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## Blum and Kalven at 50: Progressive Taxation, "Globalization," and the New Millenium

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## Blum and Kalven at 50: Progressive Taxation, “Globalization,” and the New Millennium

Michael A. Livingston\*

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## I. INTRODUCTION<sup>1</sup>

Almost 50 years ago, Walter Blum and Harry Kalven described the case for progressive taxation as "stubborn but uneasy."<sup>2</sup> This article considers the extent to which that conclusion remains valid five decades later. I argue that the case for progressivity is today even more uneasy than in Blum and Kalven's time, as a result of three principal developments: a more conservative political environment, which is generally hostile to redistributive measures; the femininization and minoritization of poverty, which make it easier to rationalize inequality and tend to divide the constituencies in favor of progressive measures; and the globalization of economic life, which suggests that a progressive rate structure may cause the country to lose business to other nations. These developments challenge both the philosophical underpinnings of progressive taxation, which is based on liberal assumptions that are now severely contested, and its political support, which flowed from a Cold War consensus that now no longer exists. Globalization is particularly significant, for it suggests a practical as well as a theoretical limit on progressive taxation, and raises the specter that progressivity may be swimming against the historical tide.

These same developments also present an opportunity. If supporters of progressivity can confront the changes described above and if they can adjust their arguments to the realities of the Twenty-First Century, then the case for progressivity may yet prove stronger than in Blum and Kalven's era. However, to accomplish this progressivity supporters must change both their rhetoric and research agenda.

On a rhetorical level, scholars must make a more candid and forceful case for progressivity as a means of redistribution, emphasizing the unfairness of today's "winner-take-all" society and the role of irrelevant factors such as race, gender, and immigrant status in pretax income distributions. These arguments suggest that, far from being inconsistent with a dynamic, merit-based society, progressive taxation may be necessary in order to preserve it. Progressive taxation should be especially attractive to those who object to affirmative action and similar race-conscious programs but support redistribution based on economic or financial status.

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1. I would like to thank Philip Harvey, Marjorie Kornhauser, Dan Shaviro, Nancy Staudt, and the participants in faculty workshops at the Rutgers, Temple, and Georgetown Law Schools for helpful suggestions in the preparation of this article. This article was made possible, in part, by generous research assistance from the Rutgers Law School and a summer research grant from the Temple-Beasley School of Law.

2. Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417, 519 (1952). For a short update by one of the authors, see Walter J. Blum, *Revisiting the Uneasy Case for Progressive Taxation*, *Taxes*, Jan. 1982, at 16. The current article focuses primarily on changes taking place since Blum's later effort.

Progressivity research should likewise emphasize new subjects. These include the impact of tax rates and other tax provisions on women and minority taxpayers, the interaction of tax and spending policies, such as health and welfare; and similar empirical and interdisciplinary projects. These topics are likely to increase our understanding of progressivity issues and convince doubters of the efficacy of a progressive rate structure. Both the research and the rhetoric must address the international aspects of the progressivity question, including the potential for international cooperation in maintaining progressive tax rates and the arguments for redistribution between, as well as within, different societies. The changes above would strengthen the case for progressivity on both an intellectual and practical level. The intellectual case would improve, because scholars would be confronting the changes of the past decades, rather than retreating to theoretical models or yearning for a consensus that no longer exists. The political case would improve, because important groups such as women, minorities, foreigners and governments would be brought into the fray on an issue to which they have heretofore been largely peripheral. The argument might or might not be won, but the battle at least would be joined.

Part II of the article considers the classic arguments for and against progressivity and efforts to update those arguments for new developments. Part III considers the changing context of the debate, including changes in political philosophy, the degree and kind of economic inequality, and the emerging global economy. Part IV evaluates the arguments for progressivity in light of these changes, and develops a case for progressivity consistent with current reality. Part V considers implications for the nature of tax scholarship and the future of the American Left.

## II. TRADITIONAL ARGUMENTS FOR AND AGAINST PROGRESSIVITY

Blum and Kalven's critique of progressivity was written in 1952, at the height of the Cold War era.<sup>3</sup> In their article, which later became a book, the authors divided the case for progressivity into two principal categories. In the first category were arguments that attempted to justify progressive taxation for reasons other than the overt redistribution of wealth. Included were arguments based on the diminishing marginal utility of money; the benefit theory of taxation; and various other formulations relating to benefit, sacrifice, and ability to pay. Blum and Kalven found these arguments appealing but inconclusive, and subject to quantification problems that made them difficult to apply on a systematic basis. For example, the benefit theory foundered on the difficulty of identifying the benefits of government spending, while marginal utility theories were inconclusive because of the difficulty of quantifying

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3. See *supra* note 2.

individual utility curves. Thus none of these theories, on their own, provided a convincing argument for progressive taxation.<sup>4</sup>

In the second category were arguments which saw progressive taxation as an overt means of redistributing income. According to Blum and Kalven, such redistribution might be justified by a feeling that the pre-tax economy did not fairly reward individual talents and abilities, or that the talents and abilities were themselves unfairly distributed in the first place. These arguments were more forceful than the first category, but also more controversial, especially in a society that was organized around capitalist principles and rejected the socialism of the Soviet Union and similar countries. Finding the first category largely unconvincing, and the second politically problematic, Blum and Kalven concluded that the case for progressivity was "stubborn but uneasy," at least for those unwilling to contemplate the more radical social engineering that a full-scale assault on inequality would entail.<sup>5</sup>

Because Blum and Kalven addressed the traditional arguments so comprehensively, more recent scholarship has tended to emphasize new intellectual developments, which might provide arguments unavailable at the time Blum and Kalven were writing.<sup>6</sup> The premiere example is Bankman and Griffith, which combines welfarist theories of distributive justice and optimal tax methodology, neither of which were completely developed in 1952, to make a sophisticated case in favor of progressive taxation.<sup>7</sup>

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4. See Blum & Kalven, *supra* note 2, at 451-86.

5. See *id.* at 519.

6. For a somewhat more practical discussion, written about halfway between the time of Blum and Kalven and later articles, see Charles O. Galvin & Boris I. Bittker, *The Income Tax: How Progressive Should It Be?* (1969) (debate between advocates of a flat tax on a more broadly defined income base and the advocacy of a traditional progressive rate tax). For a classic work of pre-Blum and Kalven progressivity scholarship, see William Vickrey, *Agenda for Progressive Taxation* (1947).

7. See Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 Cal. L. Rev. 1905 (1987); cf. Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*, 53 Tax L. Rev. 51 (1999) (optimal tax analysis may support progressive or flat taxation under different theoretical and factual assumptions). In discussing progressivity scholarship, I emphasize work by contemporary legal scholars. Economics articles tend to be more empirical in character, although frequently referring to underlying moral and philosophical issues, see, e.g., Tax Progressivity and Income Inequality (Joel Slemrod ed. 1994); Richard A. Musgrave & Peggy B. Musgrave, *Public Finance in Theory and Practice* 356-61 (5th ed. 1989) (assessing patterns of progressivity in recent American taxes); but see *id.* at 218-33 (discussing benefit theory and ability to pay as theoretical approaches to tax equity).

