Eisenhower-Era Marxist-Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich

Marc Linder

University of Iowa

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The Right's renewed agitation for liquidation of progressive income taxation in the United States prompts reexamination of its deservedly obscure predecessors' arguments during the period between the Roosevelt and Reagan Administrations. Attention focuses on the extent to which businessmen's rhetorical struggle against the New Deal survived into the post-World War II period. Such ideological sediments help explain how the Right has been able to resurrect the conservative fiscal theology of the 1880s and 1920s during the 1980s and 1990s by availing itself of a discourse that was muted but never disappeared during the early post-World War II era. The historical account shows that today's anti-progressive-tax rhetoric embodies no analytical or social policy advances over earlier, cruder variants. The history begins with an exploration of why, despite capital's prediction of the dire consequences of the continued imposition of wartime "confiscatory" taxes on the rich, the Eisenhower Administration and Republican-controlled Congress failed to reduce the rates in the Internal Revenue Code of 1954. The analysis proceeds to an empirical dissection of widespread claims that high and progressive rates were enforced and impoverished the rich. Then a forgotten episode in the history of anti-progressive taxation is disinterred—the intersection of a constitutional movement to cap income tax rates at 25 percent and a more general attack on progressive taxation as the outgrowth of a Marxist conspiracy. The focus then shifts to the seemingly counterintuitive phenomenon that the liberal Democratic Kennedy-Johnson Administration, rather than the big-business Republican Eisenhower Administration, took up Andrew Mellon's mission by initiating the process of lowering the highest rates. As an offshoot of this rate-reduction strategy, the rhetoric in support of tax preferences for highly compensated corporate executives is scrutinized. As a counterpoint to current congressional propaganda in favor of more regressive modes of taxation, the Article concludes with an empirical overview of the possibilities and limits of progressive income taxation.

If asked why they're going after the rich, our policymakers ought to be able to give the same answer Willie Sutton once gave when asked why he robbed banks: "Because that's where the money is."

Mr. Archer said he was not concerned that his tax plan might benefit rich people. . . . "I wish you wouldn't say 'rich,'" he told an interviewer

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* Professor, University of Iowa. Without Larry Norton's badgering, Larry Zacharias's kibitzing, Danny Pope's nitpicking, Linda Kerber's insistence, and Marjorie Kornhauser's perseverance this Article would have been unwritten, shorter, simpler, in the present tense, and unpublished, respectively. All translations are the author's own.

without a smile. "I wish you'd start saying people who are higher income rather than lower income."²

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I. **SISYPHEAN REDISTRIBUTIVE TAXATION**

   [T]he implications about economic inequality ... impart significance and permanence to the issue and institution of progression. Ultimately a serious interest in progression stems from the fact that a progressive tax is perhaps the cardinal instance of the democratic community struggling with its hardest problem. . . It is a sort of last refuge for doing something politely about the distribution of income under a market system.³

   Successive Congresses since the first Reagan administration have so thoroughly subverted the legitimacy of high and progressive

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³ Walter Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation* 85, 104 (1978).
income taxes for the rich\(^4\) that an advocate runs the risk of facing the same derision that the economist and comptroller-general of the ancien régime, Turgot, icily reserved for the draft of such a tax more than two centuries ago: ""Il faut éxécuter l'auteur, et non le projet."\(^5\)

The terms of the debate have shifted so markedly that the House Majority Leader in the 104th Congress, Dick Armey, is taken seriously when he characterizes his 17-percent flat tax, which exempts all unearned income, as "‘based on the idea of fairness we learned in grade school: Everyone should be treated the same.’\(^6\) Everything that ever needed to be learned about fairness in grade school apparently includes giving back $296 to those with incomes between $15,000 and $30,000 as their grubstake in the new de-governmentalized state of nature, while those whose incomes exceed $300,000 will keep $108,000 more than Leviathan had begrudged them.\(^7\) Now even such mainstream Republicans as Senators Arlen Specter and Richard Lugar can run presidential campaigns based on a flat tax or national sales tax.\(^8\) The latter is indeed the logical next step since a personal income tax deprived of progressivity is also bereft of administrative advantages, the only ones that will still count.\(^9\) A sales tax, however, not only is "easily collectible," but, as a Harding-era senator noted, also "‘[s]trikes


\(^5\) Friedrich Gentz, *Über die Hülfsquellen der französischen Regierung*, 3 HISTORISCHES JOURNAL 108, 138 n.* (Sept. 1799) (quoting Turgot). Gentz, a Prussian publicist and politician who devoted most of his adult life to the reactionary struggle against the French Revolution and Napoleon’s policies, considered progressively rising taxes "not much better than highway robbery." *Id.* at 138.


at the vicious principle of graduated taxation, which ... is but a modern legislative adaptation of the communistic doctrine of Karl Marx, who based his radical philosophy upon the doctrine of equalization of incomes, and who, having failed in his lifetime, should find posthumous glee in this generation."\(^\text{10}\)

The larger political-economic point that drives latter-day flat-taxers, but which they studiously fail to address, is, as *Fortune* noted soon after World War II in the wake of yet another capitalist mobilization to lower taxes, that "the modern graduated income tax ... was motivated in part by ... the desire ... to redistribute wealth."\(^\text{11}\)

To be sure, redistribution from the rich to the poor does not follow automatically from the existence of progressive taxation; if, for example, the rich paid the bulk of taxes but also received the bulk of the benefits flowing from state expenditures, the overall impact of the state's extraction and use of resources might not be redistributory at all. Nevertheless, the ideological distance that separates the contemporary *fin-de-siècle* movement from the views, for example, of Progressive Republican Senator George Norris is almost astronomical:

> [I]f we are to secure a permanent remedy for our difficulties as a people, it is an absolute necessity that one of the things which a complete recovery must have in view is the redistribution of wealth. This does not mean we should take the property of A and give it to B. It only means the taking of money from the estates of the very wealthy, where it can perform no real service for humanity, and the giving of it, in the form of taxes, to all the people, from whom it was originally taken, and under whose laws it was accumulated.\(^\text{12}\)

Yet even flat-taxers apparently understand that progressivity is so deeply rooted in the popular conception of fairness that they are driven to claim this virtue for their own proposals in spite of the arithmetical fact that "virtually any flat tax would reduce the tax burden on very high-income individuals."\(^\text{13}\) Thus, Senator Specter misleadingly asserts that the broader tax base in his bill "will force

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many higher income taxpayers to pay their fair share of taxes,”  
while Representative Dick Armey boasts that the $36,800 exemption  
level for a four-person family  
in his bill will remove ten million  
low-income taxpayers from the income tax rolls altogether: “This is  
the definition of progressive.” Even though Armey’s plan can  
generate progressivity only at the low end of the income scale, he is  
willing to jettison it along with the high exemption level that makes  
it possible if realpolitik dictates the revenue-neutrality that his flat-  
tax rate cannot produce. Yet other pre-Coolidge-era enthusiasts  
advocate a return to the status quo ante 1913. Bill Archer, the  
chairman of the House Ways and Means Committee in the 104th  
Congress and proponent of a consumption tax and of repeal of the  
Sixteenth Amendment, concedes that “[n]o form of taxation is as  
progressive as the income tax,” which he would “pull out by its  
roots,” but that issue does “not worry him ... because the way  
progressivity is measured ... , no account is taken of the economic  
growth that will result from his proposal to the benefit of everyone.”

In aiming at termination of the redistributory function of the  
federal income tax, the not very well camouflaged agenda of the  
current rate-flatteners harks back to the earliest opposition to Anglo-  
American graduated income taxation, Pitt’s Income Duty Bill of  
1799. In response to the objection that the bill’s stunted and very  
mild degree of graduation should have been continued throughout the  
income scale, Baron Auckland declared before the House of Lords that  
“such a rise would be contrary to all the safety and rights of  
property.” Worthy of the French Revolution, such a step “would  

14. Id. (statement of Sen. Arlen Specter), available in Westlaw, USTestimony  
database, 1995 WL 151937.  
15. Armey later lowered the exemption level to $31,400. H.R. 2060, 104th Cong.,  
1st Sess. § 101 (July 19, 1995).  
16. Flat Tax, supra note 13 (statement of Rep. Dick Armey), available in Westlaw,  
USTestimony database, 1995 WL 151910.  
17. Id. (statement of Rep. Dick Armey), available in Westlaw, USTestimony  
database, 1995 WL 151910.  
Archer), available in Westlaw, USTestimony database, 1995 WL 337307.  
19. David Rosenbaum, Tax Chairman Is Emphasizing Total Overhaul, N.Y. TIMES,  
June 7, 1995, at A1, A14 (nat. ed.).  
20. 34 THE PARLIAMENTARY HISTORY OF ENGLAND 199 (1819).  
21. 34 id.
amount to neither more nor less than the introduction of a plan for equalizing fortunes." By implication, nouveau-anti-egalitarianism, driven by the principle that "the inequalities of income remain as they were found," must reject the argument that "[t]he point to be regarded, is not what men have, but what they can spare."

The most elementary principles of stripped-down communitarianism, which even a country of rugged individualists has accepted since the advent of progressive federal income taxation eight decades ago, are discarded as the Right resumes the Gilded Age's struggle against revolutionary redistribution of the property of the rich and "The Communism of a Discriminating Income-Tax": "Equality and manhood ... require uniformity of burden in whatever is the subject of taxation." The currently resurgent movement toward quasi-solipsistic private wealth maximization is, ironically, on the verge of giving the most cramped literal effect to what a century ago was meant as a metaphorical basis for the reintroduction of federal income taxation: "In the end it will be found cheaper to pay low taxes on large estates than to hire private watchmen and private policemen to guard them."

As fundamentalist market-knows-besters position themselves to execute a final assault against progressive income taxation in the United States by the turn of the millennium, it is important to examine the arguments of their now largely forgotten predecessors during the period between the Roosevelt and Reagan administrations,

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22. 34 id.
23. 34 id.
24. WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 626 (1785).
28. Armey has declared: "'The flat tax is my No. 1 priority.... My game plan is to keep the flat tax alive and well in America as it grows stronger and stronger, so that it comes back to Washington as the 2,000-pound gorilla.... I have great expectations that the Republican Party is likely to want to embrace this concept for its platform' in 1996." Paul Starobin, True Believer, 27 NAT. J. 1, 8 (1995).
the struggles over whose tax policies have been studied in detail.\textsuperscript{29} This Article pays particular attention to the extent to which the same "fossilized" rhetoric, which conservative businessmen had ritualized into a "rigidification of their ideology" in the battle against the New Deal,\textsuperscript{30} survived into the post-World War II period. Such ideological sediments help explain how the Right has been able to mobilize the "restored conservative fiscal theology"\textsuperscript{31} of the 1880s and 1920s\textsuperscript{32} so readily during the 1980s and 1990s by availing itself of a discourse that had merely been muted but had never disappeared during the early post-World War II era. Moreover, this renewed rhetorical vitality challenges the claim that incentive-based arguments for rate reduction for the rich "had become timeworn and hackneyed" by the mid-1950s.\textsuperscript{33}

Although the liquidation of the Union of Soviet Socialist Republics has imparted an entirely different global political character to internal struggles within the United States over economic policy, the underlying anti-socialist and anti-Marxist themes of the late 1940s and 1950s have merely been submerged under other rhetorical trappings in contemporary debates. In 1956, T. Coleman Andrews, who, until late 1955, had served as Eisenhower's first Commissioner of Internal Revenue and objected to using tax legislation to "enforce social ends," told \textit{U.S. News & World Report} that

every time we talk about these taxes we get around to the idea of from each according to his capacity and to each according to his needs. That's socialism. It's written into the Communist Manifesto. Maybe we ought to see that every person who gets a tax return receives a copy of the Communist Manifesto with it so he can see what's happening to him.\textsuperscript{34}

\begin{thebibliography}{99}
\bibitem{30} \textsc{Leff}, \textit{supra} note 29, at 156-57.
\bibitem{31} \textsc{Kevin Phillips}, \textit{Boiling Point: Democrats, Republicans, and the Decline of Middle-Class Prosperity} 114 (1994).
\end{thebibliography}
Although the Internal Revenue Service apparently never augmented the circulation of the most widely published and translated political work of all time by appending copies to the Form 1040 instruction booklets, the ruling political-economic classes of the Fabulous Fifties could not totally ignore the lingering sense that "[t]he Communist idea of creating a society in which everyone does his best for the good of everyone is . . . fundamentally a more uplifting idea than capitalism." Thus, even the Eisenhower Administration was forced to abandon efforts to substitute regressive consumption taxes for the income tax.

The alleged economic and social multivalence of progressive income taxation, which has, for more than a century, struck analysts as capable of subserving both socialist and "neutral" fiscal goals, predisposes opponents and proponents to couch their attacks and defenses in corresponding terms. But if supporters of incipient progressive taxation a century ago recommended it as "a measure to kill anarchy and keep down socialists," the perceived disappearance of opposition to capitalism may have intensified ideological impatience to dispense with even symbolic redistributory accommodation. Ironically, during the ideologically formative half-century prior to the enactment of the federal income tax of 1913, "the allocative potential of the law was never tapped, [and] the rhetorical potential of the existence of the law was never exhausted" by its centrist supporters. However, during the half-century following the Roosevelt administrations, anti-collectivists have yet to exhaust the rhetorical potential of criticism of the dire macro- and microeconomic consequences of a fiscal reallocation of resources that some deny ever took place.

35. By the early 1980s, it had been published in 1,100 editions in more than 100 languages. Renate Merkel, Einführung in Marx's und Engels' Schrift "Manifest der Kommunistischen Partei" 6 (1983).
36. Andy Rooney, No Reds to Kick Around Anymore, N.Y. TIMES, June 26, 1989, at 23 (nat. ed.). To be sure, Rooney added that "Communism's only real weakness seems to be that it doesn't work." Id.
These historically oscillating patterns of national income taxation and tax rhetoric demonstrate the Sisyphean character of efforts to reconcile the production and distribution of wealth in capitalist societies. Ever since Ricardo and Malthus, economists have argued over whether crises are rooted in production, overproduction, and overaccumulation or whether they are merely underconsumption phenomena peculiar to the circulation sphere, which can be remedied through redistribution of income. At times, state tax, budgetary, and social policies have verged towards austerity in attempts to leave capital as unencumbered as possible. At other times, when such profitability-enhancing programs have exacerbated the incapacity of noncapitalists to purchase what accumulated capital had produced so that it could continue to expand profitably, state policy, pressured by working-class and other popular movements, shifted in the opposite direction in order to fortify solvent demand. Although new rhetoric justifying each of these strategies is conceivable, the oscillations themselves, as dim reflections of class struggles, are as permanent as the periodic crises of the self-contradictory capitalist mode of production.

The following historical account shows that the current guises of anti-progressive-tax rhetoric embody no logical, analytical, or social policy advances over the cruder variants of twenty-five to fifty years ago. The history begins with an exploration of why, despite capital’s predictions of the dire consequences of the continued imposition of World War II and Korean War-level “confiscatory” taxes on the rich, the Eisenhower administration and a Republican-controlled Congress failed to reduce the rates when it thoroughly revised federal income tax law in creating the Internal Revenue Code of 1954. The analysis then proceeds to an empirical dissection of the widespread claims that the high and progressive rates of the statute book were enforced and impoverishing the rich. Next, a largely forgotten episode in the history of anti-progressive taxation is reviewed—the intersection of a constitutional movement to cap federal income tax rates at 25 percent and a more general attack on progressive taxation as the outgrowth of a Marxist conspiracy.

The Article then shifts its focus to the seemingly counterintuitive development that the liberal Democratic Kennedy-Johnson administrations rather than the big-business Republican Eisenhower administration, resumed the Coolidge-era mission of Andrew Mellon
by initiating the process, a decade after the end of the Korean War, of reducing the highest income tax rates. As an offshoot of this rate-reduction strategy, the rhetoric in support of (the ultimately enacted) special tax preferences for highly compensated corporate executives is examined separately. Finally, as a counterpoint to the massive congressional propaganda currently being mobilized in favor of more regressive modes of taxation, the Article concludes with an empirical overview of the individual and macroeconomic possibilities and limits of progressive income taxation.

II. "THE HAPPY, INNOCENT EISENHOWER YEARS" 41

[T]he Secretary of the Treasury ... contends that a better way to stimulate the growth of the economy ... is to ease the tax burden on companies and investors .... Another depression and the Republicans might be out of business for another twenty years, and nobody understands that better than the business men in the Administration. .... [T]here is economics ... on both sides.... The fight may be waged ... on a basis of ... class consciousness. 42

By 1954, the Korean War was over, the Rosenbergs had been executed at the height of McCarthyism, about which big business was divided, 43 and the United States was the undisputed world power. "The second halcyon era" of the century, which would be as brief as the golden Mellon-Coolidge years, had just begun. 44 Not only was a Republican, Dwight Eisenhower, in the White House for the first time in twenty years, but the Republicans, whose congressional delegation proclaimed in 1950 that "[t]he major domestic issue today is liberty against socialism," 45 also controlled majorities in both houses of Congress. Among other items on its legislative agenda, shaped by a leadership consisting of "men whose

43. See Charles Murpy, McCarthy and the Businessman, FORTUNE, April 1954, at 156.
44. KEVIN P. PHILLIPS, POST-CONSERVATIVE AMERICA, PEOPLE, POLITICS AND IDEOLOGY IN A TIME OF CRISIS 7 (1982).
45. 96 CONG. REC. A824 (1950) (statement of Republican Principles and Objectives).
opinions were far out towards the Right," the second session of the 83rd Congress confronted the "question of distribution of an extraordinarily heavy tax burden" as it enacted a major revision of the Internal Revenue Code.48

Both before and after securing his party's nomination at a convention which former President Hoover had warned of Marx, Mussolini, and Keynes, "three sinister spooks ... mixing a poison for the American people," General Eisenhower had denounced "excessive taxation ... rates that destroy incentive" and at "only a little below the confiscatory level will destroy free government." Promising to reduce taxes radically, Eisenhower campaigned on a platform that complained of taxation "approaching the point of confiscation" against an outgoing president who had advocated increasing taxes, and a candidate whose Democratic platform had boasted of its continued adherence to the principle of ability to pay and singled out lower-income taxpayers for reductions. In his 1954 budget message, President Eisenhower explained that the overhaul of the tax code was "needed to restore normal incentives for sustained production and economic growth." As the Congress began its deliberations, U.S. News & World Report stated that taxes were the centerpiece of the Republicans' plan to dismantle the New Deal:

The Eisenhower Administration . . . is set to raze the tax structure erected under the New Deal . . .

On the way out is a New Deal theory that industry growth can be promoted best by a system of income-leveling taxes . . . designed to underwrite a boost in mass buying power. In its place comes a new

52. President Declares Tax-Cut Promises, N.Y. Times, June 20, 1952, at 1.
theory that the same purpose can be achieved more effectively by a system of profit-preserving taxes, designed to encourage investment. . . .

In tandem with the new president’s policy of ending the war in Asia, Congress reduced military spending, and in the absence of an expansive European-style welfare state—because the United States lacked national health insurance, family allowances, and disability insurance programs, social security expenditures accounted for only one-half to one-quarter of the share of national income they occupy in Western Europe—a Republican Congress finally was in a position to roll back marginal tax rates for the rich.

The highest statutory tax bracket included taxpayers with incomes in excess of $200,000. In light of the five-fold increase in the consumer price index that has taken place during the past four decades, those taxpayers were the income-millionaires of the day, eight of whom (along with a plumber) graced Eisenhower’s cabinet. As the New Dealers, in the words of that sore loser, Adlai Stevenson, made way for the car dealers, one of those eight, the president of General Motors, bared the new Administration’s soul by announcing to Congress that the country’s welfare was just one of his company’s subsidiaries. Asked whether there might be a conflict of interest between his ownership of 40,000 shares in General Motors and his position as Secretary of Defense, Charles Wilson replied that he “cannot conceive of one because for years I thought that what was good for our country was good for General Motors, and vice versa. . . . Our company is too big. It goes with the welfare of the country.” Another millionaire, Treasury Secretary George Humphrey, a wearer of pink coats while riding to the hounds and

56. HOLMANS, supra note 46, at 204, 211, 213.
60. Excerpts from Two Wilson Hearings Before Senate Committees on Defense Appointments, N.Y. TIMES, Jan. 24, 1953, at 8.
Taftite "businessman’s businessman,"62 whom union leader Walter Reuther characterized as "the modern-day reincarnation of Alexander Hamilton and Andrew Mellon,"63 confided to the Senate Finance Committee during hearings on the proposed Code that "America needs big business. It requires big business, big enterprises, to do the things in big ways that a big country has to have."64 And Eisenhower himself, vying with the impending execution of the Rosenbergs for front-page coverage in The New York Times, "Point[ed] to the T.V.A. As ‘Creeping Socialism.’”65

What kind of “businessman’s tax bill”66 did this dream-come-true of a big-business government enact for its wealthy patrons? After the President announced that he would not support a reduction in rates until federal expenditures had been reduced,67 Congress abstained entirely from touching the rates. Instead, it merely continued in force the action of the Democratic 82nd Congress, which had provided that beginning in 1954 the highest marginal tax rate during the Korean War, 92 percent—just two percentage points below its World War II peak—would be lowered to 91 percent, and the maximum effective tax rate reduced from 88 to 87 percent.68 For good measure, the 83rd Congress maintained, at Eisenhower’s urging,69 the corporate tax rate at 52 percent, postponing the reduction to 47 percent that the previous Democratically-controlled Congress had ordered.70 The Republican legislative managers

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62. GOLDMAN, supra note 59, at 239-41.
64. Id. pt. 1, at 90 (statement of Treasury Secretary Humphrey).
65. Eisenhower Points to the T.V.A. As “Creeping Socialism” Example, N.Y. TIMES, June 18, 1953, at 1.
emphasized that the new Code had never been intended as a tax-reduction measure. Anti-socialism the Eisenhower way!

The magnitude of the sea change that has overtaken and narrowed the acceptable range of mainstream tax discourse can be gauged by the reactions to it from the Right and Left. The Committee on Federal Tax Policy, led by Roswell Magill, an apostate Under Secretary of Treasury under Roosevelt, could propose no more radical rate reduction than a return to the levels of 1948, when the highest marginal rate had been in excess of 80 percent. Even for the long run, this right-wing business group dared not mention a top rate lower than 50 percent.

In spite of the retention of its nominal progressivity, the new tax code struck Democrats in 1954 as antediluvian. Former President Truman accused the Republicans of "fostering this concentration of wealth in the hands of the few by the passage of a new tax bill." Yet even while attacking "redistrib[ution] in reverse—from the poor to the rich," Truman claimed that the New and Fair Deals had raised workers' income level "without taking anything away from other groups." Minority members of the House Ways and Means Committee observed that the Code "exhumes the 'trickle-down' theory of taxation of Alexander Hamilton and, more recently, Andrew Mellon." The opposition regarded that theory as "strangely similar" to Defense Secretary Wilson's identification of the interests of General Motors and the United States. During the congressional debates, Democrats insisted that the Republicans as "the party of the big shots ... [with] no sympathy for the laboring

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72. David Davies, United States Taxes and Tax Policy 25 (1986), erroneously states that both "[t]he Eisenhower and Kennedy-Johnson administrations recommended and obtained from Congress notable reductions in the marginal rates of taxation on personal incomes."
75. Id.
man”78 had drafted a measure “loaded in favor of the wealthy.”79 Adlai Stevenson, the once and future Democratic presidential candidate, described the new tax law in terms of another “‘melon,’” namely, the one of which business got seven pieces.80 Organized labor would soon denounce the new Code as “shocking” for skewing its benefits, in particular a new dividend credit, in favor of the rich.81

The popular power of progressivity was still so great that even legislators who did not support the prevailing rate structure “feel it is politically impossible to decrease the rate of progression.”82 The legitimacy of progressive income taxation was so entrenched that even the Republican congressional majority, when it was able to tear itself away from such other pressing business as denouncing the possibility that “traitors” like Alger Hiss might retain their pensions,83 boasted of the progressivity84 in the Code that it had left untouched. Senator Millikin, the chairman of the Finance Committee, in rebutting “the general criticism that we are doing things to favor the rich at the expense of the poor,” recited: “A $500,000 man has 166.7 times as much income, but pays 979.7 times more tax than a $3,000 man.”85 Revealingly, a populist Democrat, Senator Long of Louisiana, joined Republicans on the committee and Secretary Humphrey in expressing surprise that the revenue loss associated with eliminating the highest marginal rates would itself be marginal. A surtax of 100 percent on, that is, outright confiscation of, all income above $20,000 would have netted the Treasury only $2.2 billion—not even enough to compensate for the

82. Feingold, supra note 48, at 272.
85. 1954 Hearings, supra note 63, pt. 1, at 141.
revenue loss that would have resulted from increasing the personal exemption for lower-income families by $100, \[^{86}\] which was the Democrats' chief proposed vehicle for reinforcing progressivity by removing seven million taxpayers from the rolls. \[^{87}\]

Such a change, however, was not on the Republican agenda. \[^{88}\] Moreover, labor testimony debunking this confiscation argument failed to make an impression on the congressional majority. Thus, an economist representing the leftist United Electrical, Radio and Machine Workers conceded to the Finance Committee that "[t]here is certainly not much revenue to be gained by raising the rates in the upper bracket incomes, as they are now defined"; by the same token, however, the $8 billion revenue loss that the union's proposed increase in the exemption level would have created could have been almost completely recaptured by closing some of the loopholes through which much of this group's $30 billion in adjusted gross income (AGI) escaped taxation. \[^{89}\]

Walter Heller, who as President Kennedy's chief economic adviser presided over a much larger tax cut a decade later, writing in an issue of the *National Tax Journal* devoted to the new Code, clarified the very narrowly focused orientation of the Eisenhower administration's tax policy:

> The economic core ... is to be found in its emphasis on direct stimulation of investment. ... Even generalized cuts in business taxes to increase profit margins on all segments of a firm's activity play only a secondary role ....

> ... [T]he key stimulus is to come from specific tax rewards for engaging in the highly preferred activity of investing in plant and equipment—rewards through more favorable tax treatment of depreciation, research and development expenses, loss carryovers, retained earnings, and the like. These specific tax incentive measures offer increases in profit margins, not for more efficient marketing

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86. *Id.* at 140-42, 148-49.
88. 100 id. at 3561-64 (voting to reject Democratic exemption amendment). *But see* Alan Osten, *Pressure Rises for Increase in Individual Income Tax Exemptions; White House May Be Unable to Stop It*, WALL ST. J., Feb. 23, 1954, at 6. *See generally STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 84TH CONG., ALTERNATIVE PLANS FOR REDUCING THE INDIVIDUAL TAX BURDEN (1955).*
methods, improved management, better labor relations and the like, but primarily for greater outlays on machinery, equipment, and plant.90

Just how thoroughly committed to market rather than state-interventionist mechanisms this liberal critique of the Eisenhower administration’s pro-capital “distributional preferences” was emerged from the macroeconomic justification that informed Heller’s preference for Keynesian consumption-driven tax reductions, which Heller abandoned in favor of investment-capital incentives as soon as he assumed power. But in the mid-1950s, Heller emphasized “demand for . . . rather than supply of capital. . . . In other words, let demand expand via reductions in our taxes on income and consumption. In the process of converting swollen markets into production and profits, business will allocate producers’ goods in accord with . . . the general principle of consumer sovereignty.”91 Even more programmatically, Heller contrasted matched sets of macroeconomic and tax policies: “Seldom does one find a fervent belief in redistributive taxation coupled with the view that business incentives, profit ratios, and capital accumulation are the nerve-center of economic activity and expansion. Emphasis on markets as the road to economic salvation is usually coupled with preferences for strongly progressive taxation.”92

With alacrity, Treasury Secretary Humphrey declared that tax rates were too high, but regretted that high levels of military spending did not yet permit rate reductions.93 Although Humphrey’s chief academic advisor, Dan Smith, a professor at the Harvard Business School, may have been correct in asserting that the new Code “was distinctly not a tax reduction bill,”94 the individual income tax rate structure manifestly did not exhaust capital’s redistributial agenda. Nevertheless, the Republican party in Congress was pursuing a more frontal attack on progressivity based on a more primitive macroeconomic policy.95 The Eisenhower administration’s fiscal

90. Walter Heller, Appraisal of the Administration’s Tax Policy, 8 Nat’l Tax J. 12, 16 (1955). For estimates of the amounts of tax relief provided under these headings in 1954, see id. at 13.
91. Id. at 22-23.
92. Id. at 24.
policy, which was putatively driven by a desire to raise "the prospective profitability of investment" by relieving the tax burden on it through such means as expanded write-offs and reduced taxation of dividends, must be put into proper perspective by contrasting it with that of the congressional Republicans' leading tax-cutter, the new chairman of the House Ways and Means Committee. As "the first order of business" of the first Republican-controlled Congress under a Republican president since Herbert Hoover, Daniel Reed of New York filed H.R. 1 on January 3, 1953:

The present high individual income-tax rates are preventing all segments of our people from realizing a higher standard of living, and are choking individual incentive and initiative and are thus not only undermining the driving force of our competitive economy but depriving the people of their liberty. Because of the high rates, the aim of a vast number of our citizens has now become the acquisition of pensions, perquisites, fringe benefits, and expense accounts, coupled with an increasing reliance on Federal paternalism.

Recalling the 1920s and anticipating the Laffer curve, Reed observed that "a readjustment downward of high tax rates can, and inevitably does, lead to increased productivity, an enlarged tax base, and a higher national income." Under these dire exigencies threatening the marrow of the Republic, what radical "across the board" cuts did Reed, an "uncompromising old Guard Republican" who "believes firmly in the fiscal theories expounded by Andrew Mellon," propose? H.R. 1, which was designed to accelerate by six months the termination date of the tax increases imposed by the Korean War-era Revenue Act of 1951, would have reduced by all of one-half of one percent the aggregate normal and surtax paid by the highest income-tax payers.

