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The Wealth Tax—Egalitarian Dream or Utilitarian Nightmare?

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"And then the half-mad men knew and they went all mad. One hunger sharpened another hunger, and one crime blotted out the one before it, and the little crimes committed against those starving men flared into one gigantic maniac crime."

John Steinbeck, East of Eden[1]

In the Nottingham of literary folklore, the poor starved while the wicked feasted. To survive, ordinary people needed a savior, and they found it in Robin Hood. Taking from the rich to feed the poor, the green-clad yeoman emboldened the hopeless and became a hero of the proletariat for centuries to come.[2] *Today, the poor face a similar plight—castles and kings have disappeared, but an uncrossable moat seems to be widening between the "haves" and the "have nots." Ordinary working people need a hero. Instead of Robin Hood, many are beginning to howl for a new solution—one that would turn the tables on the wealthy and give them a taste of their own medicine. Their answer: tax the rich.*

The urge is timeless. Landed gentry, titled aristocracy, or silicon-valley elite, the rich have always occupied an enviable spot in society. But in a world rocked by a global pandemic and market turmoil, the divide between ordinary and elite has only grown. As interest rates and inflation rise and hard-working Americans watch their industries dwindle, America's billionaire class is thriving. While Jeff Bezos and Elon Musk

1. JOHN STEINBECK, EAST OF EDEN 2275–76 (Penguin Books Ltd. 1979) (1952).

2. *See* John H. Chandler, *Robin Hood: Development of a Popular Hero*, UNIV. OF ROCHESTER, https://d.lib.rochester.edu/robin-hood/text/chandler-robin-hood-development-of-a-popular-hero [https://perma.cc/BB3V-MPW4] (last visited Dec. 26, 2022).

battle for the title of world's richest man, normal Americans seem to inch daily towards a Nottingham reality.

As a result, many businessmen, economists, and policymakers have come forward with a new solution: tax the assets of the ultra-wealthy. This so-called "wealth tax" would be a form of redistributive justice aimed at closing the wealth gap and putting money where it is most needed: in the hands of hard-working Americans. To do so, it would levy an annual tax on the standing wealth of the financial elite. But is this really a workable solution? At first blush, a tax on standing wealth sounds workable, even desirable. Surely the uber-wealthy can afford to lose a bit of their massive wealth, and think of all the wrongs that could be righted with the revenues such a tax would generate. Utopia, it might seem, is within grasp.

But these claims must be tested. If a wealth tax is to produce tangible good, it must be measured against a tangible standard. While the proponents of a wealth tax laud it as a modern-day Robin Hood, its detractors stand ready to point out that in the long run, the ends might not justify the means. To truly judge a policy as socially disruptive as a wealth tax, discernable standards must be applied to answer a simple question: is a wealth tax good?

This Article attempts to answer that question by applying a Utilitarian moral framework to current wealth tax proposals. Armed with a historical understanding of the progressive U.S. tax system and an eye toward cumulative effects, it seeks to determine whether a wealth tax is morally defensible, both as an economic solution and a philosophical ideal.

Ultimately, the answer is clear: a tax on wealth, while attractive in theory, is ultimately not the best solution for a struggling society. A wealth tax might feel good; it might even succeed in sticking it to the rich. But at day's end, its costs outweigh its benefits, and its downstream effects, as well as its ideological underpinnings, are less effective and far more sinister than they appear. As this Article will show, enacting any of the current wealth tax proposals would be a bad choice—one with potentially devastating consequences. It would do more harm than good and could leave the country looking a lot less like Robin Hood and a lot more like Prince John.

INTRODUCTION

Anyone who has ever read a bedtime story knows the legend of Robin Hood. What boy has not run through the woods with a bow and a quiver of homemade arrows, imagining himself cutting through the green of Sherwood Forest to raid Prince John's wagons? Lusty tales of the benevolent outlaw have woven themselves into the fabric of the downtrodden since the fifteenth century with near universal appeal.[3] By robbing the rich to feed the poor, he protected the needy from injustice—becoming the savior not only of Nottingham, but of lowly and oppressed peoples throughout the ages.[4] Many things have changed through the telling, but the heart of the story has always been the same: a worn-out ballad of rich versus poor; and as long as that ballad continues, the poor will need hope.

Ever since there was something worth having, there have been those who have it and those who do not. Landed gentry, titled aristocracy, or silicon-valley elite, the rich have always occupied an enviable spot in society. There may not be a king anymore, but there are certainly castles, and the ever-widening gap between the "haves" and the "have nots" can feel like an uncrossable moat. In a world that recently ground to a halt under the fear and uncertainty of a pandemic, that moat has only grown. As small business owners struggle to keep their doors open and hard-working Americans are laid off by the thousands, America's billionaire class is thriving.[5] And while Jeff Bezos and Elon Musk battle for the title of world's richest man, normal Americans seem to inch daily towards a Nottingham reality.[6]

As a result, many businessmen, economists, and politicians have come forward with a new solution: tax the assets of the ultra-wealthy.[7] This so-called "wealth tax" would be a form of redistributive justice aimed at

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3. *See The Real Robin Hood*, HIST. (Aug. 21, 2018), https://www.history.com/topics/british-history/robin-hood [https://perma.cc/53LY-735X].

4. *Id.*

5. *See* Juliana Menasce Horowitz et al., *Trends in income and wealth inequality*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/ [https://perma.cc/BJT7-C269].

6. *See* Davide Scigliuzzo, *The Rich Are Minting Money in the Pandemic Like Never Before*, BLOOMBERG WEALTH (Jan. 17, 2021, 6:00 AM CST), https://www.bloomberg.com/news/articles/2021-01-17/the-rich-are-minting-money-in-the-pandemic-like-never-before [https://perma.cc/6U2B-FBFD] ("For [the rich], not only has it been relatively easy to carry out their white-collar jobs . . . [b]ut the Federal Reserve's unprecedented emergency measures—including slashing benchmark rates to zero—have padded their wallets too. They've refinanced their mortgages at record low rates, purchased second homes to get away from cities and watched the value of the stocks and bonds in their investment accounts surge.").

7. *See* Kate Dore, *There's a growing interest in wealth taxes on the super-rich. Here's why it hasn't happened*, CNBC (Arp. 9, 2022, 9:00 AM EDT), https://www.cnbc.com/2022/04/09/theres-a-growing-interest-in-wealth-taxes-on-the-super-rich.html [https://perma.cc/E8LM-X9ZN].

closing the wealth gap and putting money where it is most needed—in the hands of hard-working Americans. To do so, it would levy an annual tax on the standing wealth of the financial elite. By taxing net worth, rather than income, the basic idea is to close many of the loopholes the rich use to escape taxes, allowing the government to redistribute excess wealth towards real needs. But is this really a workable solution? While the proponents of a wealth tax laud it as a modern-day Robin Hood, its detractors stand ready to point out that in the long run, the ends do not justify the means. But do they?

To answer that question, this Article proceeds in five parts to explain why a tax on wealth is not the best solution for a struggling society. Part I lays out the history and current state of America's progressive income tax structure and exposes the shortcomings which have fueled a desire for a wealth tax. Part II explains the idea of a wealth tax, detailing its theoretical underpinnings as well as its practical implications and examining the mechanisms by which it would achieve its redistributive goal. To determine whether a wealth tax is morally justifiable, Part III introduces the moral theory of Utilitarianism, tracing its development from the nineteenth-century philosophies of Jeremy Bentham and John Stuart Mill to its continuing influence today. Part IV then applies the Utilitarian framework to the idea of a wealth tax—a process that reveals the moral downsides inherent to its proposal. Finally, in light of the wealth tax's failure to commend itself to Utilitarian morality, Part V proposes a flat tax as an alternative approach, briefly addressing arguments both for and against the proposal and concluding that a flat tax, in the end, stands the best chance of righting the wrongs of the current system.

I. AMERICA'S PROGRESSIVE TAX STRUCTURE—HISTORY AND CURRENT STATE

America saw its first progressive income tax in 1861, when the Revenue Act was signed into law by President Abraham Lincoln during the Civil War.[8] From that point on, America has employed a progressive tax.[9] The structure is referred to as "progressive" because as an individual's earned income increases, the rate at which that income is taxed quite literally "progresses."[10]

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8. Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX LAW. 295, 297 (2013) (citing Revenue Act of 1861, Ch. 45, 12 Stat. 292, 309).