More recent authors have applied Rawls, Dworkin, Nozick, and other philosophers to the tax issue, with the first two of these generally being taken to support a high degree of progressivity, and the third a flat or at least less progressive regime.<sup>8</sup> Perhaps the most original approach was that of Marjorie Kornhauser, who combined feminism with more traditional arguments such as the benefit theory and democratic stability to make an eclectic, unconventional case for progressivity. Identifying progressivity with a cooperative, feminine model of social relations, Kornhauser argued that a measure of redistribution served as a necessary if modest counterpoint to an individualist, male-dominated society.<sup>9</sup>

The scholarship on progressivity is diverse and wide-ranging, but two principal themes emerge. The first is the predominantly abstract, theoretical character of such scholarship. Most articles address the issue of progressivity in a hypothetical, idealized society, with only limited empirical data regarding the actual allocation of income in the United States or other countries. Issues like the feminization of poverty, or the concentration of poverty among minorities and immigrant groups, have only recently been reflected in the literature, and discussion of these issues tends to be treated as a separate subject rather than as a part of the mainstream discourse on progressive taxation, although there are some notable exceptions.<sup>10</sup>

Second, as time goes on, tax scholars have placed increasing emphasis on the burden-sharing (i.e., non-redistributive) arguments for progressivity, or at the very least blurred the differences between the two types of arguments, arguing that progressivity is less radical than Blum and Kalven suggested and that it ought to be acceptable even to those who are generally skeptical about redistributive measures. This reflects the increasing conservatism of American society, but also the structure of the tax field, which favors consensus-style

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8. See, e.g., Donna M. Byrne, *Progressive Taxation Revisited*, 37 *Ariz. L. Rev.* 739, 771-89 (1995) (applying Rawls, Dworkin, Nozick, and Richard Posner to the issue of progressive tax rates); Donna M. Byrne, *Locke, Property, and Progressive Taxes*, 78 *Neb. L. Rev.* 700 (1999) (applying a similar application of Lockean liberal theory); cf. Charles R. O'Kelley, Jr., *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 *S. Cal. L. Rev.* 727, 735-44 (1985) (using Rawls, Nozick, Roberto Unger, and other scholars in support of an argument for a flat tax with an expanded tax base and a generous exemption amount); Robert E. Hall & Alvin Rabushka, *The Flat Tax* (2d. ed. 1995) (arguing for proportionate or flat tax rates on fairness and efficiency grounds); but see Stephen B. Cohen, *The Vanishing Case for Flat Tax Reform: Growth, Inequality, Saving, and Simplification*, 33 *Val. U.L. Rev.* 819 (1999) (arguing that persistence of high growth rates and economic inequality have largely undermined the case for a flat tax).

9. See Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 *Mich. L. Rev.* 465 (1987).

10. See *id.*, Marjorie E. Kornhauser, *What Do Women Want: Feminism and the Progressive Income Tax*, 47 *Am. U. L. Rev.* 151 (1997) (assessing normative and empirical aspects of women's support for progressive taxation).

arguments and has historically proved inhospitable to those who favor radical, nonincremental solutions.<sup>11</sup> This mainstream approach has succeeded in building broad support for progressivity, but has resulted in a perhaps overly defensive posture, in contrast with the aggressive self-assurance of many of their opponents.

While the scholarly debate continues, a largely separate debate rages in the political forum, where institution of a "flat" (i.e., non-progressive) income tax, or wholesale replacement of the income tax with a consumption, value-added, or similar levy, retain significant popular appeal. This political debate has an odd and at times contradictory character. On the one hand, the rhetorical momentum has shifted toward the flat tax advocates, who support a flat tax as part of a broad program of conservative-inspired political reform. On the other hand, the actual progressivity of the tax system has remained surprisingly high and perhaps even increased during this period, an effect which is more striking if government spending, especially Social Security, as well as taxes are taken into account.<sup>12</sup> Not surprisingly in this situation, public opinion remains ambivalent. The idea of a flat tax wins broad sympathy, but support tends to diminish as people become aware of the costs of the proposal, including loss of deductions and credits and higher taxes on low-income individuals. Some of the flat tax momentum appears to have dissipated as a result of the economic boom in the 1990's, which has focused attention on tax reduction rather than comprehensive reform, although the idea appears to have made a comeback in the recent Presidential campaign.<sup>13</sup>

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11. See Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 *Cornell L. Rev.* 365, 375-80 (1998) (describing the pragmatic tradition in tax scholarship).

12. On the progressivity of the contemporary tax system, see Staff of the Joint Committee on Taxation, *Distribution of Certain Federal Tax Liabilities By Income Class for Calendar Year 2000 (JCX-45-00)*, April 11, 2000 (hereinafter "JCT Report") (households earning over \$200,000 per year are estimated to pay 42.7% of the individual income tax for fiscal year 2000, with the top 1% of income earners paying 33.6% of the tax). These amounts become significantly lower (27.5 and 18.6%, respectively) when excise and payroll taxes are taken into account, although a significant measure of progressivity would likely be restored if the spending of payroll, primarily Social Security and Medicare, tax receipts were taken into account. Efforts to combine tax, spending, and regulatory measures and thereby provide an overall measure of the progressivity of government intervention in the economy have typically foundered on the difficulty of measuring the distributive impact of government services, such as military spending and police protection, although the combined measure would likely reveal a high degree of redistribution, particularly as individuals age and become eligible for Social Security and related old-age benefits. See Laurence J. Kotlikoff, Kent Smetters, & Jan Walliser, *Distributional Effects in a General Equilibrium Analysis of Social Security*, in *The Distributional Effects of Social Security Reform* (Martin Feldstein ed., forthcoming 2000, description available at <http://econ.bu.edu/faculty/kotlikoff>).

13. See Leslie Wayne, *Flat Tax Goes From "Snake Oil" to G.O.P. Tonic*, *N.Y. Times*, Nov. 14, 1999, at 1 (noting that three of five Republican Presidential candidates supported a flat tax at a recent New Hampshire debate). On public opinion regarding progressive taxation, see generally Karlyn Keene, *What Do We Know About the Public's Attitude on Progressivity*, 36

### III. CHANGES IN THE CONTEXT OF THE PROGRESSIVITY DEBATE

The progressivity debate is thus characterized by a dichotomy between the intellectual and the popular realms. Intellectuals tending to support progressive taxation but in somewhat defensive terms, and the populace is intrigued by a flat tax but is also ambivalent and often confused. Yet both the intellectual and popular debates threaten to be overtaken by events. These include changes in the activity and philosophy of the post-Cold War Federal Government, in the degree and type of economic inequality, and in the relationship between the United States and the emerging global economy. These changes do not necessarily weaken and in some cases may actually strengthen the intellectual arguments for progressivity, but they change the context for those arguments, so that many of the assertions made by Blum and Kalven and more recent authors bear revisiting in the new situation. Real-world changes, and especially globalization, also impose significant practical obstacles to the maintenance of a progressive tax system, so that progressivity advocates face the frustrating prospect of making a winning academic argument on behalf of a losing political cause.

