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by JOHN T. PLECNIK*

Introduction

"Eat the poor children," proposes Jonathan Swift.[1]
"Nay," protests Occupy Wall Street, "Eat the rich!"[2]

Although separated by nearly three centuries and three thousand miles of ocean, Mr. Swift's Modest Proposal and the colorful signs and slogans of Occupy Wall Street evoke concern for precisely the same issue of distributive justice. Of course, neither proposal is serious. Both are more than arguably an exercise in Juvenalian satire.[3] But they raise serious issues that require equally serious solutions. Among those, how do we distribute the tax burden in a fair, pragmatic, and constitutional way? This Article's modest proposal for the New Flat Tax is a fiscally responsible solution. And

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1. JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE IN IRELAND, FROM BEING A BURDEN ON THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK (1729).

2. Noemi de la Torre, *Wacky Signs From Occupy Wall Street*, ABC NEWS (Oct. 14, 2011), http://abcnews.go.com/blogs/headlines/2011/10/wacky-signs-from-occupy-wall-street/.

3. Juvenalian satire "inspires indignation through the mordant portrayal of human venality and cruelty." James A. McKenna, *Law Making: The Framers of the Constitution Were Our First Postmodernists (Or Why Justice Scalia Is Wrong)*, 23 LEGAL STUD. F. 71, 86 n.49 (1999) (citing MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 110–11(1995)).

it is truly modest. This Article does not propose eating the rich with draconically high taxes. It merely proposes a tax system that distinguishes between the rich, middle class, and poor, and taxes them according to their societal benefit and ability to pay. Specifically, this Article outlines a constitutional method for imposing a simple, flat rate wealth tax as a supplement to the income tax.

Uncle Sam has three nieces: Paula, Mandy, and Wanda. The nieces are identical triplets, and even Uncle Sam has trouble telling them apart. In other words, he has trouble identifying a difference principle to distinguish between them. Paula, Mandy, and Wanda all have jet black hair, hate mayonnaise, and love to dance. But that is where their similarities end. After the three nieces left college, Paula Poor fell on hard times. Instead of majoring in accounting, engineering,[4] *or some other practical subject, she studied the "Philosophy of Star Trek" and quite literally majored in "Evil."*[5] *Currently an underemployed barista at Starbucks, Paula has no wealth to speak of, income of $25,000, and consumption of $25,000.*

Her sister Mandy Middleclass was smart enough to study ventilation, and owns a relatively successful air conditioner repair business. However, margins are tight and Mandy finds that she is rarely able to save or invest. As a result, she has no preexisting wealth, income of $45,000, and consumption of $25,000.

Wanda Wealthy began college as a computer science major, but quickly dropped out to create a social networking website known as MyFace. Much to everyone's chagrin, people do enjoy posting what they ate for lunch online and looking at one another's embarrassing photos. Wanda became an overnight billionaire. Much like Mark Zuckerberg, Wanda only pays herself a nominal salary,[6] *and she is as*

4. On a list produced by the compensation research firm PayScale, based on data from the Bureau of Labor Statistics, engineering majors took the first, fourth, fifth, sixth, and ninth slots. Jenna Goudreau, *The 15 Most Valuable College Majors*, FORBES (May 15, 2012), http://www.forbes.com/sites/jennagoudreau/2012/05/15/best-top-most-valuable-college-majors-degrees/.

5. Georgetown University, *Course Catalog-The Philosophy of Star Trek*, *available at* http://courses.georgetown.edu/index.cfm?Action=View&CourseID=PHIL-180 (last visited Jan. 21, 2013). Brittany Geragotelis, *Majoring in "Evil,"* BRITTANY THE BOOK SLAYER (Sept. 22, 2010), http://brittanythebookslayer.blogspot.com/2010/09/majoring-in-evil.html (A recent, viral Internet story involved a student taking a self-directed study program at NYU Gallatin who chose to major in "Evil." Naturally, the story ends with the student going on to become a lawyer.).

6. Zachary M. Seward, *Mark Zuckerberg joins the $1 salary club*, QUARTZ (Apr. 27, 2013), http://qz.com/78979/mark-zuckerberg-joins-the-1-salary-club/.

stingy and frugal as Scrooge himself.[7] *As a result, she has wealth of $20 billion, income of $45,000, and consumption of $25,000.*

In all honesty, which of the three nieces is best off? Looking through this reverse veil of ignorance,[8] if you will, which of the three nieces would you prefer to be? All other things being equal,[9] a rational actor would prefer the economic position of Wanda to that of Mandy, and Mandy to that of Paula. Stated otherwise, most of us would prefer the lot of the rich to the poor.[10] However, not every type of tax system recognizes and reflects this intuitively obvious fact. A consumption tax would treat each of the three nieces exactly the same, ignoring Mandy's greater income and Wanda's vastly greater wealth. Even an income tax would treat Mandy and Wanda the same, ignoring Wanda's billions.

The consumption and income taxes suffer from tunnel vision. They ignore preexisting wealth,[11] no matter how great. Even $20 billion goes under the radar. In a world where preexisting wealth is often many, many times greater than consumption or income,[12] this is an unacceptable oversight. To say that the poor, middle class, and wealthy should all pay the same or similar tax bill is nothing short of absurd. It fails the most venerable balancing test of all time: the laugh test.[13] Only a wealth tax distinguishes between each of the triplets and their unique economic positions. Only a wealth tax reaches the result that we intuit to be correct. The wealthy—those who derive the greatest benefit from society, and in turn, have the greatest ability to pay—should pay more than the poor and middle class. Simply put, it is the fairest result.

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7. CHARLES DICKENS, A CHRISTMAS CAROL (1st ed. 1843).

8. JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1st ed. 1971).

9. And since our hypothetical Paula, Mandy, and Wanda are identical triplets, all other things are equal.

10. The vaudevillian Sophie Tucker famously quipped, "I've been rich and I've been poor. Believe me, honey, rich is better." Ronald Bailey, *More Money, More Happiness: More research on the economics of happiness*, REASON.COM (May 3, 2013), http://reason.com/archives/2013/05/03/more-money-more-happiness.

11. *See, e.g.*, Daniel Altman, *Editorial: To Reduce Inequality, Tax Wealth, Not Income*, N.Y. TIMES, Nov. 19, 2012, at A21; MARK B. SAWICKI, ECON. POLICY INST., THE PRESIDENT'S TAX REFORM PANEL 6 (2005), *available at* http://www.epi.org/publication/bp169/ (consumption tax ignores preexisting wealth).

12. Altman, *supra* note 11, at A21.

13. United States Supreme Court Justices have thrice cited the proverbial "laugh test" to label an argument or position as frivolous or wholly without merit. Rasul v. Bush, 542 U.S. 466, 493 (2004); Kansas v. Crane, 534 U.S. 407, 423 (2002); Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182, 231 (1999).

Moreover, it is the pragmatic and necessary result. The current federal income tax system raises insufficient revenue to maintain our military-industrial complex and social welfare state.[14] The United States has experienced year after year of multibillion dollar deficits with projections of trillions more to come.[15] As President Barack Obama and countless others have noted, spending cuts are necessary to address the budget deficit.[16] However, unless we are willing to return the size of government to colonial levels, cuts alone are not enough. If we continue to demand the current level of government services and programs or anything close to it, a responsible approach to balancing the budget must involve revenue increases[17]—hence the call for new and higher taxes. From President Ronald Reagan[18] to Speaker John Boehner,[19] Republicans have famously called for lowering the rates and broadening the tax base to raise more revenue. They just might be right. However, broadening the tax base by pulling in greater numbers of poor and middle class taxpayers will not have an appreciable effect on revenue or the budget deficit. Instead, we must broaden the tax base to include the greatest and most obvious new source of revenue—namely, the tens of trillions of dollars of preexisting wealth in the United States.[20]

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14. The budget deficit was $1.089 trillion in 2012, and is projected to grow to $6.958 trillion in 2023. CONG. BUDGET OFFICE, PUB. NO. 4649, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2013 TO 2023 at 9, tbl. 1-1 (2013), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/43907-BudgetOutlook.pdf.

15. *Id.*

16. *See, e.g.*, Jeff Mason, *Obama says U.S. can't afford more showdowns over debt, deficits*, REUTERS (Jan. 5, 2013), http://www.reuters.com/article/2013/01/05/usa-fiscal-obama-idUSL1E9C50SG20130105 ("Spending cuts must be balanced with more reforms to our tax code."); Sam Youngman & Erik Wasson, *Obama defends $3.7T budget; deep cuts needed 'to walk the walk'*, THE HILL (Feb. 14, 2011), http://thehill.com/blogs/on-the-money/budget/143845-obama-defends-37t-budget.

17. Mason, *supra* note 16.

18. William A. Niskanen, *The Concise Encyclopedia of Economics: Reaganomics, available at* http://www.econlib.org/library/Enc1/Reaganomics.html (last visited Mar. 6, 2014).

19. MSNBC.com Staff and News Service Reports, *Obama to GOP on Debt Deal: Let's Go!*, NBC NEWS.COM (July 12, 2011), http://www.msnbc.msn.com/id/43708826/ns/politics-white_house/t/obama-gop-debt-deal-lets-go/#.UQFlZ0r6YTQ (House Speaker John Boehner noting that the way to increase tax revenue is to "[B]roaden the tax base and lower (tax) rates. As (Florida) Sen. (Marco) Rubio said last week 'we don't need more taxes, what we need are more taxpayers.'").

20. The United Nations estimated that the total wealth of the United States equaled $117,832,867,000,000 in 2008. UNITED NATIONS UNIVERSITY – INTERNATIONAL HUMAN DIMENSIONS PROGRAMME ON GLOBAL ENVIRONMENTAL CHANGE, INCLUSIVE WEALTH REPORT 2012, at 329, *available at* http://www.unep.org/pdf/IWR_2012.pdf.

Fair and necessary perhaps, but is a wealth tax constitutional? Under the Taxing and Spending Clause, Congress has the power to "lay and collect Taxes."[21] However, this power is subject to two rules, namely, Uniformity and Apportionment.[22] Indirect taxes must be uniform among the several states, whereas direct taxes must be apportioned so that states pay in proportion to their population. Under mainstream jurisprudence, recently confirmed by the U.S. Supreme Court in *National Federation of Independent Business v. Sebelius*,[23] better known as the Obamacare decision, a wealth tax is almost certainly a direct tax. Hence, it must comply with the rule of Apportionment.

Determining the amount of wealth tax due from a given state based on its population, rather than its collective net worth, would result in different rates in different states. Specifically, states with larger and poorer populations would suffer the highest rates, and states with smaller and wealthier populations would pay the least. Before long, all the wealthiest taxpayers would make like a corporation and move to Delaware.[24] This result is unfair and politically absurd. Thus, many commentators have observed that wealth taxes are "impossible" to administer in the United States.[25] For decades, commentators have also called for a constitutional amendment to abolish the Apportionment Clause.[26] Others have argued that the Clause is a dead letter.[27] Still more have come up with creative arguments to circumvent the Clause.[28] This Article is the first

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21. U.S. CONST. art. I, § 8, cl. 1.