9. *Id.*

10. Steven A. Bank, *Origins of a Flat Tax*, 73 DENV. U. L. REV. 329, 335 (1996). In the context of a tax regime, a progressive rate structure is one in which

The impulse behind progressivity is twofold. First and foremost, progressivity is touted as a way to increase tax revenue so that the government can operate successfully.[11] "Over the last fifty years, income and payroll taxes have accounted for the majority of the federal revenues."[12] The thought follows, therefore, that by increasing tax rates on those who can afford to pay them, a progressive schedule can provide higher revenues for the federal government. The second justification is rooted in the theory of equal sacrifice.[13] In simplest terms, equal-sacrifice theory argues that taxes should impose equal burdens on taxpayers, relatively speaking.[14] A rich man, the theory contends, should therefore feel the same inconvenience in paying his taxes as a poor man. Under the assumption that numerically equivalent tax rates would be felt more harshly by the poor—who use their income for necessities—than the rich—who use their income for luxuries—the progressive system thus taxes the rich at a higher rate.[15]

Hard though it may be to believe, today's income-tax rates are relatively modest.[16] The United States actually enforced highly progressive taxes in the early part of the twentieth century and by the

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the rate at which an individual is taxed increases as his income increases. An individual who earns $50,000 will therefore be taxed as a lower rate than an individual who earns $100,000, and so on.

11. *See* JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 69 (1985) (noting that even the progressivity of the system introduced in the 1862 Revenue Act "was introduced not out of concern for equity, but rather to increase revenues").

12. Bank, *supra* note 10, at 340 (referencing Professor Sheldon Pollack's estimate that the income tax accounted for 45% of federal receipts from all taxes in 1950, jumping to around 73% in 1985); *see also* SIDNEY RATNER ET AL., THE EVOLUTION OF THE AMERICAN ECONOMY: GROWTH, WELFARE, AND DECISION MAKING 518 (1979) (concluding that income and payroll taxes comprised about 70% of total tax revenues in the late 1970s).

13. Bank, *supra* note 10, at 337–38.

14. *See* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 804 (Sir William J. Ashley ed., Longmans, Green & Co. 1923) (1848) [hereinafter MILL, PRINCIPLES OF POLITICAL ECONOMY] (holding that the true principle of taxation is that each person "shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his").

15. STEPHEN F. WESTON, 15 PRINCIPLES OF JUSTICE IN TAXATION 187–88 (AMS Press, Inc. 1968) (1903).

16. *See* Savr Kumar, *The Wealth Tax: Pipe Dream or Path to Justice*, BERKELEY ECON. REV. (Apr. 15, 2020), https://econreview.berkeley.edu/the-wealth-tax-pipe-dream-or-path-to-justice/ [https://perma.cc/3P4H-UZ9D].

second World War had cranked top marginal rates as high as 91%.[17] The Reagan administration's tax cuts saw top rates decrease dramatically, bottoming out around 28%.[18] Currently, the U.S. tax regime employs a seven-bracket rate structure, with the top rate set at 37% and the bottom at 10%.[19] Though a progressive system seems firmly established as the norm, the past several years have seen it face a growing discontent.[20]

II. THE WEALTH TAX EXPLAINED

There are many who question the efficacy of the redistributive theory embodied in our current progressive system.[21] The rich pay a higher rate on paper, it is true; but in reality, they often pay much less.[22] This is largely because the wealthy have the resources, knowledge, and expertise to work within the tax code to find ways to pay less—taking advantage of the system and making it work for them.[23]

A. The Perceived Need for a Wealth Tax

Many argue that the U.S. has not had a truly progressive system since politicians learned the value of trading tax breaks for campaign contributions.[24] Money is power, and the wealthy have enough of both to take advantage of the loopholes and deductions built into the tax code and

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17. Edward J. McCaffery, *The Death of the Income Tax (or, The Rise of America's Universal Wage Tax)*, 95 IND. L.J. 1233, 1270 (2000) (citing Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2096–99).

18. *Id.*

19. *Id.*

20. *See* Rick Ungar, *A Progressive's Case For Moving To The Flat Tax--Maybe*, FORBES (Nov. 11, 2015, 2:03 PM EST), https://www.forbes.com/sites/rickungar/2015/11/11/a-progressives-case-for-moving-to-the-flat-tax-maybe/?sh=1ba1ed5026bc [https://perma.cc/CW6T-VUJY] ("It should be clear to one and all that people who earn at the highest levels in our society have long been exceedingly adept at keeping their effective tax rates well below what a 'pure' progressive system would require of them.").

21. *See* Emily DeVito, *Why the US Needs a Wealth Tax*, ROOSEVELT INST. (Feb. 11, 2021), https://rooseveltinstitute.org/2021/02/11/why-the-us-needs-a-wealth-tax/ [https://perma.cc/278T-7JJQ].

22. *Id.*

23. *See, e.g.*, Ungar, *supra* note 20 ("As Warren Buffet has often reminded us, he pays at a lower rate than his secretary who earns, obviously, considerably less than the boss.").

24. *See, e.g.*, *id.*

avoid their high marginal rates.[25] Taxes fall heaviest on wage earners in the middle and lower classes who are forced to pay their share while the rich find ways to live off of existing capital.[26] This begs the question: is the U.S. progressive system really progressive?[27]

Calls for increased marginal rates only add to the problem. Though founded in the idea of fairness—making sure that the rich pay their fair share—rate hikes often do more to penalize the lower and middle classes than they do to help them.[28] The ultra-wealthy remain untouched, simply hiring lawyers and accountants to exploit provisions in the tax code that their lobbyists often have put there in the first place.[29]

Take, for example, the sections in the tax code that allow for nonrecognition of gains.[30] Under these provisions, a taxpayer can defer paying taxes on investment gains until they are "realized."[31] Thus, by properly maneuvering his investment gains, the savvy investor can avoid paying taxes on them until he has aged into a more favorable tax bracket.[32]

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25. *See id.*

26. *See* McCaffery, *supra* note 17, at 1234 ("Those few who have significant wealth can easily find ways to live off it, well and tax-free. America's many workers have no such choice.").

27. *See* Bank, *supra* note 10, at 337 (noting that since the bulk of tax code deductions favor those with the resources to use them, a graduated rate tax, however progressive, is destined to become regressive in its effect, creating a system that rewards the possession of capital and punishes its lack).

28. *See* William G. Gale, *Ocasio-Cortez's tax on the super rich won't happen. Here's a better way to do it*, CNN BUS. (Jan. 22, 2019, 5:35 PM EST), https://www.cnn.com/2019/01/22/perspectives/alexandria-ocasio-cortez-tax-plan-alternative/index.html [https://perma.cc/E4VW-PKYN] (explaining that a plan to raise the top marginal tax rates would have no other significant effect than to burden a few working millionaires).

29. Ungar, *supra* note 20 ("It should be clear to one and all that people who earn at the highest levels in our society have long been exceedingly adept at keeping their effective tax rates well below what a 'pure' progressive system would require of them.").

30. *See* 26 U.S.C. §§ 351, 1033, 1031.

31. Under 26 U.S.C. § 351, the owner of a corporation who owns 10 million dollars' worth of land that appreciates in value up to 15 million dollars can sell that land to his corporation in exchange for its value in company stock. *Id.* § 351 (2005). By engaging in similarly non-recognized exchanges, he can defer payment of gains and take a continued basis in the property (stock, land, or otherwise) until later in life, when his marginal rate for those gains will be lower.

32. Deborah H. Schenk, *Saving the Income Tax With a Wealth Tax*, 53 TAX L. REV. 423, 424 (2000) ("The realization requirement, which is easily manipulated, makes it possible for the well-advised and wealthy taxpayer at least to defer, and frequently to eliminate, tax on most capital income.").

The wealthy typically possess both the knowledge and the resources to engage in this kind of planning; the poor quite often possess neither.

This state of affairs has led many to view the current system with skepticism.[33] Some go so far as to say that the federal income tax is dead, calling it instead a "wage tax" because, in reality, it taxes the wages of working people while allowing those with vast wealth to generate income based on capital gains.[34] The middle and lower classes, whose income is comprised mainly of taxable wages, fight and claw to pay their share while the rich appear to sit on the sidelines and get richer.[35] But can anything really change that?

B. The Response—A New Initiative

In response, several politicians and prominent national figures have announced their support for what they call a "wealth tax."[36] The current system is not doing enough, they say, so drastic steps must be taken to ensure that the ultra-rich pay their fair share of the tax burden.[37] Taxing income will not solve the problem, since the rich can maneuver that income to avoid the snares of the tax code. As a result, many have concluded that the only way to make sure the well-to-do pay their fair share is to tax their standing wealth.[38]

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33. *See* McCaffery, *supra* note 17, at 1234 ("[A] cynic might suggest that the [federal] income tax . . . persists only to feed the Wall Street financiers who help their clients avoid paying it and the politicians and lobbyists who benefit whenever tax reform specifically for the wealthy is on the legislative table.").

34. *See id.*

35. Data from the Federal Reserve shows that the top one percent owned nearly one-quarter of all U.S. household wealth 30 years ago and now owns nearly one third. Meanwhile the bottom 50% of people have gone from owning 3.6% of the wealth as of year's end 1989 to a meagre 2.7% as of year's end 2021. *Distribution of Household Wealth in the U.S. since 1989*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Dec. 16, 2022), https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/ [https://perma.cc/K4ZR-W7VH] .

