60.9 percent. During the same period the lower 20 percent saw their share of the burden almost double.[14] Since 1962, things have not gotten any better. Thus, not only is the middle income taxpayer's sense that his taxes are higher than they ought to be proved true; these figures also establish that the tax burden of the middle group has risen, not because the poor now pay a smaller share of the federal tax burden, but because the rich are paying proportionately less![15]

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11. All the pre-1964 progressive rates (rates above 20 percent) yielded *less* than 10 percent of total federal collections. Bailey, *Basic Tax Reform,* 54 A.B.A.J. 127 (1968) [hereinafter cited as Bailey].

12. *Id.*

13. Herriot and Miller, *The Taxes We Pay: An Analysis of the Income Tax Burden at Each Income Level,* 8 CONF. BD. REC. 40 (1971) [hereinafter cited as Herriot and Miller].

14. Bateman, *Taxes: Who Benefits and Who Pays,* BUSINESS HORIZONS, Feb., 1972, at 41, 62 [hereinafter cited as Bateman]; SURVEY OF CURRENT BUSINESS, April, 1958, at 17, and April, 1964, at 8.

15. Bateman, *supra* note 14, at 53. *See also* J. PECHMAN & B. OKNER, WHO BEARS THE TAX BURDEN? 10 (1974) [hereinafter cited as PECHMAN & OKNER], where the point

In summary, it should be observed that any tax is regressive which charges every individual the same for a given service or in contribution to the general revenues regardless of rewards received from the total system or his wealth created under it. Examples are social security, gasoline, energy, sales, real property, head, import and like taxes. And even a tax (income or estate) of varied rates by wealth categories becomes regressive if escape clauses allow wealth to plan itself out of the higher rates (effective rather than published rates being the test).

Taxation and the Distribution of Wealth and Income

Perhaps the most invidious effect of the current state of affairs in our tax law is its discriminatory impact upon and continuation of the inequitable distribution of wealth, income, taxes and opportunity in this country. Two key points need to be made: first, that the tax system is the major determinant of the distribution of wealth and income, and second, that the present tax structure in this country exerts almost no positive effect on the redistribution of either. On these two points, the experts are in accord.[16] Indeed, one important study has concluded that even under the most progressive set of assumptions, taxes as they are now levied could reduce income inequality by less than 5 percent in any taxable year; under a more factual and realistic set of assumptions, inequality is reduced by only 1/4 of 1 percent, which is to say not at all.[17]

An equally important finding is that during the period between 1952 and 1967, the top 15 percent of the population in fact increased its share of total income from 24 to 27 percent—a not insignificant improvement, which came at the expense of the other 85 percent of the population. Furthermore, that the lower classes held their own as well (as well!) as they did in large part was due to large increases in governmental transfer (handout) payments. Even with these increased government payments, the poor's income share suffered erosion,[18]

is emphatically made that while the total United States tax system is essentially *proportional* (not progressive) for the vast majority of families, it is harshly *regressive* as it applies to the poor.

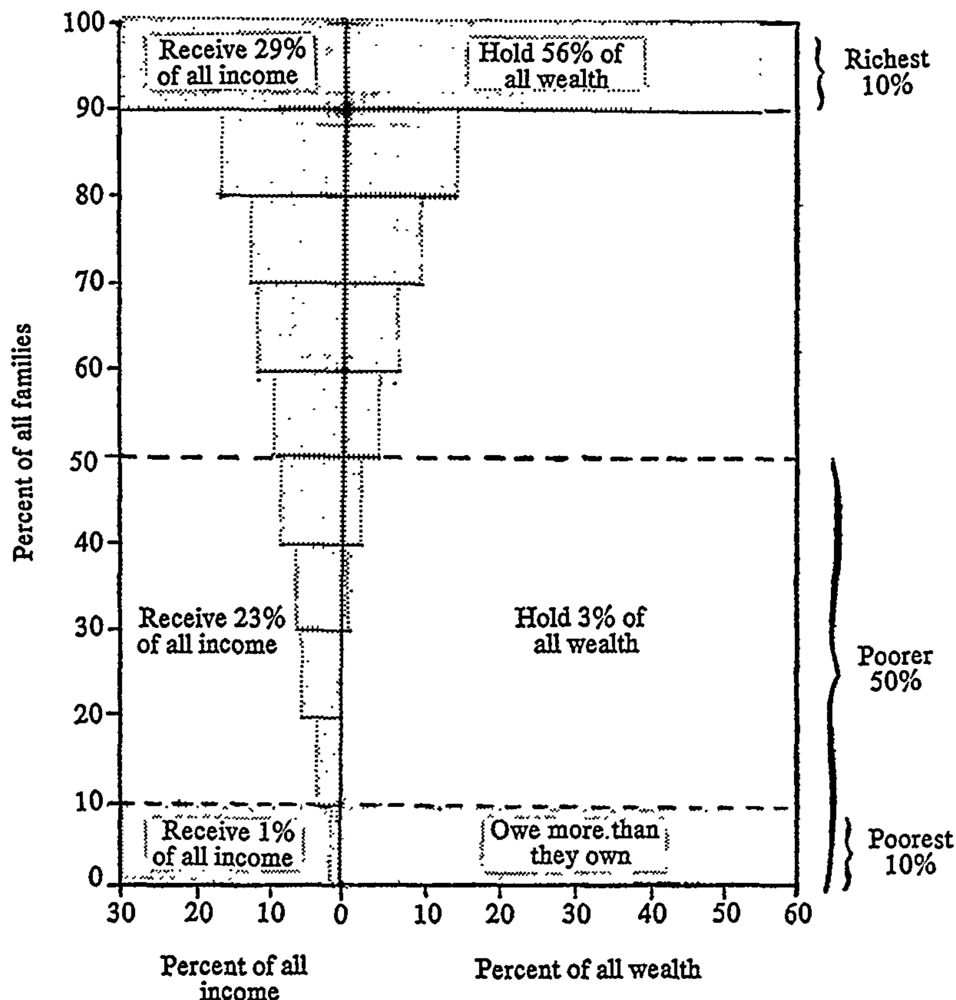
16. *See* B. OKNER, INCOME DISTRIBUTION AND THE FEDERAL INCOME TAX 6 (1966); PECHMAN & OKNER, *supra* note 15, at 10; Ackerman, Birnbaum, Wetzler & Zimbalist, *Income Distribution in the United States*, 3 RAD. POL. ECON. REV. 21 (1971); *cf.* Herriot and Miller, *supra* note 13, at 31.

17. PECHMAN & OKNER, *supra* note 15, at 64.

18. Pechman, *The Rich, the Poor, and the Taxes They Pay*, 17 THE PUBLIC INTEREST 25 (1969) [hereinafter cited as *Rich, Poor and Taxes*].

compounded by inflation, which was in part caused by the government transfusion of funds. The following graph[19] portrays existing maldistributions starkly.

U.S. DISTRIBUTION OF WEALTH AND INCOME



Data: Lewis Mandell, Survey Research Center University of Michigan

As the graph shows, the top 10 percent receive 29 percent of all income and hold 56 percent of all wealth, while the poorest 10 percent receive but 1 percent of all income and owe more than they own. The bottom half of all families receive less than a quarter of all income, and hold a mere 3 percent of all wealth. Since the tax system as it stands redistributes income hardly at all, and serves only to exacerbate the in-

19. FRIENDS COMM. ON NATIONAL LEGISLATION, TAXATION AND THE DISTRIBUTION OF WEALTH AND INCOME IN THE U.S.A. 2 (Jan. 27, 1974) [hereinafter cited as FRIENDS COMM.].

credible wealth advantage already enjoyed by the well-to-do, one need hardly look beyond these figures to discover a *need* for tax reform.

Of course, to advocate a more equitable distribution of income and wealth via a truly redistributive tax system based on democratic principles means that one will be "taking" from the rich and "giving" to the poor. Such redistribution is denounced by some as a deprivation of liberty, in that property will be taken away by coercion. But the same argument ought to be available to the poor *now*, for they are deprived of *their* liberty under the existing tax laws. Apart from the fact that the Supreme Court dealt this argument a heavy blow long ago,[20] one good conceptual answer to this (apparent) dilemma has recently been offered by Kenneth Arrow. He takes an Einsteinian view of "freedom," regarding it as a constant in the universe. Thus, in Arrow's concept, the unequal distribution of property and income amounts to an inherently unequal distribution of freedom, and when we use the tax law (as is here proposed) to redistribute wealth and income, the loss of freedom by the rich is offset by the increase in freedom and control over their own lives gained by the poor.[21] The beauty of the trade-off between wealth/income and freedom, to one who advocates redistribution of the former out of a commitment to democratic values, is that after the redistribution has occurred, the rich still have more than ample quantities of wealth, income and freedom to enjoy life as fully as anyone could reasonably desire, while the poor, blessed for the first time with something more than inadequate financial resources, will be able to share in a meaningful way in the freedoms and opportunities which the Constitution and our form of government were designed to insure.

To say all this in a slightly different fashion: the current distribution of wealth and income has no particular claim to priority or prolongation, and the current "special interests" system of taxation is not owed till-death-do-us-part obeisance. Moreover, since unequal economic power (that is, wealth and income) means unequal political power, and since the Supreme Court has tried to equalize political power by the reapportionment decisions,[22] and since Watergate has emphasized the disastrous consequences which may flow from the exercise of unequal power, solid pragmatic and constitutional as well

20. *Cf.* Knowlton v. Moore, 178 U.S. 41 (1900); New York Trust Co. v. Eisner, 256 U.S. 345 (1921).