22. *Id.*; U.S. CONST. art. I, § 2, cl. 3.

23. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

24. For a myriad of reasons, more than half of the corporations in the Fortune 500 are incorporated in Delaware. LEWIS S. BLACK, JR., DEL. DEP'T OF STATE, WHY CORPORATIONS CHOOSE DELAWARE 1 (2007), *available at* http://corp.delaware.gov/whycorporations_web.pdf. An apportioned wealth tax with no modifications would create a strong incentive for wealthy taxpayers to migrate to smaller, wealthier states, like Delaware, in order to take advantage of lower tax rates.

25. *See, e.g.*, DEBORAH A. GEIER, AN INTRODUCTION TO THE U.S. FEDERAL INCOME TAXATION OF INDIVIDUALS 91–92 (forthcoming 2014) ("A wealth tax is not administratively possible at the Federal level because it would be a direct tax that would be impossible to apportion across the states according to population."); JOSEPH M. DODGE ET AL., FEDERAL TAXES ON GRATUITOUS TRANSFERS: LAW AND PLANNING 22 (1st ed. 2011) ("Since apportionment of a wealth tax according to population is not feasible (unless the states were assessed directly by the federal government), a federal wealth tax has never gotten beyond the state of abstract discussion.").

26. Dwight W. Morrow, *The Income Tax Amendment*, 10 COLUM. L. REV. 379 (1910).

27. *See infra* notes 143–45 and accompanying text.

28. *See infra* notes 151–56 and accompanying text.

to propose a solution that complies with the Clause without imposing different rates in different states.

In Part II, this Article discusses the practical and administrative issues with implementing a wealth tax in the United States as well as the substantive fairness of such a tax relative to income and consumption tax regimes. In Part III, this Article describes the Apportionment Clause, so-called direct taxes, and the constitutional issues with implementing a wealth tax. It also describes prior proposals to circumvent the Apportionment Clause for the sake of a wealth tax. Part IV outlines this Article's modest proposal to pass the New Flat Tax—a wealth tax that complies with the dual strictures of horizontal equity and the constitutional rule of Apportionment. Under the proposal, the federal government would collect a wealth tax at a uniform rate and retain each state's apportioned share of the tax. The excess unapportioned share, if any, would be returned to the state of origin via a state-level "pick up" tax.[29] This revenue sharing arrangement ensures a uniform state and federal tax burden without redistributing wealth among the various states. Thus, equity is achieved and both the letter and spirit of the Apportionment Clause are satisfied.

I. A Pragmatic and Fair Wealth Tax

If you and I truly are the same, we should pay the same taxes. Anything else would be intuitively unfair. Horizontal equity demands that similarly situated taxpayers be taxed the same or similarly,[30] whereas vertical equity demands that differently situated taxpayers be taxed differently.[31] These fairness norms are uncontroversial and widely accepted by scholars and taxpayers alike. However, selecting the difference principle, i.e, the parameter used to determine sameness or difference—i.e., the tax base—is a different story. The principles of horizontal and vertical equity are fairly critiqued for failing "to provide a substantive criterion for determining sameness"

29. Prior to the elimination of the § 2011 credit for state death taxes, the estate tax in most states was known as a "'pick-up' tax because it picked up the amount left by the federal credit." Jason Ornduff, *The Illinois Estate Tax – One Year Later*, 18 CHI. BAR ASS'N REC. 28, 29 (2004). Similarly, a state-level wealth tax in this context may be called a "pick up" tax because it picks up the excess unapportioned share left by the federal wealth tax.

30. Joseph J. Cordes, *Horizontal Equity*, *in* ENCY. TAX & TAX POLICY. 195–96 (1st ed. 1999).

31. *Id.* at 195.

or difference.[32] Instinctively, we know that tax liabilities should not be determined randomly by lottery[33] or arbitrarily by whim or bias. No one is in favor of determining tax liabilities by roll of the dice or giving unlimited discretion to the Internal Revenue Service ("IRS"). However, the revelation that taxes should be fair as opposed to random or arbitrary does nothing to answer the question of what is, in fact, fair.[34] To answer that question, we must look to other norms for substance.

A. A Pragmatic Wealth Tax

First and foremost, any tax system must function pragmatically, in that, it must (1) raise sufficient revenue (2) in an administratively feasible way.[35] A tax system or government that fails to do so cannot survive, and other norms relating to fairness become, for lack of a better word, academic.

1. Sufficient Revenue

Given the current level of military and social welfare expenditures[36] by the United States, "[t]here are, realistically speaking, three tax base candidates capable of raising" sufficient revenue: consumption, income, and wealth.[37] Therefore, pragmatic concerns narrow our question to whether a federal consumption, income, or wealth tax is the fairest alternative.

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32. *Id.* at 195–96.

33. A tax lottery would be little more appealing to contestants than a ritualized stoning. *See* Shirley Jackson, *The Lottery*, NEW YORKER, June 26, 1948, at 25–28 (In Jackson's classic story, townspeople participate in an annual lottery in which the "winner" is stoned to death.).

34. To further illustrate the dilemma, virtually no one disagrees with President Barack Obama's repeated refrain that everyone should pay their "fair share" in taxes. However, there is much disagreement as to what is substantively fair. *See, e.g.*, Jim Angle, *Republicans dispute Obama's 'fair share' claims, say top earners already pay enough*, FOX NEWS.COM (July 12, 2012), http://www.foxnews.com/politics/2012/07/11/obama-camp-focuses-on-answering-what-fair-share-taxes-looks-like/.

35. Greg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations,* 73 GEO. WASH. L. REV. 1000, 1024 n.147 (2005) ("Tax policy is concerned with raising revenue efficiently and fairly in an administratively feasible manner.").

36. United States Military Spending was $621.1 billion in 2008, $668.6 billion in 2009, $698.2 billion in 2010, and $711.4 billion in 2011. The World Bank, *Data-Military Expenditure (Current LCU)*, *available at* http://data.worldbank.org/indicator/MS.MIL.XPND.CN (last visited Jan. 30, 2013).

37. Tariffs and other external revenue taxes—once the primary source of revenue for the fledgling United States—simply cannot raise sufficient revenue to finance a modern Westernized government.

a. Consumption

A consumption tax system taxes consumption,[38] but ignores increases in wealth (a significant component of income) and preexisting wealth. Thus, consumption taxes, such as a sales or value added tax ("VAT"), would treat Paula Poor, Mandy Middleclass, and Wanda Wealthy exactly the same. Each of the three nieces has consumption of $25,000, and would pay tax on that amount irrespective of their varying income and wealth levels. For example, a 10% sales tax would cost each of the nieces $2,500.[39]

According to the U.S. Department of Commerce's Bureau of Economic Affairs, Americans collectively consumed $10.71 trillion in 2011.[40] A 10% consumption tax on that amount (assuming no tax gap[41]) would have raised $1.07 trillion.

b. Income

A Haig-Simons[42] income tax system taxes (i) consumption and (ii) increases in wealth (i.e., income), but ignores preexisting wealth.[43] Thus, income taxes would distinguish between Paula Poor and her

38. Consumption is generally defined as "the total spending by individuals or a nation, on consumer goods during a given period." PAUL A. SAMUELSSON & WILLIAM D. NORDHAUS, ECONOMICS 853 (15th ed. 1995). Amounts spent on commercial goods, bonds, equities, land, precious metals, etc., are better viewed as part of savings and investment or wealth.

39. Assuming that all of the three nieces' consumption was subject to the sales tax, they would each owe $2,500 of tax on their consumption of $25,000. 10% × $25,000 = $2,500.

40. Table 2.4.5: Personal Consumption Expenditures by Type of Product, BUREAU OF ECONOMIC AFFAIRS, U.S. DEPARTMENT OF COMMERCE, http://www.bea.gov/iTable/iTable.cfm?reqid=9&step=3&isuri=1&903=70 (last visited Mar. 18, 2014).

41. The tax gap is the amount of tax liability owed by taxpayers that is not paid on time. Internal Revenue Service, *Tax Gap*, *available at* http://www.irs.gov/uac/The-Tax-Gap (last visited Mar. 6, 2014); Dave Rifkin, *A Primer on the "Tax Gap" and Methodologies for Reducing it,* 27 QUINNIPIAC L. REV. 375, 377 (2009) ("The 'tax gap' represents the annual amount of 'noncompliance' with the Code.").

42. German legal scholar Georg von Schanz is generally credited as the first to advocate that the proper measure of economic income is the sum of an individual's consumption and change in wealth. Georg Schanz, Der Einkommensbegriff und die Einkommensteuergesetze, FINANZ-ARCHIV, no. 1, 1896 at 1. However, his theory of income is best known as the Haig-Simons definition of income, because it was developed and popularized by American economists Robert M. Haig and Henry C. Simons in the 1920s and 1930s. *See* ROBERT MURRAY HAIG ET AL., THE FEDERAL INCOME TAX (Robert Murray Haig ed., 1921); HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY (1938).

43. Most income tax systems, like the current federal income tax system, indirectly tax consumption by disallowing deductions for personal and familial expenditures. 26 U.S.C. § 262(a) (2012).

two sisters, because Paula Poor has approximately half of their income. However, they would not distinguish between Mandy Middleclass and Wanda Wealthy, who each consume and earn the same amount. For example, a 10% income tax would cost Paula \$2,500, Mandy \$4,500, and Wanda \$4,500.[44]

However, it is important to note that the current federal income tax is only a rough approximation of a Haig-Simons income tax. It departs from the Haig-Simons definition of income in several significant ways for reasons of public policy and administrative convenience. Of these departures, the Realization Principle, which defers taxing the appreciation in property until the property is sold or exchanged,[45] is arguably the most significant. As Professor Deborah Schenk has noted, this deferral allows the wealthy to defer or altogether avoid income tax on capital gains and income.[46] Since capital income constitutes the lion's share of increases in wealth, removing it from the tax base leaves little more than consumption to be taxed.[47] With respect to the wealthy, the current federal income tax more closely approximates a consumption tax than the Haig-Simons definition of income.

To illustrate Professor Schenk's point, look to the case of Mark Zuckerberg, who founded Facebook in the early 2000s. Initially, the

44. A Haig-Simons income tax taxes consumption plus change in wealth. Paula has \$25,000 of consumption and no change in wealth, so her tax base is \$25,000 and her tax liability is \$2,500. 10% × \$25,000 = \$2,500. Mandy and Wanda each have \$25,000 of consumption and (because they only consumed \$25,000 of their \$45,000 income) a \$20,000 increase in wealth, so they each have a tax base of \$45,000 and a tax liability of \$4,500. 10% × \$45,000 = \$4,500. The current federal income tax system taxes all of one's nominal income and indirectly tax consumption by disallowing deductions for personal and familial expenditures. As a result, Paula would pay no tax under the current federal income tax system, because she has no nominal income. 10% × \$0 = \$0. However, the current federal income tax system would reach the same result as a Haig-Simons income tax as to Mandy and Wanda by taxing all \$45,000 of their nominal income for the year and disallowing deductions for their \$25,000 of personal and familial consumption. 10% × \$45,000 = \$4,500.