36. The idea of a wealth tax has taken many different forms. Senator Warren, for example, has proposed the "Ultra-Millionaire Tax Act," while Senator Bernie Sanders, not to be outdone, has offered his own "Tax on Extreme Wealth." Danielle Kurtzleben, *How Would A Wealth Tax Work?*, NPR (Dec. 5, 2019, 5:00 AM ET), https://www.npr.org/2019/12/05/782135614/how-would-a-wealth-tax-work [https://perma.cc/CJ9W-UMW4].

37. *See, e.g.*, Schenk, *supra* note 32, at 424 (affirming the need to tax wealth in light of the claim that so far no one has offered any viable solutions to the problems facing the income tax).

38. *Id.*

The idea of a wealth tax is simple. To address the needs of average Americans, those with wealth in excess of $50 million (or some other arbitrary number) should pay a percentage of their net worth annually.[39] Unlike traditional income taxes, a wealth tax would be levied on a person's standing net worth—that is, his assets minus his debts—rather than the income he brings in each year.[40]

Of the proposals, Senator Elizabeth Warren's plan is the most popular.[41] It would apply a two-percent annual levy on all household net worth and trusts valued between 50 million and 1 billion dollars and a six percent annual levy on net worth over 1 billion dollars.[42] All told, it is estimated that the plan would affect about 70,000 Americans,[43] costing them as much as $82 billion.[44] In theory, these proceeds could go towards infrastructure improvement, business-recovery packages, or direct public stimulus.[45]

At its core, a wealth tax is redistributive, founded upon the assumption of decreasing marginal utility—that is, that a dollar is less valuable to a rich man than it is to a poor man.[46] By taking money from the rich, who do not need it, and giving it to the poor, who do, redistribution aims to give the dollar its highest worth by putting money where it can elicit the most pleasure.[47]

C. But is This a Good Idea?

On its face, a wealth tax seems a noble inclination. Using the superfluities of the rich to fill the needs of the poor has a nice ring to it. It sounds, in fact, somewhat like a modern-day Robin Hood. But in a nation whose American dream envisions a boundless chance at betterment, several questions need to be asked. Is a wealth tax a good idea? Why should the government force one group of individuals to carry the load for

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39. Kurtzleben, *supra* note 36.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See* Robert Frank, *How much would a wealth tax really raise? Dueling economist reflect new split in Democratic Party*, CNBC (July 10, 2019, 4:53 PM EDT), https://www.cnbc.com/2019/07/10/dueling-economists-debate-how-much-a-wealth-tax-would-raise.html [https://perma.cc/TXH9-JBLD].

45. Kurtzleben, *supra* note 36.

46. Mark S. Stein, *Nozick: A Utilitarian Reformulation*, 18 N. ILL. U. L. REV. 339, 342 (1998).

47. *Id.* at 348.

others at their own expense? Do the rich really owe anyone anything at all? And even if they do, why is it the government's job to enforce that debt? Could redistribution be best accomplished through private benefaction? These questions, at their core, are concerned not so much with economic theory as they are with morality; if one is to answer them, a moral theory must be adopted.

III. UTILITARIAN MORAL THEORY—A SENSIBLE FRAMEWORK

Before spending hours charting graphs and yelling across tables to decide whether a wealth tax is a workable idea, one must first decide whether it is, in fact, a good idea. Enslaving a village may be a perfectly effective mechanism for, say, building a monument, and no doubt whipping a horse nearly to death will be an efficient way to pull a cart, but efficacy alone does not make an act acceptable—moral justification is required. To that end, this Article will venture to examine whether a wealth tax can be condoned on moral terms.

A. Utilitarianism Defined

Probing the moral value of a wealth tax requires the adoption of a moral theory. Generally speaking, two competing strains of moral thought have dominated western liberal philosophy: deontology and consequentialism.[48] Deontology, with its emphasis on principles rather than practical results, discusses the rightness or wrongness of an act in terms of adherence to duty.[49] Consequentialist moral theories, on the other hand, judge actions by their results, determining whether a given action is right or wrong by examining the goodness or badness of its consequences.[50] The simplicity of this approach, combined with its emphasis on widespread societal results, makes consequentialism an ideal tool to assess the moral propriety of government initiatives.[51]

Consequentialist moral inquiries proceed in two steps. First, the good must be defined—establishing a basis from which to judge "overall states

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48. JOHN P. ANDERSON, INSIDER TRADING: LAW, ETHICS, AND REFORM 171 (2018) (citing John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 28–35 (2014)).

49. *Id.* at 174.

50. Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 74 (2008).

51. *See* ANDERSON, *supra* note 48, at 174 (pointing out that economic analysis and consequentialist moral theory arguably share as a common goal the maximization of societal happiness).

of affairs from best to worst from an impersonal standpoint . . . ."[52] Second, once the good has been defined, consequentialism insists that a right action is one that maximizes that good.[53] The idea is simple and compelling: maximize good and minimize bad.[54]

There are many different forms of consequentialism, but by far the most common is Utilitarianism.[55] Utilitarianism equates good with happiness or pleasure, providing the simplistic and altogether desirable goal of maximizing societal enjoyment.[56] Applied to law, it can be used to test the morality of competing rules and principles—as opposed to individual acts—through the principle of rule Utilitarianism.[57] Rule Utilitarianism can be articulated as follows: "the rightness or wrongness of an action is to be judged by the goodness and badness of the consequences of a rule that everyone should perform the action in like circumstances."[58] Essentially, rule Utilitarianism allows one to view the rightness or wrongness of a law, not by its individual contribution to utility but by its conformity to a standard which, if generally followed, would itself advance utility.[59]

B. Jeremy Bentham and the Principle of Hedonistic Act-Utilitarianism

One of the earliest and best-known proponents of Utilitarianism, Jeremy Bentham, articulated the fundamental "principle of utility" as: "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish

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52. Samuel Scheffler, *Introduction*, *in* CONSEQUENTIALISM AND ITS CRITICS 1 (Samuel Scheffler ed., 1988).

53. ANDERSON, *supra* note 48, at 174.

54. *Id.*

55. *Id.*

56. There are, of course, variations within Utilitarianism's definition of good as happiness. Hedonistic utilitarians identify good as sensual satisfaction, while nonhedonistic variants aim for the satisfaction of preference. *See, e.g.*, SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS (1982).

57. *See, e.g.*, J. J. C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR & AGAINST 9 (Cambridge Univ. Press 2008) (1973).

58. *Id.*

59. Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 137–38 (2000).

the happiness of the party whose interest is in question . . . ."[60] This may be restated as providing that an act is right if and only if it produces at least as much total happiness for society as a whole as would any alternative act open to the agent.[61] According to Bentham, such happiness consists in the pursuit of pleasure and the avoidance of pain.[62] Applied to general law, Bentham's hedonistic formulation requires lawmakers to "quantify and aggregate the pleasure and pain of each community member affected [by potential laws], compare the totals, and then take the action that maximizes total pleasure over total pain."[63]

Benthamian moral deliberations, then, require performing a "utilitarian calculus," which ranks actions based on the net balance of pleasure and pain—measured in "hedons"—they result in.[64] The number or type of people affected by the act is irrelevant—overall pleasure or pain is all that matters.[65] An act that produces more net happiness will always be preferred over an action producing less happiness—regardless of the number of people involved.

C. The Seven Factors of Bentham's Utility Calculus

But how does one calculate such happiness, practically speaking? Bentham developed seven factors to do so: (1) intensity; (2) duration; (3) certainty; (4) proximity; (5) fecundity; (6) purity; and finally, (7) extent.[66]

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60. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Oxford at the Clarendon Press 1907) (1789) [hereinafter BENTHAM, INTRODUCTION].

61. *See* Kojo Yelpala, *Legal Consciousness and Contractual Obligations*, 39 MCGEORGE L. REV. 193, 204 (2008) (citing A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH 133–38 (1905)) ("[T]he end of every law is the promotion of the greatest happiness for the greatest number.").

62. *Id.* at 203 n.27.

63. Robin L. West, *In the Interest of the Governed: A Utilitarian Justification for Substantive Judicial Review*, 18 GA. L. REV. 469, 477 (1984).

64. *Id.* at 522.

65. For example, if Act A produces 2 hedons of happiness in 50 people, it would result in 100 total hedons. If Act B produces 100 hedons of happiness in a single person, it similarly produces 100 total hedons, making both actions equally acceptable although Act A affects many more people. Going further, say that Act C produces 2 hedons of happiness in 500 people, but Act D produces 500 hedons of happiness in just 3 people. Under Bentham's utility calculus, Act D is preferred because it produces 1,500 hedons—500 more than the 1,000 hedons produced by Act C.

