MONEY, IT'S A CRIME. SHARE IT FAIRLY, BUT DON'T TAKE A SLICE OF MY PIE!:* THE LEGISLATIVE CASE FOR THE PROGRESSIVE INCOME TAX

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ABSTRACT

The progressive tax and its soundness as the best tax structure has been the subject of extensive economic and political debate. A critical void, however, exists in the scholarship examining proposals in support of or against the progressive tax. The legislative and political rationales behind the progressive income tax have not been examined, including the reasons it was enacted and how (and whether) it has survived through so many administrations and political persuasions. Policymakers and analysts of the progressive tax cannot appropriately evaluate the consequences of a proposal regarding the progressive income tax without this analysis.

The purpose of this article is to identify the rationales for and against the progressive income tax, both at the time of its enactment and during subsequent challenges to and affirmations of the progressive income tax. This paper analyzes six fundamental reasons behind the enactment of the progressive income tax and their relevancy today. The American public is still supportive of a progressive income tax and, as a result, when opponents to the progressive income tax make alternative proposals these opponents often label the proposal or an aspect of the proposal as progressive to garner public support.

The progressive tax does not exist merely for economic reasons; there are more economically efficient systems. No matter how economically sound a proposal is, unless the proposal fulfills the rationales served by a progressive income tax, it will not be an appropriate replacement. Each of the six reasons, which have been consistently addressed in legislative history, need to be evaluated before any discussion surrounding the progressive income tax can take place.

(1) The ability to pay theory provides that those with higher-incomes should have a higher tax rate and burden because they have extra income (surplus) to fund the government. Today, however, lower-income taxpayers often pay a greater tax

* Pink Floyd, "Money" from the Dark Side of the Moon (Harvest/Capital Records) (1973).

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rate than wealthy high-income taxpayers. For example, President Obama pays a lower rate of tax than his secretary and Warren Buffett pays a lower rate of tax than his secretary. In addition, one of the major arguments in the Occupy Movement's protests is that currently the tax burden is unfairly placed on the "99%" of the population whereas taxpayers in the highest "1%" of income share a lower tax burden.

(2) Enacting a progressive income tax preserves democracy. Today many argue that democracy has been threatened by the concentration of wealth in a few through the use of superpacs, wealthy individuals and corporations who are able to dominate the political discourse through influence, ads, and power.

(3) The progressive tax was enacted to appease labor groups and populists to prevent socialism, communism, or revolution. Recently the protests from the Occupy Movement have clearly illustrated that the lack of the progressive tax is threatening the stability of our government.

(4) The benefit theory states that the taxpayers who benefit the most from government services should bear the greatest burden to fund the government. The wealthiest and the poorest receive the most in benefits from the government, while the heaviest tax burden falls on the middle class.

(5) One argument is that a truly progressive tax has not really been enacted, rather the appearance of a progressive tax is used to pacify the general public. The illusion of a progressive tax serves to appease the public while the tax system really benefits high-income taxpayers and special interest groups. Recent polls show the illusion may be wearing thin because a majority of Americans think that the income tax actually benefits the wealthy.

(6) The progressive income tax can be used to redistribute income or wealth. Today, the disparity and inequality of income and wealth is at its greatest levels since the Great Depression.

This article identifies these six rationales, examines the entire legislative history of the progressive income tax, establishes that these rationales are firmly entrenched, and creates a foundation on which legislators, analysts, and policymakers can finally base their analysis and proposals.

I. INTRODUCTION

History often repeats itself. "A page of history is worth a volume of logic."[1]

The wisdom of whether or not the United States should have a progressive income tax is continually analyzed and scrutinized. Political candidates, economists, legal academics, political science academics, tax theorists, the media, commentators, and the general public endlessly debate and examine the progressive

1. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).

income tax and alternatives; however, this discourse is missing an essential component. The critical information missing from all of these critiques and proposals is what the foundational reasons were for enacting and maintaining the progressive income tax throughout history. It is impossible to find a solution to a problem if the problem has not been identified. The progressive income tax has enjoyed stability as a concept, and the public, who in general support a progressive income tax, continue to be under the assumption that the tax code is truly progressive. The purpose of this article is to identify the rationales for the progressive income tax, both the enactment and the subsequent challenges against or affirmations for it, as a policy. This article will define and analyze the six rationales within the context of the legislative history. This will allow proponents of the progressive income tax or alternative proposals to address the underlying reasons for the tax. There are intrinsic justifications behind the congressional and the executive branch support for the progressive income tax, which are critical to understanding the tax itself. Therefore, any remedies or counter-proposals to the progressive income tax need to address these underlying issues for the proposals to be effective.

Current scholarship on the progressive income tax (and the copious alternative proposals) is profoundly lacking because the analysis is missing the essential rationales from the legislative history of the tax and its evolution. To adequately evaluate the progressive income tax, critics must understand the original justifications and reasoning for enacting and preserving the tax as well as the legislative arguments and considerations for later revisions, including any opposition and challenges lawmakers have made. Because of the void of scholarship on the legislative history of the progressive income tax, commentators and scholars examining the progressive income tax have circumvented the underlying rationales for the tax by completely avoiding it or by making assumptions upon which to base their theories. The lack of a complete analysis of the legislative history that lays out the principal reasons for the progressive income tax results in scholars and commentators merely speculating on the motives of the legislature or completely ignoring the motives altogether. The history, however, is there.

After reviewing the legislative record, congressional testimony, hearings, debates and speeches, the reasons for the enactment, preservation and scrutiny of the progressive income tax are clear. The analysis of the legislative history of the tax is at times surprising. The research reveals that often the motives of Congress and the Executive branch differ and change, as do political persuasions, powerful interests, and economic conditions. But this history is invaluable to the debate over the progressive income tax. Not only are economic conditions today reminiscent of periods within the legislative history of the progressive income tax, but by using the legislative history as a reference, scholars and current legislators can avoid making similar misguided proposals or futile arguments. Ultimately, a competent analysis of the progressive income tax in the United States and its counter proposals requires an analysis of the underlying legislative reasons and justifications for the original enactment of the tax.

This article seeks to establish the rationales behind the progressive income tax so that they can finally be part of the discourse and thus satisfy the vital need for a thorough legislative history and analysis of its development. Other scholars have noted the need to look at the history of the progressive income tax to see if the historical justifications are still relevant, particularly in light of the fact that we are facing similar issues with increases in inequality and large concentrations of wealth.[2] As this article reveals, there are some very specific rationales for the enactment of the progressive income tax, many of which cannot be addressed merely by economic theories intended to maximize revenue, provisions designed to appease particular interest groups, or engaging in class warfare. Depending on which principle behind the progressive income tax is being evaluated, economics, politics or interest groups may be insufficient to address the issue.

This article is not intended to engage in the progressive income tax debate from the perspective of economics or new political theories; it is designed to analyze the legal history of the development of the progressive income tax law and analyze the legislative premises behind the income tax structure.[3] This study of the legislative history of the progressive income tax is particularly important because tax theorists "fail to use the legislative record to evaluate norms such as progressivity, equality and efficiency."[4] As the discourse and debate of the progressive income tax continues, analysts will no longer have to make assumptions or guesses as to the reasons the tax was enacted, as a result of this research. Legislative history can offer perspective into the context in which laws are created including the movements and motivations behind a law. A complete tax legislative history can be used to "set the subject in a somewhat clearer light and to aid the legislator in constructing a workable scheme."[5] In addition, courts often look to legislative history to interpret statutes.[6]

This article will have six parts including this introduction: Part II will briefly define and discuss the progressive income tax; Part III will lay out the six legislative rationales for enacting, maintaining, and revising the progressive income tax; Part IV will provide the analysis of the legislative history revealing the development of these rationales; Part V will make some predictions and draw some

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2. *See, e.g.*, Reuven S. Avi-Yonah, *Book Review: Why Tax the Rich? Efficiency, Equity and Progressive Taxation*, 111 YALE L.J. 1391, 1411 (2002) (book review).

3. For a discussion of the philosophical arguments for and against progressivity there are many articles. *See, e.g.*, Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987); Walter J. Blum & Harry J. Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952); *see also* Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905 (1987).

4. William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 291 (1996).

5. EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD, at v (1911).

6. The "plain meaning rule," which provides that courts should only look at legislative history when the meaning is unclear, has been eroded over time. *See* Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 845 (1991) (providing that committee reports have traditionally been considered the most authoritative source of legislative history); *see id.*

conclusions based on the analysis of the legislative history; and Part VI will briefly conclude.

II. THE PROGRESSIVE TAX

The progressive income tax is a tax structure where the tax rate increases as an individual taxpayer's income increases:[7] the higher the taxpayer's income, the higher the taxpayer's respective tax rate. Alternatively, regressive taxation is when the tax rate increases when a taxpayer's income decreases, and correspondingly, the higher the taxpayer's income, the lower the tax rate.[8] Finally, degressive taxation is when the tax rate is perhaps progressive up to a certain income amount, and then remains constant beyond that fixed rate.[9] Another important tax policy consideration is neutrality, which provides that "taxes should not influence choices unless this influence is a part of a deliberate social policy."[10] Unless legislators deliberately want a tax law to impact a certain behavior, tax laws should be neutral and avoid affecting taxpayer behavior. Therefore, irrespective of whether a degressive, regressive or progressive tax is enacted, it should be neutral unless the legislature intends to influence certain behaviors deliberately.

A common misconception must be clarified before the substantive discussion of the progressive income tax. A progressive income tax does not dictate extremely high or punitive tax rates on high-income taxpayers. Progressive income taxes merely mean that the higher a taxpayer's income, the higher percentage tax rate that taxpayer pays on his income. The amount of the progressivity, meaning the difference in tax rates from high- to low-income taxpayers, may be small or dramatic and the tax rates on all taxpayers may be high or low. This is important to emphasize because a common criticism of the progressive income tax is that one of the historical legislative intents was to "soak the rich," to take wealth away from the wealthy, and that any progressive income tax dictates punitively high tax rates. This article will discuss the legislative arguments regarding wealth redistribution and punitive rates, but assuming that a progressive income tax necessarily requires high tax rates is incorrect. For example, as this article is being written, current marginal income tax rates are progressive, perhaps only slightly progressive, with low overall rates applicable to all taxpayers. Of course, the progressive income tax could be used as a tool to distribute income or wealth or to be punitive, but that would be a deliberate choice and is not an essential component of the progressive tax. In fact, as the legislative history will demonstrate, even when rates for high-income taxpayers reached 91%, the effective tax rates (the actual tax rates after deductions) were so much lower that no rates in the United States have resulted in being punitive or stunting economic growth.

The theory of a progressive income tax preceded United States' founding, but the income tax was really still being experimented with in other countries even after

7. *See* SELIGMAN, *supra* note 5, at 30.

8. *See id.*

9. *See id.*

10. WILLIAM S. VICKREY, AGENDA FOR PROGRESSIVE TAXATION, at v (1947).

the United States was founded. The United States also experimented with several different types of taxes before including an income tax. In addition, once the Supreme Court had approved of an income tax, it later had to determine whether it was constitutional if the income tax was progressive.[11] Ultimately, the Supreme Court decided a progressive income tax was constitutional and that it was in the legislature's power to decide what was just and equal in terms of rates.[12] The Supreme Court stated it would only use its judicial power to intervene if a tax was arbitrary or confiscatory, which would mean the tax would violate the Takings Clause of the United States Constitution.[13]

The general public of the United States has regularly shown approval for a progressive income tax, supporting the principle that higher-income taxpayers should bear a greater tax burden. A recent poll demonstrates that a majority of the public in the United States are concerned that the increasing division in economic status between taxpayers is bad for the country.[14] The majority of the public in the United States also believe that high-income taxpayers are not paying enough in taxes.[15] At least 58% of Americans stated that they did not believe that high-income taxpayers currently bore an appropriate share of the tax burden and were not paying enough in taxes while 26% of those polled stated high-income taxpayers already paid an appropriate amount.[16] Even 52% out of those polled who personally considered themselves "upper middle class" said upper-income Americans did not pay an appropriate share of taxes and should pay more.[17] Only 10% of the public who classified themselves as upper middle class thought the amount they paid in taxes was too much.[18] In addition, 62% of the taxpayers polled who considered themselves upper middle class said they were more financially secure now than they were 10 years ago, while less than a majority, 44% of those who identified themselves as middle class and 29% of the lower class, could say the same.[19]

> The results reinforce a tide of recent economic data showing a widening economic divide. America's middle class has been shrinking in the stagnant economy, and poverty is now approaching 1960s-level highs, while wealth concentrates at the top of the economic ladder . . . tensions between the rich and poor increase and are at their most intense level in nearly a quarter-century."[20] "About 65 percent of Americans say the gap

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11. *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Pollock v. Farmers' Loan & Trust Co. 158 U.S. 601 (1895).

12. *See* Knowlton v. Moore, 178 U.S. 41, 109-110 (1900).

13. *See id.*

14. *See* Kim Parker, *Yes the Rich are Different*, THE PEW RESEARCH CENTER (Aug. 27, 2012), http://www.pewsocialtrends.org/2012/08/27/yes-the-rich-are-different/.

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. Hope Yen, *Majority in U.S. Say Rich Pay Too Little in Taxes*, MSNBC (Aug. 27, 2012), http://www.msnbc.msn.com/id/48802418/ns/business-personal_finance/#.UDzDs44dPao; *see* Parker, *supra* note 14.

> between rich and poor has gotten wider in the past decade, while 20 percent believe it has stayed the same . . . Separately, 57 percent say a widening income gap is a bad thing for society; just 3 percent say it is a good thing.[21]

As described in greater detail in this article, during our legislative history, Congress and the Executive Branch, including the Treasury Department, determined that the federal government had to raise revenue to fund the government. Ultimately, they concluded after much debate and contemplation, that a progressive income tax should be part of the overall tax plan.

III. LEGISLATIVE OBJECTIVES OF A PROGRESSIVE TAX

Tax historians have identified three essential elements that must be part of the commencement of a new tax regime to garner support from the American public and elicit confidence in the government.[22] Successful ventures have "included some combination of [the following] elements: (1) enhanced progressiveness in rate structure, (2) allocation of revenues raised by regressive taxes to programs whose benefits are distributed progressively, and (3) regulation of behavior in ways that were widely regarded as improving the national well-being."[23]

The analysis of the legislative history behind the progressive income tax has discovered six primary reasons and rationales behind its enactment: (1) the Ability to Pay theory, (2) to preserve democracy, (3) to prevent socialism, communism, anarchy or revolution, (4) the benefit theory, (5) it is the illusion of a progressive tax to appease the public while doing favors for special interests and (6) using the progressive income tax to redistribute income or wealth.

A. Ability to Pay

The "Ability to Pay" Theory is the most often cited justification and legislative rationale for the progressive income tax. This theory contends that taxpayers should contribute to the government in proportion to their ability to pay.[24] Taxpayers must first use their income to pay for necessities. After a taxpayer has paid for his necessities, additional income is excess or surplus to spend at his whim. As the taxpayer's surplus income increases, his tax rate should increase so that he bears a greater burden of the income tax.[25] This serves to support the federal government and raise the necessary revenue without placing too high of a tax burden on lower-income taxpayers by forcing them to cut out necessities. It is better to take surplus

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21. *Id.*

22. *See* W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY 245 (2d ed. 2004).

23. *Id.*

24. *See* EDWIN R.A. SELIGMAN, PROGRESSIVE TAXATION IN THEORY AND PRACTICE 205 (1909) [hereinafter SELIGMAN, PROGRESSIVE TAXATION].

25. *See* Jason Bordoff & Jason Furman, *Progressive Tax Reform in the Era of Globalization: Building Consensus for More Broadly Shared Prosperity*, 2 HARV. L. & POL'Y REV. 327, 333 (2008).

money from the high-income taxpayer than to take money needed for necessities from the lower-income taxpayer.

Another position that has been used to support this theory is the concept of declining marginal utility of income.[26] Income declines in marginal utility, meaning the more income a taxpayer has, the less value each additional dollar has to him.[27] For example, $1,000 has much more value to someone living in poverty than to a multi-billionaire. Therefore, applying a higher marginal tax rate on that $1,000 for the high-income taxpayer is appropriate because the tax burden will not nearly be as painful as it would be to the lower-income taxpayer if a tax rate were applied to his $1,000.

An argument against the ability to pay theory is that even if taxpayers are at the same income level, the particular needs and wants of an individual, and what is considered a luxury versus a necessity, varies from taxpayer to taxpayer and depends on individual circumstances.[28] For example, one commentator stated "[s]ome have taken refuge in the phrase 'ability to pay' but unless ability to pay turns out to mean just about what the user wants it to mean; so that as a tool for determining the progressiveness of a graduation it is useless."[29] It is all subjective. Another criticism of the ability to pay theory is at what income level progressivity and the ability to pay tax rate increases stop. Certain taxpayers earn so much income that it is more than they could spend in a lifetime. If the United States enacted a progressive income tax system that continually increased in progression as income levels rose, at a certain income level it would begin to tax all of the taxpayer's excess income, essentially confiscating all of the excess income.[30] A tax that would confiscate all income would be unconstitutional in the United States.[31]

The ability to pay theory has been represented consistently throughout the legislative history of the progressive income tax code, as will be reflected by the historical analysis to follow. The ability to pay theory was actually used to justify progressivity in the Colonial Period. There was a tax in the Massachusetts Bay,[32] which taxed each man "according to his estate and with consideration of all other abilities whatsoever."[33] It was a property tax, not an income tax, but it was based on the principle that those with more wealth and prosperity had a greater ability to pay

26. *See* Bankman & Griffith, *supra* note 3, at 1947.

27. *See id.* One only needs to see some of the bar tabs on the Rich Kids of Instagram and compare it to the total income of a middle-income taxpayer to demonstrate and validate the theory of the declining marginal utility of income. *See* RICH KIDS OF INSTAGRAM, http://richkidsofinstagram.tumblr.com/post/29351797304/100k (showing a receipt (proudly uploaded and posted) for a bar tab over €107,000). Meanwhile, according to the 2010 census bureau, the median income was $50,046, less than half of the bar tab. *See* Amanda Noss, *Household Income for States: 2009 and 2010*, UNITED STATE CENSUS BUREAU 2 (Sept. 2011), http://www.census.gov/prod/2011pubs/acsbr10-02.pdf. What would have happened if those kids had decided to stay in for the night?

28. *See* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 210.

29. VICKREY, *supra* note 10, at 375.

30. *See* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 213.

31. *See* John Douglas Messina v. United States, 202 Ct. Cl. 155, 160-61 (1973) (citing Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24-25 (1916)).

32. *See* SELIGMAN, *supra* note 5, at 368 (citing Colonial Records of Massachusetts Bay (Shurtleff's ed. 1853), I, at 180).

33. SELIGMAN, *supra* note 5, at 368.

and should bear a greater burden.[34] During the American Revolution, those with greater wealth carried a greater burden of the taxes to fund the government through the property taxes.[35] The larger a taxpayer's property, the greater his perceived wealth, and thus, the greater his ability to bear the burden of the tax.[36]

The ability to pay rationale for the progressive income tax began with the first income tax. In 1862, Representative Morill, who was subsequently appointed Chairman of the Ways and Means Committee, was not an enthusiastic supporter of an income tax. However, after concluding that an income tax was needed, he further concluded that the tax should not equally impact everyone, but instead should be "proportionate to his ability to pay."[37] He argued that it was only fair for men "with large incomes, to pay more in proportion to what they have than those with limited means."[38]

B. *To Preserve Democracy*

A particular legislative concern when enacting the progressive income tax was to champion and safeguard democracy. Some legislators were proponents of the progressive income tax because in their view it was consistent with democracy, the right thing to do. For example, in 1909 Senator William Borah argued, "I do not believe that the great framers of the Constitution, the men who were framing a government for the people, of the people and by the people, intended that all the taxes of this government should be placed upon the backs of those who toil, upon consumption . . . This cannot be true; it was never so intended; it was a republic they were building, where all men were to be equal and bear equally the burdens of government, and not an oligarchy."[39]

As the thorough discussion of legislative history in Part IV will reveal, a steady and unfailing consideration throughout the years and woven throughout the debate of the progressive income tax was to preserve and protect democracy. Of particular concern was the concentration of wealth and income was one of the biggest current threats to democracy, as alluded to above when Senator Borah cites the threat of a potential oligarchy. Certain legislators warned that allowing too much income and wealth to accumulate in the hands of a few would shift the balance of power. There was a very real risk that those with power could exert strong influence over the legislative process if their incomes and wealth grew to sufficient levels. It would allow a powerful few not only the ability to influence politicians, but to essentially buy political offices. The danger is that the high-income levels and wealth will concentrate power, which ends up creating a plutocracy and thereby weakening, or altogether eliminating, democracy.[40]

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34. *See id.*

35. *See* BROWNLEE, *supra* note 22, at 19.