45. *See* 26 U.S.C. § 1001(c) (2012) ("[T]he entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized."). *See also* John Thomas Plecnik, *Abolish the Inflation Tax on the Poor & Middle Class*, 29 QUINNIPIAC L. REV. 925, 938 (2011).

46. Deborah H. Schenk, *Saving the Income Tax With a Wealth Tax*, 53 TAX. L. REV. 423, 424 (2000). *See also* Anna Bernasek, *Looking Beyond Income, to a Tax on Wealth*, N.Y. TIMES (Feb. 9, 2013), http://www.nytimes.com/2013/02/10/business/yourtaxes/a-wealth-tax-would-look-beyond-income.html?_r=0 ("'A wealth tax is an attempt to fill the holes in income tax,' said Douglas A. Shackelford, a tax expert at the University of North Carolina. 'The primary hole is unrealized capital gains. That's behind the big buildup of dynastic wealth.'").

47. Schenk, *supra* note 46, at 425.

basis and fair market value of Mark's Facebook stock are both zero. Less than ten years later when Facebook goes public, Mark's basis is still zero, but the value is now $20 billion. At this point, Mark wants to buy a private island, a yacht, and a Biarritz blue BMW F 650 GS dual sport motorcycle.[48] To raise the money, he could sell the stock and realize a taxable gain of $20 billion, but instead, he chooses to borrow against it. Under the borrowing exclusion, loan proceeds—no matter how large—are never includable in gross income and subject to tax.[49] When Mark dies holding the stock, the basis is stepped up to its fair market value of $20 billion under § 1014,[50] and his heirs may sell the stock with no income tax consequences. Just as Professor Schenk observed, Mark has effectively earned and enjoyed the use of $20 billion of capital income without paying a dime of income tax.[51] Moreover, Mark is compensated almost exclusively through capital income, so he has no appreciable wages on which to pay income tax.[52]

According to the U.S. Department of Commerce's Bureau of Economic Affairs, Americans collectively earned $12.98 trillion of income in 2011. A flat 10% income tax on that amount (assuming no tax gap[53]) would have raised $1.29 trillion. Note that a flat 10%

48. Paul Caron, *What Tax Profs Are Thankful For*, TAXPROF BLOG (Nov. 24, 2011), http://taxprof.typepad.com/taxprof_blog/2011/11/what-tax-profs.html ("John Plecnik (Cleveland State): 'I am thankful for my old tax profs, including Richard Schmalbeck, Walter Nunnallee, Mitchell Gans, Brookes Billman, and Leo Schmolka. I am thankful for my new colleagues at Cleveland State, including Debby Geier and Craig Boise. And I am thankful for my BMW F 650 GS.'").

49. *See* Joseph M. Dodge, *Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the "Claim of Right Doctrine" to Found Objects, Including Record-Setting Baseballs*, 5 FLA. TAX REV. 685, 719–20 (2000) ("The best rationale for the borrowing 'exclusion' derives from financial analysis: in an arms-length borrowing, the amount borrowed is equal to the present value of the obligation to pay both principal and interest.").

50. Section 1014 generally provides that "the basis of property in the hands of a person acquiring the property from a decedent . . . shall . . . be . . . the fair market value of the property at the date of the decedent's death." Although § 1014 is a two-way ratchet, with the potential to step down the basis of built-in-loss property and step up the basis of built-in-gain property, well-advised taxpayers will sell built-in-loss property prior to death in order to avoid losing their basis, and retain only built-in-gain property to increase their basis for their beneficiaries or heirs. As a result, § 1014 is commonly referred to as the "step up" in basis provision.

51. David S. Miller, *The Zuckerberg Tax*, N.Y. TIMES (Feb. 7, 2012), http://www.nytimes.com/2012/02/08/opinion/the-zuckerberg-tax.html?_r=0.

52. In fact, Facebook pays Mark the nominal salary of $1 as of 2013. *See supra* note 6.

53. The tax gap is the amount of tax liability owed by a taxpayer that is not paid on time. Internal Revenue Service, *Tax Gap*, *available at* http://www.irs.gov/uac/The-Tax-Gap (last visited Mar. 6, 2014).

income tax raises only 21% more revenue than a flat 10% consumption tax utilizing statistics from the same federal agency for the same year. This numerical convergence empirically demonstrates Professor Schenk's point that the wealthy can and do avoid the income tax on capital income. To the extent that Mark Zuckerberg should pay tax on his $20 billion the same way that a janitor pays tax on his $20,000, a wealth tax may, in fact, be necessary to close the deferral and § 1014 loopholes.[54]

c. Wealth

In a very real sense, a wealth tax has the broadest tax base: (1) It indirectly taxes consumption by taxing the means through which goods and services are purchased; (2) it indirectly taxes increases in wealth, by taxing the greater store of wealth those increases create; and (3) it directly taxes preexisting wealth. Consumption (and even income) are only an indirect, and hence, imperfect measure of a taxpayer's societal benefits or ability to pay. Either measure might be a sufficiently accurate proxy for the poor and middle class, such as Paula and Mandy, who consume all or a majority of their income and have modest or no wealth.[55] However, both measures fall flat with respect to the so-called "1%"[56] or wealthy who tend to spend far less than they earn[57] and earn far less than they own.[58] The majority of their benefit or ability to pay—namely preexisting wealth—is excluded from the narrow bases of the consumption and income taxes. In contrast, wealth is a direct measure of a taxpayer's economic position.

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54. *See generally* Boris Bittker, *Income Tax "Loopholes" and Political Rhetoric*, 71 MICH. L. REV. 1099 (1973).

55. The Organization for Economic Cooperation and Development ("OECD") has noted consumption taxation as a potential factor in the growing gap between the haves and have-nots in countries like the United States. Mark Pearson, Michael Förster, and Marco Mira D'Ercole, *Are we Growing More Unequal?* OECD (Oct. 2008), at 6, *available at* http://www.oecd.org/els/socialpoliciesanddata/41494435.pdf (hereinafter OECD).

56. The term, "the 1%," was popularized by the Occupy Wall Street protest movement, and refers to the wealthiest 1% of Americans. *See* Blaine G. Saito, *Building a Better America: Tax Expenditure Reform and the Case of State and Local Government Bonds and Build America Bonds*, 11 GEO. J.L. & PUB. POL'Y 577, 593 (2013) ("The talk of Occupy Wall Street (OWS) has some hints of Rawls's theoretical ideas with its focuses on the inequities of the top 1% of the population getting all the benefits of the growing economy while the lower 99% stagnate or slip away.").

57. *See* OECD, *supra* note 55.

58. *Id.*

Since a wealth tax does indeed have the broadest base, it can raise the most revenue at the lowest and least oppressive rates. Over a decade ago, Donald Trump proposed a one-time wealth tax of 14.25% on the net worth of individuals and trusts worth $10 million or more.[59] Even as a one-shot tax on the uber-wealthy with a low rate,[60] Trump's modest proposal was slated to raise over $5.7 trillion and eliminate the national debt and deficit in one fell swoop.[61] Imagine the revenue that a periodic or annual wealth tax could raise.

According to the United Nations, Americans collectively owned $117.8 trillion of preexisting wealth in 2008. A flat 10% wealth tax on that amount (assuming no tax gap[62]) would have raised $11.7 trillion. Note that a wealth tax would raise roughly ten times the revenue of a consumption or income tax at the same rate.

2. *Administrative Feasibility*

However, any proposal for a new wealth tax must respond to the longstanding critique that wealth taxes are impossible or impracticable to administer in the United States.[63] It is certainly true that the annual valuation of a taxpayer's wealth is potentially invasive, expensive, and time consuming.[64] However, these legitimate concerns can be allayed through the use of simplifying assumptions and valuation rules. Wealth taxes have an ancient heritage. From the Athenian Elders[65] to America's Founding Fathers, governments have

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59. DONALD TRUMP, THE AMERICA WE DESERVE (2000).

60. This proposed rate is less than half of the top marginal income tax rate, and even falls beneath the preferential rates for capital gains and dividends for tax year 2014.

61. *Id.*

62. The tax gap is the amount of tax liability owed by a taxpayer that is not paid on time. Internal Revenue Service, *Tax Gap*, *available at* http://www.irs.gov/uac/The-Tax-Gap (last visited Mar. 6, 2014).

63. Mathew J. Franck, *The Constitutional Problem of a Wealth Tax*, NAT'L REV. ONLINE (Nov. 19, 2012), http://www.nationalreview.com/bench-memos/333660/constitutional-fiasco-wealth-tax-matthew-j-franck.

64. *Id.*

65. The Athenian tax system has been described as the "quintessence of 'progressive' taxation." EDWARD E. COHEN, ATHENIAN ECONOMY & SOCIETY 194. In ancient Athens, most taxes were a function of wealth. *Id.* at 194–201. The wealthiest citizens paid liturgy taxes, which obligated them to finance various government functions, such as the maintenance of a particular warship, and *eisphora* taxes, which were a form of property tax to finance specific undertakings such as a naval campaign. *Id.* The Athenians continuously identified their wealthiest citizens via a process known as antidosis, which literally means "a giving in exchange." S.C. TODD, SELECTIONS BY MICHAEL DE BRAUW, edition of Mar. 16, 2003, A GLOSSARY OF ATHENIAN LEGAL TERMS 5, *available at* http://www.stoa.org/projects/demos/article_law_glossary?page=5&greekEncoding. A taxpayer

successfully imposed wealth taxes for thousands of years. In fact, our state and local governments continue to do so through a wide variety of property taxes. Millennia of experience teach us that wealth taxes are administratively feasible.

a. Periodic Appraisals or Valuations

"The oftener [valuations or appraisals] are made, the greater will be the expense; the seldomer they are made, the greater will be the inequality, and injustice."[66] When faced with the question of valuation, taxing authorities must always navigate between the Scylla and Charybdis[67] of expense and inaccuracy. Frequent valuations can be costly and inefficient, and infrequent valuations can be outdated and unfair. However, to the extent that annual valuations of net worth are currently impossible or impracticable in the United States, less frequent valuations are a pragmatic solution. Much like real property is only appraised periodically for purposes of most state and local property taxes, a taxpayer's wealth need only be appraised periodically—say once every five years—for purposes of a federal wealth tax. The resulting inaccuracy from outdated valuations could be chocked up to administrative convenience and ignored, or dealt with through an administrative appeals process for taxpayers who are unsatisfied with the tax value associated with their net worth.

b. Periodic Imposition of Tax

If periodic valuations coupled with an annual wealth tax are unsatisfactory, both the valuation and imposition of tax could be imposed on a less frequent basis with a higher rate.[68] For example,

who was nominated to pay the liturgy and eisphora taxes could avoid them "if he could name another citizen who was richer and better qualified to perform the task. *Id.* If the man challenged agreed that he was richer, he had to take over the liturgy; if he claimed to be poorer, then the challenger could insist on an exchange of all their property to test the claim—in which case the challenger would himself perform the liturgy as the new owner of the (putatively) greater estate." *Id.*

66. Hylton v. United States, 3 U.S. (3 Dall.) 171, 179 (1796).

67. The modern saying "between Scylla and Charybdis" derives from Greek mythology and refers to a choice between two "dreadful" alternatives. Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 514 n.10 (2006). In Greek mythology, Scylla and Charybdis were two monsters who resided on either side of a narrow passage of water. *Id.* Sailors attempting to pass had no choice but to sail near one of the beasts. *Id.*

68. As noted above, Donald Trump proposed a one-time wealth tax. *See supra* note 59 and accompanying text. Such a proposal is certainly administratively feasible. The relatively successful administration of the estate tax under Internal Revenue Code § 2001 has proven that valuation of a taxpayer's net worth is possible at least once a lifetime.

instead of imposing an annual wealth tax with a 10% rate, one could impose a triennial wealth tax with a 30% rate and raise roughly the same revenue.