66. BENTHAM, INTRODUCTION, *supra* note 60, at 30.

The first factor, intensity, refers to how strong a particular pleasure or pain is.[67] Duration, in its turn, looks at how long the pleasure or pain lasts.[68] Bentham's third factor, certainty, examines how likely that pleasure or pain is to result from a particular act.[69] Proximity measures how close the sensation will be to the performance of the act.[70] Fecundity refers to how likely that act is to lead to further sensations of the same kind, while purity examines how likely the act is to lead to further sensations of the *opposite* kind.[71] Bentham's seventh and final factor, extent, examines the number of people that an act would affect.[72]

Using these seven factors, Bentham conceived a system in which the utility of any act or law could be measured to determine the amount of good it would produce.[73] On its face, the system seems relatively straightforward: before taking an action, determine the net happiness that the action will produce. If the action produces more happiness than other available options, take it; if it produces less happiness, take the alternative. But there is one problem: the system is founded on the assumption that

> all pleasures included in our calculation are capable of being compared quantitively with one another and with all pains; that every such feeling has a certain intensive quantity, positive or negative (or, perhaps, zero), in respect of its desirableness, and that this quantity may be to some extent known: so that each may be at least roughly weighted in ideal scales against any other.[74]

As critics have dutifully noted, this may be supposing too much.[75]

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67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *See* Sara K. Stadler, *Forging A Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 627 (2006) (citing JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 1 n.1 (Prometheus Books 1998) (1823)) ("This egalitarian calculus came to be known as the 'Greatest Happiness Principle,' and for Bentham, it was the sole measure of the prudence of legislation.").
74. HENRY SIDGWICK, THE METHODS OF ETHICS 413 (MacMillan & Co. Ltd., 7th ed. 1907) (1874).
75. *See generally* Jimenez, *supra* note 50.

D. John Stuart Mill and the Issue of Quality

For example, imagine that *A* is a sadist who derives immense pleasure from acts of extreme cruelty, while *B* is a clinically depressed philanthropist who derives little to no pleasure from even the most magnanimous charitable acts.[76] Under Bentham's seven-factor calculus, one would be forced to conclude that *A*'s pleasure weighed more heavily than *B*'s, regardless of the societal worth of their actions.[77] This "moral monstrousness" is the direct result of a failure in Bentham's formulation.[78] By considering only the quantity of pleasure gained from an activity, his approach fails to consider something inherently crucial to every act: its *quality*.[79]

Enter John Stuart Mill—a protégé of Bentham's who was famously dissatisfied with the utility calculus's failure to account for the qualitative distinctions between actions.[80] Surely, he posited, "[i]t is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied."[81] Accordingly, he amended Bentham's calculus to include quality as an eighth factor and in so doing, fitted

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76. This example is taken from Jimenez, *supra* note 50, at 81.

77. Or take the example given by Judge Richard A. Posner's famous example in his book *The Economics of Justice*. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 56–57 (1981) (observing that if pleasure was all that mattered, irrespective of quality, then 100 hedons of pleasure derived from feeding pigeons would be no more valuable than 100 hedons derived from pulling the wings off of flies).

78. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 116 (1979).

79. *See, e.g.*, JEREMY BENTHAM, THE RATIONALE OF REWARD 206 (1825) ("[T]he game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either."); *see also* DAVID O. BRINK, MILL'S PROGRESSIVE PRINCIPLES 48 (2013); Jimenez, *supra* note 50, at 78–79 ("'[H]edonistic act-utilitarianism[]' would only consider the quantity of pleasure derived from a particular activity, rather than its quality, for purposes of calculating the utility associated with a given act. Adopting such an approach would mean that no distinctions could be drawn between the types of pleasures derived from two separate individuals engaging in two separate activities, so that the actions of an individual who derived one hundred units of utility by feeding pigeons could not be favored over an individual who derived one hundred units of utility by pulling the wings off of flies.").

80. *See* JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 8 (E.P. Dutton & Co. Inc. 1947) (1910) [hereinafter MILL, UTILITARIANISM].

81. *Id.* at 9.

Utilitarianism with a mechanism for distinguishing between higher and lower pleasures.[82] Higher pleasures, according to Mill, count for more good, while lower pleasures count for less good.[83]

IV. UTILITARIAN MORAL THEORY APPLIED—WHAT DOES UTILITARIANISM HAVE TO SAY ABOUT A WEALTH TAX?

Utilitarianism, it appears, is an apt scale to weigh the claims of competing economic reforms. By defining good, it creates a point of reference to judge right from wrong. By distinguishing higher goods from lower, it accounts for the shades of grey that characterize the human experience. It seems, despite its lofty ideals, a real and workable framework. But how does all this square with a wealth tax?

A. Short-Term Relief or Long-Term Disaster?

At first glance, it seems as though a wealth tax would pass Utilitarian muster with flying colors. Utilitarianism is, after all, geared toward maximizing societal happiness—what better way to achieve that goal than by redistributing excess wealth?[84] Jeff Bezos and Elon Musk could not spend all of their immense fortunes even if they tried. Surely it would be better to put some of that wealth into the hands of common people so that it can be enjoyed. It would certainly seem so at first, but things are not always what they appear, and a wealth tax's promise of relief might be short-lived.

B. Utility Calculus Applied to Utilitarianism

To find out whether it can deliver on its promises, the wealth tax must be weighed against the eight factors of utility calculus: intensity, duration, certainty, proximity, fecundity, purity, extent, and quality.

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82. Jimenez, *supra* note 50, at 80.

83. Mill refined Bentham's approach by observing that maximizing utility involves more than quantitative additions. Some pleasures, Mill explained, are more desirable than others and conversely, some pains less desirable than others. Some pleasures and pains simply fail at comparison with each other entirely. MILL, UTILITARIANISM, *supra* note 80, at 7–9.

84. For a classic modern statement in support of this assertion, see ABBA P. LERNER, THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS 26–32 (1944).

1. Intensity

Intensity measures the strength of the pleasure or pain that results from a particular act.[85] Applying this factor to the wealth tax requires a comparison between the strength of redistributive pleasure and the strength of the corresponding pains it will cause. But what exactly are these pleasures and pains?

The pleasure associated with a wealth tax seems obvious. By redistributing the excess wealth of the rich, a wealth tax would put money in the hands of ordinary citizens to enjoy. But a handout of "free" money may not result in the kind of intense enjoyment one would assume, and there are less obvious implications that must be considered. For instance, some people do not derive much happiness at all from receiving something they did not earn. Others might derive *some* happiness from receiving unearned money, but the fact that it is unearned might lessen the worth and, thus, the intensity of that happiness. The fact that something comes at a price makes its enjoyment that much sweeter. Take away the price, and the pleasure becomes stale.

But a wealth tax would not just result in pleasure; it would create pain as well. By stripping the rich of a percentage of their assets, a wealth tax would essentially force them to relinquish property each year. The severity of this pain may seem slight, but it cannot be overlooked. Generally speaking, the sorrow caused by losing something will exceed the thrill of gaining it.[86] This is because the pain of loss encapsulates much more than economic diminution; it includes the deep pain one feels at the loss of his hard work, the sorrow of lost ownership, and the tyranny of knowing that one's property exists at the whim of the state. These pains cut deeply. Bentham himself recognized this in what he referred to as his

85. BENTHAM, INTRODUCTION, *supra* note 60, at 29.

86. For an argument that the pain of loss exceeds the joy of gain, see James E. Crimmins, *Jeremy Bentham*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 4.1 (Edward N. Zalta ed., 2021), https://plato.stanford.edu /entries/bentham/ [https://perma.cc/DC4M-EU2A] (explaining Bentham's own "disappointment-prevention principle," which contends that the theft of a person's property will have a more intense effect on the person being stolen from than on the person doing the stealing).

"disappointment-prevention principle,"[87] and he placed a high priority on laws protecting individual property.[88]

Accordingly, although a cursory glance may approve of the strength of the pleasure created by a wealth tax, closer inspection reveals that the accompanying pain is likely to be felt more intensely. Intensity, therefore, seems to have little to say in support of a wealth tax.

2. Duration

Duration looks at how long the pleasure or pain resulting from an action is likely to last.[89] In terms of duration, the pleasure derived from a potential wealth tax simply fails to equal the pain. Admittedly, the poor man can take pleasure in the receipt of the rich man's wealth, but that joy is likely to be short lived.[90] The rich man, on the other hand, is deprived of the enjoyment of his property. Durationally speaking, this loss manifests itself in two ways. First, he loses tangible wealth. This loss may be remedied relatively quickly—at least on a balance sheet—by simply earning it back. But the rich man also loses a sense of ownership—the right to enjoy the fruit of his labor. This pain cuts much deeper, and for much longer. It strikes at the very core of the man's being, and neither time nor money can fully assuage it.[91] Thus, while the rich man's loss of money may be brief, the pain he feels at his loss of ownership may last indefinitely.