36. *See* Bordoff & Furman, *supra* note 25, at 331-332; *see* BROWNLEE, *supra* note 22, at 19.

37. STEVEN R. WEISMAN, THE GREAT TAX WARS: LINCOLN -TEDDY ROOSEVELT - WILSON HOW THE INCOME TAX TRANSFORMED AMERICA 39 (2002).

38. *Id.*

39. 44 CONG. REC. 1701 (1909) (statement of Sen. Borah).

40. *See* Bordoff & Furman, *supra* note 25, at 328.

In addition to the risk of overly influential taxpayers, if too much income is concentrated among high-income taxpayers, there is also the risk of upheaval and rebellion from lower -income taxpayers. Some legislators expressed concern that the growing economic disparity would cause lower -income taxpayers to protest and dissent, and sometimes the word revolution was used. If income inequality is permitted to increase, at a certain point the lower -income taxpayers could revolt against capitalism, threatening democracy.[41]

A recent example of the threat economic inequality poses to democracy and the stability of government and our civilized society is the Occupy Movement protests. This civil unrest was exactly what legislators throughout the legislative history sought to mitigate or eliminate. History does repeat itself and legislators envisioned a similar schism developing at the beginning of the last century, by contemplating that economic inequality posed a threat to democracy. To assuage the threat, legislators enacted progressive taxes theorizing that a progressive income tax might quell such dissent.

Federal Reserve Chairman Alan Greenspan noted, "income inequality is where the capitalist system is most vulnerable."[42] In addition, Aristotle warned that once the middle class erodes and income inequality becomes so great that the poor outnumber the wealthy "the state soon comes to an end."[43] Aware of these threats to democracy and capitalism, legislators have often argued to maintain some degree of progressivity in the tax code to protect democracy, although the constant increase in income and wealth disparity continues to pose a threat. Using the progressive income tax as a means to alleviate income inequality is another rationale for the progressive income tax addressed below. In the context of preserving democracy, however, legislators were not always concerned about the disparity per se but rather ensuring that the disparity, or the perception of the disparity, did not threaten the democracy of the United States. As a result, the progressive income tax was often seen as a tool to be used when the public would begin to object to the growing economic disparity.

In 2007, the Director of the Tax Policy Center warned in his testimony before the House Appropriations Committee that "[g]rowing inequality can lead to a populist revolt against factors thought to be implicated, such as free trade and relatively unfettered markets. Increasing trade barriers and increased regulation could diminish the incomes of those at the top by much more than a modestly progressive tax system (and might not help those at the bottom either). The progressive income tax might be viewed as a mechanism to buy the support of ordinary working people for a system that disproportionately benefits a few high earners."[44] He counseled that if legislators were concerned about preserving the

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41. *See id.*

42. Martin Crutsinger, *Greenspan Talk Doesn't Roil Markets*, THE ASSOCIATED PRESS (March 13, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13.AR2007031300744.html.

43. Bordoff & Furman, *supra* note 25, at 332 (citing ARISTOTLE, POLITICS 94 (Benjamin Jowett trans., 2004)).

44. *Tax Fairness: Policy and Enforcement: Hearing Before the Subcomm. on Fin. Servs. and Gen. Gov't of the H. Appropriations Comm.*, 110th Cong. 2 (2007) (statement of Leonard E. Burman, Director, Tax

high-income levels of their high-income taxpayer constituents then they should support a higher marginal tax rate on that income. He stated that the risk of a populist revolt which could interfere with free trade, limited regulations, capitalism and democracy, posed a greater danger to high incomes than the threat of high taxes.[45] The premise he advocated was that a progressive income tax with higher marginal rates on high-income taxpayers would appease the ordinary people, in turn supporting the stability of democracy, and the favorable economic conditions permitting high-income taxpayers to maintain their levels of income.[46] He also reported that higher marginal tax rates would be effective at quelling a populist rebellion, even if the ordinary workers did not actually benefit from the more progressive income tax because of the perception that higher-income taxpayers were bearing a greater tax burden.[47]

To avoid both of these possible threats and disruptions to democracy, the threat of an oligarchy or plutocracy and the threat of a populist revolt, legislators routinely advocated for the progressive income tax to both appease the lower-income taxpayers and to ensure that democracy would not be threatened by too much wealth and income in the hands of the few.

C. To Prevent Socialism, Communism, Anarchy or Revolution

Very often in the history of the progressive income tax, when a proponent of the progressive income tax suggests increasing tax rates, political pundits slap the label "socialist" on the proposal, as a means to draw opposition to it or to connect it with negative connotations.[48] President Barack Obama recently poked fun at this trend by relaying a story, described in greater detail below in the analysis of the legislative history in Part IV, about how a former president spoke about fairness when he discovered that he paid lower tax rates than his secretary, concluding, "[t]hat wild-eyed socialist, tax-hiking class warrior was Ronald Reagan." Even Thomas Paine, one of the Founding Fathers of the United States, who was not a socialist, was an advocate for progressive tax.[49]

Ironically, part of the reason the progressive income tax was enacted and why it survived during some of most contentious periods with socialism and communism

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Policy Center Senior Fellow, the Urban Institute), *available at* http://www.urban.org/UploadedPDF/901050_Burman_Fairness.pdf.

45. *See id.*

46. *See id.*

47. *See id.*

48. *See, e.g*, Associated Press, *Is Obama a Socialist*, CNBC (June 4, 2012), http://www.cnbc.com/id/47678760/Is_Obama_a_Socialist (discussing the various claims that President Obama is a socialist including dissents from the Socialist Party claiming that if Obama was a socialist he would be a very bad one); *see also* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 141; Michael Tackett, *Here Reagan's Compromise Would Collide with Tea Party Certitude*, BLOOMBERG (Aug. 28, 2012), http://www.bloomberg.com/news/2012-08-28/hero-reagan-s-compromise-would-collide-with-tea-party-certitude.html (pointing out that under the definition conservatives apply today when labeling someone a socialist, President Ronald Reagan would be a socialist).

49. *See* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 133.

in American history was actually to thwart this very threat.[50] This was the most evident during the 1920s under Treasury Secretary Andrew Mellon when most analysts would have expected the progressive income tax to be repealed. Furthermore, as the legislative history will illustrate, the story President Obama told about President Reagan was true (although he was not a socialist). He did, however, continue a progressive income tax after evaluating other alternatives and because of a combination of reasons, including not wanting to alienate the lower-income taxpayers.

It may be cynical, but this explanation does finally illuminate why a group of wealthy taxpayers deliberately imposed a higher tax burden upon themselves. Some lawmakers may simply have been fair and good people choosing to share a larger part of the burden. But for the more skeptical observer, perhaps these lawmakers felt what was at risk if they did not impose and maintain the progressive income tax was too great. Labor groups had become more powerful, landowners had combined forces with the Populist Party to oppose the tariffs and property tax structures, and those in power became vulnerable to the threat of socialism and communism.

As the legislative history will demonstrate, to silence and undermine the opponents to capitalism and democracy, the legislature gave the vocal populist movement the progressive income tax they had asked for. Although it increased the tax burden for the wealthy, it was certainly less problematic than what would have been lost by not acting and empowering the socialists, communists and anarchists with the existing regressive tax system. "Above all, many proponents of the income tax saw it as a safety valve; a way of placating the restive lower classes who might otherwise be alienated from American society."[51]

D. *Using the Progressive Tax to Redistribute Wealth and Income*

Henry Simons, a famous economist wrote, "The case for drastic progressive taxation must be rested on the case against inequality–on the ethical or aesthetic judgment that the prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely."[52] He was basically saying that you will never find an economic argument to justify a progressive income tax, it will always ultimately have to rest on whatever level of unfairness and inequality society in the United States is willing to tolerate.

As further evidence that the public supports the idea of mitigating some degree of income inequality, Professor Daniel Shaviro responded in testimony before the House Committee on Finance that if the sole purpose behind the federal income tax was to raise revenue and we did:

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50. *See* Marc Linder, *Eisenhower-Era Marxist –Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich*, 70 TUL. L. REV. 905, 912 (1996).

51. WEISMAN, *supra* note 37, at 138.

52. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM IN FISCAL POLICY 18 (1938).

> [N]ot care at all about the distribution of wealth—the obvious thing to do would be to have a uniform head tax in which every American, be it Bill Gates or a homeless person, pays exactly the same amount. No one agrees to that. So at this point, we are really talking in matters of degree, where really the question is—the phrase that is often used is the ability to pay, how well-off one individual is, how able to contribute to the cost of government, compared to another person.[53]

There will always be income inequality and different degrees of wealth, but a progressive income tax can be used to mitigate some degree of that inequality. Opponents of progressive income tax often contend that the intent behind progressive tax rates is to merely take income away from one taxpayer and give it to another to make everyone equal. For example, Senator Grassley addressed using the progressive income tax to redistribute income in his opening statement before the Senate Finance Committee Hearing last year. He said:

It is clear that some people believe that the tax code should be used to reduce the growing income disparity between lowest and highest income quintiles. This assumes a key objective of the Federal Government through the Federal income tax laws should be to ensure that income is distributed equally throughout the citizenry.[54]

Progressive tax rates cannot and should not attempt to equalize income after taxes. The goal of progressive income taxes is to ensure that the federal government is funded and that the burden of funding the government falls on taxpayers that have more disposable income.[55]

Part of the legislative history of this rationale as described below will demonstrate that some legislators had the viewpoint that the extremely wealthy, such as the Vanderbilts and Astors, had become wealthy on the backs of the common man; that no amount of intellect or work could justify the vast amounts of income and, therefore, it had been earned by exploiting other men. As a result, these legislators would seek to impose redistributive provisions to remedy the injustice. For example, in 1913 Congressman Copley introduced a progressive income tax because he believed that it was:

> [T]he best way of equalizing the opportunities which society in this country offers to certain men in securing more than their fair share of the benefits derived from the labors of other men. If there is one tax which

53. *Is The Distribution Of Tax Burdens And Tax Benefits Equitable?: Hearing Before the S. Comm. on Fin.*, 112th Cong. 21 (2011) (statement of Professor Daniel Shaviro).

54. *Is The Distribution Of Tax Burdens And Tax Benefits Equitable?: Hearing Before the S. Comm. on Finance*, 112th Cong. 18 (2011) (statement of Senator Grassley).

55. Professors Hall and Rabusjka, in their proposal for a flat tax stated "Despite attempts to equalize after-tax incomes through steeply graduated rates." ROBERT E. HALL & ALVIN RABUSJKA, THE FLAT TAX 43 (2d ed. 1995). However, there does not appear to be any legislative history or initiatives to try to equalize incomes in the United States, which is different than applying a different tax burden to those with a higher ability to pay and also different from using the tax code to reduce inequalities. Reducing income inequalities is different than "equalizing incomes."

> bears lightly on the shoulders of the individual paying it is that which is paid out of a surplus income.[56]

Legislators can also use the progressive income tax and the ability to redistribute income as a valuable political platform to certain constituents. However, as the legislative history will reveal, it has not been the reality. Almost all social programs have been funded by the middle class, such as Social Security and Medicare, or through the growing use of deficits. Instead, income disparity is growing. Growth in income has been concentrated at the top and at the same time tax rates have become less and less progressive.[57] IRS data shows, the richest 400 taxpayers had their incomes increase from 1992 to 2007 over 400% (from $65 million to $345 million) while, at the same time, their effective tax rates dropped from 25% to 16.6%, while most middle income families saw almost no increase in their income levels.[58] Long-term capital gains accounted for 62.7% of the income for these top 400 taxpayers.[59] So, as much as legislators and politicians, such as Senator Grassley, bemoan the redistribution of wealth or income through the progressive income tax, it is all talk. There is no redistribution; it is merely political pandering to different interest groups.

The biggest argument, however, addressing whether there is any truth behind the rationale that a progressive income tax can lead to greater income and wealth equality, or inequality, is the recent evidence presented as a result of the Bush tax cuts in 2001 and 2003. President Bush dramatically reduced the progressivity of the tax code. Several economists and commentators warned that the impact on income tax progressivity would result in a growth in income inequality. The benefits from the reduction in the capital gains rates are exceedingly concentrated with the highest income taxpayers. Over 90 percent of long-term capital gains were recognized by only 20 percent of the highest-income taxpayers.[60] As the conclusions begin to emerge, it appears that the theory is in fact valid: progressive income taxes, or in this case, the lack or elimination of progressive income taxes, can greatly affect the amount of income or wealth disparity.[61]

E. We Do Not Really Have a Progressive Tax, Just the Appearance of One to Appease the Public

Some have argued that the highest marginal rates are merely symbolic to make the general public believe "erroneously, that the tax system was steeply progressive,

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56. 50 CONG. REC. H. 1246 (1913) (statement of Representative Copley).

57. *See* Bordoff & Furman, *supra* note 25, at 328.

58. *Is The Distribution Of Tax Burdens And Tax Benefits Equitable?: Hearing Before the S. Comm. on Fin.*, 112th Cong. 138 (2011) (Appendix, Question from Senator Menendez).

59. *Is The Distribution Of Tax Burdens And Tax Benefits Equitable?: Hearing Before the S. Comm. on Fin.*, 112th Cong. 138 (2011) (Appendix, Reynolds response to Question from Senator Menendez).

60. *See Hearing on Tax Reform and Tax Treatment of Capital Gains, Joint Hearing between the Sen. Finance Committee and House Ways and Means Committee* (2012) (statement of Professor Leonard Burman 5) available at http://www.finance.senate.gov/imo/media/doc/09201220Burman20Testimony.pdf

61. *See infra* pp. 46-48.

and that the truly rich were paying most of their income to the government."[62] When the highest rate of 91% was applicable, it was so limited it did not serve much purpose other than to appease the public.[63] It made the average citizen feel better about his own tax burden when he thought at least others were paying more.

In addition, as current legislative history will demonstrate, we currently do not have a very progressive income tax. And when employment taxes are added into the equation we have a combination of a regressive and a degressive tax. Since the Bush tax cuts and the reduction of the capital gains rates, the burden of the income tax is no longer progressively on the shoulders of the wealthy. For example as Chairman of the Senate Finance Committee Senator Baucus said at a joint hearing with the House Ways and Means Committee (one of the first such joint meetings in over 70 years) "low capital gains rates are the main reason many wealthy individuals pay lower tax rates than middle class families."[64] In the same hearing, Ranking Member of the House Ways and Means Committee, Congressman Levin noted that 71 percent of the benefits of the reduced capital gains rates goes to individuals making over $1 million a year and noted that it affects the progressivity of our tax system.[65]

Finally, the legislative history will repeatedly demonstrate that legislators often prefer a steeply progressive income tax, not because they actually want higher-income taxpayers to bear a higher burden of the tax, but because it serves several political purposes. It allows them to appear sympathetic and responsive to their low-income constituents. At the same time, by having high-income tax rates they have the ability to create special loopholes, deductions, and tax expenditures for special interest groups and supporters. Because these tax benefits are masked by the higher tax rates, they are often invisible and therefore go unnoticed, allowing legislators free reign to grant political favors. The result is that the tax code becomes complicated and is so riddled with cuts and exclusions that the high marginal tax rates bear little resemblance to the effective tax rate, the tax rate the taxpayer actually pays.

F. The Benefit Theory

The final rationale to the enactment of the progressive income tax is the benefit theory.[66] The benefit theory dictates that taxes should be paid in proportion to the

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62. Edward J. McCaffery, *The UCLA Tax Policy Conference: Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1892 (1994).

63. *See id.* (Professor McCaffery cites studies that hold that citizens equate the highest rate with the most just or appropriate rate).

64. *See Hearing on Tax Reform and Tax Treatment of Capital Gains, Joint Hearing between the Sen. Finance Committee and House Ways and Means Committee* (2012) (testimony of Senator Baucus- minute marker 32.26 http://www.finance.senate.gov/hearings/hearing/?id=a8c63df9-5056-a032-5299-2e87363627af

65. *See Hearing on Tax Reform and Tax Treatment of Capital Gains, Joint Hearing between the Sen. Finance Committee and House Ways and Means Committee* (2012) (testimony of Senator Baucus- minute marker 37.38 http://www.finance.senate.gov/hearings/hearing/?id=a8c63df9-5056-a032-5299-2e87363627af

66. *See* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 150.

benefits received from the government.[67] Although an argument can be made under the benefit theory for the progressive income tax, and it was at one time used as a justification for the progressive income tax, today, the benefit theory is used more often to oppose the progressive income tax.

To give an example of using the benefit theory to support the progressive income tax, in 1913 to support the introduction of a progressive income tax, one Congressman argued that John D. Rockefeller should bear a higher tax burden under the benefit theory because:

> He could not possibly have created this wealth by the labor of his own hand or brain alone. It required, in addition the conditions of society[,] which allowed him private ownership of oil lands and oil wells, which allowed him practically whatever margin he could get on refining his product and also whatever margin for distribution he might take.[68]

A benefit argument today in support of the progressive income tax might argue that high-income taxpayers benefit from the tax treaties the United States government enters into, the military, the police force to protect their property, a sound financial system with which to hold their money, the SEC to help regulate their investments, roads that their business trucks have to drive on, public works departments that maintain their neighborhoods, even the Army Corps of Engineers repairing beach erosion to protect their summer homes. Governments are there for protection and order, and the wealthy have more to protect.[69]

Alternatively, the benefit theory can also be used to argue that the income tax should be regressive, not progressive, by arguing that lower-income taxpayers use more of the public goods provided by the government. The wealthy can use private schools and security teams. Low-income taxpayers use the public school system more often, need student loans, the public transit infrastructure, Medicaid, welfare, unemployment, social services, and so on. Many have argued that there is no way to accurately calculate the cost/benefit analysis under the benefit theory. Moreover, adding to the complexity, two taxpayers earning similar amounts may "benefit" from the tax system differently–for example, one may have several children and one may not. Taxing them differently as a result of the different benefits they receive would not only be an administrative nightmare but could violate horizontal equity. While the amount of benefits received and their value is impossible to determine, it is also unrealistic to rely on.

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67. *See id.* Both Hobbes and Adam Smith were proponents of the Benefit Theory. *See id.* at 158, 164. However, Adam Smith stated that taxpayers should contribute to the government to support its activities in proportion to each taxpayers ability to pay, and that this ability to pay was a reflection of the protection provided by that very government. *See* ADAM SMITH, WEALTH OF NATIONS 414 (Methuen & Co. Ltd.1904) (1776).

68. 50 CONG. REC. H. 1246 (1913) (statement of Congressman Copley).

69. *See* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 243.

IV. HISTORICAL ANALYSIS

A. *Ancient History*

In the Middle Ages, taxes were direct taxes, usually on trade or transportation.[70] There was, at times, the pretense of progressive direct taxes (not income taxes); however, it appears that the taxes were actually regressive and placed a higher burden on the poor rather than the wealthy.[71] The earliest record of a progressive tax is in Athens 596 B.C. and it was on the produce from land–presumably the greater the amount of produce, the higher the tax rate.[72] In the 18th and 19th centuries, England had property, customs, and excise taxes.[73] England imposed an income tax, although not progressive, in 1799 as a temporary emergency measure then enacted the income tax of 1842, which continued for at least a century.[74] In comparison, the first income tax in the United States was enacted during the Civil War in 1862 and, therefore, was not that far removed from the enactment in England. Progressive income taxes were added in England in 1910 to increase revenue and to make the wealthier classes feel more invested in the social reform targeting lower-income people.[75]

The lack of progressive taxation was one of the leading grievances motivating the French Revolution, between 1789-1799, because of the perceived economic inequality among the classes.[76] Although there were several efforts to create a progressive tax system, ultimately, the French revolution did not result in a progressive tax system.[77] France finally adopted a progressive system in the early 20th century.[78] In 1887, Germany instituted progressive indirect taxes, which were designed to protect smaller producers from larger competitors.[79]

By 1908, almost all countries had adopted a progressive "principle" to their system of taxation, although few had adopted a progressive income tax, and for the few that had, progressivity was a small feature of a larger overall taxing system.[80] An international movement had begun to transition to income taxes from the prior systems of tariffs, excise, or property taxes.[81] Throughout the world, "[a]mid the clashing of divergent interests and the endeavor of each social class to roll off the

70. *See* SELIGMAN, *supra* note 5, at 41.

71. *See* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 14-15.

72. *See id.* at 11.

73. *See* SELIGMAN, *supra* note 5, at 57.

74. *See* VICKREY, *supra* note 10, at 329.

75. *See* The Finance Act, 1909-10, 10 Edw. 7, c.8, §§65-72 (Eng.); SELIGMAN, *supra* note 5, at 207.

76. *See* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 30.

77. *See id.* at 36-37.

