INCOME TAXES AND INDIVIDUAL LIBERTY:
A LOCKEAN PERSPECTIVE ON RADICAL CONSUMPTION TAX REFORM

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I. INTRODUCTION

The federal income tax system generally taxes an individual's increase in wealth over the course of a year. [FN1] For most people, this amounts to a tax on their annual wages or salaries as well as any income derived from investments or savings. In recent years, reform advocates have proposed replacing the income tax with a consumption tax such as the "flat tax", the "Fair Tax" or the "USA tax" that would tax only an individual's consumption (or using up) of economic resources. [FN2] Under these proposals, most people would be taxed only on the portion of their wages going toward purchases of goods and services. Savings or returns from savings, e.g., interest income, would generally remain untaxed.

The merits of a consumption-based tax system have been debated for many decades. [FN3] Scholars and other commentators have discussed whether [p. 9] income taxes or consumption taxes promote individual and social welfare, examining topics such as economic and administrative efficiency, as well as less concrete factors, such as fairness. [FN4] This article focuses exclusively on whether consumption taxes intrude less on an individual's personal liberty than income taxes. [FN5] The topic seems particularly relevant today, a time where public dissatisfaction with the existing system's intrusion on personal liberty appears to have reached new highs. [FN6]

The main argument of this paper is that John Locke's philosophy supports consumption taxes as a lesser intrusion on personal liberty. [FN7] Locke's philosophy places great value on productive human behavior, including labor and savings. In Locke's view, an individual's labor is closely related to his inalienable right to property. Locke argued that because an individual's labor is his own, the benefits of this labor, i.e., property and income produced by property, are properly his as well. [FN8] [p. 10] Furthermore, Locke's theory does not restrict property only to tangible "things" . Rather, Locke's notion of private property extends also to the freedom of action to pursue life, liberty, and happiness because labor is the means to secure resources that permit an individual to survive. [FN9]

An income tax generally penalizes labor and savings to a greater extent than a consumption tax because the former taxes both current consumption and net current savings (i.e., largely future consumption) while the latter taxes only current consumption of economic resources. An income tax constrains productive behavior that is closely tied to the pursuit of life, liberty, and happiness and hence restricts personal liberty to a greater extent than a consumption tax. [FN10] On the other hand, a [p. 11] consumption tax focuses taxation on market purchases that have little or nothing to do with the promotion of personal liberty. [FN11] Locke also realized that views on human nature must be judged according to the context in which individuals exist. While there appears to be strong support for the position articulated within this article, the argument is limited by concerns surrounding distributive justice because income taxes play an important and valid role in modern market democracies in attempting to redistribute wealth from relatively wealthier taxpayers to individuals with less wealth. [FN12] The allocation of property in society is path dependent to a certain extent; many individuals acquire wealth at least partly as a result of circumstances outside of their control such as being born into wealthy households. Redistributing wealth is necessary to create a more level playing field among individuals because the bestowal of resources enhances opportunities and promotes the ideal of the meritocracy. [FN13] The main deficiency of a consumption tax is that, contrary to Lockean principles, this tax often benefits individuals who have not earned their capital income because returns from investments derived from gift or inheritance remain untaxed . In contrast, an income tax taxes both earned and unearned capital income, facilitating efforts to redistribute wealth. It does not seem likely that a consumption tax alone can accomplish the goal of redistributing wealth. [FN14]

[p. 12] The above analysis reveals the complex interaction between taxes and their impact on individual liberty. On the one hand, taxes appear to restrict liberty by constraining the ability to choose productive activities, while, on the other hand, progressive taxation and corresponding high tax burdens on certain individuals promote greater choices for those who, often through no fault of their own, do not have access to resources. Perhaps for these reasons, market democracies have historically imposed (and continue to impose) higher tax burdens on individuals than countries with political/social regimes that do not emphasize individual liberty. [FN15]

The article is organized as follows: Part II discusses Locke's views on the appropriate relationship between the state and the individual, including the right to life, liberty, and property, and describes how these views provide the foundation for the argument developed within this article. Part III begins by discussing the impact of income and consumption taxes on individuals, then argues that consumption taxes are a lesser intrusion on personal liberty, principally because consumption taxes do not restrict an individual's choice to engage in productive actions to the same extent as an income tax. Part IV concludes that any tax system will likely have to tax high levels of unconsumed wealth. Such taxation is necessary to preserve the progressive nature of the current tax system, which is seen as an important legitimizing component in the relationship between the state and the individual in modern market democracies.

II. The Individual, the State, and the Right to Property

A. LOCKE'S CONCEPTION OF INDIVIDUAL LIBERTY

John Locke, a physician by trade and philosopher by inclination, lived from 1632 to 1704. He was a founder of the liberal tradition in political theory which "is generally viewed as a relatively coherent set of principles centering on the defense of individual rights and liberties, the security of property, and the notion of limited government." [FN16] To Locke, the concept of individual liberty extended beyond existing legal rules, i.e., positive law, to include a philosophical vision of the appropriate relationship between a democratically elected government and those individuals who elected their representatives. [FN17]

[p. 13] The England of Locke's era--the dawn of the Age of Reason--was marked by political turmoil and the Glorious Revolution of 1688, where the authoritarian monarchy was overturned in favor of a bourgeois elite exercising its rights within a parliament. [FN18] Locke suggested that a political philosophy that defended monarchical absolutism was inappropriate because God did not intend to place any man above another. [FN19] As a result, Locke offered the radical suggestion that all men are created equal and, under a sensible social contract or "compact," [FN20] individuals should enjoy the rights to life and liberty, the right to rebel against unjust rulers, and the right to property. [FN21] By entering into the social compact, individuals agreed to renounce a certain amount of control over their natural rights (such as the right to seek private vengeance) in order to gain even greater protection from arbitrary force against their persons. [FN22]

[p. 14] According to Locke, the individual rights he enumerated were ordained by God and inalienable from the individual. Locke argued that these rights were objective truths that could be verified through reasoned argument concerning the "state of nature," [FN23] a hypothetical (or actual) time and place which natural rights theorists use to describe fundamental human characteristics. These rights are grounded in a view of human nature that exists independently of social institutions and positive law: "it is a natural response because it reflects the requirements of human nature, such reflection shown by the fact that it arises necessarily, through peaceful processes, from the recognition of the elemental moral realm of what is 'one's own'." [FN24] As a result of his writings, Locke is often considered to be a spiritual father of the Declaration of Independence of 1776, which asserts "that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." [FN25] Locke's right to property, however, was not included in the Constitution, partly because of fears that it might give ammunition to critics of slavery who could argue that slavery was immoral and should be prohibited. It might perhaps even justify a revolution by the slaves against their white masters, who had breached their natural rights including the right to property which, as will be discussed, is really a right to security of person. [FN26] In contrast, the French Declaration of the Right of Man and of the [p. 15] Citizen of 1789 maintained: "[t]he purpose of all civil association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property and resistance to oppression." [FN27] The American and French documents, based partly on Locke's writings, were ground-breaking in the sense that they carved out specific areas where certain citizens of a state, namely property owners, could act without interference from state agents. [FN28]

B. LOCKE AND THE RIGHT TO PROPERTY

Locke initially justifies the right to property [FN29] by the fact that each individual has a right to self-preservation, as commanded by God, [FN30] including the right to sustain himself; this right to self-preservation permits individuals to appropriate property held in common (i.e., the "common pool") for their individual needs. [FN31] Locke argued that since an individual's [p. 16] labor is his own, everything he transformed through this labor should become his as well: The earth, and all inferior creatures be common to all men, yet every man has a property in his own person. This no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided, and left it in, he hath mixed his labour with, and joyned to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, hath by this labour something annexed to it, that excludes the common right of other men. [FN32]

Locke's theory is often referred to as the "labor theory" of property because "by mixing this thing that he owns (labour) with an object lying in common, a man comes thereby to have property in that object. His new property obtains in virtue of the fact that something he already owns is irretrievably mixed with the object in question." [FN33] Hence, labor is the individual's mechanism to permit appropriation of property for his self-preservation. [FN34] Locke's references to "property" are used in a broader, more expanded sense than the term is used today, and incorporate the idea that property rights grant a form of protection over an individual's personhood or "one's own". [FN35] Under Locke's theory, property is widely defined to include anything that cannot be taken from an individual without his consent. [FN36] Further, the appropriation extends to all things under the economic control of the individual: "thus the grass my horse has bit; the [p. 17] turfs my servant has cut; in common with others, become my property, without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them." [FN37] Hence, Locke seems to suggest that returns on capital (in addition to returns on labor) fall within the definition of property belonging exclusively to the individual whose productive actions created the savings or investment generating these returns. [FN38]

Still, Locke recognizes at least two important pre-conditions to the right to property. First, he asserts that an individual has the right to appropriate property from natural resources held in common only if "there is enough, and as good left in common for others." [FN39] In other words, there must be sufficient resources so that the appropriation of property does not interfere with another individual's right to nature's resources. [FN40] This appropriation does not pose a problem in Locke's state of nature since land and resources are bountiful. Second, Locke suggests that an individual can appropriate natural resources such as land suitable for agriculture only to the extent that this property is put toward productive uses. He cannot let the property "spoil." [FN41] However, money permits individuals to trade goods before they spoil, and thus individuals can legitimately accumulate wealth, i.e., property in excess of consumption, without interfering with the rights of others. [FN42] Locke recognizes that, by the time the use of money is adopted, resources are scarce and thus it is no longer possible simply to appropriate natural resources from the common pool (as occurred in the state of nature) without interfering with rights of others. [FN43] However, the use of money promotes trading, increases an individual's productive capacity, and benefits society as a whole, thus justifying inevitable wealth concentrations.

In Locke's view, the chief purpose of government is to protect the right to property [FN44] although he repeatedly recognizes the need for [p. 18] government regulation over property, including taxation. [FN45] The main constraint on taxes, according to Locke, is that they may be imposed only with the consent of the citizens or their representatives: in other words, no taxation without representation. [FN46]

In summary, Locke placed great emphasis on the relationship between an individual's productive behavior and the right to protect the benefits of this behavior from state interference. [FN47] In fact, productive behavior serves as the foundation (or "Title") [FN48] to all of an individual's private property rights under this classical liberal view. [FN49] To Locke, it was absolutely critical that the relationship between an individual's labor and the product be granted protection from arbitrary state institutions. Beginning with this premise, this article argues tax systems should limit restrictions on private property rights earned through productive actions and their accompanying personal liberties as much as possible.

C. LIMITATIONS ON PHILOSOPHICAL DISCOURSE

Prior to proceeding with the analysis, this section will briefly mention some of the limitations involved in philosophical discourse, discuss the ambivalent nature of private property and describe more fully how Locke's right to property will be used within the main argument of the article.

Investigations into the realm of morals and values are fraught with difficulties. Some contemporary theorists suggest that our views on norms are a form of socially constructed phenomenon dictated by powerful forces such as culture, economic power, and social change. [FN50] Others stipulate that [p. 19] matters involving morality can never be discerned through logic or reason because these matters involve reality perceived by human beings--imperfect creatures who must filter reality through the distorted lens of their senses. [FN51] Some philosophers even suggest the natural sciences are not based on any real objective foundation and scientists merely assume a hypothetical reality. [FN52]

[p. 20] Further, there are clearly views other than Locke's surrounding the nature of property rights. For example, more utilitarian conceptions of property suggest that private property rights should be overridden in the best interests of the community. [FN53] The right to fence off your property, the argument goes, protects the interests of the property owner at the expense of the interests of those who have now been shut off from access to the property as a result of a human institution called private property. Private property regimes benefit and perpetuate the lot of the powerful, it is said, while ignoring the rights of less fortunate individuals to have access to resources they need or deserve. Under these views, property rights simply involve rights to exclude others. [FN54]

There is some truth to these criticisms of private property as Locke himself understood that the institution of private property leads to concentrated wealth or the "disproportionate and unequal possession of the earth." [FN55] Part IV of this article discusses the desire to promote equality of opportunity by ensuring that resources are allocated to individuals who may, through no fault of their own, have unequal access to these resources. Despite concerns surrounding wealth concentration, Locke justifies private property on the grounds that encouraging productive labor would ultimately benefit the common good, including the welfare of those [p. 21] individuals with relatively fewer resources. [FN56] Locke's conception of the relationship between labor and private property reflects an accurate assessment of the critical role private property plays in modern market democracies; the institution of private property ensures that productive human activity will be rewarded. In this way, private property benefits both individuals and, at least in the long run, society as a whole.

This article takes the view that Lockean property rights serve as important interests or values, or "species of ethical or moral rights" [FN57] calling for institutional protection, including protection from taxation, a coercive act on behalf of the state involving the forcible removal of an individual's property whether or not the individual explicitly grants his consent. However, the private property interest enunciated by Locke does not reach the level of a Hohfeldian claim-right (i.e., in the sense that there is a legal duty of the state to protect this right) [FN58] with respect to tax laws because it is not a right that is somehow protected under existing laws. [FN59] [p. 22] Nor should Lockean property rights grant individuals a form of absolute right over their property. [FN60] In reality many restrictions are placed on property ownership by the federal and subnational governments, often for sound public policy reasons. [FN61] These views are admittedly counter to those held by many natural law theorists who argue that natural law is really a model of an ideal system of positive law. [FN62]

[p. 23] Nevertheless, Locke's natural rights theory--based largely on his views of human nature developed some three hundred years ago--continues to act as an important guide in determining appropriate state limits. [FN63] Locke was keenly aware that human beings are endowed with a powerful need to promote their own self-preservation: many of his views on natural rights, including the right to property, derive from this view of human nature. [FN64] Perhaps the most compelling support for Locke's position is the insight that the right to property enables the fundamental but otherwise ineffective right of every person to life and self-preservation: the right to property protects one's right to sustain oneself through one's own productive effort. [FN65] Under this view, an individual whose property is placed entirely, or almost entirely, at the disposal of others is robbed of his security of person and the ability to pursue his own liberties and is, in some sense, a slave to the whims of the mob. As noted by Leo Strauss, Locke's theories concerning property provide a "fence" against arbitrary and absolute state power and so preserve fundamental freedoms for individuals to pursue their own desires. [FN66]

[p. 24] Locke's views on human nature are also consistent with much sociobiological thought today as well as a body of philosophical writings that relates views of human evolution to ethics. [FN67] Under this approach, rules to guide human behavior are influenced by views on which attributes have been used by people--sentient tool-using communicating apes--to survive and successfully adapt to their environments. [FN68] It has been noted, however, that much of the analysis surrounding ethics and evolution confuses the distinction between claims about matters of fact and claims about morality (in other words, an "is" is not an "ought"). [FN69] A view of human nature ought to be the starting point of any analysis that will ultimately involve normative prescriptions. It is not the end point. [FN70]

III. TAXATION AND INDIVIDUAL LIBERTY

This section begins by defining the income tax base and the consumption tax base in order to provide a foundation for the analysis in the rest of this part which explores arguments surrounding the intrusion on personal liberty imposed by both of these taxes.

A. DEFINITIONS OF INCOME AND CONSUMPTION TAX BASES

i. Taxing Income

An income tax focuses taxation on an individual's net increase in [p. 25] wealth over a period of time, [FN71] whether or not this wealth is put toward consumption of economic resources. [FN72] More formally, the modern income tax base has been defined in Henry Simons' oft-cited passage as follows: Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end period in question. In other words, it is merely the result obtained by adding consumption during the period to "wealth" at the end of the period and then subtracting "wealth" at the beginning. [FN73]

Simons' insight lay in recognizing the role consumption plays in an income tax base. [FN74] Simons' income tax base essentially involves scrutinizing amounts an individual puts toward purchases, i.e., amounts consumed, if any; whatever is left over has been saved or accumulated. [FN75] Simons' expansive definition of income includes amounts earned by the taxpayer, i.e., returns to labor and capital, as well as amounts that increase the taxpayer's level of unearned wealth, e.g., windfall gains such as finding money in an old piano. As such, the "change in the value of the store of property rights" includes any increases in the taxpayer's ability to consume goods and services currently or at some future date. [FN76] For purposes of this [p. 26] article, I will use the so-called Haig-Simons definition of income as a result of its wide-spread adoption elsewhere.

ii. Taxing Consumption

The previous section discussed the manner by which governments try to tax an individual's change in wealth over a period of time, i.e., his income whether or not consumed. Alternatively, a government can try to tax only an individual's consumption of economic resources. There are several possible approaches used to reach the consumption tax base as revealed by recent reform proposals. [FN77] One can attempt to tax consumption directly by taxing consumers at the point of sale, e.g., state retail sales taxes or a value-added tax (VAT). [FN78] [p. 27] Another approach is represented by the flat tax proposals, which are in effect very similar to a type of VAT called the subtraction-method VAT. [FN79] The flat tax--like the VAT--does not impose any tax on an individual's savings (e.g., interest income, dividends, or capital gains); an individual would pay taxes only on his wages or pension income. [FN80] Alternatively, the consumption tax base can be reached indirectly by permitting individuals to deduct any savings from their income. [FN81] *iii. The Bias Against Savings Under An Income Tax*

As discussed, the principal effect of the reform proposals is to focus taxation only on consumption while ignoring "accumulation" or net changes in wealth. The income tax imposes a tax burden on current as well as future consumption (largely savings), [FN82] while the consumption tax ignores future consumption by leaving amounts placed in savings untaxed. For this reason, the impact of consumption taxes is considered to be neutral between the decision to consume currently or to consume at some future date. [FN83] The income tax's bias against future consumption and [p. 28] savings [FN84] results from postponed spending that permits wealth to accumulate at prevalent interest rates and interest payments to be taxed a second time. [FN85]

B. RESTRICTIONS ON PERSONAL LIBERTY IMPOSED BY TAXES

This section sets out arguments for and against the view that consumption taxes act as a lesser intrusion on personal liberty and asserts that, in comparison to consumption taxes, income taxes: discourage labor, interfere with the choice to save, are incompatible with individual freedom within a greater social construct, constrain freedom because they are more arbitrary, and interfere with individual tax timing decisions.

i. The Impact on Returns from Working

All tax systems impose some form of restriction on personal liberty because they mandate government removal of some aspect of an individual's property. Further, all taxes constrain an individual's freedom [p. 29] to engage in the activity that is taxed; taxes distort individual decisions by raising the after-tax return of activities subject to taxation. [FN86] In Locke's view, the overriding consideration attaching private property to the philosophical vision of the self is the transformation of the property by the individual's labor, adding value to it and making it more productive in character. [FN87] As such, the individual has a right to the transformed property or to trade the property for money because the property now consists of "his own person." [FN88] Locke thus emphasizes the relationship between an individual's productive behavior and the consequences of this behavior, which are critical aspects of individual liberty. Under these views, both income taxes and consumption taxes interfere with personal liberty by reducing the returns from working. [FN89] Income taxes reduce disposable income and hence the ability of an individual to purchase goods and services. Higher marginal tax rates under a progressive income tax are generally thought to create further disincentives to work. [FN90]

Consumption taxes also reduce the ability of individuals to command resources and hence the returns from working. Take the example of a retail sales tax of ten percent imposed on a good such as a car. The sales tax raises the retail price of the car by ten percent, thus reducing an [p. 30] individual's purchasing power by the same amount. [FN91] In summary, both income taxes and consumption taxes [FN92] lower the ability to purchase economic resources although the magnitude of the related tax burdens on individuals continues to generate debate among economists. [FN93] Due to the adverse impact of both income and consumption taxes on laboring activity, the ideal Lockean tax would presumably involve neither of these taxes. Instead, the ideal Lockean tax would tax only those activities that have nothing to do with an individual's productive behavior. [FN94] A gift and estate tax would fit this requirement because heirs and recipients of gifts have, for the most part, received wealth without earning it productively through their own actions. But it is certainly not feasible to implement a modern tax system based only on the taxation of gifts and bequests, mainly because the exclusive use of this tax would not raise sufficient revenues. [FN95] In practice, we are left with a choice of [p. 31] implementing a consumption tax or an income tax, or some combination of both. This analysis reveals the main deficiency of a consumption tax with respect to its promotion of personal liberty: a consumption tax permits unearned capital income derived from returns on gifts and bequests, to remain untaxed while an income tax captures both earned and unearned capital income. In a recent essay, Donna Byrne similarly suggests that Locke's philosophy supports the notion that "[d]ollars that are deserved more should be taxed less." [FN96] To the extent that radical consumption tax reform shifts the tax burden away from individuals who enjoy unearned capital income, the reform efforts can be portrayed as deficient from an individual liberty perspective. Part IV of this Article describes in greater detail the need to maintain equality in opportunities to enhance wealth.

With respect to the taxation of earned income, a consumption tax under Lockean principles is the preferable alternative because this tax treats equally all forms of wealth creation. A consumption tax makes working more financially attractive, in comparison to an income tax, by increasing after-tax returns on the portion of labor income placed in savings. [FN97] In this way, an individual enjoys the benefits of his productive behavior to a greater extent under a consumption tax than under an income tax. Further, a switch to a consumption tax regime will arguably produce higher real wages in the long run, additionally benefiting labor. [FN98] The impact of income taxes on savings and other productive activities is discussed at greater length in the following section.

ii. Limits on an Individual's Ability to Choose Productive Activities

a. Choosing to Save

This section argues that income consumption taxes interfere with an individual's ability to choose saving over spending by penalizing the saver. [p. 32] There is clearly a strong relationship between savings and Lockean notions of productive individual behavior: "The classical economists. . . had almost unanimously stressed the critical importance of saving; they regarded it as the means by which men add to their productivity by equipping themselves with tools." [FN99]

Under Locke's theory, individuals seek out a "compact" or social contract to improve their own welfare. [FN100] Individuals unite and give up certain aspects of their inalienable rights because they believe the state offers them greater protection from other individuals who might seek to thwart their pursuit of life, liberty, and happiness. [FN101] As a result, Epstein argues that tax should interfere as little as possible with an individual's choice to use his natural endowments (i.e., talent, skills, risk-taking inclinations, etc.) as he sees fit: A sound tax is designed to interfere as little as possible with the ordinary decisions that individuals would make in the investment and consumption of their capital and labor. On the Lockean theory, the sphere of individual autonomy should be invaded as little as possible in order to secure the maintenance of public order. In the original state of nature no individual can pass judgment on what others decide to do with their liberty or property unless the use of force or fraud is involved. The creation of a system of government should strive not to reduce the scope of permissible individual choice from what it was before. [FN102]

Epstein's desire for tax neutrality has been prominently echoed throughout the tax literature that discusses the merits of consumption taxes. [FN103] In essence, many commentators argue that income taxes discriminate against savers by imposing a greater tax burden on savings than on savers and spenders in a no-tax world. [FN104] This bias results from the [p. 33] previously discussed double taxation of savings under an income tax: a consumption tax is said to be neutral between current and future consumption while an income tax favors current consumption and disfavors future consumption. [FN105] Many proponents of an income tax concede that this bias is unfair, but support an income tax on other grounds such as the need for an effective mechanism to redistribute wealth. [FN106] Others argue that the savings argument is defective, principally because the impact of taxes on saving behavior is unclear. [FN107] A major criticism of consumption taxes is that they tax consumption only in its tangible form while ignoring the fact that savings and wealth have value beyond deferred consumption. As has been often observed, savings are sometimes an end in themselves, not just postponed consumption: people may wish to accumulate wealth in order to feel more secure about their prospects, to provide for their friends and family members, to engender a sense of social power in their communities, and so on. [FN108]

[p. 34] Nevertheless, the concept of unfairness with respect to choice still holds: a tax should, to the greatest extent possible, preserve relative preferences of individuals to conduct the activities they see fit. [FN109] This view is consistent with Lockean notions of free will where free moral agents should be able to choose their own course of action with as little interference from state institutions as possible. [FN110] As discussed, all taxes skew individuals' choices to a certain extent. [FN111] Still, consumption taxes generally do not distort the choice between consumption and savings, and thus lead to a lesser restriction on individual liberty in comparison to the position of an individual under an income tax. [FN112] An income tax upsets the balance by discriminating against savers and punishing those who wish to devote their natural endowments to the most productive behavior possible. [FN113] This point is closely related to the Hobbesian argument discussed in the following section.