21. Arrow, *Taxation and Democratic Values*, THE NEW REPUBLIC, Nov. 2, 1974, at 23 [hereinafter cited as Arrow].

22. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

as equitable reasons would appear to be urging us in the directions we propose.[23]

The Causes of Inequity

To this point, we have argued that the current tax structure in the United States is undemocratic and inequitable, and that a system based on a democratic theory of taxation would redress the inequities and help to solve some of our current economic problems as well. We now want to zero in more closely on two or three of the most egregious *causes* of the unfairness which we identified at the outset, and show why change is needed and what shape it might take.

"Loopholes"—The Tax Expenditure Budget

Everyone knows that loopholes exist in the tax laws—provisions which enable a taxpayer to avoid or reduce payment of taxes otherwise due. Moreover, taxpayers naturally use such provisions, and they have been told by the courts to do just this—to pay the smallest tax possible.[24] Specific loopholes have long been identified and used—for example, the homeowner's deduction of real estate taxes and mortgage interest, or the use of the depletion allowance by extractive industries. It was not until the late 1960's, however, that it occurred to anyone that the multitudinous loopholes could be described generically.

Stanley Surrey, then an assistant secretary for tax policy in the Treasury Department, coined the phrase "tax expenditures" as a generic label for all loopholes in 1967.[25] Surrey pointed out that those provisions of the federal income tax statutes containing special exemptions, exclusions, deductions and other tax benefits were really methods of providing governmental financial assistance. They were government *expenditures* made through the tax system, and thus similar in purpose to the direct expenditures in the federal budget.[26] They were *tax* "expenditures" because the provisions provided assistance via tax *reduction* rather than by means of direct aid. In effect, Surrey argued, there were two federal budgets—the normal one listing expenditures

23. The fact that more equal redistribution of income would lead to improved efficiency in expenditures of federal revenues is but one such additional "pragmatic" reason; increased spending by those no longer living in poverty, and thus an again-growing economy, is another.

24. *See* Knetsch v. United States, 364 U.S. 361 (1960); Gregory v. Helvering, 293 U.S. 465 (1935).

25. S. SURREY, PATHWAYS TO TAX REFORM 3 (1973) [hereinafter cited as SURREY].

26. *Id.* at 6.

for everything from paper clips to guided missiles and now totalling over $300 billion, *plus* the *tax expenditure budget*[27]—all those provisions (now totalling some $91 billion)[28] which permit the nonpayment of taxes under certain circumstances.

Surrey, a reformer interested in restoring fairness to the federal tax picture, observed that one major avenue to tax reform lay in the elimination of tax expenditure provisions which enabled "many well-to-do individuals and corporations" to escape the burdens of a system which continued to place "an income tax on those still in the poverty class."[29] Most commentators agree with Surrey's judgment that the loopholes constitute a primary source of unfairness in our tax system.[30]

We agree with that assessment and would take it one step further. For under a democratic theory of taxation, poverty should be overcome and goods, income, wealth and opportunity should be distributed without regard to race, ethnic group, social class, geographical region, age, sex or any other irrelevant criterion.[31] But with a "special interests" system of taxation, not even the much-heralded "war on poverty" was able to make a dent in the inequality problem.[32]

The tax expenditure provisions in the Internal Revenue Code of 1954 cause the base to which federal income tax is applied to be narrower than a comprehensive income tax base, including all income

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27. *Id.* at 6-7.

28. N.Y. Times, March 2, 1975, § 3, at 1, col. 1.

29. SURREY, *supra* note 25, at 8.

30. *See generally* P. STERN, THE RAPE OF THE TAXPAYER (1974) [hereinafter cited as STERN]; Bittker, *Income Tax "Loopholes" and Political Rhetoric*, 71 MICH. L. REV. 1099, 1128 (1973); *Rich, Poor and Taxes, supra* note 18; B. BLECHMAN, E. GRAMLICH, and R. HARTMAN, SETTING NATIONAL PRIORITIES: THE 1975 BUDGET 8 (1974) [hereinafter cited as SETTING NATIONAL PRIORITIES].

31. This may sound utopian, but is it? A genuinely redistributive system of taxation would (eventually) alter the figures shown on the graph in part II, section 2, so that any given 10% of the population would receive approximately 10% of all income and hold approximately 10% of all wealth. Discrimination means that some have what others do not possess, and by definition a truly redistributive system of taxation would go far toward eliminating that kind of inequality. Even if this system did not achieve absolute parity among the classes, it is clear from the experience of the Scandinavian countries that the tax system can be used to make everyone feel, with some justification, that he or she is a roughly equal member of the society. And it is the sense of equality or belonging which makes for the effective working together of ideologically disparate groups in a society to get things done for the common good. *See* MINISTRY OF FINANCE AND CUSTOMS, TAX LAW DEP'T, SURVEY OF THE NORWEGIAN TAX SYSTEM IN 1970; M. NORN, TAXATION IN SWEDEN (1959).

32. In 1971, 25.6 million persons—12.5 percent of the American population—were still officially "poor" (their incomes fell below the current, but outdated, "poverty index" developed by the Department of Health, Education and Welfare). FRIENDS

from whatever source derived, would be.[33] Some of the more familiar (and infamous) of these provisions are the special rate for capital gains,[34] tax-exempt interest on certain types of bonds,[35] accelerated depreciation[36] and the percentage depletion allowance for oil and other extractive industries.[37] One measures the tax expenditure budget for a given fiscal year by determining the amount of tax which would be collected if these special provisions were not on the books. Recent estimates place the total of such tax expenditures (or loopholes) at $91 billion in a single year.[38] While the sheer *amount* of money which thus escapes taxation is in itself shocking, what is even more troublesome is the set of priorities which govern these tax expenditure outlays. A year ago, when the tax expenditure budget was around $75 billion, the Joint Economic Committee of the Congress estimated that over $60 billion of the total benefitted the 20 percent of the population with annual incomes in excess of $15,000.[39] That is to say, *three quarters* of this extra governmental largesse goes into the pockets of that segment of the population least in need of such "assistance."[40]

Let us look at some of the figures involved a little more closely. The capital gains rate differential saves the average millionaire $641,000 per year in taxes; it saves those who make under $10,000 less than $8 per year.[41] The percentage depletion allowance saved the

COMM., *supra* note 19, at 2. For a discussion of the obsolescence of the poverty index, *see* Dodyk, *The Tax Reform Act of 1969 and the Poor*, 71 COLUM. L. REV. 758, 787-89 (1971) [hereinafter cited as Dodyk].

33. Dodyk, *supra* note 32, at 759.

34. INT. REV. CODE OF 1954, § 1201 *et seq.*

35. *Id.* § 103(a).

36. *Id.* § 57(a)(2), (3).

37. *Id.* §§ 57(a)(8), 611-13.

38. N.Y. Times, March 2, 1975, § 3, at 1, col. 1, quoting Chapter F of the official 1976 budget.

39. FRIENDS COMM., *supra* note 19, at 3.

40. Thus prompting Phillip Stern's description of the tax expenditure "budget" as "Uncle Sam's Welfare Program—For the Rich" N.Y. Times, April 16, 1972, § 6 (Magazine), at 28. To be fair, it should be noted that one can subdivide the tax expenditure budget into component parts which sound much less inequitable. For example, $20.7 billion of the tax expenditure total goes to the individual in his capacity as consumer; $4 billion goes to the individual as recipient of governmental income maintenance transfer payments, etc. SURREY, *supra* note 25, at 61, 67. Nonetheless, the fact remains that the tax expenditure budget is the primary source of unfairness, and what is more, these provisions serve to reduce taxes by 50% for those earning $500,000 or more, by 43% for those earning between $100,000 and $500,000, but reduce taxes for those in the lowest three brackets by a mere 14%, if and as such individuals can take advantage of the loopholes. SURREY, *supra* note 25, at 69.

41. *Who Pays Taxes?*, Peace and Freedom, Feb., 1974, at 8 [hereinafter cited as

oil industry $1.3 billion in taxes in 1971 (the figure is up to $3 billion today),[42] yet barely 10 percent of the savings were invested in new oil exploration, which is the supposed justification for the depletion allowance in the first place.[43] On top of that, in 1971 all oil and gas companies paid taxes at an effective rate of but 15 percent (the statutory rate is 48 percent) and the behemoths of the industry[44] managed to pay even lower effective rates, down to a mere 1.6 percent in one instance.[45]

These 1971 figures are by no means atypical; indeed, the figures tend to stay about the same, year in and year out; only the companies reporting the figures vary. One year Mobil pays the lowest rate; another year it is Exxon which is able to combine percentage depletion, accelerated write-offs and foreign "tax" credits (another name for royalties, with vastly different United States tax consequences) in order to achieve the lowest effective rate. And in the winter of 1973-74 we suffered through a (manufactured?) period of "shortages" in petroleum products, the main result of which was vastly increased, non-taxed profits for oil companies.[46]

We could, of course, extend this catalog indefinitely. With the tax expenditure budget so alive and well,[47] one could scarcely be ac-

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Who Pays Taxes?], *citing* J. PECHMAN & B. OKNER, INDIVIDUAL INCOME TAX EROSION (Brookings Inst. 1972).