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87. Some commentators suggest that the disappointment-prevention principle should be limited to circumstances in which the two parties are on equal economic footing, suggesting that if the loser is a rich man and the gainer a poor man the principle does not apply. *See, e.g.*, *id.* This assertion is laudable in its intention but flawed in its understanding of Bentham's methods. Bentham meant for his principle to hold in all circumstances except those in which the public interest manifestly justifies government intervention. If intervention is not warranted, then there is no sense discarding the idea that loss is felt more deeply than gain.

88. *See id.* (explaining that Bentham's disappointment-prevention principle "requires that the security of legitimate expectations take precedence over other ends, save where the public interest manifestly justifies government intervention . . . ").

89. BENTHAM, INTRODUCTION, *supra* note 60, at 29.

90. One of the fundamental assumptions of a wealth tax is that the people benefitted by its spoils *need* those spoils. If this is true, and the individuals who would receive money need it for essentials, then the money will likely be spent almost immediately by those who receive it.

91. *See* Stein, *supra* note 46, at 342.

3. Certainty

The third factor of utility calculus examines the certainty with which the pleasure or pain associated with an act will occur.[92] For a wealth tax to result in real pleasure, it must actually *work*. Banks cannot cash good intentions. If the tax is going to achieve happiness with any real certainty, it must have a viable ground game.

Unfortunately, implementation would likely pose a problem. If the federal government plans to tax the wealth of billionaires, it must have a system in place that allows it to do so. Wealth must first be assessed, then constantly reassessed, to ensure that taxes are being properly apportioned. This is no small task.[93] The rich are very adept at hiding their assets—that is part of why the income tax seems to slide right over them in the first place.[94] How, and how often, should a Monet be appraised? Is a Chinese porcelain from the Ming dynasty really worth six million dollars? These are the sort of questions that would present themselves to an already thinly stretched Internal Revenue Service.[95] This would involve a substantial dedication of money, time, and resources that would eat into any expected gains from the tax.[96]

Even if a viable assessment method could be created, the government must be capable of making good on its redistributive promise—a tall order in itself.[97] Is the federal government, with its vast and shielded intricacies,

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92. BENTHAM, INTRODUCTION, *supra* note 60, at 29.

93. Janet Holtzblatt, senior fellow at the Urban-Brookings Tax Policy Center, has stated that "[k]nowing how much wealth there is in the country is something of a challenge because we don't have perfect data on that." Kurtzleben, *supra* note 36.

94. John Koskinen, former commissioner of the Internal Revenue Service, has noted that

> [t]he thing to remember is that really wealthy people don't hold all their assets in easy-to-value areas like stocks and bonds. . . . A lot of them have artwork that's worth a lot of money. A lot of them have investments in privately held corporations or in investment vehicles that do not give regular valuations.

Id.

95. Koskinen goes on to state that tracking the resources of those subject to a wealth tax would require significantly ramping up IRS resources that are already stretched thin. *Id.*

96. This is no mere conjecture—Austria waled back its own wealth tax for precisely these reasons after the program became too costly to maintain. *See* Kumar, *supra* note 16.

97. As Charles Galvin points out, many "institutional arrangements" in our society redistribute wealth much more effectively than the tax system. Charles O.

really the most accountable decision maker when it comes to redistributing wealth? Perhaps not. In fact, strong arguments can be made that redistribution would actually be best accomplished by the very private benefactors that the wealth tax would attack—free from the middleman of government.[98] Add to this the very real uncertainty that the plan would raise any revenue at all,[99] and the wealth tax appears more certain to result in fiscal disaster than egalitarian delight.[100]

4. Proximity

Bentham's fourth factor, proximity, refers to how close in time the sensation will be to the performance of the act.[101] Put another way, it examines how soon the pleasure or pain associated with an act will occur.

Unfortunately for a wealth tax, pleasure is a long way off. Before the average citizen can feel any redistributive pleasure, the government must assess, tax, collect, and redistribute the wealth of the ultra-rich. As previously noted, this would be a monumentally burdensome task—one

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Galvin, *Would Haig-Simons Plus A Flat Tax Be The Best U.S. Tax System?*, TAXNOTES (July 29, 1993), https://www.taxnotes.com/tax-notes-today-federal/would-haig-simons-plus-flat-tax-be-best-us-tax-system/1993/07/29/14jz7?highlight=haig-simon [https://perma.cc/R6W7-4EKV].

98. The oft-quoted case of *A. P. Smith Manufacturing Co. v. Barlow* is a classic example of this notion, opining that

> [w]hen the wealth of the nation was primarily in the hands of individuals they discharged their responsibilities as citizens by donating freely for charitable purposes. With the transfer of most of the wealth to corporate hands and the imposition of heavy burdens of individual taxation, they have been unable to keep pace with increased philanthropic needs.

A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 585–86 (N.J. 1953).

99. A report by the Organization for Economic Co-operation and Development (OECD) states that "[d]ecisions to repeal net wealth taxes have often been justified by efficiency and administrative concerns and by the observation that net wealth taxes have frequently failed to meet their redistributive goals. The revenues collected from net wealth taxes have also, with a few exceptions, been very low." OECD, *The Role and Design of Net Wealth Taxes in the OECD*, *in* OECD TAX POLICY STUDIES (2018), https://www.oecd.org/ctp/tax-policy/role-and-design-of-net-wealth-taxes-in-the-OECD-summary.pdf [https://perma.cc/K7ZL-KXQH].

100. France's solidarity tax on wealth cost twice as much in overall lost tax revenues as it gained in direct proceeds. Greg Rosalsky, *If a Wealth Tax is Such a Good Idea, Why Did Europe Kill Theirs?*, NPR (Feb. 26, 2019, 7:32 AM ET), https://www.npr.org/sections/money/2019/02/26/698057356/if-a-wealth-tax-is-such-a-good-idea-why-did-europe-kill-theirs [https://perma.cc/BHC2-ET4G].

101. BENTHAM, INTRODUCTION, *supra* note 60, at 29.

which has already annihilated similar attempts to tax wealth.[102] Not only that, but disputes over the accuracy and implementation of individual levies would inevitably clog courts with drawn out court battles. Combine these factors with the famous inefficiency of bureaucracy and the result is clear: redistributive gratification will be a long time in coming.

Redistributive pain, however, appears much more immediate. Those affected by the wealth tax would feel its sting the moment the tax is enacted and their property taken. Since money must be appropriated before it can be doled back out, a wealth tax's discomfort is necessarily antecedent to its thrills. Pleasure requires multiple steps—pain only one.

5. Fecundity

The fecundity of an act considers the likelihood that the act will lead to further sensations of the same kind in the future.[103] Put simply, fecundity asks, will this pleasure lead to other pleasures; this pain to other pains?[104] Wealth taxes are touted as a tool of liberation—a way to lessen wealth inequality and create a better life for the less fortunate, but is that really the case?

A good way to examine the fecundity of a wealth tax is by looking at previous attempts to tax wealth in other countries.[105] If previous efforts indicate that redistribution breaks the chain of poverty or closes the wealth gap, then a wealth tax might reasonably be expected to generate similar pleasures in the United States. But history says otherwise. In 1990, twelve countries had a wealth tax.[106] Only three still do.[107] Administrative difficulties, failure to raise revenue, and a host of other factors have combined to make wealth taxes largely unworkable, forcing the majority of progressive countries to abandon them.[108] It would be naïve to imagine that an American wealth tax would fare any differently.

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102. *See* Kumar, *supra* note 16.

103. BENTHAM, INTRODUCTION, *supra* note 60, at 30.

104. *See Philosophy 302: Ethics, The Hedonistic Calculus*, P.L.E, https://philosophy.lander.edu/ethics/calculus.html [https://perma.cc/3KSJ-E4JQ] (last visited Oct. 7, 2022).

105. *Id.* (advocating the benefit, when calculating the utility of a particular act, of looking to past experiences).

106. Rosalsky, *supra* note 100.

107. *Id.* ("Today, there are only three: Norway, Spain, and Switzerland.").

108. *Id.* ("According to reports by the OECD and others, there were some clear themes with the policy: it was expensive to administer, it was hard on people with lots of assets but little cash, it distorted saving and investment decisions, it

Fecundity of pain is a different story. Enacting a wealth tax will serve to normalize redistributive logic, condoning further incursions into private property and increased dependence on federal aid. With the redistributive impetus established, increasingly "benevolent" schemes would be justified in digging ever deeper into the reserves of prosperous individuals. Current plans, it may be argued, propose to tax only the prodigiously wealthy and would do nothing but scrape the uppermost crust of the financial strata. This may be the case, but once the door is thrown open, who knows how far it will swing? Hunger does not often satisfy itself with small bites, and a society that has tasted a few crumbs of bread may soon clamor for the loaf. A wealth tax, then, appears more likely to lead to pain than to pleasure and is thus condemned by its fecundity.