#### A. *The New Political Environment*

The most obvious change is the increasing conservatism of American politics, especially in the last twenty years. Conservatism takes many forms, but typically includes a gut-level resistance to spending and taxes, especially programs that are perceived as redistributive between income and social classes. Thus programs designed primarily to benefit the poor such as welfare and health care reform face strong opposition, while those with large middle class constituencies such as Social Security and Medicare are criticized but

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Nat'l Tax J. 371 (1983) (public believes existing tax system to be unfair but displays contradictory attitudes regarding progressive and flat taxes); Michael L. Roberts, Peggy Hite, Cassie F. Bradley, Understanding Attitudes Toward Progressive Taxation, 58 Pub. Opinion Q. 165 (1994) (public tends to prefer progressive taxation as an abstract matter but may prefer proportional or flat taxes when more concrete questions are asked); Deborah A. Geier, Cognitive Theory and the Selling of the Flat Tax, 96 Tax Notes 241 (April 8, 1996), (assessing how cognitive biases affect people's impressions of flat and progressive tax systems and responses to new tax incentives). See also Marvin A. Chirelstein, The Flat Tax Proposal—Will Voters Understand the Issues?, 2 Green Bag 2d 147, 148 (1999) (expressing the author's sense that there is considerable "misapprehension" of new flat tax proposals and providing a nontechnical roadmap to combat that misapprehension). The recent Presidential campaign suggested further ambivalence toward the tax reform issue, with the Republican candidate (George W. Bush) advocating tax cuts less extreme than a flat tax, and the Democratic candidate (Al Gore) emphasizing "targeted" tax relief and criticizing the Republican proposals for their distributional impact. See Martin A. Sullivan, News Analysis—Dueling Tax Plans: Texas Two-Step Gives Way to the Tennessee Waltz, Tax Notes, Oct. 2, 2000, at 10 (comparing Bush and Gore tax plans).



remain largely untouched or even incrementally expanded.<sup>14</sup> The issues of spending and taxes are closely linked here, because high taxes are unpopular on their own terms and because they are perceived as funding programs that undermine traditional values. The later 1990s have witnessed something of a resurgence of liberal politics, as exemplified by the election of President Clinton and similar leaders such as Tony Blair and Gerhard Schroeder in European countries, but these leaders have frequently been on the defensive and have in any case followed centrist rather than traditional liberal policies.

Together with increasing conservatism is a significant change in the nature of government spending. Blum and Kalven wrote at the height of the Cold War, when the federal budget emphasized defense spending and a variety of domestic programs, typically designed to assist poor Americans in obtaining education, housing, and other economic benefits. Today both defense and discretionary social spending have decreased in relative terms, and an increasing portion of the federal budget is taken up by "entitlement" programs (notably Social Security) that are financed from sources other than the income tax. The decline in defense spending has been accompanied by a change in national mood. The country feels less threatened by foreign adversaries than at any time in recent history, and even last year's military action in Kosova had some difficulty making front pages.

The changes above strike at both of the arguments for progressivity as described in Blum and Kalven's article. Redistributive arguments are obviously harder to make in an atmosphere hostile to redistribution. Even if taxes were raised on the rich, the decline in discretionary spending means that relatively little of the money would ever benefit the poor unless accompanied by significant new spending programs.

Burden-sharing arguments also lose some of their luster. Defense is the most obvious form of shared burden. With defense needs somewhat less pressing, many middle-class taxpayers may feel that they are receiving few benefits from federal spending, and thus have little reason to pay high taxes on increasing incomes. To the extent that they accept the benefit theory, voters are likely to use it to argue for user fees and similar charges that directly match levies and benefits, rather than as an argument for progressive income

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14. There is an anomaly here, in that the latter programs (especially Social Security) have a large redistributive component, but at least part of their success consists of hiding this component, and proposals for reform of these programs frequently call for reducing this redistributive aspect. On proposals for the reform of Social Security, see Rebecca E. Perrine Wade Note, *The Face of Social Security in the Twenty-First Century: An Analysis of the Reform Proposals Offered by the Social Security Advisory Council*, 6 *Elder L.J.* 115 (1998) (analyzing the economic and social impact of alternate reform plans produced by the Social Security Advisory Council of the Department of Health and Human Services); Kathryn L. Moore, *Redistribution Under a Partially Privatized Social Security System*, 64 *Brook. L. Rev.* 969 (1998) (evaluating effect of various privatization proposals on the redistributive capacity of the Social Security system).

taxation.<sup>15</sup> All this is really just another way of saying that progressive taxation was part of a broad liberal consensus which prevailed during the middle part of this century, and becomes difficult to maintain as that consensus breaks down. Instead of floating with the political tide, progressive taxation must now swim bravely against the tide.

### B. *The Changing Nature of Inequality*

A second change relates to the nature and degree of economic inequality. Blum and Kalven wrote against the backdrop of a classic industrial society, with a relatively small wealthy or upper middle class and a large working or lower middle class concentrated in agricultural and manufacturing jobs. The implicit purpose of progressive taxation was to redistribute income from the former to the latter, and to some extent to poor people not yet in either of these categories. Such a program had a strong intellectual and political appeal, since a majority of the population had relatively modest incomes and thus benefitted, or at the very least appeared to benefit, from progressive taxation. Racial and gender differences obviously existed, but were not yet a major part of the tax debate, and Blum and Kalven allude to them only in passing.

However, today's society differs significantly from that of the 1950s. On the positive side, the country has become immeasurably richer, and there is probably a higher percentage of affluent individuals than at any time in American history. But there is also a large and significant minority of disadvantaged individuals, many of them in the second or third generation of this disadvantaged status. The latter are moreover concentrated among women, minorities, and recent immigrant groups, so that the question of class becomes intermingled with issues of gender, race, and immigration policy. By all accounts, economic inequality is growing, as is the concentration of poverty among discrete racial and gender groups.<sup>16</sup>

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15. Cf. Blum & Kalven, *supra* note 2, at 451-55 (discussing benefit theory as an argument for progressive taxation).

16. On increasing income inequality during the past generation, see, e.g., Edward N. Wolff, *Top Heavy: A Study of the Increasing Inequality of Wealth in America* 12 (1995) (most of the economic gain during the 1980s went to the top 1% of income earners with the middle remaining fairly constant and lower wage-earners receiving a declining portion of the economic pie); JCT Report, *supra* note 12, at 1 (top 5% of households estimated to account for almost 30% of national income during the 2000 calendar year with top 10% of households accounting for more than 40% of that figure). On the concentration of poverty among women and minority groups—the so-called feminization (and "minoritization") of poverty—see U.S. Dep't of Commerce, *Statistical Abstract of the United States 1996*, Nat'l Data Book, Chart No. 736 (recording an increase in female-headed households below the poverty level, from 9.4 million in 1979 to 14.4 million in 1994); *id.*, chart No. 724 (male householders with no wife present earned an average of \$27,751 in 1994 while female householders with no husband present earned an average \$18,236); Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth* 12, 92-

The changing nature of inequality has a curious effect on progressivity. On a theoretical level, increasing inequality would appear to enhance the case for redistribution, by taxation or other means. This is particularly true, when poverty correlates strongly with immutable factors such as race and gender making it difficult to argue that poverty is attributable to lack of effort or ambition on the part of the individuals in question. Perhaps the best argument for progressive taxation, that it corrects for injustice in the pretax allocation of income, is as strong as or stronger than it was fifty years ago.<sup>17</sup>

The difficulty is, of course, in translating this moral case into an effective practical argument for progressive taxation. Here three problems present themselves.