42. N.Y. Times, March 2, 1975, § 3, at 1, col. 3.

43. *Who Pays Taxes?, supra* note 41, at 9. This depletion "gift" has applied to foreign oil as well as domestic oil, thus encouraging the importation of "cheaper" foreign oil. The current energy crisis is one result of this aspect of the depletion allowance, and it goes without saying that resurrection of the allowance with respect to foreign oil would be in direct opposition to our stated policy of achieving energy self-sufficiency.

44. Gulf, Texaco, Exxon, Standard of California and Mobil are the largest. *Id.*

45. Standard of California was the company which paid out 1.6 percent in 1971. *Id.*

46. 1974 oil company first-quarter profits were "incredible" according to *The Progressive.* The statistics were as follows:

Company	1st quarter profits	% increase over 1973
Exxon	$705 million	39%
Texaco	$589 million	123%
Standard of California	$293 million	92%
Gulf	$290 million	76%
Mobil	$259 million	66%
Standard of Indiana	$219 million	81%
Shell	$122 million	69%
Occidental	$ 68 million	718%

THE PROGRESSIVE, June, 1974, at 11.

47. The following chart shows the growth in the tax expenditure budget over the past decade:

cused of flailing a dead horse if the list were extended. One could cite, for example, the Internal Revenue Code's "housing program," the provisions in the code which allow homeowners to deduct interest payments and taxes, and in some instances depreciation. This inures almost entirely to the benefit of wealthier taxpayers. The truly poor are for all practical purposes excluded from participation, since those with incomes in the $1000 to $2000 range derive but 88¢ of benefit per tax return from the homeowner's interest and other deductions, while those in the $4000 to $5000 range do only marginally better—$19.18 per return. Over 75 percent of the $7 billion in tax revenue lost through the homeowner's deduction goes to benefit taxpayers with $10,000 or more adjusted gross income.[48] This is not to say that it is wrong to encourage home ownership; but it is to say that it is undemocratic and discriminatory to do so in such a fashion as to exclude from assistance those who need help most. When large segments of our population "lack the wherewithal to provide themselves the essentials of a decent and healthful existence . . ."[49] it is simply unconscionable to spend $80 or $90 billion (or even $8 or $9 billion) in a way which precludes participation or benefit by the poorest 10 percent of the population. The net effect of the system is to provide a "grant" of $1.00 to individuals with $3,000 incomes, while the millionaire receives $725,865.[50] Some of the major loopholes, and the amount of revenue lost to the national treasury through them, appear in the following table.[51]

Loophole	Revenue Lost
Percentage depletion (oil & gas)	$ 2.9 billion
Percentage depletion (other industries)	350 million
Capital Gains — investment income	14.7 billion
Capital Gains — agriculture	1.1 billion

1967	$36.6 billion
1968	44.1
1969	46.6
1970	43.9
1971	51.7
1972	59.8
1973	N.A.
1974	74.8
1975	81.0
1976	91.0

N.Y. Times, March 2, 1975, § 3, at 7, col. 1.

48. Dodyk, *supra* note 32, at 782-83.

49. *Id.* at 758.

50. SURREY, *supra* note 25, at 70.

51. *Fiscal 1975 Tax Expenditure Budget*, 2 TAX NOTES 4, 10-17 (January 21, 1974).

Depreciation & Property tax deductions — homeowners	13.2 billion
Investment Credits & Depreciation — manufacturing & service industries	9.7 billion
Tax credits, income exemptions — multinational corporations	945 million
Charitable deductions	3.7 billion
Tax free interest on municipal bonds	3.7 billion
Deductible state & local non-property taxes	6.7 billion

The enormity of the figures, both in terms of the sheer dollar amount involved, and in terms of the unfairness which the loopholes cause, prompts our call for a major overhaul of the tax expenditure method of conferring governmental benefits. The nature of the changes that would take place in a tax system based on a democratic theory will be outlined further in the third part of this article.

Social Security Taxes

Today the largest and most oppressive tax many Americans pay is the social security tax. Since 1944, the percentage of total federal revenue derived from payroll taxes for social security and unemployment insurance systems has grown phenomenally. In 1944, social security taxes provided 3.9 percent of all federal revenue; today nearly 30 percent of all federal tax receipts come from payroll taxes. During the same period, income taxes paid by corporations have declined drastically. In 1944, corporate income taxes accounted for 33.6 percent of federal revenues; today, corporate income tax receipts account for but 14.6 percent of the total federal tax burden. The following table provides the comparative figures:[52]

Individual and Corporate Taxes

Fiscal Year	Total %	Individual Income	Corp. Income	Social Security	Excise	Other
1944	100	44.6	33.6	3.9	9.7	8.2
1949	100	43.8	27.0	5.8	17.7	5.7
1954	100	42.4	30.3	10.3	14.3	2.7
1959	100	46.4	21.8	14.8	13.3	3.7
1964	100	43.2	20.9	19.5	12.2	4.2
1969	100	46.5	19.5	21.3	8.1	4.6
1974	100	44.8	14.6	29.1	6.3	5.2

If one adds the individual income taxes and the social security taxes

52. Nader, *Corporate Taxes One-Third of Legal Rate*, PEOPLE AND TAXES, Oct. 1974, at 4.

(which are paid only by individuals—the employers' percentage, it is generally agreed, is actually and ultimately borne by the employee), then the figures, taken together, are even more ominous. That is to say, *individuals* now bear almost 3/4 of the federal tax burden while corporations bear a meager 1/7 of the burden:[53]

Individual and Corporate Taxes

Fiscal Year	Total	Individual	Corp.	All Other
1944	100	48.5	33.6	17.9
1949	100	49.6	27.0	23.4
1954	100	52.7	30.3	17.0
1959	100	61.2	21.8	17.0
1964	100	62.7	20.9	16.4
1969	100	67.8	19.5	12.7
1974	100	73.9	14.6	11.5

But the above figures do not tell even half of the truth about payroll taxes. For not only are individuals discriminated against, vis-a-vis corporations, but among these individuals, it is the poor and the near-poor who are taxed most severely. As Fred Bateman has stated:

> [T]he major thrust of public policies since the New Deal . . . has been to enlarge the ranks of the middle-income classes, not to give the poor a share of the national product more nearly commensurate with their share of the population.[54]

Nowhere is this more true than in the area of social security taxes.

Two main points need to be made. First, social security taxes are not buying insurance. There is really no fund building up in the treasury in which the tax-paying wage earner owns a share. While today's pensioner may be getting back much more than *he* paid in, the favorable pay-off ratio is declining and it is estimated that the system will begin running deficits within one or two years.[55] One's *ability* to collect social security when he retires, and the *amount* he will receive, depends on appropriations by Congress *at that time*. We are, in short, mortgaging our sons and daughters to pay for our retirement, and with

53. *Id.*

54. Bateman, *supra* note 14, at 61.

55. Indeed, on January 24, 1975, the Advisory Council to the Social Security Administration stated that benefits would begin to exceed receipts in 1976. No immediate threat to current payment schedules would be posed, because there is a "cushion" of $50 billion in the so-called Social Security Trust Fund. Unless the method of raising social security revenues is changed, however, we will be faced with either (a) rapid diminution of the trust fund, or (b) increases in the already high rates of the payroll tax. *See* N.Y. Times, January 25, 1975, at 1, col. 8. The council has recommended that the increasingly expensive retirement benefits be paid for through a "substantial infusion" of general government revenues, rather than another increase in social security payroll taxes.

declining birth rates and increased life expectancies, we are painting ourselves into a corner where either we will receive less than our grandparents from the system, or our children will pay astronomically greater amounts in social security tax in order to provide for us. Either way, the current 15 percent-plus levy is a tax, not an insurance premium.

Second, this tax is assessed on every nickel of wage income up to the current cutoff point of $14,100,[56] whether earned at $1.60 an hour or $160.00 an hour, and not at all above it. Because of the cutoff point, which in prior years was even lower ($6,600 in 1965; $7,800 after that until 1969),[57] social security taxes have had a negative impact on the redistribution of income in this country.[58] During the years between 1962 and 1968, for example, social security taxes rose 22 percent for middle-income groups, but rose over 60 percent for those earning $2000 to $4000 per year.[59] "The promotion of income inequality by the payroll tax is most strikingly evident when it is compared with the effects of the individual income tax . . . ."[60] While low income earners are protected from federal *income* tax liability by various exemptions and deductions, the social security tax continues to apply to and tax low incomes without exemption "and at the highest effective (average) rates of all taxes."[61] Moreover, while under the income tax those with the highest incomes pay (at least nominally) the highest rates, the opposite is true for social security. Once wages go past the cutoff, the effective rate *decreases* for each extra dollar one earns. Finally, the payroll tax applies only to wages, salaries and self-employed income. Property income is exempt, again to the advantage of the wealthy.[62]

Some figures might help sharpen this analysis. A person who earns $3,400 per year currently pays a social security tax of over $415, for which he or she will receive about $1,200 a year in benefits at age 65. A person who earns ten times as much—$34,000 per year—will pay about three times as much tax and receive benefits of $3,200

56. INT. REV. CODE OF 1954, § 3121(a)(1).

57. Act of July 30, 1965, Pub. L. No. 89-97, § 320, 79 Stat. 393, *amending* INT. REV. CODE OF 1954, § 3121(a)(1); Act of Jan. 2, 1968, Pub. L. No. 90-248, § 108(b)(2), 81 Stat. 835, *amending* INT. REV. CODE OF 1954, § 3121(a)(1).