[p. 35]

b. Choosing Productive Activities within a Community

Individual freedom does not take place in a void. Freedom must be scrutinized and evaluated in the context of the environment inhabited by individuals. As such, individual freedom ought to be aligned with the interests of the community to the greatest extent possible as long as the ability of the individual to pursue his distinct path through life is preserved. This section argues that consumption taxes do a superior job than income taxes in ensuring the freedom to pursue productive activities to the benefit of both the individual and society and is closely tied to an argument in support of consumption taxes that dates back at least three hundred and fifty years. The main argument in support of a consumption tax is normally traced to Hobbes [FN114] and was later adopted by such prominent political philosophers as John Stuart Mill [FN115] and James Madison. [FN116] Nicholas Kaldor, the British economist who is generally credited with re-invigorating the modern debate surrounding consumption taxes, sets out the main argument as follows: An inhabitant from Mars, admiring the highly intricate arrangements whereby men in society satisfy their needs in common through mutual cooperation, would surely be puzzled to discover that each individual's contribution to the finance of socially provided benefits depends not on the sum of benefits he receives from the community but on his personal contribution to the wealth of the others. It is only by spending, not by earning or saving, that an individual imposes a burden on the rest of the community in attaining his own ends. In all his other activities his own interests and the interests of the community run not counter to one another [p. 36] but parallel. [FN117]

Kaldor suggests it is unfair to tax an individual's productive contribution to the community while idle individuals with lavish lifestyles (reflected by their consumption patterns) bear a lesser tax burden. [FN118] This position is closely related to Lockean notions of private property in the sense that it promotes the view that an individual should reap the benefits of his productive behavior while the community directly (because a third party is willing to pay for the product) and indirectly (because wealth production provides more resources to the community) benefits from this behavior. [FN119] This argument relies on the premise that savings left in the so-called common pool raise aggregate levels of wealth, increase productivity, and benefit society as a whole. Critics of the Hobbesian argument have noted that the common pool idea does not reflect the reality of privately-held wealth "by shareholders whose shares are simply their claims on unconsumed product." [FN120] Additionally, "[i]t is difficult. . . for people who have no wealth to regard other people's private wealth holdings as being in a 'common pool" ' because "[t]hey sure don't have any access to this particular pool." [FN121] Under these views, individuals do not save to promote the social good; rather, they behave self-interestedly to defer consumption to a later date or to enhance their social or economic power.

Society as a whole benefits from these self-interested decisions; Western society has reached an unprecedented level of prosperity and standard of living largely as a result of individual decisions by past generations to save and invest (along with social institutions that protect private property and reward productive behavior). [FN122] Society would simply not enjoy its current standard of living, including good health, longer life expectancies, greater amounts of leisure, and a two-hundred-channel television universe if past generations had consumed as much as they produced. [FN123] In a sense, the freedoms and options available in today's [p. 37] society result from the thrift of generations past. [FN124] Charles Fried elaborates on this personal liberty argument, focusing on an individual's choice to consume economic resources: "[t]o measure contributions on the basis of that withdrawal [by taxing consumption] is the fullest affirmation of the liberty of the individual to determine himself, for a man is free to determine how much he will consume." [FN125] Under Fried's view, a consumption tax better protects the moral integrity of an individual by aligning his decisions with the interests of the larger community: [I]t is a liberty to choose how one will relate to, contribute to, and cooperate with one's fellow men, a liberty to define, develop, and control what will give one satisfaction, a liberty to develop some and not other capacities, in short, the liberty to determine a life plan, to choose one's self. [FN126] An income tax, on the other hand, restricts an individual's ability to choose the morally superior course of action because the individual is punished by taxation if he chooses to contribute indirectly to the community via wealth creation. [FN127]

Professor Warren has attacked this argument concerning choice on the ground that the "argument fails to accept the distinction between persons and things." [FN128] Warren also states: "Although the matter can be disputed, people may be thought of as distinct from things, even when the things are the product of human endeavor. The individual's personhood may be said to extend to his productive capacity, but not to his product." [FN129] Under this view, choosing to purchase a thing in the market place has little [p. 38] or no relationship to individual freedom. However, the argument misconstrues Lockean notions of the right to private property that are so closely tied to the promotion of wealth-building in market democracies. [FN130] Locke's right to property is not a right to a "thing" or even an individual's right to earn a thing. It is only a guarantee of ownership to a thing after it is earned. Because Locke's right to property is a right to the consequences of one's productive actions, [FN131] an individual's personhood extends over the product of his labor and calls for greater institutional protection than a thing he has purchased in the marketplace. [FN132]

iii. Choosing Productive Activities and Self-Identity

This section briefly addresses the distinction between productive behavior and consumption activities in terms of their impact on self-identity, a critical aspect of personal liberty because individuals ought to be as free as possible to define their own vision of the self. [FN133] Fundamentally, Locke suggests that labor is intrinsically related to our being or sense of self because it forms part of the right and need to promote self-preservation. Locke's views have been summarized as follows: To have a right to property is to exact from others the duty of recognizing our personhood. Labour is a creative act by which we impress our conscious will on the brute things of the earth, and it is labour that puts the value on things. Labour is necessary to our being, not just because we must eat, but because we must make of ourselves a distinctive moral character. Property rights must be framed around the rights of personality, to which every rational being is entitled. [FN134]

This conception of the relationship between work and private property does not necessarily entail an overly Calvinist emphasis on "the work ethic." [FN135] Rather, it recognizes that productive functions of [p. 39] individuals are all, in a sense, acts of creation. A principal distinguishing characteristic of man--the "rational animal" according to Aristotle--is the ability to mold or adapt to the environment surrounding us through thought and reason emanating from our sentient minds. Human beings thus have the ability to create an expression of the environment that is original in the sense that our awareness of our distinct individual identity can be impressed on a world external to the mind, in essence a form of creative expression. [FN136] These acts of creation--no doubt related to Locke's sense of man as a reflection of the Creator (the proprietor of man) [FN137]--help to define us as individuals. This is the value that calls for institutional protection.

What role does consumption play in self-identity? Arguments surrounding individual liberty assume that an individual, acting with free will, can choose courses of action such as work, leisure or consumption. However, this argument probably cannot hold for consumption of basic items of survival. Locke indicated that individuals have a right to a subsistence level of existence and the right to consume those resources that are necessary to support this right: "Men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence." [FN138] According to traditional interpretation, [FN139] this right can be fulfilled either by an individual's own labor, or through charity or inheritance. [FN140] Hence, issues of personal [p. 40] liberty and consumption must be put aside until an individual has secured the basic means to survival. It is also true that individuals define themselves at least partly by what and how much they consume; this fact has been all too apparent to marketing companies that target individuals on the basis of their supposed consumption patterns. [FN141] The ability of each individual to define himself is inextricably woven with the notion of personal liberty. James Twitchell strongly endorses the view that consumerism defines us as individuals: "We live through things. We create ourselves through things. And we change ourselves by changing our things. In the West, we have developed the elaborate algebra for commercial law to decide how things are exchanged, divested, and recaptured." [FN142] On the other hand, Robert Frank decries consumerism, which, he argues, is driven by external social concerns over the individual's place within the community (e.g., a "keep up with the Joneses" attitude) to the point where individuals are less happy with their purchases. Frank supports a progressive consumption tax that would, in his view, constrain wasteful consumption patterns. [FN143]

Whatever one's views are concerning consumerism, [FN144] there is one critical aspect that distinguishes consumption from production. As discussed, an individual's productive behavior involves, in part, the impression of his distinct individual identity on his environment. The act of consumption, however, entails a market transaction involving the results of an individual's productive behavior (e.g., his money) and at least one other person. Under a consumption tax, the government interferes with the use of an individual's private wealth only when it is voluntarily put toward purchasing goods and services in the market. [FN145] The act of [p. 41] spending, beyond subsistence purchases, has nothing to do with self-preservation and an individual's productive behavior that Locke so closely ties to the right to property and its protection of an individual's pursuit of life, liberty, and happiness. Consumption taxes hence interfere to a lesser extent with the individual's attempt to pursue his own course through life and create his own vision of the self.

iv. Welfare Economics and the Allocation of Rights

Would a consumption tax lead to greater levels of overall wealth in comparison to income taxes? The answer is "yes," according to a remarkable consensus among public finance economists who have examined this issue. [FN146] Economists generally assert that a consumption tax will promote economic growth mainly because a consumption tax lowers the tax burden on new investment activity; a consumption tax increases the after-tax return on marginal investments, thus increasing the incentive to invest. [FN147] According to one study, almost half of historical economic growth in the United States is attributable to capital accumulation. [FN148] [p. 42] The previous section suggested that a consumption tax does a better job at aligning an individual's freedom with the interests of the community. The position implies that consumption taxes are superior partly because they do not restrict the generation of resources for the community as much as income taxes do. This section concludes that, while the above may be true, arguments surrounding welfare economics do little to support the main thesis of this article mainly because such arguments involve utilitarian considerations that are contrary in many ways to Lockean support for individual property rights.

a. Pareto Efficiency and Individual Welfare

Under Lockean theory, individual rights enhance individual efficiency by protecting an individual's actions against state intrusion as well as by maximizing desired courses of actions available to the individual. As discussed, the state is a necessary element in the promotion of this individual efficiency since individuals enter into the social contract to enhance some freedoms (such as the right to property) even while giving up other freedoms (such as the option to pursue personal vengeance against someone who has allegedly wronged the individual). The state thus protects the individual's interests and his pursuit of life, liberty, and happiness. Similarly, individuals implicitly accept a coercive system of taxation that forcibly removes their private property. This "network of forced hypothetical exchanges" [FN149] is necessary to overcome problems that would inevitably sabotage a voluntary scheme of taxation, such as free-riders and hold-outs. [FN150]

Professor Epstein compares the formation of the state to a Pareto-superior move because "some natural rights are surrendered in exchange for the greater protection of the natural rights that are retained," [FN151] relying on the frequently-used notion that welfare economics are useful to evaluate normative measures of different policy alternatives. [FN152] A policy is considered to be efficient (i.e., Pareto-optimal) when it is not possible to change the allocation of resources to make one individual better off without making another individual worse off. [FN153] In contrast, a Pareto-superior policy change improves the lot of one person without harming another, by using resources more efficiently. [FN154]

[p. 43] Would a switch from an income tax to a consumptive tax be a Pareto-superior move from the perspective of distribution of individual rights? As previously argued, under a consumption tax, an individual continues to enjoy state protection of his person and liberty while being subject to a lesser restrictions on personal liberty. [FN155] Thus, a switch to a consumption tax represents, at first glance, a Pareto-superior move. Yet there are a number of limitations inherent in the Pareto criteria. [FN156] Because the transition to a consumption tax would almost certainly make at least some individuals worse off, the change cannot truly be described as Pareto-superior. [FN157] For example, any type of radical tax change would result in at least some short-term change in the distribution of tax burdens. [FN158] Any individuals--and there will invariably be some--who end up being subjected to a higher tax burden under a consumption tax will suffer from a greater intrusion on their personal liberty (because a larger amount of their property has been taken away).

b. Kaldor-Hicks Efficiency

A related measure of efficiency that is often seen as more useful for choosing between different policy alternatives is the Kaldor-Hicks measure of efficiency. [FN159] The Kaldor-Hicks measure permits one to contrast different types of policy alternatives; the new outcome is called Kaldor-Hicks efficient if it improves the welfare of the beneficiaries to the point where they can compensate the losers enough to make the losers indifferent. [FN160] With respect to the distribution of rights, the Kaldor-Hicks model runs into problems unless we assume that each individual has the same preferences concerning individual freedoms. To get around this problem, many commentators resort to asking whether the change will promote wealth maximization: all else being equal, it is argued, wealth maximization provides a rough measure of social welfare. [FN161] This is closely [p. 44] related to the notion that, in a Lockean world, policies should try not to inhibit wealth creation since a larger pie (i.e., greater aggregate wealth in society) presents greater opportunities for individuals to pursue their own desires and needs. [FN162] As discussed, consumption tax reform will likely lead to greater overall societal wealth. Under the Kaldor-Hicks theory, the winners under consumption tax reform (i.e., those who are made wealthier) could hypothetically compensate any losers. [FN163] This could be accomplished by traditional wealth redistribution using either the tax system or direct government grants. In this way, individual welfare could be promoted under consumption tax reform (along with greater freedoms to pursue chosen courses of action) without harming the more economically vulnerable members of society. However, the Kaldor-Hicks approach is also troublesome since it equates society's overall utility with wealth maximization. This utilitarian approach is arguably contrary to principles that support individual liberty since, in many ways, a Kaldor-Hicks efficient outcome could sacrifice individual interests for the collective interest.

v. The Impact of Arbitrary Tax Laws

As previously discussed, tax laws under Lockean theory should preserve, to the greatest extent possible, the ex ante preferences of individuals. [FN164] Distortion of these preferences is undesirable in that it arguably does not relate to the chief functions of the state--that is, protecting liberty and property. Such distortions inhibit personal liberty by placing an individual's right to choose his own course of action at the disposal of the state: "[Freedom is] a liberty to dispose, and order, as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is; and therein not to be subject to the arbitrary will of another, but freely follow his own." [FN165] While a tax distortion does not necessarily prevent an individual from pursuing his choice, the distortion creates an incentive that skews the ultimate decision. For example, a high-rate income tax on farming would deter individuals from engaging in this activity, including those who dearly wish to be [p. 45] farmers. [FN166]

Tax observers often comment that an ideal tax system would involve an attempt, comprehensively, to tax a wide range of activities to ensure that certain activities are not favored or disfavored by taxes. These tax commentators have long recognized that the Haig-Simons income tax base is problematic because the tax base, from a practical perspective, necessarily involves a number of exclusions like imputed income or human capital. [FN167] Consumption tax proponents often argue that the concept of an income tax is inherently defective because it is impossible to reconcile the desire for a comprehensive tax base and the administrative difficulties with imposing a tax on this comprehensive base. [FN168] An income tax involves a greater amount of arbitrariness than a consumption tax because the former cannot tax certain activities that involve wealth creation and hence these activities are favored over others. Two examples serve to illustrate the position that it is extremely difficult to enact a comprehensive income tax base. In the first example, Joan buys one hundred shares of a public company called Ecommercegamble.com at one dollar per share. At the end of the year, each share is worth ten dollars and Joan's personal wealth has increased by nine hundred dollars. In theory, the Haig-Simons income tax base would tax the increase in Joan's wealth, including appreciation in her assets. In practice, the gain in wealth attributable to the appreciation of the shares' value will remain untaxed as long as Joan retains the shares; these types of gains are normally not taxed until the property is sold or otherwise transferred. [FN169] Income tax systems do not tax asset appreciation until sale or transfer mainly because it has not been considered administratively feasible to do so. [FN170]

[p. 46] In the second example, Jeremy is a third year-law student. Jeremy's investment in law school is akin to investing in productive machinery because his legal education will generate a potential stream of income for him. [FN171] For this reason, Jeremy's legal education is sometimes referred to as "human capital." [FN172] Jeremy's wealth has thus increased through his education despite the fact that he has not yet begun to work full-time. There may even be ways for Jeremy to generate wealth before he begins work, such as taking out a bank loan (which the bank may be willing to loan him because it believes he will generate sufficient earnings as an attorney to cover the loan). [FN173] The future stream of income can be brought back in time and given a present value using finance calculations. [FN174] Increases in wealth as a result of investments in human capital are at least arguably appropriate under the comprehensive Haig-Simons definition of income. [FN175] Nevertheless, the current income tax system ignores these types of increases in wealth because it would be administratively unfeasible to tax the increase or because it would be considered an unwarranted intrusion on personal liberty to do so, [FN176] or for some other reasons. [FN177]

Further exceptions to the Haig-Simons income tax base include gifts and bequests as well as many personal consumption items such as home ownership. [FN178] There are arguably many sound policy reasons supporting these exceptions. But each exception under an income tax potentially distorts a taxpayer's choices and grants government authority over which [p. 47] types of activities to favor and which types to disfavor. [FN179] A consumption tax can be viewed as less arbitrary than an income tax in the sense that the consumption tax base is much less contentious--a consumption tax simply taxes the using up of economic resources. [FN180]

vi. The Timing of Taxes

Warren has argued that consumption taxes are less consistent with individual liberty than income taxes as a result of timing issues: "A person's collective responsibilities are concluded at the time of production under the income tax; by contrast, under the consumption tax those responsibilities are not discharged until a person consumes his last resource." [FN181] Under this view, the government's potential claim over an individual's product lasts longer under a consumption tax in comparison to an income tax and hence represents a greater intrusion on the individual's personal liberty.

Consumption can be viewed as the final step in the production process. The first step--savings and investment--calls for tax relief to permit the process to run its course with minimal state interference. This view is consistent with Lockean theories of natural rights that emphasize the right to self-preservation. This right is secured through productive activities and the state ought to offer as much protection as possible to this right to enable an individual to enjoy the benefits secured through his efforts. [FN182] Further, the ability to defer taxation until the last moment would be looked upon by most individuals as a promotion of their liberty and not a restriction. Aside from issues surrounding the time value of money, a tax payable at some future date is probably of little concern to the taxpayer. If an individual could stay the hand of the government over his property until the last possible moment, he would probably choose to do so if he regarded the property as his own and not subject to a kind of government lien (although the latter perspective is a technically more accurate one under tax law). If the deferral of the tax bill were to result in a tax savings, [p. 48] then the taxpayer would almost certainly be more inclined to prefer the deferral. [FN183]

C. TWO QUALIFICATIONS TO THE MAIN ARGUMENT

The main thesis of this article--that consumption taxes infringe personal liberty less than do income taxes--is subject to two provisos generally applying to discussions that contrast ideal forms of consumption taxes with ideals forms of income taxes. First, most individuals in the United States with low or middle incomes save very little, effectively consuming almost as much as they produce (or even get into greater debt each year and thus consume more than they produce). [FN184] A switch to a consumption tax regime may have little practical import to these individuals. The situation becomes even more complex when lifetime earnings [FN185] or notions of inter-generational equity [FN186] are taken into account. Second, the current income tax system already imposes consumption tax treatment on the savings of most low and middle income households. [FN187] For example, the Internal Revenue Code offers preferential tax treatment on pension savings, [FN188] purchases of residential homes [FN189] and life [p. 49] insurance. [FN190] For this reason, the current income tax system is really a hybrid income tax/consumption tax system.

IV. TAXATION AND COLLECTIVE INTERESTS

This section concentrates on taxes and society as a whole, a matter necessarily involving issues of distributive justice. [FN191] An important aspect of the current income tax system is its focus on a taxpayer's ability to pay taxes by scrutinizing increases in wealth over the course of the tax year. [FN192] The "ability-to-pay" principle asserts that governments should redistribute wealth away from individuals who are capable of contributing larger sums to the collective pool to relatively less wealthy taxpayers. [FN193] Opponents of consumption taxes are often concerned that radical consumption tax reform will dilute the distributive aspects of the current tax system. In recent years, tax law professors have reviewed the political, philosophical and economic foundations of distributive justice. [FN194] Part IV of this article will only briefly set out some of the main arguments for and against the use of tax as a mechanism to redistribute wealth. The first section sets out Locke's views on wealth redistribution and acknowledges that these views have been used to justify different conclusions concerning distributive justice. The second section briefly reviews the argument that, in order fully to promote individual and social welfare, individuals ought only to pay taxes for the benefits they receive. The third section discusses the argument that tax should be used as a vehicle to promote equality of opportunity through wealth redistribution. The fourth section concludes that perhaps the best justification for redistribution lies in the necessity to promote the appearance and reality that wealth is being shared in a just society and so preserves modern market-oriented institutions, such as the right to private property, that are critical to an individual's liberties and pursuit of happiness.

[p. 50]
A. LOCKE'S VIEWS ON DISTRIBUTIVE JUSTICE

Locke does not appear to have explicitly set out views on the allocation of tax burdens among individuals with different economic levels of well-being. He does, however, recognize the necessity for taxes based on the proportion of the benefits received: "'Tis true, governments cannot be supported without great charge, and 'tis fit everyone who enjoys his share of the protection, should pay out of his estate his proportion of the maintenance of it." [FN195] This passage seems to support the "benefit principle" of taxation (i.e., individuals ought to pay only for government services they receive) [FN196] or, alternatively, a flat rate of taxes. [FN197] Yet, as discussed, Locke also discusses limitations on the right to property that involve concerns surrounding the impact of private property on the greater community. Locke argued that an individual should appropriate from property held in common only as much as he can use before the property spoils (e.g., agricultural products going to waste), and he should ensure that sufficient resources are left in the common pool for others. [FN198] However, the abundance of resources in the state of nature ensured enough resources so that removal of a portion of these resources would not affect the welfare of other individuals.

In Locke's view, the introduction of money changes the circumstances in which individuals operate. [FN199] Locke realized that money permits accumulation and trade of greater amounts of property, inevitably leading to scarcity of land and other resources. Further, use of money leads to greater disparities in wealth between individuals, prior to the advent of money, individuals could keep fewer resources since the resources would spoil if they were accumulated in excess of consumption. [FN200] The use of money permitted individuals to hoard wealth because resources could then be exchanged for coins that never spoiled. Through the use of money, individuals have "agreed to disproportionate and unequal possession of the earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of." [FN201] However, in several [p. 51] passages, Locke seems to suggest this unequal division of property is not part of the social contract, and the job of representative government is to ameliorate unequal access to property. [FN202] In fact, Locke repeatedly discusses the necessity for government to regulate access to property, especially when resources are scarce. [FN203] The only explicit limit Locke places on this regulation, including taxation, is that it must come from a duly elected government, not some group "without such consent of the people." [FN204]

In a controversial passage, Locke even suggests that the needy have certain property rights, [FN205] although this assertion has been disputed. [FN206] In a report to the government on reforming poverty laws, Locke wrote: "Everyone must have meat, drink, clothing, and firing. So much goes out of the stock of the kingdom, whether they work or no." [FN207] Locke's views on [p. 52] the right to basic subsistence [FN208] and its corollary that enough common resources must remain for other individuals to put to productive use fit well with conceptions of progressive distributive justice. His views support at least two tax levels: (1) no tax on items of basic subsistence, and (2) another level of tax once the individual has secured the means to survival. In fact, most consumption tax proposals reflect a similar viewpoint, providing relief for levels of subsistence, including either household exemptions up to stipulated income levels or exemptions for food. [FN209]

Locke's deeds and writings also support a less welfarist viewpoint. Indeed, after the Civil War, Locke helped to draft the Fundamental Constitutions of Carolina, which permitted a hierarchical society based on land holdings and included a hereditary aristocracy. [FN210] Locke further appears to uphold and justify the vast wealth disparities of his own era in a number of passages. [FN211] In fact, Locke's writings have been interpreted to support political/economic systems as diverse as a laissez-fair free market system, [FN212] a social democracy [FN213] and a communitarian polity. [FN214] Further, it can be argued that Locke only advocated equal treatment for all individuals under the law; the fact that some individuals have been fortunate enough to be born with their own talents and the fact that others are born into relatively wealthier families are simply facts of life, not matters that government institutions ought to try to change. [FN215] This position is discussed in the next section.

[p. 53]

B. THE CASE FOR EQUALITY OF RIGHTS UNDER THE LAW

Some modern-day natural rights theorists have argued that using tax as a distributive mechanism acts as an unacceptable intrusion upon an individual's inalienable property rights; they reject the view that taxes should be used as a mechanism to redistribute wealth from wealthier taxpayers to those taxpayers with less wealth. Robert Nozick puts forth the conservative libertarian position by asserting (a) that an individual is entitled to his private property because he obtained it in accordance with justice (e.g., he earned the property, purchased it, or acquired it through some other just acquisition such as a gift) and (b) that no other individual is entitled to this property unless he similarly acquires it in accordance with justice. [FN216] In Nozick's view, the central aspect of the right to property is the right to choose what to do with the property. [FN217] Progressive income taxes are unacceptable because they involve an unjust theft by the state of an individual's property. [FN218] Accordingly, Nozick concludes: "[t]axation of earnings from labor is on a par with forced labor." [FN219]

Nozick's approach may be intuitively attractive because it relies on the fundamental principle that people ought to treat others as ends-in-themselves and ought to respect each other's individual choices. [FN220] However, Epstein effectively criticizes Nozick when he asserts that Nozick does not provide a useful framework for discussing any form of taxation: the simple fact that individuals enter into a compact to obtain greater [p. 54] benefits through government institutions necessarily involves taxation. [FN221] Without a comprehensive system of taxation to pay for police, courts, schools and the like, modern market democracies would be unable to function effectively. Alternatively, a progressive income tax system has been portrayed as straight-out discrimination against the rich - a view that apparently gained support after the modern United States income tax code was introduced in 1913: [FN222] That a favored class should exist under the law is abhorrent to the sense of equality which must ever animate the motive power of a government by the people. [T]he legislature in deliberately violating this principle does nothing else than convert what purports to be a statute law into an exercise of arbitrary power, which in reality is no law at all. [FN223]

Critics of the income tax system, including some fiscal exchange theorists, sometimes suggest that a tax can be justified only if it follows the "benefit principle," according to which individuals should pay taxes only for the benefits they receive from government. Proponents of this position often argue that taxes should be proportional (i.e., a flat rate), and progressive taxation (i.e., higher tax rates on higher marginal amounts of income or consumption) is, as noted above, simply arbitrary discrimination against relatively wealthier taxpayers. [FN224] Yet even a flat rate imposes a larger tax burden on wealthier taxpayers because they have relatively larger incomes and hence will pay more taxes. The rationale for proportionality has thus often been based on a kind of insurance theory of the state where it is argued, individuals with greater wealth benefit to a greater extent from state protection and hence should pay a proportional percentage of their larger estates to the government. [FN225]

[p. 55] But what of the wealthy individual who lives in a gated community policed by a private security force? This individual could argue that he should be taxed on a lesser proportion of his income because he is already privately paying for protection. [FN226] He might argue that he should pay only for direct benefits provided to him by the government - a problem in that the actual value of benefits received is impossible to measure. [FN227] In that sense, proportional taxes are as arbitrary as progressive taxation, [FN228] although it is still possible to argue that a progressive rate structure is less desirable from an economic perspective because it is generally thought to be more harmful to the economy than a proportional rate. [FN229] Critics who suggest that taxes are an unacceptable intrusion on personal liberty rarely take their positions to their logical conclusion; proponents of an absolutist view of an individual's right to property should be content only with voluntary payment of taxes (a system of taxation that [p. 56] apparently existed in the Middle Ages) [FN230] or a head, poll, or lump sum tax (i.e., each individual pays the same regardless of his income or wealth) because these taxes are assessed equally on all taxpayers. [FN231]

Nevertheless, many of the critics of the progressive income tax take the notion of private property rights, as did Locke, very seriously. Their arguments reflect a vision of the world as being a better place if everyone respects each others' rights and lets the market allocate resources to individuals in a productive manner. According to this view, a more efficient allocation will raise aggregate levels of wealth, and all sectors of society, including low-income earners, would benefit. However, these views fail to take into account the necessity to promote (actual and perceived) equality of opportunity to individuals within a market-driven democratic society with large disparities of wealth.