If lumping multiyear tax liabilities into one year is problematic, due to liquidity[69] or other concerns, the tax liability could be due in three installments—one each year. Looking back to Wanda Wealthy from the Introduction, instead of valuing her $20 billion net worth three times and charging her 10% or $2 billion of that amount per year, she could be assessed 30% or $6 billion every three years and be required to pay one third of that amount or $2 billion per year. Due to fluctuations in value, it is unlikely that the numbers would come out so precisely the same in real life, but this example does illustrate the relative equivalence of the two approaches.

c. Simplifying Assumptions

In addition to periodic, rather than annual, valuations and impositions of tax, administrative convenience can be achieved by applying various simplifying assumptions to a wealth tax. First and foremost, valuing the net worth of every taxpayer, whether they be poor, middle class, or wealthy, would be an expensive and absurd task. Many would have negligible or negative net worths on which no appreciable amount of tax is due.[70] In their case, the cost of valuation would exceed the revenue raised, and violate the pragmatic norms. Thus, a minimum threshold or net worth must be set to trigger the imposition of a wealth tax. This Article proposes that this minimum threshold should accord with the current amount (whatever it might be[71]) of the inflation-adjusted exemption equivalent[72] of the unified

With other simplifying assumptions, and by limiting a wealth tax to the super wealthy, a decennial, biennial, or even annual wealth tax is more than doable.

69. Liquidity is defined as "the quality or state of being readily convertible to cash" or "the characteristic of having enough units in the market that large transactions can occur without substantial price variations." BLACK'S LAW DICTIONARY 1215 (9th ed. 2009).

70. Susan Tompor, *Many households have a negative net worth, study finds*, USA TODAY (May 11, 2012), http://usatoday30.usatoday.com/money/perfi/basics/story/2012-05-12/households-net-worth-university-of-michigan/54912016/1.

71. The inflation-adjusted exemption equivalent for tax year 2014 is $5,340,000. Rev. Proc. 2013–35. In the past decade, the exemption amount has been in flux. The exemption amount rose from $675,000 in 2001 to $3,500,000 in 2009 under the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA") of 2001. Economic Growth and Tax Relief Reconciliation Act, H.R. 1836, 107th Cong. § 901(a) (2001). The estate tax was temporarily abolished in 2010, and consequently, there was no exemption amount for that year. *Id.* However, EGTRRA was temporary, and sunsetted at the end of 2010. In response, Congress passed the Tax Relief Act of 2010, which first set the exemption

credit for federal estate and gift tax purposes. The unified credit[73] (and accompanying generation skipping transfer tax exemption[74]) allows an individual to transfer a specified amount free of any wealth transfer tax by gift, bequest, or inheritance. Since the primary purpose of the wealth transfer taxes (aside from revenue raising) is to break up intergenerational concentrations of wealth, presumably the unified credit amount reflects Congress' best judgment as to what amount of wealth is fair and reasonable to hold tax free, even unproductively, for one's own use. In tax year 2014, this would exempt the first $5.34 million of net worth ($10.68 million in the case of a married couple) from wealth taxation.[75] Based on the administration of the estate tax, this would limit the imposition of the wealth tax to less than 1% of the population.[76]

Second, many valuation shortcuts could be used to lower the cost and controversy of appraising a taxpayer's net worth. For example, the IRS could use state and local real property valuations rather than duplicating that effort with their own. The IRS could also assign preset values to various types of property, such as furnishings for personal residences and vacation homes.[77]

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amount at $5 million and indexed it for inflation. Tax Relief, Unemployment Insurance Reauthorization, & Job Creation Act of 2010, H.R. 4853, 111th Cong. § 101(a)(1) (2010). However, that Act was also temporary and sunsetted at the end of 2012. *Id.* The American Taxpayer Relief Act of 2012, signed into law on January 1, 2013, permanently set the exemption amount at $5,000,000 subject to inflation adjustments. With those adjustments, the exemption amount is $5,340,000 for 2014. Although predicting congressional action is rightly compared to astrology and crystal ball gazing, the exemption amount is unlikely to change dramatically in the near future.

72. The exemption equivalent of the unified credit is the dollar amount of value in the estate or gift that is effectively exempt from tax as a result of the credit against tax. Stated otherwise, it is the dollar amount of property that you can pass free of estate or gift tax as a result of the unified credit. For example, the inflation-adjusted unified credit for tax year 2014 is $2,081,800 which effectively exempts the first $5,340,000 of an estate or gift from tax.

73. 26 U.S.C. § 2010(c) (2012).

74. 26 U.S.C. § 2631 (2012).

75. *See supra* notes 71–74 and accompanying text.

76. "Today, only the estates of the wealthiest 0.14% of Americans—fewer than 2 out of every 1,000 people who die—owe any estate tax whatsoever because of the high exemption amount, which has more than quadrupled since 2001." Chye-Ching Huang & Nathaniel Frentz, *Myths and Realities About the Estate Tax* (rev. Aug. 29, 2013), *available at* http://www.cbpp.org/files/estatetaxmyths.pdf.

77. A rate of $X per square foot of residence and vacation home could be assessed for personal furnishings.

B. A Fair Wealth Tax

Intuition aside, what is substantively fair? Four competing fairness norms are commonly advanced to answer this question, and each originates from a different philosophy of government. The four norms of tax justice are the: (1) equal sacrifice norm, (2) benefit norm, (3) standard of living norm, and (4) ability to pay norm.[78] Ultimately, the equal sacrifice norm justifies head taxes, the standard of living norm justifies consumption taxes, and the benefit and ability to pay norms are best read to justify wealth taxes.

1. Equal Sacrifice

The equal sacrifice norm holds that burdens should be shared equally and "would tax people in equal absolute dollar amounts."[79] It derives from the idea "that the proper role of government is limited to securing equal rights under the law."[80] Since everyone benefits equally, everyone should pay equally.[81] The so-called "capitation," "poll," or "head taxes" reflect the equal sacrifice norm, as they charge an equal amount per head or taxpayer.[82] For example, under an annual $100 head tax, our three taxpayers, Paula, Mandy, and Wanda, would each pay $100 irrespective of their consumption, income, or wealth. However, recall that Paula already consumes 100% of her income. Perhaps she could afford to cut back $100 and pay the head tax, but her predicament illustrates why head taxes are not used in the United States. They violate the chief pragmatic norm.[83] Namely, they cannot raise sufficient revenue.[84] A head tax that is high enough to cover the budget is consequently too high for the poor and middle class to afford.[85] However, a head tax that is low enough for them to afford is consequently too low to cover the budget.[86] Today, the U.S. Department of Commerce's Bureau of Economic Affairs reports that

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78. JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 123–27 (3d ed. 2004); Joseph M. Dodge, *The Taxation of Wealth and Wealth Transfers: Where Do We Go After ERTA?*, 34 RUTGERS L. REV. 738, 744–45 (1982); Steve R. Johnson, *Unfinished Business on the Taxpayer Rights Agenda: Achieving Fairness in Transferee Liability Cases*, 19 VA. TAX REV. 403, 414–15 (2000).

79. DODGE ET AL., FEDERAL INCOME TAX, *supra* note 78, at 123.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 123–24.

84. *Id.*

85. *Id.*

86. *Id.*

there are nearly 317.3 million people in the United States.[87] Our annual budget is approximately $3.5 trillion.[88] Every man, woman, and child would have to pay a head tax of nearly $12,000 a year to cover the budget.[89] Large families would face six figure tax bills each year—for example, a mother and father with seven children would face an annual tax bill of $108,000. It goes without saying that these amounts are prohibitively high for the poor and virtually all of the middle class—many of whom lack even subsistence-level income, let alone the excess income to pay any amount of tax. The numbers simply do not add up. As a result, we must conclude that head taxes and the equal sacrifice norm must be ruled out—not as a matter of fairness, but as a matter of pragmatism.

2. Benefit

The benefit norm holds that burdens should parallel benefits and would tax people "in proportion to the varying benefits they receive from government."[90] It derives from the idea that "tax payments serve as the *quid pro quo* for receiving government services."[91] Viewed narrowly, the benefit norm is easily conflated with the equal sacrifice norm.[92] The government promises the same rights to each taxpayer, and so, the *quid pro quo* or tax for that promise should be the same for everyone as well.[93] Head taxes reflect this narrow conception of the benefit norm, as they charge an equal amount per head or taxpayer.[94] However, as noted above, head taxes cannot raise sufficient revenue, and this conception of the benefit norm is impossible to implement.[95]

Viewed more expansively, the benefit norm would catalogue actual government benefits received and present the taxpayer with an

87. U.S. Dep't of Commerce, *Census Bureau Projects U.S. Population of 317.3 Million on New Year's Day*, COMMERCE.GOV (Dec. 30, 2013), http://www.commerce.gov/blog/2013/12/30/census-bureau-projects-us-population-3173-million-new-year's-day.

88. The United States expended $3.538 trillion in 2012, and is projected to expend $3.553 trillion in 2013. Cong. Budget Office, *The Budget and Economic Outlook: Fiscal Years 2013 to 2023*, at 3 tbl. 1, *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/43907-BudgetOutlook.pdf.

89. $3.5 trillion / 300 million = $12,000 (rounded up to the nearest thousand).

90. DODGE ET AL., FEDERAL INCOME TAX, *supra* note 78, at 124.

91. *Id.*

92. *See id.* at 123–25.