78. *See* SELIGMAN, *supra* note 5, at 326.

79. *See id.* at 57.

80. *See* SELIGMAN, PROGRESSIVE TAXATION *supra* note 24, at 1 (citing as examples monarchies such as continental Europe and Japan, and also democracies such as America, Australia, Germany, Austria, Sweden, Denmark, Holland, Belgium, France, Canada and Switzerland).

81. *See* SELIGMAN, *supra* note 5, at 4.

burden of taxation on some other class . . . the history of finance, in other words, shows the evolution of the principle of faculty or ability to pay."[82]

B. *The Beginning of Taxation in the United States*

Before the adoption of a progressive income tax, taxes in the United States were typically excise, custom, or property taxes. The excise taxes, also known as consumption taxes, were regressive in nature and were preferred by Republicans.[83] The excise taxes imposed higher tax rates on lower-income taxpayers than on higher-income taxpayers.[84] Excise taxes were imposed on essentially every consumer good.[85] Before the federal tax was declared unconstitutional, variations of progressive taxes had been instituted in six different ways.[86] They included a house tax, an income tax (during the civil war), a business tax, a corporate tax, an inheritance tax, and a land tax.[87] The federal government was experimenting with the idea of progressivity, but had not yet committed to it with any substantial or meaningful tax.

C. *The Civil War and the Beginning of the Income Tax*

The first federal income tax was enacted temporarily to fund the Civil War.[88] The traditional federal tax structure of excise and custom taxes placed a greater burden on lower-income taxpayers and was not sufficient to fund the war effort.[89] In addition, because these taxes were regressive, Republican leaders became concerned that the higher tax burden on lower-income taxpayers was undermining confidence in the Republican Party and the war effort.[90] The Republican Party set out to engage lower-income taxpayers and to mend any alienation. They began to evaluate tax systems that reflected a closer relationship to a taxpayer's ability to pay.[91]

Originally the Secretary of the Treasury suggested a property tax, but the Western States objected. They argued that a property tax would unfairly fall disproportionately on the Western States because they had a larger land base and the proposed tax would exclude the income and wealth held in personal property such as real estate improvements, stocks, bonds and cash, allowing wealthy taxpayers who held their income outside of real estate to escape taxation.[92] Congressman Colfax from Indiana, for example, stated, "I cannot go home and tell

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82. *Id.*

83. *See* BROWNLEE, *supra* note 22, at 32; Sharon C. Nantell, *Symposium: Federal Tax Policy in the New Millennium: A Cultural Perspective*, 2 CHAP. L. REV. 33, 41 (1999).

84. *See* BROWNLEE, *supra* note 22, at 32.

85. *See id.*

86. *See* SELIGMAN, PROGRESSIVE TAXATION, *supra* note 24, at 101.

87. *See id.*

88. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 494 (Touchstone) (3d ed. 2005).

89. *See* BROWNLEE, *supra* note 22, at 32.

90. *See id.*

91. *See id.*

92. *See id.* at 33.

my constituents that I voted for a bill that would allow a man, a millionaire, who has put his entire property into stock, to be exempt from taxation, while a farmer who lives by his side must pay a tax."[93]

By the time of the Civil War, not only was there a desperate need for revenue but the composition of the wealth in the United States had also changed. Wealth was evolving from the traditional farmers and plantation owners, whose wealth was held in real property, to industrialists, bankers, businessmen, and merchants; people who held their wealth in stocks and bonds and lived in cities.[94] With these three new considerations: the burden on the lower-income taxpayer, the desperate need for revenue, and the changing composition of wealth, the House Ways and Means Committee considered several ways to raise the revenue.[95] A number of Congressmen wanted to continue to raise revenues by increasing tariffs. Initially, the Committee considered increasing the tariffs; it became clear, however, that it was going to be too high of a burden on the poor.[96] Then the Ways and Means Committee considered a tax on real estate.[97] The property tax, however, could not raise sufficient revenues because many of the large land area states were in the Confederacy, and the tax did not reach the wealth of the highest income taxpayers in the United States, those who held their wealth and income in salaries, stocks, and bonds.[98] Legislators discussed whether the United States should have a progressive income tax, including whether it was moral and fair to put the higher tax burden on the wealthy.

In the debate over the progressive income tax, Congressmen argued that a progressive tax that increased rates as a taxpayer's income increased was fundamentally unfair because it penalized taxpayers simply for making more income. Instead, some argued the tax burden should be shared equally:

> This provision flows upon the principle of taxing a man more because he is richer than another. The very theory of our institutions is entire equality that we make a distinction between the rich man and the poor man. . .and I regard it as an evidence of the spirit of agrarianism to present a law here, which shall make any such distinction. It is seizing the property of men for the crime of having too much.[99]

Chairman of the Ways and Means Committee Thaddeus Stevens thought it was unfair and "a punishment of the rich man because he is rich."[100] He argued in a congressional debate, "[i]t seems to me that it is a strange way to punish men because they are rich. . . . I think the principle of taxing a man who is worth twenty

93. CONG. GLOBE, 37TH CONG., 1ST SESS. 306 (1861) (statement of Rep. Colfax).
94. *See* WEISMAN, *supra* note 37, at 13.
95. *See id.* at 31.
96. *See id.*
97. *See id.*
98. *See id.* at 32.
99. CONG. GLOBE, 38TH CONG., 1ST SESS., 1876 (1864) (statement of Rep. Justin Morrill).
100. *See* WEISMAN, *supra* note 37, at 85.

thousand dollars more in proportion to his wealth is an unjust one."[101] Representative Morrill, who was also a member of the Ways and Means Committee and was Chair of the tax writing subcommittee agreed, stating that progressive income tax rates were "a confiscation of property, because one man happens to have a little more money than another."[102] Certain House members were concerned it would "lead American citizens to expatriate themselves."[103]

However, despite the objections of those Congressmen, the agenda for creating a progressive income tax during the Civil War was to "create a fair system of taxation." Member of the House Ways and Means Committee, Thomas Edwards, a banker himself, stated, "[w]hy should we stickle about terms? Why should we not impose the burdens which are to fall upon the people of this country equally, in proportion to their ability to bear them?"[104] Congress felt so strongly about including an income tax that would reach the highest income taxpayers, that when they originally received a proposal from the Ways and Means Committee for a property tax, they sent it back for revision and requested that it include "internal duties or direct taxation upon personal income or wealth."[105] In sending the original proposal back for revision, Representative Frank declared, "I think it is just, right and proper that those having a larger amount of income shall pay a larger amount of tax."[106]

The Ways and Means Committee complied and provided a proposal for a progressive income tax. In 1862 Congress enacted the first progressive income tax. As the Commissioner of the Internal Revenue Service reported in 1864, "[t]he people of this country have accepted it with cheerfulness, to meet a temporary exigency, and it has excited no serious complaint."[107] The tax rate was three percent on incomes between $600 and $10,000 and was five percent on incomes above $10,000.[108] In 1864, because of the need to raise additional revenue, rates were raised and were made more progressive.[109] There was a 5% rate on incomes above $600 and below $5,000, a 7.5% rate on incomes from $5,000 to $10,000 and a ten percent rate on incomes above $10,000.[110] While the rates are low compared to the tax rates enacted in later years, the taxes that were paid as a result of the new progressive income tax were sometimes twice the amount that higher-income taxpayers had been accustomed to paying under the previous tax structure.[111]

Secretary of the Treasury Fessenden defended the progressive structure of the tax in his report stating that increasing tax rates as income levels rise "although unequal in one sense, can be considered oppressive or unjust, in as much as the

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101. CONG. GLOBE, 38TH CONG., 1ST SESS., 1876 (1864) (statement of Chairman Thaddeus Stevens).
102. WEISMAN, *supra* note 37, at 85.
103. SELIGMAN, *supra* note 5, at 441.
104. WEISMAN, *supra* note 37, at 33.
105. *Id.* at 32.
106. *Id.* at 84.
107. SELIGMAN, *supra* note 5, at 439.
108. *See* The Act of 1861, H.R., Pub. No. 40, §§89-93, 12 Stat. 432, 37th Cong., 1st Sess. 473 (1861).
109. *See* SELIGMAN, *supra* note 5, at 440.
110. *See* The Act of 1864, H.R. 405, 38th Cong. §§ 116-123 (1864).
111. *See* BROWNLEE, *supra* note 22, at 34.

ability to pay increases in as much more that arithmetical proportion as the amount of income exceeds the limit of reasonable necessity."[112] He was asserting that the progressive income tax was fair because it correlated to a taxpayer's ability to pay and a taxpayer's surplus income. Secretary Fessenden added that he agreed with the progressive income tax because "those having very large incomes can afford, and perhaps better afford than those who have smaller ones, to pay a tax, and a larger tax, the discriminating tax if you please."[113]

Congress and the political leaders ventured into the world of progressive income taxes during the Civil War, but tepidly.[114] It would not be until the later World Wars that progressive income taxes were implemented on a larger, more permanent scale.[115] While the progressive income tax was relatively well received during the Civil War, administrative tools were not yet established (such as withholding at the employer level) and therefore President Abraham Lincoln's administration was not able to rely on the progressive income tax as the primary source of revenue to fund the war effort.[116] It ultimately funded about twenty percent of the war's cost.[117]

In the Confederacy, the income tax was used at the state level on primarily the commercial and professional classes.[118] The main taxes to generate revenues for the Confederacy were consumption taxes, which were supplemented by a progressive salaries tax that was later replaced by a proportional tax.[119]

After the Civil War ended in 1865, the progressive income tax was set to expire in 1870.[120] Representative Morrill, who was now Chairman of the House Ways and Means Committee, made a report on behalf of the Committee and acknowledged that the tax had been successful in raising revenue and was also well received by the public because of its support of the war.[121] He also cautioned that before an income tax could be permanently implemented, many changes would have to be made.[122] The income tax had a publicity requirement; Chairman Morrill noted that taxpayers did not like to disclose their incomes and predicted that taxpayers would understate their income.[123] Moreover, he continued, because the understatements would be under oath, it could lead to the corruption of morals. Being deceptive

112. CONG. GLOBE, 64TH CONG., 2D. SESS. HR 20573 (1917). (statement of Sec. of Treasury William Fessenden).

113. CONG. GLOBE, 38TH CONG., 1ST SESS. 2513 (1864). (statement of Sec. of Treasury William Fessenden).

114. *See* BROWNLEE, *supra* note 22, at 1.

115. *See id.*

116. *See id.* at 36.

117. *See id.*

118. *See* SELIGMAN, *supra* note 5, at 406; *see also* WEISMAN, *supra* note 37, at 66.

119. *See* Deborah A. Geier, *Fundamental Tax Reform: Incremental Versus Fundamental Tax Reform and the Top One Percent*, 56 SMU L. REV. 99, 100 (2003).

120. *See* SELIGMAN, *supra* note 5, at 449.

121. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2437 (1866) (statement of Rep. Morrill).

122. *See id.*).

123. *See id.*

would become so commonplace that people would feel imprudent if they chose not to be deceptive.[124]

Several senators objected to the elimination of the progressive nature of the tax noting, "[n]o one of this class has ever sent a request to this Congress to be relieved from taxation .... On the other hand, we do have petitions from struggling manufacturers coming to us from all quarters of the land, asking for relief."[125] Other senators asked for even more progressive rates, to which Chairman Morrill strongly objected.[126] At one point, Chairman Morrill even referred to progressivity as "highway robbery" when debating the ability to pay as a justification for a more progressive system.[127]

Following the Congressional debates, a continuation of some progressivity in the income tax was maintained.[128] There was a five percent rate on income in excess of $600 and a ten percent rate on income over $5,000.[129] The firm expiration date of 1870 remained.[130] In 1867, however, a mere one year after the supporters of the progressive income tax had won an extension following the Civil War, Congress decided to abandon the progressivity of the tax and instead imposed a flat five percent on all incomes over $1,000.[131] It still had an aspect of progressivity to it and was consistent with the ability to pay theory because it applied only to incomes above $1,000, the amount Congress concluded would "exempt so much of one's income as was demanded by his actual necessities."[132] This flat rate income tax continued until the income tax's expiration in 1870.

D. After Civil War until the Passage of the 16th Amendment – The Fear of Socialism

After the Civil War, the previous system of high excise taxes was eliminated along with the income tax. Wealthy taxpayers complained that the high cost of living made the excise taxes too much of a burden.[133] The Republicans did, however, keep the high tariffs and other consumption taxes, even though they were regressive and placed a higher tax burden on lower-income taxpayers.[134] In the late 1800s and early 1900s legislators began to debate whether taxes that were regressive in nature, such as the consumption tax, were fair and economically feasible. This began a discourse about replacing regressive taxes with an income tax to more fairly allocate the tax burden.[135] Most of the discussion focused on ensuring

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124. *See id.*

125. CONG. GLOBE, 39TH CONG., 1ST SESS. 2783 (1866) (statement of Sen. Frederick Pike).

126. *See* SELIGMAN, *supra* note 5, at 451.

127. *See id.*

128. *See id.* at 453-54.

129. *See id.*

130. *See id.*

131. *See* ACT OF MARCH 2, 1867, H.R. 1161, § 13, 14 Stat. 471, 39TH CONG. 2D SESS. 477-78 (1867).

132. SELIGMAN, *supra* note 5, at 453.

133. *See* BROWNLEE, *supra* note 22, at 33-34.

134. *See* Nantell, *supra* note 80, at 41; *see* BROWNLEE, *supra* note 22, at 34.

135. *See* Geier, *supra* note 117, at 100; *see generally* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057 (2001).

that there was an appropriate tax burden on the various income levels. Despite the discussions, from 1872 until 1911, tariffs continued to be the main source of federal revenues.[136] The income tax, however, had not been forgotten and was reintroduced at least sixty-six times in Congress.[137]

Although an actual progressive income tax had not been enacted, the discourse signified that lawmakers recognized the unequal burden imposed by consumption taxes. Even when a tax is equally applied to economic classes on a dollar-for-dollar basis, because of the declining marginal utility of income, the value of that dollar had a higher value in the hands of a lower-income taxpayer than a higher-income taxpayer. For example, Senator John Sherman, in advocating to move from consumption taxes to an income tax, said, "[t]he consumption of the rich does not bear the same relation to the consumption of the poor as the income of the one does to the wages of the other."[138] Legislators were clearly beginning to evaluate whether a tax was equitable based on the impact it had on economic classes rather than just on a numerical flat amount.

The desire to move to an income tax where the burden would be on higher-income taxpayers from a consumption tax, which placed the tax burden on low-income taxpayers, was intensifying. Senator Henry M. Teller advocated for an income tax noting that "[t]he man who holds millions of dollars worth of property pays no more, perhaps under the general taxes levied upon consumption than the man who has not any property."[139] "Expenditure becomes an unsatisfactory test of ability to pay, not only because it puts a premium on the penurious rich man, but because it imposes a crushing burden on the average poor man."[140]

A substantial part of the growing awareness of inequity of the tax burdens and the discussion of alternative proposals was fueled by the expanding influence of the socialist movement. Much of the debate was the result of demands for a progressive income tax from the Socialist Party and farmers groups.[141] The farmers groups later consolidated into the Populist Party.[142] The Socialist Party, the farmers groups, and the Populist Party had been advocating for a progressive income tax; however, their appeals for tax revision had largely been ignored.[143] For several years, a progressive income tax was "one of the chief planks in the platform" for all of these groups, creating a unifying cause.[144] Their calls for a progressive income tax also went unnoticed by the public through the 1880s because of a period of prosperity.[145] Politicians and lawmakers were not entirely blind to the dangers that the growing

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136. *See* Nantell, *supra* note 80, at 40-41; *see* BROWNLEE, *supra* note 22, at 37 (excluding a few years of severe depression and during the Spanish-American War when federal revenues from taxes on alcohol and tobacco exceeded the revenue raised from the tariffs); *see id.* at 37-38.

137. *See* WEISMAN, *supra* note 37, at 132.

138. Jensen, *supra* note 133, at 1094 (quoting JOHN SHERMAN, SELECTED SPEECHES ON FINANCE AND TAXATION, FROM 1859-1878, at 336, 348-49 (1879).

139. 26 CONG. REC. 6692 (1894) (statement of Sen. Teller).

140. SELIGMAN, *supra* note 5, at 12.

141. *See id.* at 493.

142. *See id.*

143. *See id.*

144. *Id.*

145. *See id.*

socialist movement and communism posed to the democracy of the United States. President Cleveland declared in a message to Congress at the end of his first term that "[c]ommunism is a hateful thing and a menace to peace and organized government. But the communism of combined wealth and capital . . . undermines the justice and integrity of free institutions, is not less dangerous than the communism of oppressed poverty and toil."[146]

At the start of the 1890s, economic conditions became more challenging, and the federal government needed more revenue.[147] During this time, the main form of federal taxation was a property tax, which left the small farmers feeling the heaviest burden of the federal taxes while the wealthier investors and businessmen in cities escaped taxation almost completely.[148] The Populist Party demanded a graduated income tax as part of its 1892 platform, while the Democrats advocated for an income tax.[149] Democrats took control of both the House and the Senate in 1893,[150] and an income tax was ultimately passed in 1894.

Income disparity was very pronounced in 1894.[151] Census data reflected that 90% of the families in the United States only owned 30% of the wealth, and the remaining top 10% of the families owned over 70% of the wealth.[152]

Senator David Bennet Hill, who had presidential aspirations, warned that the progressive income tax was an idea imported to the United States by "little squads of anarchists, communists and socialists."[153] Yet many proponents of the progressive income tax championed adopting the tax as a conservative strategy to proactively avoid rising class anger and resentment. Representative Uriel Hall, a Missouri Democrat, argued that if he had named the bill, he would have called it:

> [A] measure to kill anarchy and keep down socialists . . . I tell you when you oppose a measure of this kind, when you come to the great masses of the people and say that the wealthy of this Government shall bear none of its burdens, then you make a foundation for the argument of anarchy, socialism, and demagoguery, that eventually will sweep back and curse this country, as it did in France in the days of the French revolution.[154]

The Congressman argued that passing the bill was symbolic to the ordinary taxpayer and that if Congress failed to pass it, it would send a clear signal to the ordinary person that the wealthy had control. This, he argued, could run the risk of revolution and revolt.

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146. WEISMAN, *supra* note 37, at 112.

147. *See* SELIGMAN, *supra* note 5, at 494.

148. *See id.* at 495.

149. *Populist Party Platform,* 1892 *available at* http://historymatters.gmu.edu/d/5361; *See* WILLIAM JENNINGS BRYAN & MARY BAIRD BRYAN, SPEECHES OF WILLIAM JENNINGS BRYAN 159-179 (Funk & Wagnalls Co.) (1909).

150. *See* BROWNLEE, *supra* note 22, at 46.

151. *See* RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 39 (Little Brown) (1954).

152. *See id.*

153. WEISMAN, *supra* note 37, at 144.

154. *Id.* at 138.

Enacting the progressive income tax to prevent an insurgence from the socialists or the communists seemed to be a motivating factor. "[T]he populists frightened the industrial barons of the East into thinking that a revolutionary rabble was gathering at the gates."[155] Congressman McMillan, who was chairman of the Ways and Means subcommittee during this time, stated in January of 1894, "[e]very citizen is placed on an equality by this proposition [a tax on wealth]. The law says: As you have been prospered so pay. As you have received the blessings of the government, contribute to its support."[156]

Others, however, were not convinced. Congressman Walker countered, "the income tax takes from the wealth of the thrifty and enterprising, and gives to the shiftless and the sluggard."[157] Some congressmen were concerned that the income tax could be shifted to the poor, persuaded by Chairman Morrill's argument at the end of the Civil War that people would understate their income and because the understatements would be under oath, it would lead to the corruption of morals and ultimately the deception by all taxpayers.[158]

As the income tax of 1894 was being considered in Congress, several proposals to amend the income tax to include graduated rates, making the tax progressive, had been made and were subsequently dismissed.[159] The substance of the debate centered on enacting an income tax alone. One senator objected not just to the income tax, but also to including an exemption amount. Senator Sherman stated, "[i]n a republic like ours, where all men are created equal, this attempt to array the rich against the poor or the poor against the rich is socialism, communism and devilism."[160]

Eventually, the proponents of the income tax and those who supported one out of a reactionary fear of socialism and communism were successful, and in 1894, an income tax was enacted with a flat two percent rate on incomes over $4,000 and on corporations.[161] Democrats from the Northeast, where much of the wealth was held in stocks, bonds, securities, and salaries, Republicans, and others including Chairman Morrill, opposed a return to a full progressive income tax.[162] The exemption amount of $4,000 did add an aspect of progressivity to the income tax, even though it was otherwise a flat tax, because the high exemption amount served to shift more of the tax burden to higher-income taxpayers by excluding most low-income taxpayers.[163] Corporations had been included in the income tax under the

155. *Id.* at 114.