C. THE CASE FOR EQUALITY OF OPPORTUNITY

Proponents from what is often called the liberal egalitarian school of thought argue that the promotion of equality of opportunity is an important component of a just society. John Rawls, perhaps the most well-known advocate of this position, states: In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those with the same abilities and aspirations should not be affected by their social class. . . .To accomplish this end it is necessary to impose further basic structural conditions on the social system. Free market arrangements must be set within a framework of political and legal institutions which regulates the overall trends of economic events and preserves the social conditions for fair equality of opportunity. [FN232] [p. 57] Wealth and income disparities [FN233] are large and growing in our society: according to one study, 37.1 percent of net worth in the United States was held by the wealthiest one percent of households in 1989, while 31.5 percent of the wealth was held by the wealthiest one percent in 1983. [FN234] Further, the ability of individuals and households to move upward to different income classes during their lifetimes (i.e., income mobility) does not appear significant. Two prominent tax economists, after reviewing research in this area, conclude: "[T]he best evidence available on this subject suggests that there is a great degree of inequality even in lifetime incomes, and this too has been growing." [FN235]

Why do these wealth and income inequalities persist? Although the matter is certainly not beyond dispute, individuals acquire wealth in at least the three following ways. First, the invisible hand of the market ensures that those individuals who develop their natural endowments (e.g., talent, skills, risk-taking inclinations) and work hard are rewarded by an efficient marketplace. [FN236] Second, individuals are born into and grow up in environments (e.g., families, peers, neighborhoods, school districts) that either encourage or discourage the strategies designed to accumulate wealth. [FN237] Third, many wealth transfers to individuals have nothing to do [p. 58] with market functions. In fact, many large wealth transfers are still earned the old fashioned way: by gift or inheritance! [FN238] The libertarian arguments fail to take into account the second and third factors noted above, namely the notion that an individual may acquire wealth not by earning it, but by mere happenstance. Similarly, this view is the greatest limitation of Locke's theory of the right to property, which is based on the notion that property is the reward for (or consequence of) an individual's productive behavior. Locke's theory of the right to property has been criticized because, in many ways, the theory argues for the maintenance of the status quo and preserves, at least to a certain extent, the initial distribution of wealth in society. [FN239] The theory fails to take into account that property is sometimes allocated to individuals on a path-dependent basis for reasons that have nothing to do with merit or productive work. [FN240]

Taxes play an important role in the promotion of social welfare because taxation is a means to redistribute wealth and resources from one sector to another sector of society that can benefit from the resources. [FN241] Arguments in support of the "ability-to-pay" principle traditionally rely on a vision of the world where those who can afford to pay more in taxes should be forced to pay more. [FN242] It is based on a vision of the world as a [p. 59] place where the market alone would not equitably--or perhaps not even efficiently--allocate resources to individuals in such a way as to reduce income inequalities. It rests, as John Stuart Mill recognized, on a vision of nations as communities where all individuals, at least to a certain extent, must rise or fall together: As, in the case of voluntary subscription for a purpose in which all are interested, all are thought to have done their part fairly when each has contributed according to his means, that is, has made an equal sacrifice for the common object; in like manner should this be the principle of compulsory contributions and it is superfluous to look for a more ingenious or recondite ground to rest the principle upon. [FN243]

Wealth redistribution recognizes that the bestowal of economic resources continues to play an important part in an individual's pursuit of happiness. [FN244] Hence, wealth redistribution is necessary to promote the ideal of the meritocracy, where each individual is given the opportunity to best fulfill his pursuit of happiness. [FN245] A non-progressive system of taxation [p. 60] perpetuates an uneven playing field and arguably is contrary to generally-accepted values in modern market democracies. [FN246] The ideal of the meritocracy demands that each citizen should have similar opportunities to control his own destiny as well as to participate in political decision- making. A market democracy permits economic power (and hence those who hold the wealth) to wield greater influence and potentially to shape the political agenda to their will. [FN247] Accordingly, decisions at the political level are not necessarily made in the public interest (i.e., in the utilitarian sense of the greatest good for the greatest number of citizens) but may be made to benefit those who wield power because they own a disproportionate amount of the wealth. [FN248] In fact, it is (economically) rational that wealthier individuals develop such strategies to perpetuate their power. These decisions may help to perpetuate an agenda of the powerful few and maintain inequality of opportunity. [FN249] Redistribution of wealth works against or slows this concentration of power.

[p. 61]
D. RECONCILING INDIVIDUAL LIBERTY WITH COLLECTIVE INTERESTS

i. Striking a Balance
The previous sections in this part reveal the tensions within modern market democracies that strive to promote personal liberty while attempting to promote equality of opportunity - ideals that conflict much of the time. According to Locke, "[e]veryone as he is bound to preserve himself, and not to quit his station willfully; so by the like reason when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind." [FN250] This passage attempts to reconcile the tension between an individual's inherently selfish nature (arising from the need to promote self-preservation) and his desire to form communities. Locke's views on human nature appear to be consistent with modern sociobiological views of the human animal. [FN251] Sociobiologists and other evolutionary theorists have noted the tension between views of man as a social animal [FN252] and man as genetically predisposed toward self-interested behavior. [FN253] In fact, there is growing sociobiological support for a type of [p. 62] altruistic behavior mainly surrounding the theory of reciprocal altruism. [FN254] Thus wealth redistribution can be viewed as a form of insurance where individuals believe they will be protected by others in their community should they fall on difficult times themselves. [FN255] Using sociobiological views of human nature to generate public policy recommendations is admittedly problematic because doing so breaches the philosophical distinction between matters of fact (an "is") and normative recommendations (an "ought") discussed previously. [FN256] Perhaps a better view would rely on the notion that systems of ethics change or evolve over time to take into consideration changing cultures and environments: views on individuals as sentient, tool-using, communicating apes must be placed within the context of the time and [p. 63] place inhabited by these individuals. [FN257] We are fortunate enough to live in a society and an era of great prosperity, [FN258] not in a time where life was "brutish and short" as Hobbes put it. Societal wealth ought to be shared both to improve the lot of relatively poor individuals in order to promote equality of opportunity and to preserve the fundamental institutions of private property that permitted this wealth to be generated in the first place. In this sense, taxes and wealth redistribution can be viewed as consistent with liberty. [FN259]

Montesquieu came to this realization over two hundred years ago when, after a review of the tax policies employed by many of the world's governments, he concluded: It is a general rule that taxes may be heavier in proportion to the liberty of the subject, and that there is a necessity for reducing them in proportion to the increase of slavery. This has always been and always will be the case. It is a rule derived from nature that never varies. [FN260] Montesquieu suggests higher taxes are more consistent with liberty because, in democratic nations, citizens see taxes as consensual payments for tangible benefits they receive as well as a guarantee of security and tranquility. [FN261]

Appendix A contrasts international standards of living [FN262] and estimates on national political freedom [FN263] with the total amount of tax [p. 64] receipts and general government revenues collected by the related governments. [FN264] Appendix A reveals a rough correlation between relatively higher levels of government taxes (and spending), political freedom, and higher standards of living. The governments with higher taxes and higher standards of living are considered to be among the more liberty-oriented countries of the world; all of these governments employ progressive income tax systems. [FN265] Governments with lower standards of living and relatively lower levels of taxation possess transitional economies and are striving toward more market-oriented democratic societies. [FN266] While this analysis is unscientific, it does give a sense that Montesquieu's observations still hold today: governments imposing significant taxes generally protect the liberty of their citizenry to a greater extent than governments imposing lesser tax burdens. However, this analysis does not close the debate surrounding the need for a more limited government: [FN267] it simply shows that significant tax burdens on individuals along with concomitant redistributive policies are consistent with the preservation of individual freedom within modern market-oriented democracies. [FN268] [p. 65] Under this view, a tax system does not try to equalize the position of all individuals, but acts as a kind of rough justice to promote equality of opportunity for individuals who are relatively worse off. Such equal footing affords individuals greater opportunities to access the resources necessary for the pursuit of their own freedoms. Redistribution of wealth and the accompanying high levels of taxation also help to promote the view that all (or almost all) benefit from capitalist taxation systems; this is an important norm that continually needs to be communicated to citizens in order to legitimize social institutions protecting private property. As such, payments toward redistribution of wealth can be seen by the taxpayer as just another payment to the state for protection of the security of the individual's person, the main goal of Lockean private property. [FN269]

ii. Consumption Base vs. Income Base

The previous analysis suggests that reform measures should strive to be revenue-neutral and distributively neutral in order to preserve existing patterns of tax burdens on individuals. Which tax base--consumption or income--should serve as the basis to achieve this result? Although this article argues that consumption taxes impose a lesser restriction on individual liberty, there are several practical problems with the use of a consumption tax base to measure an individual's potential contribution to his collective responsibilities.

First, it may not be administratively feasible to raise current levels of taxes by way of a consumption tax alone. A revenue-neutral [FN270] and distributively-neutral [FN271] consumption tax may have to impose deeply [p. 66] progressive tax rates on upper levels of spending, [FN272] hence greatly distorting economic decision-making. Concerns surrounding the distributional impact of taxes on poorer taxpayers led Cordell Hull, the main architect of the modern United States income tax system introduced in 1913, to support an income tax base because it would permit the effective taxation of wealthier taxpayers. [FN273] The simple fact remains that low and middle income earners generally save very little, while upper income earners save to a far greater extent; hence, in practice, it will be difficult to maintain current distributive patterns with a consumption tax alone, especially one that imposes a flat rate under most of the existing proposals. [FN274]

Some consumption tax proponents argue that a progressive consumption tax along with a bolstered gift and estate tax will meet necessary revenue demands. [FN275] But no industrialized country has used a consumption alone (even with a gift and estate tax) to meet its revenue objectives; consequently, there is no evidence in the real world that radical consumption tax reform could achieve these objectives. The risk of revenue shortfalls is simply too great, perhaps resulting in reduction of government services and harm to those who can least afford it. [FN276] Further, taxation of wealth through progressive rates, a revitalized estate tax or otherwise, is inconsistent with the fact that savings must to be exempted [p. 67] from taxation to promote personal liberty. [FN277]

Second, transitional issues involved in switching to a pure consumption tax system are dauntingly complex with much disagreement concerning, for example, the ultimate impact of reform on wealth held when the reform is enacted. [FN278] Even supporters of consumption taxes note the uncertainty surrounding these transitional issues, [FN279] recognizing that it would probably take many years for the reform efforts to reach their full potential. [FN280] Much of the previous analysis within this article posed questions concerning preferable alternatives from the perspective of a no-tax world. From this perspective, a consumption tax seems to be preferable. But, in the real world, we are stuck with an income tax that has been in place for eighty-seven years. Again, the transitional risks seem to be significant and wholesale reform may upset many social patterns and practices individuals have relied on and taken for granted for decades.

Third, it is unlikely that sufficient political support would develop around a system that permitted extremely wealthy taxpayers with miserly spending habits to remain virtually tax free, as Kaldor himself seems to have realized. [FN281] As noted previously, many people have conflicting views [p. 68] on the subject of wealth; on the one hand, wealth creation is portrayed as a social good while, on the other hand, excessive wealth or greed is frowned upon. [FN282] As shown by this article, there are strong economic arguments against taxing investment and savings as well as strong individual liberty arguments. Nevertheless, voters may not approve of a tax system that exempts savings and investment from tax. [FN283] From the voting public's perspective, an individual's income still represents the most comprehensive measure of an individual's ability to pay taxes for the common cause, as noted by Edwin Seligman, an influential proponent of income taxes. [FN284] A consumption tax base as a means to gauge distributive justice suffers from the fact that standards of living may have very little or possibly even no relationship with an individual's ability to pay. Further, the sole use of a consumption tax ignores the fact that wealth generates intangible benefits to individuals (e.g., heightened social status) beyond postponed consumption. [FN285]

Fourth, there are serious international tax concerns militating against the imposition of a pure consumption tax regime. [FN286] Because the United States' economy is extensively linked with the economies of its major trading partners, reform measures ought to take into consideration the impact these linkages have on the domestic economy. [FN287] These linkages are increasing as a result of the development of new information technologies and the rise of electronic commerce (the world's first truly borderless form of commerce): it is estimated that the United States currently produces approximately 80 percent of the world's e-commerce [p. 69] goods and services. [FN288] Further, every tax treaty negotiated by the United States with a foreign country covers income taxes imposed only at the federal level. [FN289] Renegotiation of these treaties, if it is assumed that trade partners are willing to renegotiate fundamental aspects of international tax policy, [FN290] could take years. Trade partners probably will not sit by passively while the United States enacts fiscal change that could upset their own economies.

V. CONCLUSION

John Locke asserted an individual's labor is his own and hence benefits derived from this labor should belong to the individual and not to the state. He would probably not be pleased with the current United States income tax system with tax rates he would no doubt consider confiscatory. [FN291] However, Locke would also likely be amazed at the level of government services provided by modern market democracies along with correspondingly high standards of living and high levels of wealth for average households. Locke's quest for the truth was always firmly fixed on how to improve the lot of all individuals, including the average citizen, by setting out views on natural rights to promote the common good. Perhaps he would agree the ubiquitous presence of government along with myriad linkages between citizens and their representative government would call for complex social institutions like modern income tax systems. While recognizing the limitations inherent in any philosophical discourse, this article has shown how Locke's observations continue to provide insight to policy analysts trying to formulate prescriptions to [p. 70] govern individual behavior within modern market-oriented democracies. Locke recognized the importance of a fundamental natural law: we must produce more than we consume to promote individual and community survival. He further suggested that an individual's productive behavior is interwoven with his ability to pursue life, liberty, and happiness. From a theoretical perspective, an income tax intrudes to a greater extent on personal liberty in comparison to a consumption tax because it penalizes productive human activity to a greater extent than a consumption tax.

Nevertheless, a tax system should continue to redistribute wealth to promote equality of opportunity among individuals who inhabit the real world with societies marked by large income and wealth disparities. It is not likely that progressive consumption taxes alone can effectively perform this redistributive function. Redistribution of wealth is also necessary to promote the perception that the wealth produced by capitalism is being shared; otherwise, a potential majority of the electorate may conceivably one day seek other institutional alternatives at the expense of the right to property and its accompanying liberties. The analysis reveals the complex interaction between taxes and individual liberty: taxes inhibit liberty by constraining an individual's choice to pursue productive activities, yet redistributive taxes promote liberty by expanding choices and opportunities for other individuals.

APPENDIX A

STANDARDS OF LIVING, INDIVIDUAL FREEDOM AND TAXES

Country	Standard of Living Rank	Political Rights Rating	Civil Liberties Rating	Total Tax Receipts (% of GDP)	General Govt. Spending (% Of GDP)
Canada	1	1	1	36.8	42.8
France	2	1	2	45.7	51.6
Norway	3	1	1	41.1	42.4
USA	4	1	1	28.5	33.7
Iceland	5	1	1	32.3	34.0
Finland	6	1	1	48.2	56.2
Netherlands	7	2	1	43.3	49.9
Japan	8	1	2	28.4	28.4
New Zealand	9	1	1	35.8	N/A
Sweden	10	1	1	52.0	62.9
Korea, Rep of	30	2	2	23.2	26.4
Portugal	33	1	1	34.9	41.1
Mexico	49	3	4	16.3	N/A
Turkey	69	4	5	25.4	N/A

N/A means not available

Sources: United Nations, Human Development Index (1999) (reviewing data from 1995); Organization for Economic Cooperation and Development, OECD in Figures 36-39 (1999) (reviewing data from 1995-1997). Freedom House, Table of Countries 1999-2000: Comparative Measures of Freedom (1999) http:// freedomhouse.org/table1.html (1 represents the most free and 7 the least free).

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[FN1]. See I.R.C. § 61(a) (defining gross income as "all income from whatever source derived"). R. M. Haig, an early influential proponent of income as the appropriate tax base, indicated: "Income is the money value of the net accretion to one's economic power between two points of time." See R. M. Haig, The Concept of Income-Economic and Legal Aspects, in The Federal Income Tax 7 (1921). For more formal definitions of the income tax base and the consumption tax base, see infra notes 71-81 and accompanying text.

[FN2]. All of the above-noted proposals focus taxation on consumption. S ee, e.g., Michael Boskin, An Economist's Evaluation of the Political Discourse on Fundamental Tax Reform Proposals 13 (Center for Ecomonic Policy Research Pub. No. 446, 1995) "Although the major reform proposals are very different approaches to consumption taxation, it is important to stress the conceptual equivalence of these approaches to taxing consumption." Id. For a discussion of these consumption tax proposals, see infra notes 77-81 and accompanying text. For a lively account of the pressures to reform the income tax system with a consumption tax system, see Michael J. Graetz, The Decline (and Fall?) of the Income Tax 3 (1997). "The income tax has served the nation well during this century. Now, for the first time, its survival is being threatened." Id.

[FN3]. In fact, the debate has been traced back at least as far as three hundred and fifty years to Hobbes who wrote in support of consumption taxes:
[T]he Equality of Imposition, consisteth rather in the Equality of that which is consumed, than of the riches of the persons that consume the same. For what reason is there, that he which laboureth much, and sparing the fruits of his labour, consumeth little, should be more charged, then he that living idlely, getteth little, and spendeth all he gets; seeing the one hath no more protection from the Common-wealth, then the other? But when the Impositions, are layd upon those things which men consume, every man payeth Equally for what he useth: Nor is the Common-wealth defrauded, by the luxurious waste of private men.
Thomas Hobbes, Leviathan 386 (Penguin Classics 1986) (1651). For a review of the Hobbesian argument, see infra notes 112-16 and accompanying text.

[FN4]. See Nicholas Kaldor, An Expenditure Tax (1955) (supporting a progressive consumption tax on equity and efficiency grounds); R.A. Musgrave, In Defense of an Income Concept, 81 Harv. L. Rev. 44, 45 (1967) (suggesting that support for a consumption tax or an income tax boils down to value judgments); William D. Andrews, A Consumption-Type or Cash Flow Personal Income Tax, 87 Harv. L. Rev. 1113 (1974) (supporting a cash flow tax that only reflects personal consumption); Alvin C. Warren, Fairness and a Consumption-Type or Cash Flow Personal Income Tax, 88 Harv. L. Rev. 931, 946 (1975) (arguing that an income tax is necessary to mitigate lifetime wealth disparities) [hereinafter Warren, Reply to Andrews]; Michael J. Graetz, Implementing a Progressive Consumption Tax, 92 Harv. L. Rev. 1575 (1979) (identifying a number of practical obstacles that need to be overcome prior to the implementation of a consumption tax); What Should be Taxed: Income or Expenditure? (Joseph A. Pechman ed., 1980) (reviewing the arguments on both sides of the debate); Barbara H. Fried, Fairness and the

Consumption Tax, 44 Stan. L. Rev. 961 (1992) (arguing that the emphasis by consumption tax proponents on protecting the interests of savers has been misplaced); Edward J. McCaffery, Tax Policy Under a Hybrid Income-Consumption Tax, 70 Tex. L. Rev. 1145 (1992) (suggesting that a form of hybrid tax system incorporating both income and consumption components may be in fact the ideal tax system).

[FN5]. This question does not appear to have been seriously scrutinized in any law review article, perhaps as a result of the largely philosophical constructs at issue. In one of the few comments on the issue, Professor Alvin Warren devotes several paragraphs to the topic in his seminal article on consumption taxes and fairness. See Alvin Warren, Would a Consumption Tax Be Fairer Than an Income Tax?, 89 Yale L. J. 1081, 1120-1121 (1980).

[FN6]. The Senate Finance Committee held hearings on allegations of Internal Revenue Service abuse in 1997. The resulting public outcry led, in part, to the passage of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) (creating an independent oversight committee to review I.R.S. practices as well as a number of provisions to protect taxpayers from abusive I.R.S. activities). See also Ralph Vartabedian, I.R.S. Admits Violating Law, Apologizes to 20,000 Clients, San Jose Mercury News, June 6, 1998, at 7A (indicating the I.R.S. acknowledges overly aggressive practices in collecting taxes); Mike McNamee, Now That We've Made Taxes More Complex, Let's Simplify Them, Bus. Wk., Sept. 1, 1997, at 45 (suggesting that the Senate hearings were politically motivated in part to provide momentum for consumption tax reform).

[FN7]. Since the article examines the relationship between state-enforced taxes and the individual, I must necessarily rely on a philosophical vision of the appropriate role of an individual within her polity. For this purpose, I adopt the classical liberal definition of the right to private property developed by Locke, a founder of liberalism and a spiritual father of the American Constitution. Locke's philosophical views continue to play an important role in attempts to understand the role of an individual within modern market-oriented democracies. See, e.g., James Tully, Rediscovering America: The Two Treatises and Aboriginal Rights, in Locke's Philosophy, Content and Context 164, 164 (G.A.J. Rogers ed., 1994) "Three hundred years after its publication, Locke's Two Treatises of Government [that set out his views on the right to property] continues to present one of the major political philosophies of the modern world." Id.

[FN8]. "[E]very man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his." John Locke, Two Treatises of Government 129 bk. 2, P 27 (Mark Goldie ed., 1996) (1690) [Citations to this work will include both the page number of this particular edition of the Two Treatises as well as a notation of the paragraph under scrutiny within either the first or second Treatise (as is the common practice for philosophical writings in this area). For example, the above citation (129 bk. 2, P 27) identifies the twenty-seventh paragraph of the Second Treatise, located on page one-hundred twenty-nine]. Locke's writings continue to generate controversy among philosophers surrounding the meaning of, among other things, his views on the right to property. I will try to rely on traditional interpretations to a large extent, but will occasionally point out particular areas of controversy. For recent treatments on Locke, see Gopal Sreenivasan, The Limits of Lockean

Rights in Property (1995); Stephen Buckle, Natural Law and the Theory of Property: Grotius to Hume 125-91 (1991); Locke's Philosophy: Content and Context (G. A. J. Rogers ed., 1994); Kirstie M. McClure, Judging Rights: Lockean Politics and the Limits of Consent (1996); Jeremy Waldron, The Right to Private Property 126-283 (1988).

[FN9]. The emphasis on productive human behavior in Locke's writings reflects the normative view that this behavior is an important value that deserves institutional protection and that each person should enjoy the fruits of her labor with minimal state intrusion. This view reflects the notion of a "negative liberty" or protection against state intrusion. Personal liberty can also be viewed as a "positive liberty" in that it attempts to preserve the right of the individual to claim something like a share of material wealth. For a discussion on positive and negative rights, see Charles Fried, Right and Wrong 108-19 (1978).