58. *See* SETTING NATIONAL PRIORITIES, *supra* note 30, at 7.

59. Bateman, *supra* note 14, at 52.

60. J. BRITTAIN, THE PAYROLL TAX FOR SOCIAL SECURITY 88 (1972) [hereinafter cited as BRITTAIN].

61. *Id.*

62. *Id.* at 89.

(nearly triple those of the low income earner).[63] The below-poverty level taxpayer has his already inadequate income forcibly reduced by one sixth; the affluent taxpayer has his income reduced but one thirtieth and is left with an income (pre-retirement) some eight times the poverty level. In addition, he can look forward to more social security retirement benefits than the low-income wage earner, though as compared with the low-income earner he will almost surely need those benefits less. Whatever else may be in doubt about our tax laws, the regressivity of social security taxes as they apply to the poor is not.[64]

A final illustration of this unfairness is perhaps in order. If we add the payroll tax *and* the income tax, the total federal tax structure is *regressive* until one reaches a fairly high income level. As an example, the effective tax rate for a family of two earning $10,800 a year in 1973 was, because of social security taxes, actually higher than the tax rate for a couple earning $15,600 that same year. In fact, the rate on income of $10,800 was not exceeded until the couple earned nearly $23,000 per year![65] As John Brittain has put it with marvelous understatement, "a situation in which a family at the $10,800 level will pay at a higher rate than one near $23,000 calls for adjustment."[66]

Adjustment is of course much too mild a term. The point, nonetheless, is clear. If a person is "officially" living in poverty and excused from or otherwise unable to pay income taxes, then he should not have to pay payroll taxes either. "If equity requires his exemption from one tax, logic requires his exemption from the other."[67]

Death Taxes

The notion that the rich should pay some kind of tax on accumulated wealth at the time of death has long been a strong tenet of American populist (and popular) thought. As far back as 1907, for example, Theodore Roosevelt urged passage of a death tax as a means of preserving a "measurable equality of opportunity for [future] generations."[68] A generation later, Franklin Roosevelt declared that

63. *See* BRITTAIN, *supra* note 60, at 151-83, for a discussion of the effect of the current social security tax on lifetime income inequality.

64. *Id.*; C. WALKER & H. REUSS, MAJOR TAX REFORM: URGENT NECESSITY OR NOT? 33 (1973) [hereinafter cited as WALKER & REUSS]; SETTING NATIONAL PRIORITIES, *supra* note 30, at 12, 256; PECHMAN & OKNER, *supra* note 15, at 58.

65. BRITTAIN, *supra* note 60, at 92.

66. *Id.* at 94.

67. *Id.* at 254.

68. STERN, *supra* note 30, at 326.

inherited economic power was inconsistent with the ideals of American government;[69] when the present estate tax law was passed in 1941 (it has remained virtually unchanged since), he thought that it would effectuate the redistribution of wealth in this country.[70]

But nothing so dramatic as a more equalized distribution of wealth has come about in the intervening years. Indeed, if anything, the situation has gotten worse since the end of World War II.[71] Furthermore, there has never been any real consensus as to the *goals* of death taxes, beyond the obvious objective of raising revenue. Thus, though the aim of reducing concentrations of wealth has long been part of the *folklore* of death taxes, it has never really taken hold as a strong motivating force behind the actual estate (and gift) tax provisions. Indeed, even the revenue produced by death taxes has been declining.[72]

From the standpoint of a democratic theory of taxation, problems raised by current death tax provisions are both many and varied. Among topics frequently debated, for example, are questions whether large estates are needed for capital formation in a capital-hungry society, whether an estate or any other property should be taxed for any purpose other than the production of revenue and whether large estates should be broken up. Some of our outstanding tax theorists have written on these topics,[73] and hearings on the question have been held in Congress.[74] There seems to be general agreement, both among the commentators and within the Treasury Department, on the need for reform of estate and gift taxation. There is even a fair degree of unanimity on the kind of changes reform should bring about. What has been written will not be repeated here, except in outline form, sufficient for us to complete our picture of the need for across-the-board progressivity in the tax system.

Some of the more widely recognized death tax loopholes include:

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69. *Id.* at 306.

70. H.R. No. 1681, 74th Cong., 1st Sess., pt. 2, 643 (1935).

71. *See* C. Wilcox, Toward Social Welfare: An Analysis of Programs & Proposals Attacking Poverty, Insecurity, & Inequality of Opportunity 14-16 (1969).

72. Before World War II, 7% of federal revenues came from estate and gift taxes; today the same source provides but 2% of the revenues. Commissioner of Internal Revenue, Annual Report 1973 *v.*; Kurtz & Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, The Criticisms, and a Rebuttal*, 70 Colum. L. Rev. 1365, 1366 (1970) [hereinafter cited as Kurtz & Surrey].

73. *See generally* Readings in Death and Gift Tax Reform (G. Goldstein ed. 1971) [hereinafter cited as Goldstein].

74. House Comm. on Ways and Means, Senate Comm. on Finance, Tax Reform Studies and Proposals, I-IV (1969) [hereinafter cited as Tax Reform Studies and Proposals].

(a) the capital gains pass-through (without tax) at death;
(b) grandfather or generation-skipping trusts;
(c) the gift tax: noncorrelated and noncumulating;
(d) the use of living and charitable trusts;
(e) the marital deduction and split estates.

Estate tax *rates* are also a problem. Although nominally progressive—the statutory estate tax rates range from 3 percent on taxable estates of $500 to 69 percent-plus on estates of $20 million and over—percentages hardly tell the whole story. As the following chart[75] indicates, the actual tax or *effective* rate paid falls far short of the rate nominally imposed; to the extent that the two rates diverge, progressivity and fairness are undercut.

Gross Estate Size	*Tax per Rate Schedule*	*Actual Tax*
$500,000-$1,000,000	29%-33%	17.3%
$1-$2,000,000	33%-38%	21.0%
$2-$3,000,000	38%-42%	23.5%
$3-$5,000,000	42%-49%	25.6%
$5-$10,000,000	49%-61%	25.7%
$10-$20,000,000	61%-69%	26.8%
$20,000,000 and over	69%+	

Among other things, equity in taxation means that "similarly circumstanced" taxpayers will have very nearly identical tax burdens.[76] A look at the major death tax loopholes, to which we now turn, proves that not even this minimal objective is really achieved, and shows how they further distort the erstwhile fairness of the system.

(a) *Capital Gains Pass-Through*

The capital gains pass-through highlights the need to correlate estate and income taxes. It allows the transfer of appreciated assets at death without the payment of any capital gains tax. As long as the decedent holds the appreciated property until his death, he pays no capital gains tax on appreciation which occurred in his lifetime, and since the heir takes as *his* basis the fair market value of the property at the date of the decedent's death, the capital gains tax is forever forgiven.[77] If the heir sells, he pays a tax only on the gain which occurs during his holding, and if he passes it on at death unsold there is again no income tax. The potential for income tax avoidance is obvious.[78]

75. STERN, *supra* note 30, at 323.
76. C. SHOUP, FEDERAL ESTATE AND GIFT TAXES 105 (1966).
77. INT. REV. CODE OF 1954, § 1014.
78. The Treasury Department has estimated that at least $15 billion a year of capital gains fall outside the income tax system because of this death tax loophole. 3 TAX

(b) *Generation-Skipping Trusts*

Another device frequently used to reduce estate taxes is the generation-skipping trust. If a grandfather with an estate of $10 million took advantage of no loopholes and left his estate to his two children equally, his estate tax would be about $6 million and each child would receive $2 million. If each child lived on the income from that $2 million, then each estate would pay a tax of about $750,000 or $1.5 million total, meaning that of the grandfather's original $10 million, $2.5 million would pass to the grandchildren. If, on the other hand, the grandfather left his money in trust, the income could go to his children, then to the grandchildren alive at his death, with the remainder to the great-grandchildren. The only tax would be the original tax on the grandfather's estate, thus carrying the estate through three generations on one minimal tax. If husband and wife joined and used gifts as well as the grandfather trust device, the advantage would be multiplied.[79] As David Westfall points out, generation-skipping trusts not only mean lost federal tax revenue; there are "indirect social costs" which are perhaps as large and at least as invidious as the dollar amount of taxes thus avoided, one such special cost being the creation of irrevocable trusts in which large amounts of money or other valuable resources are indefinitely tied up.[80] The public got some notion of the amounts of money and degrees of power that can be involved, during Nelson Rockefeller's vice-presidential confirmation hearings.[81]

REFORM STUDIES AND PROPOSALS, *supra* note 74, at 331. An additional $4.5 billion passed via the section 1014 loophole from decedents for whom an estate tax was not required. The revenue lost would total at least $7 billion, and probably closer to $10 billion. *Id.* at 334.