156. SELIGMAN, *supra* note 5, at 499.

157. *Id.* at 500 (quoting Walker of Massachusetts, in a separately published speech under the title *The Income Tax*. Remarks of Hon. J. H. Walker. (1894)).

158. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2437 (1866) (statement of Rep. Morrill).

159. *See* SELIGMAN, *supra* note 5, at 503-504; *see also, e.g.* move by Senator Peffer to have an exemption of $1,000 and to have rates begin at 1% and rise progressively to 5%. *See id.* at 505.

160. *Id.* at 504 (citing CONG. REC., op. cit. p. 6695).

161. *See* THE WILSON- GORMAN TARIFF ACT OF 1894; *see also* ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX 18961-1913 132 (Oxford Press) (1993); BROWNLEE, *supra* note 22, at 47.

162. *See* BROWNLEE, *supra* note 22, at 46.

163. *See id.* at 47.

benefit and ability to pay theories of taxation.[164] The new law had been copied almost word for word from the income tax implemented during the Civil War, minus the progressivity.[165] Income was defined very broadly and included gifts and inheritances.[166]

After all of the legislative debate and negotiations, however, the income tax proved fruitless because it was deemed unconstitutional a year later in *Pollock v. Farmers' Loan & Trust Company* by the United States Supreme Court.[167] As a result of the Supreme Court decision, an income tax could not be enacted until a constitutional amendment was passed permitting one. After the Supreme Court's decision, support began to intensify for an income tax.[168] Democrats introduced several constitutional amendments for an income tax in 1896.[169] The Populist Party introduced a bill proposing a progressive income tax at least three times to Congress.[170] The bill was not adopted and neither were a number of constitutional amendments for an income tax proposed by various democrats that year.[171] At the same time, however, more momentum was growing for a progressive inheritance tax over a progressive income tax.[172] In the meantime, to raise revenue, a bipartisan group in Congress enacted a corporate tax in 1909, limiting the progressivity of the tax act "to generate enough support."[173]

Although the income tax had been declared unconstitutional, the threat from socialism and communism remained. In 1906, President Theodore Roosevelt, encouraging Congress to draft a constitutional amendment permitting an income tax, advocated for a progressive income tax as way to "stave off more radical calls for industrial democracy."[174] He stated that a "graduated income tax of the property type would be a desirable feature of federal taxation, and it is hoped that one may be devised which the Supreme Court will declare constitutional."[175] The conservative support for the progressive income tax may not have been to raise revenue, but instead because high-income taxpayers believed that enacting graduated tax schedules would diminish or eliminate the calls to restructure the capitalistic system.[176] As another income tax bill was proposed in 1906, Senator

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164. *See id.*

165. *See* SELIGMAN, *supra* note 5, at 508.

166. *See id.* at 508-09; *see* THE WILSON- GORMAN TARIFF ACT OF 1894, *supra* note 158; *see also* STANLEY, *supra* note 158, at 132.

167. *See Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895). It was held unconstitutional to tax underlying real property interest. Interest dividends and rents violated the prohibition on unapportioned direct taxes in the constitution.

168. *See* BROWNLEE, *supra* note 22, at 47-48.

169. *See id.* at 48.

170. *See* PERCY DANIELS, CUTTING THE GORDIAN KNOT, (Pittsburgh Kansan Print) (1896) *available at* http://www.ebooksread.com/authors-eng/percy-daniels/cutting-the-gordian-knot-ina/1-cutting-the-gordian-knot-ina.shtml; *see also* SELIGMAN, PROGRESSIVE TAXATION *supra* note 24, at 138.

171. TAX HISTORY PROJECT: RECONSTRUCTION TO THE SPANISH-AMERICAN WAR, http://www.taxhistory.org/www/website.nsf/Web/THM1866?OpenDocument.

172. *See* BROWNLEE, *supra* note 22, at 48-49.

173. *Id.* at 53.

174. 41 CONG. REC. 27 (1907) (remarks of President Theodore Roosevelt).

175. SELIGMAN, THE INCOME TAX, *supra* note 5, at 591.

176. *See* AVI-YONAH, *supra* note 2, at 1410.

Joseph Bailey of Texas argued, "[i]f I were counsel for the rich, the first advice that I would tender them would be to advocate a law like this."[177] He argued that an income tax "would do more to silence the envious voice of anarchy than all of the benefactions and the charities which they can do."[178] In 1910, Senator Borah argued that the wealthy needed a more equitable tax to protect themselves and their businesses against the dangers of class resentment.[179] He argued "[e]very time wealth invades equal opportunity, it is undermining its own stability."[180]

The Sixteenth Amendment permitting an income tax was ratified in 1913. According to one tax historian, Senator Aldrich, the chair of the Senate Finance Committee, worked with President Taft to draft the Sixteenth Amendment, but he and the Northeastern Republicans only submitted it for ratification to the states because they recognized the growing support among the people for an income tax.[181] It was intended as a gesture to merely appease the public. They had, however, hoped, along with the conservatives, that the measure would fail.[182] They were surprised when the Sixteenth Amendment was ultimately ratified permitting a progressive income tax.[183]

E. *After the Sixteenth Amendment Was Enacted*

The first income tax after the passage of the Sixteenth Amendment had very little progressivity to it. There was a 1% tax on incomes above $3,000 and a surtax up to 6% once incomes reached over $20,000.[184] In addition, dividends up to $20,000 were excluded from the tax.[185] The tariffs and taxes on alcohol and tobacco still served as the main sources of revenue for the federal government.[186] There was, however, significant vocalization expressing a desire for progressivity in the income tax in the Congressional Record. Congressman Gillett stated, "I appreciate that there should be a difference between the rich and the poor in the per cent of the tax and that the weight upon the poor should be made very light."[187] Congressman Rayburn stated that allocating tax burdens:

> [S]o that the greatest burden will fall on those most able to pay is the true doctrine advocated and adhered to by the Democratic Party since its

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177. WEISMAN, *supra* note 37, at 223.

178. *Id.*

179. *See id.* at 252.

180. *Id.*

181. *See* BROWNLEE, *supra* note 22, at 53.

182. *See id.*; *see also* 44 CONG. REC. 3974 (1909) (reflecting that even liberal Congressmen, such as Representative Cummins, did not expect it to be ratified).

183. *See* BROWNLEE, *supra* note 22, at 53; *see also* 44 CONG. REC. 3974 (1909) (reflecting that even liberal Congressmen, such as Representative Cummins, did not expect it to be ratified).

184. *See* Revenue Act of 1913, ch. 16, § 2, 38 Stat. 114, 166, 168 (1913). $3,000 in 1913 would be equivalent to $69,767 in 2012 and $20,000 in 1913 is equal to $465,113 in 2012.

185. *See id.* ; *see also* JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 78 (1985).

186. *See* BROWNLEE, *supra* note 22, at 57.

187. 50 CONG. REC. 1247 (1913) (statement of Rep. Frederick Gillett).

> coming into existence. . . . The system of protective tariff built up under the Republican misrule has worked to make the rich richer and poor poorer. . . . It takes from the pockets of those least able to pay and puts it into the pockets of those most able to pay.[188]

In 1913, the legislative history indicates that "the tax upon incomes [was] levied according to ability to pay."[189] Congressman Fowler said:

> The income tax stands out like a great emancipator, with a proclamation to the world declaring that the time has come when the unequal burdens of taxation shall no longer rest upon the shoulders of the laboring classes of this country, but that, instead thereof, these burdens shall be placed where they properly belong-upon the backs of the rich.[190]

Congressman Hull had worked for twenty years to get the Constitutional Amendment passed to permit an income tax and then was charged with drafting the income tax. He made a presentation in New York City, which he regarded as the center of the opposition to the income tax.[191] He told the audience that, while he was sympathetic to the new burdens they felt under the progressive income tax, New York was "the great center of commerce of the nation," and as such it "had to understand that its power and wealth resulted from the industry of all Americans and that it was wrong for the wealthy to 'segregate' themselves from their 'fair share of taxes.'"[192]

F. World War I

There may have been momentum to a transition to a more progressive income tax because of social injustice and inequality, but there was also opposition to the tax.[193] As a result, the largest steps taken toward a progressive income tax came during times of crisis, particularly war.[194] During both World Wars progressive income taxes were a significant source of revenue. Support for progressive income taxes also grew during the World Wars because of the determination and resolve for "democracy and industrialization, for a restructuring of American Society."[195]

Prior to World War I, over 90% of federal revenues came from excise taxes and tariffs.[196] Following both World Wars, the progressive income tax served as a means to raise revenue both in a time of crisis and as a general source of revenue

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188. 50 CONG. REC. 1247 (1913) (statement of Rep. Samuel Rayburn).

189. H.R. Rep. No. 63-5 (1913), *quoted in* ROBERT M. WILLAN, INCOME TAXES: CONCISE HISTORY AND PRIMER 139 (1994).

190. 50 CONG. REC. 1250 (1913) (statement of Rep. Hiram Fowler).

191. *See* WEISMAN, *supra* note 37, at 287.

192. *Id.* (quoting Congressman Hull's speech to the New York State Bar Association reprinted in 51 CONG. REC. App. 106).

193. *See* BROWNLEE, *supra* note 22, at 1-2.

194. *See id.* at 2.

195. *Id.* at 5.

196. WEISMAN, *supra* note 37, at 290.

for the federal government.[197] Moreover, the final achievement of establishing a progressive income tax extinguished any further calls for a social revolution.[198]

In 1916, President Woodrow Wilson and Secretary of the Treasury William McAdoo formed an unofficial coalition to undertake a transition to a progressive income tax.[199] They joined with Congressman Kichin, the Chairman of the House Ways and Means Committee. Congressman Kichin used his position on the Ways and Means Committee to advocate for a progressive income tax, with the goals of social justice and raising revenue.[200] World War I presented these Democrats with the opportunity to forge ahead with the progressive income tax.[201] The Revenue Act of 1916 imposed a progressive income tax that focused on the highest income taxpayers and also introduced the corporate double tax to reach any wealth or income that might escape the personal income tax.[202] The income tax was based on the ability to pay theory, while the double corporate tax was based on the benefit theory of taxation.[203]

By 1918, 15% of taxpayers had to pay taxes and the wealthiest 1% paid 80% of the revenues from personal income taxes.[204] The marginal rates in 1918 for the top 1% of taxpayers were between 15% and 77%.[205] The effective tax rate for those in the highest marginal rate was 15%.[206] The progressive income taxes of 1916 and 1918 were drawn strictly along party lines with very little Republican support. Republicans might have been willing to support higher taxes if there had been more of a consumption tax component rather than all progressive income taxes, which would have shifted some of the tax burden off of the wealthy.[207] The Democratic Party proceeded unilaterally because of their opposition to consumption taxes, increasing access to economic opportunities and helping the disadvantaged.[208] Furthermore, anything less than the highly progressive tax they enacted would have been politically damaging to President Wilson and would have divided the Democratic Party.[209]

197. *See* BROWNLEE, *supra* note 22, at 6.

198. *See id.* at 6-7.

199. *See id.* at 60. Treasury Secretary McAdoo met President Wilson's daughter while in office and married her in 1914 and so, at the time of their coalition, McAdoo was President Wilson's son-in-law. However, according to one historian, the marriage did not bring the President and his Treasury Secretary any closer; he and other members of the President's Cabinet felt marginalized. *See* WEISMAN, *supra* note 37, at 296-97.

200. *See* BROWNLEE, *supra* note 22, at 60.

201. *See id.* at 61.

202. *See id.* at 62.

203. *See id.*

204. *See id.* at 63.

205. *See id.*

206. *See* W. Elliot Brownlee, *Historical Perspectives on U.S. Tax Policy Toward the Rich, in* DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 45 tbl.2.3 (Joel B. Slemrod ed., 2000) [hereinafter Brownlee, Atlas].

207. *See* BROWNLEE, *supra* note 22, at 67.

208. *See id.*

209. *See id.*

In 1921, the Republican Party won back control of the Presidency and the Congress.[210] Andrew Mellon was appointed Secretary of the Treasury and he sought to repeal what he viewed as "soak the rich" taxes and the most redistributional aspects of the progressive income tax.[211] The Republican Congress and administration reduced the tax rates and reduced the income tax's progressivity.[212] One Republican Senator stated that a graduated tax "is but a modern legislative adaptation of the communistic doctrine of Karl Marx, who based his radical philosophy upon the doctrine of equalization of incomes."[213] In the first year in power, the Republicans cut the top rate from 73% to 58%. It was reduced even further to 25% by 1928.[214] The Republicans introduced another tax provision that reduced progressivity even further, and continues today to significantly affect progressivity. They introduced a preferential rate on capital gains at 12.5%.[215]

Without the context of legislative history, the combination of a Republican President and a Republican Congress and the "[h]igh and progressive federal taxation during the 1920's poses a historical puzzle, because political and social conditions seemed hostile to high taxes and to progressive income redistribution."[216] However, Secretary Mellon may have been attempting to silence the labor party and other populists to prevent socialism or communism from appearing attractive. Secretary Mellon was very aware that progressive income rates could be used to repress or weaken a rebellion against capitalism.[217] Many republicans and business leaders wanted to eliminate the income tax and replace it with a national sales tax, but Secretary Mellon advocated against this, suggesting that some degree of progressivity and the policy of ability to pay would "demonstrate their civic responsibility and defuse radical attacks on capital" by recognizing the popular support for the wealthy to bear the greater burden under a progressive income tax.[218]

Secretary Mellon argued that progressivity had to be sacrificed to garner economic growth.[219] Secretary Mellon advocated that less progressive income tax rates would stimulate economic expansion and prosperity, however, he did not seek to eliminate the progressive income tax rates altogether.[220] He argued that high tax rates would discourage and reduce entrepreneurial effort. They would be passed onto consumers, raising the cost of living for everyone including lower-income taxpayers.[221] He argued that taxpayers would move their assets into less productive

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210. *See id.* at 72.

211. *See* Revenue Act of 1921, ch. 136, § 210, 42 Stat. 227, 233-37, *repealed by* Revenue Act of 1924, ch. 234, § 210, 43 Stat. 253, 264.

212. *See id.*

213. 61 CONG. REC. 6472 (1921) (statement of Sen. George Moses)

214. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 375-76 (1995).

215. *See* PAUL, *supra* note 149, at 129; *see also* John W. Lee, III, *The Capital Gains "Sieve" and the "Farce" of Progressivity 1921-1986*, 1 HASTINGS BUS. L.J. 1, 7 (2005).

216. Anne L. Alstott & Ben Novick, *War, Taxes, and Income Redistribution in the Twenties: The 1924 Veterans' Bonus and the Defeat of the Mellon Plan*, 59 TAX L. REV. 373, 374 (2006).

217. *See* Avi-Yonah, *supra* note 2, at 1410.

218. *See* BROWNLEE, *supra* note 202, at 49.

219. *See* BROWNLEE, *supra* note 22, at 74.

220. *See id.*

221. *See id.*

investments, such as tax-exempt bonds, to avoid the tax rates.[222] Secretary Mellon argued that lower tax rates on the wealthier would encourage them to invest at higher rates, and in more productive investments.[223]

Mellon held some unique progressive tax ideas. He had the opinion that wages should be taxed at a lower rate than investment income.[224] He stated:

> [T]he fairness of taxing more lightly income from wages, salaries or from investments is beyond question. In the first case, the income is uncertain and limited in duration; sickness or death destroys it and old age diminishes it; in the other, the source of income continues; the income may be disposed of during a man's life and it descends to his heirs.[225]

Many legislators in Congress developed a deep fondness for the progressive income tax. However, their enchantment with the progressive income tax was not because of the social goals it advanced, the possibilities of redistribution, or the ability to raise revenue. Their appreciation of the progressive income tax was because the progressive income tax created opportunities to generate tax benefits, deductions, expenditures or loopholes for special interest groups, or other supporters with whom the legislators wanted to gain favor.[226] The Congressmen wielded a great amount of power by using relief from the high rates on behalf of powerful contributors or constituents.[227] For the most part, the legislators were able to bestow these tax expenditures and breaks without raising awareness by shrewdly including an exemption buried in the tax code.[228] The progressive income tax "had become an instrument to advance special privilege."[229] These tax expenditures, deductions, and loopholes eroded the progressivity of the high marginal tax rates, however, for almost 50 years this behavior was not addressed, or often even acknowledged. While these types of expenditures may continue even today, they are not quite as valuable because the marginal rates are not as high for the highest income taxpayers as they once were.

In 1924, a group of eleven Democratic members of the House Ways and Means Committee asserted that the proposed Mellon Bill was created "for the purpose of giving principle [sic] relief to the large taxpayer and our [the democratic] plan is based upon giving relief to all income taxpayers but the larger percentage of relief to the small taxpayer."[230] Representative Lankford expressed doubts that the Mellon Bill's trickle-down theory would be effective stating, "[t]he theory of those in

222. *See id.*

223. *See* Andrew Mellon, *Report of the Secretary of the Treasury* 8 (1923); "Mellon insisted that [tax reductions] should go mainly to the rich." GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 1075 (WW Norton & Co. Inc.) (1988); *see* BROWNLEE, *supra* note 22, at 74.

224. *See Report of the Secretary of the Treasury, supra* note 218, at 6-11.

225. MELLON, *supra* note 214, at 56-57.

226. *See* Lee, *supra* note 211, at 2; *see also* Sheldon D. Pollack, *A New Dynamics of Tax Policy?* 12 AM. J. TAX POL'Y 61, 63 (1995).

227. *See* Lee, *supra* note 211, at 2; *see also* Pollack, *supra* note, 221 at 63.

228. *See* Lee, *supra* note 211, at 2.

229. BROWNLEE, *supra* note 22, at 76.

230. H.R. REP. No. 68-179, at 77-82 (1924).

power seems to be that if the Congress will only help the railroads, the Wall Street bankers, the big manufacturing monopolies, and the immensely rich, enough will ooze through for the laboring man, the farmer, and the common folks."[231] He continued, "[t]he contention of the powers that be is that the way to feed a starving dumb brute is to give some thoughtless, selfish man all he desires to eat and perhaps he will leave enough bones for the poor dog to gnaw."[232]

G. *The Great Depression*

The next significant revisions to the progressive income tax took place during the Great Depression. When the stock market collapsed, President Herbert Hoover proposed to raise revenues though a national sales tax.[233] Many in Congress, including Congressman Robert Doughton, who was a member of the House Ways and Means Committee, opposed the national sales tax on the grounds that it violated the ability to pay concept, and would unduly burden the common people.[234] The measure was blocked and instead the Revenue Act of 1932 increased the top marginal tax rate from 25% to 63%, reduced certain personal exemptions, and imposed certain excise taxes.[235]

President Hoover lost the 1932 election and President Franklin Roosevelt began his term in 1933. President Roosevelt supported progressive income taxes based on a taxpayer's ability to pay.[236] Despite this, during his first term, Roosevelt did not change the standing progressive income tax, and only made small modifications that otherwise left most of the advancement of the progressive income tax agenda to the House Ways and Means Committee, seeking only symbolic victories.[237] In 1934, President Roosevelt proposed among other tax provisions, to increase the maximum income tax rate on individuals from 63% to 79%.[238] The Revenue Act of 1934 did result in increasing progressivity by raising the rates on capital gains.[239] Capital gains still had a preferential rate, but now it was progressive, increasing as the amount of gain increased.[240]

In 1935, President Roosevelt sent a surprise message to Congress after reviewing recent studies from the Treasury and the Joint Committee on Internal

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231. 65 CONG. REC. 2570 (1924) (statement of Rep. William Lankford).

232. *Id.*

233. *See* WITTE, *supra* note 182, at 97.

234. *See* BROWNLEE, *supra* note 22, at 83.

235. *See* The Revenue Act of 1932, H.R. 10236, Pub. No. 154, 72d Cong., 1st Sess. §§22-23 (1932); *see also* WITTE, *supra* note 182, at 96.

236. *See* MAX FREEDMAN, ED., ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945 68 (Little Brown) (1967); FRANK FREIDEL, FRANKLIN D. ROOSEVELT: LAUNCHING THE NEW DEAL 53 (Little Brown) (1973).

237. *See* MARK J. LEFF, THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION (Cambridge University Press) (1984); FREIDEL, *supra* note 231, at 51-49, 446-51.

238. *See* ARTHUR M. SCHLESINGER JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL, 328 (1960).

239. *See* The Revenue Act of 1934, H.R. 7835, Pub. No. 216, 73d Cong., 2d Sess. (1934).

240. *See id.; see also* BROWNLEE, *supra* note 22, at 84 n.24.