99. 99 id. (extension of remarks by Daniel Reed).
100. Stein, supra note 96, at 284.
102. Id. § 6, at 29.
Even in 1947, when the openly pro-capital Republican majority of the 80th Congress had unsuccessfully sought to enact a set of rate reductions—which one witness thought "so clearly designed for the unconscionable advantage of a small group of upper-bracket taxpayers ... that it ought ... to be introduced as a private rather than a public bill"—over President Truman’s vetoes, the effective rates on income-multi-millionaires would still have remained above 75 percent. The rate reduction that the Republicans ultimately enacted in 1948, after having made various concessions to the Democrats in order to insure an override, left the highest marginal rate at 82.13 percent and the maximum effective tax rate at 77 percent only marginally lower than the first postwar rates of 86.45 percent and 85.5 percent, respectively, yet significant enough to prompt the Socialist party platform to speak of “drastically lowered” rates. The virtual sanctity that progressive national income taxation had achieved impressed itself even on Reed, who prided himself on having cast more votes against the New Deal than any other congressman. Similarly, in 1956, after the Republicans lost control of Congress, Reed proposed reducing the top rate of 91 percent, which caused “serious hardships,” to 75 percent on the principle that “it seems reasonable enough that any individual be permitted to keep at least one quarter” of his income. Because that rate was even higher than the 67-percent rate of 1917, which as “the highwater mark thus far reached in ... the annals of civilization” had been denounced as socialist,


112. Sidney Ratner, Taxation and Democracy in America 390 (1967).
even right-wing Republicans apparently had developed a capacious notion of reasonableness.

After informing Reed that "we would fight the matter to the end," President Eisenhower caused H.R. 1 to be held up in the Rules Committee.\textsuperscript{113} That Eisenhower's resistance to tax reductions sustained World War II's highly progressive tax rates was later taken as evidence that, in his Administration, there is little evidence of concern for vertical equity; if vertical equity had been an issue, there probably would have been disproportionate and hence regressive tax cuts based on the premise that the structure was too progressive as it stood. The point is that there was little debate of the sort that arose under the Mellon regime or in the early Roosevelt years, when the distribution of wealth and income and its effect on investment and incentives were the heart of the matter.\textsuperscript{114}

III. SOAKING THE WATERPROOFED RICH?

I consider the so-called principle (if it may be dignified by such a title) of "taxation in accordance with ability to pay"... utterly unsound....
The sound and justifiable method of taxing income is at a flat or proportional rate.\textsuperscript{115}

But perhaps the high marginal tax rates were just "so much window dressing,"\textsuperscript{116} "A colossal illusion"\textsuperscript{117} in the age of loopholes, or "a kind of spiritual consolation prize to the 20-percent-fellows."\textsuperscript{118}

After all, as early as the 1930s, the iconoclastic Henry Simons had sensed "a grand scheme of deception, whereby enormous surtaxes are voted in exchange for promises that they will not be made effective.... [P]oliticians may point with pride to the rates, while quietly reminding their wealthy constituents of the loopholes."\textsuperscript{119} He therefore urged "Congress to quit this ludicrous business of dipping

\begin{itemize}
\item \textsuperscript{113} Dwight D. Eisenhower, Mandate for Change: 1953-1956, at 202 (1963); John Morris, Tax Relief Comes as Mixed Blessing, N.Y. Times, Jan. 4, 1954, at 72.
\item \textsuperscript{115} Robert Dresser, The Reed-Dirksen Amendment: A Reply to Professor Cary, 40 A.B.A. J. 35, 77 (1954).
\item \textsuperscript{117} Jerome R. Hellerstein, Taxes, Loopholes and Morals 16 (1963).
\item \textsuperscript{118} David Bazelon, The Paper Economy 146 (1965).
\end{itemize}
deeply into great incomes with a sieve.” Later, cynics even charged that the “only possible purpose” of the gap between paper and real tax rates “is to trick the American public” into believing that the progressivity that it preferred had actually been achieved.

During the Eisenhower years, such complaints were common. As a longtime economic critic of the tax system, Professor Harold Groves, informed Congress: “the impression is widely shared that the Congress deliberately throws a high-rate scale to the public as a demagogic bone and then as deliberately allows escapes from taxes that make these rates specious.” Stanley Surrey, the leading academic tax lawyer of the post-World War II period and the architect of rate reductions as the chief tax policy analyst in the Kennedy administration, told the readers of Colliers that the federal income tax was a clear illustration of “schizophrenia” because Congress created high rates with one hand and escapes from them with the other. This legislative behavior led Surrey to conclude that Congress must believe that high rates “impair incentives to work and invest.” His suggestion that Congress could lower the rates from 91 percent—and actually increase revenues by expanding the tax base through the elimination of privileged tax shelters—sounds prophetic of the Reagan tax reforms of the 1980s, until it emerges that by lower rates Surrey meant the 60- to 65-percent range. Ironically, Surrey reported, it was the very people who could be expected to be most vehemently opposed to a reduction in rates for the rich, the labor movement, that would gain the most by it: “Apparently Congress has felt that the only way it could justify the high rate for the mass of voters ... was to preserve ... the fantastically high rates in the top brackets.” And if the tax system was further demoralized by tunneling through high rates, Surrey implored the union leadership to understand, the alternative “is a Federal sales tax on consumer goods that would hurt

120. Id.
124. Id.
its own members more than it hurts the wealthy." Representative Wilbur Mills, chairman of the Joint Subcommittee on Tax Policy, and soon to become chairman of the Ways and Means Committee, without indulging in Surrey's rhetorical flourishes and admonitions, agreed that in addition to broadening the tax base, Congress should lower the highest marginal rate to 65 percent and the lowest to 10 percent. A political historian of the income tax later asserted:

The key to the modern nominal rate structure, which provides the illusion of progressivity, is the Eisenhower administration's reluctance to lower taxes following Korea ... suggesting that whatever progressivity exists in the income tax structure entered through the back door, not as a result of a commitment to equality, but as a response to revenue emergencies.

Exactly three decades after the Code's enactment, in response to a request for a fairer tax code from the most right-wing president in sixty years, the Reagan Treasury Department looked back almost with affection and nostalgia on "the 1954 income tax," which, "[c]ompared with today ... was simpler, more neutral, and fairer, in many respects. Perhaps as importantly, it was probably seen to be fair by most taxpayers." Although the Reagan Administration regarded the 91 percent marginal rate as a "defect," the fact that "[v]irtually all taxpayers below the top 10 percent of the income distribution paid tax at an essentially uniform marginal rate of about 20 percent" was seen as a manifest advantage:

The income tax was still being used primarily to raise public revenues, and not to guide households and private business enterprises into a multitude of activities .... With notable exceptions, the income tax was levied on a base that included most income. The erosion of that

125. Id. Hayek makes the same point: "[T]he illusion that by means of progressive taxation the burden can be shifted substantially onto the shoulders of the wealthy has been the chief reason why taxation has increased as fast as it has ... and that, under the influence of this illusion, the masses have come to accept a much heavier load than they would have done otherwise." FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 311 (Arthur Seldon, ed., 1978).


127. WITTE, supra note 114, at 262.


129. Id. at 2-3.
base by a multitude of exclusions, adjustments, deductions, and credits ... had not reached its present stage.

... By comparison, most interest, dividend, and labor income was taxed in full ...

... Exclusions, itemized deductions, and the deduction value of credits offset about 34 percent of personal income in 1982, as opposed to only 18 percent in 1954.130

What were the “effective” tax rates on high-income recipients in 1954?131 The IRS calculates effective tax rates as income tax (after credits) as a share of taxable income (after exemptions and deductions).132 The following table presents these effective tax rates according to AGI groups.

<table>
<thead>
<tr>
<th>AGI ($000)</th>
<th>Tax as Share of Taxable Income (%)</th>
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</thead>
<tbody>
<tr>
<td>&gt;1,000</td>
<td>66.9</td>
</tr>
<tr>
<td>500-1,000</td>
<td>65.9</td>
</tr>
<tr>
<td>200-500</td>
<td>61.5</td>
</tr>
<tr>
<td>150-200</td>
<td>56.8</td>
</tr>
<tr>
<td>100-150</td>
<td>52.5</td>
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<tr>
<td>50-100</td>
<td>43.3</td>
</tr>
<tr>
<td>30-50</td>
<td>33.3</td>
</tr>
<tr>
<td>20-30</td>
<td>27.1</td>
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</table>

Did big-business Republicans at the highpoint of the American century (three years later Sputnik undermined United States prestige as the international leader in science and technology) really find it perfectly compatible with their Party’s principles to take back two out of every three taxable dollars pocketed by their richest compatriots? The Wall Street Journal seemed to think so. In the midst of senatorial debate on the new tax code, the newspaper reported that the IRS had just published data for 1951 on income-millionaires; the “total income” of these 171 taxpayers was
$344,640,000, of which the IRS "scooped up" $213,654,000, or 62 percent.\textsuperscript{134}

Joseph Schumpeter, arguably the most famous living economist at mid-century, had asserted in an influential book published during the Truman administration that "a tremendous transfer of wealth has actually been effected, a transfer that quantitatively is comparable with that effected by Lenin."\textsuperscript{135} Observing, in general, that nineteenth-century socialists could not have dreamed of the extent to which it had become "possible to extract from the bourgeois stratum . . . the bulk of what in Marxist terminology is called Surplus Value," Schumpeter claimed, in a passage that was reprinted in a congressional tax hearing in 1948, that even by the mid-1930s, when the highest rates were lower than they were in 1954, the upper-income brackets had already been "expropriate[d]."\textsuperscript{136}

However, even in the simple days of the Mellonian ascendancy, the proliferation of exemptions, deductions, and allowances prompted Representative Cordell Hull to remark that the "the nominal rates prescribed are greatly misleading when compared with the actual effect of the rates upon taxable income."\textsuperscript{137} Senator Paul Douglas, perhaps the most accomplished economist ever elected to Congress and not one to let his colleagues forget that he "devoted some years of . . . [his] life to . . . refuting the Marxian contention that capital is nonproductive,"\textsuperscript{138} could be expected to caution them in 1954 that: "Before we attach too much importance . . . to the claims of heavy taxation of the well-to-do, it is important to recognize that there is a real difference between the theoretical tax rates and tax rates which are actually paid."\textsuperscript{139} And as Congress's Joint Committee on the Economic Report observed, "contrary to a widespread impression, progression in the rate structure applies to only a very limited amount of income. [T]he present system of

\begin{itemize}
\item \textsuperscript{134} Tax Report, WALL ST. J., June 30, 1954, at 1.
\item \textsuperscript{135} JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 381 (5th ed. 1966).
\item \textsuperscript{136} Id. The passage, which Schumpeter added for the 1947 edition, was included in a submission by John Hanes, former Treasury Under Secretary, which he entitled "Experiments in Socialism." Reduction of Individual Income Taxes: Hearings Before the Senate Comm. on Finance, 80th Cong., 2d Sess. 600 (1948) [hereinafter Reduction Hearings].
\item \textsuperscript{137} The REVENUE BILL of 1926, H.R. REP. NO. 1, 69th Cong., 1st Sess. 34 (1925).
\item \textsuperscript{138} 100 CONG. REC. 9156 (1954) (remarks by Sen. Paul Douglas).
\item \textsuperscript{139} 100 id. at 9153 (remarks by Sen. Paul Douglas).
\end{itemize}
exclusions and deductions serves to remove about 60 percent of total personal income from the tax base.\textsuperscript{140}

The sixty-percent erosion in the mid-1950s was, in any event, lower than the sixty-seven percent lost to the tax base a decade earlier.\textsuperscript{141} Forty years later, the effective tax rate on income-millionaires is less than half as high. Small wonder that, for some political analysts, the progressive income tax became the prime exhibit of "the divergence between a widely publicized symbol and actual resource allocation patterns."\textsuperscript{142}

Computing effective tax rates using AGI instead of taxable income as a more comprehensive income base generates "much the more meaningful indicators of tax burden distribution."\textsuperscript{143} The effective tax rates for 1954 are presented in the Table below.

**Effective Tax Rates, 1954\textsuperscript{144}**

<table>
<thead>
<tr>
<th>AGI ($000)</th>
<th>Tax as Share of AGI (%)</th>
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</thead>
<tbody>
<tr>
<td>&gt; 1,000</td>
<td>54.7</td>
</tr>
<tr>
<td>500-1,000</td>
<td>52.8</td>
</tr>
<tr>
<td>200-500</td>
<td>49.7</td>
</tr>
<tr>
<td>150-200</td>
<td>47.0</td>
</tr>
<tr>
<td>100-150</td>
<td>44.2</td>
</tr>
<tr>
<td>50-100</td>
<td>36.8</td>
</tr>
<tr>
<td>30-50</td>
<td>27.8</td>
</tr>
<tr>
<td>20-30</td>
<td>21.7</td>
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</tbody>
</table>

Although generating 15 to 20 percent lower effective rates than those based on the narrower category of taxable income, even AGI is and has always been far from a comprehensive tax base. A study presented to Congress in 1955 revealed that in 1952 (the latest year for which there were relevant data) total personal income as captured by the national income accounts exceeded AGI by $56 billion, or 26 percent. In addition to conceptual-definitional differences, the gap was accounted for by underreporting, which was much more prevalent for dividends, interest, and entrepreneurial income than for

\textsuperscript{142} Murray Edelman, The Symbolic Uses of Politics 28 (1964).
\textsuperscript{144} Calculated according to Individual Income Tax Returns for 1954, supra note 133, tab. 9, at 58.
wages and salaries.\textsuperscript{145} Three decades later, the IRS was still conceding that the information revealed on a personal income tax return was “not very close [to] the real profile of a taxpayer’s economic circumstances ... particularly ... for taxpayers with the greatest resources.”\textsuperscript{146}

By 1963, when the Kennedy Administration was seeking a significant reduction in the highest marginal rates, the Treasury Department released data on what it called effective tax rates based on amended AGI, which includes the excluded half of capital gains, and thus, “among available income measures from tax returns, comes closest to actual income.”\textsuperscript{147} Presenting data for high-income taxpayers with varying proportions of capital gains, the Treasury showed that a taxpayer with $2 million in amended AGI (but excluding tax-exempt interest) paid an effective tax rate as low as 20.9 percent if he had a high proportion of capital gains. A similarly situated taxpayer with a low proportion of capital gains paid an effective rate of only 56.7 percent.\textsuperscript{148}

Why the Kennedy administration believed that such revelations would impel legislators to reduce paper rates is unclear, but the Office of Tax Analysis made available to Senator Douglas data from 1960 showing that AGI-millionaires as a group paid only 32.3 percent of their amended AGI in taxes chiefly because two-thirds of their income was taxed at 25 percent, which was only marginally higher than the lowest bracket rate. So overpowering was the impact of capital gains as income rises even within this elite group that in 1959 the median effective tax rate for those with AGI in excess of $5


\textsuperscript{148} \textit{Id.} tab. 6, at 2602.
million (23.7 percent) was only half that of the group with $500,000 to $750,000 in AGI (53.0 percent).149

Shortly after the Kennedy tax cuts were enacted in 1964, the National Tax Journal published an obscure economics teacher’s brief quantitative analysis of progressivity during the Eisenhower years.150 The author, William Williams, used a broader income concept which he called “arbitrary” because it included one hundred percent of reported capital gains, but excluded tax-exempt interest and other income sources, the inclusion of which would have depressed effective tax rates even further. The IRS did not even collect data on, let alone tax, unrealized capital gains, although its owners, by collateralizing appreciated stock, can receive loans to increase current consumption.151 Williams’s approach reduced the effective rate for income-millionaires in 1954, for example, by another thirty percent.

Effective Tax Rates, 1953-1961152

<table>
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</tr>
</thead>
<tbody>
<tr>
<td>&gt; 1,000</td>
<td>49.3</td>
<td>38.8</td>
<td>35.8</td>
<td>36.1</td>
<td>40.0</td>
<td>33.1</td>
<td>30.6</td>
<td>31.3</td>
<td>27.2</td>
</tr>
<tr>
<td>500-1,000</td>
<td>46.2</td>
<td>38.7</td>
<td>35.6</td>
<td>36.7</td>
<td>36.6</td>
<td>36.0</td>
<td>32.1</td>
<td>30.8</td>
<td>29.1</td>
</tr>
<tr>
<td>200-500</td>
<td>45.9</td>
<td>39.3</td>
<td>36.8</td>
<td>37.4</td>
<td>38.6</td>
<td>36.9</td>
<td>33.8</td>
<td>33.1</td>
<td>31.5</td>
</tr>
<tr>
<td>150-200</td>
<td>44.6*</td>
<td>39.6</td>
<td>37.0</td>
<td>37.4</td>
<td>38.5</td>
<td>37.0</td>
<td>34.3</td>
<td>34.6</td>
<td>33.1</td>
</tr>
<tr>
<td>100-150</td>
<td>44.6*</td>
<td>39.0</td>
<td>36.0</td>
<td>35.9</td>
<td>38.1</td>
<td>36.8</td>
<td>34.5</td>
<td>34.5</td>
<td>33.0</td>
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<tr>
<td>50-100</td>
<td>39.1</td>
<td>33.9</td>
<td>32.4</td>
<td>33.0</td>
<td>33.3</td>
<td>32.1</td>
<td>31.6</td>
<td>31.3</td>
<td>30.5</td>
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<tr>
<td>20-50</td>
<td>27.1</td>
<td>23.4</td>
<td>22.9</td>
<td>23.0</td>
<td>22.0</td>
<td>22.5</td>
<td>22.1</td>
<td>21.9</td>
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The effective tax rates for all high-income taxpayers, who numbered between half a million and a million and comprised one to two percent of all taxpayers during these years,153 declined by forty-five percent for income millionaires and by twenty percent for those in the lowest bracket. Moreover, in every year after 1953, progressivity ended well below $1 million in AGI, in several years at a bracket as

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149. Id. pt. 1, tab. 1, at 278, tab. 4, at 282.
152. Williams, supra note 150, at 426. In 1953, the AGI classes $100,000-$150,000 and $150,000-$200,000 were combined.
low as $100,000-$150,000. The decline in the effective tax rate for income-millionaires from 49.3 percent in 1953 to 27.2 percent in 1961, for example, appears in large part due not so much to changes introduced by the Code in 1954 as to the increasing proportion of their income stemming from tax-favored, long-term capital gains. From forty percent in 1953 and fifty-eight percent in 1954, this share rose to almost three-quarters of millionaires’ income in 1961\(^{154}\) because the Dow-Jones average industrial stock price almost tripled during the Eisenhower boom.\(^{155}\) (The decline in effective rates continued after the Kennedy-Johnson rate reductions: In 1963, the last year under the old rates, income-millionaires paid 27.6 percent of their expanded AGI in taxes; in 1965, the first year during which the lower rates were fully implemented, the rate fell to 26.7 percent.)\(^{156}\) Another indicator of the decline in progressivity during the 1950s emerges from a comparison of the shares of aggregate AGI and taxes paid accounted for by the richest groups. Although, for example, income-millionaires’ share of both totals increased, their share of tax liability rose more slowly, producing a sharp reduction in the ratio of their share of taxes paid to AGI received.

<table>
<thead>
<tr>
<th>Year</th>
<th>AGI (%)</th>
<th>Tax (%)</th>
<th>Ratio Tax Share/AGI Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>1953</td>
<td>0.16</td>
<td>0.58</td>
<td>3.63</td>
</tr>
<tr>
<td>1954</td>
<td>0.27</td>
<td>0.83</td>
<td>3.07</td>
</tr>
<tr>
<td>1960</td>
<td>0.29</td>
<td>0.71</td>
<td>2.45</td>
</tr>
</tbody>
</table>

Williams, who had formerly been an assistant to the tax auditor at Standard Oil,\(^{158}\) concluded that the gap between paper and real rates should be closed by lowering nominal rates even further by “adjusting

\(^{154}\) Williams, supra note 150, at 425-27.

\(^{155}\) Calculated according to Paul Samuelson, Economics 74 (8th ed. 1970).


\(^{158}\) AM. ECON. REV., Dec. 1993, at 514.
the tax base.” Thus, despite Williams’s preference for limiting the scope of individual taxpayers’ opportunity “to legislate tax cuts for themselves,”159 this revenue-neutral solution in effect accepted as the future tax rate the level that the rich have been able to secure through clever avoidance and outright nonreporting of income.160

IV. AND THE RICH GET POORER?

To the average man, it seems not unfair that the taxpayer with an income of over $200,000 a year should pay over half of it to the Government. It is a well-known fact that most people of great wealth use a comparatively small amount of their incomes for their own and their families’ personal physical needs.161

Merely because the party of Eisenhower carried forward the high statutory rates of taxation hardly meant that the propertied interests accepted them.162 The big-business economic research facility, the Committee for Economic Development (CED), for example, immediately issued its recommendations, prescribing a long-range program of reduction in the highest individual income tax rates as a priority in order to restore incentives; the CED insisted that, in the medium term, such reductions would preclude an increase in exemption levels,163 which coincidentally would disproportionately benefit low-income recipients. Although the rich had been complaining since the end of World War II that high taxes were hollowing out the meaning of life as they had known it, the accumulation of wealth was proceeding at an unprecedented rate. In 1952, Fortune offered a peek into the rise of “The New Rich”:

Since 1945 a brand-new crop of rich men has risen in the U.S. . . . and their collective wealth, glittering from coast to coast, has given the whole country a pleasantly golden hue.

They are the core of that fast-growing group whose 15,000-odd members report incomes between $100,000 and $300,000 a year . . .

159. Williams, supra note 150, at 429.
160. See generally Harley Hinrichs, Unreporting of Capital Gains on Tax Returns or How to Succeed in Gainsmanship Without Actually Paying Taxes, 17 Nat’l Tax J. 158 (1964) (discussing the “Gambits” of avoiding taxes).
162. See Eisenhower versus the Republican Party, supra note 95, at 5-6.
163. COMM. FOR ECONOMIC DEVELOPMENT, FEDERAL TAX ISSUES FOR 1955, at 6-7 (1955); Report Urges April 1 Tax Drop If Spending Is Cut by 5 Billion, N.Y. TIMES, Jan. 10, 1954, at 1.
Right behind them, ready to step into their shoes, are roughly 50,000 individuals who in 1948 reported incomes of $50,000 to $100,000 a year, and 175,000 who reported $25,000 to $50,000.

Nationally their presence is recorded in the 400,000 Cadillacs sold since 1945, the 37,000 pleasure craft registered since 1946 . . . and the introduction, under the pressure of demand, of a sixty-two-footer, priced at $125,000.164

This florescence of material riches was, however, according to Fortune, stratum-specific; for from the height of the boom at the end of the 1920s to 1948, federal taxation had significantly reduced the number of self-reported income-millionaires:

Most spectacular of all was the effect of income taxes on top corporation personnel. Corporation executives began to realize that their once fabulous salaries had become largely fictitious, an assay of their value to the company in which the government did not concur.

When the rates rose to a point where the tax on salaries of $150,000 to $200,000 was almost three times the capital-gains rate, the implication could no longer be ignored: Men of ability could make more money by building up a business of their own, and then selling it, than they could by working as a salaried official of a big corporation.165

The problem for executives, however, was "how to live at the level imposed by the job and . . . accumulate the necessary capital . . . to strike out on their own" in the face of "semiconfiscatory rates."166 These postwar frustrated would-be entrepreneurs thus experienced the same Faustian constraints observed in the nineteenth century: "Whereas the classical capitalist brands individual consumption as a sin against his function and 'abstinence' from accumulation, the modernized capitalist is capable of regarding accumulation as 'renunciation' of his pleasure drive."167 What was true of already existing capitalists a century earlier applied with even greater intensity to their embryonic mid-twentieth-century successors: Once a certain degree of development is attained, "a conventional degree of extravagance, which at the same time is an exhibition of wealth and therefore a means of credit, even becomes a

165. *Id.* at 62.
business necessity of the ‘unhappy’ capitalist. Luxury enters into capital’s costs of representation.”

The demand for lower taxes for the rich who wish to consume and accumulate without deductions from either category can be realized in the short term by forcibly reducing individual consumption by the nonrich, who will then finance a larger share of the state budget. Postwar proposals for shifting part of the federal income tax burden from the rich to the nonrich merely modified the form in which historically, as Henry Simons remarked, “[t]he cost of our present stock of productive instruments was . . . decades and centuries of terrible poverty for the masses.”

Tax experts’ and politicians’ concern with so-called horizontal inequity between rich recipients of similar amounts of income from different sources was translated into lay terms by the business press, which in the early postwar years was replete with heart-rending accounts of the pecuniary travails of corporate executives, whose $70,000-$80,000 salaries (excluding fringe benefits and stock options) were, Fortune insisted, “hardly princely.” The magazine acknowledged that “[p]eople in low income-tax brackets . . . express loud, mocking sympathy for the man who makes a gross of $75,000 a year and pays out $40,000 in taxes. But the man who is paying these taxes is suffering indeed.” What was worse, when taxes level a $150,000-a-year executive down to only $45,000, “[m]oney is no longer a prime incentive in getting a good day’s work out of the boss.” Although the magazine’s 1947 survey of $25,000-a-year executives (paying $5,700 to $8,400 annually in federal income tax) concluded that “[n]o one is likely to shed even a crocodile tear” over their fate, “[w]hat emerges . . . from these accounts of their ‘getting and spending’ is a sense of futility. If this is what you get by working hard enough to earn $45,000 or $25,000 a year, what’s the use?” Yet it was precisely members of this “stratum of the corporate rich” who, according to sociologist C. Wright Mills, writing in the middle of the

168. Id. at 579.
169. Simons, supra note 119, at 22.
170. The Nine Hundred, FORTUNE, Nov. 1952, at 132, 133.
172. Id. at 106.
173. $25,000 a Year: A.D. 1948, FORTUNE, Jan. 1948, at 167.
Eisenhower years, “possess far more money than they can personally spend with any convenience.”

Why the poor mocked and how the quondam corporate rich suffered both become easier to understand against the background of an eight-part series, “Family Fortunes,” which The Wall Street Journal published in late 1946 and early 1947 to gauge the impact of rising living costs and high taxes on the ability of families in various income classes to save money. A president and general manager of a firm with $45,000 in income paid $20,000 in income tax; out of the remaining $25,000, he somehow had to meet the expenses of a full-time cook, governess, and second maid as well as a part-time gardener, who, besides being paid, had to be fed three times a day. What with an additional $4,000 in annual entertainment expenses (including dues for six clubs), he was no longer able to engage in the abstinence that permitted his income class to generate the savings on which U.S. corporate enterprise purportedly relied as a source of capital. And as Henry Hazlitt, Newsweek columnist and for the previous dozen years chief economic editorial writer for The New York Times, reminded the reading public, whatever was taxed away from the rich would have been invested in, and therefore was being withdrawn from, new equipment and factories.

A steelworker grossing $47.50 and taking home $44 weekly who had to raise chickens to make ends meet, was featured in another article in The Wall Street Journal series. Such a person could perhaps be excused for lacking empathy with the $45,000-a-year man, but surely the predicament of the chief executive of one of the country’s biggest industrial corporations and his incredibly shrinking income moved him. With only $36,611 of his $200,000 salary surviving taxes and charitable tithing, he was better off than in 1944 when the same salary had netted him only $21,000. But he still looked back nostalgically on Mellonian times, when “I kept $98,000 out of

174. MILLS, supra note 61, at 161.
175. Charles St. Peter, “Mr. X” Barely Manages To Make Ends Meet On $45,000 a Year, WALL ST. J., Dec. 18, 1946, at 1.
my $132,000 salary." In gratitude for doubling the wages of his chauffeur, gardener, and servants and giving them fresh vegetables from the farm, he was greeted with their strike threats. Fortunately for this chief executive, the fact that he would have to earn $9 to have enough left over after taxes to pay for a $1.50 taxi bill did not force him to walk to work: He simply shifted the cost to his firm's business expense account. Significantly, despite having recently rejected a $30,000 salary increase because the $2,000 it would have netted him was not worth making "some stockholders and employees mad," he advocated high executive compensation because it both determined his worth and self-worth and was "an energizer to inspire those down the line to equip themselves for the higher jobs."

If these tales of impoverished woe were not sufficiently depressing, in 1949 *U.S. News & World Report* admonished its wealthy readers to learn the lesson of their British counterparts. Under the title, "Socialism: How the Rich Get Poorer," the magazine spread the horrifying news of the redistributional hell that World War II and the postwar Labour government had unleashed. The taxman had left only seventy Britons with the equivalent of $24,000 after taxes, compared with 7,000 Britons a decade earlier. Presumably because wealthy Americans were not afflicted with a "Socialism" that redistributed their income "to give the poor the advantage of Government services and benefits," they were spared the fate of being "all but eliminated." During the same period, the number of Americans whom the IRS permitted to keep at least $24,000 had risen from 37,000 to 155,000. The image of a corrupted Albion became widespread: The Republican chair of the Finance Committee during the 80th Congress, Senator Millikin, had already asserted that taxes on the rich "have been confiscatory, to the point that Great Britain's capital structure is now impotent." By the end of Labour's reign of terror in 1951, *Fortune* related that it had become "virtually impossible for any income, after tax, to exceed about £5,000 ($14,000)."

179. *Id.*
180. *Id.* at 4.
182. *Id.*
183. *Id.*
The transatlantic imagery had executed an arresting inversion since the time of the United States Civil War, when English supporters of "aristocratic institutions" censured as "confiscation" the wartime progressive income tax that ranged from 5 percent on incomes below $5,000 to 10 percent on those above $10,000. In defending the tax, Francis Bowen, one of the leading political economists in the United States, scoffed that "hardly any one will relax his efforts to obtain an income of more than $10,000 a year, by being made to see that he will have to pay . . . 2½ per cent more tax than if he had only $6,000." For him, taxation would pass into "robbery," for example, only if a 50-percent rate were imposed on incomes above $10,000 when the next lowest rate were twenty percent.

Writing in 1949, U.S. News & World Report in fact captured the highpoint of the redistributory movement in Britain: Between 1938 and 1949, the share of after-tax personal income received by the richest one percent of British income units had declined from fifteen percent to ten-and-a-half percent. Thereafter, little or no redistribution took place, thus leaving the richest one percent of the population with as much income as the poorest thirty percent.