The first is the simple fact that a wealthy society, even as it presents a stronger moral case for redistribution, is likely to resist it politically. Increasing unfairness might in theory cause the better off to support redistributive measures. But the opposite may also occur. The wealthy are emboldened in their efforts to undo transfer programs, and the middle class becomes fearful of sharing its more precarious advantages with the classes below them. Race and gender differences may actually enhance this process, making it difficult for the rich to identify with those less fortunate than they are, and enhancing the physical separation of rich and poor which is a feature of all advanced societies. It is important to note that there is no clear line between intellectual and political arguments on this subject. Thus, conservatives (and some liberals) argue that rewards should be distributed on the basis of "merit," which is measured by standardized tests and other vehicles that tend to favor the more advantaged parts of society, and criticize progressive taxation for interfering with merit-based awards.<sup>18</sup> Similarly, the lower classes, especially single mothers, are often cited for immoral conduct which is said to explain their poor economic status. Whether such statements are taken to be good-faith arguments or self-serving rationalizations, they contribute to a climate that is increasingly hostile to redistributive measures, on both intellectual and political grounds.

A second problem relates to the Left, the most likely supporters of progressivity. As poverty becomes concentrated among women, minorities, and other discrete groups, "progressive" people inevitably begin to place less faith in generic remedies like taxation and pay more attention to sectarian concerns.

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103 (1995) (conditions for disadvantaged African-Americans have deteriorated significantly since 1970 while even middle-class blacks lag substantially behind whites in volume of assets and income security). The concentration of income among wealthy individuals lends a perverse quality to progressivity statistics, since the increasing percentage of taxes paid by upper-income taxpayers is, in part, a reflection of their increasing percentage of income rather than of a more redistributive tax system; what seems clear is that after-tax incomes would be even more skewed toward the wealthy under a proportionate or flat tax regime. See *supra* note 12.

17. See Blum & Kalven, *supra* note 2, at 496-97 (arguing for redistribution based on unfairness of pretax income allocations).

18. See *infra* text accompanying notes 44-57 (discussing the "meritocracy" concept).

If the problem is discrimination against women or African-Americans, why not advocate policies like affirmative action which deal directly with these problems? Why make an issue of progressive tax rates, which address only the effects of discrimination, and then only in an indirect, blunderbuss manner? The rise of identity politics, so visible in other areas, here collides full-force with tax policy. Tax scholars themselves have become less interested in overall tax structure and more interested in provisions affecting women, minorities, and other discrete, identifiable groups. Two left-leaning authors have written that progressivity is itself a "contestable" proposition, given its failure adequately to consider the problems of poorer taxpayers and other methodological flaws.<sup>19</sup>

Even if these ideological problems could be resolved, there remain the practical limitations of progressive taxation in the contemporary economy. Progressivity is a good vehicle for redistributing income between the upper and middle segments of society, but is generally less effective at assisting the very poor. Many poor people do not pay income taxes at all, and for those that do, sales and payroll levies often remain more important than the income tax. Progressive (i.e., higher) taxes on the wealthy might in theory be used to fund direct spending programs that benefit poor individuals, but this depends on numerous political assumptions, and in the current political environment it is unlikely that this would happen.<sup>20</sup> Fifty years ago, progressive taxation was relatively good at solving the problem of redistribution from the wealthy to the middle and working class, but today progressive taxation is relatively bad at solving the problem of reallocation from a large and mostly contented population to a smaller but growing number of poor. This is obviously a simplification, but it helps to explain the defensive posture of progressivity advocates, and the lack of enthusiasm for the concept among its intended beneficiaries.

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19. Karen B. Brown & Mary Louise Fellows (eds.), Introduction, *Taxing America* 9-10 (1996) (arguing that progressivity "depends on a series of contestable proposition," including a focus on income rather than wealth and an emphasis on the effects rather than the causes of income disparities).

20. See *supra* text accompanying notes 12-13. The role of the poor, as opposed to the working class, in progressive tax theory has always been somewhat ambiguous, because many poor people pay little or no income tax and because theorists have tended to emphasize the effect of progressivity on the rich rather than the poor. Most current flat tax proposals include generous exemption amounts that exempt all or most of the poor from taxation. On the role of the poor in progressive tax theory, see Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 *Vand. L. Rev.* 919, 958-91 (1997) (arguing that the poor have a right to pay taxes as well as receive government benefits and that both liberal and conservative authors have paid inadequate attention to this right).

*C. Globalization and the "Race to the Bottom"*

Perhaps the biggest cliché of the past decade is the rise of a global economy and the corresponding decline in the importance of national boundaries. "Globalization" has in fact been taking place for several decades, but there is a sense that the 1990s, the decade of the Internet, cell phones, and the New Economic Order, marked a point of no return, in which markets became inextricably intertwined and no nation could hope to remain free of the demands of international capitalism. One must be wary of exaggeration—earlier prophecies of the "end of history" have met with dubious fates<sup>21</sup>—but on the level of perception, if not reality, something has clearly changed, and tax and nontax public policy will henceforth be made in a new and different environment.

Globalization, like domestic political changes, has contradictory effects. Globalization, at least in the short run, tends to exacerbate economic inequality, pulling the wages of highly skilled workers up to international levels while pushing wages of unskilled individuals down toward the level of Third World residents who in theory could and sometimes do replace them. This increased inequality, which results from global economic forces rather than any moral failure on the part of the less skilled workers, provides a further argument in favor of progressive taxation and other redistributive programs. Michael Knoll has written eloquently of the economic dislocation caused by the new global economy and the need to adjust public policy to cope with this problem.<sup>22</sup>

But if globalization makes high tax rates sympathetic, it also makes them difficult to maintain. In a global economy, a country that increases tax rates beyond those of competing nations will eventually lose business to those competitors. This is particularly true of taxes on capital, which can more easily be shifted to low-tax jurisdictions than labor or other economic inputs. Globalization thus tends to discourage taxation of capital and encourage taxation of labor and other factors; since capital tends, almost by definition, to be owned by wealthier people, progressivity will thus be harder to maintain in a global economy, unless there is substantial cooperation between taxing units.<sup>23</sup> International tax policy thus threatens to recreate the "race to the

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21. See, e.g., Norman Angell, *The Great Illusion: A Study of the Relation of Power in Nations to Their Economic and Social Advantage* (1911) (arguing that the growth of international trade made international conflict obsolete in the pre-World War I era).

22. Michael S. Knoll, *Perchance To Dream: The Global Economy and the American Dream*, 66 S. Cal. L. Rev. 1599 (1993).

23. See generally Vito Tanzi, *Taxation in an Integrating World* 134 (1995) (globalization makes it difficult for countries to impose progressive taxes on factors, especially financial capital and highly skilled labor, that can move to countries that impose lower marginal tax rates); Sven Steinmo, *The End of Redistribution? International Pressures and Domestic Tax Policy Choices*, *Challenge*, Nov.-Dec. 1994, at 9 (tax systems in both industrial and Third World nations are becoming increasingly regressive as taxes on wealthy individuals and corporations

bottom" between American states, which compete to provide lower taxes and services and attract new jobs and investment. To some degree, this phenomenon is offset by advantages resulting from higher taxes and spending, including an improved infrastructure and a well-educated workforce; but in the immediate term, at least, the impetus appears to be toward lower and less progressive taxes.<sup>24</sup>