6. Purity

Purity examines the likelihood that an act will lead to further sensations of the *opposite* kind.[109] An examination of purity, therefore, asks whether a pleasure-inducing act is likely to lead to pain as well.[110] Since the goal of the wealth tax is redistributive pleasure, an honest inquiry must consider whether taxing the rich is likely to lead to any pain. The more pain it leads to, the less pure a wealth tax will be, and the less pure the tax is, the less Utilitarianism approves of it.

Regrettably for the wealth tax, its pleasures are likely to be mixed with a great deal of pain. Take, for instance, the practical effect of a wealth tax in driving out wealth. The top one percent are not just capable of moving around their assets—they can move themselves. If the federal government tells them to pay an annual portion of their net worth, there is a good chance they will simply leave the country. This is not speculation; it is an economic reality.[111] In France, for example, an excessive wealth tax led to the exodus of 42,000 millionaires in a ten-year span, eventually forcing

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pushed the rich and their money out of the taxing countries—and, perhaps worst of all, it didn't raise much revenue.").

109. BENTHAM, INTRODUCTION, *supra* note 60, at 30.

110. Bentham himself referred to the purity of an act as "the chance it has of *not* being followed by sensations of the *opposite* kind: that is, pains, if it be a pleasure: pleasures, if it be a pain." *Id.*

111. French economist Alain Trannoy has stated that the "'wealth tax in some countries seems more efficient to repel [the] rich than to effectively redistribute wealth.'" Michael Hendrix, *The Impoverished Idea of a Wealth Tax*, GOVERNING (Jan. 11, 2021), https://www.governing.com/finance/the-impoverished-idea-of-a-wealth-tax.html [https://perma.cc/UC4R-HP3N] (alteration in original).

French President Emmanuel Macron to kill the program entirely.[112] Or witness the current exodus of wealthy citizens and large corporations from New York state.[113] As government officials have threatened to drive up taxes on the wealthy in lieu of federal bailouts, the top one percent is eyeing an escape from the Big Apple that could have enormous consequences on its tax base.[114]

Senator Warren's latest proposal has a solution for this problem: anyone who wants to leave the country must pay 40% of their net worth over $50 million on the way out.[115] To ensure that individuals do not simply move their assets to foreign countries, the plan would also tax foreign assets.[116] The problem with these strategies—assuming they are constitutional—is that the game is not so simply played. Actions have consequences, and by imposing onerous limits on the enjoyment and mobility of assets, the wealth tax would become a serious deterrent to the in-migration of talent and capital and would very likely deter foreign direct investment.[117] Why would a wealthy foreign citizen want to move to the United States when doing so could risk subjecting his global assets to confiscatory taxes?

Moreover, a wealth tax would act as a powerful disincentive to entrepreneurship. In 2020 alone, over 400 people became billionaires,

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112. Rosalsky, *supra* note 100.

113. *See* Post Editorial Board, *As NY politicians eye new taxes on the rich, high earners eye the exits*, N.Y. POST (Nov. 28, 2020, 8:28 PM), https://nypost.com/2020/11/28/as-ny-politicians-eye-new-taxes-on-the-rich-high-earners-eye-the-exits/ [https://perma.cc/PD45-HFDH] (describing how the wealthy citizens of New York have responded to Governor Cuomo's threats to hike taxes by simply moving out of the state); Ben Steverman & Katherine Burton, *Hedge Funds Are Ready to Get Out of New York and Move to Florida*, BLOOMBERG (Apr. 17, 2021, 8:00 AM CDT) https://www.bloomberg.com/news/articles/2021-04-17/wall-street-hedge-funds-are-ready-to-get-out-of-new-york-and-move-to-florida [https://perma.cc/Y8X4-XQH4] (observing the migration of hedge funds to the sunny state of Florida to obtain lower tax rates).

114. A recent poll taken by the Siena College Research Institute in September 2020 found that 44% of six-figure earners in New York City had considered leaving the city in the past four months. *44 Percent of Six-Figure Earners in NYC Have Considered Relocating*, SIENA COLL. RSCH. INST. (Sept. 16, 2020), https://scri.siena.edu/2020/09/16/44-percent-of-six-figure-earners-in-nyc-have-considered-relocating/ [https://perma.cc/9MU3-MTZD]. *See* Post Editorial Board, *supra* note 113.

115. Rosalsky, *supra* note 100.

116. Hendrix, *supra* note 111.

117. *Id.*

many of them self-made.[118] These individuals may be worth billions on paper, but their assets are often tied up in business with little to show in actual cash reserves.[119] If their net worth was taxed, they would be forced to liquidate those assets annually to meet their tax burden, resulting in less innovation and a loss of jobs.[120] All too often, the true losers would not be the wealthy, but the average American citizen.

Mill himself warned against the disincentivizing effects of unbounded taxation.[121] In his *Principles of Political Economy with Some of Their Applications to Social Philosophy*, Mill wrote:

> Both in England and on the Continent a graduated property tax . . . has been advocated, on the avowed ground that the state should use the instrument of taxation as a means of mitigating the inequalities of wealth. I am as desirous as any one that means should be taken to diminish those inequalities, but not so as to relieve the prodigal at the expense of the prudent. . . . A just and wise legislation would abstain from holding out motives for dissipating rather than saving the earnings of honest exertion.[122]

Although Mill was referring to a progressive income tax, his admonitions apply just as well to a wealth tax: the government should not seek to create equity at the expense of economic incentive. Diligence, resourcefulness, and ambition are impulses that allow an economy to grow and thrive, and as such, should be protected at all costs. A system that sacrifices these impulses for immediate satisfaction may find itself digging its own grave. Massive departures of wealth, decreased innovation, and stifled incentive:

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118. In 2020, there were 231 self-made female billionaires, up from 51 the previous year. Fang Block, *The World Added 412 Billionaires in 2020, Bringing the Total to 3,288*, BARRON'S (Mar. 2, 2021, 4:12 PM ET), https://www.barrons.com/articles/the-world-added-412-billionaires-in-2020-bringing-the-total-to-3-288-01614719531 [https://perma.cc/742R-MLHD].

119. For an illustration of this fact, one can observe how precariously the wealth of the richest Americans is tied to the smalled fluctuations in the market. Billionaries such as Elon Musk, Jeff Bezos, Warren Buffet, and others have high net worths on paper, but the fact is that those assets are illiquid—tied up in large-scale assets and fluid businesses. *See* Dayana Mustak, *Richest Americans Lose $93 Billion After Inflation-Fueled Stock Rout*, BLOOMBERG (Sept. 13, 2022, 4:34 PM CDT), https://www.bloomberg.com/news/articles/2022-09-13/richest-americans-lose-93-billion-after-inflation-fueled-stock-market-rout [https://perma.cc/R9M5-6U6D].

120. Hendrix, *supra* note 111.

121. *See* MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 14, at 808.

122. *Id.*

these are the likely fruits of a tax that punishes people for being wealthy. Such a state of affairs could hardly be considered pure.

7. Extent

The seventh factor of utility calculus, extent, studies the number of people affected by the pleasure or pain of the act.[123] The greater the number of people positively impacted by an act, the greater the extent of its pleasure. On its face, this appears to be a no brainer. The wealth tax is quite literally aimed at repurposing the wealth of a small number of people to meet the needs of an overwhelmingly larger majority. What could possibly go wrong?

The truth is that whatever the extent of a wealth tax's positive effects, it is likely to have negative consequences with equally great extent. The problem lies in the proposal's far-reaching economic effects. A rising tide lifts all boats, but a low tide puts them right back in the mud. That is exactly what a wealth tax would do. It would disrupt the tax base by driving and keeping out wealth. It would create dependence by rewarding lack of effort. It would disincentivize new business formation through oppressive and unrealistic tax demands and undermine the value of self-reliance. In short, a wealth tax would not just affect the wealthy few—it would do damage to the entire national economy. Every citizen would feel its pangs.

8. Quality

The eighth and final factor of utility calculus, and the one most damning to the wealth tax, is quality. Under its tutelage, the utilitarian can account for the qualitative difference between pleasures, distinguishing between those of a higher and lesser order.[124] This is important because the higher the quality of an act, the more commendable it will be. At first, the idea of taking money from the rich has a certain virtuous ring to it. The whole idea of redistribution, after all, is charitably premised upon egalitarian desire.[125] But are the redistributive impulses at the heart of the wealth tax really so benign?[126]

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123. BENTHAM, INTRODUCTION, *supra* note 60, at 30.

124. SMART & WILLIAMS, *supra* note 57, at 5, 13.

125. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 274 (1974).

126. Many scholars would argue that it is not. *See, e.g.*, *id.* at 240 (noting the "great ingenuity with which people dream up principles to rationalize their emotions").