To be sure, the collapse of the relative shares of the richest Britons had been "primarily a tax return income revolution" because "in a time of rapidly advancing progressive taxation the individual income tax return is an unreliable indicator of equality trends," especially as capital gains and undistributed profits remained excluded from those returns. That the shift away from the top had stopped far short of eliminating enormous inequality was later linked to the fact that "[t]he intense concentration of income at the top arises . . . from a concentration of profit-bearing ownership among a tiny minority . . . . Any policy of redistribution which is to cut drastically into the wealth

186. FRANCIS BOWEN, AMERICAN POLITICAL ECONOMY 440 (1873).
187. Id.
189. JOHN WESTERGAARD & HENRIETTA RESLER, CLASS IN A CAPITALIST SOCIETY: A STUDY OF CONTEMPORARY BRITAIN tab. 2, at 42, 43 (1975). A contemporaneous study found that whereas in 1938 the richest 1% of the population accounted for 19% of pre-tax and 14% of post-tax private income, by 1947, the shares had declined to 17% and 11%, respectively. DUDLEY SEERS, THE LEVELLING OF INCOMES SINCE 1938, at 39-40 (1951).
of the few must therefore involve public appropriation of the means of production.”\textsuperscript{191}

Because the British Labor Party had not even undertaken “serious taxation of capital gains or of industrial dividends,”\textsuperscript{192} let alone implemented such a socialist program during its six-year postwar rule,\textsuperscript{193} the limits of purely fiscal redistribution based upon a continuation of wartime tax rates were narrow even if they were and remained more capacious than the confiscatees would allow and achieved considerably greater equalization of incomes than did the United States tax system during the Roosevelt and Truman administrations.\textsuperscript{194} Yet even in Britain, where “the ‘working class’ pays for its own benefits in the . . . welfare state, . . . a ‘trickle-down’ income revolution . . . did little for the bottom half” primarily because whatever vertical redistribution had taken place “represented a draining of high incomes to meet the expanded needs of the war” rather than “equalitarian welfare spending.”\textsuperscript{195}

The magazine’s readers may be excused if they were puzzled as to how such prodigious incomes could have proliferated in the United States in the teeth of the confiscatory tax rates that wealthy conservatives had been cursing for the past decade and a half. Their bewilderment would only have intensified had they read a contemporaneous piece in \textit{Fortune}, explaining that for all its bite, the federal income tax had failed to redistribute “much for liberals to boast about.”\textsuperscript{196} The magazine pointed out that at the height of the confiscatory frenzy in 1945, when the richest five percent of taxpayers had paid half of all income taxes, the difference between the amount they had paid and the sum that they would have paid under a proportional system had come to less than five billion dollars: “Thus, of a $180-billion national income, this great instrument of social justice redistributes a scant 2 per cent,” or less than four percent, of the

\textsuperscript{191} Westergaard & Resler, \textit{supra} note 189, at 44.
\textsuperscript{195} Brittain, \textit{supra} note 190, at 595, 603.
\textsuperscript{196} \textit{The Modern Income Tax}, \textit{supra} note 11, at 92, 93.
total income of the "assumed beneficiaries."\textsuperscript{197} The upshot of this arithmetical exercise in irony was not that paper progressivity had to be translated into real progression, but rather the intimation that this fiscal game was not worth the rich people's candle: "This sorry showing . . . raises the question whether the lower income groups are in fact any better off economically as the result of it."\textsuperscript{198}

The reason that \textit{U.S. News & World Report} chose $24,000 as a benchmark for comparing the United States and Britain is noteworthy. During World War II, President Roosevelt, "in order to correct gross inequities and to provide for greater equality in contributing to the war effort," had issued an executive order limiting salaries to $25,000 after taxes.\textsuperscript{199} Taking the position that for reasons of "morale," "no American citizen ought to have a net income, after he has paid his taxes, of more than $25,000 a year," Roosevelt had proposed "a special war supertax" to limit a married couple's after-tax income from all sources to $50,000.\textsuperscript{200} Congress, which nullified his executive order, never acted on his proposal to enact the supertax.\textsuperscript{201} Later, only the Trotskyist Socialist Workers Party continued to include this cap in its platform.\textsuperscript{202}

Just as a number of congressmen at the time had accused Roosevelt of having articulated a socialist, communist, or Marxist agenda,\textsuperscript{203} many top-bracket taxpayers and their publicistic advocates neither forgave nor forgot. During congressional hearings on the financing of the Korean War, for example, the chairman of the tax committee of the National Association of Manufacturers (NAM) insisted that achieving a rate increase by adding percentage points would merely intensify progression—"a condition which has already been carried too far unless one is to accept the Karl Marx doctrine that the main function of severe tax-rate progression is to destroy the basis of private capitalism."\textsuperscript{204} His successor, Fred Maytag II, the

\textsuperscript{197.} \textit{Id.}
\textsuperscript{198.} \textit{Id.}
\textsuperscript{200.} \textit{The Public Papers and Addresses of Franklin D. Roosevelt} 68, 90-94 (1943).
\textsuperscript{201.} \textit{See} Tax Act of Apr. 11, 1943, ch. 52, § 4, 57 Stat. 63, 63 (1943).
\textsuperscript{202.} \textit{National Party Platforms, supra} note 53, at 573 (1956 platform).
\textsuperscript{203.} \textit{See, e.g.,} 89 Cong. Rec. 95, 1877, 1886 (1943) (remarks of Rep. Wolcott, Jenkins, and Disney); 88 \textit{id.} at 4148 (1942) (remarks of Rep. Plumbly).
eponymous washing-machine capitalist, reiterated shortly after enactment of the 1954 Code, that "the present tax system was 'conceived by Karl Marx to liquidate the middle class'" and was responsible for "95 per cent of the country's troubles."\(^{205}\) And the NAM's official publications were replete with denunciations of the "socialistic smokescreen," "socialist pressures," and "socialist strategy" that had promoted a "socialistic tax structure . . . in classless America."\(^{206}\)

A decade after the war's end, *U.S. News & World Report* continued to remember vividly that, although "Congress balked at fixing a rigid $25,000 ceiling on income," it not only set "rates approaching the President's goal," but virtually retained them at their wartime peak levels.\(^{207}\) Because Congress had merely substituted a "flexible" limit for Roosevelt's rigid one, "high incomes have been leveled down. In effect, taxes have put a ceiling on the incomes of the upper group."\(^{208}\) In the mid-1950s, the magazine believed that Congress still adhered to the linked fiscal policies of "'soak the rich' taxes" and using taxes "for social purposes, as well as for revenue."\(^{209}\) What remained to be seen was whether the "[t]op men in the Eisenhower Administration," who did not view taxes "as an instrument of . . . social reform" except for that of abolishing "any official rule against getting rich" could persuade Congress that providing tax relief for "the little man" could be achieved only by imposing "confiscatory" rates on the rich.\(^{210}\) If, for example, the proposed $400 increase in the personal exemption had been enacted, it would have cost almost as much in revenue because all taxpayers in the over-$25,000 brackets were paying. The implication—one that the magazine shared with many defenders of lower rates—that the rich in the United States were neither numerous nor rich enough to finance such frills for the "little taxpayers"\(^{211}\) contrasted sharply with the lack

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208. *Id.* at 29.

209. *Id.*

210. *Id.*

211. *Id.*
of constraint acting on the policy pursued by the Republican rate-cutters four decades later. In the mid-1990s, even anti-progressive-taxers almost cavalierly voted to hand out additional $500 per child personal exemptions, "frightfully costly in terms of lost revenue," without having to give any thought to whether the shortfall can be retrieved from the rich because all things are allegedly possible in the new era in which fiscal pressures will be alleviated by the dismantling of the national government.

U.S. News & World Report failed to make full disclosure of the play in the redistributional joints. In 1954, for example, the 0.3 percent of the taxpayers with more than $40,000 AGI reported almost $13 billion in AGI (including 100 percent of capital gains but excluding exempt interest); yet their effective tax rates ranged from as little as 27 percent to 39 percent—far from the infamous rates conjured up by the Code tables. An additional $3 billion in taxes from this tiny group of fewer than 170,000, which would still have left them taxed below the abominable paper rates (which started at 69 percent in the $40,000 bracket), would have sufficed to eliminate entirely the federal income tax burden of the more than twenty-nine million poorest (or fifty-two percent of) taxpayers.

Rising to the level of a veritable fiscal revelation was a sidebar comment by Fortune made in discussing the possibilities for tax reform in the 83rd Congress:

As high as surtax rates are, however, quite a bit more income remains after taxes than is generally supposed. It has been argued . . . that confiscation of all incomes over $10,000 would produce only $3 billion to $4 billion more revenue. The statement is true—but only so far as "taxable income" is concerned. Actual "cash income" is considerably larger than "taxable income"; thus the over-$10,000 group retains $41.2 billion of cash income after paying $17.4 billion in taxes, according to FORTUNE estimates . . . . [W]ith present revenue needs what they are, the personal-income-tax take cannot be reduced

213. The set of annual income statistics published by the magazine appears not to correspond to any published by the Internal Revenue Service. Cf. Why It's Hard to Get Rich Now, supra note 207, at 28.
215. Calculated according to INDIVIDUAL INCOME TAX RETURNS FOR 1954, supra note 133, tab. 1, at 33, tab. 12, at 69.
materially, nor can much of it be shifted to lower income groups
without cutting consumption unduly.216

Although this disclosure makes it clear even to a small child that the
emperor does not have anything on, public discourse proceeds on the
assumption that his purse is empty too.

V. CONSTITUTIONALISTS CONTRA KARL MARX AND FREDERICK
INGALLS

The relations of distribution that are founded directly on bourgeois
production, the relations between wages and profit, profit and interest,
rent and profit, can at most be modified by taxes in minor matters, but
can never be threatened in their foundations. All investigations and
debates about taxes presuppose the eternal existence of these bourgeois
relations.217

The tax lawyer[s'] . . . efforts to amend the Constitution to put the
income tax into proper bounds makes Calvin Coolidge look like a
Marxist.218

Regardless of whether the nonrich benefited from what U.S.
News & World Report deemed the redistributory use of the taxing
power "to a considerable degree,"219 "an important, though little
noticed movement,"220 which had been afoot since the New Deal,
had been in high gear since the early 1950s to pass a constitutional
amendment to cap marginal income tax rates at 25 percent.221 This
tack had become necessary for the antitaxers because, despite the
United States Supreme Court's having struck down the 1894 federal
income tax,222 progressivity per se had been immune to constitutional
challenge since reenactment of the tax immediately following

EISENSTEIN, THE IDEOLOGIES OF TAXATION (1961)).
220. Godfrey N. Nelson, Tax Relief Held Likely This Year, N.Y. TIMES, Jan. 5, 1953,
at 51.
221. Theodore M. Meyer, The Reed-Dirksen Amendment: A Re-Examination of Our
222. See Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 573 (1895), overruled
ratification of the Sixteenth Amendment. To be sure, the Court assured the wealthy at the turn of the century that if a legislature were ever to impose a confiscatory exaction . . . bearing the guise of a progressive . . . 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, even though there be no express authority in the Constitution to do so.

But as far as the Supreme Court was concerned, it had never become time to put an end to the nightmare conjured up by Joseph Choate, who had successfully argued Pollock v. Farmers’ Loan & Trust Co., that “this communist march” might proceed to the scarcely imaginable stage in which a 20-percent tax would be levied on incomes above a $20,000 exemption level.

First submitted to Congress in 1938 by Emanuel Celler, “the congressional coordinator of business tax pressure,” the constitutional amendment had emerged as a pro-business, anti-New Deal, anti-soak-the-rich movement. As early as 1944, populist Texas Representative Wright Patman had denounced the group as “Fascist.” Representative Noah Mason, an extremely anti-communist Republican from Illinois, who extolled the virtues of “True Americanism Against Roosevelt’s New Deal Socialism,” revived the initiative immediately after World War II and resubmitted it to the 80th Congress, the first that Republicans controlled since the Hoover Administration.

During this historically important Congress, which witnessed the enactment of a number of big business’s highest priorities on its anti-
labor agenda such as the Portal-to-Portal amendments to the Fair Labor Standards Act and the Taft-Hartley amendments to the National Labor Relations Act, Representative Bertrand Gearhart, a Republican from Fresno, who was leading a successful drive to roll back social security coverage,\textsuperscript{234} took time to bemoan the alleged decimation of the rich in England and to alert Treasury Secretary John Snyder and his colleagues on the House Ways and Means Committee in January 1948 that "this year in the estimation of many so-called Americans, too many for the good of the country, is a year of great celebration. This is the one hundredth anniversary of the issuance of the Communist manifesto."\textsuperscript{235} Precisely because the diabolically cunning "Mr. Karl Marx" and "[h]is partner, Mr. Frederick Ingalls [sic]," knew that "[c]apitalism must be constantly fed with new capital which can only come from accumulated savings," they ascribed transcendent importance to "the graduated progressive income tax":\textsuperscript{236}

Marx knew and Ingalls [sic] knew that the income tax was the politicians [sic] tax. Every time they have a budget to balance, they raise it a point or two. . . . Karl Marx knew and Frederick Ingalls knew those rates would be constantly boosted up until they became confiscatory and the people would not be able to retain any of their earnings beyond that which they needed for a day-to-day living, that they would be unable to save, that private enterprise would be starved into obsolescence, and the time would come when there would be nothing left to do but to turn into the socialistic slavery in which England flounders today.\textsuperscript{237}

Inspired, perhaps, by the only remark that the doubtless flabbergasted Secretary Snyder managed to interject into Gearhart's unstoppable lecture—"Mr. Congressman, you really are most effective"\textsuperscript{238}—two weeks later Gearhart offered a repeat performance for the sake of all his colleagues in the House of Representatives. In reissuing his centennial proclamation concerning "the Communist Manifesto of Karl Marx . . . the real father, the first real proponent of the income tax as we now know it," Gearhart left no doubt in 1948 that "Marx and his crew" were the spiritual authors of the "un-

\begin{itemize}
\item \textsuperscript{235} Reduction Hearings, supra note 136, at 109.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Id. at 110.
\end{itemize}
American" Sixteenth Amendment.  Whether ignorantly or deceitfully, Gearhart described Marx as having counseled his followers to hoodwink bourgeois politicians into introducing graduated income taxation as an almost casual, opportunistic measure, which, once on the statute books, could be used to destroy the source of new capital.

Such rhetoric is hardly confined to the unenlightened right wing. Indeed, its pedigree is long. As far back as 1895, The Nation editorially castigated United States Supreme Court Justice John Harlan, who had dissented from the majority’s decision holding the income tax unconstitutional, for having “expounded the Marx gospel from the bench.”

The curious congressional centennial celebration of the Communist Manifesto was resumed a month later before the Senate Finance Committee. The star witness was John Hanes, an apostate former Under Secretary of the Treasury in the Roosevelt Administration. Hanes, who was then chairman of the finance committee of the United States Lines Company, was an economic systems purist, for whom even the slightest mongrelization inexorably led to perdition:

Socialism and capitalism cannot live together, and our obligations are so great that we cannot afford any further experiments in socialism.

... If you want a capitalistic system in this country, you have got to have a capitalistic system, and you have got to admit the inequities and inequalities that go along with that system.

Badgered by Senator Alben Barkley to identify examples of socialist enterprise, Hanes named “the attack upon the managerial class in this country [a]s the first one. If you will read Marx, you will find this is one of the first ways of going socialistic.” In response, Barkley,

239. 94 Cong. Rec. 889 (1948).
240. Id. at 889-91.
244. Reduction Hearings, supra note 136, at 98, 108.
245. Id.
246. Id. at 108.
soon to become Truman's vice president, blurted out: "How are you going to prevent people from attacking something they do not like?" After Hanes explained that he meant that high taxes which, revealingly, he failed to distinguish from progressive rates "are killing the incentive of those who manage the enterprises," Barkley succeeded in baiting him into acknowledging that virtually every state activity from flood control to social security would qualify as socialistic. Elaborating on his position at leisure, Hanes later had inserted into the record a submission, "Experiments in Socialism," which labeled both the Fair Labor Standards Act and the National Labor Relations Act as "excursions into the field of socialism" as "laid down by the Socialists in 1932."

The chairman of the taxation committee of the NAM also testified on the need for tax reductions that would not interfere with capital accumulation. Don Mitchell, who was also the president of Sylvania Electric Products, Incorporated, declared that Marx had accorded

the graduated income tax second place among the important steps for destroying the system of free capitalism. Today, the last great bulwark of free capitalism in the world is undermining its strength with a tax system that could not have been better conceived in the Politburo. We shall be inviting all the disaster that Karl Marx intended for us if we ... employ a tax system which will bleed our free economy white.

Freely inventing in the course of evading a senator's question as to whether NAM opposed tax progressivity, Mitchell added that: "What Karl Marx said was that the graduated income-tax system once installed keeps getting higher and higher and higher and sometimes goes on until it finally gets so high it dries up the sources of capital."

To be sure, the Right, whose atavistic political-economic agenda a noted British economist at the time characterized as "suicidal conservatism," was not alone in holding this erroneous opinion. For example, an entrepreneur testifying before Congress on revision of the tax code in 1959 went out of his way to call Marx "the person who

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247. _Id._
248. _Id._ at 109.
249. _Id._ at 599.
250. _Id._ at 234.
251. _Id._
suggested first really steeply progressive tax rates as the way for capitalism to be defeated over a period of time.\textsuperscript{253}

In fact, however, the \textit{Communist Manifesto} characterized progressive taxation as part of an overt working-class revolution designed to wrest the instruments of production from their monopoly owners and to concentrate them in the hands of the workers in an already existing transitional state controlled by the working class in order to “increase the mass of the forces of production as quickly as possible.”\textsuperscript{254} A few weeks later, with the emergence of the revolution of 1848, Marx and Engels composed a leaflet, “Demands of the Communist Party in Germany,” a program for the League of Communists, in which they reiterated, as the antepenultimate of seventeen demands, that “heavy progressive taxes” be introduced and consumption taxes be abolished.\textsuperscript{255} Marx stated his position even more clearly two years after publication of the \textit{Communist Manifesto}. In the course of reviewing a French book on socialism and taxes, he observed that “[t]ax reform is the hobby horse of all radical bourgeois, the specific element of all bourgeois-economic reforms.”\textsuperscript{256}

That Marx did not propagate progressive taxation as an insurgent strategy became obvious at the latest in 1875 when Marx caustically criticized the German social-democratic Gotha Program, which demanded that the progressive income tax be the economic basis of the State. He found it amusing that this demand had already been more or less realized in Switzerland and that “the Financial

\begin{itemize}
\item \textsuperscript{253} Income Tax Revision: Panel Discussions Before the House Ways and Means Comm., 86th Cong., 1 Sess. 1231 (1960) [hereinafter Tax Revision Panel Discussions] (testimony of Roland Bixler, JBT Instrument Co.). RONALD KING, MONEY, TIME, & POLITICS: INVESTMENT TAX SUBSIDIES & AMERICAN DEMOCRACY 448-49 (1993), charges Marx and Engels with “ambiguity” (or perhaps ambivalence) based on a remark by Engels that “basically the principle of taxation is a purely communist one.” Friedrich Engels, \textit{Zwei Reden in Elberfeld}, in 2 \textsc{Marx \& Engels}, supra note 27, at 536, 548 (1957). Engels, however, made this speech three years before the Communist Manifesto, at a time when his theoretical understanding of capitalism was as yet far removed from that which Marx and he would ultimately develop. This immaturity can be gleaned from his argument that “especially the human heart” was the guarantor of a communist future. \textit{Id.; see also} Auguste Cornu, \textit{Karl Marx und Friedrich Engels: 3 Leben und Werk 1845-1846}, at 106-07 (1968).
\item \textsuperscript{254} Karl Marx \& Friedrich Engels, \textit{Manifest der Kommunistischen Partei}, in 4 \textsc{Marx \& Engels}, supra note 27, at 459, 465-69, 481 (1959).
\item \textsuperscript{255} Karl Marx \& Friedrich Engels, \textit{Forderungen der Kommunistischen Partei in Deutschland}, in 5 \textsc{Marx \& Engels}, supra note 27, at 2 (1959).
\item \textsuperscript{256} Marx, supra note 27, at 285.
\end{itemize}
Reformers of Liverpool bourgeois with Gladstone’s brother at the top raise the same demand as the Program. In 1880, when leading French socialists asked Marx and Engels’s help in drafting a labor party electoral program, its practical part included such manifestly reformist minimal demands as progressive income taxation, a statutory minimum wage—of which Marx said: “If the French proletariat is still so childish that it requires such bait, so is it not worth while drawing up any programme whatever”—equal wages for both sexes, and employer liability for work injuries. Marx’s scorn for socialists who considered progressive taxation an instrument for destroying capitalism was also reflected in the fact that socialists were indifferent to the late-nineteenth-century struggle over progressive income taxation in the United States, the introduction of which has been analyzed as responding to “the centrist need for a rhetorically dramatic, allocatively impotent income tax” to “quiet dissent against redistribution from the bottom up.” In the very same month in which the Congress passed the modern progressive income tax statute, Rosa Luxemburg, the German Social Democratic Party’s leading revolutionary theoretician, insisted at the Party congress that “[n]ot even the best tax changes capitalist exploitation in the least.”

But pedestrian misunderstanding of Marx’s view on progressive taxation is common to much more sophisticated intellects than right-wing congressmen. For example, no less a figure than Schumpeter expressly certified in 1949 that “conservative Republicans” had


258. Letter from Karl Marx to Adolph Sorge, Nov. 5, 1880, in 34 MARX & ENGELS, supra note 27, at 475-76 (1966) (the latter part of this quotation is in English in the original); see also Letter from Friedrich Engels to Eduard Bernstein, Oct. 25, 1881, in 35 MARX & ENGELS, supra note 27, at 232 (1967).


260. STANLEY, supra note 40, at 76-77.

261. Id. at 248.

262. Id. at 72.

correctly divined Marx’s intent. Richard Musgrave, another German-speaking professor of political economy at Harvard, agreed that Marx did not view progressive taxation “as a device to redistribute income or as a means to expropriate the ruling class . . . through majority action. Rather, the manifesto (like conservative business groups) views progressive taxation as a means of hastening the breakdown of the capitalist system.” Unlike the antitax politicians, however, Musgrave added that: “Contrary to this expectation, progressive taxation has in fact acted as a major safety valve and protection for that system.”

Although the centenary of the *Communist Manifesto* proved to be bad luck for Gearhart, who lost his seat in that year’s election, in 1951, Representative Chauncey Reed and Senator Everett Dirksen, both of Illinois, took up the anti-Marxist cudgels by introducing House Joint Resolution 323 and Senate Joint Resolution 108, respectively. In addition to repealing the Sixteenth Amendment to the United States Constitution and forbidding Congress to impose gift and estate taxes, it simply declaimed that: “The maximum top rate . . . of all taxes, duties, and excises which the Congress may . . . collect on . . . income shall not exceed 25 percent.” By a three-fourths vote of all the members of each House the resolution would have authorized raising the cap to 40 percent for one year at a time and suspending it altogether during wartime. At the very outset of the 83rd Congress, Reed and Dirksen filed their proposals once again, this time as House Joint Resolution 103 and Senate Joint Resolution 23, respectively. In an effort to demonstrate flexibility, proponents cleverly provided that Congress could exceed this cap for one year at a time by a vote of three-fourths of the members of each House if the new highest rate did not exceed the lowest rate by more than fifteen percentage points. Political realities would, then, as

265. MUSGRAVE & MUSGRAVE, supra note 143, at 101 n.22.
266. Id. Alternatively, Musgrave attributed to Marx the view that progressive taxation was “a means of overcoming the capitalist order.” Richard Musgrave, *Theories of Fiscal Crises: An Essay in Fiscal Sociology*, in *THE ECONOMICS OF TAXATION* 361, 361-62 (Henry J. Aaron & Michael J. Boskin eds., 1980).
267. 97 CONG. REC. 11,287, 12,933 (1951).
268. 97 id.
269. 97 id.
270. 99 id. at 314, 318, 395 (1953).
Dean Erwin Griswold of the Harvard Law School noted, have inevitably turned the 25 percent cap into a flat tax.271 A prominent law professor could ironically advise the sponsors to “forget about a constitutional amendment” and just lobby straightforwardly for reduction of marginal rates in the highest income classes,272 but the enthusiastic NAM found the solution “neat.”273 The American Bar Association (ABA), which officially supported the amendment, applauded the revised resolution for answering the first version’s critics except the incorrigible ones, “who insist upon a heavy progression in rates for the primary purpose of ‘penalizing’ the recipients of the middle and higher incomes.”274

Dirksen was particularly pleased with the potential for cross-class alliances and voter mobilization that the new rate structure offered. In language that he lifted, without attribution, word for word from an article by one of the movement’s most tireless leaders, the New England corporate attorney Robert Dresser,275 Dirksen pointed out in 1955 that “[t]he amendment would make it in the interest of every taxpayer ... to keep the top rate down to 25 percent ... and ... the bottom rate no higher than 10 percent .... This united self-interest of all taxpayers is relied on as a force that would keep the tax rates within reasonable bounds.”276 If the electorate decided that it continued to want the goods, services, and transfer payments that the federal government had been financing, then, Dresser helpfully added, the revenue shortfall caused by “the elimination of the communistic or socialistic features of our tax system” could easily be compensated for by a national retail sales tax, the working-class incidence of which would have deviated from the “confiscatory” pattern that had incited the upper-class

275. Dresser, supra note 115, at 35.
movement. Others on the Right spoke not of individual features, but of the 1913 tax law itself as part of a Socialistic “plot” to “socialize” the United States.

The constitutional movement was manifestly undeterred by what Walter Blum and Harry Kalven called the “basic rhetorical awkwardness” inherent in a demand for lower rates for the rich, which is “tantamount to arguing for increasing the prevailing degree of economic inequality after taxes.” For obvious reasons, proponents might not have been touting their proposal as an instrument of antiegalitarian income reconcentration, but class alignments on the question were plain. After all, as even Blum and Kalven recognized, although support of progressivity is logically possible on nonegalitarian grounds, “today one is not likely to do so with any enthusiasm unless he has made peace with the issue of equality.” Precisely because the principle had, by the time of the Truman administration, become “extremely popular in a democracy,” any effort to weaken or abandon progressivity was perceived as a push for greater income inequality.

The constitutionalists seem to have chosen the 25-percent level on the basis of affection for the rate achieved by Mellon in the mid-1920s and of the logic of the Mellon-Laffer curve: In contrast to higher rates, which are self-defeating in terms of revenue-productivity because they undermine initiative, “low rates will in due course produce greater revenue.” The conclusion that the chairman of the amendment’s principal supporter, the Committee for Constitutional Government, drew is politically pregnant: “[S]uch confiscatory rates cannot be justified on a fiscal basis, and can only be defended on the communistic theory that equality is more desirable than prosperity, or on the ground that success is criminal,

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277. Dresser, supra note 115, at 36, 78.
279. BLUM & KALVEN, supra note 3, at xx.
280. Id. at 73.
281. King, supra note 33, at 42.
282. See Revenue Act of 1926, ch. 27, §§210-211, 44 Stat. 9, 21-23 (1926) (reducing the maximum combined normal and surtax on income above $100,000 to 25%).
283. Dresser, supra note 115, at 36.
and that those who succeed ought . . . to be punished.” Similar reasoning today undergirds the flat tax with the difference that its supporters at least concede that unless and until the intensified incentive of lower taxes impels “the most successful Americans” to “productive undertakings,” “the poor and the middle class subsidize the rich.”

Chauncey Reed, the new chairman of the House Judiciary Committee, appeared to be the stalking horse for such groups as the big-business Small Business Economic Foundation and the Committee for Constitutional government, which had combated the allegedly socialist programs of the Roosevelt and Truman Administrations and regarded drastic reductions in federal government revenues as effectively limiting the growth of social security legislation. In explaining the need for his resolution, Reed reduced the whole movement to “the simple issue of whether we are to have in this country a system of society based upon . . . private enterprise . . . or . . . socialism.” The linkage between progressive taxation and socialism was found, once again, in Marx, whose “attempt to destroy the capitalistic or private-enterprise system with its right of private property” had prompted him to incorporate in the Communist Manifesto “heavy progressive or graduated income tax” and “[a]bolition of all right of inheritance.” Since “industry must have a steady continuing supply of new capital,” “Marx knew that he could dry up the sources of private capital, which are essential to the continued existence of the capitalistic system.” And because “[m]uch of the capital for the maintenance and expansion of our industries is supplied by the persons having the larger incomes . . . [t]he heavy progressive income tax strikes directly at this source of supply.” Reed’s attempted refutation of the objection that his proposal favored the rich was as simple as it was disingenuous: “The preservation of the private-enterprise system is just as

284. Reduction Hearings, supra note 136, at 492 (statement of Willford King).
287. 99 CONG. REC. 313 (1953).
288. 99 id.
289. 99 id.
290. 99 id.
important to those with small incomes as it is to those with medium and large-sized incomes."

In contrast to the universal benefits promised by the constitutional income-tax cappers, congressional staffers pointed out that only the 450,000 richest, or one percent of taxpayers, would have benefited from the limitation. Even among this elite, the benefits would have been very unequally distributed. For example, whereas a taxpayer with $25,000 in AGI would have saved $754, or eleven percent, the tax reduction for one with a million dollars would have amounted to more than $600,000, or seventy-one percent. This skew was confirmed by Mr. Conservative himself, Senator Robert Taft, who astutely used it as the basis of his opposition to the cap. As a candidate for the Republican nomination for president in 1952, Taft had argued that: “I don’t suppose more than 1 per cent of the people would be affected in any way by a 25 per cent limitation on income taxes and the other 99 per cent, I’m afraid, aren’t going to care a great deal about that particular constitutional amendment.”

Anticipating such a lack of acclamation, Taft instead proposed that government expenditures be limited to twenty-five percent of total income.

Reed, like Gearhart, erroneously left his colleagues with the impression that Marx had been trying to perpetrate a surreptitious plot to euthanize the bourgeoisie and reduce civilization to a stagnant preindustrial state. In fact, however, Marx acknowledged the world-historical role that the bourgeoisie played in revolutionizing production. Reed’s distorted view was anticipated by Marx and Engels, who observed that “for the bourgeoisie the end of class property is the end of production itself.” Despite the fact that Edwin Seligman, who later became the editor in chief of the Encyclopedia of the Social Sciences, managed to write a thick history of progressive taxation, which the American Economic Association published in two editions in 1894 and 1908, without

291. id.
293. Verbatim Record of the Questions and Answers as Issues of the Campaign Are Put to Ohio Senator, N.Y. TIMES, June 13, 1952, at 15.
294. Id. at 14-15.
295. Marx & Engels, supra note 254, at 477.
ever mentioning Marx, the Right continued to link them indissolubly. Representative Wilbur Mills, already a power as chairman of a joint subcommittee studying tax policy and soon to become chairman of the Ways and Means Committee, obviously found it tedious to have to remind readers of *U.S. News & World Report* in 1956 that the principle of graduated income taxation "was started before the beginning of Christianity and was put into effect long before Karl Marx began spouting his socialist nonsense." Yet myths die hard: As late as 1969, the president of Brigham Young University was still informing the House Ways and Means Committee that the tax "has gone higher than even Karl Marx ever dreamed of in his Communist Manifesto." Not the hobbyhorse of a few right-wing outliers, the proposed amendment had been endorsed by more than twenty state legislatures at one time or another and enjoyed the support of such mainstream advocacy organizations as the ABA and the NAM. The industrialists’ organization, distressed by "excesses of income taxation that have been committed in the absence of any limiting or control provision," welcomed the effort to put an end to "exorbitant . . . and . . . discriminatory rates of income taxation," which have threatened "the survival of the middle-income groups . . . and . . . created a serious disunity among taxpayers." Whereas the businessmen were flexible enough, in the alternative, to settle for a massive reduction of the highest marginal rate to 35 percent, and Eisenhower, the global strategist, was realistic enough to oppose an "arbitrary" ceiling on taxes without a counterpart cap on spending, the lawyers girded their loins to slay their ideological foes. In 1952, the ABA's house of delegates adopted the report of a specially appointed committee that recommended ratification of Reed's resolution. With marginal rates as high as 92 percent, the ABA

302. *Ike on Record Against Millionaire Amendment*, 39 *Butcher Workman* 17 (1953).
wailed that: "To attempt to build an estate has become futile. One earning in excess of normal needs serves only as a Federal tax collector." In case the "man with the small income" thought he was immunized against such confiscatory taxation, the ABA devised a more immediate threat than Reed was able to develop. The lawyers' group announced that the bell tolled for him too: "[H]e is in the same class as the former [sic] rich: the latter are being soaked to the vanishing point and the man with the small income is on the way to join up."