[FN10]. Locke apparently did not comment on the merits of consumption taxes or income taxes, but I use his other philosophical views to support my argument. The article focuses on Locke's philosophical notion of personal liberty, but does not discuss whether certain consumption tax proposals are less intrusive on personal liberty from a tax administration perspective; these arguments have been made for some time now. S ee, e.g., James Coffield, A Popular History of Taxation 104 (1970) (indicating the British income tax act was repealed in 1816 as a result of concerns surrounding the invasion of personal liberty). Three hundred years ago, the Baron de Montesquieu suggested indirect taxes are more consistent with personal liberty since a tax on merchandise is paid by the vendor and there is no requirement for the consumer to pay a tax that "requires a perpetual rummaging and searching into their houses... [A] duty on merchandise is more natural to liberty, by reason it has not so direct a relation to the person." See Baron de Montesquieu, The Spirit of Laws 227-232 (J.V. Prichard ed., G. Bell and Sons, Ltd. 1991). Some consumption tax proponents argue that the reform proposal will greatly simplify the filing of tax returns and will not necessitate extensive government intrusiveness compared to the current income tax system. Whether these claims are accurate depends upon the ultimate form of implementation of the consumption tax. For a discussion of these administrative issues, see Stephen Moore, The Economic and Civil Liberties Case for a National Sales Tax, in Frontiers of Tax Reform 111, 117 (Michael J. Boskin ed., 1996) (arguing that the National Sales Tax would not require intrusive scrutiny of taxpayers by the I.R.S.). Critics suggest that the simplification claims by consumption tax proponents are overstated. See, e.g., Charles E. McLure, Jr., The Simplicity of the Flat Tax: Is It Unique?, 14 Amer. J. Tax Policy 283, 297 (1997) (indicating that a flat tax would be simpler than the current income tax, but that political reality likely will mean the adoption of greater complexity and that the taxation of business entities will complicate the matter further); Joel Slemrod, What Makes Some Consumption Taxes So Simple, and Others So Complicated? 26 (Center for Economic Policy Research No. 445, Dec. 1995) (concluding that the consumption base is not key to the supposed simplicity of the reform initiatives).

[FN11]. This article takes the position that taxes constrain the freedom to perform the action that is taxed. So an income tax interferes with the right of an individual to exchange her labor for compensation along with the right to save and invest: the right to engage in productive activities has hence been constrained. A consumption tax interferes with the right to exchange money for goods and services, which also constrains productive actions. But, it is argued, this latter action deserves less institutional protection than the former right because productive actions are constrained by a lesser amount. See Steven Rieber, Freedom and Redistributive Taxation, 10 Public Affairs Quarterly 63, 72 (1996) (distinguishing between the right to use the property that is collected by tax and the right to perform the action that is taxed).

[FN12]. According to recent studies, income disparities are growing among families within the United States. See infra notes 233-35 and accompanying text.

[FN13]. Locke fully recognized the ambivalent nature of private property regimes that encourage wealth disparities among individuals through merit-based effort as well as human-made conventions such as the development of money and inheritance that have nothing to do with merit. See John Dunn, Locke, in The British Empiricists 44-47 (1992) (asserting that Locke felt deeply ambivalent about economic inequality resulting from factors that did not relate merit to the ownership of property). A tax system that redistributes wealth is important because it promotes (actual and perceptual) equality of opportunity, an important value in modern market democracies. See generally Marjorie E. Kornhauser, Equality, Liberty, and a Fair Income Tax, 23 Fordham Urb. L. J. 607, 609 (1996) (arguing that the American sense of distributive justice and taxation "rests on the twin foundational principles of America-liberty and equality" and that these principles are compatible at times and conflict at other times).

[FN14]. The argument also is subject to two provisos. First, the United States already employs a hybrid tax system that imposes consumption tax treatment in many circumstances and, second, most Americans consume as much (or almost as much) as they produce, so for these people changing the focus of taxation from income to consumption may not have a significant practical effect. These two provisos are rarely explicitly stated in the literature that discusses the merits of two tax systems from the perspective of an ideal consumption or income tax. But see Eric M. Zolt, Prospect for Fundamental Tax Reform: Comparisons Between the United States and Japan, Tax Notes Int'l 1837, (May 3, 1999) "It may be time to put aside the continuing academic debate over the relative superiority of either income taxes or consumption taxes. As a practical matter, a better approach may be to try to design the best hybrid system." Id. See infra notes 203-07 and accompanying text.

[FN15]. After a review of different tax systems employed in Europe and Asia in the 18th Century, the Baron de Montesquieu asserted: "It is a general rule that taxes may be heavier in proportion to the liberty of the subject, and that there is a necessity for reducing them in proportion to the increase of slavery." De Montesquieu, supra note 10, at 230. See also infra Appendix A.

[FN16]. See McClure, supra note 8, at 3.

[FN17]. These aspirational rights have been referred to as "background rights" in contrast to existing legal rights or "institutional rights." Under the classical liberal conception of rights, background rights and legal rights should be the same to promote individual and collective prosperity. See Ronald Dworkin, Taking Rights Seriously 93 (1977). "Any adequate [political] theory will distinguish... between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a political justification for a decision by some particular and specified political institution." Id. Individual liberty can be seen as a normative view of the state/citizen relationship because it focuses on the appropriate, not actual, limit of government interference with an individual's rights and liberties. Legal rules continue to play a crucial role in this relationship because they serve as both a reflection of these norms and a powerful reinforcement of the norms. See, e.g., A. Javier Trevino, The Sociology of Law: Classical and Contemporary Perspectives 439 (1996) (discussing the manner in which legal modifications follow social modifications and/or the ways that legal changes can instigate social changes).

[FN18]. Locke published his Two Treatises of Government in 1690- two years after the Revolution, although the date of the actual writing continues to generate controversy. After the Revolution, the English Bill of Rights of 1689 offered protection against arbitrary taxation by the sovereign: "[T]hat the levying money for or to the use of the crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal." Carl Wellman, The Proliferation of Rights: Moral Progress or Empty Rhetoric? 16 (1999).

[FN19]. "Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his consent." Locke, supra note 8, at 163 bk. 2, P 95. The first Treatise is largely devoted to refuting claims by Filmer that the divine rule of the monarchy was justified by the fact that the kings and queens were direct descendents from Adam. See Locke, supra note 8, at 9 bk. 1, P 8. "And first, as it was vested in Adam, he says, 'not only Adam, but the succeeding patriarchs, had by right of fatherhood royal authority over their children." ' Id.

[FN20]. The only way whereby anyone divests himself of his natural liberty, and puts on the bonds of civil society is by agreeing with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it... And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to everyone of that society, to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact, if he be left free, and under no other ties, than he was in before in the state of nature.
Locke, supra note 8, at 163-64 bk. 2, PP 95-97 (emphasis added).

[FN21]. Locke, supra note 8, at 157 bk. 2, P 87.
Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men...
Id.

[FN22]. Locke, supra note 8, at 178 bk. 2, P 123.
For all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition, which however free, is full of fears and continual

dangers: and 'tis not without reason, that he seeks out, and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.
Id.

[FN23]. "The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions." Locke, supra note 8, at 117 bk. 2, P 6.

[FN24]. See Buckle, supra note 8, at vii (discussing the views of Grotius and Pufendorf, early natural rights theorists).

[FN25]. See, e.g., Richard A. Epstein, Taxation in a Lockean World, in Philosophy and Law 49, 51 (Jules Coleman & Ellen Frankel Paul eds., 1987). "The American tradition of government has been heavily influenced by Lockean social contract theory." Id.

[FN26]. See Locke, supra note 8, at 5 bk. 1, P 1. "Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation; that 'tis hardly to be conceived, that an Englishman, much less a gentleman, should plead to it." Id. Jefferson apparently feared that such a provision would be unacceptable to many of his needed supporters since it could arguably be used as the basis to strike down slavery laws. Jefferson opposed slavery in many of his writings yet owned hundreds of slaves during his lifetime. In 1770, Jefferson represented a slave in a suit for freedom and argued "under the law of nature, all men are born free, and every one comes into the world with a right to... liberty..."; see Aaron Schwabach, Jefferson and Slavery, 19 T. Jefferson L. Rev. 63, 65 (1997); Aaron Schwabach, Thomas Jefferson as an Unsuccessful Advocate for Freedom in Howell v. Netherland, 20 T. Jefferson L. Rev. 129 (1998); Aaron Schwabach, Thomas Jefferson & Sally Hemings, 21 T. Jefferson L. Rev. (1999) (reviewing the impact of recent DNA evidence that suggests Jefferson fathered at least one child with his slave Sally Hemings). Locke, like all too many of his contemporaries, in many ways justified slavery in the New World as the result of a just war. See generally R.W. Grant, John Locke's Liberalism 66- 80 (1987).

[FN27]. See Wellman, supra note 18, at 16 (asserting that natural rights theory were used to justify the American and French Revolutions since any government that violates these rights may be legitimately resisted and replaced with one that will respect the fundamental moral rights of its citizens).

[FN28]. Wags might argue that these documents came into being five hundred years after the signing of the Magna Carta of 1215 (and a hundred years after the English Bill of Rights of 1689), which began the process of enshrining fundamental rights against the state. The Magna Carta gave the lords the ability to oust the king or queen under certain conditions. In many ways, modern democracies are not dissimilar since they grant the power to citizens to elect a new government if the old one is deemed to have performed poorly. (Good performance appears to be tied to economic well-being in recent years.) This is essentially the point Hobbes tried to make when he suggested that a type of benevolent monarchy was the most appropriate form of government. As such, he was not too far away from the current system of democracy since, in Hobbe's view, the king or queen should be replaced if they did not contribute to the general level of prosperity. See Hobbes, supra note 3, at 382-390.

[FN29]. Locke's views on private property are mainly set out in chapter 5 of his Two Treatises on Government. According to one commentator, Locke's emphasis on the importance of private property led to the formation of our modern capitalist society. See C.B. Macpherson, The Political Theory of Possessive Individualism (1962) (suggesting Locke's justification of private property served as a legitimating force behind capitalist morality). I do not intend to suggest that Locke came up with the notion of private property. The concept of private property can be traced back at least twenty-five hundred years to the Greeks of Antiquity (who, at any rate, thought of everything). See, e.g., Aristotle, The Politics 28 (T.A. Sinclair trans., Penguin Classics 1986). "For, while property should up to a point be held in common, the general principle should be that of private ownership. Responsibility for looking after property, if distributed over many individuals, will not lead to mutual recriminations; on the contrary, with every man busy with his own, there will be increased effort all round." Id. (emphasis added). For a discussion on the suspected origins of private property, see Friedrich A. Hayek, The Fatal Conceit: The Errors of Socialism 29-47 (1988) (discussing how private property promotes social justice since individual incentives to accumulate wealth inadvertently benefits the larger community). Locke himself, a humble man by all accounts, suggested in a letter to his cousin that "property I have nowhere found more clearly explained, than in a book entitled, Two Treatises of Government." (quoting letter from John Locke to Rev. Richard King (Aug. 25, 1703)). Buckle, supra note 8, at 150 n.74.

[FN30]. In Locke's view, the need and duty toward self-preservation arise from the individual's relationship to her Creator: "For the desire, strong desire of preserving his life and having been planted in him, as a principle of action by God himself, reason, which was the voice of God in him, could not but teach him and assure him, that pursuing that natural inclination he had to preserve his being, he followed the will of his Maker..." See Locke, supra note 8, at 62 bk. 1, P 86. See Sreenivasan, supra note 8, at 6-7 (arguing the fundamental elements of Locke's theory do not require a belief in God's existence and that these elements can "be reconstructed with functionally equivalent secular premisses").

[FN31]. See Sreenivasan, supra note 8, at 23. "[Locke suggested] that men have a natural right to preservation and to preserve themselves. These two natural rights may be distinguished by considering the particular duty each right imposes on others when possessed by a rights-bearer. In the former case, others have a duty to refrain from directly endangering the life of the rights-bearer; in the latter case, others have a duty to refrain from impeding the rights-bearer from actively preserving herself. These two natural rights constitute the ground of the further natural right to property in common. If a man had a right to his preservation and a right to preserve himself, then he had a right to the means of preservation." Id.

[FN32]. Locke, supra note 8, at 128 bk. 2, P 27.

[FN33]. Screenivasan, supra note 8, at 32-33. See also McClure, supra note 8, at 92-3.

[FN34]. "[T]here must of necessity be a means to appropriate [the common property] in some way or other before they can be of use, or at all beneficial to any particular man." See Locke, supra note 8, at 128 bk. 2, P 26.

[FN35]. Locke makes this clear when he states: "[Individuals] have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name, property." See Locke, supra note 8, at 178 bk. 2, P 123. See also McClure, supra note 8, at 86-87 ([T]he "property" [Locke] grants his natural agents is both broader and more complex than the simple possession and use of material things. Indeed, the semantic field of Lockean "property" extends to all that which, in the seventeenth century, could properly be called one's own, encompassing one's person, actions, life, limbs, labor, health, and liberty, as well as outward possessions or material goods... [I]t is important to note that for Locke the property right natural to the human species pertains more specifically to the liberty of action that its use entails than to the particular objects or things of which it is predicated." (emphasis added)); Buckle, supra note 8, at 169-74 (comparing Locke's views on property with early natural rights theorists' notion of the suum where one's life and liberty only belong to oneself).

[FN36]. See, e.g., Locke, supra note 8, at 157 bk. 2, P 87. "Man... hath by nature a power, not only to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men.... Id. (emphasis added). For a discussion of this point, see Sreenivasan, supra note 8, at 32-33.

[FN37]. See Locke, supra note 8, at 129 bk. 2, P 28.

[FN38]. This seems to imply an individual who uses a modern commercial entity to conduct his business like a corporation is entitled to the earnings of the business entity.

[FN39]. Locke, supra note 8, at 128 bk. 2, P 27.

[FN40]. This proviso will be discussed in the context of redistributive justice. See infra notes 200-02 and accompanying text.

[FN41]. As much as anyone can make use of to any advantage of life before it spoils; so much he may by his labour fix a property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy.
Locke, supra note 8, at 130 bk. 2, P 31.

[FN42]. "And thus came in the use of money, some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, perishable supports of life." Id. at 138 bk. 2, P 47.

[FN43]. Locke's conception of private property has been described as historical in nature since he seems to discuss two different eras: the state of nature and the later state of scarcity. See, e.g., Buckle, supra note 8, at 147.

[FN44]. "The great and chief end therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property." Locke, supra note 8, at 178 bk. 2, P 124.

[FN45]. See infra notes 203-05 and accompanying text.

[FN46]. According to Locke: 'Tis true, governments cannot be supported without great charge, and 'tis fit everyone who enjoys his share of the protection, should pay out of his estate his proportion of the maintenance of it. But still it must be with his own consent, i.e. the consent of the majority, giving it either by themselves, or their representatives chosen by them. For if anyone shall claim a Power to lay and levy taxes on the people by his own Authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government. For what property have I in that which another may by right take, when he pleases to himself?
Locke, supra note 8, at 187 bk. 2, P 140.

[FN47]. See, e.g., Robert Nozick, Anarchy, State, and Utopia 171 (1974).
This notion of property helps us to understand why earlier theorists spoke of people as having property in themselves and their labor. They viewed each person as having a right to decide what would become of himself and what he would do, and as having a right to reap the benefits of what he did.
Id.

[FN48]. See Locke, supra note 8, at 131 bk. 2, P 34.

[FN49]. At one point, Locke seems to suggest that charity also gives title to property rights. See infra note 205 and accompanying text.

[FN50]. This point has been succinctly explained by Sir Geoffrey Vickers as follows:
The simplest discrimination - 'This is a that' - (whether 'that' be a cow, a contract, or a sin) is no mere finding of fact but a judgment which carves something out of the field of attention and assimilates it to a category which has been generated by previous acts of the same kind. The simplest valuation - 'This should be thus' - is equally a judgment arrived at by comparing some object or event or course of events (real or imagined) with some standard which has become accepted as the appropriate norm. The simplest decision on action - 'In these circumstances this should be done' - is the selection of a response from a repertory by rules which determine what is suitable to what occasion. The categories by which we discriminate, the standards by which we value, the repertory of responses from which we select, and our rules for selection are all mental artifacts, evolved, learned, and taught by the cultural process and more or less peculiar to the culture which produces them. This process is a circular process, in which all these settings of the appreciative system are constantly being modified by their own exercise.
Philip R. Rhinelander, Is Man Comprehensible to Man? 77-78 (1974) (internal citations omitted). See also Peter Berger & Thomas Luckmann, The Social Construction of Reality (1986). In legal academia, the Critical Legal Studies movement (along with its two step-children, feminist legal theory and critical race theory) adopt these views to a certain extent. See, e.g., James Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 U. Penn. L. Rev. 685 (1985) (describing the theories associated with Critical Legal Studies that share assumptions concerning the use of social power in apparently rational discourse).

[FN51]. For example, Professor Hart prominently argued almost a half-century ago that it is morally wrong to try to attach natural law theories with positive law because this only legitimizes the moral authority of the government actors and encourages obedience even though the law itself is arguably unjust. See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958). But see Philip Soper, Choosing a Legal Theory on Moral Grounds, in Philosophy and Law 31 (Jules Coleman & Ellen Frankel Paul eds., 1987) (rejecting Hart's claim). See also Hayek, supra note 29. Hayek criticizes the view that morality can be discerned through logic, which he calls constructive rationalism, as the 'fatal conceit' since morals can never be fathomed through reason, but only through following a tradition of learned moral rules through the evolution of cultural institutions. Feminist legal theorists might question the value of following 'traditions' which, they say, can be understood only in terms of the preservation of social and economic power by certain groups in society such as men. For example, the English common law followed a long tradition of maintaining and reinforcing the 'patriarchy' through a history of legal decisions such as the 'rule of thumb' (a wife ought only to be beaten by a stick no thicker than a thumb), and 'the husband and wife are one and the one is the husband' (used to justify the removal of property ownership and the ability to contract from married women). According to these theorists, deciphering the usefulness of tradition invariably involves political judgments concerning the value of the tradition in question.

[FN52]. The most influential commentators in this area are Karl Popper and Thomas Kuhn. Popper asserts that the distinguishing element of science is 'falsifiability' and that science moves forward through 'bold conjectures' that other scientists try to refute - the body of undefeated knowledge grows. Popper denies that one can ever reach the ultimate truth, although there does seem to be an approach to some sort of absolute or objective knowledge. He also says that it is necessary to assume that there is a 'hypothetical reality.' Khuhn states that scientists are trapped in a 'paradigm' or view on how the world functions. Since the paradigms have their own rules, scientific change in some sense stands outside logic. See Michael Ruse, Evolutionary Naturalism 119-21 (1996). Other commentators suggest that the natural world exists whether or not it is scrutinized by humans (i.e., the facts have an existence independent of the observer) and that scientists get an accurate (albeit imperfectly measured) picture of this natural world. See, e.g., Albert Einstein & Leopold Infeld, The Evolution of Physics, From Early Concepts to Relativity and Quanta 121 (Simon & Schuster 1966) (1938).
Modern physics has attacked all these problems [related to the mechanical view of nature] and solved [them]. But in the struggle for these solutions new and deeper problems have been created. Our knowledge is now wider and more profound than that of the physicist of the nineteenth century, but so are our doubts and difficulties.
Id. For a discussion on the usefulness and limitations of science in philosophy see Rudolf Carnap, An Introduction to the Philosophy of Science 281 (Martin Gardner ed., 1995) (1966).
[Nineteenth-century scientists] realized, also, that no observation is ever completely precise. There is always an element of uncertainty. All laws of science are, in this sense, statistical; but it is a trivial sense... There seemed to be no limit to the precision that could be obtained in any type of measurement.
Id.

[FN53]. John Stuart Mill is probably the most well-known proponent of the utilitarian school of thought. His main position is summarized in the following passage:

[T]he ultimate end, with reference to and for the sake of which all other things are desirable (whether we are considering our own good or that of other people), is an existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality; the test of quality, and the rule for measuring it against quantity, being the preference felt by those who in their opportunities of experience, to which must be added their habits of self-consciousness and self-observation, are best furnished with the means of comparison. This, being, according to the utilitarian opinion, the end of human action, is necessarily also the standard of morality; which may accordingly be defined, the rules and precepts for human conduct, by the observance of which an existence of which an existence such as has been described might be, to the greatest extent possible, secured to all mankind; and not to them only, but, so far as the nature of things admits, to whole sentient creation.
John Stuart Mill, Utilitarianism, On Liberty and Considerations on Representative Government 12 (J.M. Dent & Sons Ltd. 1972) (1863). See also Harold Groves, Tax Philosophers: Two Hundred Years of Thought in Great Britain and the United States 56 (1974) (discussing Jeremy Bentham's views on utilitarianism: "To the view that a person has a natural right to the fruits of his own labor the answer is that he has no right to anything unless it can be established that his possession on balance and in the long run will add more to the well-being of the community than it will detract."). See also Waldron, supra note 8 (identifying and discussing two main theories of the right to property: the Lockean (or Nozickian) right to property and a more egalitarian right to property associated with Hegelian political theory).

[FN54]. See, e.g., Robert Goodin, Reasons for Welfare 313-314 (1988) (describing how private property rights diminish the rights of propertyless individuals). For a general criticism of unrestricted property rights, see Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1890 (1987) (indicating there is no real difference between property produced by slaves and property produced by employees). For a criticism of these views from a libertarian perspective, see Walter Block, Market-Inalienability Once Again: A Reply to Radin, 22 T. Jefferson L. Rev. 37 (1999).

[FN55]. Locke, supra note 8, at 139 bk. 2, P 50.

[FN56]. To establish this point, Locke compares the plight of Native Americans (where the use of money and the existence of private property did not exist) to Englishmen and indicates the wealthiest Native American is worse off in terms of material wealth than a "day Labourer in England." Locke, supra note 8, at 135 bk. 2, P 41. But see Tully, supra note 7, at 165-96 (arguing convincingly that Locke misinterpreted the nature of property rights shared by Native Americans in Locke's era and that Locke's views concerning the appropriation of land held in common in many ways was used to justify the exploitation of these Native Americans).

[FN57]. This is the position adopted by Washington University Professor Carl Wellman. See Carl Wellman, An Approach to Rights: Studies in the Philosophy of Law and Morals 15-16 (1997) (indicating that "primarily what are now called human rights are theoretical descendants of what were once called natural rights and therefore to be contrasted with any sort of artificial or institutional rights. They are rights one possesses, not by virtue of some special status, but simply as a human being. This explains their universality and why one can appeal to human rights to promote social equality. And I asserted that they are rights that hold against, and only against, the state."). The right is also important because it is a construct that has been internalized within a large segment of Western society. For example, most individuals within the United States would likely agree in general with Locke's views on the necessity to maintain private property since this system rewards effort and merit. See Kornhauser, supra note 13, at 643-53 (reviewing polls that suggest Americans support the preservation of a system that rewards merit along with a system that promotes equality of opportunity) The "value" of private property is certainly real to most of us. If you disagree, I have a few friends who would like to live at your home for an indefinite period.

[FN58]. See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 24-65 (1919) (discussing the different conceptions of legal rights).

[FN59]. But see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 283-305 (1985) (suggesting that the eminent domain clause of the Constitution could act as a limit the government's power to tax). Although Epstein's position would support the argument herein, takings and taxation have virtually always been treated as separate issues and hence there is no reasonable Constitutional basis to support a limit on the government's ability to impose certain types of taxes (other than certain discriminatory taxes). For example, I will take the standard position that the Constitution does not provide limits on the right of the federal government to tax its constituents by way of an income tax. See Commissioner v. Glenshaw Glass Co., 348 U.S. 429, 429-30 (1955). "But Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted." Id. Further, the Supreme Court has accepted that tax law can be used to impose progressive rates on individuals in order to redistribute wealth away from relatively wealthier taxpayers to those with less wealth. Redistibutive justice issues are discussed infra notes 210-69. See Knowlton v. Moore, 178 U.S. 41, 109 (1900). The Court stated:
Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution... [I]t is apparent that the argument as to the enormity of the tax is without merit.
Id. at 109. The tax in the Knowlton case was an estate tax with progressive rates. The Supreme Court later accepted progressivity with respect to income taxes in Brushaber v. Union Pacific R.R. Co. (1916). For a different perspective from the Supreme Court, see Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 303 (Brewer, J., dissenting). [A progressive tax is] "unequal because based upon a classification purely arbitrary, to wit, that of wealth-a tax distinctly and intentionally made unequal. I think the Constitution of the United States forbids such inequality." Id.

[FN60]. Locke's writings continually express support for the notion that his natural rights promote the common good of humankind. While Locke has often been held up to represent a defender of absolute rights to property, more recent Lockean scholars suggest a more egalitarian perspective on Locke's writings. The reassessment may have its origin in the writings of James Tully. Tully suggests that Locke argued for an inclusive natural right to property in common in the state of nature. This right suggests that each individual has a right to the means necessary to promote support: "a right to one's due rather than to one's own." Essentially, Tully concludes that community ownership of property is the correct interpretation of Locke's writings. See James Tully, A Discourse on Property: John Locke and His Adversaries 61 (1980). While most commentators do not go as far as Tully (and, in fact, suggest his interpretation is incorrect), they do support the view of a Locke intensely interested in the promotion of the good of all participants in the community. See Buckle, supra note 8, at 147-148 (indicating that Locke understood that values must be defined contextually since sense-experience varies over time); McClure, supra note 8, at 96-106. Philosophy Professor Sreenivasan's recent work also reflects the view that Lockean property does not grant an absolute right over all forms of property. For example, he argues that property obtained by gift or inheritance does not give the owner of this property absolute rights over it since this property was not acquired through labor. See Sreenivasan, supra note 8, at 151. But s ee Waldron, supra note 8, at 137 (asserting that, in a Lockean world, individuals bring their private property rights into political society to ensure protection of these rights to property and not for the public good "though Locke certainly believed that").