Whether it strengthens or weakens the case for progressivity, globalization poses a new intellectual challenge for tax scholars, who are used to thinking in one-country terms. An obvious question concerns the role of poor countries (as opposed to poor people) in progressive taxation. Tax brackets for American married couples are now delineated at, approximately, \$37,000, \$89,000, \$140,000, and \$250,000, with marginal tax rates increasing from 15% to 28%, 31%, 36%, and 39.6% percent at these respective cutoffs.<sup>25</sup> By contrast, the per capita GDP in Mexico, a country now linked to the United States by the comprehensive North American Free Trade Agreement (NAFTA), is approximately \$4,300 per year.<sup>26</sup> Does it make moral or practical sense to redistribute income between Americans with taxable incomes of \$30,000 and \$60,000, when the average Mexican enjoys about one-seventh the per capita GDP of the average American?<sup>27</sup> Shouldn't both rich and poor Americans pay higher taxes, with the excess being redistributed to Mexicans with much lower

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are cut and replaced by increases in consumption taxes, social insurance charges, and public sector borrowing); Editorial, *The Taps Run Dry*, *The Economist*, May 31, 1997, at 21 (globalization is forcing governments to shift taxation from "footloose" production factors like profits and savings to less mobile factors like consumption and labor, resulting in increased regressivity). Although the most immediate impact of globalization is on business taxes, tax rates on high-income individuals have also decreased sharply in most industrial nations in the past two decades, a development which appears to result at least partly from fears of a "brain drain" if taxes on the most productive individuals are too high. See Tanzi, *supra*, at 32-41 (concluding that income taxes may play a significant role in labor migration, especially for high-income individuals and especially in smaller countries).

24. See Robert B. Reich, *Toward A New Economic Development*, *Indus. Wk.*, Oct. 5, 1992, at 37 (tax breaks and subsidies have only a marginal effect on where industry decides to locate; accordingly "the only way to lure global capital while maintaining or increasing people's standard of living is . . . to offer a highly skilled workforce and world class infrastructure"); Jeffrey Owens, *Globalisation: The Implications for Tax Policies*, *Fiscal Stud.*, Vol. 14, No. 3, at 21 (1993) (globalization leads to increased tax competition but high tax locations which have good infrastructure and a well educated workforce may be more attractive to some high-tech companies than low tax jurisdictions with minimum government expenditures).

25. IRC § 1(a). These brackets have been adjusted for inflation annually since 1992. *Id.* § 1(f). (1999).

26. See 1 Organisation For Economic Co-Operation and Development, *Nat'l Accounts Main Aggregates 1960-1997* 146-47 (1999) (noting that Mexican per capita GDP was approximately \$4,300 in 1997). The use of Mexican per capita GDP probably overstates the hypothetical U.S. taxable income of Mexican taxpayers. The taxable income of Mexicans, measured by U.S. standards, would be still lower than these GDP figures because of the effect of deductions, exclusions, and other measures.

27. The per capita GDP of the United States in 1997 was approximately \$29,300. See *id.*

incomes? If this seems too extreme, shouldn't some milder form of redistribution be instituted between the two countries, and isn't this matter at least as pressing as redistribution between the American upper and middle classes?

The question seems far-fetched, even bizarre, because most Americans, including the American Left, have historically thought of foreign policy as subsidiary to domestic concerns. For example, the Left has frequently supported protectionist trade legislation in order to help American workers even though the same legislation may hurt still lower-paid workers in other countries.<sup>28</sup> But poor countries are likely to raise precisely this sort of question when rich countries ask them to cooperate in tax matters, by harmonizing tax rates, restricting tax havens, or otherwise protecting the existing tax structure. The arguments for progressive taxation, including reduction of income inequality, marginal utility of money, and similar theories, are no less applicable merely because national borders have been crossed. On both a moral and practical level, globalization requires a rethinking of progressive taxation, ranging from implementation problems to the very definition of the progressivity concept.

#### IV. REFLECTING THE CHANGES: TOWARD AN ETHOS OF PROGRESSIVITY FOR THE POST-COLD WAR WORLD

The preceding pages suggest some of the intellectual and practical challenges that progressivity will face in the foreseeable future. The remainder of the article sets forth a strategy for responding to these challenges. This includes a new rhetorical approach, which emphasizes the redistributive nature of progressive taxation and its role in a highly competitive, merit-based society, and a new research program, which ties progressivity to the issues of gender and racial equity within the United States and the globalization of tax policy outside it. These aspects are closely related, as the rhetoric provides inspiration

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28. A dramatic example of left-wing (and some right-wing) reservations about free trade was provided by the late 1999 Seattle demonstrations against the World Trade Organization, which found surprising support in several Establishment corners. See, e.g., G. Richard Shell, Protesters Have a Point on WTO: Interest Groups Need to Be Heard, *Phil. Inquirer*, Dec. 3, 1999, at A43 (WTO should be democratized to reflect interests of nongovernmental as well as governmental constituencies and to recognize the validity of environmental, human rights, and other noneconomic claims); Robert E. Lighthizer, Conceding Free Trade's Flaws, *N.Y. Times*, Dec. 3, 1999, at 31 (globalization is a positive development but U.S. should ensure that it does not lead to world government or a "race to the bottom" in labor and environmental standards); but see Trudy Rubin, Protesters Overestimated WTO's Power, *Phil. Inq.*, Dec. 8, 1999, at A27 (arguing that Seattle protesters should focus on domestic issues rather than attempting to force U.S. norms on developing countries). On tax and trade issues involved in the North American Free Trade Agreement—a sort of regional equivalent of the WTO—see generally Colloquium on NAFTA and Tradition: Forward, 49 *Tax L. Rev.* 525 (1994).

for new research projects and the research, in turn, provides support and backing for the rhetorical argument.

I wish to be clear at the outset about the scope of my effort. The changes that I propose are, in general, incremental rather than revolutionary, an effort to update Blum and Kalven rather than discard it and start again. There is no magic bullet for reviving progressivity or repelling the flat tax challenge. What I offer is engagement, a proposal to confront rather than avoid what I believe to be the real issues in the progressivity debate, together with a belief that such engagement will, in the long run, strengthen rather than weaken the argument for progressivity.

Making a new argument inevitably involves some restatement of points from the earlier, descriptive part of this article. The reader will forgive this repetition, together with the clumsiness resulting from the presentation of a unified position in its separate component parts.

#### *A. Arguing Progressivity: The Case for a Modest Meritocracy*

Begin with rhetoric. The first step in arguing for any proposition is to be honest about its strengths and weaknesses. Now as always, the case for progressivity rises and falls with the redistributive argument.<sup>29</sup> The alternate arguments—diminishing marginal utility of money, the benefit theory and the breakup of large concentrations of wealth—were dubious even in Blum and Kalven's day, and intermediate developments have if anything weakened these further. Marginal utility, always indeterminate in nature, becomes still more so in a wealthier society, where the differences in consumption patterns tend to be of degree rather than kind. This problem may be sidestepped by focusing solely on extreme cases of wealth and poverty, but at that point becomes essentially a restatement of the case for redistribution, with relatively little added by the utility concept.<sup>30</sup> The benefit theory founders on the lack of any obvious

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29. Cf. Henry C. Simons, *Personal Income Taxation 18-19* (1938) ("The case for drastic progression in 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.")