Revenue Taxation.[241] He observed that the "revenue laws have operated in many ways to the unfair advantage of the few, and they have done little to prevent an unjust concentration of wealth and economic power."[242] The President cautioned that accumulations of wealth led to the "great and undesirable concentration of control in relatively few individuals over the employment and welfare of many, many others."[243] He stated, "whether it be wealth achieved through the cooperation of the entire community or riches gained by speculation- in either case the ownership of such wealth of riches represents a great public interest and a great ability to pay."[244]

President Roosevelt clarified in a later interview that it was not his intent to "destroy wealth, but to create a broader range of opportunity, to restrain the growth of unwholesome and sterile accumulations and lay the burdens of Government where they can best be carried."[245] Unlike Treasury Secretary Andrew Mellon, President Roosevelt did not believe that one had to choose between progressivity and growth, but instead he believed they could co-exist.[246]

During much of President Roosevelt's presidency he had the support of Congressman Robert Doughton, who served as Chairman of the House Ways and Means Committee for eighteen years.[247] Congressman Doughton opposed large tax increases and attempted to reallocate the tax burden from lower-income taxpayers to higher-income taxpayers, believing that lower-income taxpayers had a higher overall effective tax rate.[248] With Chairman Doughton's support, Congress raised effective rates on the high-income taxpayers by almost 50% and the effective tax rate on the wealthiest 1% was increased to the highest level it had ever reached.[249]

Additionally, the Treasury Department decided to go after taxpayers that had evaded taxes.[250] They identified 67 wealthy taxpayers who had used "inventoried loopholes" and incorporation to reduce their taxes.[251] The Roosevelt administration

241. *See* President Franklin Roosevelt, *Message to Congress on Tax Revision* (June 19, 1935) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15088.

242. *See id.*; *see also* ROY G. BLAKEY AND GLADYS BLAKEY, THE FEDERAL INCOME 366 (1940); CONG. REC. 79:9659 (1945). In response only one Senator, Senator Long had a comment for the record, he said, "Mr. President, before the President's message is referred to the Committee on Finance, I wish to make one comment. I just wish to say Amen!" CONG. REC. 79:9659 (1945).

243. President Franklin Roosevelt, *Message to Congress on Tax Revision* (June 19, 1935) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15088; CONG. REC. 78:30; *see* SCHLESINGER, *supra* note 233, at 328.

244. *Id.*

245. *See* SCHLESINGER, *supra* note 233, at 328.

246. *See* BROWNLEE, *supra* note 22, at 90.

247. *See id.*

248. *See e.g., Hearings before the Committee on Ways and Means, House of Representatives on Revenue Revision,* 73d Cong. 2d Sess. (1934), CONG. REC. 80: 5978-5989 (statement of Chairman Doughton); *see* BROWNLEE, *supra* note 22, at 83.

249. CONG. REC. 80: 5978-5989 (the effective rate on the highest 1% taxpayers in 1936 was 16.4%); *see also* The Revenue Act of 1934, H.R. 7835, Pub. No. 216, 73d Cong., 2d Sess. §117 (1934); *see* BROWNLEE, *supra* note 22, at 92. It also should be noted, however, that the progressivity of the income tax was reduced by the regressive nature of the social security taxes also adopted under President Roosevelt's reforms. *See id.*

250. See *Report of the Joint Committee on Tax Evasion and Avoidance*, 75th Cong., 1st Sess. CONG. REC. 81: 5124-25.

251. *See* BROWNLEE, *supra* note 22, at 97.

pursued these taxpayers for two primary reasons, to at least slow down the practice of enacting special provisions in the tax code to benefit favored wealthy taxpayers, and second, to send a message to both low and high-income taxpayers that the tax was indeed progressive and that the high-income taxpayers were expected to pay their share.[252] President Roosevelt also wanted to publicly expose high-income taxpayers that had deliberately avoided paying income taxes.[253] Treasury Secretary Morgenthau dissuaded President Roosevelt from publicizing the names and taxes paid by convincing him that it could be illegal.[254] However, the Treasury Secretary did give the President the names of the evaders and the data, which President Roosevelt then passed onto James Farley, the Chair of the Democratic National Committee and to Homer Cummings, the Attorney General, perhaps hoping the information would be leaked to the public.[255]

As a result of the pursuit of the high-income taxpayers, Congress unanimously passed the Revenue Act of 1937, which eliminated many of the loopholes these high-income taxpayers had used to avoid taxes.[256] Congress through the Revenue Act eliminated or reduced the deductions for country estates, yachts, deductions for multiple trusts, and personal holding companies among other deductions. Following the enactment of the New Deal policies, President Roosevelt did not try until World War II to accomplish his economic objectives through tax reforms or increases to the tax rate because of the political climate, and the objections of conservatives.[257] In 1938, following a drop in the stock market, Congress reduced the tax rate applicable to capital gains, which reduced the progressivity of the income tax at the highest income bracket levels.[258] Congress reduced the capital gains rate to benefit both taxpayers with small amounts of capital gains and larger deductions and high-income taxpayers with a larger proportion of the public stock and smaller deductions.[259]

Once it became clear that the United States was going to enter World War II, President Roosevelt and the Congressional bipartisan leadership agreed that large tax increases were needed to fund the war effort and decrease inflationary pressures.[260] There were disagreements and disputes as to which taxes would be increased, and how much taxes would be increased. President Roosevelt spoke at a joint session of Congress after Pearl Harbor in 1942 stating, "[i]n this time of grave national danger, when all excess income should go to win the war, no American citizen ought to have a net income, after he has paid his taxes, of more than

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252. *See* JOHN MORTON BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF CRISIS, 1928-1938 324-337 (Houghton Mifflin) (1959); *see also* JOHN MORTON BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF URGENCY, 1938-1941 22-30 (Houghton Mifflin) (1965); JOHN MORTON BLUM, FROM THE MORGENTHAU DIARIES, YEARS OF WAR, 1941-1945 33-78 (Houghton Mifflin) (1967).

253. *See* BROWNLEE, *supra* note 22, at 97.

254. *See* BLUM, YEARS OF CRISIS *supra* note 247, at 327-337; *see* BROWNLEE, *supra* note 22, at 97.

255. *Id.*

256. *See* The Revenue Act of 1937, H.R. 8234, Pub. L. No. 75-377, 75th Cong., 1st Sess. (1937); *see also* BROWNLEE, *supra* note 22, at 98.

257. *See* BROWNLEE, *supra* note 22, at 104.

258. The Revenue Act of 1938, H.R. 9682, Pub. L. No. 75-554 § 117 (b), 52 Stat. 447, 501 (1939).

259. *See* Lee, *supra* note 211, at 13.

260. *See* BROWNLEE, *supra* note 22, at 108.

$25,000."[261] No confiscatory tax above $25,000 was ever actually proposed, and the intent was most likely to rally Congress to increase progressive tax rates.[262]

With the need for revenue, Congressional members once again suggested the traditional stand-by proposals. Legislators suggested a national sales tax that the Treasury Secretary suggested placed too high of a burden on the lower one third of taxpayers. Instead, the Treasury Secretary proposed increasing business taxes, which business leaders and the Senate Finance Committee responded would severely cripple businesses, unable to withstand impending financial crises.[263] Then the Treasury Secretary, along with several scholars, suggested a graduated spending tax, but Congress rejected that proposal as too radical and economically risky at such a desperate time.[264]

Finally, Congress agreed to increase the progressivity of the income tax rates as a way to control inflation and raise revenue.[265] The committees, however, protected loopholes in the income tax that favored the wealthy.[266] The result of these protections were that progressive tax measures focused more heavily on wage income than on income from rents, interest and profits, because of concerns surrounding financial pressures and the threat of another depression.[267] Congress, in order to raise enough revenue while still maintaining the loopholes for the wealthy, broadened the tax base, increasing tax rates on the salaries and wages of the middle class as well as high-income taxpayers.[268]

The culmination of changes to the income tax over the course of the two World Wars resulted in a tax policy that was more "progressively redistributional."[269] The tax rates were increased to 13% on the first $2,000 of income and 82% on incomes over $200,000, the highest marginal rates up to that point at any time in United States history.[270] The effective tax rate on taxpayers in the highest marginal tax rates was 58.6% in 1944.[271] Also of note, Democrats were in power during both World Wars and were typically more committed to progressive income taxes, generally opposing regressive taxes.[272] It was President Roosevelt's hope that the revenues raised (beyond those needed for the war) would be distributed progressively.[273] He and the other New Deal legislators felt that a progressive income tax was the most effective way to ensure federal programs of social justice.[274]

261. *Hearings before the Committee on Ways and Means, House of Representatives on Revenue Revision*, 73d Cong. 2d Sess. (1934), CONG. REC. 80: 4448 (statement of President Roosevelt).

262. *See* BROWNLEE, *supra* note 22, at 108.

263. *See id.* at 110-111.

264. *See id.* at 111.

265. *See id.*

266. *See e.g., id.*

267. *See* The Revenue Act of 1942, H.R. 7378, Pub. No. 753, 77th Cong., 2d Sess. (1942).

268. *Id.*

269. *See* BROWNLEE, *supra* note 22, at 5.

270. THE REVENUE ACT OF 1942, H.R. 7378, Pub. No. 753, 77th Cong., 2d Sess. (1942).

271. *See* Brownlee, Atlas *supra* note 201, at 60 tbl.2.5.

272. *See* SUSAN B. HANSEN, THE POLITICS OF TAXATION 72 (Praeger) (1983); *see* BROWNLEE, *supra* note 22, at 6.

273. *See* BROWNLEE, *supra* note 22, at 112.

274. *See id.*

By the end of World War II the income tax had become commonplace to the ordinary American rather than just to high-income taxpayers. In 1945 almost 90% of the labor force filed income tax returns.[275] "Mass taxation had become more important than class taxation."[276] During the war the effective tax rate increased to more than 40% and even reached 58.6% in 1944.[277] In 1945 the top 1% produced 32% of the revenue.[278] As one tax historian concluded, the revisions to tax policy during World War II resulted in a progressive but broadly based income tax and importantly, "[f]or the first time since the early nineteenth century, the two political parties agreed on the essential elements of the nation's fiscal policy."[279]

H. The Mad Men Years- The 1950s and 1960s

Following World War II, in the 1950s and 1960s the Democrats abandoned, or to put it more gently, lost their enthusiasm for, increasing tax rates on higher-income taxpayers.[280] Or more appropriately, there was no room to increase rates. The tax rates did appear extremely high on high-income taxpayers, but, with all of the tax expenditure items and loopholes, the tax burden imposed on high-income taxpayers was in reality much less. The façade of high tax rates served to appease the common public while the wealthy constituents benefited from special tax breaks.[281]

The progressivity of the income tax was in fact, "a colossal illusion."[282] In the beginning of 1954, while President Eisenhower was in office, the highest marginal tax rate was 92%, it was lowered to 91%, but the effective tax rate (the actual, real tax rate) was only 32.2%.[283] Although Republican President Eisenhower was not in favor of high tax rates, he was not willing to reduce tax rates until the tax expenditures and loopholes were reduced.[284] Southern Democrats and Northeastern Democrats had different reasons for ignoring, or being complacent about the lack of true progressivity in the tax code and pursuing other ways to assist disenfranchised constituents.[285] The progressivity they achieved during World War II had proven their commitment to the progressive income tax and now they turned their focus elsewhere.[286]

275. *See id.* at 115.

276. *See id.*

277. *See id.*

278. *See* Bureau of Internal Revenue, *U.S. Department of Treasury, Statistics of Income for 1945*, Par I, 71 (1951).

279. BROWNLEE, *supra* note 22, at 121.

280. *See id.* at 122.

281. *See* SIMONS, *supra* note 52, at 219; LESTER C. THUROW, THE IMPACT OF TAXES ON THE AMERICAN ECONOMY 154 (Praeger) (1971).

282. JEROME R. HELLERSTEIN, TAXES, LOOPHOLES AND MORALS 16 (McGraw-Hill) (1963).

283. *See* REVENUE ACT OF 1951, ch. 521, § 101, 65 Stat. 452, 459-61; IR.C. §1 (1954), 68A State. 1, 1-7 (1954); 26 U.S.C. § 11 (1952); *see* Brownlee, Atlas *supra* note 201, at 61 tbl.2.6.

284. *See* Linder, *supra* note 50, at 916-918.

285. *See* BROWNLEE, *supra* note 22, at 122.

286. *See id.*

In the 1950s the Democrats in Congress allowed the effective maximum income tax rate to be reduced to 25% from the 40% it was during the war and from the high of 58.6% it had been in 1944.[287] The public so staunchly supported progressive income taxation that even legislators who believed the rate structure needed to be revised, "felt it impossible to decrease the rate of progression."[288]

In Senate Hearings in 1963, Senators heard the actual hard facts reflecting the degree to which high-income taxpayers were benefiting from low tax rates on capital gains.[289] The evidence demonstrated that 75% of the income of high-income taxpayers was from capital gains and was therefore taxed at preferential rates, further affecting the progressivity of the income tax.[290] Senator Douglas commented at the hearings, "I find those figures shocking. Here are 20 men with adjusted gross incomes of over $5 million who paid no taxes."[291] The effective rate for these taxpayers was 22% while the maximum ordinary tax rate was 90%.[292]

In 1964, Democratic President Johnson called on Congress to reduce tax rates even further. Congress responded by lowering the tax rate on capital gains, allowing more generous depreciation allowances, and cutting the marginal tax rates on high-income taxpayers.[293] The top marginal rate was reduced from 91% to 70%.[294] It does not appear that any Congressman objected to the reductions. The rationale for the tax cuts was to increase the amount of national income and to help with large deficits without increasing the cost of living or putting expansion at risk.[295] It appears that in almost all cases during the presidencies of President John F. Kennedy, President Johnson, President Truman, President Nixon and President Ford and up until President Carter, there was bipartisan consensus for most tax provisions and any tax debates were mild and not publicly contested.[296]

Tax expenditures, deductions, and preferences intended to benefit certain classes of taxpayers continued to be very popular with lawmakers.[297] The introduction of joint returns and the mortgage interest deduction were tax expenditures favoring the middle class and affecting the overall progressivity of the income tax. Accelerated depreciation was a tax expenditure affecting the progressivity of the income tax that primarily benefited high-income taxpayers.[298]

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287. *See id.*

288. Linder, *supra* note 50, at 916-918 (citing Eugene Feingold, *The Internal Revenue Act of 1954: Policy and Politics* 272 (1960) (unpublished Ph.D. dissertation, Princeton University)).

289. *See Hearings on H.R. 8363 Before the S. Fin. Comm.*, REVENUE ACT OF 1963, pt. 2, 88th Cong. 278-83 (1963).

290. *See* Lee, *supra* note 210, at 232; *Hearings on H.R. 8363 Before the S.enate Fin.ance Comm.ittee*, REVENUE ACT OF 1963, pt. 2, 88th Cong. 278-83 (1963).

291. *Hearings on H.R. 8363 Before the S. Fin. Comm,*, REVENUE ACT OF 1963, pt. 2, 88th Cong. 278-83 (1963).

292. *See* Lee, *supra* note 210, at 232.

293. *See* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, LYNDON B. JOHNSON 1963-1964 BOOK 1, 9-10 (1965).

294. *See* REVENUE ACT OF 1964, Pub. L. No. 88-272, § 111, 78 Stat. 19, 19.

295. *See* REVENUE ACT OF 1964, Pub. L. No. 88-272, § 111, 78 Stat. 19, 19; *see* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, LYNDON B. JOHNSON 1963-1964 BOOK 1, 9-10 (1965).

296. *See* BROWNLEE, *supra* note 22, at 124.

297. *See id.* at 129.

298. *See id.*

In the 1960s and 1970s lawmakers showed no restraint when it came to creating tax expenditures, deductions, and loopholes. The special tax breaks were particularly attractive to members of Congress because they allowed legislators to give away tax benefits to special interest groups or constituents without having to go through the process of obtaining direct expenditure approval for the funds.[299] Both Democrats and Republicans used tax expenditures freely, reducing the progressivity of the income tax, to further whatever agenda they prioritized at that point in time.[300] As one commentator noted, "no one controls tax policy and the tendency is for politicians to confer as many benefits on as many groups as is politically feasible."[301] It also allowed both Democratic and Republican congressional members to create tax programs benefiting certain interest groups without being subject to public scrutiny because the benefits were essentially hidden within the progressive income tax.[302]

I. The Inflation of the 1970s

During the 1970s inflation there was a huge strain on the economy.[303] Because of rampant inflation, many individuals who had previously been exempt or excluded from the income tax now fell outside of the exemption levels and were suddenly subject to the income tax.[304] This included many low-income taxpayers, including low-income taxpayers with dependents facing the income tax for the first time. The tax brackets were not adjusted for inflation, so tax rates that were originally intended for high-income taxpayers were now encompassing middle-income taxpayers and tax rates intended for middle-income taxpayers were now capturing low-income taxpayers who should have been exempt from tax.[305] Moreover, the top brackets were not adjusted to tax high-income taxpayers proportionately, so they were paying the same rates as many middle-income taxpayers.[306]

In 1976 while running for President, candidate Jimmy Carter referred to the federal income tax system as "a disgrace to the human race" and promised to eliminate many if not all of the tax expenditure provisions that favored high-income taxpayers.[307] As a result of the combination of dramatic inflation, pressures on the tax system such as various tax benefits and expenditures, and the rollback of tax

299. *See* THOMAS J. REESE, THE POLITICS OF TAXATION (Quorum Books) (1980).

300. *See* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (Harv. Univ. Press) (1973).

301. WITTE, *supra* note 181, at 121.

302. *See* BROWNLEE, *supra* note 22, at 130.

303. *See e.g.* GARY M. WALTON AND HUGH ROCKOFF, HISTORY OF THE AMERICAN ECONOMY 626-28 (9th ed. 2002).

304. *See* BROWNLEE, *supra* note 22, at 133.

305. *See* TIMOTHY J. CONLAN ET AL., TAXING CHOICES: THE POLITICS OF TAX REFORM 19 (Cq Pr) (1990); JOSEPH J. MINARIK, MAKING TAX CHOICES 37 tbl. 4 (Univ. Pr. of Am.) (1985).

306. *See* CONLAN, *supra* note 299, at 19.

307. *See Text of Carter's Speech Accepting the Nomination*, 510 FACTS ON FILE WORLD NEWS DIGEST, at A1 (July 17, 1976).

rates in the 1950s and 1960s, progressivity was completely eroded. President Carter promised to restore progressivity to the income tax.[308]

President Carter found it impossible to implement any of his promised changes because, as he discovered, both Democratic and Republican Congressional members wanted to expand the tax preferences for the rich.[309] The legislators were not about to give up the powerful tool they had in tax expenditures. Congressional members justified their free and unhampered reign over tax expenditures by relying on the following theory: using tax expenditures for individuals who are savers and investors, who also earn a high income, will result in more saving and more investment.[310] The theory also provided that if the tax preferences were eliminated, as President Carter had pledged, Congress and President Carter would essentially be specifically penalizing taxpayers who choose to save or invest their money.[311]

President Carter faced two issues in office while trying to fulfill his promise for a more progressive income tax. The first problem was the high rates of inflation that resulted in taxpayers falling into tax brackets never intended to cover them, in particular low-income taxpayers who should have been exempt from the income tax. The second problem was the resistance President Carter faced from Congressional Democrats and Republicans to change the system because they did not want to give up their ability to use and offer tax expenditures and benefits.[312] Conservatives in Congress proposed to index the tax rates for inflation, which would have addressed the first of President Carter's challenges, but it did not address the second of the challenges; the abuse and misuse by the legislature of tax expenditures and tax preference items. In addition, many legislators were concerned that indexing tax rates to inflation would be too confusing and complicated, while others were concerned with what indexing the rates would do to revenue.[313] While Republicans in Congress quickly supported the indexing proposal, the Carter administration was ultimately able to block it.[314]

The Republicans countered with a second proposal, which again would have addressed the first of President Carter's problems, but not the second. It also would have dealt a severe blow to the progressivity of the income tax as a whole. Congressman Kemp proposed slashing tax rates across the board with a 30% reduction.[315] When Congressman Kemp's proposal did not garner enough support, he joined with Republican Senator Roth to reduce tax rates 30% over three years, at 10% a year, rather than a 30% reduction all at once.[316] The proposal might have

308. *See* W. CARL BIVEN, JIMMY CARTER'S ECONOMY: POLICY IN AN AGE OF LIMITS 198-200 (Univ. of N.C. Press) (2002).

309. *See id.*

310. *See id.*

311. *See id.*

312. *See* BROWNLEE, *supra* note 22, at 134-135.

313. *See id.* at 135.

314. *See* PAUL CRAIG ROBERTS, SUPPLY-SIDE REVOLUTION: AN INSIDER'S ACCOUNT OF POLICYMAKING IN WASHINGTON, 31 (Harv. Univ. Press) (1984); *see* BROWNLEE, *supra* note 22, at 136.