93. *Id.*

94. *Id.*

95. *Id.*

itemized bill for them.[96] This view "is hard to implement" for three reasons: (1) direct government benefits, such as use of highways or police services, are hard to value; (2) direct government benefits to some taxpayers, such as good public schools, can create indirect government benefits to other taxpayers, such as higher property values and less crime, which are still harder to value; and (3) the norm of paying for any and all government benefits is inconsistent with the notion of government welfare and subsidies, which are generally transferred to those with no ability to pay for them.[97] A straight-up *quid pro quo* tax, structured like an itemized bill for services rendered would reflect this conception of the benefit norm.[98] However, such a system would prove administratively complex and would require abandoning all social welfare programs.[99] Although not impossible to implement, it is incompatible with our current society and system of government.[100]

The most expansive view of the benefit norm is perhaps the most useful.[101] Rather than measure benefit according to promised or actual government benefits, it would measure benefit "in terms of the taxpayer's total dollars earned through utilizing the infrastructure" created by our "regulated capitalist system."[102] Under the expansive benefit norm, benefit equals wealth.[103] This view holds that wealth is not created in a vacuum.[104] It is created within a government system and, in part, because of that system. Thus, benefit, for which taxes must be paid as a *quid pro quo*, must be measured according to wealth.[105] Wealth taxes,[106] quite obviously, reflect this conception of the benefit norm, as they place a toll charge on wealth itself. President Barack Obama's now famous "you didn't build that" remark is one of the clearest and most succinct statements of the expansive benefit norm: "[L]ook, if you've been successful, you didn't

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96. *Id.* at 124–25.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *See id.*
105. *Id.*
106. Wealth transfer taxes also arguably reflect this conception of the benefit norm. *See* 26 U.S.C. §§ 2001, 2501, 2601 (2012).

get there on your own. . . . Somebody helped to create this unbelievable American system that we have that allowed you to thrive. Somebody invested in roads and bridges. If you've got a business, you didn't build that. Somebody else made that happen."[107] Senator and Professor Elizabeth Warren similarly asserted that "there is nobody in this country who got rich on his own."[108]

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107. Here is the full context of President Obama's now famous "you didn't build that" remark:

> We've already made a trillion dollars' worth of cuts. We can make some more cuts in programs that don't work, and make government work more efficiently . . . We can make another trillion or trillion—two, and what we then do is ask for the wealthy to pay a little bit more. . . .
>
> There are a lot of wealthy, successful Americans who agree with me, because they want to give something back. They know they didn't . . . look, if you've been successful, you didn't get there on your own. You didn't get there on your own. I'm always struck by people who think, well, it must be because I was just so smart. There are a lot of smart people out there. It must be because I worked harder than everybody else. Let me tell you something—there are a whole bunch of hardworking people out there.
>
> If you were successful, somebody along the line gave you some help. There was a great teacher somewhere in your life. Somebody helped to create this unbelievable American system that we have that allowed you to thrive. Somebody invested in roads and bridges. If you've got a business. you didn't build that. Somebody else made that happen. The Internet didn't get invented on its own. Government research created the Internet so that all the companies could make money off the Internet.
>
> The point is, is that when we succeed, we succeed because of our individual initiative, but also because we do things together. There are some things, just like fighting fires, we don't do on our own. I mean, imagine if everybody had their own fire service. That would be a hard way to organize fighting fires.
>
> So we say to ourselves, ever since the founding of this country, you know what, there are some things we do better together. That's how we funded the GI Bill. That's how we created the middle class. That's how we built the Golden Gate Bridge or the Hoover Dam. That's how we invented the Internet. That's how we sent a man to the moon. We rise or fall together as one nation and as one people, and that's the reason I'm running for president—because I still believe in that idea. You're not on your own, we're in this together."

Jake Tapper, *Did Obama Say, 'If You've Got a Business, You Didn't Build That'?*, ABC NEWS (July 16, 2012), http://abcnews.go.com/blogs/politics/2012/07/did-obama-say-if-youve-got-a-business-you-didnt-build-that/.

108. Lucy Madison, *Elizabeth Warren: "There is nobody in this country who got rich on his own"*, CBS NEWS (Sept. 22, 2011), www.cbsnews.com/news/elizabeth-warren-there-is-nobody-in-this-country-who-got-rich-on-his-own/.

However, this concept is not without controversy. The "We Built It" slogan of the 2012 Republican National Convention was one of many repudiations of President Obama's endorsement of the expansive benefit norm.[109] In addition, the norm is counterintuitive because it flies in the face of conventional wisdom that "welfare queens" benefit from government services whereas the wealthy pay for them.[110] In this line of thought, the poor are the main, if not exclusive, consumers of government benefits. Moreover, the recent and marked increase in the use of food stamps, unemployment benefits, welfare, and other government transfer payments has only reinforced this traditional view.[111]

However, the traditional view is blind to the totality of government services as well as their end user. Who makes greater use of police and fire services? Is it the average Jane with a house on the corner, or Warren Buffett with billions of tangible and intangible assets that need constant protection from thieves and the elements? Who makes greater use of the interstate highway system? Is it the average Joe on his daily commute, or Meg Whitman with a company that ships billions in goods across those highways every year? Who makes greater use of public education? Is it the average Jane attending Cleveland State University, or Bill Gates who hires thousands of public school graduates to remake Windows every year? Berkshire Hathaway Inc., Hewlett-Packard Company, and Microsoft Corporation are only possible in a regulated capitalist economy like that of the United States. Without legal protections, public goods, and an educated workforce, none of these corporations could exist. Nor would the vast stores of private wealth they create. Redistribution of wealth is not occurring when Buffet, Whitman, and Gates pay their taxes to finance the government benefits their companies and wealth depend on. They are merely paying their tab.

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109. Hendrik Hertzberg, *"We Built It,"* NEW YORKER (Aug. 29, 2012), http://www.newyorker.com/online/blogs/hendrikhertzberg/2012/08/we-built-it.html.

110. Randy Albelda, *Fallacies of Welfare-to-Work Policies*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 74 (2001) ("Led by Ronald Reagan and Charles Murray in the 1980s, women on welfare were given the title of welfare queen.").

111. Some reports show total welfare spending topping $1 trillion in 2011. *See, e.g.*, Jim Kouri, *Welfare under Obama White House hits $1 trillion, claims report*, EXAMINER.COM (Nov. 2, 2012), http://www.examiner.com/article/welfare-under-obama-white-house-hits-1-trillion-claims-report.

3. *Standard of Living*

The standard of living norm holds that burdens should correspond to standard of living and "would tax people according to [that standard], as evidenced by their level of personal consumption."[112] It derives from the Hobbesian notion "that citizens should contribute to government according to what they 'take out' of society."[113] The more one consumes or takes out of society, the more one should pay.[114] Not surprisingly, then, consumption taxes reflect the standard of living norm, as they place a toll charge on consumption.[115] However, not all saving is virtuous and there are benefits to possessing wealth beyond the future ability to expend it, such as prestige and power.[116] Therefore, the standard of living norm, which ignores the utility of wealth, is deficient.[117]

4. *Ability to Pay*

The ability to pay norm holds that burdens should correspond to ability and would tax people "according to the economic resources under their control."[118] It derives from the idea "that taxes, being a contribution of material resources to government, should be based on the respective material resources of individuals, measured objectively."[119] Stated otherwise, those who can pay more should pay more.[120] Scholars oft-noted that a Haig-Simons income tax better reflects the ability to pay norm than consumption taxes, because it encompasses not only consumption but also increases in wealth. However, neither income nor consumption taxes encompass preexisting wealth, which undoubtedly represents a greater ability to pay taxes. Much like the expansive benefit norm, the ability to pay norm is best reflected by wealth taxes.

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112. DODGE ET AL., FEDERAL INCOME TAX, *supra* note 78, at 125.

113. *Id.*

114. *Id.* at 125–26.

115. *Id.*

116. *See* Dodge, *The Taxation of Wealth and Wealth Transfers*, *supra* note 78, at 745 ("People, however, may save, as well as consume, for selfish motives. Saving is not equivalent to an act of charity that deserves a reward based upon good intentions."); *id.* at 745 n.41 ("Savings . . . involves present security, power, and personal satisfaction.").

117. *Id.*

118. DODGE ET AL., FEDERAL INCOME TAX, *supra* note 78, at 126.

119. *Id.*

120. *Id.*

II. A Constitutionally Apportioned Wealth Tax

The taxing power of the United States is limited, *inter alia*, by the Apportionment Clause, which requires "direct taxes" to be apportioned by population. From the Founding Fathers to today, the definition of direct taxes has never been clear. However, under the Obamacare decision, certain categories of taxes, including wealth taxes, are almost certainly within the scope of direct taxes. To avoid the application of the Apportionment Clause to wealth taxes, some commentators have argued that the Clause is a dead letter, and others have sought to circumnavigate the Clause with arguments of form over substance.

A. The Taxing Power and the Apportionment Clause

"Nearly two centuries ago, Chief Justice Marshall observed that 'the question respecting the extent of the powers actually granted' to the Federal Government 'is perpetually arising, and will probably continue to arise, as long as our system shall exist.'"[121] The United States is a constitutional government of limited powers. For Congress to pass a law or impose a tax, there must be a constitutional basis for it to do so. A wealth tax is no different from any other, and any proposal to impose such a tax must comply with the Constitution. This concern is far from speculative. Today, tax protestors contest virtually every line of the Internal Revenue Code on constitutional grounds. Organized political groups habitually relitigate major legislative battles in the U.S. Supreme Court. Something as controversial as a new, federal wealth tax would almost assuredly come before the Nine for adjudication.

Under Article I, Section 8, Clause 1, of the Constitution, otherwise known as the Taxing and Spending Clause, Congress has the authority to "lay and collect Taxes, Duties, Imposts, and Excises to pay the debts and provide for the common defense and general welfare of the United States."[122] However, Congress' power to lay taxes is subject to two rules, namely, Uniformity and Apportionment. The last portion of Article I, Section 8, Clause 1, otherwise known as the Uniformity Clause, explains that "all Duties, Imposts and Excises shall be uniform throughout the United States."[123] "This uniformity

121. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

122. U.S. CONST. art. I, § 8, cl. 1.

123. *Id.*

requirement has been construed by the courts to prohibit only patent or intentional discrimination based on geography."[124] For example, a tax that applied only to Texans, but not to the residents of the other 49 states, would violate the Uniformity Clause. However, a tax that disproportionately applied to Texans, such as a tax on oil and gas income, but theoretically applied to the residents of every state, satisfies the Clause.[125]

The rule of Apportionment derives from two clauses. Article I, Section 2, Clause 3, otherwise known as the Representation Clause, provides that "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons." Article 1, Section 9, Clause 4, otherwise known as the Apportionment Clause, provides that "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." The rule of Apportionment applies whenever the rule of Uniformity does not, and vice versa. Thus, so-called direct taxes, which explicitly include capitation taxes, are subject to the Apportionment Clause, and all other taxes, traditionally labeled as indirect taxes, are subject to the Uniformity Clause. A 10% wealth tax on every taxpayer, regardless of their state of domicile, is uniform by definition. Thus, there is only a constitutional problem if that tax is a so-called direct tax and subject to the rule of Apportionment by population. "[Direct or indirect], that is the question."[126]

1. A Brief History of the Apportionment Clause

The history of the Apportionment Clause is fraught with inconsistencies and scholars hotly dispute its origins, purpose, and meaning. This Article does not attempt to resolve that dispute. Rather, this Article will outline the uncontroversial facts about the Apportionment Clause as a backdrop for its proposal for a constitutional wealth tax that complies with the rule of Apportionment.

124. Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 846 (2009).

125. *See id.*

126. WILLIAM SHAKESPEARE, HAMLET, act III, scene I, l. 65 (A. R. Braunmuller ed., Penguin Books, rev. ed. 2001).

It is uncontroverted that the principal reason for adopting the Constitution in lieu of the old Articles of Confederation was to enhance the taxing power of the federal government.[127] Under the Confederation, the federal government was restricted to raising revenue by requisition from its various member states, which could and often did refuse to comply.[128] Financing the Revolutionary War by these means was impossible, and the so-called Federalists banded together to support a Constitution with a greater taxing power.[129]

However, the origins of the Apportionment Clause are less clear. Professors Bruce Ackerman and Calvin H. Johnson attribute the Apportionment Clause to a compromise over slavery.[130] The South wanted slaves to count toward population for purposes of representation in Congress to enhance their political power.[131] The North wanted slaves to count toward population for purposes of Apportionment and taxation to increase the South's tax bill.[132] Professor Dodge counters that "[t]he principle of apportionment was not generated by the institution of slavery."[133] Rather, in his view, apportionment was the default rule under the Articles of Confederation, and inertia allowed that default rule to survive, in a limited way, in the new Constitution.[134]

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127. *See, e.g.*, Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, *supra* note 124, at 848; Letter from Henry Lee to George Washington (Feb. 16, 1786), *in* W. W. ABBOT & DOROTHY TWOHIG, III THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 560–61 (1992) (discussing the necessity of more tax money).

128. *Id.*

129. *Id.*

130. *See, e.g.*, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4 (1999) ("This essay attempts a precautionary survey of the fascinating twists and turns of two centuries—trying hard, at the same time, to avoid missing the forest for the trees. My story begins with the tainted origins of the 'direct tax' clauses. They do not represent an independent judgment about the proper system for direct taxation, but were part and parcel of a larger compromise over slavery at the Philadelphia Convention. Quite simply, the South would get three-fifths of its slaves counted for purposes of representation in the House and the Electoral College, if it was willing to pay an extra three-fifths of taxes that could be reasonably linked to overall population."); Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 296 (2004) ("[A]pportionment of tax was brought into the Constitution to impose a disincentive on slavery.").

131. *Id*.

132. *Id*.

133. Dodge, *supra* note 124, at 855.

134. *Id.* at 854. Professor Dodge also attributes apportionment to "a realization that requisitions could create conflict between the federal government and the states, and . . . a

2. *Definition of Direct Taxes*

The constitutional definition of the term "direct tax" was unclear "[e]ven when the Direct Tax Clause was written."[135] James Madison and Alexander Hamilton famously clashed over the meaning of direct taxes in the *Hylton* case.[136] Madison claimed that the carriage tax of 1794 was an unapportioned direct tax, and Hamilton objected that direct taxes are limited to head and real property taxes.[137] The Supreme Court sided with Hamilton, and limited the term "direct tax" to taxes that are reasonably capable of apportionment without "inequality and injustice."[138] However, the Supreme Court essentially overruled *Hylton* in the *Pollock* cases in which it expanded the term to include income and personal property taxes.[139]

Much ink has been spilled over the centuries debating the precise constitutional definition of direct taxes. This Article humbly demurs from that debate, and instead, focuses on the narrower question of whether a wealth tax is a direct tax subject to apportionment by population. In answering that question, it helps to query: What definitively is a direct tax? Under the majority opinion in the recent Obamacare decision, the recognized categories of direct taxes are: (1) head taxes, (2) real property taxes, and (3) personal property taxes.[140] Given that real and personal property taxes are recognized as direct taxes, it would be a Herculean stretch to say that wealth taxes imposed on the excess of real and personal property over liabilities are indirect.[141] Even prior to the Obamacare decision, most commentators assumed that wealth taxes are direct.[142] In its wake, there is little, if any, room for doubt. In all likelihood, wealth taxes are direct taxes, and short of a constitutional amendment, they must comply with the Apportionment Clause.

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growing awareness that apportionment would not work for certain non-requisition taxes." *Id.*

135. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2598 (2012).

136. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 179 (1796).

137. *See id*.

138. *See id.*

139. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 618 (1895).

140. *Sebelius*, 132 S. Ct. at 2598–99.

141. Although the argument has been made.

142. *See* DODGE ET AL., *supra* note 25, at 22 ("[A] federal wealth tax in the U.S. is considered by most commentators to be a 'direct tax' that would be unconstitutional *unless apportioned among the states in accordance with population*."); Dodge, *supra* note 78, at 753 ("an annual wealth tax would probably violate the United States Constitution").

B. Proposals to Circumvent Apportionment

To date, calls for a constitutional wealth tax have come in two forms. First, some scholars argue that the Apportionment Clause is not a constitutional roadblock to an unapportioned wealth tax because expansive interpretations of the clause were implicitly overruled and are no longer good law. Second, other scholars have proposed to reframe an unconstitutional, unapportioned wealth tax as a constitutional income or wealth transfer tax.

1. The Thirteenth Amendment and Hylton *Trump* Pollock

In essence, Professors Ackerman and Johnson claim that the Apportionment Clause was a horse trade between the North and the slave states—a horse trade that is completely irrelevant in light of the Thirteenth Amendment abolishing slavery.[143] Professor Ackerman goes so far as to say that the Thirteenth Amendment implicitly repealed the Apportionment Clause,[144] whereas Professor Johnson argues that the Sixteenth Amendment and case law on excise taxes reversed the *Pollock* decisions and restored *Hylton* to the status of controlling precedent.[145] These views clash with a conventional, textbook approach to interpreting Apportionment Clause jurisprudence.[146] Moreover, the U.S. Supreme Court appears to have rejected any proposition that the Apportionment Clause or the *Pollock* decisions are a dead letter in the recent Obamacare decision.[147] In that case, Chief Justice John Roberts and a bare majority of the Supreme Court cited the *Pollock* decisions

143. *See supra* notes 130–32 and accompanying text.

144. Ackerman, *supra* note 130, at 58 ("[T]his original understanding [of the Apportionment Clause] must be revised in the light of the Civil War. Given the Reconstruction Amendments, there is no longer a constitutional point in enforcing a lapsed bargain with the slave power. The express condemnation of 'Capitation' taxes should be respected, but no others—not even a classical tax on land—should any longer be considered 'direct' for constitutional purposes.").

145. Johnson, *supra* note 130, at 298–99 ("It is time now to overrule *Pollock* in full and to return to *Hylton*. *Pollock* can be and has been contained by manipulative definition of 'excise tax' or 'income' so that the case is avoidable in every instance. *Pollock* is dead on its holding as to the income tax. Indeed, courts have a duty to distinguish *Pollock* in every case. Apportionment is too awful a requirement to enforce. Since Pollock should never apply, it should be overruled outright.").

146. *See* Dodge, *supra* note 124, at 842–43.

147. This case runs contrary to Professor Johnson's speculation that the Supreme Court would overrule *Pollock* given the chance. *See supra* note 145 and accompanying text.

approvingly to conclude that the shared responsibility payment[148] under the Affordable Care Act is not a direct tax.[149] Moreover, Justice Scalia and the dissenters implied that they might interpret the Apportionment Clause and the term "direct tax" even more expansively than the majority.[150]

2. *Professor Schenk's Income Tax on the Risk-Free Return of Wealth*

Professor Deborah Schenk proposed reframing a wealth tax as an income tax on the risk-free return of wealth.[151] However, she concedes that "the Supreme Court might see this reformulation as a mere semantic change that does not cure the constitutional infirmity of a wealth tax."[152] Stated otherwise, Professor Schenk's proposal is admittedly vulnerable to substance over form[153] or a related doctrine.[154]

3. *Professor Dodge's Proxy Wealth Tax*

Professor Joseph Dodge proposed reframing a wealth tax as a wealth transfer tax.[155] Much like Professor Schenk's proposal, Professor Dodge's proposal is vulnerable to substance over form or a related doctrine to the extent that it approximates a wealth tax.[156]

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148. The shared responsibility payment is better known to laymen as the individual mandate.

149. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2598–99 (2012).

150. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2655 (2012) ("Finally, we must observe that rewriting §5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, § 9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters.").

151. Schenk, *supra* note 46.

152. *Id.* at 441–42.

153. *See* Allen D. Madison, *The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699, 701 (2003) ("Under the substance-over-form doctrines, courts are permitted to ignore or disregard the text of the Internal Revenue Code on the basis of economic principles or taxpayer motivation or both.").

154. Professor Dodge has also concluded that redubbing an ad valorem property tax or personal wealth tax as an income tax would fail constitutional scrutiny because the taxes "are not the same in substance." *See* Dodge, *supra* note 124, at 932–34.

155. Dodge, *supra* note 78, at 760–68 (proposing a "proxy wealth tax").

156. Specifically, Professor Dodge proposes a wealth transfer tax that is keyed to the holding period of assets. *Id.* The longer an asset is held, the more tax is due on transfer. *Id.* One might argue that this tax is different in substance from a wealth tax, and thus

III. A Modest Proposal For A Constitutionally Apportioned Wealth Tax

A wealth tax is pragmatic and fair. It may even be necessary to plug the ballooning deficit. If only it were *constitutional*. Attempts to read the Apportionment Clause out of the Constitution ala *Hylton* or the Thirteenth Amendment appear futile in the wake of the Obamacare decision. Proposals to reframe an unconstitutional wealth tax as a constitutional income or wealth transfer tax are admittedly vulnerable to substance over form. How then can we implement the benefit and ability to pay norms and achieve true horizontal equity in our tax policy, while complying with the chief pragmatic norm of raising sufficient revenue? The answer is simple. Rather than ignore or evade the Apportionment Clause, comply with it.

Under this Article's modest proposal, the federal government would collect a wealth tax at a uniform rate and retain the constitutionally apportioned share of the tax. The excess unapportioned share, if any, would be returned to the state of origin via a state-level "pick up" tax. This revenue-sharing arrangement complies with the Apportionment Clause, because the federal government never retains more than its constitutionally apportioned share. It also complies with the bedrock principle of horizontal equity by ensuring a uniform state and federal tax burden.