30. It is easy to suppose that the utility of an additional dollar will be greater to a serf than to a lord, or to an individual earning \$5,000 per year than to an individual earning ten times that amount. It seems harder to assume that a person earning \$50,000 or \$75,000 will derive more utility from her next dollar than a person earning \$150,000 or \$200,000, although these kinds of distinctions are made regularly by today's tax rate tables. Most likely, the latter's consumption will involve more luxurious versions of the former's such as a house in a nicer neighborhood or a Lexus in place of a Camry rather than the satisfaction of essentially different needs; the declining utility implied by this increased luxury may be overwhelmed by the latter's higher appreciation of luxury items, or greater materialism, or other factors that are difficult to quantify in a comprehensive utility theory. One can still argue, rather persuasively, I think, that the latter person has a greater taxpaying capacity, and hence a greater responsibility to contribute to those less fortunate than she is, but this is a redistributive or similar argument rather than an argument based on diminishing marginal utilities in a theoretical sense. To put the same matter somewhat



correlation between taxes and benefits, and if extended to its ultimate logic would produce a regime of user fees rather than a progressive income tax. Concentrations of wealth, if we are seriously concerned about them, are better dealt with by a wealth or inheritance tax. There is no escaping the redistributive or fairness issue.

To say that the issue is fairness is not necessarily to make a convincing case for progressivity; for the more unfair the pretax income distribution, the more many may struggle to preserve it. This is particularly true when the political climate is conservative, when poverty is concentrated among discrete and insular groups, and when the merit or just desserts concept is used to rationalize existing income distributions and argue against reallocation.<sup>31</sup> A contemporary case for progressivity accordingly requires that we confront these factors, reducing their negative impact and where possible turning them into affirmative arguments for progressive taxation. I consider these issues in turn.

1. *Politics: the Rise of Neoliberalism and the Reappearance of Distributional Concerns.*—A major spur to the flat tax movement is the rise of political conservatism in the 1980s and 1990s, in the United States and to a lesser degree its major trading partners. The conservative trend is important, because it provides an ideological context for an otherwise parochial issue, tying the flat tax to an overall program of smaller government and reward for individual effort. In this view, the end of the progressive income tax is important both directly, because progressive taxation is an important redistributive program, and indirectly, because the progressive income tax has traditionally provided funding for liberal spending programs.

Although the conservative movement is hardly spent, there are signs that it may finally be on the wane. The electoral successes of Bill Clinton in the United States, Tony Blair in the United Kingdom, and Gerhard Schroeder in Germany do not mark a return to traditional liberalism, as all three candidates campaigned on centrist, nonideological platforms. But they do suggest a change in public mood, in which the fear of concentrated economic power has replaced or at least balanced the fear of “Big Government,” and voters look to government to restrain the excesses of the new global economy. This is particularly true of Clinton, who has presented himself as a defender of government programs such as Social Security and Medicare that protect vulnerable groups from the unrestrained operation of the free market. There are clear limitations to this analysis such as the fact that Clinton also signed a harsh welfare reform law, and his health care reform package was soundly defeated, but the widespread celebration of private markets and demonization of

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differently, a wealthy society tends to collapse the differences between redistributive and marginal utility arguments. Marginal utility becomes either less persuasive on its own terms or a restatement of the case for redistribution, which rises or falls independent of the utility analysis.

31. See supra text accompanying notes 14-28.

government, a defining feature of 1980s politics, appears to be a thing of the past. This pattern of moderation was also reflected in the 2000 presidential election, in which the Republican candidate (George W. Bush) emphasized "compassion" over traditional conservative themes and both he and the Democratic candidate (Al Gore) pledged support for middle and working class issues.

Were the changes above merely short-term political cycles, they would have little relevance for our analysis. But they may be more than that. E.J. Dionne, Jr. in his book, *They Only Look Dead: How Progressives Will Dominate the Next Political Era*, argues that the current era, with its rapid economic change and wide diffusion of new technology, is in many ways similar to the Progressive Era at the beginning of the Twentieth Century, the era that produced the federal income tax and other progressive-inspired reforms.<sup>32</sup>

According to Dionne, the economic dislocation resulting from globalization together with a general crisis of faith in political institutions have made conditions ripe for a revival of Progressivism, historically characterized by the "effective use of democratic government to temper market outcomes, and to accomplish things that the market could not have achieved on its own."<sup>33</sup> Dionne, a liberal, is not alone in his analysis. Kevin Phillips, a leading conservative, has written of the dangers of "Arrogant Capital" and has argued that distributional issues will likely return to the fore in the near future.<sup>34</sup>

Whether there will be a Progressive revival, and what it might mean for tax policy if there is one, remains to be seen. Even Dionne himself is short on specifics, although he generally supports progressivity and calls for reductions in subsidies to corporations and wealthy taxpayers.<sup>35</sup> However, it seems inevitable that a more liberal political culture, one specifically attuned to

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32. E.J. Dionne, Jr., *They Only Look Dead: Why Progressives Will Dominate the Next Political Era* 34-37 (1996) (noting parallels between today's economic and political issues and those arising between 1870 and 1900).

33. See *id.* at 265, 274.

34. Kevin Phillips, *Arrogant Capital: Washington, Wall Street, and the Frustration of American Politics* (1994). For further "neoliberal" analyses of contemporary American politics, expressing a wide range of disagreement on basic issues, see, e.g., Jeff Faux, *The Party's Not Over: A New Vision for the Democrats* (1996) (advocating economic nationalism and an avowedly class-conscious approach as a strategy for rebuilding the Democratic Party after the Reagan era); Mickey Kaus, *The End of Equality* (1992) (expressing skepticism about redistributive policies but calling for a "civic egalitarianism" in which class segregation is reduced and life becomes more democratic). Not surprisingly, Faux is more or less enthusiastic about progressive taxation, while Kaus remains more or less skeptical. See Faux, *supra*, at 197-98 (advocating a combined progressive tax on income, gift, estate, and payroll receipts); cf. Kaus, *supra*, at 170 (Characterizing progressive taxes are "pretty weak social egalitarian medicine," and arguing that "drafting Donald Trump's son (and daughter) into the armed services would make the social-egalitarian point a lot more forcefully than raising his taxes.")

35. See Dionne, *supra* note 32, at 304 (opposing flat tax as a form of redistribution to the wealthy from the middle class and calling for a reduction of "corporate welfare" in the form of business tax subsidies).

distributional and fairness issues, will be more hospitable to progressive taxation than the conservative era which preceded it. This is particularly true if progressivity advocates can make the case that the pretax income distribution is unfair and becoming more unfair, and if they can also link progressive taxation to a broader agenda of spending and regulatory policies, in the same way that the flat tax forms part of a broader conservative agenda. While not providing an independent argument for progressivity, recent political developments suggest there may be a sympathetic audience for these arguments if they can be adequately made.

2. *Economics: "Winner-Take-All" Theory and the Limitations of Private Markets.*—If fairness is the strongest argument in favor of progressive taxation, the strongest argument against progressivity is that it interferes with the operation of the free market.<sup>36</sup> According to this argument, high taxes reduce the incentive for productive labor and make the economic "pie" smaller for everyone, before the issue of distribution is even reached. The incentive argument can be made against any tax system, but is particularly useful against progressive taxation, which (or so the argument goes) punishes the most productive members of society and discourages them from adding to their marginal work product. This argument is crucial to the flat tax movement on both a practical level, because it suggests that the losses from progressivity outweigh its potential gains, and on moral grounds, because it suggests that progressivity punishes the more worthy members of society and rewards less deserving members.