315. *See* PAUL CRAIG ROBERTS, SUPPLY-SIDE REVOLUTION: AN INSIDER'S ACCOUNT OF POLICYMAKING IN WASHINGTON, 1-33, 69-88 (Harv. Univ. Press) (1984).

316. *See id.*

made it through Congress, but President Carter promised to veto it and therefore the plan was not passed.[317] Meanwhile, Democrats in Congress led by Senator Russell Long, Chairman of the Senate Finance Committee, with support from Representative Al Ullman, Chairman of the House Ways and Means Committee, began to discuss a proposal for a value added tax on consumption.[318] President Carter argued that a value added tax on consumption would be regressive, and therefore would not restore any progressivity to the income tax.[319] Republicans argued that a value added tax would make government larger.[320] Facing opposition from both sides, the bill was not brought to a vote.[321]

As the 1970s came to a close, President Carter was unable to affect any of the promises for tax changes he had made during his campaign.

J. The Reagan Years

The income tax underwent a major reformation during the presidency of Ronald Reagan.[322] When President Ronald Reagan was elected, the Republicans also gained control of Congress. Beginning at the start of President Reagan's term, legislators from both sides of the aisle, Democrats and Republicans, introduced nearly a dozen bills for a flat tax.[323] In most of the proposals, there was a base exemption amount before the flat tax applied, and thus remained progressive in that one respect. But other than the exemption amounts, the flat tax proposals would have completely eliminated progressivity in the income tax.[324] Supporters of a flat tax included the Secretary of the Treasury Donald Regan, Senator Dole who was the Chair of the Senate Finance Committee, and Democratic Senator Bill Bradley who was also a member of the Senate Finance Committee.[325] Eventually President Reagan and many of his advisors became convinced that abandoning the progressive income tax and moving to a flat tax, while completely eliminating tax

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317. *See* BROWNLEE, *supra* note 22, at 136.

318. *See* TAX RECONSTRUCTION ACT OF 1979, H.R. 5665 96th Cong. (Oct. 22, 1979).

319. *See* BROWNLEE, *supra* note 22, at 139.

320. *See id.*

321. *See id.*

322. *See* THE ECONOMIC RECOVERY ACT OF 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981); THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, Pub. L. No. 970248, 51 U.S.L.W. 10 (Sept. 14, 1982).

323. *See* Michael J. Graetz, *The 1982 Minimum Tax Amendments as a First Step in the Transition to a "Flat-Rate" Tax*, 56 S. CAL. L. REV. 527, 528, n3 (1983).

324. *See* DONALD T. REGAN, REGAN FOR THE RECORD: FROM WALL STREET TO WASHINGTON, 198 (Harcourt) (1988); "*Interview of Donald T. Regan by Alan Murray of the Wall Street Journal, Anne Swardson of the Washington Post and Peter Kilborn of the New York Times*," folder Tax Reform 1985(4), OA 14862, Frederick McClure Files, RRL (July 9, 1986).

325. *See* "*Flat-Rate Tax Advanced as Radical Cure for Problems of Existing Revenue System,*" CONGRESSIONAL QUARTERLY, 1331-34 (June 5, 1982); DAVID A. STOCKMAN, THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED 355-365 (Harper & Row) (1986); RICHARD DARMAN, WHO'S IN CONTROL? POLAR POLITICS AND THE SENSIBLE CENTER, 118-19 (Simon & Schuster) (1996).

expenditures would be the most effective way to raise revenue without having to raise tax rates.[326]

Treasury Secretary Donald Regan wanted to advance his own flat tax proposal, and he was not convinced that President Reagan had fully committed to a flat tax.[327] So to promote his proposal, Treasury Secretary Regan set out to shock President Ronald Reagan by pointing out that the President's personal secretary paid more in taxes than General Electric, Boeing, General Dynamics, and over fifty more large companies combined.[328] Warren Buffet often cites the same dynamic when advocating for more progressive rates. President Obama recently revealed that he also pays a lower tax rate than his secretary, also advocating for more progressive income tax rates.[329]

When President Reagan began to evaluate the flat tax plans, however, it became clear to him that it was inaccurate to claim that tax rates would not increase. That was only true for some high-income taxpayers whose tax rates would not increase. But if high-income taxpayers had been the beneficiaries of the tax expenditures that were being eliminated, their tax rates would increase. According to Treasury Secretary Donald Regan, the number of low-income taxpayers that would also see an increase in tax rates was the most disturbing to President Reagan. Treasury Secretary Donald Regan said President Reagan was concerned that a flat tax plan would reduce or eliminate the progressivity in the tax code and that the flat tax would result in increasing taxes for lower-income taxpayers.[330]

Another issue with the flat tax was that several of the President's economic advisors began to question whether the plan raised a sufficient amount of revenue.[331] President Reagan's plan to eliminate tax expenditures and other loopholes stemmed from his desire for horizontal equity, making sure that equally situated taxpayers are taxed the same and that there are not preferences available to one and not the other. He was not as concerned about vertical equity, which relates to how progressive a tax system is.[332] Democrats did object to the flat tax and did not raise concerns over eliminating progressivity from the income tax.

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326. *See Regan, Dole, Stockman, Long Contribute to Flat-Rate Tax Debate and Flat Rate Discussion Continues on the Sidelines*, 16 TAX NOTES 266, 267 (July 19, 1982); *see* STOCKMAN, *supra* note 319 at 355-365; DARMAN, *supra* note 319 at 118-19.

327. *See* REGAN, *supra* note 318 at 196-203.

328. *See id.*

329. *See White House Explanation of the Buffett Rule*, http://www.whitehouse.gov/economy/buffett-rule and Jake Tapper, *President Obama's Secretary Paid Higher Tax Rate Than He Did*, ABC NEWS (Apr. 13, 2012) http://abcnews.go.com/blogs/politics/2012/04/president-obamas-secretary-paid-higher-tax-rate-than-he-did/.

330. *See* REGAN, *supra* note 318 at 198. "Donald Regan's recollections point to the president's concern about the loss of progressiveness in the flat tax; see Regan, For the Record, 198. His recollections are consistent with his comments in "Interview of Donald T. Regan by Alan Murray of the Wall Street Journal, Anne Swardson of the Washington Post, and Peter Kilborn of the New York Times," July 9, 1986, folder Tax Reform 1985 (4), OA 14862, Frederick McClure Files, RRL. In this interview, Regan said that the administration had had reservations about a flat tax because it 'would increase taxes for a heck of lot of people.'" *See* BROWNLEE, supra note 22 at 158.

331. *See* STOCKMAN, *supra* note 319 at 355-365.

332. *See* The President's Tax Proposals to the Congress for Fairness, Growth, and Simplicity (May 29, 1985).

In the end, President Ronald Reagan did not enact a flat tax. President Reagan's revisions to the income tax also did not repeal the income tax, and although the rate of progressivity was dramatically reduced, it did retain some degree of progressivity. His tax proposals were successful in raising revenue.[333] Some of President Reagan's proposals were aligned with the theory of increasing the progressivity in the income tax. For example, matching the capital gains rate to the income tax rate, thereby eliminating the capital gains preference, and President Reagan's proposal to eliminate the tax expenditures resulted in increasing progressivity. President Reagan strengthened the progressive changes that had been made in World War II by eliminating the hidden tax breaks and special expenditures that had pervaded the income tax, although these changes have been undermined in the subsequent decades.[334]

President Reagan wanted to cut taxes for high-income taxpayers because he believed it would stimulate the economy. He proposed cutting all tax rates and promised to retain the progressivity of the income tax.[335] The tax cuts President Reagan proposed ultimately benefited the wealthy more than they relieved the tax burden on the poor. In particular the low-income taxpayers who had unintentionally become subject to the income tax as a result of the inflation of the 1970s were insufficiently relieved of their tax burden.[336] In order to pay for an accelerated depreciation method that business lobbyists requested, President Reagan dropped the portion of the proposal that would have indexed the tax rate for inflation, leaving lower-income taxpayers with the tax burden unfairly imposed by the inflation of the 1970s.[337] In 1981, the final bill provided for a 23% tax rate reduction.[338]

After the 1981 Tax Act was passed, the federal government needed to raise revenue to pay for the increase in the defense budget that Reagan requested.[339] President Reagan was unwilling to raise individual income tax rates, but he did support repealing tax expenditures, including the special deductions, credits and preferences that permeated the tax code.[340] Progressivity might not have been the motive behind President Reagan's decision to raise revenue by eliminating many of the tax expenditures, many of the provisions resulted in supporting progressivity. The rampant tax expenditures, breaks, and benefits enacted by legislators had eroded the progressivity of income tax since President Eisenhower took office. Once the special tax provisions were removed, more high-income taxpayers became

333. *See* THE ECONOMIC RECOVERY ACT OF 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981); THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, Pub. L. No. 970248, 51 U.S.L.W. 10 (Sept. 14, 1982).

334. *See* BROWNLEE, supra note 22, at 8.

335. *See id.* at 141.

336. *See id.* at 141 n39.

337. *See* BROWNLEE, supra note 22, at 143; JEFFREY H. BIRNBAUM AND ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM, 16-18 (Vintage) (1987); CATHIE J. MARTIN, SHIFTING THE BURDENS: THE STRUGGLE OVER GROWTH AND CORPORATE TAXATION, 47 (U. of Ch. Press) (1991).

338. *See* THE ECONOMIC RECOVERY ACT OF 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981).

339. *See* BROWNLEE, supra note 22, at 153.

340. *See* THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, Pub. L. No. 970248, 51 U.S.L.W. 10 (Sept. 14, 1982) and THE DEFICIT REDUCTION ACT OF 1984, Pub. L. No. 98-369, § 1, 98 Stat. 494 (1984).

subject to the marginal tax rates. Conveniently, President Reagan did use progressivity as a rationale for the repeals, arguing that eliminating the tax expenditures would restore fairness to the income tax as a justification to gain public support when he encountered resistance from Republicans in Congress.[341]

Even with President Reagan's modifications the overall progressivity in the income tax continued to decline while he was in office. The average effective tax rate and the rate of progressivity fell from 1980 to 1985.[342] Despite the early decrease, the income tax rates and the rate of progressivity rose again from 1985 to 1993, although payroll taxes affected the progressivity of the tax rates overall.[343] According to the Congressional Budget Office, once President Reagan enacted his initial set of tax proposals in the early 1980s, income tax rates were dramatically reduced for the highest income earners, and were reduced by lesser amounts for other taxpayers. For the bottom 20% of taxpayers, tax rates actually increased because the payroll tax increased to extend the solvency of the Social Security system.

President Reagan enacted a second set of tax revisions in 1986. President Reagan stated that after passing the 1986 Tax Reform Act he felt like they had "just played the world series of tax reform and the American people won."[344] The 1986 Tax Reform Act reduced individual tax rates across the board, reducing the top marginal rate from 50% to 28%, increasing personal exemptions and standard deductions to benefit low-income taxpayers and thereby allowing many individuals to avoid paying taxes at all. It also expanded the earned income tax credit to better address tax penalties faced by the working poor and increased the capital gains rate for high-income taxpayers from 20% to 28%.[345] For the first time since 1921 capital gains did not have a special preferential rate. Instead they were taxed at the same rate as ordinary income. Because higher-income taxpayers generally have a greater share of capital gain income, the reduced rates on capital gains had always reduced the amount of progressivity in income tax, irrespective of the ordinary income rates.[346] The effective tax rate on the taxpayers in the highest marginal tax bracket after the 1986 Act was 22.1%.[347] Certain provisions, particularly the overall low rates, reduced the progressivity of the income tax.[348] Eliminating the tax preferences and benefits for high-income taxpayers, increasing the capital gains rate, and creating higher exemption levels allowed more low-income taxpayers to avoid paying income tax and alleviated some of the decrease in progressivity.[349]

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341. *See* Text of the Address by the President to the Nation (August 16, 1982); Fact Sheet, The Equity and Fiscal Responsibility Act of 1982.

342. *See Economist Examine Whether Progressivity has Regressed*, TAX NOTES, 1520, (Sept 21, 1992).

343. *See id.*

344. Ronald Reagan, "Remarks by the President at the Signing Ceremony for Tax Reform Legislation," October 22, 1986.

345. *See* Lee, *supra* note 210 at 2.

346. *See id.*

347. *See* Brownlee, Atlas *supra* note 201 at 60 tbl.2.6.

348. *See* Lee, *supra* note 211, at 1.

349. *See id.* at 74.

The severe reduction of the number of marginal rates resembled a variation of a flat tax. Senator Kerry stated, "I am troubled by the fact that the bill abandons our traditional commitment to a progressive rate structure in the Tax Code. When added to the burden of the payroll taxes, the two rates in this bill create what comes close to a flat tax rate for all Americans, with effective tax rates that actually decline as income rises into the range of the wealthy."[350] Senator Chiles stated, "How fair is tax reform when the average taxpayer . . . receives a tax cut of a couple hundred dollars when the most wealthy individual receives a tax cut of almost 3 grand . . . and, in fact, includes a higher marginal tax rate of 33 percent for the upper-middle-income individuals, while offering a lower 28-percent rate for the very wealthy?"[351] The growth in income and wealth inequality has increased to a greater degree since the tax changes implemented during the Reagan administration.[352]

K. Bush Senior's Quick Foray into the Progressive Income Debate

George H.W. Bush set out to reduce progressivity and he ended up increasing it. Just as when President Reagan took office, once President George H.W. Bush was elected, a rush of several proposals came from Congress including a consumption tax, a value added tax, a national sales tax, and a flat tax. "The American public seemed bored or bemused by this brief reform campaign. If anything, Americans retained their attachment to the principle of progressive taxation and were reluctant to sacrifice that principle."[353] The most significant change that President George H.W. Bush proposed was to reduce the capital gains rate from the 28% increase under President Reagan to 15%. This would have undermined one of the only progressive highlights from President Reagan's tax reform and would have reduced progressivity because high-income taxpayers earn most capital gain income.[354]

The federal government needed revenue, but President George H.W. Bush had made his famous pledge not to raise taxes. Senate Majority Leader Democrat George Mitchell and President Bush came to an informal agreement, a truce; President Bush would not attempt to lower any taxes and Senator Mitchell would not embarrass President Bush by revealing that a tax increase was necessary or remind the public of his pledge when the President came a year later to request the tax increase. As a result, the Bush administration strategically planned to wait a year before suggesting a bill with the reduced capital gains rate.[355]

350. 132 CONG. REC. at S13, 893 (1986) (statement of Sen. John Kerry).

351. 132 CONG. REC. at S13, 939 (1986) (statement of Sen. Lawton Chiles).

352. *See* Beverly Moran, *Wealth Distribution and the Income Tax*, 53 HOW. L.J. 319, 319-21 (2010).

353. BROWNLEE, *supra* note 22, at 180.

354. BROWNLEE, *supra* note 22, at 182 ("[George H.W. Bush and Secretary of the Treasury Brady] were both members of 'old money' families with capital tied up in highly appreciated assets, and they may well have had a first-hand appreciation of the argument that lowering the taxation of capital gains would encourage the reinvestment of such assets in more productive activities.").

355. *See* DARMAN, *supra* note 320, at 200, 202, 209, 213.

The supply side Republicans in Congress had other plans though and insisted on moving forward to reduce the capital gains tax rate immediately.[356] President George H.W. Bush decided to align himself with the powerful Congressional Republicans and supported a bill to reduce the capital gains rate. In exchange, Senate Majority Leader Mitchell, feeling that President Bush had violated his promise not to lower taxes in the first year, blocked a vote on the capital gains tax cut and stopped bipartisan negotiations on the 1991 budget.[357] As a result of the deficit and the desperate need for revenue, the Bush administration was forced to request a tax increase. The irony is that because President Bush was so insistent on lowering taxes for high-income taxpayers, he ended up being forced to request a tax increase.[358]

The initial taxes the Bush administration proposed were not progressive. They included a variety of consumption taxes, excise taxes, and a value added tax.[359] Eventually, the reduction in the capital gains rate was removed from the bill and revenue was raised through taxes on home heating oil, a regressive tax. Congress also chose to eliminate a gasoline tax from the bill and made up for the missing revenue by raising the highest marginal tax rate from 28% to 31%. The tax bill increased the earned income tax credit, benefiting low-income taxpayers and adding some progressive income tax reform.[360] When finally completed, the 1990 bill resulted in a more progressive income tax, and in exchange, Congressional Democrats agreed to reduce the national budget deficit.[361] What had begun with a proposal to make the tax system less progressive ironically resulted in creating a more progressive income tax.

L. The Clinton Years

Presidents Reagan and Bush set out to eliminate or at least decrease the amount of progressivity in the income tax. They had mixed success, with some policies increasing progressivity and some not. Once President Clinton was elected, there was a strong popular movement to restore progressivity to the income tax. As a result, opponents of the progressive income tax came in an onslaught, attempting to eliminate the progressive tax, providing alternative proposals and of most interest, going so far as to call their own regressive tax plans "progressive" to engender support among the American public. This indicates that opponents of the

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356. *See* BROWNLEE, *supra* note 22, at 187.

357. *See id.* at 187-188.

358. *See id.* at 188.

359. *See* DARMAN, *supra* note 320, at 246-47.

360. *See* OMNIBUS BUDGET RECONCILIATION ACT OF 1990, Pub. L. No. 101–508, 104 Stat. 1388 (1990). *See generally* George H.W. Bush, "Address to the Nation on the Federal Budget Agreement," October 2, 1990, Public Papers of George W. Bush, http://bushlibrary.tamu.edu/research/public_papers.php?id=2291&year=1990&month=10 (appealing to the American public to pressure congress to pass the OBRA 1990).

361. *See* C. Eugene Steuerle, *Financing the American State at the Turn of the Century, in* FUNDING THE MODERN AMERICAN STATE, 1941-1995: THE RISE AND FALL OF THE ERA OF EASY FINANCE 400 (Camb. Univ. Press) (1996); C. EUGENE STEUERLE, THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA 163-84 (Urban Inst. Press) (1992).

progressive income tax recognized that the American public was strongly supportive of the progressive income tax. Therefore to generate enough support for their bills, proponents had to create the appearance of progressivity, either by claiming a regressive bill was actually progressive or perhaps by inserting a small progressive element to the plan allowing the lawmaker to point to the provision and claim it represented progressivity. No new theories or rationales for the progressive income tax developed under the Clinton administration. Instead, it was merely a plan to restore some of the progressive elements that had been eliminated under prior administrations.

President Clinton was a strong supporter of progressive income tax reform.[362] Unfortunately, once President Clinton came into office he had to prioritize reducing the deficit over tax cuts, in particular for the middle class.[363] Instead, the Clinton administration focused on reducing the deficit and increasing progressivity by increasing taxes. The 1993 Act increased the marginal tax rates on the highest individual income taxpayers and increased the Earned Income Tax Credit.[364] President Clinton placed particular emphasis on ensuring that the tax rate increases made the income tax more progressive, highlighting the taxes on families earning more than $200,000 a year would pay for 80% of the increased revenues raised under the tax act.

After President Clinton failed to reduce tax rates for the middle class, the Republicans won control of both the Senate and the House of Representatives in 1995. When they took office, many conservatives began to propose "revolutionary" ways to restructure and completely revise the United States taxing system. Almost all of the proposals were regressive and would have had redistributionary effects (and were recycled proposals seen over and over again in this analysis of legislative history). None of the proposals garnered any large amount of public support.[365] The proponents of these regressive proposals recognized how fundamental progressivity is to the income tax system and how ingrained it is to the American public and therefore they sought to prove that their proposals were in fact progressive.[366]

House Speaker Newt Gingrich and Chairman of the Ways and Means Committee Representative Archer, along with other congressional authors sponsored the "Contract for America," bill. Other proposals included consumption taxes and flat taxes. Senator Arlen Specter tried to make his proposal sound progressive by arguing that his flat tax proposal would "force many higher income taxpayers to pay their fair share of taxes."[367] Critics of the "Contract for America" saw it as a regressive tax that was an "affront to fundamental fairness and

362. *See* ELIZABETH DREW, ON THE EDGE: THE CLINTON PRESIDENCY (1994); BOB WOODWARD, THE AGENDA: INSIDE THE CLINTON WHITE HOUSE (1994).

363. *See* BROWNLEE, *supra* note 22, at 194.

364. *See* THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993, Pub. L. No. 103-66, 107 Stat. 379 (1993).

365. *See* BROWNLEE, *supra* note 22, at 211.

366. *See* Linder, *supra* note 50, at 908.