Having identified graduated income taxes as the engine of "state socialism" bent on "the destruction of the necessary risk capital to maintain our free enterprise system," the ABA declared it the "duty of the American lawyer to buckle on his shield and undertake to save his country in its headlong path toward a welfare state." The blows that that shield—perhaps constructed of the common-law rule against perpetuities, which permits "natural forces" to break up large estates—would ward off were administered by none other than those ubiquitous evil twins, Marx and Engels. For as the ABA's own Special Committee on Communist Tactics, Strategy, and Objectives made it possible to perceive, the real "challenge" is the "Marxian principle ... 'From each according to his ability, to each according to his needs.'"

Dresser underscored this quasi-McCarthyist thrust of the antitax movement. Responding in the ABA's own journal to such a prime suspect as Harvard Law School's Dean Griswold, who had dared to criticize the proposed constitutional amendment, an exasperated Dresser let it be known both that "[o]pposition to the revised amendment can be explained only by an adherence to the taxation philosophy of Karl Marx" and that supporters of graduated tax rates "whether they realize it or not, are following the Marxian

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304. Id.
305. Id. at 587.
306. Id. at 582.
307. Id. at 587.
When reproached by another anti-taxer for "insinuating that any who differ with a stated viewpoint is [sic] a subversive or communist traitor," Dresser lamely responded that although Congress had in fact enacted "the income tax plank in the Marx platform," he "certainly d[id] not regard the members of Congress as 'subversive or communist traitors.'" Nevertheless, Dresser noted that "it is a common practice" in constitutional tax amendment circles to insist on the "virtual acceptance" of Marx's plank by Congress. While Dresser may have flinched, his supporters refused to yield an inch: "Those who put their shoulders to the wheel of Marx's theory (everyone knows who they are) and strive mightily to advance his graduated income tax will not be forgotten by those who want to preserve incentive to individual initiative. All, except the blind or dumb, can see the issue is Marxism or individualism." The same lawyer knew that: "Like Karl Marx... most members of the American Bar Association plainly see the Communistic end to which high tax rates redound."

The ABA Journal could not tear itself away from the theme. In another article on "Class War and the Income Tax," it permitted another member and former congressman to announce that with a 92 percent marginal tax rate, the "'war of the poor against the rich'" had achieved "[o]ne plank of the Communist Manifesto," which as a whole was "now rapidly being adopted by many so-called Democrats and Republicans." The President of the State Bar of California warned that while "the American people are thoroughly aroused over the dangers from the Third International," they remained oddly "complacent about the aims of the Second International, the aims of which accomplish the purposes of the Red International, not by revolution, but by the insidious routes of nationalization and taxation." Of special interest to the members

312. Id.
of the ABA was the claim that "the elimination of the wealthy and middle class through this brutally effective device [of progressive taxation] . . . was absorbed by the democracies from the Communist Manifesto . . . [and] has made it almost impossible for lawyers any longer to leave much of an estate. . . . The same thing is true of their clients. . . ."

Dubbed the "millionaires' amendment" by such populist congressional advocates of progressive taxation as Wright Patman,\(^{318}\) the proposal did not emanate from the lunatic fringe. As the Republicans assumed control of the national government in 1953, the *New York Times* observed that if income tax rates were not reduced, it was "entirely possible" that the amendment would be adopted.\(^{319}\) The proposed amendment's principal airing coincided with the nationally televised Army-McCarthy hearings. It was a propitious time for propertied animosities towards progressive taxation, which had been pent up for thirty years, to surface. Henry Hazlitt, the anti-Keynesian economic journalist, lashed out at the "class tax," which was a "reflection chiefly of envy and vindictiveness . . . a desire to punish success," and, perversely, "discourage[s] the most productive people from producing and earning."\(^{320}\)

The Senate Judiciary Committee also heard testimony from Willford King, who as early as World War I, as a pioneer in the development of national income statistics, had found "a marked concentration of income in the hands of the very rich."\(^{321}\) After World War II, he plied his trade for the Committee for Constitutional Government, the chief proponent of the constitutional amendment. When he was its chairman in 1948, he informed Congress that, in addition to those whose "communistic philosophies" or "code of ethics" instilled a belief that "uniform poverty is preferable to a system in which some citizens are continuously more prosperous than others," many Americans "are led by envy to take the attitude that all success is criminal, and that, therefore, 'swatting the rich' is a

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317. *Id.* at 414-15.
legitimate form of sport.\textsuperscript{322} The educational mission of the Committee for Constitutional Government was precisely to teach the latter group that "when Government confiscates the incomes of the wealthy, and thus prevents the accumulation of capital, it ... automatically puts a brake on the upward movement of wages."\textsuperscript{323}

King's abstract and flat injunction against the State's extraction of any surplus from the rich that might interfere with capital accumulation was emblematic of the Right's inability or unwillingness to engage the real debate concerning the optimal division of society's yearly total production. As King and his comrades could have discovered from reading rather than merely denouncing the execrable Marx, even he emphasized that many deductions had to be made from that annual product before any part was available for individual consumption. Chief among these are replacement of used-up means of production; additional means of production for purposes of expansion; reserve funds for failures, disturbances, and natural catastrophes; collective satisfaction of needs such as educational and health facilities; and various income maintenance funds for those who can no longer or not yet work.\textsuperscript{324}

All societies are subject to the economic necessity of operating under some division of currently produced resources into these various uses, but not all societies expressly and consciously determine this division. What King and other pro-capitalist representatives were tacitly advocating was the greatest possible commitment of this decisionmaking process to individual investors' discretion. An alternative imaginable process would have been democratic control over this division, which would, for example, have included debate concerning the comparative macrosocietal value of additional medical research facilities, or national parks, or highways on the one hand and (the self-serving promises of the rich to abstain from consuming much of their income and instead to dedicate it to) additional investment in stocks and bonds that would eventually find its way into expansion of production on the other. Thus, opting for minimalist and nonprogressive taxation of the rich is, not coincidentally, linked to an antidemocratic decisional process, in which, apart from periods of major wars, macrolevel planning of the

\begin{itemize}
\item \textsuperscript{322} Reduction Hearings, \textit{supra} note 136, at 486-88 (statement of Willford King).
\item \textsuperscript{323} \textit{Id.} at 488 (statement of Willford King).
\item \textsuperscript{324} Marx, \textit{supra} note 257, at 18-19.
\end{itemize}
optimal use of current production is severely limited from the outset both by putting investment beyond the legislative pale and excluding such a significant proportion of the surplus from social control that the quantitative scope of resource reallocation must shrink to a rump status.

Despite his eminence as an economist, King deferred to Dirksen in identifying the Marxist conspiracy. To be sure, he seemed to associate Presidents Theodore Roosevelt and William Howard Taft with this intrigue since he dated it back to the second decade of the century when "the Marxians advocated, to accomplish their end, the enactment of the progressive income tax."325 King's analysis of the tax could scarcely be matched for simplicity. He tested progressive income taxation from the "standpoint of fair play" and found it wanting in the extreme. His model was a winner-take-all bet by five runners in a race, which was won by the one "who obeys all the rules carefully."326 But instead of permitting the winner to take the money, the losers "force the umpire" to hand over seventy percent to them. He asked rhetorically whether this procedure was not "exactly what we do when we lay down the rules of the game (laws regarding the conduct of business) and then seize 70 or 80 or even 90 percent of the earnings of the man who conducted business honestly and legally."327 After providing further storybook variations on this theme, King concluded that the system turned out to be no better than "robbery" committed on behalf of those who "because of envy, hate the successful."328

As empirical proof of this claim, King stated that the effective average tax rate on all those with incomes in excess of $140,000 was 63.5 percent in 1950.329 Although he in fact significantly exaggerated the tax rate for this elite, which actually amounted to 53.6 percent or, if 100 percent of long-term net capital gains are included, only 43.8 percent,330 King's real purpose was to

326. Id. at 165 (remarks of Willford King).
327. Id. (remarks of Willford King).
328. Id. (remarks of Willford King).
329. Id. at 165-66 (remarks of Willford King).
330. Calculated according to I.R.S., STATISTICS OF INCOME FOR 1950, pt. 1, tab. 1, at 36-37, tab. 10, at 112-13 (1954). Since the I.R.S. did not publish data using $140,000 AGI as a cutoff point, it is unclear how King arrived at his figures; the rates here have been
demonstrate to the benighted legislators "who have supported confiscatory income-tax rates, not as punitive measures, but purely on a need-for-revenue basis," that this "legalized robbery" was fiscally unnecessary. He calculated that the revenue loss that would have resulted from taxing this group at only 40 percent would have amounted to a mere 1.1 percent of federal revenues; similarly, if the amendment had been in effect and effective tax rates had been capped at 25 percent, the reduction in revenues from all those with more than $50,000 in income would have amounted to 3.5 percent of federal revenues, or thirteen days' worth of federal expenditures. Although King again understated the share of total taxes paid by the rich—those with AGI in excess of $150,000 accounted for 8 percent, and those with more than $50,000 for almost 20 percent, of total tax liability—such calculations became a set piece of reduction rhetoric. Senator Walter George, for example, a conservative southern Democrat who was the main sponsor of the unsuccessful amendment to the 1954 Code increasing the exemption level, told the readers of Look that even if the Treasury confiscated all income in excess of $100,000, the additional $85 million in revenue would have sufficed to fund the federal government only for twelve hours. The rhetorical point was presumably sharpened for those who never knew or had forgotten that during World War I quite respectable economists advocated precisely such a "conscription" of wealth to parallel that of men. Even Randolph Paul subscribed to the view.

The point that King, George, and others wished to make was commonplace. As Richard Musgrave, perhaps the most eminent public finance economist in the United States during the post-World War II era, put it: "The rich, unfortunately, are not numerous enough.... [T]he case for steeply rising marginal rates must be made on equity rather than revenue grounds. It is a fact of life that calculated for the group with more than $150,000 in AGI. The "effective tax rate" figures published by the I.R.S. are also much lower than King's. Id. tab. 6, at 76-77.

331. Taxes on Incomes, Inheritances, and Gifts Hearing, supra note 273, at 166.
332. Id.
335. 3 JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION: 1865-1918, at 482 (1949).
336. RANDOLPH E. PAUL, TAXATION FOR PROSPERITY 268 (1947).
... only if yield requirements are low, relative to national income, can ‘soaking the rich’... be a major revenue consideration." 337 The economics profession’s highest authority echoed the sentiment: “It is not the rich who pay for the bulk of government; they are too few.” 338

The observation, however, that the national State had become too sprawling an operation for its chief beneficiaries, the rich, to finance single-handedly, failed to deter even noncollectivists from persisting in their demands for progressive taxation. Henry Simons, for example, in a work that he wrote during World War II but that was published posthumously in 1950 by the godfather of the law and economics movement, Aaron Director, admitted that

[g]iven a properly high basic income-tax rate, the degree of progression is of minor importance revenuewise. It is important in preserving private property as an institutional device for democratic decentralization of power. For checking radical collectivism, the worst device is a combination of high nominal rates and wholesale, notorious avoidance. 339

From a distinctly liberal-welfarist perspective, the poverty researcher Robert Lampman argued the same point toward the end of the Eisenhower Administration. Testifying at one of the never-ending series of House Ways and Means Committee hearings on tax revision, Lampman conceded that

[a]t the top of the income distribution ... [w]e are concerned ... with restraining economic power differences. We are concerned with limiting the growth of a dynastic kind of society, where the rich get richer and the poor get poorer. ... [W]e do not gain a great deal of revenue by these high progressive rates, so that is some purpose other than to gain revenue. There is some purpose here ... having to do with the quality of our society .... It shows up in general ways of increasing the participation of all parts of the population ....

... I think that is the only purpose that has been offered for it, really. It certainly isn’t revenue. We don’t get any revenue from it. 340

337. MUSGRAVE & MUSGRAVE, supra note 143, at 224-55.
338. SAMUELSON, supra note 155, at 161.
This qualitative perspective casts doubt on the sweeping claim of John Witte, the leading recent historian of income tax policy, that fiscally mediated redistribution has been undermined by attitudinal ambiguity and equivocation, which manifests itself most distinctly in an “almost total lack of a positive ideal of equality” in contradistinction to “vindictive” attacks on the privileges of the rich.341 Lampman’s approach also contrasts sharply with the currently fashionable narrow cost-benefit analysis according to which, “If levying higher rates on the rich yields no increase in revenue then only the envious would favor such taxation, for it benefits no one in society.”342

What in succeeding decades became particularly interesting about this candid admission of the real purpose of progressive taxation at the highest income levels is that as the number of rich people and their income rise absolutely and relatively, their collective income becomes so massive that finally it can furnish a significant proportion of total taxation and revenue. As this potentiality is realized, however, the frankly redistributionist objective of yesteryear conveniently disappears from mainstream public discourse. By 1990, a leading economist provoked little or no contradiction in wholly overlooking this egalitarian function: “The top rates served not to produce revenue but as political camouflage, kept to reassure middle-class taxpayers that they were not paying rich people’s rates.”343

Congressman Patman was constrained to admit before the Senate Judiciary Committee that he could not match Dirksen’s and Dresser’s erudition as Marx scholars: “I don’t know anything about Karl Marx’ teachings, not so much as, I guess, a person should know, because I had to spend my time working just a little bit extra every day to make up for what I don’t know in other directions.”344 When Senator Kilgore asked him whether it would “not be rather dangerous for one of us to ever admit that he ever read Karl Marx,” Patman agreed but averred that he was not being disingenuous. Moreover, he insisted, echoing John Kenneth Galbraith, that progressive income taxation was

341. Witte, supra note 114, at 376.
capitalism's best friend: "I believe in a capitalistic system. I think it is the finest and greatest and best system on earth. I want to save it. I think these gentlemen would destroy it. . . . I am going to protect them . . . from themselves." 345

Seen from this vantage point, advocacy of progressive taxation, far from objectively espousing a program of socialist transformation, could assume a directly antirevolutionary cast. In Galbraith's view, "the income tax is . . . the great buttress of income inequality. The rich man no longer has the embarrassing task of justifying his higher income. . . . He need only point to the tax he has to pay." 346 What Galbraith passed over is the other legitimizing advantage of steeply progressive paper rates: "When a person consults the rate table to figure his own tax, his eye wanders down to the rates on higher incomes. . . . The taxpayer is willing to pay the Government on the basis of his own rates, since those with higher incomes pay a steeper percentage." 347

This capital-functionality emerged clearly in Henry Simons's World War II-era writings. Simons was greatly exercised over the "heavy tribute to labor" and "extortion at the hands of organized sellers of labor" to which investors and enterprisers were subject: "In the name of equalizing bargaining power we have sanctioned and promoted the proliferation of militant labor monopolies. . . . For industrial investors, the result is much the same as though the state had promoted organized banditry and denied them all protection against it." 348 Simons did not deny the existence of "a real problem in economic inequality," but argued that

progressive taxation is a workable, democratic method for dealing with inequality. The alternative of unionists is to send workers out in packs to exploit and expropriate by devices which resemble those of bandit armies. The one device is inherently orderly, peaceful, gradualist, and efficient. It is the device of law. The other is inherently violent, disruptive, and wasteful in the extreme. 349

345. Id. (remarks of Wright Patman).
347. 100 CONG. REC. 9152 (remarks of Sen. Douglas).
349. Id.
Patman argued that the cap would have benefited the richest 420,000 taxpayers at the expense of the forty-two million poorest. With an implicit nod to McCarthy, Patman pleaded ignorance of Marx's doctrine. But he announced that not only was he no Communist, but that he did "not know of any Member of the United States Congress who has even socialistic or communistic leanings." Repeating his decade-old accusation that the resolution was "Fascist," Patman abjured extremes and declared, "We want the capitalistic form of government we have today."

The amendment's chief senatorial sponsor, Dirksen, only halfheartedly sought to refute Patman's position:

Maybe he can demonstrate it. I don't know.... But it runs in my mind that about 70 percent of all our revenue is gotten out of the bottom brackets.... So, as a matter of fact, big benefits are here for the modest taxpayers in the country. To be sure, I suppose substantial taxpayers would get some benefit, but I am thinking of the little taxpayers more than I am of anybody else. So I think they share in a very, very substantial way in the benefits that are envisioned in this kind of a limitation on the taxing power.

Dirksen's allegation was a remarkable piece of demagoguery in light of the fact that the tax structure of the period was "mainly a flat rate for the vast majority of taxable returns." In 1954, eighty-three percent of returns fell into AGI classes of less than $6,000. The marginal tax rates in the new tax code, however, amounted to only 20 to 26 percent for taxable incomes below $6,000. Since taxable income of $6,000 equated to an AGI of more than $6,000, the proportion of taxpayers who might have benefited from the cap was probably no more than ten percent.

At the height of McCarthyism, it could not be entirely coincidental that opponents of progressive taxation identified Marx as lurking in the background if not actually orchestrating this conspiracy. On the same day that he launched his attack on creeping socialism, President Eisenhower placed his imprimatur on the

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350. 100 Cong. Rec. 5603.
351. 100 id.
burning of communist works in libraries maintained by the United States government abroad. Although he urged the reading of Marx in order to understand the enemy, the former president of Columbia University would no more have wanted a student led astray by a Communist teacher than "he would give anybody an Al Capone book to learn to be a crook." During the countdown to the Rosenbergs' execution, the New York Times maintained a sufficient sense of humor to report that copies of Das Kapital and the Communist Manifesto adorned the bookshelves in Eisenhower's office. Marx's taint of progressive taxation was so strong that the director of the AFL-CIO's research department, in defending the institution before the National Tax Association, found it expedient to "state, categorically and unequivocally, without invoking the Fifth Amendment, that I am not now, nor have I ever been, a Socialist, Communist, or anything else which is foreign to our basic free enterprise system."  

Dirksen was not to be outdone by Eisenhower in his Marxist erudition. Like a latter-day Luther, Dirksen, refusing to rely on mere secondary sources, "send[s] over to the Congressional Library . . . to get Mr. Marx's Manifesto, itself." Having recommended "primary sources" to his congressional colleagues, Dirksen "refreshed [him]self on it, and do[es] it every once in a while."

There is one undiluted Socialist who knew what the taxing power could do. He was a schoolmaster with a beard who lived in Bonn, Germany, a long time ago and then died in a garret in London. His name was Karl Marx. It was 106 years ago that he uttered the Communist Manifesto. I think it ought to be required reading in every school in the United States. . . . [I]n that Manifesto Karl Marx simply said:

360. Id. (statement of Sen. Dirksen).
"If you are going to have socialism all you need is heavy progressive income tax and confiscatory estate taxes so that when a man leaves this earth the government just takes all."  

Proffered in the form of a direct quotation, Dirksen’s purported citation from the *Communist Manifesto* not only was fictitious, but both contradicted the political function that Marx accorded progressive income taxation in a transition society and diametrically opposed Marx’s view of the prerequisites of socialism. This technique of outright falsification also appealed to the NAM, which ascribed to Marx similar “strategic thinking”:

He foresaw quite clearly that once the principle of progression was accepted, there would be no adequate defense against extreme application . . . . While he knew that excessive rates would at first fall only on those with very high incomes, he was confident that successive adjustments would extend the crippling rates throughout the middle income groups . . . .

Such wholly fraudulent imputation may have been part of the NAM’s self-proclaimed successful strategy for making opponents of progressivity as “respectable” as those who “question whether the Chinese Communists were actually ‘agrarian reformers.’”

Dirksen’s engaged pseudo-scholarship was well designed to secure him the titular leadership of “the movement to amend the Sixteenth amendment” upon Chauncey Reed’s death in 1956. In 1955, he once again counseled repentance to his congressional colleagues, who had permitted the federal government for twenty years to “follow[] the course prescribed by Marx,” which will eventually result in the substitution of “some form of socialism.”

Dirksen’s prescience, however, failed him. For the road paved by progressive taxes led to a hell worse than socialism, the saving grace of which at least was that its inhabitants had forsaken Marx. The chairman of the taxation committee of the Chamber of Commerce of the United States, who was also a member of one of the most prestigious Washington, D.C. law firms, and believed that the high

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361. *Id.* at 20 (statement of Sen. Dirksen).
363. *Id.* at 10.
marginal tax rates were "a sorry symbol of injustice . . . even to those who do not have to pay them," offered the House Ways and Means Committee an intriguing progressive-tax-rooted explanation of the advent of Sputnik:

Our tax structure has eliminated incentive and slowed our momentum . . . .

The principal thrust and emphasis of our tax system is away from individual achievement, productivity, initiative, and growth, and toward a social leveling . . . .

. . . .

The Russians are a hardheaded people, and they have never been so fooled by Marxist doctrine as to let it dictate their actual economic system. Bad as their system is, they have been able to stimulate their intellectual, scientific, industrial, military, and government talent by increasingly holding out the reward of rich economic incentives. They move in the direction of offering more reward while we move in the direction of offering less.

Perhaps it is we who have been fooled. It is we who have attempted to level economic differences by steep and unjust progressive tax rates.

VI. THE HORRORS OF PROGRESSIVE TAXATION

[A]ll attempts to use the power of taxation for the promotion of ideal justice . . . are based on the Hegelian view of the "State," which has taken a strong hold on the socialistic mind. . . . To intrust the brutish Congress which has passed the income-tax law . . . with the power of deciding who should be rich and who poor, would strike every intelligent person as an invitation to anarchy.

After Reed and Dirksen resubmitted their resolutions to Congress in 1955, the constitutional amendment movement degenerated into the right wing of capital’s lobbying for compression of progressivity and lower top rates. The anti-Marxist mantle passed to one Ronald Reagan, who, under the motto, "Keep

366. Revenue Revision Hearings, supra note 81, pt. 1, at 557 (statement of Joel Barlow).
367. Id. at 558-59 (statement of Joel Barlow).
368. The Income-Tax Decision, supra note 243, at 394.
370. Richard Epstein may be the movement’s chief surviving advocate. See, e.g., RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 147 (1995).
Government Poor and Remain Free," informed the Orange County, California Press Club in 1961 that "[w]e have received this progressive tax direct from Karl Marx who designed it as the prime essential of a socialist state."\(^{371}\) This concerted attack on high marginal tax rates was twofold. On the objective side, the point was that once "the savings which constitute the source of capital" were taxed away, only the State was in a position to supply it, thus supplanting capitalism with socialism.\(^{372}\) The growing importance of internally generated, self-financed capital accumulation in the postwar corporate sector, which was making individual savings less important for industrial investment, was ignored. U.S. business, as a contemporaneous Harvard Business School study observed, "has relied mainly on retained earnings rather than on new stock issues to finance its growth. . . . The role of the savings of private investors as a source of venture capital for business expansion and the repressive effects of taxes thereon are often greatly exaggerated in popular discussions."\(^{373}\) A critique of the study by the NAM, which desperately wished that those "who believed, prior to the book's appearance, that taxes had created a venture capital shortage can, with good conscience, continue to hold that opinion," conveniently ignored this vital consideration.\(^{374}\) Adolf Berle, one of the founders of the new economic-legal analysis of large corporations, added that individual savings furnished only five percent of capital flowing into United States industry from 1947 and 1957.\(^{375}\) And the AFL-CIO testified before Congress in 1959 that, because manufacturing corporations generated more than ninety percent of their new investment funds internally, it was "patently nonsensical" to claim

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that tax rates must be reduced to stimulate the flow of investment capital.376

In spite of such judgments, the president of the New York Stock Exchange, adroitly availing himself of the day’s most prepotent political trope, insisted before Congress that “[t]he present capital gains tax law can be described as an iron curtain which divorces two of the most dynamic factors in American capitalism—venture capital and industrial growth.”377 Moreover, despite the inroads that the federal income tax system had made since the New Deal, because “there are numerous ways in which many groups of upper bracket individuals can accumulate investable funds without having them subjected to the full impact of the individual income tax,” the capacity of the rich “to accumulate new investable funds . . . is still very large—much larger than is popularly supposed.”378

The central subjective objection to progressive income taxation was its alleged deleterious impact on the incentive to invest and work. Here the focus was on motivation: Regardless of whether the tax code permits anyone to save any longer, entrepreneurial and executive activity was paralyzed by the absence of a sufficient pecuniary lure. One United States Senator dwelt on this theme when he informed his colleagues in 1948 that “[m]en from all over the country are coming to my office and going into everybody else’s office and saying: ‘Why should I make $100,000 only to keep $29,000?’”379

Willford King also drove this point home in instructing Congress to “give thought to the fact that even ‘captains of industry’ often prefer loafing or playing to working.”380 The one “fact” King demonstrated by reference to another “fact,” namely, that whereas in the late 1920s, when the effective tax rate on the richest one-tenth-thousandth of taxpayers had been only 16 percent, they had “produced” 2.4 percent of national income, between 1942 and 1947, when rates were four to

378. Butters et al., supra note 373, at 29 (emphasis omitted).
five times higher, they accounted for 0.77 percent.\footnote{Id. (remark of Willford King).} King, therefore, concluded that "with income-tax rates reduced to fair levels, these men would again go to work in earnest."\footnote{Id. (remark of Willford King).} Since the "work" that the richest 4,000 taxpayers performed to "produce" their outsized incomes largely consisted of reshuffling their portfolios among various unearned income sources, the reason that their share of national income had declined may have had more to do with the evolution of stock and bond prices, interest rates, and corporate dividend policies than with income tax rates.

Why the struggle against the Nazi and Japanese war machines had failed to furnish this elite with an incentive "to work in earnest" King did not explain—just as the aforementioned senator mysteriously failed to grasp that, to the extent that anyone actually paid an effective tax rate of seventy-one percent, he continued to work because his after-tax income was still twelve times higher than the before-tax annual earnings of the average employee.\footnote{The average annual earnings of employees in 1947 was $2,468 after deduction for unemployment. \textit{Stanley Lebergott, Manpower in Economic Growth: The American Record Since 1800} tab. A-16, at 523 (1964).} In what sense "loafing or playing" would have been inconsistent with earnestly producing income among those whose incomes overwhelmingly consisted of capital gains, dividends, and interest all of which enjoyed preferential tax treatment also remained unclear. In 1945, capital gains, dividends, and interest together with rents and income from estates and trusts constituted eighty-eight percent of income-millionaires' AGI, whereas income even plausibly associated with work—salaries and business or professional income—accounted for only five percent. Even the poorest of the richest one-tenthousandth of taxpayers (those with AGI between $150,000 and $300,000) reported more than half of their AGI under these non-earned-income rubrics.\footnote{Bureau of Internal Revenue, \textit{Statistics of Income for 1945} pt. 1, at 24 (1951).} Revealingly, in 1947, when the short-lived Republican congressional majority unsuccessfully sought to enact rate reductions, it explained why it (allegedly) conferred below-average cuts on the richest taxpayers on the ground
that because such a small proportion of their total income was earned, their "need" for a reduction was not so great. 385

In contrast, the iconoclastic Harvard Business School survey could find "little or no evidence that corporation executives subject to the administrative disciplines of an organization worked less energetically because of taxes." 386 Another contemporaneous Harvard Business School survey devoted exclusively to this question found that the extent to which business executives have reduced their work and effort, as a result of taxes, has frequently been much exaggerated.

....

It would be strange indeed if any other result had been found. During and since the war American industry has achieved gigantic and unprecedented productive accomplishments .... Any finding that these records had been made under conditions in which the management class was shirking its job would be an anomaly. 387 Especially with regard to executives who "are subject to superior officers, one of whose principal duties is to see to it that they do work ... the testimony is practically unanimous that there is no significant relaxation of effort." 388 Amusingly, a number of the executives interviewed "volunteered the flat statement that ... the difficulty of dealing with labor unions ... constitute[s] a greater disincentive to them than does the reduction of their income by taxes." 389

Even more trenchant analysis of the alleged disincentive that high and progressive income taxation has allegedly created for business executives came from William Whyte, Jr., an editor of Fortune. Taking at face value their repeated complaints about the "slothfulness" encouraged by the tax, Whyte asked them about the issue in The Organization Man: "Would you, personally, be working harder now if your taxes were less?" Well, said the executives, now don't get them


386. BUTTERS ET AL., supra note 373, at 48; see also J. Keith Butters, Taxation, Incentives and Financial Capacity, 44 AM. ECON. REV. 504, 504-19 (1954).

387. THOMAS H. SANDERS, EFFECTS OF TAXATION ON EXECUTIVES 12, 17 (1951).

388. Id. at 18.

389. Id. at 14.
wrong, they don’t take back anything about taxes, but as far as their own particular case went—no, they wouldn’t be working harder now.” The reason was straightforward:

[T]o them the key aspect of salary is not its absolute but its relative size. And the relative size does depend on the income before taxes. The part of the pay stub that shows gross salary may be cause for hollow laughter, but it is still the part that is critical, and the man who gets $30,000 a year finds very little comfort in pondering the thought that his $37,000-a-year rival takes home only $892 more than he does.