79. The example is drawn from Kurtz & Surrey, *supra* note 72, at 1369. Treasury Department data reveals that the generation-skipping device is most useful to the very wealthiest estates—those over $2 million. As a department publication put it, the "situation unfairly discriminates against those persons of relatively modest wealth . . . as well as against all persons regardless of wealth who for personal or family reasons do not desire to make use of these generation-skipping arrangements. . . . It leads to all individuals . . . having to choose between personal and family considerations, on the one hand, and tax savings on the other. A fair tax system would not demand this choice." 3 TAX REFORM STUDIES AND PROPOSALS, *supra* note 74, at 389.

80. Westfall, *Revitalizing the Federal Estate and Gift Taxes*, 83 HARV. L. REV. 986, 1007-08 (1970).

81. J. Richardson Dilworth, financial advisor to Mr. Rockefeller, disclosed that the vice-president and 83 other members of the Rockefeller family are worth more than $1 billion, and that figure excludes Mr. Rockefeller's personal real estate holdings and his vast private art collection. According to the Senate testimony, John D. Rockefeller, Sr., made about $1 billion, gave half of that away, and passed $465 million on to John D. Rockefeller, Jr. The second generation gave away another $500 million and passed $240 million on to Nelson and his four brothers. Mr. Dilworth's statement that the family

Not only does the generation-skipping trust provide a means for tax avoidance; it also has a "crippling effect" on the progressivity of the estate tax structure.[82] Only large estates are able to make use of the device—smaller ones need the principal during the intervening generation. Thus we have a loophole for the wealthy which only the most wealthy can employ—a case of double discrimination, as it were, and one more instance of the tax system giving an advantage to those who really need no further advantage. As one writer has objected, "If a testator wants to skip generations that should be his business, but there should not be a prize of tax savings associated with it."[83] As things now stand in this country great wealth, and great power, pass from one generation to another by means of inheritance among a relative handful of families. However beneficent the intentions (and even the actions) of such individuals may be, their vast and continuing familial accumulations of wealth and power are inconsistent with the normative ideal of equality for all upon which this country was established. It may well be that doctrines such as "one-man-one-vote" and "no discrimination before the law" will have to expand to reach not only into the voting booth or the jail, but also the tax laws. Votes are not equal when "fat cats" control presidential and other campaigns including those of judges and prosecutors; the law *encourages* discrimination when tax statutes *add* to the privileges already enjoyed only by the rich.

(c) *The Gift Tax*

All estate planning makes use of the fact that the gift tax and the estate tax are not cumulative, that there are exemptions from the gift tax as well as the estate tax, and that the rates for each begin quite low.[84] For example, a wealthy family of five married brothers, each with five children, each child having five children, can give away $5 million dol-

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is "totally uninterested in controlling anything" was disputed by executives of Eastern Airlines (of which Laurence Rockefeller is the largest shareholder) who asserted that the Rockefellers were highly influential in determining company policy. The largest family holdings today, held outright by family members *or in trust*, are in Exxon, IBM, Standard of California, Chase Manhattan Bank, Mobil, Eastman Kodak, Texas Instruments and General Electric. N.Y. Times, December 4, 1974, at 1, col. 1; at 29, col. 1.

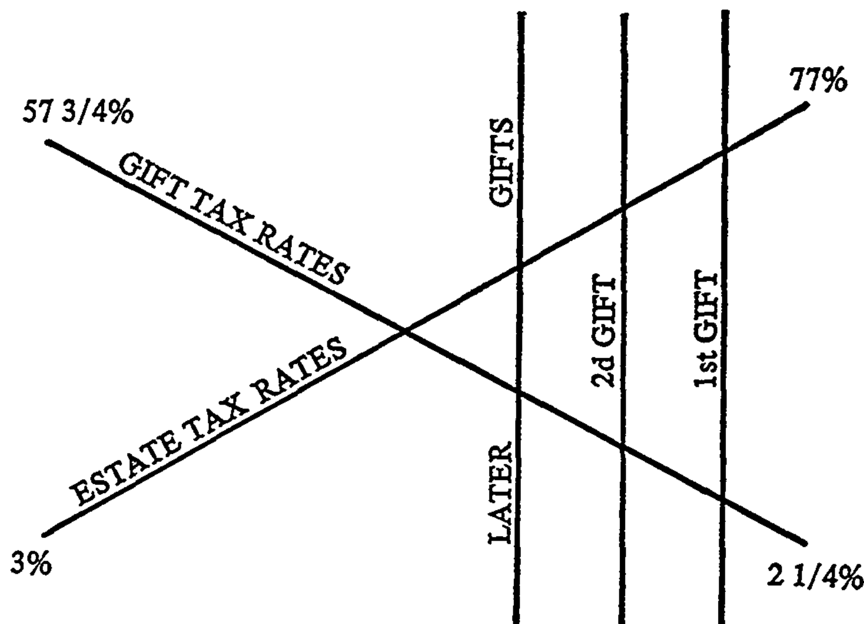
82. Kurtz & Surrey, *supra* note 72, at 1370.

83. Brannon, *Death Taxes in a Structure of Progressive Taxes*, 26 NAT'L TAX J. 451, 467 (1973) [hereinafter cited as Brannon].

84. For a discussion of the relation between estate and gift taxes, *see* C. LOWNDES, R. KRAMER & J. MCCORD, FEDERAL ESTATE AND GIFT TAXES § 24.4 (3d ed. 1974) [hereinafter cited as LOWNDES, KRAMER & MCCORD].

lars per year within the family without paying any tax merely by using the gift tax exemptions. That would be $100 million in twenty years.

The same family could go much further, at minimal tax cost, by making added gifts at minimal gift tax rates, simultaneously lowering the remaining estate into lower estate tax rates. The interlocking operation of estate and gift taxes is shown in the following diagram:



Numerous relatively small gifts (as in our example) are taxed at the lower end of the gift tax scale,[85] yet the same gifts, one by one, reduce the size of the estate and thereby reduce the estate tax rate which will eventually be applicable. On a $10 million estate, for example, to pick up our earlier illustration, the normal estate tax would be about $6 million. If the decedent disposed of his wealth during his lifetime, however, he would be able to give away (to the same heirs) some $6 million, on which gift taxes would normally be about $3 million. The tax saving (and revenue lost) is $3 million. The serious element of unfairness[86] in all this is that smaller estates, not to mention those taxpayers who pass on to their reward without leaving a taxable estate at all, are unable to take advantage of this exclusive, rich-only loophole.

(d) *Living and Charitable Trusts*

A fourth set of estate tax provisions favorable to continued control of wealth and power by the wealthy are those dealing with living (*inter*

85. The tax is 2¼% on amounts not over $5,000. INT. REV. CODE OF 1954, § 2502(a).
86. Kurtz & Surrey, *supra* note 72, at 1373.

vivos) and charitable trusts.[87] The variations here are infinite, but the effect always the same. One may escape income tax by creating a ten year "Clifford" trust,[88] making the income taxable to another (the beneficiary), but with the property reverting to the settlor at the end of ten years. Or one may create a trust in which the grantor gives up all rights *except* management and escape both income and estate taxes.[89] Additionally, one can, during his lifetime, create private or public foundations, pay no estate tax, deduct the charitable gift from yearly taxable income and thus save large income taxes, and yet continue to exert at least influence if not control over voting of stocks or other assets.[90] The same can be done by will with avoidance of estate taxes only. Oftentimes it is not the dollar amount of wealth involved that is important but the power that attaches thereto. And, though the 1972 Tax Reform Act imposes heavy restrictions on private foundations, it does not completely destroy the basic wealth-control benefits.[91]

The Marital Deduction

The marital deduction permits up to one half of an estate to be transferred to the surviving spouse (if full control is given) without estate or gift tax.[92] This in effect permits every family to consist of two estates, each one half as large as the family wealth and thus transferable at lower estate tax rates. If one half of a decedent's estate goes to the surviving spouse, the combined effect of these provisions is thus to tax only half of it, and that at a much-reduced rate. In theory, of course, the lost revenue is recouped when the surviving spouse dies, but since the survivor may reduce the estate significantly by making tax-free or low-tax gifts and since either spouse can make use of the other loopholes discussed here, a large part of the revenue is lost permanently to the federal government.

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87. The Internal Revenue Code allows a deduction for transfers for public, charitable and religious uses. INT. REV. CODE OF 1954, § 2055. For a discussion of tax avoidance by means of inter vivos transfers, *see* LOWNDES, KRAMER & MCCORD, *supra* note 84, at 902-31, 1000-21.

88. INT. REV. CODE OF 1954, § 673; *see* discussion in LOWNDES, KRAMER & MCCORD, *supra* note 84, at 1002.

89. INT. REV. CODE OF 1954, § 675; LOWNDES, KRAMER & MCCORD, *supra* note 84, at 968-71, 1003-04.

90. *See* STAFF OF SENATE COMM. ON FINANCE, 89TH CONG., 1ST SESS., TREASURY DEPARTMENT REPORT ON PRIVATE FOUNDATIONS 8-9, 37045 (1965).

91. *See* Johnson, *The Privation Foundation is Alive and Moderately Well*, 35 MONT. L. REV. 53 (1974).

92. INT. REV. CODE OF 1954, § 2056.

Over the years the marital deduction has come in for heavy criticism on two main scores: one, the provisions are too complex; and two, they are too harsh in the way they operate on widows in cases where the relatively small estate proved inadequate to meet the family's needs when the widow had responsibility for raising minor children. The 1969 Treasury Department proposals aimed at solving both problems by means of an *unlimited* marital deduction.[93] Such an unlimited deduction may be simpler but it only compounds the advantage of the wealthy in the guise of response to the emotional appeal of less-wealthy widows.[94] We would not accept the Treasury proposal.