[FN61]. Try to cut down a tree, burn garbage or renovate without permission and an army of bureaucrats will descend upon you. For a discussion of the ambivalent nature of private property in the United States, see Joan Williams, The Rhetoric of Property, 83 Iowa L. Rev. 277, 280 (noting "[M]any commentators have noted the gap between the political rhetoric of absolute property rights and the practice of limited property rights"). For example, under California state law individuals are prohibited from placing certain restrictions on the title of their homes that violate public policy; absolute property rights would permit individuals to place any title restrictions they want. Our recently purchased home in San Diego included the following title restriction from 1938:
Said property shall never be sold, conveyed, transferred, devised, leased to or inherited by or be otherwise acquired by and become the property of any person other than of the White or Caucasian race. Said property shall never be used or occupied by any person other than of the White or Caucasian race, except that occupation or use of said property by a person not of the White or Caucasian race in the capacity of a servant or employee of the Caucasian occupant.
This type of negative covenant is now a violation of California law. See 42 U.S.C. § 3604(c).

[FN62]. For a discussion on this point, see Wellman, supra note 18, at 14. The position I adopt could perhaps be most closely identified with the law-as-integrity school of thought since it takes the notion of property rights seriously because this right, it is argued, is based on an accurate view of human nature and the right promotes individual and social welfare in the context of our times. There are three dominant philosophical ways of looking at what constitutes a legal right: legal positivism, legal realism, and law-as-integrity; see Kevin T. Jackson, Charting Global Responsibilities: Legal Philosophy and Human Rights 1-3 (1994). Positivism recognizes only those rights which are identifiable as a matter of empirical fact based on actual community practices. Realism (in some sense the precursor of the critical legal studies movement) views rights as sometimes useful social/political fictions. Thus, under this view the judicial interpretations of rights can be viewed as subjective or arbitrary. Law-as-integrity comes somewhere in between these two views by identifying interpretations of rights with normative political theories which seek to take rights seriously through constructing the best possible justifications for settled law. Id. As such, this middle road approach best matches the attempt here to define the boundaries of certain individual rights (although the use of sociobiological analysis leans toward the positivist approach).

[FN63]. One prominent social critic decries the absence of discussions concerning these fundamental human characteristics. See Noam Chomsky, Chronicles of Dissent 1-2 (1992).
[A]ny stance that one takes with regard to social issues, for example, advocacy of some kind of reform or advocacy of a revolutionary change, an institutional change, or advocacy of stability and maintaining structures as they are--any such position, assuming that it has any moral basis at all and is not simply based on personal self-interest, is ultimately based on some conception of human nature. That is, if you suggest things should be reformed in this or that fashion and there's a moral basis for it, you are in effect saying, 'Human beings are so constituted that this change is to their benefit. It somehow relates to their essential human needs.' The underlying concept of human nature is rarely articulated. It's more or less tacit and implicit and nobody thinks about it very much.
Id.

[FN64]. A Man, as has been proved, cannot subject himself to the Arbitrary Power of another; and having in the State of Nature no Arbitrary Power over the Life, Liberty or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all he doth, or can give up to the Common-Wealth, and by it to the Legislative Power, so that the Legislative can have no more than this.
Locke, supra note 8, at 183 bk. 2, P 135 (emphasis added). See also Williams, supra note 61, at 286 (noting that Lockean "property rights stem from human biology, specifically from human hunger"); Buckle, supra note 8, at 125. "Thus, Locke holds that natural reason and revelation provide alternative, independent justifications of the right of self-preservation." Id.

[FN65]. See supra notes 29-30 and accompanying text. For a discussion on this point, see Sreenivasan, supra note 8, at 41. But see Locke, An Essay Concerning Human Understanding 115 (Clarendon Press 1975) (Locke seems to recognize the limits of this line of argument: "[I]f the source and origin of this law is the care and preservation of oneself, virtue would seem to not so much man's duty as his convenience, nor will anything be good except what is useful to him").

[FN66]. See Leo Strauss, Natural Right and History 231 (1953). See also McClure, supra note 8, at 90.

[FN67]. The attempt to use evolutionary principle to guide ethical discussion represents a form of natural rights theory because the philosophy purports to rely on an accurate view of human nature. For a review of the literature in this area by a leading commentator, see Ruse, supra note 52. For an earlier treatment on the use of evolution theory and morality, see Julian Huxley, Evolutionary Humanism 73 (Prometheus Books 1992) (1964).
[Man] needs to use his best efforts of knowledge and imagination to build a system of thought and belief which will provide both a supporting framework for his present existence, an ultimate or ideal goal for his future development as a species, and a guide and directive for practical action and planning. This new idea-system, whose birth we of the mid-twentieth century are witnessing, I shall simply call Humanism, because it can only be based on our understanding of man and his relations with the rest of his environment. It must be focused on man as an organism, though one with unique properties.

Id.

[FN68]. "[T]he very crux of the evolutionary approach to ethics is that nature sets certain universals and you break these at your peril." Michael Ruse, Naturalistic Fallacy, Reason, Oct. 1996, at 54.

[FN69]. See F.J. Ayala, The Biological Roots of Morality, 2 Biology and Philosophy 235, 245 (1987), as excerpted from Ruse, supra note 52, at 269.
Because evolution has proceeded in certain particular way, it does not follow that course is morally right or desirable. The justification of ethical norms on biological evolution, or on any other natural process, can only be achieved by introducing value judgments, human choices that prefer one rather than other object of process. Biological nature is in itself morally neutral.
Id. An example of the problem resulting from confusing an "is" with an "ought" might go as follows. Anthropologist and evolutionary scientists believe that males hunted for millions of years and spent very little of their time caring for children (arguably an "is"). Therefore the government should implement public policies that encourage women only to care for their children at home (an "ought").

[FN70]. See infra notes 248-67 and accompanying text.

[FN71]. See supra note 1 and accompanying text.

[FN72]. I will adopt the common-sense definition of economic resources employed by Professor Warren: "[G]oods and services, whether real or financial, that are generally the subject of market transactions in our society. This category can be defined in part in principle (excluding the pleasures of one's own psyche) and in part by custom (excluding the exchange of services typcial of personal relationships)." Warren, supra note 5, at 1084.

[FN73]. Harry C. Simons, Personal Income Taxation 50 (1938). A slightly more refined and accurate definition is offered by Kaldor who recognized that increases in wealth need to be corrected for inflationary changes that increase the nominal value of assets but that do not increase purchasing power:
It follows from this that the ideal definition of Income, as a measure of taxable capacity, is to be thought of, not as Consumption plus Actual Capital Accumulation (à la Haig) nor as Consumption plus Capital Accumulation Excluding Windfalls (the accountancy ideal) but as Consumption plus Real Capital Accumulation, where the term ' Real Capital Accumulation' is to be understood as Actual Capital Accumulation subjected to a double series of corrections: first, for the change in the general level of prices (of consumers' goods), and second, for the change in the general level of interest rates.
Kaldor, supra note 4, at 69-70.

[FN74]. To help to understand Simons' point, consider an individual named Terrence who begins to create a giant apple pie on January 1, 2000. Terrence works on the pie throughout the course of the fiscal year (adding ingredients, mixing the batter and so on). But sometimes Terrence gives into temptation and eats some of the batter. Further, Terrence bakes the pie in the beginning of December 2000 and eats a quarter of the finished pie by December 31, 2000.

During the course of the year, Terrence has consumed both the ingredients and the final product. The consumption of the ingredients alone can be analogized to spending money earned through salaries (i.e., returns on labor) while the consumption of the finished pie can be further analogized to withdrawing amounts placed in savings during the year. Terrence keeps whatever is left to eat at some future date. If the creation of the pie is analogized to an individual's generation of wealth then the same principle holds: we either currently consume the economic resources generated by our wealth or we currently save (or accumulate) this wealth. In other words, after taking into consideration our consumption of economic resources, whatever is left over has been saved.

[FN75]. It has been noted that savings and accumulation are not exact. See, e.g., Andrews, supra note 4, at 1149.

[FN76]. This definition (the so-called Haig-Simons definition of income) serves as the conceptual foundation for the United States Internal Revenue Code, although the Code departs from the definition in many important ways (as do most other income tax systems throughout the world). This definition can be represented symbolically, $I = C + A$, where I equals income, C equals consumption and A equals accumulation. Accumulation is equivalent to current savings or change in net worth. As discussed, returns to labor and capital serve as the foundation to private property under Locke's conception while the Haig-Simons definition of income includes any expansion of wealth even if unrelated to an individual's productive actions. "The arithmetical process of the Haig-Simons definition should not, however, obscure the nature of the aggregate tax base, which is the product of the society's private capital and labor for the accounting period." Andrews, supra note 4, at 1149 . (emphasis added). See also Warren, supra note 5, at 1086; Kaldor, supra note 4, at 70- 72 (discussing how the calculation of social product is simpler than the calculation of individual income). As such, the Haig-Simons formulation is necessary to identify the individual's portion of society's product. See Warren, supra note 5, at 1090. The emphasis on taxing productive individual behavior (versus some other aspect of individual behavior like consumption) reflects a value judgment inherent within the tax system. The decision to tax income (as defined by Simons) as a measurement of an individual's ability to command economic resources rests on the notion this measurement properly reflects an individual's ability to pay taxes. In other words, it is possible to define income in other ways and many tax economists have done so in the past. See Kaldor, supra note 4, at 54-78 (discussing different definitions of income). For example, Professor Fischer's well-known definition of income is that income equals consumption. Under this view, income is the net benefit derived from capital goods (both human capital and material capital) after all double-counting has been eliminated. Savings does not form part of the definition since savings only adds to the stock of capital by enlarging its future yield. If savings is considered to be part of the current yield then, in Fischer's view, it would mean to count the same thing twice. See Id. at 56-57.

[FN77]. For a more detailed account of the proposals, see Joel Slemrod & Jon Bajika, Taxing Ourselves: A Citizen's Guide to the Great Debate Over Tax Reform 195-205 (1996). The following analysis draws heavily from this source. See also Arthur Cockfield, The Impact of U.S. Consumption Tax Reform on Canada, 4 Nafta L. Rev. 74, 77-79 (1998) (discussing the international implications of the tax reform proposals).

[FN78]. Value-added taxes, imposed by every OECD member country in the world other than the United States, are similar to retail sales taxes because they are imposed at the point of consumption. Unlike a retail sales tax, the VAT is imposed on the amount of value added all along the production and distribution chain equaling sales price minus the cost of material inputs and investment goods, but excludeing labor costs. Under a credit-invoice VAT, a business is entitled to a credit for the amount of VAT paid on purchases from other businesses by deducting this amount from the VAT collected from consumers. The business must remit the difference between these two amounts to the government. Hence, a VAT is really only a tax on the ultimate consumer and is equivalent to a retail sales tax. The VAT is generally considered to be superior to a retail sales tax since it is much easier to enforce, partly since businesses are encouraged to maintain tax records (and ensure other companies are properly paying the taxes) in order to substantiate the businesses' claim for the VAT credit. The consumer ultimately pays the VAT as a percentage of the purchase price of the good or service. For example, a seven percent VAT (called the Goods and Services Tax or GST) is imposed on the sale price of most goods and services in Canada. See Excise Tax Act, R.S.C. 1985 (Can.). The most recent national sales tax proposal is called the Fair Tax. See H.R. 2525, 96th Cong. (1999). See also <http://www.fairtax.org>.

[FN79]. See Slemrod, supra note 10, at 13 (noting that the flat tax is essentially equivalent to a consumption-base VAT, but allows some degree of flexibility (such as progressivity) to be built into the tax system). Most of these proposals are based on an approach developed by Stanford University professors Robert Hall and Alvin Rabushka. See Robert Hall & Alvin Rabushka, The Flat Tax (2d ed. 1995). Under the flat tax, businesses pay tax on their total revenues minus total inputs including labor costs (unlike the VAT). Wages and salaries are then taxed separately at the same tax rate, which makes the tax economically equivalent to a VAT. Id. at 52 (proposing a tax rate of 19%). Some commentators prefer the flat tax over a VAT, however, because the wage tax can be tailored to benefit certain individuals or households. For example, Representative Richard Armey proposed the tax should not be imposed on household income below $33,000 (for a family of four). See Richard Armey, The Flat Tax: A Citizen's Guide (1996). It is technically inaccurate to say that a flat tax imposes only one tax rate (as some flat tax proponents seem to suggest). In reality, two rates are imposed: a rate of zero for incomes below stipulated thresholds and another rate for amounts above this threshold.

[FN80]. As many commentators have observed, a flat tax on wages is economically equivalent to a consumption tax under plausible assumptions. See infra note 92 and accompanying text. Note that a flat tax on wages is not necessarily equivalent to the so-called flat tax. The flat tax is a consumption tax because the business level tax taxes capital income minus investment (old capital) while the individual level tax taxes wage income only . See, e.g., Lawrence Zelenak, The Selling of the Flat Tax: The Dubious Link between Rate and Base, 2 Chapman L. Rev. 197, 203 (1999).

[FN81]. This can be represented symbolically by defining consumption along the lines of the formulation for income identified in the footnote above: $C = I - A$ This kind of personal consumption tax is represented by the USA Tax or Unlimited Savings Allowance Tax. See generally Alliance USA, USA Tax System, 66 Tax Notes 1482 (1995). All items of income (e.g., salaries, interest income, capital gains) are included in the tax base while a deduction is permitted for all current savings. Income would be taxed at progressive rates from eight to forty percent. Id. at 1489. Amounts withdrawn at later date from savings would be taxed if not reinvested, because these amounts are presumably put toward consumption of economic resources. Unlike a "pure" personal consumption tax, the USA Tax permits deductions for mortgage interest, charitable contributions and certain education costs. Id. at 1489.

[FN82]. Amounts placed in savings do not necessarily have to result in future consumption during the taxpayer's lifetime. The amounts can also be given away by gifts or bequests.

[FN83]. This insight has been traced at least as far back as John Stuart Mill who wrote:
No income tax is really just from which savings are not exempted; and no income tax ought to be voted without that provision, if the forms of the returns, and the nature of the evidence required, could be so arranged as to prevent the exemption from being taken fraudulent advantage of, by saving with one hand and getting into debt with the other, or by spending in the following year what had been passed tax-free as saving in the year preceding.
See John Stuart Mill, Principles of Political Economy bk.5 ch.2, P 4 (1848). See also Kaldor, supra note 4, at 79; Andrews, supra note 4, at 1168. For a discussion on this point, see Richard A. Musgrave, The Theory of Public Finance: A Study in Public Economy 249 (1959). Musgrave notes: A tax on income discriminates in favor of leisure against present consumption, and more strongly so in favor of leisure against future consumption. Moreover, it discriminates in favor of present against future consumption. A tax on consumption discriminates equally in favor of leisure against present and future consumption, and is neutral between present and future consumption.
Id. (emphasis added). But see McCaffery, supra note 4, at 1194 n. 236 (noting that a progressive rate consumption tax taxes savings under certain circumstances).

[FN84]. See, e.g., Boskin, supra note 2, at 8. "Perhaps nowhere is the current income tax system more harmful than in the taxation of saving, investment, and entrepreneurship... [T]he overwhelming evidence is that [income taxes] wind up favoring current consumption and penalizing saving and investment." Id. (emphasis in original).

[FN85]. This point is typically illustrated by an example such as the following:
Two taxpayers, Profligate and Thrifty, each earn $100 in wage income in a world without taxes. Profligate spends the entire $100 in the year it is earned. Thrifty sets it aside for consumption upon retirement fourteen years later. At five percent compound interest, Thrifty's initial $100 will double in value to approximately $200 at the end of that period. Assume now the adoption of a 40 percent cash-flow consumption tax. Profligate earns $100 in year one, and receives no deduction for savings. He thus pays a tax of 40 percent of $100, or $40, leaving him with $60 for consumption. In that year, Thrifty pays a tax of $80 (40 percent of the $200 he dissaves) and is left with $120 for consumption. Thus, Thrifty will again enjoy twice as much consumption as Profligate-that is to say, the ratio of the two taxpayers' funds available for consumption (1:2) remains unchanged under a consumption tax from a no-tax world. Moreover, Thrifty and Profligate will pay an identical tax in present value terms: Although Thrifty will pay a tax of $80 as compared to Profligate's tax of $40, Thrifty's tax is not due until the end of fourteeen years, and the present value of that liability (at five percent interest) is only $40. Under a 40% percent income... tax, however, the tax liabilities of Profligate and Thrifty diverge. Profligate will stay

pay $40 in tax in year one, leaving $60 for consumption. But Thrifty will pay a tax on wages in year one and also a tax on interest as it accrues in years one through fourteen. Thus, rather than having twice as much ultimate consumption as Profligate as a result of saving, Thrifty ends up with only about fifty percent more. The present value of Thrifty's tax liability likewise increases relative to Profligate's as the amount Thrifty has available for consumption decreases.
Fried, supra note 4, at 963-64. See also Kaldor, supra note 4, at 84.

[FN86]. These distortions are generally considered undesirable since they generally result in a misallocation of resources that otherwise would be deployed in a more efficient manner (in a world with no taxes). That is, taxes distort behavior by increasing the after-tax cost of engaging in this behavior; all else being equal, individuals are given incentives to engage in activities that are not as disfavored by the tax regime (i.e., with a higher after-tax return). It is often noted, however, that the assumption of a no-tax world is in some sense unrealistic since, for society to function, government institutions like courts and police forces are required and hence these activities must be financed through taxation. See, e.g., Graetz, supra note 2, at 11 (noting that "nevertheless, people are rightly concerned with the potential reductions in the economy's ability to satisfy people's desires that might occur because taxes will change people's incentives to engage in important economic activities, such as work, savings, risk taking, or consumption").

[FN87]. "Nor is it so strange, as perhaps before consideration it may appear, that the Property of labour should be able to overbalance the Community of Land. For 'tis Labour indeed that puts the difference of value on everything..." Locke, supra note 8, at 135 bk. 2, P 40.

[FN88]. Locke explains: From all which it is evident, that though the things of Nature are given in common, yet Man (by being Master of himself, and Proprietor of his own Person, and the actions or labour of it) had still in himself the great Foundation of Property; and that which made up the great part of what he applied to the support or comfort of his being, when Invention and Arts had improved the conveniences of Life, was perfectly his own, and did not belong in common to others.
Locke, supra note 8, at 137 bk. 2, P 44.

[FN89]. Hence both taxes also affect incentives to work or not although the ultimate outcome of these incentives is not always clear. On the one hand, the taxes reduce the incentive to work since they make alternatives (like leisure) more attractive (the so-called "income effect"). On the other hand, the taxes act as an incentive to work harder since greater amounts of income are necessary to enjoy a set standard of living (the so-called "substitute effect"). For a discussion of the income and substitution effects, see Musgrave, supra note 83, at 232-46.

[FN90]. For a review of the economic literature in this area, see Joel Slemrod, The Economics of Taxing the Rich (Natl. Bureau of Economic Research Working Paper 6584, 1998) (concluding that, while many assumptions are controversial in the models that study high-income individuals, high marginal rates give incentives to work less or at least to engage in less socially productive activities in order to avoid paying taxes).

[FN91]. The extent by which an individual or business bears a tax burden is called tax incidence, a complex and often controversial aspect of tax economics. For an accessible discussion on the topic, see Slemrod & Bajika, supra note 77, at ch. 4. For a discussion on tax incidence of the corporate income tax, see Richard M. Bird, Why Tax Corporations? (Tech. Comm. on Bus. Tax. Working Paper 96-2). In fact, even a direct tax on wages may not fall on an individual; the business may simply have to raise the wages to take into account the tax if the business is unable to shift the additional tax burden to its workers. But see Slemrod & Bajika, supra note 77, at ch. 4 (indicating that research suggests that labor is generally not highly responsive to after-tax salaries and businesses are better enabled to find alternatives to workers such as more capital-intensive modes of production). In the example above concerning the retail sales tax, if the sales tax is imposed only on cars allowing consumers to substitute this item for another good or service such as taking the bus, the car dealer might not be able to raise the price of the car by ten percent and could be forced to absorb all or part of the sales tax.

[FN92]. Under certain plausible assumptions, a consumption tax is generally considered to be equivalent to a flat tax on wages, i.e., a tax imposed exclusively on amounts earned through salaries or wages while ignoring other aspects of the income tax such as interest or capital gains. Both a consumption tax and a wage tax are generally thought to be neutral between current and future savings. But see Slemrod & Bajika, supra note 77, at 171; 173-76 (noting that, since the transition to a consumption tax would impose a tax burden on pre-existing wealth while a wage tax does not, the two taxes would only be exactly equivalent if we were starting society over again). For a discussion of the necessary assumptions, see Graetz, supra note 4, at 1602 (concluding that the pre-conditions will not exist at the time the consumption tax is implemented); William D. Andrews, Fairness and the Personal Income Tax: A Reply to Professor Warren, 88 Harv. L. Rev. 947, 953-55 (1975) (concluding that the pre-conditions - that all wealth is traceable to original savings out of wages plus simple investment income and a single rate of tax has to be applied to all earnings or consumption expenditures throughout all time - simply do not and will not exist). To the extent that a consumption tax resembles a wage tax and consumption tax reform focuses tax burden on wages in relief of capital then the reform arguably hurts many labor-related activities and corresponding liberties.

[FN93]. See Musgrave, supra note 83, at 249. Musgrave says:
According to the earlier view of excess burden, one is tempted to argue that work effort is higher under a tax on consumption because an income tax imposes an excess burden. However, we have seen this conclusion follows only if the supply of work effort is assumed to be fixed; it does not apply in the present case, where work effort is variable. Depending on the circumstances, one or the other tax may be more adverse to work effort. Work effort will be higher under the consumption tax if future consumption and work are complementary while present consumption and work are rival; and it will be higher under the income tax if these relations are reversed.
Id.

[FN94]. See also Mill, supra note 83, at bk. 5 ch. 2, P 3. "It is not the fortunes which are earned, but those which are unearned, that it is for the public good to place under limitation." Id.

[FN95]. At any rate, there appears to be strong sentiment within the United States to reform or even abolish the gift and estate tax. These reform efforts are arguably contrary to Lockean principles which emphasize the need to protect earned wealth as long as these taxes do not interfere with productive actions. See, e.g., Jane G. Gravelle & Steven Maguire, Estate and Gift

Taxes: Economic Issues, 88 Tax Notes 551, 567 (2000) (concluding that the evidence reveals the estate tax does not have much effect on savings and may increase rather than reduce savings).

[FN96]. See Donna M. Byrne, Locke, Property, and Progressive Taxes, 78 Neb. L. Rev. 700, 737 (1999). Byrne's essay traces how Locke's philosophy supports progressive taxation and suggests a theory of "marginal deservedness of income" based on this philosophy. Id.

[FN97]. See Slemrod & Bajika, supra note 77, at 171 (indicating that both a consumption tax and a wage tax make working more financially attractive by increasing after-tax returns on the portion of labor income that is saved); Andrews, supra note 4, at 1169 (noting that while both income and consumption are biased against work, a consumption tax "is apparently less so"); Kaldor, supra note 4, at 134-36 (arguing that work effort will be promoted more under a proportional consumption tax than under a flat rate income tax).

[FN98]. The consumption tax is generally thought to encourage greater levels of overall wealth in society due to the lesser tax burden on investment activity. See infra notes 144-46 and accompanying text. As a result, wages paid for labor should rise. See Dan R. Mastromarco, What's So Fair About an Income Tax?, Tax Notes 217, 220 (Oct. 11, 1999) (indicating that "the almost universal view of economists [is that] a consumption tax will result in higher real wages and disposable income for almost everyone over time").

[FN99]. See, Groves, supra note 53, at 143.

[FN100]. See supra notes 20-22 and accompanying text.

[FN101]. See Epstein, Taxation in a Lockean World, supra note 25, at 53. Epstein explains:
[The Lockean solution] postulated a world in which, as a first approximation, every individual was required to surrender his right to use force to the state in exchange for the like promise of every other individual to so refrain. In such a world, the gains from being free of risk of aggression are worth more than the unqualified rights of self-help they replace. The risk of aggression of course remains, and self-help (now subject to judicial scrutiny and review) remains for emergencies where state intervention cannot be timely.
Id.