Congress also repeatedly heard testimony from academic economists to the effect that conclusory claims that “high income-tax rates such as have prevailed . . . since World War II seriously sap the work incentives of the American people and thereby deter economic growth” were “largely illusory.” Because economists generally agreed that “[d]eductive reasoning” alone could not predict the impact of taxation—whereas lower after-tax incomes may prompt some recipients to work less, others may work more in order to maintain a certain standard of living—empirical studies were necessary. The chief reason that Professor George Break could find no “convincing evidence that current high levels of taxation were seriously interfering with work incentives” was that the effect of “inflexible monetary commitments” such as mortgages and other periodic payments was “to make the taxpayer react to an increase in income taxes by increasing his efforts to earn income.” Another leading economist (and future United States senator), Professor Clarence Long, also found that neither in the United States nor in four other countries he studied had income tax rates influenced the level of labor force participation. Forty years later, radical tax-reducers unwittingly undermine the logic of their own position by opportunistically reading into the record constituents’ complaints that they “‘had no choice but to go to work for $5 an hour to . . . keep

391. Id. at 144-45.
up the taxes."\textsuperscript{396} Since "[i]ndirect coercion through taxation" was widely and effectively used by European imperialist powers in their African and other colonies as a means of forcing workers to become wage laborers in world-market-oriented enterprises,\textsuperscript{397} it is not surprising that admirers of free markets would have repressed this nonconsensual tax link.

Despite these academic refutations, however, in what became yet another ideological set piece, tax opponents paraded as their prime illustration of "taxation ... destroying accumulation" neither a Schumpeterian entrepreneur nor a driving top manager but, tragically, (what at least at the time appears to be) a contestant on the television show, \textit{The $64 Thousand Question}. Thus, the representative of the pro-tax-cap Committee for Constitutional Government, testified before Congress in 1956 that:

\[\text{In the case of a single person with a $4,000 income from other sources, a winning of $32,000 is taxed $15,400, leaving the winner $16,600. An additional $32,000 winning would be taxed$23,292, leaving the winner $8,708. . . . The result is that people hesitate to go beyond the $32,000 mark as you all know from watching the television program.}\textsuperscript{398}

That such hesitation may have been as staged as the tax-ideological set pieces that have been carefully choreographed for Congress’s benefit for years was not readily evident.

Two years later, someone as mainstream as a Covington and Burling attorney representing the Chamber of Commerce of the United States recited (with unintended irony) the message before the Ways and Means Committee: "The quiz shows . . . have dramatized the injustice of steeply graduated rates and how they destroy the incentive and motivation to earn and produce more."\textsuperscript{399} And in his anecdotalogy, one President of the United States later gave personal testimony to the disincentive by asserting that actors who had come into ""the Big

\begin{itemize}
  \item \textsuperscript{396} 141 CONG. REC. S7154, S7164 (daily ed. May 23, 1995) (remarks of Sen. Grams, R.-Minn.).
  \item \textsuperscript{397} WILBERT E. MOORE, INDUSTRIALIZATION AND LABOR: SOCIAL ASPECTS OF ECONOMIC DEVELOPMENT 67-69 (1951).
  \item \textsuperscript{398} Taxes on Incomes, Inheritances, and Gifts Hearing, supra note 273, at 33 (statement of Robert Dresser).
  \item \textsuperscript{399} Revenue Revision Hearings, supra note 81, pt. 1, at 559 (statement of Joel Barlow).
\end{itemize}
Money'” during the 1940s ‘‘quit working after four pictures’” because they had become subject to the 90 percent marginal rate.400

VII. THE LIBERAL KISS-OF-DEATH DEFENSE OF PROGRESSIVITY

I have learned the hard way that, if taxed at excessively high rates, the rich will seek out loopholes explicitly or implicitly designed for their benefit. It is a far better strategy to eliminate the loopholes first and expose the real effective tax rates applying to the top incomes. Only then does a battle over the rate of progression become possible. I cannot predict the outcome of that battle, but it is certain that more progression will not be won merely by proposing high tax rates.401

Through the end of the Eisenhower administration, the House Ways and Means Committee held hearings virtually every session at which liberal tax experts continued to attack the prevailing system of illusory high rates and to propose a tradeoff between a more comprehensive tax base and lower rates. But once the Republicans lost their congressional majority in the 1954 elections, the possibility of rate reform dimmed as the Democrats’ preference for rate reductions for lower-income groups through higher exemption levels conflicted with the Eisenhower Administration’s plan to reduce the highest rates. Because the Administration refused to accept the risk ‘‘that if it opened the door to further tax reduction it would have to accept tax reduction of a kind that it regarded as less important, and which would cost so much revenue as to defer for a long time the possibility of getting the kind of tax reduction it wanted,” the decade ended without any reform.402

Accurately capturing this redistributional stalemate, John Kenneth Galbraith noted in his 1958 book, The Affluent Society, that, just as liberals had refrained from proposing enhanced progressivity, so too conservatives had been unable to attack the principle itself.403 Precisely because the surtax rates, despite their peculiar wartime

400. DAVID STOCKMAN, THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED 10 (1986) (quoting Ronald Reagan); see also Revenue Revision Hearings, supra note 81, pt. 2, at 1983 ("[T]he artist in a 75 or 91 percent top bracket... if he had done his 1 or 2 pictures, he turns down the picture entirely." (statement of Ronald Reagan, Motion Picture Industry Council and Hollywood AFL Film Council)).


402. STEIN, supra note 96, at 308.

origins, were regarded "perhaps by most people as permanent . . . not
even a conservative administration such as that of President
Eisenhower thought it wise to tackle the question of surtax reduction
on a wide front." Galbraith's powers of predictions went astray,
however, when he stated his belief that liberals would "rally in
opposition to any general reduction in rates on the higher income
brackets." They were in fact in the midst of flunking the test that
Galbraithian history had set for them: "[T]he test of the good liberal is
still that he is never fooled and that he never yields on issues favoring
the wealthy." That the liberal had begun to yield may have been
linked to the Cold War political constellation, which had delegitimized
a potential source of his conscience: "Behind him, always challenging
him, is the cynical Marxian whisper hinting that whatever he does may
not be enough. Despite his efforts, capitalist concentration will keep
on, and the wealthy will become wealthier and more powerful."

The congressional testimony in the late 1950s was, nevertheless,
important for consolidating the framework for discourse. Perhaps the
most persistent liberal reformer of the period was Randolph Paul, who
had been chief counsel in the Treasury Department during the
Roosevelt Administration and had founded the prominent liberal
corporate law firm of Paul, Weiss. He carried this persistence to
mortal limits, being perhaps the only witness ever to have dropped
death while testifying before Congress. In 1956, he "literally died . . .
with his boots on" in the midst of arguing both that the tax system
"lacks the progressivity it pretends to have" (as illustrated by the fact
that the effective tax rate on a comprehensive income would have been
below 45 percent for those with incomes in excess of $100,000) and
that the highest marginal rates should be lowered "to more reasonable
and realistic levels" in the range of 65 to 70 percent in order to "relieve
pressures . . . resulting in a continuing erosion of the tax base."

Two months before his death, in late 1955, Paul also testified
before the Subcommittee on Tax Policy of the Joint Committee on the

404. Id. at 83.
405. Id.
406. Id. at 82.
407. Id.
408. January 1956 Economic Report of the President: Hearings Before the Joint
Douglas).
409. Id. at 232, 234.
Economic Report on the subject of erosion of the tax base and the structure of tax rates. In preparation for this testimony, Paul submitted a paper in which he presented a set of calculations of effective tax rates on the rich using tax bases of varying comprehensiveness. Most revealing was Paul's admission to chairman Wilbur Mills that "we do not have a very progressive tax system at the top, or at least not as progressive a tax system as I myself had thought we had until I prepared this data."410 It seems nothing short of astounding that one of the most sophisticated, distinguished, and well-connected tax lawyers in the United States could have retained his innocence on this matter for decades and almost until he was in his deathchair. Nor was Paul entirely disturbed by this late intelligence since it "may explain one of the many mysteries of modern economic life—why we have sufficient funds for investment to maintain the pace of our fast-moving economy. From this standpoint it may . . . be fortunate that the bark of our income tax is so much worse than its bite."411

This gladsome news soon prompted Milton Friedman to take a sigh of relief too.412 But such insights apparently traveled slowly and selectively. A decade-and-a-half later, the titular patriarch of the richest family in the United States, in the course of seeking congressional reauthorization "to set up a government of its own to render philanthropic services,"413 informed the Ways and Means Committee that "the person of means" pays seventy-five percent—"it used to be 90 percent"—of his income in taxes.414 Fortunately, for the sanity of the assembled legislators, Stanley Surrey was there to recall for them that seventy-five percent of income-millionaires paid an effective tax rate of 20 to 30 percent.415

411. Id. at 231-32.
414. Id. at 1573 (testimony of John D. Rockefeller, III).
415. Id. at 1597-98 (testimony of Stanley Surrey) (including in income tax-exempt interest, 100 percent of capital gains, and excess percentage depletion and real estate depreciation).
irritated him. Paul did move on to mention that in contrast to the paper effective rates of 68 to 87 percent on incomes above $100,000, the real rate on AGIs in this group was only 50 percent in the early 1950s; inclusion of all net capital gains in the denominator would have lowered the rate to 45 percent, while that of exempt interest and income subject to the oil depletion allowance would have reduced it even further. Paul emphasized that because the statutory tax table "comes closer to living up to its pretensions with respect to low-income taxpayers . . . the average ratio of apparent to actual tax rates is considerably higher for" them than for the rich.

What was most interesting about Paul's position that the "unrealistic high rates" should be lowered to 70 percent was his denial that such a move would "be a bargain . . . in exchange for the elimination of special favors." Paul, in other words, seemed to be proposing neither a revenue- nor incidence-neutral reform nor the kind of pro-wealth revision that the Reagan Administration and Congress enacted in 1986, when full taxation of capital gains—deviation from which Paul in 1955 called "the major reason for the disparity between theoretical and actual rates of taxation in the high-income brackets"—was traded off for much lower rates for the rich. In this sense, he differed from contemporaries who, while bemoaning the "emasculation" of progressivity, expressly proposed elimination of "confiscatory rates" (above 70 percent) as the quid pro quo for the elimination of loopholes, especially those shielding capital gains. Not coincidentally, this tradeoff position was coupled with "the realization that expenditures on welfare programs can more effectively reduce the sources of inequality of income than can the income tax."
Paul, in contrast, remained committed to a redistributional fiscal program. He was therefore convinced that:

If they were put to the test, most taxpayers with large incomes would prefer the existing state of affairs. They would hardly favor a revision which eliminated rates they do not pay and also eliminated provisions that bring their burden down to a level well below the level it would reach if the statute contained lower, but actually effective, rates for high-bracket incomes.\footnote{424. Paul, supra note 416, at 309.}

For Paul’s restoration of the tax base was designed to “make the income tax a more efficient agent for the redistribution or equalization of income and wealth, if that is an important value.”\footnote{425. Id. at 303, 309.}

And in any event: “The best argument for the elimination of the rates above 70 percent is that they mean next to nothing and misrepresent to the lower brackets the tax burden actually being imposed upon the high brackets.”\footnote{426. Id.}

Underlying Paul’s unorthodox earnest search for additional revenue from the rich was his disagreement with the “undue emphasis upon the stimulation of investment and freedom from taxation for incentive reasons.”\footnote{427. Id. at 307-08.}

Unlike those who seemed driven by “an almost neurotic fear that American business is a house of cards which a slight gust of wind can blow away,” Paul, despite his personal distaste for high taxes, was constrained to concede that “work and investment incentives have remarkably survived the high taxes of the last twenty years.”\footnote{428. Id.}

In 1957, in what Stanley Surrey, whose tax-institutional memory was long, recalled as “the first time in recent income-tax history that the subject of income-tax differentials has been highlighted in hearings” before the Ways and Means Committee,\footnote{429. Revenue Revision Hearings, supra note 81, pt. 2, at 2282.} Chairman Jere Cooper, shortly before his death, announced that the committee would reexamine the basic underlying tax policies:

The main volume of the individual income tax comes from the low and middle income groups. These groups, because they are primarily recipients of earned income, cannot avail themselves of preferential rates and tax differentials which are available to many of the recipients
of other types of income. This has resulted from the narrowing of the
dollar base of our tax system through exceptions and differentials to
the point where the rate schedules no longer are meaningful. This
causes some to raise the question as to the fairness and equity of our
present tax system which we intend to explore.\footnote{Id. at 3.}

Under the guidance of the new chairman, Wilbur Mills, whose
tenure would be long and consequential, advocates aplenty appeared.
Mills’s attitude toward progressivity was captured by his article in
\textit{Life} in which he called the 91-percent rate “totally confiscatory.”\footnote{Wilbur Mills, \textit{Are You a Pet or a Patsy?}, \textit{Life}, Nov. 23, 1959, at 51, 60.}
Not only the realities, but even the formalities of progressive
taxation suggested that Mills was using the term in Pickwickian
fashion. To begin with, the 87-percent statutory cap on effective tax
rates left an income-millionaire with at least thirteen percent of
taxable income. When, during the Kennedy Administration, the IRS
finally published detailed figures on the number of taxpayers actually
paying taxes at various marginal rates, it revealed that of the 7,487
taxpayers with more than $200,000 AGI in 1961, who were
theoretically subject to the highest rate, only 156 had taxable income
taxed at 91 percent; and only thirty-three returns reported taxes
limited to the 87-percent effective maximum.\footnote{I.R.S., \textit{Statistics of Income} 1961, supra note 153, tab. 1, at 32, tab. 25, at 162.}
The \textit{de facto} effective tax rate for income-millionaires in 1954 was 67 percent
with respect to taxable income and 55 percent with respect to AGI; if
one hundred percent of capital gains are included in their AGI, the
effective tax rate fell to only 39 percent.\footnote{Calculated according to \textit{Individual Income Tax Returns for 1954}, \textit{supra} note 133, tab. 9, at 58, tab. 12, at 69 (1957).}
In light of the opportunities available to the rich for lawful exclusion and unlawful
concealment of income,\footnote{See generally Victor Perlo, \textit{The Income \textquotedblright Revolution\textquotedblright} (1954) (studying the
class distribution of income in the United States).} their fiscal fate remained far from total
confiscation. If the horrifying socialist bottom of the fiscal slippery
slope was “to leave men with equal incomes after you have taxed
them,”\footnote{50 CONG. REC. 3807 (1913) (remarks of Sen. John Williams, D.-Miss.).} income-millionaires remained at least two to three orders
of magnitude richer than the average worker.

The congressional witnesses appearing before Mills’s committee
rarely, if ever, made clear exactly what level of progressivity would or
should be maintained. Professor Musgrave, for example, who expressly bracketed the issue of "just how much progression we ought to retain," spoke of

a sham progression. We are really having the worst of all worlds. We don't have progression, but we make it look like we had exorbitant progression. If the Congress does not want to apply the degree of progression which is implicit in our present bracket rates, then it would be very much better to close loopholes and to do away with this excessive degree of progression, because the cost of carrying the sham progression is much too high, the cost that is, in terms of unequal treatment of different types of income, and of people in essentially equal positions.436

Everett Kassalow, testifying on behalf of the AFL-CIO, was startled by the almost continuous obsession of tax experts with the so-called confiscatory rates which are levied against the upper income groups.

Stories of confiscatory taxes imposed upon the wealthy make good horror fiction, but the actual fact is that through gaping escape hatches the wealthy are able to avoid much of tax payments that are theoretically due.437

Surrey himself, who later assumed a high-ranking position in the Treasury Department in the Kennedy Administration, focused his testimony on "myths of the income tax."438 Despite a Code that conjured up "the picture of an income tax of extremely wide sweep applied at most severe rates especially in the upper brackets," Surrey calculated the average tax rate on all taxpayers with more than $100,000 in AGI as only 48 percent in 1954.439 If the excluded half of capital gains and an estimate for tax-exempt interest were added, the rate fell to 37 percent in contrast with an effective rate generated by the tax table that began at 67 percent at $100,000 and climbed to a maximum of 87 percent.440 Surrey also found that if tax preferences such as capital gains, interest, natural resource depletion, stock options, and dividend credits were eliminated, the highest rate

437. Id. at 216 (testimony of Everett Kassalow).
438. Revenue Revision Hearings, supra note 81, pt. 2, at 2282 (statement of Stanley Surrey).
439. Id. (statement of Stanley Surrey).
440. Id. at 2282-83 (statement of Stanley Surrey).
could be reduced to 65 percent without any revenue loss. Legislative inaction on these issues, however, prompted Surrey to

conclude that the average Congressman does not believe in the present high rates of income tax, especially those applicable in the upper brackets. When he sees them applied to individual cases, he thinks them too high and therefore unfair... True believers in these high rates would long ago have torn down the tax shelters... 441

In contrast to the many high-income taxpayers for whom paper rates were only paper tigers, Surrey also called attention to the discriminatory impact of high rates on the one-fifth of those with AGI in excess of $200,000 who reported only ordinary income in 1954 and many of whom “must, therefore, have actually paid tax at very high rates.” 442 The following year, Surrey delivered virtually the same lecture to the Ways and Means Committee, merely updating his data. 443

A similar theme was struck by George Lanning, a professor at the Yale Law School and former IRS official, in his testimony, which was also incorporated into the 1959 Tax Revision Compendium: Compendium of Papers on Broadening the Tax Base. Although chairman Mills was “not a strong advocate of comprehensive taxation,” he initiated this publication project, which would have “considerable influence on tax policy in succeeding years.” 444 Lanning, too, focused on the prevailing myth that the steep statutory rates of progressive taxation apply in practice. The general public and the tax decision makers feel that the taxpayers is [sic] crushed by the burden of harsh, progressive taxes. This myth is partly a product of inadequate information. The public is reminded at frequent intervals of the harsh nature of our tax system. They are much less frequently informed as to its real character—the network of special provisions, and their effect on the real rates of taxation, and on the location of the tax burden. Judges and other decisionmakers tend to visualize the 91-percent rates in the books, and to give “relief” to the taxpayer before them, forgetting the

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441. Id. at 2290 (statement of Stanley Surrey).
442. Id. (statement of Stanley Surrey).
443. Tax Revision Panel Discussion, supra note 253, at 6-8 (statement of Stanley Surrey).
effect of this upon the tax burdens of the general public and upon the
equity of the taxing system.445

Lanning’s reform strategy, which was based on the political
process dictum that “[n]othing creates more embarrassment for a
pattern of special advantage than a free flow of information,”446
seemed almost to presuppose a conspiracy of silence and ignorance.
Yet the propertied interests supporting reform were hardly reticent
about exposing the structure of the system they denounced as
irrational and inefficient. The chairman of the tax committee of the
Chamber of Commerce of the United States, for example, testified
that the high marginal rates “require a complex patchwork of relief
provisions to keep them from being intolerable. The serious erosion
of our tax base by this patchwork of relief provisions stems entirely
from a rate structure so unreasonably high and progressive that
individual initiative, effort, and productivity are discouraged.”447
What was kept murky in the debate was the real incidence and
distribution of taxation in the new system. When the Chamber of
Commerce argued that the “complex maze of deductions and
exemptions” has resulted in “an inequitable shifting of the tax
burden,” a legislator might almost have been tempted to imagine that
it was conceding that the rich are sloughing off their fair share on to
poorer taxpayers, that is, until the Chamber revealed that Congress
could compensate for any revenue reduction resulting from lowering
the highest rates by introducing a general federal excise tax.448

Perhaps the most explicit attempt to strategize about the
conflicting forces behind rate reform came from Carl Shoup, the dean
of U.S. public finance experts. He explained to the Ways and Means
Committee that the chief obstacle to reform was the “deadlock”
between the group that wanted to reduce the highest rates as part of a
“lightening of the income tax” and the group that, driven by the belief
“that many taxpayers of substantial income contribute less than their
fair share because of loopholes,” sought a more comprehensive tax

445. Geoffrey J. Lanning, Some Realities of Tax Reform, in 1 COMM. ON WAYS AND
MEANS, TAX REVISION COMPRENDIUM: COMPRENDIUM OF PAPERS ON BROADENING THE TAX
BASE 19, 35-36 (Committee Print, 1959).
446. Id. at 36.
447. General Revenue Revision: Hearings Before the House Comm. on Ways and
448. Id. (statement of Joel Barlow).
Shoup argued that the antagonists were irrationally thwarting each other when they could in fact cooperate:

Both groups are in the right, but neither, seemingly, will agree that the other one is. Meanwhile, each of those two defects in the tax law tends to perpetuate the other. Loopholes are driven in the law because the high rates make for hard cases, and arouse understandable sympathy in the minds of legislators. But some of the loopholes, when publicized, arouse resentment and envy in taxpayers, usually large in number, who are not in a position to take advantage of those provisions. These feelings in turn create a formidable barrier to the lowering of the top surtax rates.

Shoup's analysis suffered from a conflation of means and ends and of form and substance. By focusing on the reconcilability of lower rates and a broader tax base, he could show that the opponents failed to perceive their common ground. But tax rates and tax base were merely techniques for achieving certain societal objectives with respect to income redistribution. If, as Shoup's own formulation stated, what those who opposed a 91-percent marginal rate really wanted was more after-tax income for the rich whereas the antiloopholers wanted the rich to give more back to the collectivity, that quantitative conflict and the contending images of the qualitatively different societies that would result from varying resolutions of it were the essence of the dispute. The positions may have been compromisable—the rich might have paid a greater proportion of their income and of total taxes than they wanted but less than the nonrich wanted to impose on them but the resolution hinged on confronting this redistributational question rather than on finding a *modus vivendi* concerning the form (rates versus loopholes) that it would have assumed.

Thus, when Shoup asserted that both groups were right but irrationally refused to acknowledge the correctness of the other party's position, he could only be referring to the means; for if the tax level that the existing combination of rates and loopholes was producing required lightening as far as the rich were concerned but was unfairly low from everyone else's perspective, then only one of the two sides was right and could not, therefore, have logically agreed with the other.


450. *Id.* (statement of Carl Shoup).
Shoup’s confusion on this ultimate issue manifested itself in his asymmetrical explanations of why the two groups had not agreed to lower rates in exchange for closing loopholes. Rich conservatives, according to Shoup, reasoned that whereas “[t]ax rates cannot go beyond 100 percent; loophole creation . . . has no known limits.”\(^{451}\) This position seemed eminently self-regarding and materialistic and in this sense reducible to the maxim: If it’s broke but works for you, don’t fix it. In other words, since the rich could trump any move their opponents could make, they had little reason to abandon the dynamic but controllable status quo for an uncertain set of changes that might have permanently eliminated their trump—loopholes. The liberals’ tactical reasoning, in contrast, seems merely derivative and driven by ignorance: They feared that their constituents, who “[did] not lead complex financial lives” and thus knew what tax rates were, “but ha[d] only a vague notion of loopholes,” would feel betrayed if their leaders accepted the tradeoff.\(^{452}\) “Thus the deadlock results; few leaders of either group find it to their interest to advocate both reforms at once.”\(^{453}\) The nonrich, who, unlike the rich, could not speak for themselves, and in spite of the resentment and envy that Shoup credited them with having expressed about loopholes for the rich, did not understand those loopholes or their own material interests well enough to know that they would be better off with the tradeoff. In the end, all Shoup could recommend was mobilization of public opinion against both high rates and loopholes in the realization that “we shall always yield to pressure for special tax favors as long as we maintain 90 percent rates.”\(^{454}\)

In this narrow strategic context, the cynical-revisionist criticism of the liberal view by Louis Eisenstein, a well-known tax lawyer, became plausible. Writing as the Kennedy Administration was succeeding the Eisenhower Administration, Eisenstein faulted the liberals for their premise that there was a causal relationship between high rates and loopholes. On the empirical level, he pointed out that the three most important dispensations relating to capital gains, interest on state and local bonds, and oil and gas depletion allowances all

\(^{451}\) Id. at 2429 (statement of Carl Shoup).
\(^{452}\) Id. at 2430 (statement of Carl Shoup).
\(^{453}\) Id. (statement of Carl Shoup).
\(^{454}\) Id. at 2431 (statement of Carl Shoup).
antedated the enactment of high marginal rates. More significant, however, was the charge of political naivete:

[N]aturally, if the top rate is 91 per cent, a reduction to 65 per cent is gladly welcomed. But once the reduction is made, then some lower rate becomes the highest peak to which Congress should aspire. The sights vary as the rates change. . . .

Since the rates will always be too high, the pressures for special dispensations cannot be bought off through general reductions.455

VIII. DID MELLONISM TRANSMUTE CLASS STRUGGLE?

[M]any shrewd observers thought of the income tax as a form of class struggle.456

The perspective on the struggles over rate reduction that has emerged here deviates sharply from that of a recent study that emphasizes that tax politics in general “displays little of the divisive fervor that characterized the redistributive struggles of an earlier era.”457 The first Reagan Administration seems a curious time for such scholarly revisionism. After all, by triggering working- and even middle-class outrage over a palpably instrumental rate reduction redistributing income to the rich on a scale not seen since Secretary Mellon’s days, Reaganomics ushered in a period of national political-economic conflict over class-based federal tax and budget policies that continues to dominate congressional politics.458 Yet Ronald King chose precisely that time to present his thesis that Treasury Secretary Mellon had succeeded in the 1920s in transforming what had until then been a zero-sum redistributional tax politics aimed at democratic control of excessive accumulations of wealth into a non-zero-sum investment-dependent, dynamic game logic, which, by taking into account market ramifications of the taxes, hegemonically “encourages workers to believe that their interests are best served by cooperating with capital, making them dependent upon the size and use of the surplus going to owners,

456. PAUL, supra note 47, at 763.
457. King, supra note 33, at 1.
rather than by winning present income gains at capital’s expense."^459
Whereas both plutocrats on the one hand and populists and progressives on the other had, during the formative years of struggle over a national income tax, defined the issue “in terms of distributional equity versus myopic greed,”^460 by the time that United States entry into World War I prompted Congress to raise the highest marginal rate to 77 percent for income-millionaires, eleven times what it had been just three years earlier, “concern was for the first time expressed that a level might be reached where business would lose its incentive to invest.”^461 When “[b]usiness agitation for reductions in tax rates” inevitably emerged after the war, however, it entailed far more than a reactionary dream of returning to normalcy. Finding its best spokesman in the incoming Secretary of the Treasury, Andrew Mellon, a new conservatism arose that accepted the principle of graduated taxation but proclaimed that rates on profits and high incomes ought not be set so as to restrict economic expansion.^462

The choice of Mellon as the centerpiece of a study driven by the methodological desideratum of explaining how or why political outcomes “often tend to favor the interest of economic elites . . . without positing . . . an instrumental elite oligarchy”^463 is indeed a challenge. After all, Andrew W. Mellon, reputed to be the third richest man in America,^464 “had to resign directorships in sixty corporations with an aggregate capital of $2 billion” to qualify as President Harding’s Treasury Secretary.^465 The almost $2 million in personal income tax that he paid for the year 1924 ranked him fourth nationally behind the world’s most prominent capitalist icons, John D. Rockefeller, Jr. and Henry and Edsel Ford.^466 Because Mellon’s investment income was not concentrated in tax-exempt interest or capital gains, and, therefore, “[a] greater percentage of his income

^459. King, supra note 33, at 2-5.
^460. Id. at 19.
^461. Id. at 21.
^462. Id. at 22-23.
^463. Id. at 6.
actually reached the highest tax bracket than was true of most wealthy men," he may have been the biggest beneficiary of the almost 50-percent reduction in the highest marginal rate that he was instrumental in enacting for 1925; but since he was also instrumental in repealing the income tax, publicity (which he deemed not only mere "gratification of idle curiosity" but also a certain spur to avoid taxable income in order to avoid being pilloried) that had made such disclosures possible, such information did not become public. As even an uncritical biographer is constrained to admit, however, "[s]imply holding the position [of Treasury Secretary] . . . was a violation of the most primitive definition of a conflict of interest."

But even if Mellon's tax policies were not driven by personal or even class greed, is King's argument tenable that whereas in the past complaints had focused on violations of "normative values fundamental to American life," Mellon's approach "gave conservatives a new, more sophisticated position from which to resist" redistribution? Under Mellon, "the income tax was no longer seen as confiscation and progressive rates were not indicative of encroaching communism. The problem with the tax system was merely that it contained inefficient mechanisms that required readjustment." The chief interrelated inefficiencies created by high progressive rates were the diversion of capital into "unproductive" tax-exempt local and state securities, the weakening of incentives, and the reduction of the total amount of private investment capital. By asserting that workers were injured indirectly through the ensuing unemployment caused by high progressive taxes more than the rich

471. King, supra note 33, at 23.
472. Id.
themselves, Mellon created, according to King, "a full statement of the integrative, cooperative aspect of business-stimulative tax policy arising from the new conservative fiscal ideology." To be sure, implementation of such a policy that integrated workers into "the emerging system of corporate capitalism" presupposed that "subordinate classes could be convinced that the private market gains secured by . . . tax-stimulated increases in productivity were greater than those possible through tax redistribution." In any event, King insists that this tax theory, which he interprets "as part of the movement toward the integration rather than the repression of organizations representing workers' material interests," which was exemplified by Herbert Hoover's "corporatist vision of a voluntarily self-regulating society," "did quickly become a central tenet of mainstream Republicanism."475

In view of the repressive antiunion practices of Mellon's own extensive enterprises and of the general tenor of management policies during the 1920s, which veered from "a full-scale direct attack on trade unionism with the panoply of hostile techniques . . . to the gentler methods of paternalistic welfare capitalism," King's claim of a larger integrative agenda loses its plausibility. In addition, Mellon's policies were by no means novel. A more important deficiency in King's analysis of the Mellonian revolution, apart from its disregard of contemporaries' refutation, or at least contestation of the empirical underpinnings of Mellon's claim that capital was scarce, is its absolutizing focus on tax rates and its neglect of the capitalist class's recognition of the new role of the national State, which would have to continue, even after the world war, to absorb a significantly larger share of national income than the prewar State did. Because the low tax rates on the rich during the first prewar years of the national

473. Id. at 24.
474. Id. at 24-25.
475. Id. at 26.
income tax had still lagged far behind the regressive customs and excise taxes as a source of federal revenue, once it became clear that (individual and corporation) income taxes would have to furnish the bulk of federal revenues, capital formulated a fiscal plan to burden its profitability and accumulatatability as little as possible.

Mellon articulated this new perspective in his first *Annual Report*:

The increase in population, the enlargement of Government functions, the addition of new agencies, the interest on the public debt, and the expenditures indispensable in connection with the disabled veterans . . . make it manifest that the ordinary expenses of the Government for some years to come will probably be several times those for prewar years. It is, then, of vital importance that adjustments be made in our scheme of taxation whereby the burden will not fall unduly . . . upon any particular class, and at the same time will not seriously interfere with productive industry . . . .