Income, wealth, opportunity and power are already unequally distributed in this country. That the state and gift tax laws do nothing to redress that imbalance is sufficient criticism.[95] That they in fact allow, authorize and facilitate the perpetuation and increase of that inequality to the third and fourth generations is a potent argument for overhaul of the total tax system and quick adoption of a democratic theory of taxation.

Inflation

Strictly speaking, inflation cannot be described as a loophole, but the topic deserves mention here because the effects of inflation bear most heavily on the poor.[96] For the last two years the media have carried almost daily accounts of increasing prices for food, gasoline, housing, etc. Yet a recent study by the Congressional Joint Economic Committee shows that the *biggest* increases for consumers in 1974 were for income and social security taxes. The figures were as follows:[97]

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93. *See* 3 TAX REFORM STUDIES AND PROPOSALS, *supra* note 74, at 358.

94. The amount of revenue lost was estimated at 13% of estate and gift tax revenues for a ten year period; losses after that were estimated at 10% annually. TAX REFORM STUDIES AND PROPOSALS, *supra* note 74, at 44.

95. President Truman summed things up this way in 1950: The estate and gift tax law contains "excessive exemptions, unduly low effective rates . . . and . . . favors large estates over smaller ones [putting] substantial amounts of wealth completely beyond the reach of the tax laws." H.R. DOC. No. 451, 81st Cong., 2d Sess. 6-7 (1950).

96. "The percentage increases in tax associated with inflationary rises in income will be greatest for taxpayers with very low tax liabilities . . . ." Murray, *Income Tax Progression and Inflation,* 35 TAX. REV. 47, 48 (1974).

97. The figures are based on the effects of inflation on a family of four with income of $14,446. *See* CONGRESSIONAL JOINT ECON. COMM. REPORT, STUDIES IN PRICE STABILITY AND ECONOMIC GROWTH. No. 1: INFLATION AND THE CONSUMER IN 1974, 94th Cong., 1st Sess. (1975), as quoted in N.Y. Times, Feb. 10, 1975, at 14, col. 1. The effect is undoubtedly worse on the genuinely poor.

Item	Percentage Increase
Food	11.9%
Housing	13.5%
Transportation	14.3%
Social Security Taxes	21.6%
Income Taxes	26.5%

As journalist Tom Wicker noted, the committee report is full of "other evidences that under the American tax and economic system, the rich generally get richer and the poor get poorer."[98] For example, families earning more than $50,000 a year in 1973 could make as much as 12 percent ($6,000) more in 1974 without paying higher taxes, while poorer families with a similar percentage increase would wind up in a higher tax bracket. In the words of the committee, "inflation worsens rather than improves the income redistribution function of the tax system."[99]

Another reported example of how inflation perversely affects the distribution of income is the fact that federal, state and local income taxes for a family of four earning $9,320 rose by 31 percent in 1974, yet income taxes for similar families earning $14,466 or $20,883 rose only 26.5 percent. The report concludes that the "spiraling inflation of the past three years has had an adverse impact on all consumers, but the poor have clearly borne a greater burden."[100] Congress may not be able (or willing) to do much that directly affects the price of meat or bread, but Congress can directly affect the income and social security taxes paid by low and moderate income wage earners. Infla-

98. N.Y. Times, February 11, 1975, at 39, col. 1.

99. N.Y. Times, February 10, 1975, at 14, col. 1. The report gives this example: "An average four-person family with an income of $13,000 in 1973 took the standard deduction and paid $1,391 in federal income taxes. Its disposable, after-tax income was $11,609. Let us assume that this family's income rose 8 percent in 1974 to $14,040 (per capita personal income rose 8.3 percent from third quarter 1973 to third quarter 1974). This family would be liable for $1,609 in federal income taxes and its after-tax income would be $12,431. This means that the family's after-tax income in dollar terms has risen by 7 percent. The higher taxes that resulted from the diminished value of the standard deduction and the exemption actually increased the tax burden on this family from 10.7 percent of income to 11.5 percent.

"In real terms, of course, this family's real after-tax income has fallen as a result of higher taxes and inflation. Measured in 1973 dollars, its 1974 disposable income of $12,431 is actually worth only $10,939. Therefore, even though the family's income rose by 8 percent during 1974, its purchasing power has dropped 6 percent.

"Even if this family's income had risen by the rate of inflation, 12 percent, its after-tax purchasing power would have declined 3 percent from 1973 to 1974."

100. N.Y. Times, February 10, 1975, at 14, col. 1.

tion adds to the inequity of the tax system; inflation is therefore one more good reason for reform now.

A Democratic Theory of Taxation

Congressman Henry Reuss has urged tax reform to achieve four fundamental purposes: (1) to raise additional revenue; (2) to achieve full employment and prosperity; (3) to encourage economic efficiency; and (4) to make the tax system more equitable.[101] All of these are important and necessarily follow when tied together by a truly democratic theory of taxation. But it is the fourth of these goals which is the key to democratic equality and which most concerns us here.

As Pechman and Okner have pointed out, given certain not implausible assumptions (for instance, that corporate and property taxes are shifted in whole, or at least in part, to consumers and renters), then even those United States citizens who receive transfer payments (essentially for income maintenance) from the United States government wind up paying 21.5 percent of their "income" in taxes.[102] Just as great wealth and high income in this country are often based on "nothing more than the 'talent' that certain people have for inheriting large fortunes,"[103] so also is the predicament of the poor an accidental condition. As things now stand, the tax system does too much to perpetuate the former, and too little to alleviate the latter condition. What we are proposing is a tax system which would truly function as something of an equalizer.

The chief characteristics of such a democratic theory of taxation are: (a) it guarantees every family at least the minimum essentials of life;[104] (b) it fulfills the basic political thesis of "one-man-one-vote"[105]—no one should have added political power on account of wealth; (c) it imposes tax proportionately to the benefits and protections received from the system; (d) it provides the revenue which would assure education and health, job and earnings, small savings, a home and a dignified old age; and (e) it redistributes wealth and power when their distribution becomes inequitable and undemocratic.

Such a democratic theory would go far toward solving some of our

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101. WALKER & REUSS, *supra* note 64, at 18-33.

102. PECHMAN & OKNER, *supra* note 15, at 65, 78.

103. Gurley, *Federal Tax Policy*, 20 NAT'L TAX J. 319, 326 (1967).

104. Cases like Fuentes v. Shevin, 407 U.S. 67 (1972) and Randone v. Superior Court, 5 Cal. 3d 356, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) have emphasized the essential need to provide a minimally decent environment for human beings in their everyday lives.

105. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

most pressing problems: poverty amid plenty, unemployment (and particularly disproportionate unemployment), inflationary recession, energy crisis, maldistribution of wealth and buying power, overexpansion and ecological-natural resource plunder. The wide gap, in terms of wealth, income and opportunity which exist between the "haves" and the "have-nots" in this country would be narrowed. In terms of the specific problems which have been discussed in this paper, the redistributive goal of a tax system based on a democratic theory would be achieved by reforms such as those which follow (these are suggestive, not exhaustive).

(1) Elimination of tax laws which give special privilege or benefit to special interest groups and the rich. Capital gains, tax-exempt interest, accelerated depreciation, percentage depletion, foreign and realty tax shelters, investment and tax credits, etc.—all these would go out the window.[106] As Professor Surrey and others have suggested, the tax expenditure budget (that is, the special interest system of taxation) should be replaced by direct programs of financial assistance which are voted out of public revenues by elected officials after public debate.[107] Many of these tax expenditure items have not had the desired incentive effects,[108] and switching to direct subsidies would permit us to separate the wheat from the chaff. Even a modest reform package on these loopholes would raise federal revenue by $16 billion by 1978; a more thoroughgoing house-cleaning would raise $33 billion in new revenue.[109] Reform in this one area alone would go a long way toward eliminating the current budget deficit.

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106. On March 29, 1975, President Ford signed into law a tax bill eliminating the oil depletion allowance except for small producers. See note 135 *infra.* We do not mean to suggest here that the presence of such loopholes in the Internal Revenue Code makes the American tax system the most undemocratic in the world. In Brazil, for instance, the goal of "expanding capitalism" leads to the use of the tax laws to create capital in the hands of the system's controllers at the expense of unskilled workers, 45 million of whom are not yet covered by any program of social security. The difference between the minimum federal wage in Brazil and the top executive salaries is a ratio of 500 to 1; the minimum wage is $40 a month while top executives earn $300,000 per annum from salaries alone. The ratio in this country is approximately 60 to 1. *See* Koeppel, *That 'Brazilian Miracle,'* THE PROGRESSIVE, Feb., 1975, at 43.

107. *See* SURREY, *supra* note 25, at 175-208.

108. The oil depletion allowance, combined with provisions which permit oil companies to exempt intangible drilling costs, has reduced effective tax rates for oil companies and resulted in huge revenue losses to the treasury (over $3 billion in fiscal 1975), but did not result in the kind of exploration and drilling which these "loopholes" were designed to foster and which might have averted or at least minimized the energy crisis. *See* SETTING NATIONAL PRIORITIES, *supra* note 30, at 161.