367. *The Flat Tax and Small Business: Hearing Before the Subcomm. on Taxation and Finance of the H. Comm. On Small Business*, 104th Cong. 178 (1995) (statement of Arlen Specter).

decency"[368] because it would take "food from the mouths of children and heat from the homes of senior citizens."[369] The "Contract for America" would have dealt a severe blow to vertical equity and the progressivity of the income tax, perhaps eliminating it all together. Vice President Al Gore called the proposal, "Robin Hood in Reverse."[370] Several Senate Republicans on the Senate Finance Committee voiced concerns or opposition to the tax cuts proposed in the "Contract for America" proposal.[371] The Senate ultimately voted it down.[372]

Other Republican proposals promoted eliminating the income tax, and in particular, strongly encouraged the repeal of the progressive tax.[373] Once the "Contract for America" lost its bid in the Senate, Representative Archer with Senator Richard Luger proposed a national sales tax or a consumption tax.[374] In this version of a national sales tax, Representative Archer and Senator Luger proposed a 16% sales tax rate on everything except food and medical services and a complete elimination of the income tax.[375]

In 1994 House Majority Leader Dick Armey proposed a flat tax, claiming it was, "based on the idea of fairness we learned in grade school: Everyone should be treated the same."[376] His version of a flat tax, at 17%, taxed all wages, salaries, and pensions, but exempted all unearned income.[377] This flat tax claimed simplicity but it was highly regressive. All income from investments and other types of non-wage or non-salary income was tax-free. Trying to gain public support, Representative Armey attempted to claim that his regressive tax was, "the definition of progressive."[378] Democratic Minority Leader Senator Gephardt called the flat tax "the largest redistribution of income in the history of the country."[379] Senator Gephardt instead wanted to lower the tax rate for most taxpayers to 10% and to include a high degree of progressivity for tax rates going up to 34%.[380] Senator Gephardt's plan claimed to continue to permit a deduction for home mortgage

368. 141 Cong. Rec. 2991 (1995) (statement of Rep. Richard Gephardt).

369. *See id.*

370. *See* Michael Wines, *Gingrich Promises to Tie Tax Relief to Cuts in Deficit,* NY TIMES (April 4, 1995).

371. *See* Eric Pianin, *Tax Cutters Lose Steam in Senate; House Panel to Unveil GOP Revenue Plan* WASHINGTON POST (March 14, 1995).

372. *See id.*

373. *Description of Provisions in the Contract with America within the Jurisdiction of the Committee on Ways and Means,* Committee on Ways and Means, U.S. House of Rep., 104th Cong., 1st Sess. (Jan. 5, 1995).

374. *See* BROWNLEE, supra note 22, at 1.

375. *See Just the Job for Jack Kemp,* THE ECONOMIST, (Apr 8, 1995); *Alternatives to our Current Tax System* , Congressional Record (House- June 8, 1995) H5704 (favoring the bill particularly because it would result in repealing the 16th Amendment and would ask the states to collect the funds while dismantling the IRS)(Nick Smith).

376. *See* Dick Armey, *Review Merits of Flat Tax,* WALL ST. J. A 16. (June 16, 1994).

377. *See* Linder, *supra* note 50, at 907.

378. *See Flat Tax: Some Economic Considerations Hearing Before the Senate Com on Finance,* 104th Cong., 1st Sess. (Apr. 5 1995) (statement of Dick Armey).

379. *See* Richard A. Gephardt, *A Democratic Plan for America's Economy: Toward a Fairer, Simpler Tax Code,* "Address, Center for National Policy, July 6, 1995; "Gephardt has his Own Plan on Tax Reform, San Francisco Chronicle, July 7, 1995.

380. *See id.*

interest, continue the earned income tax credit and retain the capital gains preference, and put up to 75% of taxpayers under the new 10% rate.[381]

Another proposal from the Senate was called the Unlimited Savings Allowance Tax (the USA Tax). It claimed to retain the progressive income tax, eliminating tax expenditures, adding an unlimited deduction for savings, a partial deduction for educational expenses, and a credit for social security taxes.[382] This would have been a combination of a progressive income tax with a consumption tax. It also would have included an 11% value added tax.[383] The USA Tax was very reminiscent of the Spending Tax that Treasury Secretary Thomas Adams had proposed after World War I and had also been favored by Treasury Secretary Henry Morgenthau during World War II.[384] A proposal was also made to eliminate the progressive income tax altogether in favor of a national sales tax.

President Clinton chose not to endorse or engage any of these proposals for reform. As one tax historian noted, there was no motive for President Clinton to try to radically overhaul the tax system.[385] There was severe partisanship dividing the executive and the legislative branches and President Clinton did not see the need for a dramatic reform of the tax code, particularly to one that would result in regressive taxes.[386]

CBO data illustrates that the changes enacted by President Clinton and the first President Bush restored progressivity of the federal tax system to the same level experienced in the early 1980s before the 1986 Tax Act.[387] The increase in progressivity was muted by a cut in the capital gains tax in 1997 reversed that pattern for very high-income families.[388] In the late 1990s there was a very dramatic increase in the incomes of higher-income workers, which contributed to an increase in effective tax rates, since a progressive tax system collects larger shares of income when the growth in income exceeds inflation.[389]

M. George W. Bush, Attacks on the Progressive Income, and Recent Laws

When George W. Bush took office in 2001 he planned to make tax cuts as significant as those made by President Reagan 20 years before him.[390] A critical difference is that President Bush did not take office with the extremely high tax rates Reagan encountered, or the complex network of tax expenditures and benefits that were used to undermine the progressivity of the income tax.

381. *See id.*

382. *See* USA TAX ACT OF 1995 S.722 by Sens Nunn and Domenici, Congressional Record (Senate- April 25, 1997), S5664.

383. *See id.*

384. *See* BROWNLEE, supra note 22, at 204.

385. *See id.* at 209.

386. *See id.*

387. *See* Burman, *supra* note 44 at 7.

388. *See id.*

389. *See id.*

390. *See* BROWNLEE, *supra* note 22, at 217.

When President Bush took leadership Republicans also controlled the Congress. Another difference between President Bush and President Reagan is that President Reagan sought to retain some progressivity in the income tax and was cognizant that if rates were adjusted in a certain way, the tax burdens would fall too hard on low-income taxpayers.[391] President George W. Bush's tax proposals either completely eliminated progressivity or severely limited it. Even though President Bush wanted to dismantle the progressive tax that President Reagan had sought to keep intact, he often invoked arguments that Reagan had used to leverage President Reagan's popularity.[392] While on the campaign trail, Candidate George W. Bush suggested a series of tax rate cuts at all levels, but the plan benefited high-income taxpayers the most.[393] He repeated President Reagan's argument that cutting taxes would stimulate growth of the economy.[394]

Following the election, polls reflected that the American public ranked debt repayment and continued social spending as higher priorities than tax cuts.[395] Ignoring the polls, the Bush administration ran with the assumption that most American wanted tax cuts and made cutting taxes and revising the underlying principles of progressivity in the income tax the highest priority of his administration.[396] Democrats argued that if there was money to cut taxes, the cuts should be made for low-income taxpayers who were more likely to spend their tax savings, producing an immediate stimulus to the economy. Irrespective of these challenges, President Bush passed his tax cut proposals in the first year of his presidency.[397] It reduced the tax rates including the highest and lowest rates and eliminated the estate tax.[398] Initially, the changes in rates and other tax revisions, such as educational benefits and an increase in the child tax credit, did not affect the progressivity of the tax code very much; nevertheless, President George W. Bush had a larger plan in place, which was implemented incrementally to drastically overhaul the progressivity of the income tax.[399] A drop in income in 2001 reduced the average tax bill, but the tax cuts enacted since 2001 had a far larger impact on revenue.[400]

391. *See infra* fn 324.

392. *See* BROWNLEE, *supra* note 22, at 218, 220.

393. *See id.*

394. *See id.* at 221.

395. *See* Wendy W. Simmons, *Public Has Mixed Feelings About Tax Cuts*, GALLUP (Jan. 24, 2001), http://www.gallup.com/poll/2077/Public-Has-Mixed-Feelings-About-Tax-Cuts.aspx..

396. *See* BROWNLEE, *supra* note 22, at 223.

397. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

398. *See id.*

399. *See* C. Eugene Steuerle, *The 2001 Tax Legislation from a Long-Term Perspective,* 54 NAT'L TAX J. 427, 430 (2001); LEN BURMAN, ELAINE MAAG & JEFF ROHALY, TAX POLICY CTR., *THE EFFECT OF THE 2001TAX CUTS ON LOW AND MIDDLE-INCOME FAMILIES AND CHILDREN* (2002), *available at* http://www.urban.org./uploadedpdf/410465.pdf.

400. *See* Steuerle, *supra* note 393; BURMAN ET AL., *supra* note 393.

In 2002, President George W. Bush proposed a consumption tax, which would have completely eliminated the progressive income tax.[401] In addition to his consumption tax proposal, he also began to consider making dividends tax-free.[402] In 2003 Congress enacted a series of tax cuts that began a shift toward a consumption tax system and away from a progressive income tax.[403] President Bush's revisions to the tax system cut taxes so dramatically that it caused a large drop in revenue, potentially risking an "episode of extreme fiscal stress . . . to materialize if the Bush tax cuts turn out to have made the tax system inadequate to meet the economic challenges facing the nation during the twenty-first century."[404] President Bush not only decreased taxes, creating this possibility of financial distress, but he also increased the deficit. President Bush did not exercise the fiscal restraint of former President Reagan or his numerous other predecessors. The proposed cuts were so dramatic that 450 economists, including 10 Nobel Prize winners, took out a full-page ad in the New York Times pleading with President Bush not to enact the cuts.[405] The economists released a statement through the Economic Policy Institute contending that the cuts would increase income inequality, increase the budget deficit, and fail to provide economic growth.[406]

The Bush administration proposed additional cuts: including a proposal to completely exempt dividends from taxation, permitting individuals to move $60,000 a year worth of investments into tax-free accounts among others. The income tax would remain in place but would only apply to wages, salaries, and rents.[407] High-income taxpayers who held wealth in investment accounts and generated income from those investments rather than from wages or salaries would have a significantly lower rate of tax (or perhaps no tax) while laborers would bear the burden of funding the federal government's operations. The final legislation as enacted in 2003 did not make dividends tax free but did reduce their tax rates to 15%, further affecting the progressivity of the income tax because dividends are typically earned by high-income taxpayers.[408] All of these proposed cuts would have diminished the tax codes progressivity even more. In addition, the President's Advisory Panel on Federal Tax Reform rejected the proposal for a national retail

401. *See* Richard W. Stevenson, *Bush, After Gaining Tax Cut, Is Taking Aim at Tax Code,* N.Y. TIMES, July 16, 2001, http://www.nytimes.com/2001/07/16/us/bush-after-gaining-tax-cut-is-taking-aim-at-tax-code.html.

402. *See* COUNCIL OF ECON. ADVISERS, ANN. REP. COUNCIL ECON. ADVISERS, *in* 2002 ECON. REP. PRESIDENT 7, 23-64.

403. *See* BROWNLEE, *supra* note 22, at 1.

404. , *Id.* at 8; in fact the plan appeared to be that if the revenue was cut, the spending would soon just automatically follow rather than anticipating that instead the lack of revenue would merely increase the size of the deficit, *see* David Firestone, *Washington Talk: Conservatives Now See Deficits as a Tool to Fight Spending,* NY TIMES (Feb.11, 2003).

405. *See* ECON. POLICY INSTITUTE, ECONOMISTS' STATEMENT OPPOSING THE BUSH TAX CUTS, *available at* http://www.epi.org/page/-/old/stmt/2003/statement_signed.pdf.

406. *See id.*

407. *See* OFFICE OF THE WHITE HOUSE PRESS SEC'Y, FACT SHEET: PRESIDENT BUSH TAKING ACTION TO STRENGTHEN AMERICA'S ECONOMY (2003), *available at* http://www.presidency.ucsb.edu/ws/?pid=80072 . For a more detailed discussion, see CRS IB10110, DAVID L. BRUMBAUGH & DON C. RICHARDS (COORDINATORS), MAJOR TAX ISSUES IN THE 108th CONG. (CRS updated Apr. 17, 2003).

408. *See* Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No, 108-27,115 Stat. 752.

sales tax, stating that the tax system would result in a high tax rate, would be difficult to administer, and would be burdensome on state taxing authorities.

The 2003 Bush Tax Cuts resulted in tax cuts of 0.3% of income for the bottom 20% of taxpayers and a 2.5% cut for middle-income taxpayers while the top 1% got tax cuts twice as large at 5.4%. The top 0.1% saw their after-tax income increase by 6.2%.[409] Estimates by economists Thomas Picketty and Emmanuel Saez conclude that the average federal tax for the top 0.1% of households fell from 60% to 34% from 1960 to 2004.[410] These tax cuts, and the corresponding decrease in progressivity of income taxes, resulted in dramatic growth in income and wealth disparity.

At a hearing on Tax Fairness held by the House Committee on Ways and Means, Leonard Burman, a Senior Fellow of the Tax Policy Institute made the following points: income inequality has been rising since the mid-1980s and is now approaching levels not seen since the Great Depression.[411] The federal income tax system mitigates economic inequality—and potentially at lower economic cost than other alternatives, such as trade restrictions or labor market regulations—but the recent tax cuts have disproportionately benefited those at the top, exacerbating the trend in the disparity of pre-tax income.[412] Further intensifying the inequality, the income levels of these same high-income taxpayer households have increased. The top 1% now earns 16% of all income—a level last seen just before the Great Depression, and double the amount in the 1960s and 1970s.[413] "However, even while economic inequality has been approaching record levels, the tax cuts enacted since 2001 have sharply reduced progressivity."[414]

These numbers validate one of the rationales behind the progressive income tax, that the progressive income tax can be used to distribute or mitigate income or wealth disparity. In this case, the Bush tax cuts have demonstrated that eliminating the progressivity of the income tax can increase the amount of income inequality, which was theorized by the economists who had publicly objected to President Bush's 2003 Tax Proposal and it appears that they were correct.

Income inequality continues to grow.[415] There have been gains in labor productivity, but all of the benefits have gone to the 10% highest-income individuals.[416] All other income classes have seen their wages grow more slowly

409. *See id.*

410. *See* Thomas Piketty & Emmanuel Saez, *How Progressive is the U.S. Federal Tax System? A Historical and International Perspective*, 21 J. ECON. PERSP. 3, 13 (2007). Jason Bordoff and Jason Furmann, both at the Bookings Institution, attribute most of this drop to a reduction in corporate tax rates, but I would argue that in fact it is not from a reduction in corporate tax rates, but instead that the taxpayers in the 0.1% are now investing in partnerships and limited liability companies, allowing them to escape the corporate tax altogether and permitting any gains to be taxed at capital gains rates. *See* Meredith R. Conway, *Stealth Inequity: Using Corporate Integration to Ease Unfairness in the Tax Code*, 2 WM. & MARY POL'Y REV. 53 (2010). *See also* Bordoff & Furman, *supra* note 25 at 335.

411. *See* Burman, *supra* note 44, at 4.

412. *See id.*

413. *See id.* at 3.

414. *See id.* at 3.

415. *See id.* at 2.

416. *See id.*

than productivity. Some have attributed the increasing skew in earnings to "the economics of superstars," which richly rewards the top performers relative to others who are nearly as productive.[417] The progressivity of the income tax has dramatically decreased since the enactment of the Bush tax cuts from 2001 to 2009.[418]

'President Obama has repeatedly stated that he is supportive of a progressive income tax and that he plans to enact tax rates consistent with a progressive income tax. However, Obama did not revise the tax system during his first term because of its potential impact on an unstable economy. Instead, when many of the tax cuts enacted during the second Bush administration were set to expire, debates over the appropriate amount of progressivity of the tax code and who should bear the burden of the tax began. The continuation of certain tax cuts does continue to be a subject of debate and is used by the Obama administration to further other policy goals when needed. Therefore, the future of the progressivity of the tax code and the full impact of the Bush tax cuts still remains to be seen and repercussions are still being felt and discovered.

V. PREDICTIONS AND CONCLUSIONS TO DRAW FROM THE ANALYSIS OF THE LEGISLATIVE HISTORY

There are several predictions and conclusions that can be made as a result of the analysis of the legislative history and the explanation of the six rationales for the progressive income tax. After reviewing the substantial legislative and secondary historical materials, there are certain trends developing in the recurring debate over the progressive income tax and alternative proposals that can be identified. In addition, this article uses testimony from two recent hearings, one before the House Ways and Means Committee and one before the Senate Finance Committee, to establish the relevance and necessity of the six fundamental rationales for the progressive income tax.

A. The Current Progressivity of our Income Tax

First, it is important to establish that the current income tax system is no longer truly progressive. The United States currently has what is in reality, a flat tax with smaller graduated rates for those who make less income. There is a flat tax rate for those who make $250,000, $2.5 million, $25 million or $250 million, and there are rate reductions for taxpayers who make $60,000 rather than $80,000. We essentially have flat tax with a couple of rate breaks for lower-income taxpayers. Once you add in employment taxes such as social security, which does not apply to much of the income earned by high-income taxpayers, the income tax appears even flatter. This flat tax trend is only further exacerbated by the 15% to 20% tax rate, which is essentially a flat tax that currently exists on capital gains and dividends and capital gains often make up most of the income of the wealthiest taxpayers. As

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417. *See id.*

418. *See* Beverly Moran, *Wealth Distribution and the Income Tax*, 53 HOW. L.J. 319, 325 (2010).

noted by Chairman Senator Baucus, "capital gains make up 57 percent of the adjusted gross income for the richest 400 taxpayers . . .[which] helped these extremely wealthy taxpayers, who had an average income of $345 million in 2007 . . . to pay an average tax rate of only 17 percent."[419]

As Professor Daniel Shaviro recently testified during a Senate Finance Committee, "A similar change in focus emerged during the 2010 debate concerning extending the Bush tax cuts for people at the top of the income distribution. Many on both sides of the debate argued that people at the very top were importantly different from those earning only, say, $250,000. This change reflects widespread public awareness of rising high-end income concentration, a trend in which there is substantial academic consensus that does not depend on people's policy preferences."[420]

Some resemblance to a progressive income tax does remain. Most importantly, the perception of the general public is that we still have a progressive income tax. In addition, the basic structure still exists in the current law with the pretense of graduated rates giving a lawmaker the ability to modify rates and the income levels to which they apply to create more progressivity. But as of right now, following the Bush Tax Cuts of 2001 and 2003, most of the progressivity in the income tax has been eliminated and the United States is experiencing the consequences of that decision.

B. Current Trends for Proposals for or Against the Progressive Income Tax

There are several trends in the debate surrounding the progressive income tax and alternative proposals that have emerged after reviewing the substantial history and supplementary materials. Since the Clinton Administration was in office, a consistent theme has emerged in alternative conservative proposals. When opponents to the progressive income tax make an alternative proposal, they attempt to ascribe a progressive aspect to the proposal. Sometimes they will label the proposal outright as progressive.

Perhaps this is because proponents of these alternative proposals believe that to get public support for the bill, it must contain a progressive aspect. As a speaker before a recent Senate Finance Committee noted, since World War I the Progressive Income Tax, although attacked at times and repeatedly contending with radical tax reforms, has remained the main source of revenue. The level of progressiveness because of tax loopholes and expenditures as well as inflation has threatened the degrees of progressivity but overall "the continuing progressiveness of the federal tax system helped maintain middle and lower class support for it. Most Americans still preferred the progressive income tax as the primary means of federal finance."[421] In addition, President Reagan's tax policies, "made it more

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419. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 2 (2011).

420. *Is The Distribution Of Tax Burdens And Tax Benefits Equitable? Hearing Before The Comm. on Fin.*, 112th Cong. 6 (2011) (statement of Daniel Shaviro, Wayne Perry Professors of Taxation, New York University School of Law).

421. BROWNLEE, *supra* note 22, at 216.

difficult for critics of the income tax to make an appealing case for abandoning it."[422] As a result, it seems that opponents now claim that their plans are progressive in some respect.

The progressive income tax is deeply ingrained in the American public and, in general, the presumption of the public is that our tax system is progressive. Therefore, when an alternative proposal is made, the proponent either just claims it is somehow progressive, inserts a small provision with a progressive aspect to it so they can claim that the bill is progressive, or they go through a deep and thorough analysis with the goal at the end to somehow conclude that the proposal is ultimately progressive, despite its appearance of being regressive.