Five years later, he reiterated that the scope of government activities had continued and would continue to expand, singling road construction out for special mention. Quantitatively, federal government outlays had risen only 147 percent during the four decades preceding the last prewar year (1873-1913); during the next decade alone, they increased 339 percent even though in 1923 they remained a small fraction of their world war peak. Federal government expenditures as a proportion of national income had approximately doubled since the immediate prewar years.

Mellon explained that the "tremendous" economic development in the United States had been primarily attributable to "three things": first, the incentive to acquire wealth; second, "the steady accumulation of capital," which in turn made possible "a constantly expanding scale" of industry; and third, and most pertinently, "the very moderate Federal taxation, whereby the free flow of capital, wherever it was

484. Id. pt. 1, series F6-9, F250-61, at 224, 240; id. pt. 2, series Y457-465, at 1114.
needed, ... was not interfered with, the natural laws of trade being allowed full play. 485 Contrasting the previous five years (1917-1921), when the highest marginal rates ranged between 67 percent and 77 percent, with the gilded age of comparative taxlessness for capital—Representative Cordell Hull had spoken in 1909 of the protective tariff as a system of class legislation that burdened the people while "virtually exempting the Carnegies, the Vanderbilts, the Astors, the Morgans, and the Rockefellers, with their aggregated billions of hoarded wealth" 486—Mellon asked whether "anyone believe[d] that if our policy ... as respects taxation had been for the Government to take away from successful effort one-third, one-half, or three-fourths of the gains resulting therefrom we would have accumulated the wealth which we now possess ... ?" 487

The only way that capital could continue to accumulate was "through the savings of the people, and the amount which any individual can save ... , of course, increases progressively with the amount of his income." 488 This graduated ability to save arose from "the larger margin over reasonable living expenditures" 489 among the rich. Thus, because this group also had the greatest ability to pay taxes, Mellon concluded, a tension (if not a contradiction) obtained between the source of accumulation and that of resources for the national State. 490 Consequently, the rich (objectively) held "the poor" virtually hostage: Whatever the government "unnecessarily takes away from this accumulated property necessarily injuriously affects the people as a whole." 491 For, after all, "the wealth of the country ... refer[s] to the aggregate wealth of the people of the country. The amount held by each individual does vary, but the statement is true from the smallest amount in a child's savings bank to the largest fortune"—by which Mellon may have been alluding to his own. 492

486. 44 Cong. Rec. 536 (1909).
488. Id. at 17.
489. Id.
490. Id.
491. Id. at 18.
492. Id. at 17.
Mellon’s chain of reasoning, thus, ran as follows. First, the rich could not finance both the accumulation of capital and the national government; second, only the rich could finance capital accumulation; third, forcing the rich to finance the State would detract from their role as accumulators; fourth, a large and increasingly expensive national State was both unavoidable and necessary; and fifth, nonrich classes would have to be taxed to finance the federal government.493 Since Mellon acknowledged that “[t]he income tax is firmly embedded in our system of taxation . . . [his] objections . . . are not to the principle of the tax but only to the excessively high rates.”494 His long-term plan was to reduce the highest surtax rate from 65 percent to 10 percent, making up for the revenue shortfall through a national sales tax.495 Indeed, as late as 1926, Representative Hull, arguably the most ardent proponent of the income tax in 1913, expressed his suspicion that since 1921 “[d]ominant Republican leaders have had the one idea of wiping out all graduated income taxes as quickly as opportunity might offer and substituting a general sales or like tax.”496

Mellonism thus objectively resembled old-fashioned state-centered “conservative attempts to unburden the rich” more than King’s theory would admit.497 The strike on which capital has always been wont to go in order to administer wage discipline to its labor force cyclically—the recession and accompanying “spectre of unemployment” that workers experienced as Congress worked on the new tax code in early 1954, for example, were widely regarded as availing themselves of “human nature” to increase productivity498—was also available to it in the 1920s when after-tax profit rates were inadequate.499 Moreover, Mellon himself, even in his official pronouncements, could not resist falling back into the “timeworn and hackneyed” “normative” rhetoric that, King believes, Mellon’s subtle approach had rendered anachronistic.500 In his 1924 Annual Report,

493. Id. at 25-26.
494. Id. at 5.
495. Id. at 25-26.
496. The Revenue Bill of 1926, supra note 137, at 31.
499. 61 CONG. REC. 6471 (1921) (remarks of Sen. Moses).
500. King, supra note 33, at 23, 42.
for example, after calling estate tax rates "confiscatory," Mellon declared, "Taxation should not be used as a field for socialistic experiment, or as a club to punish success, but as a means of raising revenue to support the Government."\(^501\) In slipping into the perennial rhetorical ploy that "the wealthy" could not possibly bear the burden of federal income taxation because even total confiscation would fall far short of the requisite revenues, Mellon also defined them in Pickwickian fashion by confining the group to the 246 to 537 persons who in the early 1920s filed returns with net incomes in excess of $300,000—today's equivalent of more than $2.5 million.\(^502\)

More important than King's revisionist reconstruction of Mellon's role in the 1920s is Mellonism's allegedly enduring impact on the willingness of conservatives and liberals after World War II to "compromise[e] effective tax progressivity in the attempt to expand productive capacity. . . . [N]ot only the possibility of, but also the very ideology of, tax redistribution seems to have disappeared."\(^503\) Although conservatives never needed any prompting to attack progressivity, King's claim that supple economic Mellonism displaced political fundamentalism in the Republican mainstream is precipitous. After all, hard-core mainstream Republican Charles Wilson, found it necessary to express his concern at a cabinet meeting in 1954 that a draft of Arthur Burns's *Economic Report of the President* would lead "'[s]ocialists . . . [to] rejoice that even Republicans see the need for a planned economy.'"\(^504\) And later Burns himself wrote Eisenhower that if Congress sent him "'a socialistic [tax] bill, you can send it back with a healthy veto.'"\(^505\) King takes note of the Mellonian underpinnings of the 80th Congress's Republican tax initiatives without recognizing how close they were to and intertwined with pre-Mellonian fundamentalism. His analysis of Eisenhower's "reluctance to tinker with nominal rate schedules . . . [which] frustrated traditionalists within his party demanding . . . consistently lower tax impositions upon savings and business initiative,"\(^506\) however, is self-contradictory,

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502. Id. at 5, 9.
505. Id. at 147 (quoting Letter from Burns to Eisenhower of May 5, 1958).
506. King, supra note 33, at 41.
especially in light of his admission that "there is a certain irony in the pride [of the Eisenhower administration] took in its battles to maintain the federal revenue base. The 91-percent maximum individual rate . . . remained in force for nearly ten years."507

King argues that, far from abandoning hegemonic tax policy, Eisenhower's "refusal to reduce over-all tax rates . . . established the basis for a reconciliation between stabilization and business-dependent growth that was impossible under earlier conservative approaches."508

The Internal Revenue Code of 1954,509 in King's view represents a new twist in the game of hegemonic capital stimulants. In . . . previous years, proponents emphasized the degree of progressivity of the entire taxation system, arguing that . . . high surtaxes reduced the quantity of capital available for investment and imposed disincentives upon those with funds to commit. By 1954, however, such claims had become timeworn and hackneyed, often associated with the same conventional republicanism that was blamed for the depression . . . As was clear from the Truman experience, progressive taxation had become a fundamental revenue precept, defended by liberals and by labor interests and extremely popular in a democracy. General tax reductions for industry and investors were thus difficult to obtain. However, the new bill taught that narrowly written provisions could be approved somewhat more easily. The revenue loss from any such request would be smaller and the level of public information lower on these apparently technical leakages.510

Here King has undermined his own claim that triumphant Mellonism had superseded redistributory struggles; for the popular prejudice in favor of high and progressive tax rates had apparently become so deeply rooted that even a Republican Congress and administration dared not attack them frontally. After all, whereas Mellon's immediate success consisted in lowering the highest marginal rate from 77 percent to 25 percent, his legacy manifestly did not extend to delegitimizing World War I-level rates. That mission fell to the liberal Kennedy Administration, and not until the Reagan era would Mellon's authority be openly and admiringly

507. King, supra note 253, at 144.
508. King, supra note 33, at 41.
509. Id. at 42; see also King, supra note 253, at 138-39, 175, 269, 534. King erroneously refers to the Internal Revenue Code of 1954 as "The Revenue Act of 1954." King, supra note 33, at 41.
510. King, supra note 33, at 42.
reinvoked. Moreover, Mellonism failed in this larger and medium-term task precisely because the enormous upward redistribution and concentration of income in the 1920s\textsuperscript{511} associated with Mellon’s tax cuts were popularly held responsible for the underconsumption basis of the Great Depression.\textsuperscript{512}

During the 1954 congressional debates over the new tax code, Democrats, when not preoccupied with “applaud[ing] the people of Guatemala, who have, ... thrown off threatened Communist enslavement,”\textsuperscript{513} repeatedly expressed amazement that the “trickle down” policy of Hamilton and Mellon, “a theory that places property rights ahead of human rights,” which “resulted in the never-to-be-forgotten depression of the early 1930’s,”\textsuperscript{514} was once again at the top of the Republican agenda.\textsuperscript{515} In the 1950s, not even the opponents of the rhetoric of incentives, which was on the verge of leading its xth new life under Kennedy, treated it as “timeworn and hackneyed.”

Although the Internal Revenue Code of 1954 may have introduced such new tax expenditures as accelerated depreciation write-offs, the very fact that the resulting revenue losses were “smaller” suggests that the corresponding gains to the rich were also smaller than Mellon-like rate reductions would have secured them. Furthermore, just how new the “twist” was that the new Code put on “the game of hegemonic capital stimulants” is made dubious by the decades-old battles over taxation of capital gains, which involved the same objectives and techniques.

For King, the Code’s hands-off treatment of rates was precisely its cunning strength:

Official rate schedules would be kept sharply progressive as a matter of conscious policy yet would be combined with a number of categorical exemptions and dispensations. This policy would give the tax system the appearance of egalitarianism while reducing effective tax burdens for those engaging in specified practices, particularly owner expenditures on new capital facilities... By sacrificing all global claims..., hegemonic considerations would be granted a more secure


\textsuperscript{512.} See, e.g., 1954 \textit{Hearings}, supra note 63, pt. 2, at 804 (statement of Walter Reuther).


\textsuperscript{514.} 100 id. at 3450-51 (remarks of Rep. Forand).

\textsuperscript{515.} 100 id. at 9285 (remarks of Sen. Murray), 12,545 (remarks of Sen. Humphrey).
and systematic place in the tax structure and would in fact provide
greater protection against real redistribution than ever before.516

Although King criticizes commentators who, because they
failed to notice that in 1954 Republicans and Democrats both
accepted growth as the primary objective, saw nothing new in yet
another zero-sum tax game,517 King himself overlooks the fact that
the intended discrepancy between progressive paper rates and lower
effective rates for those with very high entrepreneurial, rentier, or
managerial incomes was scarcely a product of a neo-Mellonian
hegemonic growth strategy. In the 1920s, Cordell Hull had
denounced the gap as having been deeply embedded in the federal
income tax since its inception.518 Moreover, as Reaganism
demonstrated, rate reduction for the rich remains the sine qua non of
Mellonism, which in its Lafferite reincarnation undermines King’s
focus on the integration of subordinate classes.

IX. DID CAMELOT CHANGE A LOT OR WAS IT JUST ANOTHER
MELLON?

Only the Republicans can recognize Red China and only the
Democrats can adopt a sales tax.519

It took a decade after enactment of the Internal Revenue Code
of 1954 to carry out the first successful assault on paper
progressivity, but under the Kennedy-Johnson Administration,
Congress finally reduced the highest marginal rate to seventy
percent; beginning in 1965, it applied to the over-$100,000 tax
bracket for individuals and over-$180,000 brackets for household
heads.520 Walter Heller, who as the chairman of Kennedy’s Council
of Economic Advisers played a key role in the process, had
suggested the reason for the delay: In a quasi-self-fulfilling prophecy
at a 1954 American Economic Association panel discussion of the
new Code, he observed that “largely artificial” high marginal rates
above 70 percent had attained such legitimation as a tool of social
justice that, despite the fact that they generated a net loss by

516. King, supra note 33, at 43.
517. Id. at 43-44.
518. The Revenue Bill of 1926, supra note 137, at 34.
519. Walter Heller, Discussion, 45 AM. ECON. REV. 441, 444 (1955).
1964 was a transition year in which the highest marginal rate was lowered to 77 percent. Id.
distorting incentives and promoting avoidance and evasion, "a frontal assault on the unrealistic top brackets is politically ruled out."

Whereas Heller's dictum may have been valid during a Republican administration, Kennedy's Keynesian-Mellonism created a new political constellation. The economic policy groundwork for this reconfiguration was laid on the eve of Kennedy's election, as one of his advisors, Richard Musgrave, wrote to Heller, "'To the extent that changes in tax structure are needed to encourage investment, they should not necessarily be ruled out because they interfere with equity.'" The Kennedy administration's tax policy in general "deliberately avoided progressive redistribution and consciously promoted the accumulation interests of investors." The sea change that soak-the-rich Democrats underwent was captured by James Tobin, a member of Kennedy's Council of Economic Advisers in 1961-1962, who confirmed that "'[t]he fire has gone out of' the policy of tax- and transfer-based redistribution of income and wealth: 'The current liberal political movement, the New Frontier, is providing incentives for business investment through new tax legislation.... The Kennedy Administration is ... about to be the vehicle for ... substantial lowering of top-bracket rates.... [T]hese are the objectives that business advocates of tax reform have long espoused." Tobin himself was not a mere observer, but personally promoted the shift of aggregate resources from consumption to investment, which coincided with a redistribution from the all-consuming poor to the provident rich, whose propensity to consume is reputed to be considerably below unity.

In his 1963 Economic Report, President Kennedy announced that what you can do for your country is what your country can do for you. In what in retrospect seems to be an exercise in flogging a willing horse, Kennedy urged the identity of the visible and invisible hands: "'[T]he citizen serves his country's interest by supporting income tax

521. Heller, supra note 519, at 444.
523. King, supra note 253, at 154.
525. James Tobin, Growth Through Taxation, New Republic, July 25, 1960, at 15-
reductions. For through the normal processes of the market economy, tax reduction can be the constructive instrument for harmonizing public and private interests.526

By the Reagan years, backward-looking economists were praising this Mellonian move.527 A prominent market-knows-best economist, who believes that steeply progressive rates have historically caused the high-income tax base to shrink, reconstructed postwar development so that by 1963

if all rates above 50 percent had been abolished only 2 percent of revenue would have been lost. The top rates served not to produce revenue but as political camouflage, kept to reassure middle-class taxpayers that they were not paying rich people's rates.... [T]he income tax was clearly so overbearing ... that it was damaging the economy.528

Far from raising more revenue or soaking the rich, high tax marginal rates were alleged to "ossify the class structure" barring access to the "would-be rich" in the sense that they were associated with the predominance of unearned income, whereas at lower top marginal rates wage and entrepreneurial income rose as a share of the income of the rich.529 The proffered golden mean was adoption by the federal government of "the role of tax revenue-maximizing monopolist," which discovers that "the more progressive a tax scheme you desire, the lower is the revenue-maximizing top marginal rate."530 The approach was handed down directly by Mellon, who likened the setting of tax-rates to the "problem of any sales manager attempting to price the article he has to sell."531

Urging Congress to emulate Mellonian-Kennedyism once again with yet another round of rate reductions for the rich, the vice president and chief economist of the Chamber of Commerce of the United States told the Joint Economic Committee in 1985 that by

527. SUBCOMM. ON MONETARY AND FISCAL POLICY OF THE JOINT ECONOMIC COMM., 97TH CONG., 2D SESS., THE MELLON AND KENNEDY TAX CUTS: A REVIEW AND ANALYSIS (Joint Committee Print, 1982).
528. LINDSEY, supra note 343, at 26-27.
529. Id. at 89-90.
reducing the highest marginal rate from 91 percent to 70 percent, the
Revenue Act of 1964 "made the tax system more progressive." Robert Rahn derived this conclusion from the claim that income-
millionaires between 1963 and 1965 paid 147 percent more taxes
and a 232-percent larger share of the total tax burden, which rose
from 1.9 to 4.4 percent.532 Although Rahn's figures, which were not
only incorrect but appear not to bear any relationship to the official
data published by the IRS,533 may be disregarded, he offered a clue as
to what happened by noting that the rate reduction "increased
marginal after-tax income by as much as 233%."534 The following
table shows the development of AGI and income tax for the richest
taxpayers before and after the Kennedy-Johnson rate reduction:

<table>
<thead>
<tr>
<th>Year</th>
<th>AGI (%)</th>
<th>Tax (%)</th>
<th>Ratio Tax Share/AGI Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961</td>
<td>0.2</td>
<td>0.8</td>
<td>4.0</td>
</tr>
<tr>
<td>1962</td>
<td>0.2</td>
<td>0.7</td>
<td>3.5</td>
</tr>
<tr>
<td>1963</td>
<td>0.2</td>
<td>0.7</td>
<td>3.5</td>
</tr>
<tr>
<td>1964</td>
<td>0.3</td>
<td>0.9</td>
<td>3.0</td>
</tr>
<tr>
<td>1965</td>
<td>0.3</td>
<td>1.2</td>
<td>4.0</td>
</tr>
<tr>
<td>1966</td>
<td>0.3</td>
<td>1.1</td>
<td>3.7</td>
</tr>
</tbody>
</table>


533. Rahn states, for example, that total "Revenues Collected" rose from $6.7 billion in 1963 to $7.3 billion in 1965. *Id.* tab. V, at 68. In fact, total "Income tax after credits" rose from $48.2 billion in 1963 to $49.5 billion in 1965. I.R.S., *Statistics of Income* 1963, *supra* note 156, tab. 1, at 28; see also I.R.S., *Statistics of Income* 1965, *supra* note 156, tab. 1, at 8. Rahn's data for individual income groups, for which he provides no source, are similarly inaccurate and appear to bear no relation to the published data.


Share of Total AGI and Income Tax Accounted for by Taxpayers with More Than $100,000 and $200,000 AGI, 1961-1966

<table>
<thead>
<tr>
<th>Year</th>
<th>AGI Share/100,000</th>
<th>Tax Share/200,000</th>
<th>Ratio Tax Share/AGI Share</th>
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<td>1962</td>
<td>1.5</td>
<td>0.8</td>
<td>5.1</td>
</tr>
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For the richest income-recipients, the reduction of the highest marginal tax rates in 1964 and 1965 was associated with an increase in the group’s share of total AGI commensurate with its share of total federal income tax paid. Consequently, progressivity, as measured by the ratio of the group’s share of total AGI to its share of total tax paid, remained more or less unchanged. Since long-term capital gains rose as a share of income-millionaires’ AGI between 1963 and 1965, inclusion of the exempt half of capital gains in AGI would flatten the tax/AGI ratio. Because income-millionaires, for example, increased their share of aggregate expanded AGI and of total tax liability at almost equal rates from 1963 to 1965, their tax/AGI ratio remained unchanged at 2.3.

Regardless of what the future would actually bring, one group that in 1963 needed no prompting from President Kennedy to demand rate reduction was the executive committee of the Business Committee for Tax Reduction. Including those over-towering capitalist icons—Henry Ford II (co-chairman) and David Rockefeller, in addition to the chairmen of American Telephone & Telegraph Company and the Pennsylvania Railroad Company—the group was, revealingly, called into being by Secretary of the Treasury Douglas Dillon, recently of Wall Street. The group’s avowed agenda was reducing individual and corporate income tax rates and shifting resources from the federal government to the private sector. The share, including full capital gains in numerator and denominator, rose from sixty-three percent in 1963 to seventy-three percent in 1965. Calculated according to I.R.S., STATISTICS OF INCOME 1965, supra note 156, tab. 12, at 28; I.R.S., STATISTICS OF INCOME 1963, supra note 156, tab. 15, at 58.

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social viewpoint of the organization was best captured by Ford’s feisty testimony. When Senator Douglas tried to elicit from Ford the same shock that he had experienced when he had first discovered that many income millionaires “did not pay a single cent in Federal income taxes,” Ford laconically replied: “They are pretty lucky to work it out that way, are they not?”538 Pressed, the chairman of Ford Motor Company, instead of expressing any understanding for Douglas’s sentiment, used the opportunity to attack tax progressivity per se:

I think there has been a tendency in government to be interested in socialization, ... in not allowing the fellow who is able to produce more than his neighbor ... to reap the benefits of that. ... I think with a leveling kind of thing you can do great harm to the economy of this country.539

Senator Albert Gore of Tennessee, in the tradition of southern populism, proceeded to taunt Ford with a question as to whether he and his big business committee were aware that the proposed bill would increase the take-home pay of a taxpayer with $4,000 of taxable income by $3 per week while a corporation executive with taxable income of $300,000 would find himself $1,000 richer every week. Not only had Ford and his associates not concerned themselves with such matters of “distribution,” but once having been put on notice, he had “no criticism” of the bill with respect to “social justice”; for “there are always inequities, but it is one of the problems we all face.”540

Secretary Dillon revealed the congruence of goals between big business and the Administration by explaining to the Ways and Means Committee that “[t]he single, most important, element” in Kennedy’s tax program was rate reduction: “There has clearly developed in recent months a consensus among spokesmen for business, labor, and the population at large on the desirability of reducing tax rates.”541 To be sure, the consensus seemed more additive than mutual; for whereas the CED, the NAM, and the Chamber of Commerce “have urged that top rates be reduced to 60 or 65 percent,” the AFL-CIO’s “emphasis

538. Id. at 1252-53.
539. Id.
540. Id. at 1280-81, 1283.
[is] on the lowest bracket rates (indeed the AFL-CIO conditioned its acquiescence in rate reductions for the rich on regaining the same amount of revenue from this group through loophole closing). Taxpayers in the lowest income brackets may, Dillon conceded, have needed relief “most,” but: “[f]or the highest income taxpayers, present rates are today simply unrealistic. These rates, ranging to 91 percent, were originally enacted to insure a broad distribution of the sacrifices required by an all-out war effort. They are no longer justified.”

Precisely in what sense high marginal rates were “unrealistic” Dillon did not say. He did not appear to join those who had been complaining for years that those paper rates did not reflect reality because Congress had simultaneously accommodated the rich by inserting convenient escape clauses into the Internal Revenue Code. After all, he and Senator Douglas discussed a table prepared by the Treasury Department showing that in 1960, income-millionaires paid only 47.8 percent of their AGI in taxes, a figure that fell to 32.3 percent if one hundred percent of capital gains are included in AGI. Dillon surely could not have meant that the rates were unrealistic in the sense that, as a survey was about to reveal, almost one-third of high income taxpayers were unaware of their tax rates and were therefore unlikely to modify their behavior in tandem with rate changes. Rather than stating that it was unrealistic to believe that they actually paid those rates, Dillon argued that it was unrealistic to believe that the United States was a society that should, absent the threat of external destruction presented by total war, even strive to foster the kind of solidarity and egalitarianism that the tax code once aspirationally expressed.

Here the Secretary of the Treasury was faithfully conveying the spirit of President Kennedy’s message to Congress in which he reduced the communitarianism of the war experience to a tax structure that had merely been “designed to hold back war and postwar inflation.” In order to liberate an economy “checkreined ... by a war-born tax system,” Kennedy declared that his proposed top

542. Id.
543. Id. pt. 4, at 1962.
544. Id. pt. 1, at 41.
545. Revenue Act of 1963 Hearings, supra note 147, pt. 1, at 278.
marginal rate of 65 percent “will restore an idea that has helped make our country great—that a person who devotes his efforts to increasing his income, thereby adding to the Nation’s income and wealth, should be able to retain a reasonable share of the results.”\(^5\)\textsuperscript{48} The highest-placed state officials were merely reproducing the more embellished rhetoric of their private-sector counterparts, who cautioned that capitalism is the moral equivalent of war:

> Untold numbers of our citizens are discouraged from working that additional hour or day or even month, from writing another book or another play, from inventing another device or process, from giving another play or concert, and from making more products. Realistically we must recognize that the counterbalancing advantage of patriotic effort comes significantly into play only during a shooting war.\(^5\)\textsuperscript{49}

Under normal, nonexistential circumstances of capitalist competition, Dillon agreed with the line expounded by corporate management: “[t]he prospect of pecuniary reward is only one of a number of forces motivating individuals to their best effort and to risk taking and investment, but it is an extremely important one.”\(^5\)\textsuperscript{50}

Without revealing how he had divined the point at which the rich called it a day, Dillon announced: “To promote risk taking and effort, the highest tax rate should not exceed 65 percent . . . .”\(^5\)\textsuperscript{51}

Such a reduction, however, “will put an end to the diversion of effort on the part of some of our most productive citizens from economically valuable undertakings toward efforts to avoid the consequences of unjustifiably high tax rates.”\(^5\)\textsuperscript{52}

The logic was not wholly persuasive. On the one hand, whatever pecuniary motivation investors required was furnished by the generous preferential treatment accorded capital gains—a generosity that Kennedy’s proposed revisions would have intensified by increasing the proportion of excluded long-term capital gains from 50 to 70 percent and taxing the remaining thirty percent at a maximum rate of 65 percent; the resulting maximum capital gains tax of 19.5 percent would have been thirty percent lower than the then prevailing 28

\(^{548}\) Id. at 5, 9.

\(^{549}\) Revenue Revision Hearings, supra note 81, pt. 1, at 559-60 (statement of Joel Barlow, Chamber of Commerce of the United States).

\(^{550}\) President’s 1963 Tax Message Hearings, supra note 541, pt. 1, at 41.

\(^{551}\) Id.

\(^{552}\) Id.
percent. As Senator Gore, a fierce opponent of the proposal, observed, even under current law, a taxpayer with AGI of $700,000 and considerable capital gains paid a maximum effective rate of 20.1 percent: "What ever happened to the 91 percent, so-called 'confiscatory' tax rate?" On the other hand, "our most productive citizens," whose apparently monomaniacal desire to avoid high marginal rates led them to fritter away their time and energy on locating the optimal loopholes, were presumably in the main highly paid corporate executives who (or whose firms) paid tax lawyers to perform that task for them. Although they may have had to share a small part of the tax savings with such experts, it is unclear why their entrepreneurial or managerial productivity should have been impaired by such straightforward commercial transactions.

The euphoria over the impending unleashing of primordial entrepreneurial forces that seemed to stifle all Democratic doubts did prompt at least one congressional concurring dissent by Representative Charles Vanik, who was troubled by "the assault which the legislation makes on the principles of just taxation" because the legislation would increase the disposable income of a rich taxpayer one hundred times more than that of his low-income counterpart. His prophetic powers did not prove themselves then, but Vanik sketched the political-economic mechanism that would ultimately undo progressive taxation:

One of the hallmarks of modern civilization can be found in the degree of fairness which is achieved through tax laws which adjust the burdens of society upon its members to the degree of their capacity to contribute . . . . My fear is that the new reserves of released capital will be used to propagandize the ultimate erosion of the income tax system and support in substitution a Federal excise or sales tax which would shift a substantial portion of the tax burden upon the great body of citizens who constitute the population base which lives by labor rather than from the income of investment . . . .

From a Galbraithian perspective, Senator Gore attacked the 1964 revisions for their shift of resources to the private from the

553. Id. pt. 1, at 23.
556. 109 id. at 17,014.
public sector where "[t]he vast, unfulfilled economic needs of our society lie [with] better housing for low-income groups, better mass transit systems, better educational facilities at all levels, better highways, more and better hospitals and nursing homes, more clean drinking and industrial water."\(^{557}\) Instead, "this frontal attack ... on the graduated income tax," according to Gore, amounted to an "unconscionable" tax reduction "for the already very rich," which would result in "a reconcentration of income and wealth in the 1929 pattern."\(^{558}\) Gore saw the compression of rates as "one of the most flagrant, obvious, and dangerous attacks of the past thirty-five years on the ideals, purposes, and underlying machinery of our economic democracy."\(^{559}\)

In 1964, too, the attack on progressive taxation meshed with ever vigilant normative Republican fundamentalism. When George Meany, the president of the AFL-CIO, submitted a statement to the Ways and Means Committee referring to the "'wealthy and their many apologists,'" Congressman James Utt, a California Republican, used the occasion to reject the epithet of

apologist for the wealth[y] or the capitalistic system because to me the capitalistic system is the American way of life.

The only struggle in the world today ... is between socialism and capitalism and the graduated income tax is probably the greatest weapon in the hands of the Socialists directed at the heart of capitalism.

Therefore, ... to apologize for the capitalistic system is probably the greatest sin that any American can commit ...\(^{560}\)

Meany managed to interject that he was proud that Radio Moscow and Pravda constantly called him an apologist for the capitalistic system, in which he believed "just as much as anyone in this room," because he believed in "making investment attractive" to risk-takers, in "management getting paid to manage and ... in the entire system."\(^{561}\) His reference to apologists for the wealthy, he insisted, was merely a system-immanent critique of such flaws as


\(^{558}\) Id. at 173-74, reprinted in 1964 U.S.C.C.A.N. at 1845-46.

\(^{559}\) Id. at 174, reprinted in 1964 U.S.C.C.A.N. at 1846.

\(^{560}\) President's 1963 Tax Message Hearings, supra note 541, pt. 4, at 1979.