In reality, one of the largest rationales for a wealth tax is what economists refer to as "positional externality."[127] The layman would call it envy.[128] It is the idea that people want to tax the rich primarily to punish them; to make themselves feel better; to watch them cry.[129] Such savage delight cannot be considered a "higher" pleasure in any traditional sense, and setting it up as the basis for an economic scheme is a recipe for failure.[130] Greed, envy, hunger for power—these are corrosive impulses of base quality which should be repressed, not embraced. Enshrining them through a wealth tax would be a sort of legislated schadenfreude, essentially codifying the sort of impulses that the original social contract sought to restrain.[131]

But what if the pleasure of a wealth tax is not rooted in envy at all? The real pleasure, one might say, is not the pleasure of taking, but the pleasure of *getting*. Surely a poor man's pleasure in receiving money he needs is the sort of delight that quality approves of? Perhaps, but caution is advised all the same. The most dangerous devils carry harps, not pitchforks, and a pure-hearted seeker should inquire beyond mere appearances. Gratification might seem innocent enough at first, but it would be unwise to risk long-term evils in pursuit of short-term pleasures.

People may derive some happiness from receiving unearned money, but that happiness is of very low quality and is short lived. It may be tempting to classify such pleasures as noble or charitable, but in the end, there is a price to be paid for instant gratification. Consider the example of a father whose daughter asks him for money. He wants to give her what she asks for because he wants to see her happy. But he also knows that if he gives his daughter what she wants every time she asks for it, he runs a very real risk of spoiling her. It may be unpleasant at first to tell her she cannot have the money, but it is the only way she can learn the value of work—something much more valuable in the long run than a few dollars. He makes a hard choice—one that very likely results in pain—because he hopes that she will achieve a higher and longer lasting sort of pleasure in the end.

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127. Joseph Thorndike & Tax Notes Staff, *The Wealth Tax Debate*, FORBES (Feb. 18, 2020, 7:27 AM EST), https://www.forbes.com/sites/taxnotes/2020/02/18/the-wealth-tax-debate/?sh=3ad2fc571d40 [https://perma.cc/6FDH-PQBA].

128. *Id.*

129. Some would go so far as to say that this envious tendency is at the root of *all* egalitarian theories. *See* NOZICK, *supra* note 125, at 240.

130. "[I]f . . . thine eye be single, thy whole body shall be full of light. But if thine eye be evil, thy whole body shall be full of darkness." *Matthew* 6:22–23 (King James).

131. Thorndike & Staff, *supra* note 127.

As it turns out, redistribution actually threatens to destroy such higher pleasures. By forcibly transferring property from one individual to another, redistribution impedes upon the principal of self-ownership inherent in a Western conception of private property.[132] Government was created to protect ownership, not subvert it.[133] The rights to own property and pursue one's own happiness are central to the American ideal, and the fact remains that a wealth tax threatens principals that are foundational not only to the rich, but to the very fabric of American society.[134] Not only that, but the forced redistribution of wealth discourages the sort of enterprise and frugality that earned that wealth in the first place. By giving people money they have not earned, redistribution might undermine their motivation to work (or work harder) to earn even more money.

It might be argued that necessities are more valuable than ideals; that it is more important to put food on the table than to uphold the principle of self-ownership. That would be a shortsighted and ultimately incorrect way of thinking, however, as a simple illustration will demonstrate. Suppose *A* is a poor man living in the gutter, begging for a penny to buy a loaf of bread. *B*, a rich man, offers poor *A* a deal: *B* will *provide A* with food to eat, clothes to wear, and a roof over his head, if only he will consent to becoming *B*'s slave. Surely, one might argue the poor man's daily bread is worth more than his principles? But this is not the case. For what sane person, reared with any moral backbone, would trade his freedom for a loaf of bread? Are the primal desires of the downtrodden more powerful, more qualitatively fundamental, than the principle of self-ownership? Clearly, they are not. Even when struggling to subsist, man's greatest pride of ownership rests in himself.[135]

132. *See generally* NOZICK, *supra* note 125.

133. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1960).

134. *See Natural Rights*, CONST. RTS. FOUND., https://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html [https://perma.cc/7FTU-F99T] (last visited Dec. 10, 2022) (espousing the idea that under the Lockean viewpoint, humans are endowed with fundamental and unyielding rights, among them the right to property). *See also* Samuel H. Sturgis, *An Appeal to Heaven—The Timeless Appeal for* Nollan/Dolan *Extension to the Sphere of Legislative Exactions*, 40 MISS. COLL. L. REV. 251, 254 (2022) ("[Our country's founders] understood the right to private property was as vital to freedom as life itself.").

135. *See* Stein, *supra* note 46, at 342. ("Some might even value self-ownership more than a subsistence income; presumably, this ranking of preferences would be revealed by their refusal to sell themselves into slavery in order to survive. In any case, it seems that self-ownership would be among the most valuable of property rights.").

In the long run, then, it simply will not do to talk of redistributive happiness as though it were on par with loss of property and principle. A wealth tax may seem a noble endeavor, but in point of fact, the happiness it would produce is of a quality far inferior to the virtues it would undermine. The qualitative worth of self-ownership, private property, and hard work are fundamental to the success of our society, and we would be wise not to trade them for a passing pleasure.

V. HOW THINGS SHOULD CHANGE—THE PATH FORWARD

Clearly there is a problem. The current system fails to enforce income taxes in a way that feels fair, and any remedial efforts seem to backfire. But what is equally clear is that imposing a wealth tax would be a mistake. Utility calculus opposes redistribution at every turn, and the pain it would cause far outweighs any corresponding pleasure. What, then, may be said for equality? Is there no answer to the plight of the U.S. taxpayer?

A. Equality of Sacrifice—A Worthy and Elusive Goal

In his own writings, Bentham claimed that the best system of taxation is one based on equality of sacrifice[136]—a concept that has long been recognized as the primary maxim of modern taxation.[137] Mill, for his part, believed the best way to achieve such equality was by "apportioning the contribution of each person towards the expenses of government so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his."[138] Stated simply, Mill believed the answer lay in proportional burdens.

B. A Flat Tax—The Savior We have been Looking for?

The idea of a proportional burden sounds fairly straightforward, but it has engendered much debate over the years.[139] How, practically speaking,

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136. *See generally* JEREMY BENTHAM, A PROTEST AGAINST LAW TAXES (1793) [hereinafter BENTHAM, A PROTEST AGAINST LAW TAXES].

137. H.P. Young, *Progressive Taxation and the Equal Sacrifice Principle*, 32 J. PUB. ECON. 203, 203–04 (1987).

138. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 14, at 804.

139. For an example of the debate involved in applying equal sacrifice to the sphere of practical economics, see Young, *supra* note 137, at 204 ("Whether equality of sacrifice entails progressive taxation depends to some extent on how the term 'equal sacrifice' is interpreted. *Equal absolute sacrifice* means that everyone foregoes the same *amount* of utility in paying taxes. *Equal proportional*

can a real-life proportional burden be achieved? An answer is found in the concept of a flat tax.

1. So, Just What is a Flat Tax?

The flat tax is an alternative method of taxing income. Unlike the current progressive U.S. system, a flat tax would levy a fixed rate between 10% and 20% on all income—regardless of the amount a person makes.[140] There would be no deductions, no loopholes, and none of the rigmarole that accompanies modern tax filing.[141]

For years, advocates such as Steve Forbes, Richard Armey, and Alvin Rabushka have proposed a flat tax to replace our current progressive system.[142] But the idea is nothing new.[143] Bentham himself championed a modified flat tax nearly two centuries ago.[144] In Bentham's opinion, a flat tax would solve the problem of equal sacrifice through mathematical uniformity, imposing the same amount of loss relative to overall income regardless of an individual's wealth.[145] In response to arguments that a flat tax would fall hardest on the poor, Bentham modified his flat tax to carve out a minimum amount, essential for livelihood, that would be exempt

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sacrifice means that everyone foregoes the same *percentage* of utility in paying taxes.").

140. *See, e.g.*, ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX (2d ed. 2007).

141. In fact, everything could be done as simply as filling out a postcard. *See* Michael Burgess, *The Case for a Flat Tax*, INSIDER (Apr. 15, 2014, 8:57 AM), https://www.businessinsider.com/op-ed-the-case-for-a-flat-tax-2014-4 [https://perma.cc/JZ2P-QN7X].

142. *See, e.g.*, HALL & RABUSHKA, *supra* note 140; Lawrence Zelenak, *The Selling of the Flat Tax: The Dubious Link Between Rate and Base*, 2 CHAP. L. REV. 197, 197–98 (1999); Steve Forbes, *The Tax Code: Make It Flat*, FORBES (Mar. 7, 2014, 9:00 AM EST) https://www.forbes.com/sites/steveforbes/2014/03/07/the-tax-code-make-it-flat/#31880e2a7e0e [https://perma.cc/44AY-KSSF]; Daniel Mitchell & William Beach, *How the Armey-Shelby Flat Tax Would Affect the Middle Class*, THE HERITAGE FOUND. (Mar. 12, 1996), https://www.heritage.org/taxes/report/how-the-armey-shelby-flat-tax-would-affect-the-middle-class [https://perma.cc/5XVF-Z44R].