A. The Mechanics of Complying with Apportionment by Population

Issues of valuation and administrative convenience aside, the main bar to implementing a wealth tax in the United States has been the Apportionment Clause[157] of the Constitution, which requires so-called "direct taxes" to be apportioned equally among the states according to their respective populations. To illustrate, if 10% of the nation lives in Ohio, and 10% lives in New York, the Apportionment Clause requires Ohioans and New Yorkers to collectively pay the same amount (i.e., 10%) of any direct tax—even if Ohioans possess half the wealth of New Yorkers. This results in twice as high an effective wealth tax rate on Ohioans than New Yorkers, precisely because Ohioans are poorer than New Yorkers. This is an absurd

constitutional. *See id.* However, to the extent that is true, the proposal fails to achieve a true proxy for a wealth tax. *See id.*

157. U.S. CONST. art. I, § 9, cl. 4.

result—unfair in practice and politically infeasible. As such, Congress has largely avoided all forms of direct taxation.[158]

B. Calculating a Constitutionally Apportioned Wealth Tax

In the controversial (and landmark) *Pollock* decisions,[159] the Supreme Court held that taxes on real and personal property are direct taxes that are subject to the Apportionment Clause. Since the *Pollock* decisions were never overruled, a plurality of scholars agrees that an unapportioned wealth tax is unconstitutional.[160] However, this Article proposes an apportioned wealth tax that is nonetheless fair and uniform. How is it possible to levy a straight, say 10%, wealth tax on each taxpayer irrespective of state populations and still comply with the Apportionment Clause? To date, that question has gone unanswered. However, this Article proposes to untie the Gordian knot through a revenue sharing arrangement between the federal and state governments that is reminiscent of the pre-EGTRRA[161] credit for state death taxes under Code § 2011. Under that section, taxpayers were entitled to a dollar-for-dollar federal estate tax credit for any state death taxes they paid.[162] As a result, states were able to levy "pick up" death taxes up to the maximum amount of the credit without increasing the total federal and state tax burden of their citizens.[163] The federal government was effectively sharing the proceeds of the federal estate tax with state governments.

In like manner, this Article proposes a federal wealth tax that is initially collected without regard to state populations (e.g., a wealth tax of 10% on net worth), but to the extent that a state is found to have contributed more than its apportioned share of the total tax, that excess shall be refunded. However, this methodology raises two questions. First, what is a state's apportioned share of the total tax? Second, how does this system differ from traditional apportionment such that it complies with notions of tax justice?

158. In fact, congress passed the Sixteenth Amendment of the U.S. Constitution in response to *Pollock* so that it could directly tax income without apportionment.

159. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 618 (1895).

160. *See* Schenk, *supra* note 46, at 475 n.95

161. Economic Growth and Tax Relief Reconciliation Act of 2001, H.R. 1836, 107th Cong. (2001).

162. *See* 26 U.S.C. § 2011.

163. 26 U.S.C. § 2011(f) provides that the credit "shall not apply to the estates of decedents dying after December 31, 2004." For the time being, there is no credit for state death taxes. Instead, there is an unlimited deduction for state death taxes under 26 U.S.C. § 2058.

Traditionally, in a requisition system, the total tax was a known quantity. The federal government would decide how much revenue was needed and order the states to pay that amount. Once the requisition was set, each state's apportioned share was calculated by multiplying the percentage of the population that lived within its borders by the total requisition tax:

$$A = P\% \times T$$

where A is the apportioned share, P% is the percentage of the population that lives within the relevant state, and T is the total requisition tax set to raised from the states. For example, if the federal government resolved to raise $10 trillion dollars from the various states, and 10% of the population lived in Ohio, then Ohio citizens would be collectively responsible for paying one-tenth of that amount or $1 trillion.[164]

Under this Article's proposal, the total tax is not a known quantity. Instead, the tax rate is the known quantity and the equation must be solved to learn the apportioned and unapportioned share of the wealth tax. This methodology can be illustrated through four distinct steps: (1) calculate the total wealth tax in each state; (2) calculate the wealth tax per capita in each state; (3) determine the lowest wealth tax per capita of any state and multiply it by the population of each state to determine the apportioned share of the wealth tax; and (4) return the excess unapportioned share via taxpayer refund or a state-level pick up tax.

1. Calculate the Total Wealth Tax

First, the wealth tax is applied, quite directly in both economic and constitutional terms, to the individual taxpayer. Everyone pays a straight 10% tax on their net worth irrespective of the state in which they live:

$$T = R \times W$$

where T is the wealth tax, R is the tax rate (here, 10%), and W is the taxpayer's wealth or net worth. The equation is applied in precisely the same manner at the state level. The wealth tax due from the citizenry of any state would equal 10% of their collective net worth. For example, if the net worth of Ohio residents were calculated to be $1 trillion, then the tax due from them would equal one-tenth of that amount or $100 billion.

164. $1 trillion = 10% × $10 trillion.

If we were to stop here, this wealth tax would be horizontally equitable, in that, the citizens of every state would pay a uniform 10% wealth tax. However, it would certainly violate the Apportionment Clause and thus fail to pass constitutional muster. Hence, step two.

2. *Calculate the Wealth Tax Per Capita for Each State*

Next we would compare the amount of wealth tax raised from the various states to determine which state had the lowest amount of wealth tax per capita. The wealth tax per capita is calculated by taking the dollar amount of wealth tax raised in step one and dividing it by the total population of the state:

$$\mathrm{WTpC} = \mathrm{T} / \mathrm{P}$$

where WTpC is the wealth tax per capita, T is the tax initially collected from the state, and P is the state population. For example, if our hypothetical Ohio had 10 million citizens, then its wealth tax per capita or per person would be $10,000.[165]

3. *Calculate Each State's Apportioned Share of the Wealth Tax*

Once the WTpC is calculated for each and every state, and the lowest WTpC is determined, the apportioned share for each state is calculated by multiplying the lowest WTpC by their respective populations:

$$\mathrm{A} = \mathrm{WTpC}^{\mathrm{L}} \times \mathrm{P}$$

where A is the apportioned share, $\mathrm{WTpC}^{\mathrm{L}}$ is the lowest wealth tax per capita of any state, and P is the state population. For example, if our hypothetical Ohio had the lowest wealth tax per capita, then the apportioned share for every other state is calculated by multiplying $10,000 by their respective populations. If New Hampshire had 1 million citizens, then its apportioned share would be $10 billion.[166] If California had 20 million citizens, then its apportioned share would be $200 billion,[167] etc. This methodology allows for the highest possible apportioned share of tax.

165. $1,000 = $100 billion / 10 million.

166. $10 billion = $10,000 × 1 million.

167. $200 billion = $10,000 × 20 million.

4. *Return the Unapportioned Wealth Tax*

a. Refund the Unapportioned Share to Taxpayers

Once the apportioned share is determined for each state, the excess of the initial wealth tax collected over the apportioned share must be refunded to comply with the Apportionment Clause. As a matter of fairness, if the tax is in fact refunded, it should be refunded to taxpayers in proportion to the amount of tax they paid. For example, if California raised $300 billion with its initial wealth tax, but its apportioned share is only $200 billion, it must refund $100 billion to its citizenry. If a taxpayer, say Bill Gates, paid $30 billion or 10% of the initial wealth tax, then $10 billion or 10% of the excess should be refunded to him.

If we were to stop here, this wealth tax now complies with the Apportionment Clause and passes constitutional muster, but it is no longer horizontally equitable. Citizens of different states are subject to different effective wealth tax rates. In particular, states with comparatively smaller and wealthier populations are undertaxed and those with larger and poorer populations are overburdened—an absurdly unfair result.

b. Allow or "Encourage" a State Level "Pick Up" Wealth Tax

However, under this Article's proposal, states would be allowed (or perhaps *encouraged*[168]) to levy a "pick up" wealth tax to claim the excess. In this case, the excess wealth tax collected by each state is paid into that state's treasury instead of being refunded proportionally to the taxpayers. Assuming that every state enacted a "pick up" wealth tax, the end result would be a federal wealth tax that is apportioned equally among the states, but a total federal and state wealth tax system that applies with equal force to the citizens of every state. This approach is not only horizontally equitable as between taxpayers in different states, but it complies with the letter and spirit of the Apportionment Clause. It complies with the letter of the law,

168. Although most states would need little coaxing to claim millions or billions in additional tax revenue, it is at least arguably constitutional for the federal government to condition the receipt of other funds on the enactment of a "pick up" wealth tax. Much like the federal government encouraged states to adopt a uniform minimum drinking age by conditioning the receipt of highway funds on the same, it could "encourage" states to participate in a national wealth tax scheme by conditioning other funds on their cooperation. South Dakota v. Dole, 483 U.S. 203 (1987). *See also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981).

because each state pays no more than its apportioned share to the federal government. In addition, this approach complies with the spirit of the law because no state is enriched at another's expense. Although wealth is redistributed among citizens, there is no redistribution whatsoever among the states.

Moreover, this approach should succeed where prior proposals fall on shaky ground. First, one need not read the Apportionment Clause out of the Constitution for it to work. As noted above, the constitutional wealth tax fully complies with the Apportionment Clause.[169] Second, the related substance-over-form and "step transaction" doctrines are not implicated. Unlike the federal government, state governments are not subject to the Apportionment Clause. Indeed, some of the states-rights Federalists supported the Apportionment Clause, in part, to preserve direct taxes as the primary domain of the states.[170] Thus, there is no realistic concern that federal and state "pick up" wealth taxes would be collapsed as one through the substance-over-form or step transaction doctrines. There is nothing unconstitutional or untoward about a state leveling direct taxes without apportionment; the states have done so throughout history and they continue to do so through various property taxes.

IV. The New Flat Tax

A. Description

This Article proposes the New Flat Tax to raise revenue without the regressive impact of adopting a consumption tax or hiking the income tax. Simply put, the New Flat Tax is an annual wealth tax

169. In fact, it could be said that this Article's wealth tax proposal not only complies with the Apportionment Clause, but is constitutional in the broadest sense of the word. It is legal, in that, the Supreme Court is likely to uphold it. It also more than arguably complies with our society's norms and sense of fairness in the tax laws. *See* James G. Wilson, *The Unconstitutionality of Eliminating Estate and Gift Taxes*, 48 CLEV. ST. L. REV. 771, 772 (2000) (arguing that eliminating the federal estate tax would be constitutional in the legal sense, but unconstitutional in the broader, normative sense of violating our society's "unwritten 'constitutional conventions'").

170. Joseph M. Dodge, *What Federal Taxes are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 855 (2009) ("direct taxation was expected to be the rare federal practice rather than the norm; in addition, apportionment—as an acknowledgment of the role of states—would serve the cause of ratification.").

with a flat rate equal to the estimated risk free rate of return[171] imposed on the excess of a taxpayer's net worth over the inflation-adjusted exemption equivalent for the estate tax under § 2001. The estimated risk free rate of return would equal the average, long-term applicable federal rate (AFR) for the tax year at issue.[172] The New Flat Tax is expressed as the following equation:

$$NFT = (NW - EE) \times AFR$$

where NFT is the amount of the New Flat Tax due and payable, NW is the taxpayer's net worth, EE is the inflation-adjusted exemption equivalent, and AFR is the average AFR for the tax year.