\(^{561}\) Id. pt. 4, at 1979-80.
workers' perennially insufficient "share of what the system produces" and the growth of unemployment, which would eventually become incompatible with America's leadership of "the free world."\textsuperscript{562}

Utt, who confessed to having had his "teeth cut on economics under the old laws, 'The Wealth of Nations,' by Adam Smith," took umbrage at the "inference of apology for wealth. You don't build a nation with poverty. You build it with wealth."\textsuperscript{563} This shibboleth led Utt to interrogate Meany as to whether his "philosophy of taxation is for the purpose of raising revenue or for the purpose of punitive action or for the purpose of Federal control."\textsuperscript{564} The motivation behind the question was the conviction that "the only reason" that the labor movement could oppose a fifty percent reduction in capital gains taxes, which "would unlock between $500 and $700 billion worth of frozen assets . . . is because you think it is wrong for me to retain some of my capital gains."\textsuperscript{565} Meany promptly fell into the trap by replying that Utt had raised the issue of an "inequitable tax structure. In other words, it is wrong for people to retain more provided somebody else is not allowed to retain a certain amount. Certainly the theory of taxation is based on the ability to pay."\textsuperscript{566} Utt had heard the Q.E.D. he has been looking for: "[o]f course that means the doctrine of Marx and Engels?"\textsuperscript{567} When Meany denied the affiliation and averred that using taxpayers' money to finance transcontinental railway construction on behalf of private corporations could just as well be called socialism, Utt returned the discourse to the inequitable tax system, charging that Meany came to the complete Socialist idea it is unequitable [sic] for me to make money and keep more than anybody else can. Therefore, I become an apologist and if I have a guilt complex and I decided that my dad made too much money, I must divide it with somebody down at the pool hall.\textsuperscript{568}

\textsuperscript{562} \textit{Id.} pt. 4, at 1980.
\textsuperscript{563} \textit{Id.}
\textsuperscript{564} \textit{Id.} pt. 4, at 1981.
\textsuperscript{565} \textit{Id.}
\textsuperscript{566} \textit{Id.}
\textsuperscript{567} \textit{Id.}
\textsuperscript{568} \textit{Id.}
X. Enabling Managerial Capitalists to Avoid the Faustian Conflict Between Accumulation and Consumption

This country needs more capitalists, not less.569

The plight of highly paid corporate executives, which has been alluded to repeatedly, merits its own special chapter in the history of the rise of the rhetoric of the decline and fall of tax rates. The business class’s persistent pursuit of the theme since the end of World War II is illustrated by Business Week’s announcement as early as 1947 that “Executives Need an Incentive.”570 In connection with efforts by the Republican-controlled 80th Congress to reduce rates, Roswell Magill, who had become the chief tax attorney at Cravath, Swaine and Moore in 1943 and also taught law at Columbia University,571 testified in 1947 that “a full share of relief” had to be afforded the upper brackets because “the incomes of the men who manage American business fall in those brackets, and we want to encourage them as much as we can to vigorous activity in the next decade.”572 Magill, who had been Under Secretary of the Treasury from 1937-1938 after having served under Mellon in the mid-1920s,573 brought his fiscal acumen to bear by likening federal budget issues to the

situation that any of us might confront with our wives.

That one situation is your income is so much. . . .

The little woman wants a mink coat. Can she have it or not? A mink coat is a nice thing, and she will look very well in it, and you certainly want her to have a mink coat if anybody else has a mink coat.

Nevertheless, he cannot afford it, and I am afraid that the Federal Government cannot afford all of the good things anybody can think of doing. . . . 574

With such demanding wives, it is small wonder that the high tax rates made it impossible for “the young men” at Cravath with


570. Executives Need an Incentive, BUS. WEEK, July 5, 1947, at 15-16.


salaries of only $10,000 in 1947 "to save enough to buy a house.... It takes everything they have got in order to live."575

The highpoint of the 1947 congressional tax hearings in this regard was the effort by Magill, Representative Gearhart, and several other Republican congressmen to document how corrosive the effect of high tax rates was on incentives for businessmen and other recipients of high incomes. After relating a Ronald Reaganesque anecdote of two prominent attorneys who declined compensation for service on a government commission because the tax collector would take it all anyway,576 Gearhart bemoaned:

How could they be inspired to work a whole year, if they knew that everything they make in the second 6 months is going to have to be given to the income-tax collectors? And to deprive the great profession of which they are a part of their very special talents during the full period of the year ... could only be considered a most unfortunate consequence of what the people have come to regard as confiscatory income tax levies.

Is that not just as true in the field of business as it is in the profession of the law: Take the case of a businessman who is the head of a business concern, knowing that he has earned all he could earn in the first 6 months, is he not very apt to let down in the second 6 months?577

While seeking to shield lawyers from this accusation since "we keep on plugging no matter what," Magill expressed concern about businessmen, whose patriotism could not be expected to induce them to continue doing their best as they did during World War II, without the traditional material emoluments.578 The wake that the Right was holding for monetary incentives was, however, brought to an abrupt end by the intervention of a Democratic congressman from New York, who confessed that he had yet to meet a lawyer or businessman who, upon reaching $10,000, declared: "'I am going to stop; it does not benefit me to work any more; I have lost the incentive.'"579 When Representative Lynch asked Magill whether he had in fact ever met such a person, Magill evaded the question by

575. Id. at 124.
576. Id. at 147-48.
577. Id. at 148.
578. Id. at 73, 123, 143 (remarks of Roswell Magill and Rep. Robert Kean).
579. Id. at 160.
asserting that the disincentive kicked in at a higher level; but when Lynch persisted, inquiring as to the relevant level as well as to whether Magill had ever met anyone who had retired from business because of taxes, Magill had to confess that he had not.580 The colloquy is doubly instructive since earlier in the hearing the Republicans had unsuccessfully sought to force the Secretary of the Treasury to speculate as to the tax rate at which “the game is no longer worth the candle” for income recipients.581

Perhaps the most trenchant refutation of the financially feckless and beleaguered executive argument came from a most unlikely source. During his infamous Senate confirmation hearing regarding his nomination as Secretary of Defense in 1953, General Motors president Charles Wilson, the country’s highest-paid corporate executive in the early 1950s,582 testified that he owned stock valued at $5 million, including 40,000 shares of GM stock worth almost $3 million.583 In justifying his annual salary (and bonus) of $600,000, Wilson stated that if “the General Motors men . . . do [their job] well, it really will not cost the stockholders anything to have a little incentive for us who have the responsibilities.”584 When he proceeded to express doubt that the firm’s plan or he himself “ever contemplated my making $600,000,”585 he furnished powerful evidence for Henry Simons’s provocation concerning the social construction of executive compensation: “What competing firms must pay to get experts away from one another is vastly different from what society would be obliged to pay in order to keep the experts from being ditch-diggers.”586

After passage of the new tax code in 1954, Magill continued his tireless advocacy of more for corporate managers and lawyers. Securing a niche in the Harvard Law Review for his attacks against the imposition of high progressive taxes on a select group comprising 300,000 taxpayers in 1954, he contended,
Most important, perhaps, is the fact that those members of the upper professional and managerial group ... who earn from $25,000 to $150,000 gross per annum receive as ‘take home pay’ from $19,226 to $70,596. The balances of their stated incomes are not theirs to spend; a great portion of what they earn, they earn for the Federal Government.  

Although the whole point of lighter taxation of the rich was supposedly their proclivity to save rather than to spend and thus to promote the withdrawal from current consumption and the channeling to investment that purportedly would benefit even the nonrich later, here Magill appeared to be berating the national State for abrogating and siphoning off the spending power of the rich. This plea reached its rhetorical highpoint two years later in Magill’s response to his liberal counterpart, Randolph Paul. Demonstrating the broad view that a Cravath, Swaine tax attorney presumably cultivated to serve his clients, Magill began his “consideration of the general impact of the federal income tax on individuals” by asking what advice an “articulate father” would give his college-graduate son concerning choice of an occupation:

Might the father start by saying that the money incentive for choosing any particular career is largely gone? The son can hardly pick an occupation which will ultimately produce a private yacht or a private car or a mansion on Fifth Avenue. Certainly some occupations are still much better remunerated than others, but in hardly any is there much prospect of making a million dollars. There may be one or two exceptions: possibly one can make a million by the capital gains route and retain most of it; possibly one can make a million by wise investments in oil interests. Either route . . . , however, requires initial capital. Where is that to come from . . . ?

The ancestral home in the country is a unique and valuable possession, provided it is not too big for the young people to afford. They cannot use it very well if it is too large for the son’s wife to take care of by herself, for she probably cannot afford a servant; and it is rather unlikely that a servant is available anyway. 


In light of this dispiriting and gloomy, if not downright funereal, perspective for large-scale unproductive consumption, Magill speculated that there might be a connection with intelligence reaching him from his "friends on the boards of theological seminaries . . . that men of unusually high caliber are studying for the ministry today." That they might have chosen to become visible men of the cloth rather than the life of closet monks to which the tax system had reduced them is plausible in view of Magill’s explanation that the law firm can no longer honestly assure promising young men that if they become partners they can save money in substantial amounts, build country homes and gardens for themselves like [sic] their fathers and grandfathers did, and plan extensive European holidays. What chance has a lawyer today of building the Elihu Root house at 71st and Park Avenue?590

If "[i]t really is very hard to save money" and "a practical impossibility for a law firm today to pay members . . . net after taxes as much as they received ten or twenty years ago," perhaps this devaluation merely registered the market’s appropriate response to the educational and cultural decline that Wall Street lawyers must have undergone if even a Magill is capable of a grammatical degradation otherwise perpetrated only by denizens of the lowest income brackets.

Leading Democratic tax legislators, to be sure, continued to press the counter-argument. In the mid-1950s, Wilbur Mills confided to U.S. News & World Report that although many executives testified before Congress that unnamed others were deterred by high and steeply graduated taxes from working harder, he had yet to hear a witness admit falling prey to such reactions himself. But liberals met their rhetorical match in the riveting testimony attacking high personal income rates and their deleterious impact on “the future of business enterprise” by the president of E.I. du Pont de Nemours and Company, Crawford Greenewalt, whose half-million-dollar salary and bonus made him the second highest-paid corporate executive in the

589. Id.
590. Id. at 4.
591. Id. at 4-5.
592. Keep the Income Tax But Make It Fair, supra note 126, at 70.
country in the early 1950s. Conceding that his "views are not wholly based on demonstrable evidence," he issued a kind of industrial Quesnaysian-Physiocratic caution that:

Industry is the keystone of our economic arch. The real wealth it produces makes possible progress in all our other fields of endeavor, educational, cultural, charitable, governmental. . . . Conversely, any act that cripples our industry, cripples the Nation and the free world along with it. In proof one need only look at Communist efforts to foment discord in our American industry.

Because Americans' standard of living was "vitaly dependent" on industry, their well-being presupposed that industry could continue to "compete successfully for the limited supply of talented people." "[U]nfortunate" though it may have been the case that "human donkeys" did not "do their best without external motivation," and despite the existence of a multiplicity of incentives, Greenewalt asserted that industry "is in a poor position to compete" with academia, politics, the arts, the military, and "even the church" for the conferral of such nonmonetary incentives as power, prestige, recognition, attention, rank, and perquisites. Financial gain was not coincidentally industry's centerpiece—"largely because it is the type of inducement most consistent with the business environment."

Because "industry must rely upon the coin of compensation most suitable to its character," Greenewalt perceived a danger: "I am certain that the effectiveness of the money incentive is being eroded by the tax rates that prevail in the upper brackets today."

Exculpating the present generation of executives, whose already attained "position of eminence" subjected them to an overriding sense of loyalty and obligation to their firm, from the temptation "to rest on their oars," Greenewalt promptly added, even they "may not be happy over the realization that at top levels each additional dollar of gross income nets its earner about 9 cents. I confess to some pain in this respect myself, but I cannot say that I am inclined as a result

595. Intriguingly, one of Quesnay's leading adherents, Pierre S. Dupont de Nemours, who also coined the term "Physiocratie," was the father of the founder of Greenewalt's firm.
596. Greenewalt, supra note 594, at 191.
597. Id. at 185-87.
598. Id. at 188.
to work less diligently....”599 Indeed, when Greenewalt told Representative Mills that “every penny that the Du Pont Co. paid me in 1954 was taxed at 91 percent,”600 the congressman suggested that the witness must have misspoken, having presumably meant that that part of his salary or bonuses that exceeded $200,000 (or, if he is married, $300,000) was taxed at that marginal rate. Greenewalt unraveled the mystery by mentioning his “independent income,” but “hasten[ed] to say I still work.”601

Greenewalt’s real concern was with the long-term effect of high rates on industry’s ability to recruit “young men with real ability” for whom “the lure of security at a modest level had gained in recent years as against the desire to venture and work to reach the top.”602 Greenewalt suspected that the tax system may have been at fault. Why, after all, should a young man “enter the industrial arena when he knows that the higher he gets on the ladder, the more of his time will be spent working for the Government and the less time working for himself?”603 Since industry, unlike other fields of endeavor, had in the last analysis no unique incentives to offer but money, “any erosion of that incentive makes it more difficult for industry to get its share of the supply.”604 The problem, from the perspective of a corporate employer such as Du Pont with sixteen levels of employment, was that it had to offer sufficiently graduated monetary incentives to entice its managers to keep climbing those steps. “And this increase must be net, after taxes, for actual spendable money is what counts. The large gross figure, impressive though it may appear, gives one no advantage opposite the landlord or butcher, or the increased financial demands that go with increased responsibility and higher standards in the community.”605 But where a firm had established twenty-percent salary increments between adjoining levels, “[o]ne arrives at figures at the top which are in the realm of pure fantasy.”606

Relieved that he could furnish Congress with something other than “nebulous and hard to grasp” hypothetical situations, Greenewalt

599. Id.
600. Id.
602. Greenewalt, supra note 594, at 188, 189, 190.
603. Id.
604. Id.
605. Id.
606. Id.
was "fortunate[]" to find "quantitative evidence quite outside the realm of speculation"\textsuperscript{607} in that rhetorically ubiquitous symbol, \textit{The $64,000 Question}, which the NAM had also deployed to bring "to the attention of citizens generally ... the devastating share which the federal government demands from the fruits of success."\textsuperscript{608} For with the exception of a lone Marine captain, who "was motivated by pride in his organization, not by after-tax benefits," "the risk involved to win a few thousand dollars after taxes just didn't seem worth while."\textsuperscript{609} And just as the Du Pont Company could not afford or refused to pay its executives salaries high enough to hold them harmless after taxes, so too from the sponsor's standpoint, "to give a prize of $450,000 so that the winner could have his $64,000 net of taxes seemed understandably imprudent."\textsuperscript{610} In light of the homologous decisionmaking structure to that of his subordinates, Greenewalt advised Congress, "It might have been interesting for your deliberations to have the viewpoints of the unwilling contestants on the question of the tax collector versus individual incentive."\textsuperscript{611} Although the legislators eventually accommodated the suggestion, their inquiry focused on a somewhat different aspect of financial incentives for contestants and television networks.

To be sure, Greenewalt failed to identify the plausible reference point \textit{vis-\textipa{a}-vis} which the corporation had to hold its executives harmless. After all, marginal rates had been high for the past quarter-century, and, with the exception of Andrew Mellon's stewardship, had never been otherwise since World War I. How, then, could firms or their rising managers ever have formed expectations incompatible with the tax structure? In any event, in seeking to explain why it was so vital that "the game must be worth the candle" to those young men, Greenewalt was at pains to make clear that his solicitude was not for them as individual losers, but for the entire population. "[W]hen a promising young executive decides he won't try for the $64,000 question ... everyone is the loser," for the diminished pool of executive candidates would ultimately manifest itself as "[m]anagement ineptitude," which, spreading "with great force and ruinous force" through a highly integrated economy, would put at risk

\textsuperscript{607}. \textit{Id.} at 190.
\textsuperscript{608}. \textsc{National Ass'n of Mfrs.}, \textit{supra} note 206, at 8.
\textsuperscript{609}. Greenewalt, \textit{supra} note 594, at 190.
\textsuperscript{610}. \textit{Id.}
\textsuperscript{611}. \textit{Id.}
the "industrial miracle of America." In an ambiguous closing plea that can be interpreted either benignly as a mere Charles Wilson-type identification of the interests of America and corporate America or more sinisterly as a quasi-capital-strike threat to hold the economy hostage to extort lower taxes for corporate executives, Greenewalt went beyond the anti-tax movement ideologues. Repeating the movement’s testimony that federal revenue derived from the high marginal tax brackets is trivial, Greenewalt urged “that it would be a tragic thing ... if, for such a relatively small amount, we should jeopardize the future successful operation of our industry [and] face a bleak and static future.”

Although Professor Long, another congressional witness, “really detest[s] the income tax, and ... can fully sympathize with somebody who pays even more income tax than I do,” he took exception to Greenewalt’s position. One reason that Long detected no disincentive even among highly paid corporate executives was that money was not their only goal: “They are men of power and influence. [T]hey enjoy that kind of life. Furthermore, hard work the struggle for success is not the kind of thing the average businessman can turn off and on, in response to the income tax. He can’t decide he is going to work just so hard and then stop when his taxes begin to mount.”

A particular twist on the use of capital gains gave added urgency to the dispute over the consequences of the high and progressive taxation of corporate executives. With the steepened marginal rates since the beginning of World War II,

the executive class has been steadily occupied in carving out tax shelters to ameliorate materially the impact of the high rate scale. This was a natural reaction to that rate scale, since the executives saw that their high salaries lay unprotected against the high rates while the investor class received protection through capital gain rates, natural resource preferences, tax-exempt obligations, and corporate accumulations of earnings.

612. Id. at 190-91.
613. Id.
615. Id. at 142-43.
616. Revenue Revision Hearings, supra note 81, pt. 2, at 2286 (statement of Stanley Surry).
The impressive increase in top executives’ compensation and the shift from salaries and bonuses to pensions and other deferred forms of compensation and especially to stock options after favorable legislation went into effect in 1950 enabled managerial capitalists to avoid relegation to the twenty percent of taxpayers with $200,000 or more in AGI who, for want of capital gains, actually paid the “paper rates.” The result, as Surrey explained to Congress,

is remarkable. If an unmarried clerk making $5,100 receives a Christmas bonus of $100 he pays at a 26 percent rate on that $100. But if a $100,000 a year executive receives a bonus through a large stock option profit, he pays at only a 25 percent rate, 1 percent less than the clerk.

Corporate executives, in addition to echoing the denunciations of high taxes presented by the rich generally, had also been complaining about the horizontal inequities of the Code, which taxed salaries at high rates, capital gains at low rates, and interest from local and state bonds not at all. Mobilization of public opinion on behalf of beleaguered executives appeared in unexpected places. The Ladies Home Journal in 1959 effectively told the affecting story of “How It Feels to Earn $200,000 a Year.” An anonymous high-ranking executive facing a marginal tax rate of 84 percent stood financially naked before the readers by revealing that he paid $108,000 of his $207,000 income in taxes. Yet what irritated him even more than this halving was the knowledge that his even richer neighbors had been able to hold on to their millions because of the preferential treatment accorded the chief sources of their income, capital gains and state and local bonds. He, in contrast, would have been able to keep at most $750,000 of the $4 million that his firm would have paid him during twenty years; after decades of long hours, the $12,500 annual income that his total savings of $350,000 would eventually yield him after retirement would scarcely enable him to lead the much more lavish lifestyles that unearned incomes had already conferred on his neighbors.

618. Revenue Revision Hearings, supra note 81, pt. 2, at 2290 (statement of Stanley Surrey).
619. Id. at 2286 (statement of Stanley Surrey).
620. How It Feels to Earn $200,000 a Year, LADIES HOME J., Apr. 1959, at 68-69, 187-91.
The conversion of executive compensation subject to high marginal rates into stock options subject to capital gains knew no more fervent supporter than Henry Ford II. Writing "dispassionately" on this "relatively new form of economic incentive" in the *Harvard Business Review* in 1961, Ford saw such a device as an illustration of "the very genius of our economic system . . . because it persuades managers that they are working for themselves when they are, in reality, serving the total economy."621 Why the lure of paying taxes at a rate otherwise available only to someone earning a twentieth or a hundredth as much as a highly paid executives was so strong is clear:

it offers . . . his most promising means of building a nest egg . . . universal human urges for economic security and independence.

At present levels of progressive taxation, it is almost impossible for a top-salaried executive to create a substantial estate out of income. To do so requires that he devote to minimizing taxes and seeking outside capital gains much time and energy that, in the stockholder's view, certainly ought not to be diverted from his job.622

For the owner of the world's second largest automobile manufacturing firm, it "is hard to understand" why anyone should "take so grim and puritanical a view of people being normally acquisitive and wanting tangible things . . . like cars."623 Moreover, from the owners' point of view, only by virtue of receiving a sufficient capital stake in the corporation could the executive throw off the blinders that induced him to consider himself "a mere hired hand" and to align his self-interest with enhancing the firm's long-run profitability.624 Implicitly responding to the question as to why the rest of the taxpayers should be subsidizing such private gains, Ford claimed that top executives not only "make or break" a company, but were "equally critical to the whole economy" by increasing "everybody's income and standard of living."625

Corporate executives achieved their next goal, a straightforward reduction in paper rates, with the Tax Reform Act of 1969, which

622. Id. at 48.
623. Id.
624. Id. at 49.
625. Id. at 46-47.
reduced to 50 percent the maximum marginal rate on earned income.626 What chiefly animated Congress, and in particular the Ways and Means Committee, in addition to the belief that in general "extremely high tax rates are unrealistic," in adopting the 50-percent tax-rate cap on earned income was a desire "to reduce the pressure for the use of tax loopholes."627 Since the Senate had deleted this provision from the House bill,628 and Senator Gore of the Finance Committee criticized the proposal for giving $100 million to fewer than 30,000 taxpayers with more than $50,000 in income and thus "excessively reward[ing] high-paid executives at the expense of progressivity,"629 the Ways and Means Committee recognized that it was hopeless, as a public relations matter, to justify the special rate "as a tax relief measure."630 Instead, it advertised the reduction of high rates on earned income as a method of "reduc[ing] the pressure for the use of tax loopholes."631 In particular, the provision was designed to reduce the incentive to convert earned income (taxable at 70 percent) into capital gains (taxable at 25 percent).632 Diminishing the gap between the two taxes was predicted to "reduce the time and effort devoted to 'tax planning' at the expense of pursuing normal business operations."633

The impression conjured up by Congress was that of a highly paid corporate executive who, instead of devoting himself to his appointed mission of enhancing his firm's profitability, spent much of the day on the telephone with his personal stockbroker shuffling his own portfolio in a desperate attempt to maintain his standard of living in the teeth of a powerful IRS maw. John Kenneth Galbraith, however, was merely amused because:

The case for such concessions evaporates when executive income is seen to be a function not of market valuation but of tradition, hierarchical position and bureaucratic power. Since it is these, not effort or intelligence, that are the determining factors in the reward, there is no danger that the input of energy or intelligence will be threatened by increased taxation. Nor will their supply be increased by lower taxation. The only consequence of such argument is to perpetuate or accentuate inequality. The market is irrelevant. But its myth survives as a cover for tax avoidance by those best able to pay taxes.634

XI. HAS THE UNITED STATES EVER TRIED PROGRESSIVE TAXATION?

If each of the hundred thousand men who landed in France in August 1914 had been presented with the one-hundred-thousandth part of the cost of the first expeditionary force, and instructed to spend it, in the manner he thought best, in making the world safe for democracy, it is possible that the arrangement might have been welcomed by keepers of estaminets [pubs], but it is improbable that the German advance would have stopped at the Marne.635

Now as in the past:

The primary goal of taxation is to transfer control of resources from one group in the society to another . . . . The transfers may be of two general kinds. The first shifts purchasing power from one group to another in the private sector . . . ; these are aimed at making the distribution of private income and wealth conform to the distribution that society views as desirable. The relevant instruments are taxes on those with too much income and wealth and transfer payments to those with too little. The second type shifts actual control of resources from the private to the public sector in pursuit of . . . social priorities, such as transportation, health care, education, and housing.636

The new fin-de-siècle antitaxers seek to portray themselves as extricated from this context by virtue of their purported agenda of restoring a mythical nineteenth-century stateless capitalism unmodified by redistribution or social capital infrastructure.

The entire debate over progressive income taxation as a redistributional force may, as the most recent historian of the subject

has suggested, be tangential to the real fiscal history. John Witte argues that in the United States “there is no evidence either that the income tax significantly redistributes income or that there was ever any sustained intention that income taxes should redistribute income.”

In order to explain why the redistributional impact has been so minor, Witte asserts that in large part the “failure is due to the fundamental problem that given the degree of inequality in the pretax distribution of income, income taxes are simply too small a percentage of income to have a significant effect.”

He seeks to illustrate his claim by re-running a Brookings tax and income model in which only the richest decile would pay any federal income taxes (although the incidence of all other taxes remains constant). As a result, the total effective tax rate for this group rises to 48.5 percent while that of the other nine-tenths of the population would range between 12 and 15 percent. Because even under these extreme imaginary conditions, the highest decile’s after-tax income share declines from thirty percent to twenty-one percent and the lowest quintile’s share rises only from 4.23 to 4.42 percent, Witte concludes “that redistribution depends not only on progressivity, but also on the relative pretax distribution and the total amount of taxes paid.”

In one sense, Witte’s thirty-year-old data are less meaningful than he believes, since real redistribution to low-income taxpayers has traditionally been not so much a function of the tax system as of the structure of the state budgetary and welfare-transfer systems. Moreover, higher effective rates on the much larger number of very rich taxpayers today would make feasible considerably more redistribution. By the same token, a flat tax would severely weaken the progressivity of the government expenditure system by shifting much of the tax burden from higher- to lower-income

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637. Witte, supra note 114, at 257-59.
638. Id. at 261.
639. Id.
641. In Canada and Western Europe, pre-tax income inequality is lower and income taxation reduces it more than in the United States. ORGANISATION FOR ECON. CO-OPERATIONAL DEV’T, THE PERSONAL INCOME TAX BASE: A COMPARATIVE SURVEY tab. 6.4, at 64 (1990).
taxpayers. More recent data, however, underscore the vitality of Witte's skepticism. Pre-tax and pre-transfer income distribution shifted so markedly in favor of the rich during the Reagan era that it would require unprecedented redistribution to undo its effects. Thus, alone from 1981 to 1988, the share of AGI accounted for by the richest one-tenth of one percent of the taxpayers rose two-and-one-half-fold, from 2.6 percent to 6.8 percent, while that of the richest one percent increased from 8.8 percent to 15.4 percent. The intensification of state-induced redistribution that would be required to annul such concentration of income would, according to a recent study, be "enormous." Even restoring the top 1980 marginal rate of 50 percent in tandem with enactment of a wide-ranging set of reinforcing ancillary measures such as a doubling of the earned income tax credit, increasing Supplementary Security Income payments, and imposing a tax on securities transactions, would eliminate only fifteen percent of the cumulative exacerbation of income inequality during the 1980s. If 50-percent tax rates do not suffice to break out of this capitalist Sisyphus work, perhaps Eisenhower-era rates would. Alternatively, if a skewed distribution of income is essential to capital accumulation, then the tax system, as Marx suggested, may be powerless to eliminate such equality.

Much more significant, however, is Witte's conclusion that "the tendency and bias of tax politics toward lower taxes [make] ... the prospect of using the income tax to redistribute income in the near future ... extremely doubtful." This pessimism is intensified by his observation that legislators never intended to use income taxation

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645. Id.
646. According to Mickey Kaus, "the top 1 percent have gotten so rich that it would now take a boost to more than 50 percent [effective tax rate] to reduce their income share to what it was . . . in 1977." Mickey Kaus, The Fairness Trap, New Republic, Apr. 5, 1993, at 208.
647. Witte, supra note 114, at 261-62.
as a tool of redistribution, progressivity having been largely driven by “a dire need for revenue.” 648 For Witte, this view is clinched by Eisenhower’s fiscal policy:

The key to the modern nominal rate structure, which provides the illusion of progressivity, is the Eisenhower administration’s reluctance to lower taxes following Korea, an action inspired by a fear of deficits and a fear that a tax reduction intended to stimulate consumption would have been inflationary. . . . [T]he long-term results suggest that whatever progressivity exists in the income tax structure entered through the back door, not as a . . . commitment to equality, but as a response to revenue emergencies. 649

Witte’s position both resembles and contrasts sharply with that occupied on the right and left. Roswell Magill, the Wall Street tax lawyer and perennial congressional witness, insisted in the late 1950s that the rate structure “reflects the attempts during the depression to redistribute income, not only as a possible method of increasing aggregate spending, but also a method of attack on the economic power of high income groups.” 650 The long-term trend toward a more equal distribution of income, in particular the reduction in the share flowing to the rich, had, in Magill’s view, rendered irrelevant the former basis of redistributory tax policy. 651 Thus, whereas Witte believes that redistribution was never intended or effected, Magill argued that the planned implementation had to be terminated before it wreaked further havoc.

Joseph Pechman, the Brookings Institution’s chief tax expert during the post-World War II period, though a strong advocate of using the income tax to reduce disparities of welfare and power, conceded that such redistribution has not been the primary basis for income taxation, 652 and eventually welcomed the arch-antiprogressive Tax Reform Act of 1986 because of its base-broadening. 653 In his influential 1969 piece, “The Rich, the Poor, and the Taxes They Pay,”

648. Id. at 262.
649. Id.
651. Id.
in *The Public Interest*, Pechman explored both the possibilities and the impossibilities of developing progressive taxation to "moderate income inequality." He noted that effective tax rates on incomes in excess of $100,000 as calculated by the IRS had declined from 57 percent to 39 percent from 1947 to 1967; use of a total income concept including all realized capital gains revealed that for the richest one percent of taxpayers (those with before-tax income in excess of $43,000), the effective tax rate had declined from 33 percent in 1952 to 26 percent in 1967. Setting as a modest objective the elimination of regressive sales, payroll, and property taxes imposed on the poor through federal refunds, Pechman recited "[t]he classic objection against an attack on tax regressivity . . . that there is simply not enough income in the higher classes to do the job." After opining that the requisite twenty-percent increase in taxes on those with incomes in excess of $10,000 would trigger a "revolt," Pechman closed with the ironic lament that "at some distant future date, the well-to-do and the rich will have enough income . . . to help relieve the tax burdens of those who are less fortunate," but that until that time "the tax system will continue to disgrace the most affluent nation in the world." The arithmetical advent of that day unaccompanied by a greater trend toward redistribution must give pause. Yet even based on the most recent data, many economists continue to argue that the increasingly unequal pre-tax income distribution has become so marked that the requisite degree of offsetting tax progressivity would be politically or perhaps even economically impossible.