[FN102]. Id. at 55. Epstein briefly examines the consumption vs. income tax debate and concludes that the debate boils down to issues of timing and concludes: "[T]he answer must rest on a detailed examination of the administrative and incentive effects of the two systems and the intermediate position, a task which is largely beyond the scope of this paper." Id. at 67. Epstein does not consider the bias against savings under scrutiny within this part of the article.

[FN103]. See, e.g., Andrews, supra note 4, at 1167-68. Andrews notes:
Neutrality with respect to consumption is important not only because it promotes efficiency in the allocation of income, but because it keeps the tax from bearing more heavily on one person than another on account of differences in need or taste for particular goods or services, now or in the future.
Id.

[FN104]. Id. at 1167-69.
The most sophisticated argument in favor of a consumption-type tax is that the lesser burden of a deferred tax is more appropriate because it ultimately imposes a more uniform burden on consumption, whenever it may occur, than does an accretion-type tax [e.g., an income tax]... [N]o careful writer seems to have denied that an accretion-type tax imposes a heavier ultimate burden in relation to deferred consumption than to current consumption.
Id.

[FN105]. Boskin, supra note 2, at 7. [I]t is well-known that an income tax doubly or triply taxes savings and thus distorts the incentive to consume versus save or, alternatively, to consume in the present versus the future. Id. See also supra 82-85 and accompanying text.

[FN106]. See, e.g., Warren, supra note 5, at 1099.

[FN107]. See Alvin C. Warren, Jr., Comments, in What Should be Taxed: Income or Expenditure? 120, 121 (suggesting that "endowment is necessarily an ex ante concept and, as such, seems to be irrelevant to discussions of fairness"). Professor Warren uses the term endowment in the traditional sense it is used in tax literature, that is as a proxy for the present discounted value of future streams of income. This includes physical capital and assets that influence an individual's potential future earnings. Here, I use the term natural endowment only to refer to natural talents and inclinations. It is these natural talents that call for an ex ante preservation of neutrality so that an individual's natural desires will not be skewed by tax. But see Fried, supra note 4, at 999-1015 (arguing, in part, that savers are already compensated by the market interest rate which is influenced by government policy); Slemrod & Bajika, supra note 77, at 110-12 (reviewing the evidence that saving responds to its after-tax return and concluding that the relationship between savings and this return is unclear partly as a result of the substitution effect where higher rewards to savings give an incentive to save less to achieve desired levels of future consumption). The relationship between savings and tax levels is a complex one, especially once the different reasons for saving (e.g., for retirement, for precautionary reasons or to provide for another) are taken into account. The ex post effect of a tax change that affects an individual's savings is clearly uncertain. The point I am trying to stress is that a consumption tax preserves the ex ante savings preferences of an individual to a greater extent than an income tax; what the individual ultimately decides to do is hence up to her. She could certainly decide to not employ her natural endowments in their most productive fashion by deciding to currently consume rather than to save. A consumption tax does a better job at preserving neutrality for this decision.

[FN108]. Professor Andrews states: "This is the strongest argument against sole reliance on a personal consumption tax." Andrews, supra note 92, at 956. See also Richard Goode, The Superiority of the Income Tax, in What Should be Taxed: Income or Expenditure? supra note 4, at 49, 56 (stressing that both consumption and wealth accumulation are exercises of economic power). It must also be recognized, however, that neither a consumption tax nor an income tax will tax consumers on the psychic benefits of their consumption as well as certain other items of consumption. Say I visit Ocean Beach pier. I enjoy the sunshine and a free walk on the pier (speeding the deterioration of the pier). I take a drink of water from the water fountain. I catch a mackerel, fishing off of the pier. Certainly, I have consumed resources. But I will not pay any tax on this consumption. See, e.g., Simons, supra note 73, at 119. Simmons notes:

To abandon amounts paid and market prices as measures is to leave one's self stranded in the intellectual desert of subject values and psychic numeraires. An ideal income tax would perhaps differentiate among individuals according to their talents for using funds in consumption; but, until some adequate, objective index of such abilities is forthcoming, income taxes must worry along with measurable quantities!

Id.

[FN109]. See Epstein, supra note 25, at 55. "The function of the state is to protect liberty and property. It is not to aid one group or another in skewing the uses to which individuals put their natural endowments." Id.

[FN110]. Locke himself set out a complicated explanation of free will. On the one hand, Locke suggested that an individual's actions are determined by outside forces such as education. On the other hand, he ackowledged that adult human beings are rational agents that decide their own course of action. Accordingly, Locke is often considered to fall with the "compatibilist" school of thought that reconciles determinism with free will. For a discussion on certain aspects of Locke's theory concerning free will. S ee Vere Chappell, Locke on the Freedom of the Will, in Locke's Philosophy: Content and Context 101-22 (1994). In many ways, the compatibilist position seems to be consistent with the position on free will taken by many evolutionary theorists. For a review of sociobiological views on the genetic constraints on free will, see G.C.Williams, Adoption and Natural Selection 32 (1963).

Richard Alexander, Charles Lumsden and Edward O. Wilson have made essentially the same observation here. After explaining flexible programming, they emphasize that any disposition to act on occasion in a given manner is the result of the interaction between (1) genetic programming to act flexibly, but toward generalized goals (the survival and reproduction of their genes most generally), and (2) the particular environment individuals find themselves in at any moment. And the "environment" of individuals includes what is going on in their heads as well as what is going on outside of them.

Id.

[FN111]. A possible exception is a lump sum or head tax (i.e., a tax where every taxpayer pays an equivalent amount regardless of her wealth or income). A lump sum or head tax is effectively neutral since the tax burden will remain unaltered under all forms of taxpayer behavior. But even a lump sum tax may affect behavior in some way such as encouraging the individual to work more or perhaps leave the country. See also supra note 229 and accompanying text.

[FN112]. See, e.g., Musgrave, supra note 83, at 141. "Taxes should be designed so as to meet [their function of allocating different tax burdens] with greatest efficiency, but beyond this, taxes should be as neutral as possible. Unintended interference with the market mechanism may result in an excess burden that should be avoided." Id. This individual welfare gain likely only holds under a partial equilibrium setting where only the decision between savings and consumption is taken into consideration. Transitional issues involved in moving from an income tax to a consumption tax complicate the matter significantly. See McCaffery, supra note 4, at 1170.

[FN113]. See also Mastromarco, supra note 98, at 238 (indicating consumption taxes offer "greater personal choice over taxability").

[FN114]. See supra note 3 and accompanying text. Hobbes, like Locke, suggests that taxes are the price paid for protection by the sovereign; they are "nothing else but the Wages, due to them that hold the publique Sword, to defend private men in the exercise of severall Trades, and Callings." See Hobbes, supra note 3, at 48-50. Taxes should equal the benefits received since "the benefit that every one receiveth thereby, is enjoyment of life, which is equally dear to poor, and rich; the debt which a poor man oweth them that defend his life, is the same which a rich man oweth for defence of his..." Id. But the rich often have to pay for protection of others since the rich benefit from the labor of the poor. Since the rich benefit to a greater extent, Hobbes suggests they should pay a tax proportional to their wealth. But he recognizes that an income tax would be a disincentive to industry and saving. To avoid this disincentive while keeping taxes in some way related to wealth, Hobbes proposes that taxes be proportioned to the amount an individual spends on the consumption of goods. This would make proportional the part that is consumed, but not the entire benefit that the rich receive. Hence everybody should pay their fair share, but only so far as this does not interfere with industry and wealth accumulation. For an account of the argument, see C. B. Macpherson, Introduction, in Leviathan, supra note 3, at 48-50.

[FN115]. See Mill, supra note 83, at bk. 5 ch.2, P 4. For a discussion of Mill's perspective, see Kaldor, supra note 4, at 11-13, 49 n.1.

[FN116]. The commentators have suggested a consumption tax base is the most appropriate measure of an individual's potential contribution in taxes to the collective. These commentators argue standards of living (measured in large part by resources consumed) are a superior measure of the potential distribution of economic resources relative to social product (measured in large part by income). See Andrews, supra note 4, at 1167. These views rely on the notion saved resources are socially desirable because they represent investments that will promote greater social wealth.

[FN117]. See Kaldor, supra note 4, at 53.

[FN118]. Id. John Rawls also supports the Hobbesian argument although without much comment. See John Rawls, A Theory of Justice 278 (1971). Rawls states:
Leaving aside many complications, it is worth noting that a proportional expenditure tax may be part of the best tax scheme. For one thing, it is preferable to an income tax (of any kind) at the level of common sense precepts of justice, since it imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes (assuming here that income is fairly earned).
Id.

[FN119]. In Locke's view, labour is to be understood as the activity of improving for the benefit of life, an activity commanded by God as a result of the Fall. Labour is the means whereby property is acquired, both because of the role human beings play in God's larger purposes for the whole created order, and because labour is the improving, value-adding activity required by the duty to preserve oneself and others.

[FN120]. See Warren, supra note 5, at 1095.

[FN121]. See Graetz, supra note 2, at 202.

[FN122]. For a discussion on the relationship between savings and investment and economic growth, see infra notes 144-46 and accompanying text.

[FN123]. See, e.g. Arnold C. Harberger, Comments, in What Should be Taxed: Income or Expenditure?, supra note 4, at 119. "The chief purpose of a tax reduction on saving would be to help build up a larger private capital stock to pass on to future generations. It does not matter that the capital may be invested in Eurodollar bonds - it will still benefit Americans." Id.

[FN124]. Professor Warren effectively recognizes this position when he states: "Indeed, leaving resources in the common pool can be characterized as socially desirable in that the capital so supplied will increase both future production and the future productivity of workers." See Warren, supra note 5, at 1094.

[FN125]. See Fried, supra note 9, at 149. Fried recognizes that individuals can also choose how much to work: "True, under an income tax a man is also free to determine how much he shall earn. What could be more absurd, however, than to tax a man more heavily for the sole reason that he is making a greater contribution?" Id. at 149.

[FN126]. Id. at 150.

[FN127]. Id. at 147. Fried notes: Undoubtedly people with greater income have greater capacity in the sense just that they have more money. Yet this can serve as the justification of an income tax only on the assumption that how much we can get out of a man is the proper measure of how much we may get out of him, as if all possession were at the sufferance of the state.
Id.

[FN128]. According to Warren, the distinction between people and things is necessary to avoid taxing an individual's productive capacity. See Warren, supra note 5, at 1120. Warren properly argues that "any tax on earning capacity is inconsistent with widely accepted concepts of individual liberty because it would disregard such personal choices as which career to pursue, the amount of time to devote to work as opposed to leisure, and so on." Id. at 1114. While it is true that a Haig-Simons income tax should tax any increase in wealth that permits taxpayer's to command future resources such as a student who attends law school (and thereby increases her potential earnings), the Internal Revenue Code generally ignores these theoretical increases in wealth and focuses on actual market transactions that put wealth in the hands of taxpayers. A consumption tax would similarly avoid taxing productive capacity.

[FN129]. Id. at 1115.

[FN130]. Warren admittedly does not base his views on Lockean philosophy nor does he identify the philosophical foundation for these views. Other legal scholars, however, have expressed similar sentiments. See, e.g., Radin, supra note 54, at 1893 (relying on Kantian philosophy to assert that individuals are distinct from their property as part of overall critique of certain market forces).

[FN131]. See, e.g., McClure, supra note 8, at 86. "[I]t is important to note that for Locke the property right natural to the human species pertains more specifically to the liberty of action that its use entails than to the particular objects or things of which it is predicated." Id. (emphasis added). See also supra notes 70-73 and accompanying text.

[FN132]. See also infra note 143 and accompanying text.

[FN133]. See, e.g., Fried, supra note 9, at 150.

[FN134]. Mark Goldie, Introduction, in Locke, supra note 8, at xi.

[FN135]. Nevertheless it is true that Locke seems to emphasize the necessity of hard work throughout his writings. See, e.g., Locke, supra note 8, at 131 bk. 2, P 34. "God gave the world to men in common... He gave it to the use of the industrious and rational, (and labour was to be his title to it;) not to the fancy or covetousness or the quarrelsome and contentious." Id. Ashcraft suggests that Locke provided a conception that:
supplies a positive endorsement of labouring activity, productivity, and commercial expansion and a corresponding critique of idleness and waste... [[T]he political message of the chapter was clear enough: Artisans, small gentry, yeoman farmers, tradesmen and merchants were all productive members of society and ought, therefore, to unite in pursuit of their interests against an idle and wasteful landowning aristocracy.
Sreenivasan, supra note 8, at 17-18.

[FN136]. For a similar perspective, see Rhinelander, supra note 50, at 97.
It is my belief that a unifying focus [regarding different conceptions and models of man] may be found if we stress man's capacity for inventiveness, recognizing that such inventiveness is displayed not merely in man's art and crafts, but also in his ability to establish complex symbol systems, to make and modify social systems, and to build elaborate normative systems to guide his own behavior. The root of man's inventiveness seems to lie in his capacity - evidently related to his highly developed brain - to envisage possibilities beyond the actualities of immediate experience.
Id.

[FN137]. See Locke, supra note 8, at 117 bk. 2, P 6.
For men being all the workmanship of one omnipotent, and infinitely wise Maker; all the servants of one sovereign master, his property, whose workmanship they are, made to last during his, not one another's pleasure... Everyone as he is bound to preserve himself, and not to quit his station wilfully;... [he ought to do], as much as he can, to preserve the rest of mankind...
Id. Tully calls this the workanship model where God has ownership over individuals and the individuals enjoy ownership over their person and labor. See Tully, supra note 60, at 109. "His body and his limbs are God's property: the actions are his own." Id. See also McClure, supra note

8, at 88-90 (noting that Locke related self-identity to conscious acts and that some actions like the need to act productively to promote self-preservation are "directed" by the conscious mind); Buckle, supra note 8, at 151 (noting, under the workmanship model, "the human activity which mirrors the divine creative act, which accords with its purposes"); Strauss, supra note 66, at 248. "Not resigned gratitude and consciously obeying or imitating nature but hopeful self-reliance and creativity become henceforth the marks of human nobility." Id.

[FN138]. See Locke, supra note 8, at 127 bk. 2, P 25.

[FN139]. See Screenivasan, supra note 8, at 41.

[FN140]. See infra notes 203-07 and accompanying text.

[FN141]. See generally James Twitchell, Lead Us Into Temptation: The Triumph of American Materialism (1999) (discussing how marketing companies try to place individuals in "consumption communities" like Generation-X, Yuppies and Baby Boomers to predict their future purchases).

[FN142]. Id. at 18. Professor Twitchell acknowledges that his views are contrary to the views of most academics who study consumerism since, in his view, these academics view consumers as passive, unthinking creatures gullible enough to fall for any ad man's pitch. Twitchell considers this to be an inaccurate, condescending view propagated by elite (Volvo-driving no less!) professors who are out of touch with the common folk. Id. at 278.

[FN143]. See generally Robert H. Frank, Luxury Fever: Why Money Fails to Satisfy in an Era of Excess 224 (1999). Economists even have a name for certain goods that are purchased to confer status on the owner like a Sports Utility Vehicle; these goods are called "positional goods" . To Frank, individuals are driven by concerns surrounding relative income which influences how they view their subjective well-being. Id. at 111-21.

[FN144]. A person's views on consumption are probably influenced by a number of factors including life circumstances, income level and even generational attitudes. The Baby Boomers (or their subcategory the Yuppies) are often portrayed as rampant consumers, constantly seeking to fulfill their otherwise empty souls with new and better toys while the generation that came of age in World War II (the so-called "Greatest Generation") is portrayed as thrifty with moderate purchasing patterns. Generation Xers are viewed as wary consumers, but brand loyal.

[FN145]. It is acknowledged that consumption taxes can also interfere with an individual's accumulation of wealth. See supra note 105 and accompanying text; see infra note 275 and accompanying text. Some philosophers argue that redistributive taxation merely transfers freedoms from the haves (who now have less freedom) to the have nots (who now have more freedom) so that there is not any net loss of freedom to society as a whole. Steven Rieber, on the other hand, distinguishes between the right to use the property that is collected by the tax (agreeing this freedom is simply transferred) from the right to perform the action that is taxed, which is constrained. In his view, the freedom to use the money that is collected by the tax is distinct from the freedom to engage in the action that is taxed. See Rieber, supra note 11, at 72.

[FN146]. The consensus is remarkable since economists so rarely agree on matters of macroeconomics. See generally Alan J. Auerbach, Tax Reform, Capital Allocation, Efficiency and Growth (Center for Economic Policy Research Pub. No. 444, 1996) (concluding that the reform proposals should increase investment in the United States and lead to growth); Heidi Glenn, Consumption Taxes Good for Economy, 76 Tax Notes 893 (1997) (Congressional Budget Office concludes that consumption tax reform would improve economic growth); Fred Stokeld, Brookings Panel Drills Holes in Kemp Commission's Tax Plan, 70 Tax Notes 487, 489 (1996) (indicating that, under the Kemp Commission consumption tax plan, an increase of "only" 0.3 percent in economic growth per year can be expected); William M. Gentry & R. Glenn Hubbard, Distributional Implications of Introducing a Broad-Based Consumption Tax 25-39 (Center for Economic Policy Research Pub. No. 443, 1996) (noting that, as a result of the fact that corporations can deduct interest payments under an income tax, the effect on interest rates is ambiguous since this deduction will be lost); Boskin, supra note 2, at 28 (reviewing three studies on the consumption tax reform efforts that suggest large economic gains); McCaffery, supra note 4, at 1166-67 (noting "a very broad consensus among political economists is that, in the long run, the world would be a better place under a consumption tax" but noting a number of areas of uncertainty surrounding income and substitution effects, open economy considerations and the potential for inefficient over-saving).

[FN147]. See generally Cockfield, supra note 77, at 79-80.
[A difference between an income tax and a consumption tax is that the former taxes the portion of capital income representing opportunity cost while the latter does not.] When a saver invests in a project, he sacrifices consumption today by using his resources to invest in the project and this is the opportunity cost of capital. This opportunity cost of capital equals the before-tax return on marginal investment. At the margin, a firm will continue to acquire and hold capital until the last unit of capital earns just enough income to cover the cost of holding it. Taxes on marginal investments drive up the cost of capital and firms must earn more income in order to break even, hence discouraging investment. Removing the tax on marginal investments under the tax reform proposals will thus alter the incentive to invest in capital.
Id. See Gentry & Hubbard, supra note 146, at 3-11.

[FN148]. See The National Commission on Economic Growth and Tax Reform, Unleashing America's Potential: A Pro-Growth, Pro-Family Tax System for the 21st Century, 70 Tax Notes 413, 434 (1996) (citing a study conducted by Jorgenson that reviewed American economic activity between 1948 and 1980). See also Michael J. Boskin & Lawrence J. Lau, Capital Formation and Economic Growth 12 (Center for Economic Policy Research Pub. No. 214 1990) (concluding in a study that the benefits of technological progress to the economy are directly proportional to the size of the capital stock).

[FN149]. See Epstein, supra note 25, at 53.

[FN150]. Id. at 52.

[FN151]. Id. at 53.

[FN152]. Mark Seidenfeld, Microeconomic Predicates to Law and Economics 49 (1996). See also Anthony Kronman, Wealth Maximization as a Normative Principle, 9 J. Legal. Stud. 227 (1980).

[FN153]. See Richard G. Lipsey et al., Economics 292-95 (7th ed. 1991) (discussing principles of productive and allocative efficiency developed by Italian economist Vilfredo Pareto).

[FN154]. For a review of economic studies that explore the choice of tax base, see David F. Bradford, The Case for A Personal Consumption Tax, in What to Tax: Income or Expenditure, supra note 4, at 103-106 (concluding that consumption taxes maximize social welfare).

[FN155]. Because all enjoy a greater amount of personal liberty, no other person is made worse off.

[FN156]. See Seidenfeld, supra note 152, at 54 (noting that the most serious problem with the Pareto measure is that outside of simplified, theoretical economic models, virtually any real world change will result in making somebody else worse off). See also Ronald Dworkin, Is Wealth a Value? 9 J. Legal Stud. 191 (1980).

[FN157]. See McCaffery, supra note 4, at 1156 (noting that tax involves a public taking and will typically leave somebody worse off than before the tax).

[FN158]. See infra notes 268-72 and accompanying text.

[FN159]. See Seidenfeld, supra note 152, at 54-56.

[FN160]. Id. at 55. Professor Seidenfeld uses the following example to help to illustrate this point: [S]uppose a policy change results in an increase in food and clothing consumption by Al of two meals and two suits. But the change causes Barb to lose two meals and one suit. Because Al could make up Barb's loss and still be one suit of clothing better off, this change would be Kaldor-Hicks efficient.
Id. See McCaffery, supra note 4, at 1156-57 (noting "the Kaldor-Hicks criterion is both stronger and more broadly applicable to actual policy questions than is the Pareto standard").

[FN161]. But see Seidenfeld, supra note 150, at 55 (stating "Wealth maximization is not a panacea to the problems of evaluation [of the preference functions or indifference curves] that otherwise plague the Kaldor-Hicks approach").

[FN162]. See, e.g., Epstein, supra note 25, at 54 (asserting that "The Lockean theory of government calls for the use of coercion only to create a larger pie with all persons sharing in the gain"). At first glance, Epstein's statement seems inapplicable to the tax arena since all taxes curtail growth to a certain extent. But the statement makes sense if we acknowledge that taxes are a necessary component in any democratic modern state. The question that remains is what type of tax will inhibit economic growth to a lesser extent.

[FN163]. Note that Kaldor-Hicks efficiency does not require an actual compensation to take place. Hence there is always the risk that, after the reform effort is initiated, many individuals will be relatively worse off (and therefore not indifferent) since they will not in reality be compensated.

[FN164]. See supra notes 100-04 and accompanying text.

[FN165]. See Locke, supra note 8, at 142 bk. 2, P 57.

[FN166]. Rieber uses a "Very High Tax Argument" to sustain his argument that taxes reduce the freedom to perform the action that is taxed: "But since a 100% income tax completely eliminates the freedom to effectively exchange labor and money, in the same way a 99% tax nearly eliminates it, and a 20% tax somewhat reduces it." Rieber, supra note 11, at 65-66.

[FN167]. See, e.g., John K. McNulty, Tax Policy and Tuition Credit Legislation: Federal Income Tax Allowances for Personal Costs of Higher Education, 61 Cal. L. Rev. 1, 37 n.115 (1973). "[T]ax equity in general is closely geared to the problem of perfecting the definition of taxable income; in any event, it can be viewed largely from that perspective." Id.; Boskin, supra note 2, at 14 (stating that "[W]hatever its other merits or problems, measuring income is a severe, probably insurmountable, problem."); Andrews, supra note 4, at 1115 (discussing the different ways that the income tax falls short of the ideal tax base); Bradford, supra note 154, at 80-96 (arguing that a comprehensive consumption tax base is easier to implement than an income tax base since the latter often involves calculating past transactions that give rise to unobservable quantities).

[FN168]. Epstein discusses the problems associated with a comprehensive tax base and the income tax, but concludes that most of these problems are not significant since they do not seriously affect government revenues and it would be too administratively difficult to take the problem areas into account in a comprehensive base. See Epstein, supra note 25, at 60-63.

[FN169]. See Treas. Reg. §1.1001-1(a) (as amended in 1996) (providing that a gain or loss is not realized until property is exchanged for cash or other property).

[FN170]. For thoughts on how the government can tax appreciations in capital assets in some circumstances, see Joseph M. Dodge, A Combined Mark-to-Market and Pass-Through Corporate Shareholder Integration Proposal, 50 Tax L. Rev. 265 (1995); Joseph Bankman, A Market Value Based Corporate Income Tax, 68 Tax Notes 1347 (1995).

[FN171]. For a discussion on education as human capital, see McNulty, supra note 167, at 16-17 (discussing views that suggest education should be amortized over the limited useful life of the income-producing activity).

[FN172]. See, e.g., Louis Kaplow, The Income Tax versus the Consumption Tax and the Tax Treatment of Human Capital, 51 Tax L. Rev. 35 (1995).

[FN173]. But see Warren, supra note 5, at 1116 (noting that even if a current value can be obtained, the rights of the purchaser or lender are not the same since the recipient of the value cannot be forced to work). Again, Warren seems to imply a more exacting distinction between a person and her work product than actually exists. While it is true we have legal rules that prohibit specific enforcement of contracts involving personal services (that do to a certain extent reflect different treatment between property and individuals), it is also true that a judgment rendered against a person will have to be satisfied by some means. In other words, the defendant would have to somehow come up with the money to pay the judgment, which will presumably come from some other work that the individual has done. In this way, the defendant is forced to work to pay off the debt.