109. *Id.* at 258.

(2) Social security taxes must be overhauled. These taxes now provide twice as much revenue as is collected from corporate income tax, and though the individual income tax rates on income go as high as 70 percent, the bite of social security taxes for upper income individuals is miniscule.[110] Congressman James Burke has recently proposed that the percentage rate drop from 5.85 percent to 3.9 percent with the lower rate to be imposed on earnings up to $25,000.[111] The Advisory Council to the Social Security Administration has recently reported that social security benefits will top receipts by 1976.[112] The council estimates that an additional $7 billion will be needed, and has apparently rejected a proposal similar to Mr. Burke's as being "a move beyond the philosophy" of the system.[113] The only alternative methods of raising the needed $7 billion appear to be (a) increasing the percentage rate yet again—the council has considered rates as high as 9.75 percent on both employer and employee,[114] or (b) tapping general tax revenues. The latter course was finally recommended to Congress by the council, but what action will be taken remains to be seen.[115]

The same solution has also been strongly urged by John Brittain, a commentator who would simply replace payroll taxes by the income tax.[116] Even if *nothing* additional were done by way of income tax reform, the poor and middle classes would be better off than they are now, and if income tax reform were to accompany the switch from payroll taxes to general revenues as the source for social security benefits, the broadened tax base would mean that very little, if any, income tax rate increase would be needed to provide sufficient social security funds. Under one combined income tax-payroll tax proposal, for example, individuals with incomes under $7,000 would pay no federal

110. Individuals earning up to $14,000 a year pay 5.58% of their earnings in social security taxes. INT. REV. CODE OF 1954, § 3101(a)(5) and (b)(4). Another 5.85% is paid by the employer. INT. REV. CODE OF 1954, §§ 3111(a)(5) and (b)(3). Since the latter 5.85% lessens what the employer would otherwise pay the employee in wages, the entire tax comes out of the employee's pocket. A person earning $5,000, for example, pays about $600 in social security taxes, yet with ordinary exemptions the same individual would pay *no* income taxes. Persons earning $20,000 or $100,000 pay only $825 in social security taxes, the same as the $14,000 wage earner. INT. REV. CODE OF 1954, § 3121(a)(1).

111. N.Y. Times, Jan. 6, 1975, at 18, col. 3.

112. N.Y. Times, Jan. 25, 1975, at 1, col. 7.

113. *Id.* at 14, col. 4.

114. The Washington Post, Jan. 16, 1975, *quoted in* The Ithaca Journal, Jan. 18, 1975, at 1, col. 1-6.

115. *See* N.Y. Times, Jan. 25, 1975, at 1, col. 8.

116. BRITTAIN, *supra* note 60, at ch. V.

taxes whatsoever.[117] Total taxes for the majority of taxpayers would be reduced, the rate structure would be much more equitable, and the rich would finally start paying their fair share.

(3) Death taxes would likewise really start to bite. Theoretically, a good case can be made for viewing the death tax as a delayed income tax on decedent's income.[118] Increased estate taxes—which can be justified as being more consistent with the goal of equal opportunity than increased income taxes would be, since the death tax reduces inherited wealth rather than earned wealth[119]—would make it possible to avoid exorbitant income tax rates at the higher levels while at the same time going far to make the whole tax system more truly democratic and progressive. Special changes would likely include (a) the taxation of appreciated assets at death, perhaps in the form of an accessions tax;[120] (b) imposition of taxes at least once each generation on each transmission of wealth;[121] (c) a ceiling on the amount of wealth which can be transmitted upon death—a figure of three or four times the income of the upper middle class ($75-100,000) comes to mind:[122] and (d) unification of death and gift taxes—one set of exemptions, one set of rates, cumulative, and not based on who the recipient is.[123]

(4) Finally, any truly democratic system of taxation would include some form of negative income tax or other allowance to assure that even the least among us have a sufficient income to guarantee the necessities of life. A figure in the $7,000 range is not unrealistic, for the goal is to provide enough so that everyone can regard him or herself and be regarded by others as a person of dignity.[124]

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117. *Id.* at 149.

118. *See generally* Brannon, *supra* note 83.

119. *Id.* at 452-53.

120. For discussion, *see* Andrews, *The Accessions Tax Proposal*, in Goldstein, *supra* note 73, at 190, reprinted from 22 TAX L. REV. 589 (1967); Jantscher, *Death and Gift Taxation in the United States After the Report of the Royal Commission*, in *id.* at 235, reprinted from 22 NAT. TAX J. 121 (1969).

121. *See* concerning this subject Westfall, *Revitalizing The Federal Estate and Gift Taxes*, in Goldstein, *supra* note 73, at 146, reprinted from 83 HARV. L. REV. 986, 1006-13 (1970); Kurtz & Surrey, *supra* note 72, in *id.* at 154.

122. This may sound draconian, but when 1% of the population holds 56% of all wealth, draconian measures are called for.

123. U.S. TREASURY DEP'T, TAX REFORM STUDIES & PROPOSALS, UNIFICATION OF ESTATE AND GIFT TAXES, pt. 3, 351-57, 360-77, 381-87 (1969), in Goldstein, *supra* note 73, at 78; Kurtz & Surrey, *supra* note 72, at 1389-91.

124. The new tax bill, while not constituting a real income plan, at least helps to establish the validity of cash payments to the poor as a viable means of redistributing income. Redistribution of income is, of course, a democratic principle central to the

Conclusion

It may be that we need to re-examine our concept of "uniformity" as it was defined in *Knowlton v. Moore*,[125] *Flint*[126] and *Brushaber*,[127] in light of the preceding materials.

The kind of challenge we have in mind may be sketched out briefly. Article I, sec. 8, and the Fifth Amendment, are our touchstones.

First, the *need* for a new constitutional analysis arises from the fact that over the last twenty-five to thirty years the tax structure has become increasingly regressive.[128] Since World War II, the duty to pay taxes has resulted in the increasingly inequitable invasion of small earners' incomes. Over the entire history of federal taxation, of course, the "intake" accomplished by use of the taxing power has been increased by taxing excess profits, increasing tax rates and by greater wealth inclusion—all without any serious constitutional challenge being raised.[129] Because these changes were essentially democratic or "progressive" in character, no constitutional challenge was either necessary or proper. But that historical lesson loses its validity as a guideline for current thinking on the question of constitutional re-evaluation of the tax system when the tax structure is so visibly regressive rather than progressive.

Second, we believe that a taxpayer's suit, rather than an effort to secure a new constitutional amendment such as the Sixteenth, would be the best vehicle for raising the constitutional challenge, if Congress does not act, for three reasons: 1) Speed. A suit can be put together and brought to final determination more quickly than a proposal for a constitutional amendment. 2) Logistics. Taxpayers' suits can be initiated by a few people in many places, making for a great cumulative effect, whereas to secure a constitutional amendment requires many people in one place at first (Washington) and later many people in many places (the various state capitals). 3) Case law. Scattered through a wide range of Supreme Court decisions there is much help-

approach and content of this paper, and it may be that the 1975 tax bill will eventually come to be seen as the first real step taken in this country toward the guaranteed income we have proposed. See note 135 *infra*.

125. 178 U.S. 41 (1900).

126. Flint v. Stone Trace Co., 220 U.S. 107 (1911).

127. Brushaber v. Union Pacific R. Co., 240 U.S. 1 (1916).

128. See text accompanying notes 10-16 *supra*.

129. 1 S. SURREY, P. MCDANIEL, & H. AULT, FEDERAL INCOME TAXATION 15-17 (1972).

ful language which suggests, if one only ferrets it out, that the Court might well be favorably disposed to such a challenge. It is to that case law we now briefly turn our attention.

Standing

The old posture of absolutely denying taxpayers standing to sue (*Massachusetts v. Mellon*)[130] is now dead. As the Court said in *Flast v. Cohen*,[131]

> a taxpayer will have standing . . . to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.[132]

In sum, there is a growing tendency to recognize a taxpayer's standing to challenge a tax because it is raised or expended for unconstitutional purposes, or in unconstitutional ways.[133]

Present Exemptions from Taxation

The major present exemptions from federal taxation exist because certain *policy* decision have been made, and not because the exemptions are constitutionally compelled.[134] Indeed, the anti-recession tax bill passed by Congress and signed by President Ford on March 29, 1975, eliminated the oil depletion allowance for all but the smallest producers;[135] and, there are cases suggesting that the emphasis on immunity from taxation for state and local government bonds should be changed to a *limitation* upon the grant of tax immunity.[136] These changes have come about precisely because the policy reasons for con-

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130. 262 U.S. 447 (1923).

131. 392 U.S. 83 (1968).

132. *Id.* at 105-06.

133. *See id.* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971); Bob Jones University v. Connally, 341 F. Supp. 277 (D.S.C. 1971). *Compare* Pietsch v. President, 434 F.2d 861 (2d Cir. 1970) *with* Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968) *and* Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen*, 36 U. CHI. L. REV. 364, 375 (1969). *See also* Sierra Club v. Morton, 405 U.S. 727 (1972).

134. For a discussion of the policy reasons behind tax exemption of interest earned on state and municipal bonds, *see* Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures With Direct Governmental Assistance*, 84 HARV. L. REV. 352, 371-80 (1970).