To be sure, the transformation of the pre-World War I "state of courts and parties" into the late-twentieth-century globe-straddling and solar system-exploring United States has necessitated a vastly

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655. *Id.* at 26-27. Pechman updated these figures showing that by 1981 the effective rate for the top one percent had risen somewhat to 30 percent. JOSEPH PECHMAN, *THE RICH, THE POOR, AND THE TAXES THEY PAY* 24 (1986).
657. *Id.* at 43-44.
changed system for securing resources for the public sector. Not even the transitional State imagined in the *Communist Manifesto*, were it to come to power today, could manage to finance its national government's budgetary obligations solely by extractions from the wealthy. Cordell Hull's explanation of what was supposed to trigger liability at the inception of the federal individual income tax regime in 1913 is quaintly antiquated: "If a citizen has not been successful in his efforts to accumulate profits he is not required to pay the tax . . ."\textsuperscript{660}

The case for progressive taxation has been made both more transparent and more complicated by the significant shift in composition of federal expenditures away from traditional public goods and toward transfer payments. Taking more from the rich than from the nonrich primarily to finance wars may prompt the conclusion that any resulting after-tax income redistribution is merely inadvertent; linking progressive taxation to an avowedly redistributionist set of expenditure programs makes the underlying intent more straightforward. Thus, if even moderates in 1913 found the progressive income tax "a fair and reasonable way to divide the costs of public goods like the Army, the federal courts, and the regulatory commissions,"\textsuperscript{661} now that the government is "squarely in the business of reshuffling incomes,"\textsuperscript{662} according to Arthur Okun, "[t]ax policy should be confronted candidly as part of the decision of how much and how the government should equalize incomes."\textsuperscript{663} Once that decision is confronted, however, Okun observed during the Nixon Administration, the "super-rich," the top one percent of income tax payers, are rich enough to finance the entire cost of Medicaid, welfare, food stamps, and public housing just from the progressive part of their federal income taxes.\textsuperscript{664}

Such quantitatively precise, narrowly focused redistributional determinations remain important in light of the persistent acceptance, even by scholars, of the venerable claim that "despite whatever our populist gut impulses tell us, there really are not enough rich people and corporations (or perhaps they are just not rich enough) to pay for

\begin{footnotes}
\item[660] 50 Cong. Rec. 505 (1913) (remarks of Cordell Hall).
\item[662] Id. at 102.
\item[663] Id.
\item[664] Id. at 103.
\end{footnotes}
the public programs our taxes currently support." During the Korean War, for example, Business Week editorialized that even total confiscation of all incomes above $100,000 would net the federal government only $39 million. And even a critical social historian of the income tax tacitly embraces this position in insisting that its role "as the primary rhetorical answer to class anxiety" was destined to fade once its conversion into a mass tax "ruined its original reason for being, since persuading the bulk of the populace that the tax was salving the class gap was no longer possible." After all, transforming a system that combined total exemption of the working class and very light taxation of the wealthy (as was the case in 1913) into one that taxed workers at a highest marginal rate of 20 percent while imposing rates on the rich that would not have been imaginable to their counterparts even as nightmares before World War I (as was the case in the 1950s), would have been compatible with top-down redistributory objectives (as was the case in Britain during the 1940s).

The linkage between the claim that the rich lack the riches to finance prosperity for the poor through sheer redistribution and the shift away from collective consumption is complex. As English historian and socialist, R.H. Tawney, observed in the early 1950s, the objection that it is futile to seek to redistribute wealth since the amount available, if equally divided, would not suffice to add appreciably to anyone’s income (just as the leveling of the Himalayas would scarcely elevate the earth’s surface) implicitly assumes that the only relevant datum is the average per capita income “as though the only conceivable departure from existing arrangements were to redivide the national income into equal fractions, and to set everyone rubbing up his arithmetic to make sure of his quota.” Such an individualistic perspective, according to Tawney, misses the point; for redistribution is not the division of the nation’s income into eleven million fragments, to be redistributed ... like cake at a school treat. ... It is, on the contrary, the pooling of its surplus resources by means of taxation ...

667. Stanley, supra note 40, at 255.
668. Tax Act of Oct. 3, 1913, ch. 16, § II, 38 Stat. 114, 166-68 (1913) (exempting persons with incomes below $3,000 and imposing a 7-percent marginal rate on those with incomes in excess of $500,000).
669. Tawney, supra note 635, at 128.
to make accessible to all, irrespective of their income, occupation, or social position, the conditions of civilization which, in the absence of such measures, can be enjoyed only by the rich. . . . [C]ollective expenditure makes possible results which would be unattainable, were an identical sum distributed . . . in fractional addition to individual incomes.670

A dim reflection of this collectivist approach can be gleaned from the efforts of John D. Rockefeller, III to persuade the Ways and Means Committee in 1969 to continue to grant him (and other very rich would-be nontaxpayers) the unlimited charitable deduction. As one congressman asked rhetorically: "[S]hould we permit a segment of our society to set up a government of its own to render philanthropic services?" The consequence is that the nonrich must then pay higher taxes to finance the collective services that "some people with wealth . . . do not want to support."671 If, for example, Rockefeller funnels his tax-exempt wealth to Yale University, which "is beyond the reach of the average American child," then the plumber- or truck driver-parents will have to fund public education by themselves.672 The result, Stanley Surrey added, of extending to everyone the right to direct what are in fact federal income tax payments, designed to defray the cost of collective consumption, to personal philanthropic projects would be "anarchy."673 Thus, even private-collective surplus pooling may, as Rockefeller himself synthesized the critique, be "less meaningful and less effective than wealth that is spent through tax channels."674

XII. THE SALUTARY EFFECTS OF A RENAISSANCE OF PROGRESSIVE TAXATION

"The European knows that if he gets sick he can go to a good hospital and it won't bankrupt him," said Mr. Breuer, who added that his tax rate was approaching 60 percent. "He knows his child will get a good education. He knows if his old parent gets sick or they need someone to give them a bath or take them out for a walk, they're protected."

670. Id. at 130.
672. Id. at 1569 (remark of Rep. Martha Griffiths, D.-Mich.).
673. Id. at 1600.
674. Id. at 1569.
"To Americans, these can be financially disastrous. But we don’t fear them. That is why we keep paying."\textsuperscript{675}

Four decades after the zenith of McCarthyism, the struggle against progressive income taxation has assumed new forms. To be sure, the ideologically less subtle foes, such as the Republican presidential candidate Patrick Buchanan,\textsuperscript{676} have never modified their approach. For them, the “forced redistribution of ... wealth” means that “[t]he American people are paying dearly because Marx’s plans are in force.”\textsuperscript{677} Pro-capitalist ideologues even less supple than Republican congressional leaders would not be satisfied with rolling back the progressive marginal tax rates that are “ascribable to the politics of envy and an egalitarian ethic intolerant of genius and aristocracy of merit.”\textsuperscript{678} Outraged that (allegedly) “the top 1 percent of all income earners pay approximately 30 percent of all federal income taxes, while the bottom 50 percent ... contribute a paltry 5 percent of income tax revenues,” one influential right-wing lawyer urges that because the activities of “[t]he highest income earners ... satisfy more wants of their fellow citizens than does the labor of low income individuals ... they should receive lighter taxation to reward conduct that most advances the happiness of others.”\textsuperscript{679}

Such views are neither new nor confined to the Right. Almost a century ago, Seligman, the prominent historian and theoretician of progressive income taxation who contributed much to its acceptance as a considerably diluted state policy, argued:

> From the principle that the state may modify its strict fiscal policy by considerations of general social utility to the principle that it is the duty of the state to redress inequalities of fortune by taxation, is a long and dangerous step. It would land us not only in socialism, but practically in communism. . . .


\textsuperscript{677} Jack Perry, Letter to the Editor, INDIANAPOLIS NEWS, Apr. 13, 1995, at A9.

\textsuperscript{678} Bruce Fein, Morally Right, Fiscally Astute, WASH. TIMES, Dec. 13, 1994, at A18.

\textsuperscript{679} Id.
There would be only one simple principle: confiscate the property of the rich and give it to the poor.  

And a half-century later, another historian of progressivity agreed that "the higher taxation of the rich in order to ameliorate the inequality of income distribution . . . is the same ultimate objective at which Socialists aim."  

What is ideologically innovative about late-twentieth-century opposition to progressivity is that it adds to the traditional attack on takings a critique of collective consumption. Thus, Senator Phil Gramm, a former economics professor, announces straightforwardly that "I am proposing cutting Government spending . . . so that families can spend their own money on their own children on their own future, and invest in their own businesses." The notion that "Democrats . . . believe all wealth generated in this country is ultimately the Government’s to distribute [whereas] Republicans believe it belongs to the people and they should be allowed to keep as much of it as possible," means not only perpetuation of a skewed distributional status quo, but also the restoration of a hypertrophied and unregulated sector of private accumulation. The sense of a solidary society in which egalitarian and democratic-participatory values coexist with personal material well-being has been supplanted by the image of a society consisting exclusively of atomized, individualist, competitive biological units whose only goal is to retreat to their fortified shelters with as much of the lucre as their market power permits to acquire. Senator Gramm’s dictum that "[r]edistributing wealth doesn’t solve poverty [whereas] [c]reating wealth does," may, in light of thousands of years of coexistence of wealth creation and poverty, make little sense, but it does fit comfortably within a venerable tradition of antiprogessivity.

Treasury Secretary Mellon, under whom the three presidents of Republican normalcy were said to have served, may have opposed a general sales tax on the grounds that it bore no relation to ability to pay

680. SELIGMAN, supra note 257, at 131.
and was in fact regressive, and his contemporary, T.S. Adams, an economics professor at Yale and Treasury official, may have frankly regarded "[c]lass politics . . . [a]s of the essence of taxation," but the neo-flat-taxers and consumption-taxers studiously deny that their proposals are tainted with such obvious class-biased sentiments. Their efforts to project their reforms as benefiting the poor as much as the rich, however, remain unpersuasive. Thus, one of the movement's theoretical propagandists, Paul Craig Roberts, a leading tax policy maker in the Reagan Treasury Department, believes that he has undermined the alleged redistribution-linked monopoly that progressivity has on fairness by asserting that "[n]ot even regressive forms of taxation prevent redistribution of income to the poor" because the poor could subsidize themselves.

Yet now as in the past, conflicts over the magnitude, sources, and distribution of taxes and the uses to which the state puts them reflect class antagonisms. As Rudolf Goldscheid, a founder of financial sociology, observed in the 1920s, the mutual functional connections between public expenditures and revenues are so intimate that it is possible to declare

Tell me how and from whom you raise your revenues and I will tell you how your expenditure budget must be composed. And this sentence is also valid in its converse: Tell me what you want to make your expenditures for and I will tell you with what means, by the burdening of what popular strata . . . you will raise the requisite revenues.

As applied to the fin-de-siècle anti-progressive-taxers, this finance-sociological insight straightforwardly means first constructing and then catering to the so-constructed "fact" that "upper income Americans are acutely influenced by marginal tax rates in making their employment and investment decisions."
Once the state has set in motion a massive shift in income to the rich, the supply-side scenario calls on it to exit, returning United States society to the status quo ante 1913. As *The Wall Street Journal* editorially rhapsodized in 1954: "Oh, To Be in 1912."690 Paul Craig Roberts writes the script calling for the rebirth of the mythical nineteenth-century night-watchman State:

Sometime since World War I, a decision was made that we would rely more on Government to reduce poverty and less on the economy, and we built up massive Government programs and spending that became very large as a share of the national income.

So . . . the kind of reform we really need is one that goes back toward the way we used to be, when we relied on the economy to reduce poverty . . . . That approach allows you to cut back taxes and Government hand in hand.691

Before analogous nostalgia sets in over a return to Eisenhower-era progressive taxation, it is necessary to explore the peculiar contours of progressivity in the 1950s. The statement that federal income taxes were no more progressive then than under Mellon692 must be understood against the background of the intervening universalization of coverage. Because the comparatively high exemption level in the 1920s meant that only a small fraction of the population paid any tax, the rich necessarily had to pay a large share. Thus, taxpayers with incomes over $100,000 paid sixty-five percent of the tax in 1929 but only five percent in 1953.693

The income tax base in the 1950s was also very narrow. Of the forty percent of personal income actually subject to federal income tax in 1951, for example, only eighteen percent was taxed at progressive rates above the lowest bracket rate.694 Although high paper rates were imposed on high incomes, the vast majority of taxpayers were subject to what was in essence a flat tax: ninety percent of taxpayers paid a

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marginal rate between 20 and 21 percent. Both the reduction of the lowest bracket rate from 20 to 14 percent in 1964 and the shift of large numbers of taxpayers into the higher brackets in tandem with the rise of their real and inflation-bloated incomes generated enhanced progressivity in the 1960s and 1970s in income-classes below the richest groups. Thus, whereas in 1961, ninety-seven percent of returns were taxed at or below a marginal rate of 26 percent, by 1979 the corresponding proportion was seventy-eight percent. Similarly, whereas in 1961 only five percent of personal income was taxed at marginal rates above 26 percent, by 1979 the corresponding proportion was twelve percent. That the increase of the highest marginal rate imposed on a taxpayer at the ninety-fifth percentile, for example, from 20 percent in 1961 to 38 percent by 1979, contributed to increased progressivity was chiefly an unlegislated and unintended consequence of bracket creep. So, too, although Congress did not enact the doubling of the marginal tax rate for households with twice the median income from twenty-two to forty-three percent from 1967 to 1980, affected upper-middle income taxpayers did not appreciate the slack in progressivity that they were picking up for the richest taxpayers.

The cumulative impact of the vast statutory transformations of the tax rates in 1981 and 1986—from 1985 to 1990 alone the share of income received by the richest one percent of taxpayers rose eighteen percent while their share of taxes rose only thirteen percent—was intentional. With the highest marginal rates at their lowest level since before World War I (with the exception of the Mellonian ascendancy when they were reduced to 24 to 25 percent between 1925 and 1931) the federal income tax approached a flat tax as only one quarter of returns faced a marginal rate above fifteen percent. Moreover, at the low end of the income scale, the tax-exempt threshold as a percentage of the official poverty line for a family of four, after a great deal of fluctuation, was no higher in the wake of the Reagan tax revolution than it had been in the early post-World War II period; indeed, the tax-exempt threshold per family member as a percentage of per capita

697. Sarah Nutter, Individual Income Tax Rates and Taxes Shares, 1990, 14 SOI Bulletin 47, tab. 6, at 72 (1994). These figures are based on a 1979 income concept to provide a uniform measure over time despite changes in the statutory definition of AGI.
personal income fell considerably. Consequently, the thresholds exempt a much smaller share of income and require a larger share of the population with below-average income to pay federal income tax.\(^{699}\)

How much would federal revenues rise if Congress restored the effective tax rates of the 1950s for the rich? The following data relate to taxpayers with AGI in excess of $200,000. This income class is iconically significant because Congress used this threshold in the Tax Reform Act of 1976 to define the "high-income" tax returns from which it directed the IRS to publish annual data in connection with public concern over nontaxable returns filed by the rich.\(^{700}\) The over-$200,000 income class came under scrutiny again in 1986. As Congress was debating what was widely perceived as the second massive reduction in taxes for the rich in five years, a Roper poll revealed that seventy-three percent of respondents supported increased taxes for this group and only five percent thought its taxes should be lowered.\(^{701}\)

In 1954, the 0.3 percent of taxpayers reporting AGI in excess of $40,000 (the equivalent of $200,000 today)\(^{702}\) accounted for five percent of AGI\(^{703}\) but sixteen percent of all income tax liability after credits.\(^{704}\) In other words, this group's share of total taxes was 3.2 times greater than its share of total AGI. By 1993, the 0.9 percent of the taxpayers reporting $200,000 or more in AGI accounted for thirteen percent of total AGI, but only twenty-seven percent of total AGI.


\(^{703}\) The 5% percent AGI figure includes 100% of net long-term capital gains in order to make the tax base statistically more comparable to today's.

\(^{704}\) Calculated according to INDIVIDUAL INCOME TAX RETURNS FOR 1954, supra note 133, tab. 1, at 33, tab. 12, at 69. The lowest relevant AGI class in 1954 encompassed incomes from $30,000 to $50,000; in order to include only those returns with at least $40,000 AGI, the figures for this group were halved. Since there were presumably fewer returns reporting between $40,000 and $50,000 AGI than between $30,000 and $40,000, this procedure probably understates the progressivity of the income tax in 1954 and understates the need for additional taxes from the counterpart group in 1993.
income tax (after tax credits plus the alternative minimum tax). The reduction in progressivity during the last four decades is indicated by the fact that by 1993 the ratio between the group’s share of AGI and its share of taxes has been squeezed down to 2.1. If income tax progressivity had remained constant, the rich would have paid forty-two percent (or 3.2 times their share of AGI) of all taxes in 1993.

Of the $481 billion in AGI that the 979,616 richest taxpayers with AGI above $200,000 reported in 1993, twenty-nine percent, or $138 billion, was computed as federal income tax. In order to increase their share of taxes commensurately with the increase in their share of AGI since 1954, this small elite should have paid an additional $73 billion in taxes in 1993; its total income tax of $210 billion would then have amounted to forty-two percent of the aggregate income tax of $501 billion. For the group of richest taxpayers as a whole, the effective tax rate would have increased to an average of forty-four percent of AGI (with those reporting $200,000-500,000 in AGI paying as little as thirty-eight percent instead of the actual twenty-five percent and income-millionaires fifty percent instead of thirty-two percent).

Such a reversion to Eisenhower-era tax rates would still leave each member of this group with an average of $277,000 not including the $16 billion in tax-exempt interest that is reported by more than forty percent of this income class. Despite the higher rates, not only would the wealthiest taxpayers retain an affluence far above that of the other ninety-nine percent of taxpayers, but the burden would be shared much more democratically than under the Eisenhower-era Marxist-confiscatory Code, when only 170,000 taxpayers reported today’s

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706. Cruciano, supra note 705, tab. 1, at 21, 27.

707. These hypothetical effective tax rates are just one of several possible sets for distributing the additional $73 billion in taxes among the affected AGI classes.

equivalent of $200,000 in income and a mere 3,872 were income-

millionaire-equivalents—one-sixth and one-seventeenth, respectively, 
of today's contingents.\footnote{709}

An additional $73 billion in federal revenue would make it 

possible to finance many of the social programs that the new 
congressional majority asserts the United States is no longer rich 
enough to afford. Thus, whatever rhetorical sense it may have made a 

half-century ago to declaim on the floor of Congress that even "[i]f we 

confiscate all the income of the so-called rich we would not have very 
much compared to the volume of taxes collected,"\footnote{710} today such total-
terminal confiscation would be very significant. In 1993, the half-

trillion dollars in income (including tax-exempt interest) of the fewer 
than one million persons with AGI in excess of $200,000 equaled, 

coincidentally, all taxpayers' total federal income tax.\footnote{711} Indeed, even 
in 1947, the aggregate AGI of the richest 0.36 percent of taxpayers 

with more than $25,000 in AGI equaled more than half of the total tax 

liability; if one hundred percent of capital gains and tax-exempt 

interest had been included in income, the share would have been closer 
to three-fifths.\footnote{712} And, contrary to the assertion of one of the most 

liberal contemporary economic commentators, it is no longer the case 

that "once you get up to income levels where there would be general 

agreement that the family is rich, there is so little taxable income . . . 

that it is impossible to promise substantial income tax reductions for 

the rest of the population by raising the tax rates of the rich."\footnote{713}

Restoration of 1950s' progressive tax rates would not only 
generate the requisite revenues for enhanced collective investment and 

consumption, but would also fulfill the other traditional purpose of the 
income tax by reducing the market's increasingly unequal distribution

\footnote{709. \textit{Individual Income Tax Returns for 1954}, \textit{supra} note 133, tab. 1, at 33; 
I.R.S., 1993 \textit{Individual Statistics of Income Advanced Data} (furnished to author by the 
I.R.S. on June 16, 1995).


711. Calculated according to Cruciano, \textit{supra} note 705, tab. 1, at 21, 27. Including 
tax-exempt interest, these taxpayers' $497 billion in income equaled 99 percent of the total 
$501 billion in income tax.

tab. 10, at 170-71 (1953). For 1950, it was estimated that in addition to $1.6 billion in 
taxable interest, wholly tax-exempt interest amounted to $250 million. \textit{Lawrence H. 
Seltzer, National Bureau of Econ. Research Inc., Occasional Paper 51, Interest as 

713. \textit{Thurow}, \textit{supra} note 151, at 169.
of income through redistribution. During the last ten years, the share of total income flowing to the poorest twenty percent of households dropped from four percent to 3.6 percent, while that of the richest five percent rose from seventeen percent to twenty percent.\textsuperscript{714} As a result, the United States now boasts the most unequal distribution of income and wealth of all industrialized societies.\textsuperscript{715} Much less certain, however, is the answer to the question as to whether even radical tax-mediated redistribution could, if it were tried, eliminate the self-reproducing causes of poverty and inequality or whether progressive taxation itself is condemned to a Sisyphean fate.

XIII. APPENDIX: THE CAPITAL IMPORTANCE OF CAPITAL GAINS

Look out kid,
They keep it all hid.\textsuperscript{716}

One seemingly statistical technicality renders the comparison of tax rates in 1954 and the 1990s complicated. Although long-term capital gains, then as now, are taxed at lower rates than the highest marginal rates for earned income and this special treatment, thus, favors high-income taxpayers, significant differences remain. In 1954, the 25 percent maximum tax rate on capital gains was much more beneficial to the richest taxpayers whose marginal tax rate could have been as high as 91 percent; today's 28 percent maximum tax rate on capital gains is much less important to those paying the top marginal rate of 39.6 percent, which to an amnesiac generation is still too high.\textsuperscript{717} More importantly, the convoluted method by which Congress chooses to calculate capital gains taxation in the 1950s made half of them disappear entirely from AGI, thus skewing so-called effective tax rates.\textsuperscript{718}

Until the Tax Reform Act of 1986 included all capital gains within AGI—a step that House Majority Leader Armey now calls "a

\textsuperscript{716} BOB DYLAN, SUBTERRANEAN HOMESICK BLUES, ON BOB DYLAN'S GREATEST HITS (Columbia Records 1967).
\textsuperscript{718} I.R.C. §§ 1201-1202 (1954).
demagogic class-warfare attempt to 'tax the rich'"—they were the single most significant source of the gap between nominal and actual effective rates for the richest taxpayers. In 1976, they accounted for half, and by 1985, for three-fifths of the gap among income-millionaires. When Brookings economists Joseph Pechman and Benjamin Okner proposed a comprehensive tax base to Congress in 1972 that extended far beyond what Congress itself enacted fourteen years later, capital gains accounted for three-fourths of the gap between the actual effective tax rate and the proposed comprehensive rate and 89 percent of the increase in the tax base for income millionaires. 

Randolph Paul told Congress in the mid-1950s that the preferential treatment of capital gains was "probably ... the main reason for the disparity between theoretical and actual rates of income taxation in the high-income brackets." And already in 1947, William Vickrey had observed that without subjecting all capital gains to taxation, "attempts at further increasing the progressivity of the income tax in the upper ranges might as well be abandoned." Unsurprisingly, then, Henry Wallace ran on a Progressive party platform in 1948 that called for subjecting one hundred percent of capital gains to taxation. As the country’s leading public finance economist, Richard Musgrave, soon noted, "the income tax ... ceases to be progressive above a certain level of income and in fact turns


720. Though not concerned with the gap between nominal and real tax rates, one ex-Treasury official has argued that the effective rate on the equivalent of $100,000 AGI declined more than that on lower brackets from 1946 to 1976 chiefly because of an increase in itemized deductions. See Edwin Cohen, Reflections on the U.S. Progressive Income Tax: Its Past and Present, 62 VA. L. REV. 1317 (1976).

721. Joseph Minarik, Who Doesn't Bear the Tax Burden?, in THE ECONOMICS OF TAXATION, supra note 266, at 55, fig. 1, at 59; JOSEPH A. PECMAN, FEDERAL TAX POLICY, fig. 4-2, at 76 (4th ed. 1983). For the major sources of the gap after the 100% of realized capital gains were included in AGI, see JOSEPH A. PECMAN, FEDERAL TAX POLICY fig. 4-2, at 80, tab. D-11, at 377 (5th ed. 1987).


724. WILLIAM S. VICKREY, AGENDA FOR PROGRESSIVE TAXATION 381 (1947).

725. NATIONAL PARTY PLATFORMS, supra note 53, at 446.
regressive . . . due very largely to the effects of taxing capital gains at a maximum rate of twenty-five percent.” 726

However, in the 1950s, as now, pro-plutocratic self-serving demagoguery asserts that capital gains are not a rich man’s issue. The president of the New York Stock Exchange, in an effort to persuade the 83rd Congress to eliminate all capital gains taxation, informed the Ways and Means Committee that it “is not a tax which affects only a privileged few.” 727 Despite the fact that it would relieve millionaires of most of their tax liability, he conveyed to Congress his “deep conviction that any capital-gains tax cannot be defended on any basis of justice, logic, or equity.” 728 Torn between his loyalty to the accumulation interests of his class and the demands for revenue required by the new global military capacity of the United States, the realpolitiker prevailed: “I realize as a practical person, that, because the Government needs huge sums of money, some form of capital-gains tax is inescapable at this time.” 729 He therefore proposed halving the effective rate to 12.5 percent—the same level that the congressionally ubiquitous representative of the Committee on Constitutional Government urged. 731 For the long term, however, the wealthy intended to eliminate the tax altogether. 732

In spite of the alleged democratization of stock ownership associated with the rise of mutual funds, the finding is invariant that “[r]ealizations of capital gains are highly concentrated among the top income groups.” 733 The reason is that “the hard core and the overwhelming beneficiary of the capital gain preference is represented by stock investment,” 734 which is highly concentrated. As it debated the Internal Revenue Code of 1954, the 83rd Congress heard that 0.6

728. Id. at 963 (statement of J. Keith Funston).
729. Id. (statement of J. Keith Funston).
730. Id. (statement of J. Keith Funston).
731. Id. at 1129, 1133 (statement of Robert Dresser, purporting to testify only in his own behalf).
732. Revenue Revision Hearings, supra note 81, pt. 1, at 579 (statement of representative of the Chamber of Commerce of the United States).
percent of families owned eighty percent of publicly held stock. In 1936, the only year for which comprehensive data were available in the early 1950s, stocks and bonds accounted for seventy-nine percent of all realized net gains from capital assets; among income-millionaires, the share was ninety-nine percent. In 1954, when only three percent of all returns showed any net capital gains, the top one percent of returns accounted for fifty-one percent of all long-term gains, while the top 0.25 percent recorded thirty-seven percent. By the mid-1980s, just before the Tax Reform Act of 1986 eliminated the deduction for capital gains, these shares were only slightly higher. Alone, 164 taxpayers with more than $1 million in AGI accounted for more than five percent of all capital gains in 1954, while barely more than 3,000 taxpayers with more than $200,000 in AGI accounted for one-sixth.

In 1959, the AFL-CIO testified to Congress on the differential impact that taxing one hundred percent of capital gains as ordinary income would have. Among the two percent of taxpayers with less than $3,000 AGI in 1956, the result would have been an average additional tax payment of $81; among the eighty-one percent of income-millionaires, the average additional payment would have risen to almost $1.5 million, an amount in excess of their tax liability under the then-prevailing law. Not only are capital gains extraordinarily concentrated among these groups, the richest taxpayers’ income stems largely from this source. The principal contemporary study of the

735. 1954 Hearings, supra note 63, at 149.
736. LAWRENCE SELTZER, THE NATURE AND TAX TREATMENT OF CAPITAL GAINS AND LOSSES tab. 69, at 495 (1951). The Internal Revenue Service began a pilot project to study capital gains under the Kennedy Administration. It revealed that 70% of income-millionaires’ long-term capital gains in 1959 derived from the sale of corporate stock; for those with less than $10,000 AGI, the corresponding share was only 23%. Calculated according to I.R.S., STATISTICS OF INCOME 1959: SUPPLEMENTAL REPORT: SALES OF CAPITAL ASSETS REPORTED ON INDIVIDUAL INCOME TAX RETURNS FOR 1959 tab. 3, at 11 (1962). The shares in 1962, the first year in which detailed data were available, were 72% and 23%, respectively. Calculated according to I.R.S., STATISTICS OF INCOME 1962: SUPPLEMENTAL REPORT: SALES OF CAPITAL ASSETS REPORTED ON INDIVIDUAL INCOME TAX RETURNS tab. 1, at 21 (1966).
737. INDIVIDUAL INCOME TAX RETURNS FOR 1954, supra note 133, tab. 1, at 33, tab. 12, at 69.
738. CONGRESSIONAL BUDGET OFFICE, supra note 733, tab. 6, at 31.
739. Calculated according to INDIVIDUAL INCOME TAX RETURNS FOR 1954, supra note 133, tab. 12, at 69.
740. Peter Henle, Taxes from the Workers’ Viewpoint, in 1 COMM. ON WAYS AND MEANS, supra note 445, at 119, 124, tab. VIII, at 137.
subject revealed that over the whole period (1917-1946) for which data were available in the 1950s, net capital gains accounted for only five percent of all net incomes but fifty-one percent of the net income of income-millionaires. Among income-millionaires, capital gains accounted for forty-one percent of AGI; if the excluded half of capital gains was included, this share rises to fifty-eight percent. Although wages and salaries made up eighty-one percent of aggregate AGI in 1954, income-millionaires received only 0.003 percent of that source. When the Kennedy Administration was advocating rate reduction, the Treasury Department released data showing that, in 1961, one-fifth of all AGI-millionaires reported no income whatsoever other than capital gains.

At the end of the century, the same rhetoric prevails. In justifying yet another reduction in the capital gains tax, this time to a new low of 19.8 percent for the richest taxpayers, the Ways and Means Committee in 1995 "rejects the narrow view that reductions in the taxation of capital gains benefit primarily higher-income Americans." In order to overcome the slight empirical problem that the vast majority of capital gains still flow to a small minority of rich taxpayers, and in the teeth of the Committee’s own admission that many taxpayers realize capital gains only once or twice in a lifetime, it faults studies that classify taxpayers only by their current economic condition. Studies show that there is substantial economic mobility in the United States. An individual who might be counted as lower income now may in a decade be higher income.

Thus, taking a longer view, the Committee sees a reduction in the taxation of capital gains as providing potential benefits to all individuals.

741. SELTZER, supra note 736, tab. 6, at 377.
742. Calculated according to INDIVIDUAL INCOME TAX RETURNS FOR 1954, supra note 133, tab. 3, at 35, tab. 12, at 69.
743. Calculated according to Revenue Act of 1963 Hearings, supra note 147, pt. 5, tab. 2, at 2604.
745. Id. The senior tax counsel at the United States Chamber of Commerce also seeks to camouflage the antiegalitarian nature of the undertaxation of capital gains by advertising to the proportion of middle-income taxpayers reporting such income rather than the share of total capital gains for which they account. See The Contract with America: Hearings Before the House Comm. on Ways and Means, 104th Cong., 1st Sess. (1995)
Apparently, then, just at the point in history when we are no longer all Keynesians, we have all suddenly become embryonically rich.

It would be ironic if Republicans finally find their holy grail of total abolition or even a significant reduction of capital gains taxation; after all, the great compromise of the Tax Reform Act of 1986 was the tradeoff of unprecedentedly low rates for the rich for complete inclusion of capital gains in AGI.

(statement for the United States Chamber of Commerce by William T. Sinclaire), available in LEXIS, LEGIS Library, CNGTST File.