Of course, the incentive argument relies on the assumption that the pre-tax marketplace operates more or less efficiently; this assumption has sparked a feisty debate among experts. Welfare economists have long suggested that, under certain circumstances, redistribution to lower-income individuals may actually increase efficiency, since these individuals derive more utility from the additional dollars than is lost by the wealthy individuals who lose them.<sup>37</sup> Economists have further questioned whether high tax rates actually discourage productivity among the wealthiest individuals, who tend to be highly motivated and may have strong nonmonetary reasons for performing at a top level. These arguments are appealing, but difficult to quantify, and, like the flat tax arguments they oppose, rely upon assumptions about human behavior that may be impossible to verify in the real world.

During the past decade, some fascinating new evidence has emerged on the behavior of labor markets, especially at the high end. In their book, *The Winner-Take-All Society*, Robert H. Frank and Philip J. Cook argue that the

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36. See Blum & Kalven, *supra* note 2, at 437-44.

37. The welfare economics theory forms the basis of the diminishing marginal utility argument that is discussed in Part III of this article. For (relatively) recent overview of welfare economics, see Amartya Sen, *On Ethics and Economics* (1987); cf. John Rawls, *A Theory of Justice* (1972) (approaching distributional issues from the perspective of political theory).

American economy is increasingly characterized by markets, such as those for sports, entertainment, and academia, which judge participants on the basis of relative rather than absolute performance. These markets tend to concentrate rewards in the hands of a very small number of individuals, whose ability and effort may be only marginally greater than other participants in the same market.<sup>38</sup> According to Frank and Cook, such winner-take-all markets are not merely inequitable, because they concentrate rewards among a small number of people, but also inefficient, because similar to a national labor lottery they encourage participation by individuals whose likely returns would actually be higher in other fields.<sup>39</sup> The authors support a progressive consumption tax as a means of reducing this inequality and discouraging individuals from entering the already overcrowded winner-take-all markets.<sup>40</sup> Two leading tax scholars, Martin J. McMahon and Alice G. Abreu, have expanded upon Frank and Cook's thesis, arguing that the phenomenon of winner-take-all markets supports progressive taxation on both fairness and efficiency grounds, with high taxes being especially justified on the top 1% of incomes.<sup>41</sup> McMahon and Abreu further argue that progressive taxation will not reduce the productivity of high-income individuals because these individuals are motivated by competitive rather than financial success and might actually work harder to compensate for their lost income.<sup>42</sup>

It is possible to exaggerate the significance of Frank and Cook's argument, which appears to describe only some sectors of the economy, and at best supports progressive tax rates on a relatively small portion of the population. Yet the winner-take-all theory is significant for two reasons.

First, the theory suggests that the markets may be seriously flawed in rewarding ability and effort, especially at the high end where the progressivity debate is most visceral. Indeed, Frank and Cook suggests that technological and communication advances, by increasing the size and scope of winner-take-all markets, are actually enhancing these flaws.<sup>43</sup> If this is true, the incentive argument may be weaker than is commonly supposed, and the case for progressivity may be strengthened on both fairness and efficiency grounds.

Second, the winner-take-all concept also undermines, albeit more subtly, the moral argument against progressivity. By questioning the link between income and ability and by suggesting that trivial differences in

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38. Robert H. Frank & Philip J. Cook, *The Winner-Take-All Society*, 2-3, 23-25 (1995).

39. See *id.* at 101-23.

40. See *id.* at 212-14.

41. Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 *Fla. Tax. Rev.* 1 (1999).

42. See *id.* at 63-65 (contending that top performers in winner-take-all markets are motivated primarily by nonpecuniary factors and would be unlikely to reduce their efforts in response to higher taxation).

43. See Frank & Cook, *supra* note 38, at 45, 47-52 (concluding that the computing and telecommunications revolutions are important reasons for the growth of winner-take-all markets).

performance account for huge variations in income, Frank and Cook effectively challenge the entire moral basis of pretax income allocations.

If pre-tax income is as much attributable to luck, timing, and other factors as to truly significant differences in talent or effort, then this in turn reduces the deference that might otherwise be accorded to pretax outcomes, and reduces the argumentative burden that proponents of redistribution must bear.

3. *Morality: Meritocracy and its Measure.*—Meritocracy also plays an important role in the progressive/flat tax debate because the concept of merit provides the moral or ethical link in an otherwise rather dry economic debate.<sup>44</sup> If American society is not fundamentally meritocratic in nature and if it fails to reward people based on their actual ability and effort then there is necessarily a powerful argument for redistribution to correct this unfairness.<sup>45</sup> By contrast, if there is a functioning meritocracy, then there remains only weaker arguments that the economy rewards ability and effort, but that ability and perhaps effort were unfairly distributed in the first place, or that need rather than accomplishment should be the basis for the allocation of economic rewards.<sup>46</sup> The second of these arguments looks a little bit like arguing with capitalism, and the first of these looks a little bit like arguing with God.<sup>47</sup> Although coherent arguments can be made for both these positions, in this country they

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44. The terms "merit" and "meritocracy" have a specific historical meaning, involving the substitution of purportedly scientific, achievement-based criteria (including but not limited to standardized testing) for more traditional criteria such as birth, friendship, and so forth in education and other spheres. Merit also has a more colloquial meaning, roughly equivalent to "good" or "deserving," that is related to but distinct from its more specific historical meaning. Thus, one might argue that the descendants of John Harvard merited (i.e., deserved) admission to Harvard under the second definition, even if they had relatively average credentials, but this argument would be incoherent under the first definition, which speaks specifically to the substitution of neutral criteria for family or other advantages. I try to use the term according to its narrow historical meaning, although like others I slip at times into a broader, less rigorous usage. On the concept of meritocracy, see Michael Young, *The Rise of the Meritocracy 1870-2033* (1958) (satirically depicting the ambitious beginnings and less-than-satisfying future of meritocracy in British society). For a recent application, suggesting how murky the merit concept can be in actual practice, see Nathan Glazer & Abigail Thernstrom, *The End of Meritocracy: Should the SAT Account for Race*, *The New Republic*, Sept. 27, 1999, at 26-29 (debate between liberal and conservative academics on the propriety of the Scholastic Aptitude Test (SAT) adopting a "Strivers" score that adjusts performances based on students' race and socioeconomic background).

45. See Blum & Kalven, *supra* note 2, at 496-97 (discussing the argument for redistribution based on the unfairness of pretax income allocations).

46. See *id.* at 498 (discussing argument for redistribution on the basis that talent and ability are unfairly distributed among the population and "everyone's income is [accordingly] equally undeserved"); cf. Karl Marx, *Critique of the Gotha Program: Marginal Notes on the Programme of the German workers' Party* (1875) (advocating philosophy of "[F]rom each according to his abilities, to each according to his needs"), in Marx's *Later Political Writings* 208, 215 (Terrell Carver trans. & ed., 1996).

47. Cf. Genesis 18: 22-32 (recounting patriarch Abraham's challenge to God regarding the future of Sodom and Gomorrah).

tend to be unsuccessful. Thus, the case for redistribution remains immeasurably stronger if the link between reward and merit can somehow be broken. This is true in a political as well as moral sense: That society is becoming more meritocratic is a persistent theme in conservative ideology, and has been adopted by some liberals as a reason for downplaying redistributive programs.<sup>48</sup>

So is this country a meritocracy, or not? It is not possible to answer that question in one brief article, but two points are worth making on this issue.