135. Tax Reduction Act of 1975, Pub. L. No. 94-12, §§ 601-04 (Mar. 29, 1975).

136. *E.g.*, New York v. United States, 326 U.S. 572 (1946).

tinuing the exemptions no longer exist, and because we have become increasingly aware of the unfairness which the exemptions create. The point here is that a taxpayer's suit challenging the constitutionality of existing exemptions does not involve asking the court to rewrite the Constitution. Rather, such a suit would suggest that existing exemptions fail the constitutional test for imposition of taxes: that they be uniform and provide for the general welfare. Moreover, when the exemptions exist because of policy reasons, the exemptions can be changed or eliminated for policy reasons. Thus the taxpayer's suit would attack the tax structure on two related but distinguishable grounds: reasons of policy, and the Constitution.

The Concept of General Welfare

The original meaning of the term "general welfare" may have been merely to signify something "beyond the power of the states," something which was in the "general interests of the union."[137] However, from the earliest time after adoption of the Constitution, the Court's emphasis has been on federal powers as derived from *all the people* and operating for the benefit of *all the people.*[138] Generally the Court has deferred to Congress when it comes to defining what the general welfare consists of,[139] and this deference has extended to congressional tax enactments designed to regulate or even suppress certain conduct.[140] To the extent that the Court has defined the term, even its most restrictive opinions[141] have acknowledged the correctness of the Hamiltonian view that the general welfare clause embodies a separate and distinct power, one which goes beyond the other *express* bases upon which the taxing power may be invoked.[142] When the cases upholding the constitutionality of "progressive" taxation[143] are anchored in the assumption that constitutionality follows from the progressive *operation* of the grad-

137. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787, 25-27 (1937).

138. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

139. *See, e.g.*, Helvering v. Davis, 301 U.S. 619 (1937).

140. *See* United States v. Kahriger, 345 U.S. 22 (1953); Sonzinsky v. United States, 300 U.S. 506 (1937).

141. *E.g.*, United States v. Butler, 297 U.S. 1 (1936).

142. For conflicting appraisals of the historical material bearing upon the general welfare clause, *see* Corwin, *The Spending Power of Congress*, 36 HARV. L. REV. 548 (1923), and Tucker, *The General Welfare*, 8 VA. L. REV. 167 (1922). For a general discussion of the general welfare clause *see* Nicholson. *The Federal Spending Power*, 9 TEMPLE L.Q. 3 (1934).

143. Brushaber v. Union Pacific R. Co., 240 U.S. 1 (1916); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); Knowlton v. Moore, 178 U.S. 41 (1900).

uated rates, then a taxpayer's showing that the *operation* of the rates is no longer progressive makes out a case that the system is unconstitutional because it no longer operates to provide for the general welfare.

As the quote from *Knowlton* which heads this article suggests, the question now is: isn't it time that the judicial power "afford a remedy" for extortionate, confiscatory taxation "by applying inherent and fundamental principles"? We think that it is. As was intimated in *Brushaber*, the Fifth Amendment applies where,

> although there was a seeming exercise of the taxing power, the act complained of was so arbitrary . . . that it was . . . a confiscation of property . . . or . . . was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.[144]

The constitutional argument under *Knowlton, Flint* and *Brushaber* then would challenge the present tax scheme's operation as irrational on two grounds: it runs counter to Congress' stated progressive intent (and so its continuance on the basis of that theory is internally inconsistent); and it is also irrational even absent any stated congressional intent (on the ground that regressive taxation violates virtually all modern economic and social theory).

There is another constitutional ground for challenging the tax system, apart from the Fifth Amendment and the cited cases. If the general welfare is the ground on which the taxing power is *invoked*, it is also the standard against which the exercise of that power must be *tested*. And although there are cases restricting the substantive meaning of the "general welfare" language, it nonetheless has *some* meaning; that meaning is measured by something akin to the minimum rationality standard of the Fifth Amendment. Thus if the scheme in operation functions to the demonstrable detriment of the general welfare, it violates the very constitutional provision in which it is anchored.

Equality and Fairness: The True Tests for the Constitutionality of Tax Laws.

As was suggested at the outset, the due process clause of the Fifth Amendment has equal protection overtones as it is applied to federal laws.[145] The development of the "new equal protection" doctrine,[146]

144. 240 U.S. at 24-25.

145. If a narrow reading of due process were adopted and the tax system subjected to only a minimal test, with the Court willing to imagine legislative ends, there is little question that it would be upheld. But that standard is not appropriate where more than economic regulation is in question—and the pervasive and systematic penalizing of

when combined with cases like *Loving v. Virginia*[147] and *Truax v. Raich*,[148] suggests that notions of equality are constitutionally important in the tax area. Just as unequal treatment in racial matters is offensive, so too is inequality in taxation "at war with our basic concepts of a democratic society . . . ."[149] For "lines drawn on the basis of wealth or property [which is the kind of discriminatory linedrawing which results from the current tax structure], like those of race . . . are traditionally disfavored."[150]

The real purpose of a taxpayer's suit challenging the constitutionality of inequitable and therefore discriminatory tax laws would be the enactment by Congress of tax laws geared to restore the democratic ideal of progressivity.[151] The Court's role here can be analogized to the "affirmative action" cases in which the Court has ordered that corrective measures be taken to right previous wrongs.[152] We are not suggesting that some new discrimination be perpetrated in order to make up for past wrongs. That would be counterproductive. We are suggesting that statutory tax revision is needed, and that if Congress will not revise on its own initiative, then a suit in which the Court finds

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lower-income taxpayers to the benefit of the rich, it is submitted, goes well beyond mere economic regulation.

146. *See* Gunther, *The Supreme Court 1971 Term—Foreword*, 86 HARV. L. REV. 1 (1972). Cases frequently cited as illustrative of the "new equal protection" doctrine in operation include: San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Roe v. Wade, 410 U.S. 113 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969); and Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). Development of the "new equal protection" idea is particularly appropriate when one recalls that the federal Constitution's Bill of Rights was drawn from provisions in *state* constitutions, particularly that of Virginia. Article 4 of Virginia's Declaration of Rights, adopted June 12, 1776, read: "that no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services . . . ." R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-91, 231 (1955).

147. 388 U.S. 1 (1967), where the Court stated that our institutions are based upon a doctrine of equality.

148. 239 U.S. 33 (1915), suggesting that the right to work and the right to economic security are the very essence of personal freedom and opportunity.

149. Smith v. Texas, 311 U.S. 128, 130 (1940).

150. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969), suggesting that welfare cannot constitutionally be apportioned on the basis of past tax contributions.

151. This can be achieved by a number of methods. See notes 101-23 *supra* and text accompanying.

152. See note 5 *supra*. We recognize the improbability (and impropriety) of a court's ordering Congress to revise the taxation system in any particular way. But a judicial declaration that the existing system is unconstitutional in operation is at least imaginable, and could force reform of the type we are advocating.

the existing scheme to be constitutionally wrong and orders that some affirmative action be taken is one way to provide impetus toward achieving the overall goal. *Congressional* action is the goal because, as suggested by *Rodriguez*,[153] in cases where there has been a legislative attempt at equality the Court will defer to the legislature's determinations unless those determinations are manifestly unreasonable. The Court of course recognizes the right of the poor not to be discriminated against (in education, or in taxation), and the same principles—fairness, equality, the essential need of all citizens for some minimum of economic well-being—under which the existing structure would be condemned would lead the Court to sustain the enactments once legislation to redress its inequities is passed.[154]

Thus a concept of equality and a democratic economic principle arise out of several constitutional provisions and their interpretation (just as does the right of privacy, for instance). This concept is not a "levelling" doctrine, and it is not penal, but instead is informed by the precept that those who benefit the most from the economic system, and who have as a consequence the greatest ability to pay, should be made to do so in pursuit of the "general welfare."

We do not ask the courts to rewrite the Constitution. Instead, what we propose is a *reaffirmation* of principles long recognized by our courts, and an *application* of those principles to the federal taxation system. Just as *Plessy v. Ferguson*,[155] with its rule of "separate but equal," was finally re-examined in *Brown v. Board of Education*,[156] because the *expected* fairness and equality was not achieved, so too should *Knowlton v. Moore* and the charade of "progressive" tax rates be re-examined when, as now, the tax system fails to produce the tax equity which was the goal of the early decisions.

When loopholes and special tax privileges so dominate the tax system as to make a mockery of the principle of progressive or democratic taxation, then the whole structure of the tax law must be changed to

153. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

154. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966), where the Court upheld federal voting rights legislation. The law looked to exemptions to the English literacy requirements proposed by the state of New York, in effect, to determine that the New York law was unfairly discriminatory. The conclusion was upheld by the Court. The point relevant here has two elements: (1) the tax laws likewise contain many exemptions from taxation which result in unfairness, and (2) new laws which eliminate discriminatory barriers or privileges will be sustained by the courts because they are in harmony with our most basic egalitarian constitutional ideals.

155. 163 U.S. 537 (1896).

156. 347 U.S. 483 (1954).

bring it into harmony with the constitutional democratic ideal which we have worked so hard to achieve in other areas.

To summarize in a single sentence: the potential viability of a taxpayer's suit challenging the uniformity, fairness and constitutionality of the current tax structure is but another strong reason for tax reform now. And if none of this works? Legislators ought not to forget that our forefathers dumped tea into Boston Harbor as a tax protest.