143. Steve Forbes, an outspoken proponent of the flat tax, has made similar concessions in his proposed change. Ted Cruz, during the 2015 Republican Presidential Debates, similarly proposed that families making less than $35,000 pay no taxes at all. *See* Ungar, *supra* note 20.

144. *See* BENTHAM, A PROTEST AGAINST LAW TAXES, *supra* note 136.

145. *Id.*

from taxation.[146] This modified version of a flat tax would allow those with income under a certain amount to avoid paying taxes altogether.[147] Beyond that point, income would be taxed proportionately at a single fixed rate.[148]

Flat tax skeptics decry it as a regressive approach that would benefit the wealthy.[149] But if one is honest, the current system has become so perverted by special interests and tax breaks that it can no longer even be called legitimately progressive.[150] The fixed rate of a flat tax may appear to be a break for the rich,[151] but reality would likely prove otherwise. By eliminating the bulk of the tax code, a flat tax would cut down on avenues for avoidance and might actually force the rich to pay a higher effective rate than they do currently. Put simply, the longer the tax code, the more the rich can exploit it. Cut down the code, and the ability to avoid taxes disappears.

2. Benefits of a Flat Tax

First and foremost, a flat tax provides certainty. By eliminating the 75,000 pages of loopholes and deductions that make up the current tax code, a flat tax would level the playing field and ensure that the rich cannot weasel their way out of shouldering their fair burden. This assurance, in turn, might ease some of the bitterness that has led to calls for a wealth tax in the first place. And for those in the lowest tax brackets, the allowance for a nontaxable minimum living amount would ensure that they pay nothing at all—providing peace of mind and actually guaranteeing them a benefit that the wealthy cannot enjoy.[152]

The flat tax's simplicity means it should also be easier to implement and maintain than a wealth tax. Where a wealth tax fails miserably in duration and proximity, a flat tax excels. No longer would individual taxpayers have to face the intricacies of the tax code each year; a flat tax filing could be as simple as filling out a postcard.[153] By reducing the hassle

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146. *Id.*
147. *Id.*
148. *Id.*
149. Ungar, *supra* note 20.
150. *Id. See, e.g.*, HALL & RABUSHKA, *supra* note 140; Zelenak, *supra* note 142; Forbes, *supra* note 142; Mitchell & Beach, *supra* note 142.
151. Ungar, *supra* note 20.
152. *Id.*
153. *Id.*

and expense of filing, a flat tax would thus lighten the load of the everyday filer and cut down administrative costs for the government.[154]

Finally, by increasing savings and economic growth, a flat tax would generate the kind of high-quality pleasures that lead to future prosperity. Concern over savings and growth is well justified—saving has been on the decline for decades.[155] A flat tax would change this by increasing savings by as much as 10%–20%.[156] This is largely due to the way a flat tax would treat capital gain. The current system taxes investment gain twice, once when earned and again when that investment produces realized gain.[157] By eliminating capital gains tax, a flat tax would avoid double-taxing investment and encourage individuals to invest for themselves.[158] Rather than envy the rich, a flat tax would provide both the incentive and the opportunity to *become* the rich. Far from driving away wealth, its simplicity and operative ease would attract it. It would encourage enterprise and frugality by shifting secondary income to those who are diligent in saving and investing.[159] Higher savings and investment, in turn, will result in more retirement income and less dependance on strained social safety-net programs.[160] It will free up resources for private investments, which will spur business growth and create jobs. In short, increased savings and investment will lead not only to immediate satisfaction but also to the kind of long-term economic prosperity that Utilitarianism would approve of.

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154. *See* William G. Gale, *Flat Tax Impact on Saving and the Economy*, BROOKINGS (Feb. 19, 1996), https://www.brookings.edu/opinions/flat-tax-impact-on-saving-and-the-economy/ [https://perma.cc/NM9W-988M]; *see also* Kelly Phillips Erb, *Our Current Tax v. The Flat Tax v. The Fair Tax: What's the Difference?*, FORBES (Aug. 7, 2015, 10:16 AM EDT), https://www.forbes.com/sites/kellyphillipserb/2015/08/07/our-current-tax-v-the-flat-tax-v-the-fair-tax-whats-the-difference/?sh=159404d55612 [https://perma.cc/K3G2-AJJ8] (noting that some go so far as to conclude that the simplicity of a flat tax could eliminate the need for an IRS altogether).

155. *See* Gale, *supra* note 154 ("After averaging 8% of gross domestic product from 1950 to 1980, U.S. private saving—that is, saving by businesses and families—has averaged 4.9% since 1990.").

156. *Id.*

157. 26 U.S.C. § 1221.

158. *See* Susan Dentzer, *Trial balloons on tax reform*, INDEX ARTICLES, https://indexarticles.com/reference/us-news-world-report/trial-balloons-on-tax-reform/ [https://perma.cc/2FG5-JQYS] (last visited Jan. 8, 2023).

159. Gale, *supra* note 154.

160. *Id.*

3. Arguments Against a Flat Tax

But not everyone agrees. Many are skeptical or downright opposed to a flat tax, and they bring various reasons to the table to justify their doubt.

For instance, critics often contend that by lowering rates to a fixed amount, a flat tax would fail to generate sufficient revenue to support a functioning government.[161] This is simply incorrect. Historically, the amount of income-collected revenue necessary to maintain federal government operation has been 17%.[162] To solve this problem, a flat tax could simply be set at 17%.[163] Additionally, the bolstered savings and investment created by a flat tax would lead to economic growth and an enlarged revenue base.[164] Increased business investment would lead to more and higher paying jobs, which in turn would lead to more taxable wages as the economy operates at a higher level. A look at other countries confirms this, as flat tax policies have been accompanied by vast increases in revenue and growth.[165] Even if insufficiencies were to arise, might it be that the problem is not that a flat tax fails to generate sufficient revenue, but that the federal government budget is bloated and inefficient? Perhaps a bit of government thinning and bureaucratic frugality would not be such a bad idea.

Perhaps the most compelling argument against a flat tax is that despite its proportional rate, it will still fail to treat taxpayers at different levels of wealth equally. For example, most flat tax proposals do not tax capital gains and other non-wage income. This would seem to favor the wealthy, who can structure their assets to provide income from capital rather than wage and, thus, take advantage of the system. But perhaps that is not such a bad thing. Eliminating the capital gains tax will likely leave the average person looking for ways to create such gains himself. And with a flat tax's

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161. *See* Janet Berry-Johnson, *Flat Tax: Definition, How it Works, Benefits, Critics and Example*, INVESTOPEDIA (Nov. 20, 2021), https://www.investopedia.com/terms/f/flattax.asp [https://perma.cc/TQD5-7LRP].

162. *See* Burgess, *supra* note 141.

163. *Id.*

164. *Flat Taxes in Central and Eastern Europe*, EUR. CENT. BANK MONTHLY BULL., Sept. 2007, at 81–83.

165. Hard though it may be to believe, Russia provides a real-world example of the economic growth that accompanies the imposition of a flat tax. After the first year of its introduction in the country, the real revenues from its personal income tax rose by 25% followed by a 24% increase in the second year and a 15% increase in the third year. Estonia, Latvia, and Lithuania have experienced similar growth since adopting flat rate policies. *See Flat Taxes in Central and Eastern Europe*, *supra* note 164, at 81–83.

propensity to encourage savings and investment, people will have not only the incentive to take advantage of such opportunities but also the ability. Any favorable treatment it affords the rich by allowing them to build investment gains from capital will be more than atoned for by the enhanced opportunities it affords the common man to do the same.

CONCLUSION—A NEW PERSPECTIVE

The reality is that the United States may be approaching the problem of wealth inequality all wrong. Instead of fretting to make the rich pay and vilifying them when they do not, what if everyday citizens put that same energy towards making themselves rich? Perhaps utilitarian morality would best be served not by bringing the wealthy down but by *bringing the poor up*. A wealth tax, for all its talk, fails to do this. It is founded in bitterness and seeks to punish success more than it seeks to promote it. Its pleasures are fleeting, and its consequences are devastating.

If mankind is going to be lifted out of poverty, it must be done from within. The very pride and self-ownership that makes normal Americans gripe at the current system must be reformed—channeled into a nobler longing for a better life. It is exactly this sort of impulse that a flat tax would thrive on. Its simplicity and tendency to promote individual enterprise would create a higher, long-lasting pleasure that would endure well beyond its enactment. Rather than tear down, it would build up and encourage precisely those virtues a wealth tax would destroy. If America is to find its Robin Hood, perhaps it would do well to take this new perspective. After all, it was not the rich who put the people of Nottingham in chains—it was a tax.[166]

166. *See The Real Robin Hood, supra* note 3.