[FN174]. For a discussion on the calculation of present value of future interests, see William A. Klein & John C. Coffee, Jr., Business Organization and Finance 302-315 (1996).

[FN175]. In fact, human capital actually receives consumption tax treatment. See Kaplow, supra note 172, at 35 (arguing that, with respect to human capital treatment under the income tax, only realizations are taxed and basis is effectively zero).

[FN176]. See Warren, supra note 5, at 1114.

[FN177]. In fact, the Code offers a number of incentives to engage in higher education which effectively subsidize the future higher income earners; many of these incentives have been introduced in recent years. See I.R.C. § 25A(b) (1997) (granting a Hope Scholarship credit for first two years of post-secondary education); § 25A(c) (1997) (granting a Lifetime Learning Credit for any year of study in an "eligible educational institution").

[FN178]. For administrative reasons or other policy reasons, the Internal Revenue Code departs from the Haig-Simons income tax base in a number of important ways. For example, the Code also excludes gifts from the definition of gross income. See I.R.C. § 102(a) (1986). The Code does not tax individuals on their imputed income - amounts of income that are not attributable to market transactions-such as the benefits derived from living in an owner-occupied home (where the imputed income would be the rental value of the home).

[FN179]. See McClure, supra note 4, at 9 (noting that Lockean theory attempts to set the proper boundaries of state power over individual liberty and to separate the proper use of this power from arbitrary excess).

[FN180]. Of course, the matter is not so straight-forward for many items of purchase. Take the example of the purchase of a residential home under a consumption tax regime. Should an imputed rental value be taxed to the owners of the home under a consumption tax? See Graetz, supra note 4, at 1620-23 (discussing problems associated with taxing expensive consumer durables like housing).

[FN181]. See Warren, supra note 5, at 1121.

[FN182]. See, e.g., Sreenivasan, supra note 8, at 51.
[T]he natural right safeguarded by the sufficiency condition is the right to the means of preservation. It discharges this function by securing the material preconditions of this right, the right to produce subsistence quantities of meat, drink, and whatnot. More precisely, the right is an inclusive right of access to the common materials that God provided for the purpose of actualising - in consumption, but through labour - the prior right to preserve onseself.
Id.

[FN183]. Take the example of an individual who invests in an Individual Retirement Account (a tax-deferred pension scheme). See I.R.C. § 408 (1998). Money deposited within the account remains untaxed until withdrawn. I suspect that the knowledge that deposited amounts will be taxed at some future date (i.e., the state continues to exert a future claim over the money) is of little concern to the taxpayer.

[FN184]. See, e.g., U.S. Department of Commerce, Bureau of Economic Analysis, Survey of Current Business: Note on the Personal Saving Rate 8 (Feb. 1999) (indicating the personal savings rate, i.e., personal saving as a percentage of disposable personal income, has declined for two decades to 0.5% in 1998). See also Andrews, supra note 4, at 1151. "Most people spend most of their ordinary income for current consumption, and to that extent a consumption-type personal income tax would be no different from the existing tax." Id.

[FN185]. Under the life cycle theory of saving and consumption, individuals vary their amounts of savings over their lifetimes: the young dissave, then save during the peak earning years and dissave again during retirement. See, e.g., Gentry & Hubbard, supra note 146, at 2 (indicating that consumption taxes may be less regressive from a lifetime perspective than an annual perspective). See also Joseph Bankman & Barbara H. Fried, Winners and Losers in the Shift to a Consumption Tax, 86 Geo. L. J. 539 (1998); McCaffery, supra note 4, at 1184-97.

[FN186]. Through the 1980s until recently, the United States government has produced significant annual deficits. These deficits can be looked at as a kind of deferred taxation on future generations since these generations will likely have to make-up for the shortfalls along with the interest build-up. Tax reform that creates further revenue shortfalls (as some predict would occur under radical consumption tax reform) would exacerbate the problem and impose greater burdens on future generations. This issue is closely related to the problems with funding Social Security payments for future retirees. The huge demographic blurb known as the Baby Boomers will soon be reaching the age of retirement - a smaller percentage of the population consisting mainly of subsequent generations will have to likely pick up the tax bill for these retirees. See also Bankman & Fried, supra note 185, at 565-68 (discussing issues involving intergenerational equity and noting that the impact of the reform may be to redistribute wealth from the old-since they own most of the current assets-to the young).

[FN187]. See, e.g., Andrews, supra note 4, at 1117, 1128-38 (noting that "the existing tax is hybrid, closer in many respects to a consumption-type than an accretion-type tax").

[FN188]. See, e.g., I.R.C. § 401(k) (1997) (exempting from tax specified amounts set aside for retirement).

[FN189]. See I.R.C. § 121 (1998) (exempting from tax the first $250,000 ($500,000 for joint filers) in capital gains on the sale of a residential home that has been held for at least two years).

[FN190]. See I.R.C. § 101 (1997) (exempting from tax life insurance proceeds).

[FN191]. As previously discussed, views on human nature ought to be the starting point of analysis concerning systems that partly address value issues. But the larger context which these individuals inhabit must also be taken into consideration. See supra notes 67-70 and accompanying text.

[FN192]. Tax laws apply higher marginal tax rates to individuals with larger incomes. For example, an unmarried individual is subject to a tax rate of 15% for amounts of income less than $22,100. Higher incomes are subject to higher tax rates with incomes over $250,000 taxed at the highest rate of 39.6%. See I.R.C. § 1 (1986).

[FN193]. For further discussion on the ability to pay theory, see infra note 257 and accompanying text.

[FN194]. See Edwin J. McCaffery, Tax's Empire, 85 Geo. L. J. 71, at 72 (1996) (announcing boldly that "Tax has replaced constitutional law as the most prominent set of public political issues in late twentieth-century America"); Kornhauser, supra note 13; Marjorie E. Kornhauser, What do Women Want: Feminism and the Progressive Income Tax, 47 Am. U. L. Rev. 151 (1997); Anne L. Alstott, Tax Policy and Feminism: Competing Goals and Institutional Choices, 96 Colum. L. Rev. 2001 (1996); Jeffrey A. Schoenblum, Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals, 12 Am. J. Tax Pol'y 221 (1995); Donna M. Byrne, Progressive Taxation Revisited, 37 Ariz. L. Rev. 739 (1995). The classic tax work on this topic is Edwin R. A. Seligman, Progressive Taxation in Theory and Practice (1894).

[FN195]. Locke, supra note 8, at 187 bk. 2, P 140.

[FN196]. See infra note 224 and accompanying text.

[FN197]. See infra notes 224-225 and accompanying text.

[FN198]. See supra notes 39-40 and accompanying text.

[FN199]. See supra notes 42-43 and accompanying text.

[FN200]. "And as different degrees of industry were apt to give men possession in different proportions, so this invention of money gave them the opportunity to continue to enlarge them." Locke, supra note 8, at 138 bk. 2, P 48. See McClure, supra note 8, at 175-81 (suggesting that the introduction of money diminishes an individual's need to act in accordance with natural law).

[FN201]. See Locke, supra note 8, at 139 bk. 2, P 50. Locke's discussion of money and scarcity has created controversy surrounding whether scarcity nullifies the limitation to leave sufficient resources for others and invalidates Locke's natural rights property regime. Nozick suggests that appropriation is just even if there is nothing left for others since the others can improve their situation in other ways. See Nozick, supra note 47, at 175- 77. For a discussion on this point, see Sreenivasan, supra note 8, at 36-40. Waldron argues Locke's "enough, and as good clause" does not mean that there must be enough resources left in common for everyone to share. The advent of a money economy (and scarce resources) means that greater social bounty results and thus ensures that all individuals have enough resources to ensure their self-preservation. See Waldron, supra note 8, at 208-216.

[FN202]. See Locke, supra note 8, at 139 bk. 2, P 50.
This partage [division] of things, in an inequality of private possessions, men have made practicable out of the bounds of society, and without compact, only by putting a value on gold and silver and tacitly agreeing in the use of money. For in governments the laws regulate the right of property, and the possession of land is determined by positive constitutions.
Id. This seems to be Locke's most revealing passage on the topic since he makes it clear that governments alone can legitimately regulate property. The controversy surrounds the extent of this permissible government regulation. Under one view, government can regulate property as long as government does not undermine the basic nature of private property rights. See Buckle, supra note 8, at 188; Strauss, supra note 66, at 235 (noting that "civil property" is based on positive law alone although "civil society must respect civil property" because under Lockean theory the main function of the state is to protect property rights).

[FN203]. Locke states: By the same act therefore, whereby anyone unites his person, which was before free, to any commonwealth; by the same he unites his possessions, which were before free, to it also; and they become, both of them person and possession, subject to the government and dominion of that commonwealth, as long as it hath a being.
Locke, supra note 8, at 176 bk. 2, P 120.

[FN204]. Id. at 187 bk. 2, P 140. But see McClure, supra note 8, at 295 (indicating that although Locke accepts regulation of private property, the fact that he did not address resdistributive issues is problematic since the regulation can be portrayed as harming the individual's liberties).

[FN205]. Locke states: [N]o man could ever have a just power over the life of another, by right of property in land or possessions; since 'twould always be a sin in any man of estate, to let his brother perish for want of affording him relief out of his plenty. As justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another's plenty, as will keep him from extreme want, where he has not means to subsist otherwise...
Locke, supra note 8, at 31 bk. 1, P 42 (emphasis added).

[FN206]. Epstein asserts that the duty to supply charity is limited to cases of "extreme want" and "not mere poverty." Further, he suggests that charitable claims are likely meant to be secured only through "a network of imperfect social obligations." See Epstein, supra note 25, at 68 n.36.

[FN207]. John Locke, A Report to the Board of Trade to the Lords Justices 1697, Respecting Relief and Unemployment of the Poor, in Sreenivasan, supra note 8, at 42 (emphasis added).

Professor Sreenivasan disputes one commentator's view that all individuals have the right to basic subsistence. Sreenivasan argues that this interpretation is incorrect since Locke later points out: "This, rightly considered, shows us what is the true and proper relief of the poor. It consists in finding work for them, and taking care that they do not live like drones upon the labour of others." Id. Further, Locke seems to set out a plan for compulsory work for the poor (three hundred years before the idea of workfare (vs. welfare) was introduced in this country!). Hence Locke may have been simply trying to demonstrate a right to produce subsistence resources only.

[FN208]. See supra notes 138-140 and accompanying text.

[FN209]. See supra note 79 and accompanying text.

[FN210]. See Mark Goldie, Introduction, to Locke, supra note 8, at xxxix.

[FN211]. See, e.g., Locke, supra note 8, at 138 bk. 2, P 46.
[As a result of the introduction of money] he invaded not the right of others, he might heap up as much of these durable things as he pleased; the exceeding of the bounds of his just property not lying in the largeness of his possession, but the perishing of anything uselessly in it.
Id. See also bk. 2, P 50. John Dunn asserts Locke's writings are unclear with respect to his views on economic inequality created by human conventions like money. See Dunn, supra note 13, at 43.

[FN212]. See Nozick, supra note 47. Nozick's views are discussed in the next section, infra.

[FN213]. Rawls, supra note 118, at 11 (using Lockean social contract theory to justify the view that individuals, behind a veil of ignorance, would choose welfare policies to ensure their own safety).

[FN214]. See Tully, supra note 60, at 165. "[C]ommunity ownership of all possessions is the logical consequence of Locke's theory in the Two Treatises." Id.

[FN215]. Though I have said above, chapter 2, that all men by nature are equal, I cannot be supposed to understand all sorts of equality: age or virtue may give men a just precedency: excellency of parts and merit may place others above a common level: birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude or other respects may have made it due; and yet all this consists with the equality, which all men are in respect of jurisdiction or dominion one over another, which was the equality I there spoke of, as proper to the business in hand, being that equal right that every man hath, to his natural freedom, without being subjected to the will or authority of any other man.
Locke, supra note 8, at 141 bk. 2, P 54 (emphasis added).

[FN216]. Nozick, supra note 47, at 149- 210.

[FN217]. Id. at 171.

[FN218]. Nozick rejects wealth redistribution to improve the lot of the less fortunate since the redistributive effort interferes with an individual's personal liberty and right to private property. Id. at 237, 238.

[FN219]. Id. at 169, 172.
Whether it is done through taxation on wages or on wages over a certain amount, or through seizure of profits, or through there being a big social pot that it's not clear what's coming from where and what's going where, patterned principles of distributive justice involve appropriating the actions of other persons. Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities. If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a part-owner of you; it gives them a property right in you.
Id. Nozick does not consider the impact of consumption taxes on individuals although they, under Nozick's argument, could be viewed as "forced labor" since consumption taxes can increase the price of goods and services and hence an individual must work harder to purchase the equivalent amount of goods and services than in a world without consumption taxes. Id.

[FN220]. Nozick essentially relies on Kantian moral theory that one should treat other individuals as ends-in-themselves and not as part of some larger construct. Hence, a moral right should be construed as a negative right since it imposes obligations on others not to interfere with an individual's freedom to pursue his own path as long as this choice does not interfere with the rights of others. But an absolutist view of the right to property - as espoused by Robert Nozick - has been criticized since it fails to recognize that other interests give rise to certain social welfare rights (often referred to as second generation rights) that must co-exist with the right to property. Id. As discussed, Locke recognized that property rights were limited by a number of conditions. Similarly, it has been argued that these social welfare rights serve as a limit to the absolutism that would ultimately require the removal of all taxes on individuals. See generally Tony Honoré, Property, Title and Redistribution, in Equality and Freedom: Past, Present and Future (Carl Wellman ed., 1977).

[FN221]. See Epstein, supra note 25, at 59. "Nozick's categorical condemnation of all coercion provides no framework for ranking alternative systems of taxation, or, indeed, any government action, in any responsible way." Id. Epstein understands the taxation must involve at least some forced exchanges otherwise the problems of hold-outs and free-riders defeats the entire system and individual protection is sacrificed. Id.

[FN222]. See, e.g., Frank Warren Hackett, The Constitutionality of the Graduated Income Tax Law, 25 Yale L. J. 427 (1916).
In the opinion of a great many lawyers [the progressive] feature of the income tax law violates that principle of equality which requires that all taxable income, so far as amount is concerned, be treated alike. To accept without question the doctrine of an existence of this power in Congress falls little short of conceding that Congress may legally confiscate the property of a citizen.
Id.

[FN223]. Id. at 435, 438. Similarly, Professor Randy Barnett recently argued against the current system of income taxation partly as a result of the uncertainty that surrounds any scheme to redistribute wealth through taxation. See Randy E. Barnett, The Structure of Liberty: Justice & The Law 308-17 (1998). He suggests that redistribution via taxation inherently suffers from "serious problems of knowledge, interest and power." Id. at 311.

[FN224]. See, e.g., Seligman, supra note 194, at 67. "The fiscal policy necessarily results in proportional taxation; the socio-political policy results in progressive taxation." Id.

[FN225]. Id. at 212.
The old doctrine of taxation was that of benefits. It held that taxes must stand in a definite relation to the advantages derived by the individual citizen... Taxes were looked upon as premiums of insurance which individuals paid to the collective insurance company - the state - in order to enjoy their possessions in peace and security. The natural conclusion from this doctrine was proportionality of taxation. The larger a man's property or income, the greater are the benefits that accrue to him from the protection of the state.
Id. Of interest, a review of the literature in this area reveals that Adam Smith finds himself conscripted by both sides of the proportional/progression debate apparently as a result of conflicting statements on his part. Most of his writings seem to support proportional taxation, but at one point he indicates: "It is not very unreasonable that the rich should contribute to the public expense, not only in proportion to their revenue, but something more than in proportion." Adam Smith, Wealth of Nations bk. 5, ch. 2, art.1 (Clarendon Press 1976) (1776).

[FN226]. See Schoenblum, supra note 194, at 227 (arguing low income earners receive greater utility from public expenditures since they are unable to afford to purchase their own protection).

[FN227]. See, e.g., Epstein, Takings supra note 59, at 297 (concluding that "no direct measurement of public goods aids in deciding how to allocate the tax burden."); Schoenblum, supra note 192, at 229.

[FN228]. Many commentators have noted that government intrusion into complex market process is inevitably an arbitrary decision to a certain extent. See Seligman, supra note 194, at 194.
All governmental actions which have to do with money relations of classes are necessarily more or less arbitrary. The fines imposed by the courts, the fixing of the rates of import duties or excise taxes are always, to a certain extent, inexact. And in truth, a strict proportional tax... is really more arbitrary as over against the individual taxpayers, than a moderately progressive tax. The ostensible "certainty" involves a really greater arbitrariness.
Id. See also Groves, supra note 53, at 98.
It is true that all taxation is more or less arbitrary; no definitive pattern is prescribed either by natural law or scientific analysis. Following the market pattern of the private economy is no less arbitrary than its alternatives. It would merely cope with uncertainties by resolving all the doubts in favor of the wealthy.
Id.; Hayek, supra note 29, at 148 (arguing that this arbitrariness suggests that government should never interfere with the free market process). But see Epstein, Takings supra note 59, at 298 (indicating that a flat tax "gives a respectable matching, and it is clearly superior to a highly

progressive tax.").

[FN229]. For example, progressive rates encourage taxpayers to shift income between high bracket taxpayers and low bracket taxpayers. For a discussion of taxpayer strategies under a progressive rate system, see generally Slemrod, supra note 90. But see Martin J. McMahon, Jr. & Alice G. Abreu, Winner-Take- All-Markets: Easing the Case for Progressive Taxation, 4 Fla. Tax Rev. (1998) (arguing that the U.S. economy operates as a "winner-take-all" market where over half the income is earned by 20% of families and progressive taxes promote greater aggregate utility and greater efficiency).

[FN230]. See Ferninand H. M. Grapperhaus, Taxes, Liberty and Property: The Role of Taxation in Democratization and National Unity 511-1787 56-57 (1989) (describing the 9th Century custom of voluntary donations to the sovereign by the clergy and the aristocracy).

[FN231]. But see Grapperhaus, supra note 230, at 38 (discussing how the head tax imposed by the Merovingian kings was considered a restriction in freedom since the tax meant surrendering part of one's freedom to the king); Robert Nozick, The Examined Life: Philosophical Meditations 28 (1993) (softening his position on taxation to accept taxation of inheritances in some circumstances). The most recent attempt to introduce a poll tax occurred in Britain in 1990: a violent tax protest erupted that led in part to the downfall of the Thatcher government. Professor Schoenblum appears to be one of the very few commentators who would support a poll tax. See Schoenblum, supra note 194, at 269 (concluding "each of us ought to be required to pay the same absolute amount of tax to [the state]").

[FN232]. See Rawls, supra note 118, at 73. Rawls argues we should make moral pronouncements from an "originalist position," that is we must create a system of laws as if we did not yet exist. From this originalist position, we might be aware that we could be born into a poor family or perhaps a family that did not emphasize strategies to generate wealth in future years (e.g, get good grades in school so that you can ultimately attend a professional school like law school and enter into a profession with relatively high wages). From this position, Rawls argues that individuals would choose social structures that would permit the less fortunate to improve their lot while permitting producers to be rewarded for their efforts. For a discussion of the Rawlsian position, see Kornhauser, supra note 13, at 623-26; Schoenblum, supra note 194, at 250- 58.

[FN233]. According to one study, in two-thirds of states, the gap in incomes between the top 20% of income-earning families and the bottom 20% grew between the late 1980s and the late 1990s. In three-fourths of the states, income gaps between the top fifth and middle fifth of families grew during the same time period. Overall, from the late 1970s to the the late 1990s, the average real income of high-income families grew significantly while lowest-income families stagnated or declined and the middle-income families increased slightly. See Economic Policy Institute & Center on Budget and Policy Priorities, Pulling Apart: A State-by-State Analysis of Income Trends (Jan. 2000), available at < http://www.cbpp.org/1-18-00sfp.htm>. According to another study, in 1977, 47 percent of all income in the United States went to the top 20% of the population with the highest incomes. In 1990, 51 percent of all income went to the top 20%. The average real (i.e., inflation-adjusted) incomes declined from 1977 to 1990 for families in the bottom 40 percent of households while the real income among the wealthiest 1 percent rose by 74 percent during this time period. Real incomes for families in the third and fourth quintile rose during this period. See Slemrod & Bajika, supra note 77, at 56-57 (citing Congressional Budget Office research); Stephen B. Cohen, Vanishing Case for the Flat Tax: Growth, Inequality, Saving, and Simplification, 86 Tax Notes 675, 680-687 (Jan. 31, 2000) (reviewing Census Bureau data on after-tax income that shows growing income inequality over the past twenty-five years); Alan Wolfe, Americans Do Care About the Income Gap, San Diego Union-Tribune, Sept. 23, 1999 at B-15 (citing an Institute for Policy Studies study that indicates top executives made 419 times more than factory workers in 1998 compared with 42 times more in 1980).

[FN234]. See Slemrod & Bajika, supra note 77, at 56 (citing Arthur B. Kennickell & R. Louise Woodburn, Estimations of Household Net Worth Using Model-Based and Design-Based Weights: Evidence from the 1989 Survey of Consumer Finances (1992)).

[FN235]. See Slemrod & Bajika, supra note 77, at 56 (citing a study that indicates "nine-year averages of labor income were considerably more unequal in the 1980s than in the 1970s"); Bankman & Fried, supra note 185, at 560. "Contrary to the image of an equal opportunity society that income mobility is often proffered to support, the data suggest relatively rigid lifetime income classes." Id. But see Schoenblum, supra note 194, at 267 (concluding that "the ultimate income position for an individual is largely one of his own responsibility").

[FN236]. Rawls indicates that the notion that rewards should be distributed based on natural endowments is incorrect since nobody deserves the talents and abilities he or she is born with. He favors a general welfare principle. See Rawls, supra note 118, at 60-65.

[FN237]. The straight-forward point here is that nurture (in addition to nature) ultimately affects how individuals perceive the world and how they behave. For example, a parent that stresses hard work and the value of education will tend to encourage her or his child to do better in school and better students, all else being equal, will go on to earn more wealth (unless they choose to become professors).

[FN238]. See Roy Blough & Carl Shoup, A Report on the Federal Revenue System Submitted to Undersecretary of the Treasury Roswell Magill (1937), reprinted in 70 Tax Notes 1071 (1996) (concluding that estate and gift taxes are effective at slowing the concentration of wealth); Henry J. Aaron & Alicia H. Munnell, Reassessing the Role for Wealth Transfer Taxes, 45 Nat'l Tax J. 119 (1992) (reviewing data that suggests a major deconcentration of wealth in the United States in the first half of the century, a stabilizing of wealth from the 1960s to the mid1980s and a significant increase in the concentration of wealth holding of the top 1% from this point to 1989; suggesting the estate tax has had little impact on wealth concentration for many decades).

[FN239]. See, e.g., Williams, supra note 61, at 282 (noting that Locke's property system needed to destroy the right of the Crown to all property while at the same time managing to avoid destabilizing the property rights of the aristocracy).

[FN240]. For a discussion on the uses of the path dependency concept, see Path Dependency, or Why History Makes it Difficult but Not Impossible to Reform Health Care in a Big Way, 14 J.

Pub. Pol'y 251-83 (1994); Michael Trebilcock, What Make Poor Countries Poor?: The Role of Institutional Capital in Economic Development, in Law and Economics of Development (1997) (indicating developing countries are poor as a result of long-lasting institutional factors and path dependence); Douglas C. North, Institutions, Institutional Change and Economic Performance 7-8 (1990).

[FN241]. The extent by which taxation actually achieves this goal is certainly controversial. Some argue that progressive taxation has not resulted in any effective redistribution of wealth. Progressive taxation may simply act as a buffer against the tide of wealth concentration. See Boskin, supra note 2, at 7 (indicating that higher tax rates on individuals "sharply limit the extent of income redistribution..."); see Seligman, supra note 194, at 73-76 (indicating that this approach is "impracticable" since it not possible to measure the extent of the inequality created by the state and hence the amount the tax system should counterbalance this inequality).

[FN242]. This is in effect what the current progressive income tax system accomplishes. The top 1% of income earners pay 28.3% of all income taxes. The top 5% pay 47.3%. The top 10% pay 58.8%. The top 25% pay 79.2%. The top 50% pay 95.2%. The bottom 50% pay 4.8%. Tax Foundation (1996). But see Daniel Shaviro, Effective Marginal Tax Rates on Low Income Households (forthcoming) (concluding that low income earners face "astonishingly high" marginal tax rates when government programs such as Social Security benefits and foods stamps are taken into consideration since many of these programs are phased-out as income increases). Seligman speaks with approval of a "special compensatory theory" that supports progressive taxation: progressive taxes, it is argued, need to balance out other more regressive taxes in society. See Seligman, supra note 194, at 76. The same argument could be applied today since Social Security taxes (a flat tax on wages) and other government programs are regressive.