For example, if the taxpayer has a net worth of $6,340,000 in 2014 when the inflation-adjusted exemption equivalent is set at $5,340,000 and the average, long-term AFR is 3%, then the taxpayer would be assessed $30,000 under the New Flat Tax:

$$\$30{,}000 = (\$6{,}340{,}000 - \$5{,}340{,}000) \times 3\%$$

It is impossible to determine the exact revenue impact of the New Flat Tax prior to implementation. However, conservatively speaking, it would raise hundreds of billions of dollars each tax year.[173]

171. This Article adopts the risk-free rate of return proposed by Professors Deborah Schenk and Joseph Dodge, which accords with the low rate of 2% proposed by Professors Anne Alstott and Bruce Ackerman. *See generally* Schenk, *supra* note 46; Dodge, *supra* note 78, at 760–68; BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999). A wealth tax keyed to the risk-free rate of return discourages parking wealth unproductively. *See, e.g.*, The Parable of the Bags of Gold, Matthew 25:14–30. *But see* Richard Lavoie, *Dreaming the Impossible Dream: Is a Wealth Tax Now Possible in America?* (Univ. of Akron Legal Stud., Paper No. 14–01, 2014), *available at* http://papers.ssrn.com/ sol3/papers.cfm?abstract_id=2402978. Professor Richard Lavoie has proposed an "equality tax" that is designed to do more than raise revenue and discourage the unproductive use of assets. *Id.* Like the wealth transfer taxes, Professor Lavoie proposes using the wealth tax to break up intergenerational concentrations of wealth by applying a rate that substantially exceeds the risk free rate of return. *Id.* Specifically, he proposes a progressive wealth tax with a top rate of 10%. *Id.*

172. The various AFRs are oft used as proxies for the risk-free rate of return, under the theory that the U.S. Department of the Treasury is the most secure of all creditors and presents little to no risk of default.

173. Estimates of the total preexisting wealth of the United States vary considerably. The United Nations estimates the total wealth of the United States at nearly $118 trillion, whereas John Rutledge estimates the total wealth at $200 trillion using the Flow of Funds statistics from the Federal Reserve Board. *See* John Rutledge, *Total Assets of the U.S. Economy $188 Trillion, 13.4xGDP*, *available at* http://rutledgecapital.com/2009/05/24/total-assets-of-the-us-economy-188-trillion-134xgdp/; Federal Reserve Statistical Release, Dec. 29, 2013, *available at* http://www.federalreserve.gov/releases/z1/Current/. Given that most estimates place more than one third of the total wealth of the United States in the hands of the top 1%, we can assume a tax base of tens of trillions of dollars. *See* Edward N.

If the United Nations is correct in their claim that the total wealth of the United States is nearly $118 trillion, and the top 1% possess approximately one-third of that wealth, then a 3% annual wealth tax would raise over half a trillion dollars a year—even if half of the tax base was ultimately exempt.[174]

B. Why Dub a Wealth Tax a Flat Tax?

"Therefore I repeat, let no Man talk to me of these and the like Expedients, till he hath at least a Glimpse of Hope, that there will ever be some hearty and sincere attempt to put them into Practice."[175] Stated otherwise, there is little point in discussing the politically implausible, and none in discussing the impossible.

Although the term "flat tax" is strongly associated with "a particular form of consumption-based direct tax,"[176] a flat tax is not necessarily a consumption tax. A flat tax is simply a proportional tax, which is defined as "a tax in which the tax rate remains constant regardless of the amount of the tax base."[177] Thus, any tax with a flat rate, i.e., a constant marginal rate, is accurately referred to as a flat tax.

Particularly in conservative circles, so-called "fair" or flat taxes have achieved popularity as a supposedly simpler and fairer alternative to the income tax. Nearly half of the Republican presidential candidates in 2012, including the Libertarian hero and Austrian economist Ron Paul, proposed flat taxes as part of their platform. Although these flat taxes were all a variety of consumption taxation, it appears that their popularity is tied to simplicity, not consumption taxation. Dubbing an annual, flat rate wealth tax as the New Flat Tax plugs into that popularity and increases the possibility of bipartisan appeal. Liberals should find the progressivity of the

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Wolff, Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze—an Update to 2007 (Levy Economics Institute of Bard College, Working Paper No. 589), *available at* http://www.levyinstitute.org/pubs/wp_589.pdf at 44 (showing that the net worth of the wealthiest 1% of Americans represents 34.6% of the total wealth of the United States in 2007 using data from the Survey of Consumer Finances conducted by the Federal Reserve Board).

174. $118 trillion × 1/3 = $39.33 trillion × 1/2 = 19.67 trillion × 3% = $590 billion

175. SWIFT, *supra* note 1.

176. Charles E. McLure, Jr., *The Simplicity of the Flat Tax: Is It Unique?*, 14 AM. J. TAX POL'Y 283 (1997).

177. *Flat Tax*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/flat%20tax (last visited Feb. 4, 2014); *Proportional Tax*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/proportional+tax?show=0&t =1374071755 (last visited Feb. 4, 2014).

New Flat Tax appealing, whereas conservatives are likely to appreciate the simplicity of administrating a tax that applies a single rate with one exemption to a handful of taxpayers.

As laid out above, a wealth tax is not only pragmatic and fair, but viable as a constitutional matter. However, the fact that a wealth tax is constitutional does not mean it is politically possible. By way of example, it is certainly constitutional to hike the top marginal federal income tax rate to 94%.[178] However, given the rancorous debate over raising that same rate from 35% to 39.6% in 2012, it is all but politically impossible to do so. Constitutional law and politics are two very different worlds, and a wealth tax proposal is only relevant if it has a chance of becoming law. Of course, the nation's heightened need for revenue does increase the likelihood that Congress will seriously consider a new form of taxation. However, the question of whether Congress will consider a wealth tax vis-à-vis a consumption or income tax depends on public perception. That is why this Article proposes dubbing wealth taxation as the New Flat Tax. By labeling a wealth tax as a flat tax, it piggybacks off of the popular sentiment that libertarians and conservatives have built for flat consumption taxes. Packaged correctly, a constitutional wealth tax could plausibly be a popular wealth tax.

Conclusion

Prior to the credit crisis and the recession that followed, the federal government already experienced multibillion dollar deficits. In the wake of those events, the billions became trillions. Lest the trillions become quadrillions,[179] googolplexes or some other far-fetched number, something must be done. Just as there are only two, rather unpleasant ways to lose weight, diet or exercise, there are only two ways to balance the budget, spending cuts or revenue increases.

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178. "The highpoint in marginal rates was 1944 and 1945, with the top rate at 94% for Taxable Income exceeding $200,000 (nearly $2.6 million in 2013 dollars)." GEIER, *supra* note 25, at 58.

179. A quadrillion is a thousand trillion. Lest the number quadrillion seem fanciful with respect to the national debt, it should be noted that Japan's debt exceeded $1 quadrillion yen for the first time in 2013. Charles Riley, *Japan debt tops 1 quadrillion yen*, CNNMONEY (Aug. 9, 2013), http://money.cnn.com/2013/08/09/news/economy/japan-debt-quadrillion/index.html. It is doubtful that China, Paypal, or anyone else can pay off our national debt, although accidents do happen. *See* Sho Wills, *Paypal accidently credits man $92 quadrillion*, CNN (July 17, 2013), http://www.cnn.com/2013/07/17/tech/paypal-error/index.html?hpt=hp_t2 (Paypal accidentally credits Pennsylvania PR executive's account with over $92 quadrillion dollars, making him "the richest man in the world by a long shot.").

To continue the analogy, dieting can only be taken so far. Anorexia and Bulimia are neither healthy nor sustainable. Likewise, spending cuts alone are not enough to balance the budget. So long as taxpayers continue to demand our military-industrial complex and social welfare state, revenue increases are also necessary.

Given that reality, we have three realistic alternatives: (1) pass a consumption tax, (2) hike the income tax, or (3) pass a wealth tax on less than 1% of the population. Two of the three are unpalatable. Consumption taxes are somewhat of a cause célèbre in both liberal and conservative circles.[180] However, they are inherently regressive and disproportionately affect the poor and middle class. Moreover, the current federal income tax system has many consumption tax features. Thanks to the realization principle and the step-up in basis rule of § 1014, wealthy taxpayers can and do defer or altogether avoid the income tax on their capital income. As a result, hiking the facially progressive income tax is little better than passing a new consumption tax. That leaves us with door number three—pass a wealth tax.

Wealth taxes are fair: They measure the totality of a taxpayer's economic position, societal benefits, and ability to pay. Wealth taxes are also pragmatic: History has shown them to be administrable, and due to their broad tax base, they are capable of raising the most revenue at the lowest and least oppressive rates.

For some time, scholars have debated ways to skirt the constitutional rule of Apportionment to pass a wealth tax. For the first time, this Article demonstrates how a wealth tax can comply with the dual strictures of horizontal equity and Apportionment. Under this Article's modest proposal, the federal government would collect a wealth tax at a uniform rate and retain each state's constitutionally apportioned share of the tax. The excess unapportioned share, if any, would be refunded to the state of origin by means of a state-level "pick up" tax. Thus, a wealth tax is not only fair and pragmatic—it is also constitutional.

But is a wealth tax politically possible? Passing a law that complies with the Apportionment Clause is certainly more plausible than amending the Constitution to allow for unapportioned wealth

180. Like the Devil, regressive consumption taxes go by many names. Many liberals support a European-style VAT as a permanent revenue source "to fund a robust, compassionate government." N. Gregory Mankiw, *Much to Love, and Hate, in a VAT*, N.Y. TIMES (May 1, 2010), http://www.nytimes.com/2010/05/02/business/02view.html. On the other hand, many conservatives support a "flat tax" on sales as a simpler alternative to the income tax. *Id.* Although they go by different names, the VAT and the flat tax are both consumption taxes, and they are both regressive. *See id.*

taxes.[181] In today's political climate, however, building a coalition that constitutes a majority in the U.S. House of Representatives and sixty votes in the U.S. Senate is no small task.[182] That is precisely why this Article proposes redubbing wealth taxation as the New Flat Tax. In taking on the mantle of simplicity implied by the term "flat tax," a wealth tax just might achieve the level of popularity necessary to pass the halls of Congress.[183] Moreover, the New Flat Tax is legitimately deserving of that mantle. What could be simpler than a flat tax with a single rate and a single exemption that applies to less than 1% of all taxpayers? Forget the so-called "postcard return" under the Hall and Rabushka flat consumption tax.[184] Under the New Flat Tax, the supermajority of taxpayers need file no return at all. Stated otherwise, a simple wealth tax that is marketed for its simplicity is simply more likely to pass.

181. However, the Sixteenth Amendment was successfully adopted for purposes of levying an unapportioned federal income tax.

182. Even this scenario assumes no presidential veto, which would require a two-thirds majority of Congress for passage.

183. *See* Ronald McKinnon, *The Conservative Case for a Wealth Tax*, WALL ST. J. (Jan. 9, 2012), http://online.wsj.com/article/SB10001424052970203462304577139232881346686.html.

184. *See generally* ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX (2d ed. 1995) (advocating to replace the FORM 1040 – U.S. INDIVIDUAL INCOME TAX RETURN with a shorter, postcard-length return).