For example, during the Clinton administration, Senator Arlen Specter tried to make his proposal for a flat tax sound progressive by arguing that it would "force many higher-income taxpayers to pay their fair share of taxes."[423] Representative Dick Armey claimed his flat tax proposal was, "the definition of progressive."[424] Others have argued that the tax is "already progressive enough" by looking at just income taxes alone and excluding the impact on progressivity of any payroll or capital gain taxes.[425]

A more recent example from 2011 is from the Fair Tax Act.[426] The proponents argued that a national sales tax with an effective tax rate of 23% on the consumption of all goods and services was actually progressive. To make this argument, they used math to call it progressive.[427] The proponents had economists determine whether the rates would be regressive or progressive. Because the rates are clearly regressive (when applied in the current time), the economists decided to determine if the tax would be regressive based on the tax rates one pays over his entire lifetime.[428] And as a result, these economists were able to conclude that the Fair Tax was in fact a progressive tax by looking at the applicable lifetime tax

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422. *Id.*

423. *Flat Tax: Hearing Before the Senate Comm. on Fin.*, 104th Cong., 165 (1995) (statement of Hon. Arlen Specter).

424. *Flat Tax: Hearing Before the Senate Comm. on Fin.*, 104th Cong., 94 (1995) (statement of Rep. Dick Armey).

425. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 131 (2011) (statement by the U.S Chamber of Commerce citing statistics provided by the Tax Foundation).

426. Fair Tax Act of 2011, H.R. 25, 112th Cong. (1st Sess. 2011), http://www.opencongress.org/bill/112-h25/text, S. 13, 112th Cong. (1st Sess. 2011).

427. *Tax Reform and Consumption-Based Tax Systems: Hearing Before the Comm. On Ways and Means*, 112th Cong., 8 (2011).

428. *See Tax Reform and Consumption-Based Tax Systems: Hearing Before the Comm. On Ways and Means*, 112th Cong., 13–22 (2011) (Testimony of Laurence J. Kotlikoff, Professor of Economics, Boston University). For example, most infants do not pay taxes (or buy things) as with many senior citizens, so averaging the lifetime tax rate of 30% (with an effective rate of 26%) by including theses periods, permitted economists to conclude that over a lifetime, the Fair Tax would actually be progressive. Unfortunately the plan did not include depositing one's lifetime savings in a bank account as well to be able to actually afford the tax during the temporary "current periods" where it will be regressive, such as when you need to buy a car and it would cost 26% more, or pay for college or daycare and it would cost 26% more.

rates.[429] The economist testifying at the hearing stated, "[Y]ou will see that this is actually a highly progressive tax, and it does lower the taxes on working people."[430]

C. *Recent Hearings Illustrate the Need for Understanding the Rationales for the Progressive Tax*

Because the Bush tax cuts were set to expire in 2012, there was significant debate throughout 2011 and 2012 regarding where and how the tax burden should fall. These debates continued to raise the six primary justifications for the progressive income tax as a justification for and against a more progressive system. In a September 2011 hearing on Tax-Reform Options in the Senate Finance Committee, Chairman Baucus argued that the wealthier taxpayers should bear a greater burden of the taxes because these taxpayers have a greater ability to pay.[431] He argued that the Bush tax cuts should be permitted to expire with respect to the highest income taxpayers because "[p]utting the full load of deficit reduction on seniors, on veterans, and middle-class families, for example, when the wealthiest can afford to pay more, simply does not make sense."[432]

Alternatively, Senator Orin Hatch stated that the momentum for asking the wealthier to pay a greater amount of the tax was from "talking points from wealthy liberals who seek to raise marginal rates . . . because they feel guilty that they are not paying their fair share, I guess."[433] Senator Hatch argues that rates should not be raised because it would raise taxes on small businesses. He did not argue against the ability-to-pay theory, but instead claimed that increasing tax rates on high-income taxpayers would result in unfair burdens on small business owners rather than targeting those with excess disposable incomes. For example, Senator Hatch says President Obama is not "trafficking in economic reality and cutting to the effectual truth for small businesses, if we raise marginal rates, the President talks about raising rates on wealthy people like himself, because he has money he really does not need."[434]

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429. At the hearing Economist Professor Kotlikoff argued that the Fair Tax was actually more progressive than the current income tax. He stated "Economists measure tax progressivity in terms of lifetime net tax rates, specifically as the ratio of the present value of lifetime net tax payments divided by the present value of lifetime resources (initial wealth plus the present value of future labor earnings). Politicians like to measure tax progressivity in terms of current taxes divided by current income. But current income is not a useful measure of a person or household's economic resources. Warren Buffett may have zero current income this year if his capital losses are large enough to offset his capital gains, but his personal resources are immense." *See Tax Reform and Consumption-Based Tax Systems: Hearing Before the Comm. On Ways and Means*, 112th Cong., 19 (2011). (Testimony of Laurence J. Kotlikoff, Professor of Economics, Boston University)

430. *Id.*

431. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 1 (2011).

432. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 1 (2011).

433. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 2 (2011).

434. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 2 (2011).

Many have again relied on several of the six justifications to emphasize the need for a more progressive tax. In recent legislative hearings experts testified that increasing tax rates on higher income taxpayers is necessary to redistribute the wealth and to stop populist uprisings. In 2011 one expert testified before the Senate Finance Committee that "[h]igher tax rates could mitigate economic inequality, which has grown markedly over the past 30 years . . . the middle class has been in a 30-year recession. While top incomes have exploded, middle incomes have stagnated." He further added, "[s]ome would like to raise taxes on low-income households, but that would put an undue burden on working families struggling to get by, and it would not raise as much revenue. Those people are poor." The same expert in public policy suggested increasing tax rates would also preserve the stability of the government arguing that, "the tax system plays an important role and might forestall more costly populist responses to inequality, such as trade restrictions, if we do not deal with the growing gap between rich and poor."[435]

In 2011 there were two hearings held on alternative tax proposals, one with the House Ways and Means Committee and one before the Senate Finance Committee. Both illustrate the need for the six rationales behind the progressive income tax and how the rationales, without proper context, may come up in debate, but merely confuse the discourse without giving any direction. It is helpful to pull some of the relevant testimony out of the most recent hearings to demonstrate how the six rationales intersect in the legislative debate, and to illustrate how now, with a better foundational understanding of the rationales, more logical and purposeful arguments can be made.

D. *Ways and Means Committee Hearing, Hearing on Tax Reform and Consumption-Based Tax Systems (July 26, 2011).*[436]

This hearing focused on the Fair Tax Act (the plan described above where the economist claimed it was actually a progressive tax plan). The testimony in this hearing touched upon some of the six rationales identified in this article, but because of a lack of historical references and analysis, the arguments were often incomplete. With the analysis of the six rationales, policymakers and lawmakers could more appropriately evaluate and debate whether a tax proposal was appropriate.

For example, in response to the claims of the economist that the 23% effective sales tax rate was actually progressive, several lawmakers made ability to pay arguments and argued that the burden was not proportionate to a taxpayer's ability to pay and reflected a disproportionate burden. Representative Bill Pascrell stated in response to the economist, "Let's be clear. A national sales tax would be nothing more, in my perception, than an enormous windfall for the very wealthy of this country. Plain and simple, the wealthy do not spend as much as lower-income

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435. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 14 (2011) (testimony of Dr. Leonard E. Burman, Professor of Public Policy at Syracuse University).

436. *See Tax Reform and Consumption-Based Tax Systems: Hearing Before the Comm. On Ways and Means*, 112th Cong. (2011).

families and the middle class. They just do not, as a percentage of their income."[437] Representative Black then argued along similar lines, "If you look at the Consumer Expenditure Survey, you will see that people in the bottom quintile spend about twice as much as their income. So the tax base that applies to consumption for people with low income is going to be higher, precisely because a lot of those people are the elderly who are drawing down saving."[438]

Representative Pascrell's argument was a representation of the ability to pay theory and the concept that a taxpayer's tax burden should be proportionate to his income level. Representative Black argued that the burden was also not proportionate to their ability to pay and would fall disproportionately on the poorest taxpayers, those below the poverty level and the elderly, who both generally spend all of their income and have less available funds, less surplus of income, to pay the tax.

E. Is The Distribution Of Tax Burdens And Tax Benefits Equitable? Hearing before the Committee on Finance, United States Senate

A hearing was also held in 2011 in the Senate Finance Committee. It further illustrates a Congressional debate where several of the six fundamental rationales for a progressive income tax are raised.

Chairman of the Senate Finance Committee, Senator Max Baucus, began by stating, "[A]n article by the Associated Press detailing this new study also revealed a perception among average Americans that the wealthy do not pay their fair share. The perception is that the tax loopholes and benefits that exist do not benefit average Americans, and Americans do not know a lot about them."[439] He added, "The 400 taxpayers with the highest adjusted gross incomes had an effective tax rate of just below 17 percent for the 2007 tax year. The average income for those taxpayers was $345 million per household. But the effective tax rate of folks earning between $1 million and $1.5 million was much higher at 24 percent. How is that possible? The U.S. has a fairly progressive income tax system. The tax brackets rise with income. But we also must consider the tax incentives that affect a person's tax liability and bring down tax rates. Two prime examples of this inequality are deductions and exclusions."[440]

Senator Baucus is illustrating two of the rationales presented by the legislative history. The first is the rationale that the progressive tax system is not actually progressive but is instead designed merely to give the impression that it is progressive, while in reality it is filled with so many loopholes and targeted breaks that the wealthy end up paying a lower rate of tax. The second rationale he describes is the ability to pay theory and what is a taxpayer's appropriate burden.

437. *Id.* at 56.

438. *Id.* at 63.

439. *Is The Distribution Of Tax Burdens And Tax Benefits Equitable?: Hearing Before the Comm. on Fin.*, 112th Cong., 1 (2011) (opening statement from Sen. Max Baucus, Chairman of the Sen. Fin. Comm.).

440. *Id.* at 2.

The taxpayers in his example are all wealthy and would be able to pay the tax imposed, but he is arguing that taxpayers who earn more should pay more.

Later, a discussion between Senator Baucus and Senator Orrin Hatch illustrates the ability to pay concept and the common misconceptions that can surround it. Senator Hatch states, "The Joint Committee on Taxation estimates that approximately 51 percent of all households, which includes filers and non-filers, had either zero or a negative income tax liability for tax year 2009."[441] Senator Baucus then points out that the "Tax Policy Center estimates that 47 percent of Americans did not pay income taxes in 2009. But that does not mean they did not pay any taxes at all. Many of these same folks paid payroll taxes, and they paid excise taxes. A large share of them are seniors, and many are families living in poverty."[442]

This is a perfect example of the ability to pay concept and the appropriate tax burdens for different levels of income. Originally, Senator Hatch objects to the discovery that a majority of taxpayers are not paying any tax. Then Senator Baucus clarifies that the percentages represent taxpayers who are either elderly and on a fixed income with limited resources and therefore little surplus income, or they are individuals living in poverty.

Senator Baucus then proceeds to give an example of the rationale of whether the progressive income tax should be used to distribute income and/or wealth among taxpayers. He also asks whether the growing disparity in income and wealth is perhaps causing the growing lack of progressivity in the income tax.

Senate Baucus states, "The general perception of inequity in the tax code may also stem from the fact that economic prosperity is not shared as widely as it once was. Over the last 30 years, households with incomes in the highest 1 percent have seen their before-tax income grow by 280 percent. But over the same period, 90 percent of Americans have seen essentially no increase at all."[443] And "As we focus on tax reform, we must ask whether our tax code has contributed to this disparity in income growth. We should consider whether our tax system should take these disparities into account in some way, and we must question whether our tax code can better promote economic mobility and opportunity."[444]

Senator Baucus is debating the fundamental rationale of whether the progressive income tax plays a role in distributing income and wealth and whether it should. He also perceptively raises the possibility that the progressive income tax (or decrease in the progressivity of the income tax) is contributing to the growing inequality.

During the hearing, Professor Daniel Shaviro added to the issue of whether the progressive income tax affects income inequality. He states in his testimony that he does not believe the lack of progressivity is adding to rising inequality, but that the income tax can be used to alleviate it. He reports, "The tax code is not a main player in [the increase in income inequality] which is a lot of the demographics,

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441. *Id.* at 4.
442. *Id.* at p. 2.
443. *See id.* at 2.
444. *See id.*

technology, things like that. The tax code has contributed, though, in the sense that, if there were higher rates that were effective—and that is, obviously, an important question—then it could have ameliorated after- tax inequality."[445] Professor Shaviro also added "but I want to mention a lot of the story has to do with things like the financial sector, and CEO compensation going up, and things like that. Salaries have really been the big driver of rising high-end income inequality. The tax code can ameliorate that. That is all we are talking about, not eliminating it, but ameliorating it if there are slightly higher rates that are relatively effective."[446]

While Professor Shaviro does not believe that the progressive income tax (or lack thereof) is creating the growing inequality in income, he posits that higher tax rates under a progressive income tax could be used to alleviate the inequality and help redistribute the income.

During the hearing Senator Orrin Hatch identifies one of the questions that this paper seeks to address. "What this hearing is fundamentally about is whether the tax code is a means of funding the basic and essential functions of a constitutional republic or whether it is a means for a small elite to create their vision of a utopia. I think the answers to these questions about the equitability of tax burdens and tax benefits will become apparent once we actually determine the purpose of the Federal tax code."[447]

The six primary rationales for the progressive income tax have now been identified and may clarify the answer to Senator Hatch's question. With that information lawmakers and scholars can determine whether the six underlying reasons for the progressive income tax are still relevant and how to address them.

V. CONCLUSION

The intent and scope of this paper does not include making broad policy recommendations or evaluating the economic debate and evidence on an income tax to propose a "best tax structure." Because of the lack of existing scholarship establishing the reasons a progressive income tax was enacted and continued through so many administrations, political parties and persuasions—policy makers could not appropriately evaluate the consequences of a proposal affecting the progressive income tax.

Instead, the intent of this paper is to lay out the six fundamental reasons we have a progressive income tax. For better or worse, the American public is tied to a progressive income tax, and in each legislative session, as more and more proposals are introduced to eliminate or tinker with the progressive income tax, lawmakers need to ask the critical question of why they are supporting or opposing a progressive income tax, as well as what the consequences of that decision are.

The progressive tax does not exist merely for economic reasons; there are more economically efficient systems, so no matter how economically sound a proposal is, unless it fulfills additional needs served by a progressive income tax, it will not be

445. *Id.* at 15.
446. *Id.*
447. *Id.* at 5.

an appropriate replacement. The progressive tax does not exist because it always creates the fairest results, so coming up with a "more fair" proposal will not work if the lawmakers making the proposal do not address the underlying issues behind the progressive tax. Essentially, each of the six reasons, which have been repeatedly readdressed throughout the legislative history, need to be evaluated before any discussion surrounding keeping, repealing, amending, or revising the progressive income tax can take place.

A. Applying the Factors

An analysis of the six foundational rationales in the current economic and political climate demonstrates that all of them are still very relevant and need to be essential considerations to any discussion about an appropriate tax structure.

(1) The Ability to Pay Theory – Recent statistics demonstrate that taxpayers with higher incomes face lower tax burdens as a result of the tax cuts under President Bush, including the reduction in the capital gains tax rate. Lower-income taxpayers often now pay a greater tax rate than extremely wealthy high-income taxpayers. Recent examples in the media include President Obama, who pays a lower rate of tax than his secretary, and Warren Buffett, who pays a lower rate of tax than his secretary as well. "One advantage of taxing capital gains in full is it allows [the government] to lower tax rates on ordinary income, on small business income, while maintaining the overall progressivity of the tax system."[448] Another current example was reflected in the protests of the "99%" against the "1%" in the Occupy Movements and the arguments that the wealthiest 1% of taxpayers are not paying their share of taxes.[449]

(2) To Preserve Democracy – Democracy has been threatened by the concentration of wealth in the few who are able to control the airwaves and advertising, special interest political groups formed by wealthy individuals and now corporations following the Citizen United decision where wealth is concentrated and can inappropriately influence both legislation and the political debate.[450] Allowing these groups the largest and loudest voices disenfranchises the ordinary individual citizen from having his voice heard. All of these groups powerfully influence our legislators, legislative policy, and dominate and control the political discourse. The inequality of wealth is creating the very power instabilities that the

448. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 23 (2011) (testimony of Dr. Leonard E. Burman, Professor of Public Policy at Syracuse University).

449. *See Cornel West on Occupy Wallstreet: It's the Makings of a U.S. Autumn Responding to the Arab Spring*, DEMOCRACY NOW!. (Sept. 29, 2011), http://www.democracynow.org/blog/2011/9/29/cornel_west_on_occupy_wall_street_its_the_makings_of_a_us_autumn_responding_to_the_arab_spring;
Katrina vanden Heuvel, *Will Occupy Wall Street's Spark Reshape our Politics*? THE WASH POST (Oct. 11, 2011), http://www.washingtonpost.com/opinions/will-occupy-wall-streets-spark-reshape-our-politics/2011/10/10/gIQArPJjcL_story.html.

450. Citizens United v. Federal Election Commission, 558 U.S 310.(2010); Sheelah Kolhatkar, *How Karl Rove's Super PAC Plays the Senate* BUSINESS WEEK (Sept. 4 2012), http://www.businessweek.com/articles/2012-09-04/exclusive-how-karl-roves-super-pac-plays-the-senate.

founders were concerned about and is a threat to our democracy and a government for the people, of the people and by the people.

(3) To Prevent Socialism, Communism, Anarchy or Revolution – The constant protests throughout the country under the Occupy Movement have clearly illustrated that the progressive income tax (or the lack of one) is threatening the stability of our government. The very premise of the 99% versus the 1% argument is how income and wealth is distributed and who bears what burdens. The tax system is not adequately addressing this issue and is resulting in demonstrations and riots, some specifically designed to interfere with business and the government.[451] As one expert testified, "[i]f the bottom 60 or 80 percent of the population feels like they're not getting their fair share, that could lead to a populist revolt." Therefore "those who benefit most from the current system have an incentive-completely beyond any notion of altruism- to try to mitigate extreme inequality in ways that entail less economic cost."[452]

(4) The Benefit Theory – It is unclear who is receiving the benefits of government. While it is only a matter of perception, it appears that taxpayers at either end of the income spectrum, the wealthiest and the poorest receive the most in government benefits, while the tax burden falls the heaviest on the middle class. The middle class goals of good schools, opportunities for college, secure jobs, and financial stability are not benefits currently being provided by the government.

(5) There is an illusion of a progressive tax to appease the public while really doing favors for special interests – the statements made and statistics cited by Senator Max Baucus above and recent polls clearly demonstrate that the perception of the American public is that the tax system is not truly progressive, that high-income taxpayers have a lower tax burden than middle7-income and low-income taxpayers, and that there are many tax breaks designed just for the wealthy.[453] The progressivity of the tax has dramatically decreased since the Bush tax cuts of 2001-2009.[454]

(6) Using the Progressive Income Tax to Redistribute Income or Wealth – The disparity and inequality of income and wealth is at its greatest levels since the Great Depression and the growth in disparity correlates with the same time period that progressivity began to erode from the income tax. Income and wealth disparity has

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451. *See Cornel West on Occupy Wallstreet: It's the Makings of a U.S. Autumn Responding to the Arab Spring*, DEMOCRACY NOW!. (Sept. 29, 2011), http://www.democracynow.org/blog/2011/9/29/cornel_west_on_occupy_wall_street_its_the_makings_of_a_u s_autumn_responding_to_the_arab_spring;
Katrina vanden Heuvel, *Will Occupy Wall Street's Spark Reshape our Politics*? THE WASH POST (Oct. 11, 2011), http://www.washingtonpost.com/opinions/will-occupy-wall-streets-spark-reshape-our-politics/2011/10/10/gIQArPJjcL_story.html.

452. *See Tax Reform Options: Marginal Rates on High-Income Taxpayers, Capital Gains, and Dividends: Hearing Before the Sen. Finance Committee* 45 (2011) (written statement of Dr. Leonard E. Burman, Professor of Public Policy at Syracuse University).

453. *Is The Distribution Of Tax Burdens And Tax Benefits Equitable?: Hearing Before the Comm. on Fin.*, 112th Cong., 1–3 (2011) (opening statement from Sen. Max Baucus, Chairman of the Sen. Fin. Comm.); Rep. Chaka Fattah, *Policy Essay: Déjà vu All Over Again: Reexamining Fundamental Tax Reform and Evaluating the Feasibility of a Transaction Tax in the 111th Congress*, 47 HARV. J. ON LEGIS. 327, 332 (2010).

454. *See* Beverly Moran, *Wealth Distribution and the Income Tax*, 53 HOW. L.J. 319, 325 (2010).

been increasing since the mid-1980s, which corresponds to when the Reagan tax breaks began to take effect and reduce the amount of progressivity in the income tax.[455]

Now that the six rationales used throughout the legislative history of the progressive income tax have been established, and it has been confirmed that they are still very much relevant today. Legislators, analysts, and policymakers can finally base their analysis and proposals on the central principles upon which the progressive income tax was based.

455. *See* Burman, *supra* note 44, at 4.