[FN243]. See Mill, supra note 83, bk. 5 ch.2, P 2. Mill supported, however, a flat consumption tax base as the best measure of an individual's ability to pay mainly since he felt a progressive income tax punishes savings. The ability to pay doctrine often relies on the theory of declining marginal utility. Basically, a dollar to a person with minimal income is thought to be worth more to this person (since the dollar will go to the purchase of necessities) than a dollar to a wealthy person (since the dollar will go to the purchase of non-necessities). Hence taking the dollar from the wealthy person, the argument goes, represents a lesser "sacrifice" by this individual. There is a great deal of controversy surrounding the slope of the utility curve. For a discussion on different sacrifice theories, see Kornhauser, supra note 13, at 616-20; Seligman, supra note 194, at 127-50 (discussing the development of theories underlying the sacrifice principle).

[FN244]. See Kornhauser, supra note 13, at 635.
An early, commonly held American view of equality is equality of opportunity. Emerson calls this "the most distinctive and compelling element of our national ideology." ... Equality of opportunity is connected fundamentally to the basic revolutionary premise of our country. Implicit in the abolition of privilege and hierarchy is the belief that each individual is as good as the next person and is entitled to the same opportunity to achieve or obtain as every other person... If there is not equal opportunity... unequal treatment is necessary or fair to the extent that such treatment moves the disadvantaged person up to the starting line.
Id.; Kornhauser later notes that:

Merit outcomes equality, however, has contradictory effects. At the individual level, merit equality dictates that each person with equal merit receive equal economic distributions... Those people possessing greater merit - as determined by such criteria as skill, talent, or perhaps risk-taking ability - will receive a greater portion of the proverbial pie. Merit equality is premised on the existence of equal opportunity which can be destroyed by the very wealth inequality that merit equality produces.
Id. at 641.

[FN245]. Plato recognized the crucial role that an individual's background (e.g., family wealth and parental guidance) plays in the pursuit of self-fulfillment. Accordingly, he proposed an ideal state where children would be taken away from their families at a young age and raised in state-controlled nurseries and educational institutions where they would be guided toward the fulfillment of their naturally-endowed abilities. In his view, the set-up guaranteed an equality of opportunity (hence promoting the ideal of the meritocracy). This view can be seen as the ultimate form of wealth redistribution, acceptable to only the most sleep-deprived parent. See Plato, The Republic 58 (Oxford University Press 1945).

[FN246]. Of course, plans for wealth redistribution must meet the test of practicality. In other words, wealth redistribution is only feasible in societies (like our own) where higher income earners have sufficient resources left over to permit their own pursuit of happiness (albeit at an admittedly more impoverished level). This practicality test flows logically from sacrifice theory of the "ability to pay" doctrine. See supra note 241 and accompanying text. See also Wellman, supra note 57, at 105-106.
The core of every economic human right consists of one or more ethical claims of the right-holder against some second party or parties to be provided with some specific economic good or service...And since ethical claims of a right-holder are logically correlative to moral duties of the second party against whom the right holds, there can be no real right corresponding to unreal moral duties.
Id.

[FN247]. For a radical discussion of this view, see Chomsky, supra note 63, at 139 (indicating that "elites... determine the basic framework of what happens in the society based on their power, which ultimately is rooted in economic power, in simple ownership of the basic facilities out of which the society is constituted").

[FN248]. See, e.g., Groves, supra note 53, at 74 (reviewing Henry Simons' views concerning "vote-buying" where legislators favor special interests above the common interest). See Graetz, supra note 2, at 111-38 (discussing the impact of lobbying on the current income tax).

[FN249]. Klaus Vogel, a German international tax scholar, traces the justification for tax throughout the past centuries and concludes that progressive tax policies play a critical role in the relationship between individuals and modern democracies. See Klaus Vogel, The Justification for Taxation: A Forgotten Question, Amer. J. Juris. 19 (1988). This view relies on the contributions of Lorenz von Stein who recognized that "State and taxation have a historical dimension." Id. at 37. "In summary, Stein justifies taxation vis-à-vis 'individual independence' by arguing that it is only through taxation that the community is placed in the position to provide individuals with 'the economic conditions required for their development.' In other words, through taxes individuals return to the community 'a portion of the economic progress they derive therefrom." ' Id. Vogel asserts the rise of large corporations as a form of conducting business during the last one hundred fifty years necessitate a re-examination of the modern state which he terms the "triangle state/economy/society" . In his view:

[A]mong the commitments of the State today, one is to protect important general interests against a principally autonomous, efficient, but powerful economy and to correct the results of economic self-regulation, when and where necessary. Consequently, expenditures - and taxes to cover these expenditures - are justified, too, if and as far as they are necessary to place the State in a position to satisfy these "welfare State" commitments.

Id. at 45.

[FN250]. See Locke, supra note 8, at 117 bk. 2 P 6.

[FN251]. Locke notes the social aspects of human nature: "[An individual] is urged to enter into society by a certain propensity of nature, and to be prepared for the maintenance of society by gift of speech and through the intercourse of language, in fact as much as he is obliged to preserve himself." See Buckle, supra note 8, at 144 (citing John Locke, Essays on the Laws of Nature 157 (Wolfgang von Leyden ed. 1954)). Buckle notes that

Whether this use of 'urged' in this passage refers to an obligation or merely to natural instinct, it is clear that Locke understands sociable instincts to be in accord with the dictates of natural law. This is indicated by the conclusion of the quotation: we are urged to enter into society as much as we are obliged to preserve ourselves.

Id.

[FN252]. Darwin was apparently one of the first to put forth this notion:

The development of the moral qualities [of man] is a more interesting problem. The foundation lies in the social instincts, including under this term the family ties. These instincts are highly complex, and in the case of the lower animals give special tendencies towards certain definite actions; but the more important elements are love, and the distinct emotion of sympathy. Animals endowed with the social instincts take pleasure in one another's company, warn one another of danger, defend and aid one another in many ways. These instincts do not extend to all individuals of the species, but only to those of the same community. As they are highly beneficial to the species, they have in all probability been acquired through natural selection.

See Charles Darwin, The Descent of the Mind (1871), as excerpted in Darwin: A Norton Critical Edition 200 (Phillip Addleman ed., 1979).

[FN253]. This is consistent with the sociobiological 'selfish gene' view of evolution which relates most individual acts back to self-interest. Of course, genes themselves are not selfish, but the metaphor draws attention to the fact that the units of inheritance work in order to benefit the individual's biological ends. The other side of the coin, however, is that these ends demand cooperation among individuals. See, e.g., Ruse, supra note 52, at 236. The term 'selfish gene' was coined in Richard Dawkins, The Selfish Gene (1976). Although humans are cognitively separate in a biological sense, on some level we feel empathy for others in our community (perhaps even nation). Empathy brings about a corresponding desire to help others regardless of whether this action is in one's self-interest. Evolutionary biologists create models that try to gauge to a certain extent the altruistic tendencies of individuals toward others. These models invariably show that individuals will be far more likely to extend aid to close relatives, while altruistic tendencies tend to fall off as one moves away from these relatives (e.g., obligations to distant cousins are far less than to one's own children).

[FN254]. Sociobiology attempts to explain altruism in terms of 'kin selection' (i.e., individuals make altruistic sacrifices on behalf of relatives to promote survival of copies of their genes) or 'reciprocal altruism' (i.e., altruistic acts are expected to be rewarded at some future time); see William Buskist & David Gerbing, Psychology Boundaries and Frontiers 83 (1990). It should be noted that this area of sociobiology is disputed by a number of observers. For example, paleontologist Stephen Jay Gould argues that many human traits are not derived as a result of the function of natural selection but occurred through other processes: many theorists have differing views on the process of genetic transference of behavioral traits. See Ruse, supra note 52, at 92.
To talk in terms of metaphor, one set of evolutionists (the Darwininians, the synthetic theorists) regard the organic world in terms of adaption, which is to say as though it is functioning or designed. The other set of evolutionists, of which Gould is a prime representative, does not. They think of the organic world in terms of form, which means that there are certain basic structures or blueprints according to which organisms are constructed.
Id. Still, it appears that a consensus exists that at least some aspects of human behavior result from a predisposition caused by the passage of genes. The real debate surrounds the degree of influence that genetic programming asserts in comparison to environmental factors - the nature/nurture debate. See, e.g., G.C. Williams, Adoption and Natural Selection (1963).
Complex systems of behavior, such as the more elaborate reproductive patterns will usually be a blend of learned and instinctive elements. There are things that have to be learned such as the individual characteristics of a particular mate or the location of a nest site. All elements that can be instinctive, however, will be instinctive. Instinct costs less than learned behavior in the currency of genetic information.
Id.

[FN255]. For a discussion of the application of social insurance theory to tax policy issues, see Gene Steuerle, And Equal (Tax) Justice for All?, Tax Notes 1455, 1456 (Dec. 13, 1999) (arguing tax policy based on social insurance principles provides a balance between protecting freedom and promoting social welfare).

[FN256]. See supra note 69 and accompanying text. The problem is that views of humans as naked tool-using communicating apes may be an accurate depiction of people but this does not necessarily help to determine the social rules that ought to govern human behavior. See, e.g., Allan Mazur, Periods and Question Marks in the Dynamics of Evolution, in The Punctuated Equilibrium Debate in the Natural and Social Sciences 222 (Albert Somit & Steven A. Peterson eds., 1992). "In contrast with the empirically documented reconstruction of the physical evolution of humans, speculations about the evolution of social behavior are based on much flimsier grounds. Since behavior does not fossilize, theorists are free to offer whatever reconstructions they like, virtually unconstrained by data that can falsify their claims." Id. A student of history recognizes that evolutionary principles have been used to justify a bewildering set of political institutions from capitalism (because entrepreneurs struggle to provide their goods to the market in a kind of survival of the fittest), to fascism (because human organizations are like many animal organizations that require a strong Alpha leader--add a eugenics twist under Nazism to promote a superior breed of evolved humans), to communism (because humans are social animals that benefit to the greatest extent through shared resources).

[FN257]. See generally William H. Durham, Coevolution: Genes, Cultures and Human Diversity (1991) (discussing how biological evolution is similar in many ways to the evolution of human cultures and norms).

[FN258]. This statement is not meant to deny the reality that a significant percentage of children within the United States lack proper nutrition, health care and education. In fact, the ideal of the meritocracy argues, at the very minimum, for government programs to redress this problem in order to promote equality of opportunity.

[FN259]. See Buckle, supra note 8, at 190. "Property arises naturally through the self-preserving activities of human beings, and the more sophisticated notions of property that develop in civil society are a continuation of this natural process, being adaptations to changed circumstances or refinements introduced for the further improvement of human life." Id.

[FN260]. See de Montesquieu, supra note 10, at 230. De Montesquieu is generally credited with introducing the idea of separation of powers among different government entities like the judiciary and the legislature that was eventually introduced in the United States Constitution.

[FN261]. See D'Alembert, Analysis in The Spirit of Laws, supra note 10, at xxxiv.

[FN262]. Standards of living estimates are taken from a study called the United Nations Human Development Index. The United Nations Human Development Index represents the most comprehensive annual attempt to gauge standards of living and includes such factors as life expectancy, adult literacy rates, and adjusted real GDP per capita. See United Nations, Human Development Index (1999) available at <http://www.undp.org/hdro>.

[FN263]. Freedom House, Table of Countries 1999-2000: Comparative Measures of Freedom (1999) available at <http://freedomhouse.org/table1.html>. Freedom House bases its views on human freedom on the following principles:

Political rights enable people to participate freely in the political process, which is the system by which the polity chooses authoritative policy makers and attempts to make binding decisions affecting the national, regional, or local community. In a free society, this represents the right of all adults to vote and compete for public office, and for elected representatives to have a decisive vote on public policies. Civil liberties include the freedoms to develop views, institutions, and personal autonomy apart from the state.

Id. Freedom House uses a checklist of questions to determine a particular country's rating with respect to political rights and civil liberties, with one representing the most free and seven the least free category.

[FN264]. See Organization for Economic Cooperation and Development, OECD in Figures: Statistics on the Member Countries 36-39 (1999). The Paris-based Organization for Economic Cooperation and Development is the leading international organization that compiles international tax statistics.

[FN265]. See Hugh J. Ault, Comparative Income Taxation, A Structural Analysis (1997) (reviewing income tax systems in nine different industrialized countries). A recent study notes that for every single point increase in a country's rating of economic freedom, per capita Gross Domestic Product rises by $0.33. Economic freedom involved reviewing government regulations over market activities. Taxes--a form of regulation over private property--seem to have a far lesser impact on economic growth than say government control over investment flows. See James Gwartney, Rovert Lawson & Walter Block, Economic Freedom of the World, 1975-1995 111 (1996).

[FN266]. I have not relied on tax statistics for countries with authoritarian governments such as China or North Korea which would show even lesser amounts of total tax collected since these statistics are notoriously unreliable. The United States has the fourth highest standard in the world and total tax receipts as a percentage of gross domestic product of 28.5 percent. United States taxes are much lower than the OECD average of 37.7%. See OECD, supra note 264, at 39. The highest personal income tax rate in the United States of 46 percent (representing both federal and state rates) is approximately the same as the OECD average of 47.8 percent. Id.

[FN267]. Professor Epstein, who seems to have softened his position against redistribution over the years, now agrees that the: state can redistribute as much as it likes from rich to poor so long as it does so through general revenues... This proposal waives all objections to progressive taxation, but insists only that the remainder of the structure protecting private property and economic liberties be respected and enforced... [But t]here is redistribution along one dimension only, from rich to poor, for it is only among that line that one can assume that a single unit of wealth means more to the recipient than it does to the donor.
Richard A. Epstein, Property, Speech, and Politics of Distrust, in The Bill of Rights in the Modern State 41, 88-89 (1992). Epstein's final caveat is a sound one. The current income tax system gives out a multitude of subsidies to various special interest groups. The ultimate result may be that poorer taxpayers benefit from redistributive efforts to a far lesser extent than suspected.

[FN268]. This point is strongly related to Oliver Wendell Holmes' famous observation that "taxes are what we pay for civilized society." Compania General de Tobacos de Filipinas v. Collector, 275 U.S. 87,100 (1927) (Homes, J., dissenting). He observed that, unlike government imposed fines and penalties, taxes have two effects because "every exaction of money for an act is a discouragement to the extent of the payment required, but that which in its immediacy is a discouragement may be part of an encouragement when seen in its organic connection with the whole." Id. at 100. Robert Goodin suggests that the redistribution of property rights is a constant-sum game because freedoms that are taken away from one individual are given to another. There is therefore no net loss of freedom for society as a whole. See Goodin, supra note 54, at 313. While redistributive policies do in a sense transfer freedoms among individuals, this article has taken the position that taxation reduces the freedom to perform the action that is taxed, and hence from the individual's perspective, freedom has still been curtailed. See Rieber, supra note 11, at 64 (distinguishing between "the freedom to use the property that is collected", which is transferred to other members of society, from the "freedom to perform the action that is taxed," which is constrained).

[FN269]. Under this argument, wealth redistribution through taxation actually enhances personal liberty. The argument rests on the assumption that democracies can only tolerate a limited amount of wealth disparities among families. Accordingly, wealth redistribution via taxation along with institutions that protect private property act as a kind of positive sum game where overall individual freedom is enhanced. Whether growing wealth disparities and separation among different economic classes will damage democratic institutions is only speculative at this point. It has been noted that in recent years the United States has become to resemble the Europe of old "with an entrenched upper class [that] controlled the bulk of wealth" because the data suggests a much higher concentration of wealth in the U.S. when currently compared to the situation in Europe. Edward N. Wolff, Top Heavy: The Increasing Inequality of Wealth in America and What Can be Done About It 20 (1995).

[FN270]. A revenue neutral reform proposal would raise current amounts of tax revenues.

[FN271]. A distributively neutral reform proposal would strive to maintain current tax burdens on different classes of taxpayers. See, e.g., Gentry & Hubbard, supra note 146, at 50 (concluding that the reform proposals could harm the middle class more than the wealthy since the reform measures favor owners of corporate equity (where the ownership is concentrated among wealthier households) at the expense of the current favorable tax treatment of home owners (where home ownership represents most of the savings of the middle class)).

[FN272]. For example, Kaldor recommended replacing a British income surtax with an expenditure tax with rates up to 300 percent. See Kaldor, supra note 4, at 241. See also Goode, supra note 106, at 56.

[FN273]. Cordell Hull wished to end to "the infamous system of class legislation" which imposed the greatest tax burden on the citizens through protective tariffs while "virtually exempting the Carnegies, the Vanderbilts, the Morgans and the Rockefellers with their aggregated billions of hoarded wealth." Coffield, supra note 10, at 231 (citing S. Ratner, American Taxation 272 (1942)).

[FN274]. See, e.g., Graetz, supra note 2, at 262. "No one should doubt that replacing the current corporate and individual income taxes with a flat-rate tax on consumption would shift substantial amounts of taxes from higher- to lower-income families." Id.; Cohen, supra note 233, at 677 (indicating "nearly every... study finds that the immediate impact of the flat tax would be to dramatically shift the tax burden from the rich to middle and lower classes."); Zolt, supra note 14, at 1844. "Major tax changes will affect the relative tax burden between the rich and the poor, between the young and the old, among different sectors of the economy, and among different industries." Id.

[FN275]. See, e.g., Andrews, supra note 4, at 1172 (concluding that wealth disparities ought to be attacked by strengthening the gift and estate tax rather than trying to use the income tax). As discussed, both consumption and income taxes interfere at least to a certain extent with an individual's productive labor. For this reason, some commentators have suggested that unearned wealth (i.e., wealth received by an individual that has nothing to do with his own efforts such as gifts or inheritances) should be targeted as the basis for equalizing wealth inequalities. This approach would be more consistent with the argument within this article that suggests government should interfere to least extent possible with an individual's productive behavior and proposals have been put forth in this direction from time to time. But the estates and gift tax raise relatively small amounts of revenue (approximately one to two percent of total federal revenues) and there are a number of administrative reasons that suggest this would be very difficult to change. Tax lawyers and CPAs have come up with a number of creative mechanisms to lower estate tax liabilities through such devices as estate tax freezes or gifts to charitable remainder trusts, strategies permitted by existing tax laws.

[FN276]. But see Mastromarco, supra note 98, at 233-235 (suggesting a consumption tax would enhance the ability of individuals to improve their lot in life by rewarding productive behavior).

[FN277]. See Goode, supra note 106, at 71 (arguing that the taxation of wealth is inconsistent with some of the principal arguments advanced to support a consumption tax); Warren, Comments, supra note 107, at 121 (noting that a graduated consumption tax would reduce disparities, but this would be inconsistent with the desire for neutrality between present and future consumption since progressive rates ultimately impact on savings decisions).

[FN278]. See, e.g., Boskin, supra note 2, at 24-27,

there are great concerns over transition cost[s]. Partly this reflects uncertainty about the future, how the economy will react, but also that the putative benefits of simplicity, decreased economic distortions, etc., come at a substantial potential cost, both [in terms of] administrative compliance and economic disruption... There is an old bromide that an old tax is a good tax. This is true for a variety of reasons, because tax changes result in disruptions, capital gains and losses on different assets, etc.

Bankman & Fried, supra note 185, at 540-46, 568 (discussing the different components of investment returns for both consumption and income taxes and the ultimate distributive estimates based on these components and later suggesting that, while wealthier taxpayers will likely benefit disproportionately from the reform, the impact may be less than is generally assumed).

[FN279]. See William D. Andrews, A Supplemental Personal Expenditure Tax, in What Should be Taxed: Income or Expenditure? supra note 4, at 127. "It is not clear, however, that completely replacing the present regime is practical. It would in any event raise serious transition problems, and it might burden us with unanticipated problems affecting what would then be our principal revenue source." Id.; See also Nicholas Kaldor, Comments, in What Should be Taxed: Income or Expenditure?, supra note 4, at 154 (agreeing that "it is better to use an expenditure tax as a supplement to an income tax than as a replacement").

[FN280]. See, e.g., Martin A. Sullivan, What Rate for the Flat Tax? 70 Tax Notes 490 (1996) (noting that "even under the most optimistic of scenarios, it would take many years for the benefits of a flat tax to reach their full economic potential" and hence Congress would likely have to adopt higher rates to achieve revenue neutrality during this time).

[FN281]. See Kaldor, supra note 4, at 29-30.
The prevailing view of equity undoubtedly regards this notion of spending power as superior to actual expenditure as a criterion of taxable capacity... [This] is partly a reflection of the general belief that a just system of taxation should tax persons by criteria that are as far as possible independent of their own volitions or dispositions. From the latter point of view the amount that a man can afford to spend appears to the man-in-the-street a more reasonable measure of his taxable capacity than the amount he chooses to spend.
Id. Kaldor later suggests "It is the charge on dissaving, much more than the exemption of savings, that distinguishes an expenditure tax from an income tax." Kaldor, Comments, supra note 277, at 151. Many of the recent consumption tax reform proposals ignore the fact that amounts borrowed for consumption would be taxed. The reason for this is clear: such a tax would likely be politically infeasible in a culture where consumerism is often fueled by debt.

[FN282]. Professor Kornhauser reviews a number of polls (and polling methodologies) that try to gauge Americans' views on taxation. She concludes that the studies generally back up the view that Americans support economic liberty in the sense that individuals ought to be rewarded for their efforts, talents and abilities, but there is also support for redistribution of wealth to address problems of equality of opportunity. See Kornhauser, supra note 13, at 643-54. For a review of the political hurdles that would need to be overcome prior to the implementation of fundamental tax reform, see generally Boskin, supra note 2.

[FN283]. See, e.g., Zelenak, supra note 80, at 199 (indicating that while a single rate of tax has considerable appeal to the American public, a consumption tax base would be far harder to sell). But see Daniel J. Mitchell, The Inevitability of the Flat Tax, 86 Tax Notes 669, 673 (Jan. 31, 2000) (citing polls that indicate a majority of those polled would support flat tax reform).

[FN284]. See Seligman, supra note 194, at 195.

[FN285]. See supra note 106 and accompanying text. See also Cohen, supra note 233, at 686 (indicating that "in a representative democracy, the distribution of power is often related to the distribution of wealth") (citing Edward N. Wolff, Recent Trends in the Size Distribution of Household Wealth, 12 J. Econ. Persp. 131 (1998)).

[FN286]. See generally Cockfield, supra note 77, at 82-91. Matters of international tax equity are highly contentious, even more so than matters of domestic tax policy. For a review of fairness issues in the international arena, see Nancy H. Kaufman, Fairness and the Taxation of International Income, 29 Law & Pol'y Int'l Bus. 145 (1998).

[FN287]. But see Arthur J. Cockfield, Tax Integration under NAFTA: Resolving the Conflict between Economic and Sovereignty Interests, 34 Stanford J. Int'l L. 39 (1998) (discussing how sovereignty concerns on behalf of the U.S. government as well as its citizenry often prevent implementing effective international tax reform).

[FN288]. See generally Arthur J. Cockfield, Balancing National Interests in the Taxation of Electronic Commerce Business Profits, 74 Tulane L. Rev. 133, 172 (1999).

[FN289]. See, e.g., United States Treasury Department Convention Between the United States of America and for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital P2 (CCH, Sept. 1996) (defining taxes covered as income taxes or taxes that are identical or substantially similar). On rare occasions, the income tax treaty is extended to all federal level taxes for certain circumstances. This has occurred for the non-discrimination clause in the Canada-U.S. Treaty. See Income Tax Convention P 25, Sept. 26, 1980, U.S.- Can., Tax Treaties (CCH).

[FN290]. See, e.g., Reuven S. Avi-Yonah, Comment on Grubert and Newlon, The International Implications of Consumption Tax Reform, 49 Nat'l Tax J. 267, 269 (1996) (noting that, if radical consumption tax reform was initiated in the U.S., foreign governments could deny deferral of unrepatriated profits in subsidiaries within the U.S. and may try to retaliate by expanding their tax jurisdiction).

[FN291]. The modern U.S. income tax in 1913 imposed tax rates of 1% to a high of 7% with generous exemptions for taxpayers with low incomes. In 1957, the highest marginal federal tax rate was 91.1%. In 1999, the highest federal income tax rate was 39.6%. A statement recorded from the Congressional debates that led to the imposition of the 1913 tax illustrates the fears surrounding the use of coercive taxation:

A fear expressed by a number of opponents was that the proposed law, with its low rates, was the camel's nose under the tent - that once a tax on incomes was enacted, rates would tend to rise. Senator William E. Borah of Idaho was outraged by such anxieties and derided a suggestion that the rate might eventually climb as high as 20 percent. Who, he asked, could impose such socialistic, confiscatory rates? Only Congress. And how could Congress - the representatives of the American people - be so lacking in fairness, justice and patriotism?

International Bar Association, Tax Avoidance, Tax Evasion 19 (1982).