First, it is interesting to observe how tenuous the supposed underpinnings of meritocracy become on close observation, even for those who are relatively conservative in orientation. The most frequently cited method of determining merit, standardized testing, is subject to numerous criticisms on grounds of arbitrariness, incompleteness, and discrimination against racial minorities. In fact, even its advocates admit it is a very incomplete measure of ability, and no measure at all of effort or moral worth.<sup>49</sup> Moreover, the belief that a free market inherently rewards talent and initiative probably works to some degree within occupations, but is extremely difficult to apply on a society-wide level. It is less an argument than a profession of faith, a collection of simplistic economic principles covered by a thin moral garb. Other rationalizations, like the supposed virtue of high achievers or (its flip side) the alleged immorality of the lower classes, are either derivative of the first two or even less subject to empirical verification. These and other explanations are severely undermined by the persistence of race, gender, and immigrant status as factors in the determination of economic status. Even the authors of "The Bell Curve" did not claim that minorities were less virtuous than other Americans, but rather that their lower performance was embedded in social and economic patterns that were extremely difficult to change.<sup>50</sup>

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48. Cf. Kaus, *supra* note 34, at 18, 23-24 (posing Money Liberalism (emphasizing economic redistribution) and Civic Liberalism (emphasizing the breakdown of social distinctions) as two alternate strategies for contemporary liberals).

49. On the efficacy of standardized testing, and its relationship to broader themes in American society, see, e.g., Richard J. Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994) (discussing the importance of standardized testing and other measures of "intelligence" in determining class structure and assessing the consequences of minority groups' lower average performance on such tests); William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998) (assessing discriminatory impact of standardized testing as part of a broader argument in favor of affirmative action in university admissions); Nicholas Lemann, *The Big Test: The Secret History of the American Meritocracy* (1999) (taking a generally skeptical view of standardized testing in general and the Educational Testing Service (ETS) in particular).

50. See Herrnstein & Murray, *supra* note 49, at 369-86 (discussing the relationship between social behavior and perceived cognitive ability). On the role of inherited educational and social advantages, and the difficulty of reaching these items under the existing income and estate taxes, see John H. Langbein, *The Twentieth Century Revolution in Family Wealth Transmission*, 86 *Mich. L. Rev.* 722 (1987) (suggesting that the estate tax was designed to reach transfers of money and tangible property and that it does not successfully reach intergenerational transfers of educational and social advantage which are today the most important forms of inherited

Second, if a meritocracy once existed in American society, or if it still exists within particular sectors, numerous forces are undermining it on a more macroscopic level. It may be possible to argue that small town America, the world of Horatio Alger and his like, was predominantly meritocratic, at least for those (primarily, although not exclusively, white males) who had full access to the system and its advantages. Perhaps this remains true within a few, highly competitive industries, but it is harder to make that argument for the economy as a whole. To say that a secretary who receives thousands of dollars in a stock bonus from a Silicon Valley employer has a high degree of merit, or that a steelworker who loses his job to a Third World competitor lacks it, seems to me to stretch merit beyond any but the most tautological meaning. Concepts like "globalization" or the "winner-take-all" society may help us to rationalize such outcomes, but it is simply common sense to recognize that success or failure in today's economy is a matter of luck, timing, and other factors as well as (no doubt) a significant portion of ability, determination, and effort. To recognize this is not to oppose economic progress, but merely to recognize that it comes at some price in the correlation of individual efforts and rewards.

Perhaps the issue is not the reality of a functioning meritocracy, but the perception of it, and here there is indeed a significant change in the past decades. Whatever the facts, today's economic elite plainly *believe* that they have succeeded because they are smarter and work harder than their fellow citizens, and appear to have little of the *noblesse oblige* that characterized other, more traditional aristocracies.<sup>51</sup> Here, perhaps, is the true relevance of standardized testing and similar indicators: not as perfect or even near-perfect measures of ability, but as somewhat arbitrary measures that still retain enough content to convince successful candidates of their superior entitlement to positions and rewards.<sup>52</sup> Here perhaps is the real meaning of suburbanization and racial segregation: Not creating an elite that is actually better than everyone else, but permitting it to think that it is, or at least (what is effectively the same)

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wealth). For a recent exchange on the estate tax and its role in the overall tax system, see Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 *Yale L.J.* 283 (1994) (citing Rawls and other liberal thinkers in support of a proposal to repeal the income and estate taxes and replace them with a progressive consumption levy); Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 *Tax L. Rev.* 363 (1995) (arguing that McCaffery overstates the estate tax's role in discouraging savings and understates the political and social impact of unequal concentrations of wealth); see also Bruce Ackerman & Anne Alstott, *The Stakeholder Society* (1999) (proposing that all Americans be granted an \$80,000 "stake" in early adulthood to be financed by an annual 9% wealth tax and an additional payback at death for those able to do so).

51. See Kaus, *supra* note 34, at 47-48 ("The more the economy's implicit judgments are seen as being fair and based on true 'merit' (and 'equal opportunity') . . . the easier it will be to equate economic success with individual worth, and the greater the threat to social equality.").

52. See Frank & Cook, *supra* note 38, at 40 ("In this context, who can blame people for treating the tests as if they measure, not what cynics say they measure (how well you do on tests), or what they're supposed to measure (how well you'll perform in college), but something more, something closer to innate personal worth—Merit!").

to avoid thinking too much about its obligations to other, less fortunate segments of the same society. Such "us and them" perceptions have already fueled resistance to affirmative action, welfare spending, and other redistributive measures. Will they also spell the end of progressive taxation?

I think this argument overstates both the self-righteousness of Americans and their demand for moral absolutes. Most Americans are, I suspect, less impressed by high test scores than are most law professors. Most seem quite capable of recognizing that economic success results from a combination of merit and other arbitrary factors. There is indeed a self-righteous arrogance in American culture, but there is also a strain of humility, together with strong egalitarian tendencies and a religious-inspired resistance to the values of the commercial marketplace.<sup>53</sup> The distance between rich and poor, both physical and psychological, has also been exaggerated by some commentators. Most middle class families were poor within the past two or three generations, and many of them experience economic and personal worries not wholly different from those of their more modest fellow citizens. Indeed, the vulnerability of the middle and working classes to economic changes has been a major theme of the past decade and the recent presidential election..

Perhaps the best word to describe Americans' attitude toward the new economy is ambivalence: The willing and even exuberant acceptance of global capitalism as the most productive (not to mention the only available) economic system, combined with a fear of its potential effects, particularly on more vulnerable members of society and on those noneconomic values (such as family and religion) that are important to substantial parts of the population. Progressive taxation is an expression of this ambivalence. It is an implicit recognition that higher incomes are a mixture of skill, luck, and social advantage, and requires that a portion of them be shared with the collective without confiscating them entirely or destroying the incentive to earn them in the first place. It demonstrates that the market, while it plays the primary role in our economic life, is not the be-all and end-all of our society. Indeed, the symbolic significance of progressive taxation, as a refutation of the potential arrogance of a (supposedly) meritocratic elite, may be no less important than its economic significance.<sup>54</sup> It is the signature of a modest meritocracy, one that

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53. The conflict between these values is reflected in the famous New Yorker cartoon showing a rather glum middle-aged man over the caption: "My Protestant ethic netted me a bundle, but my Puritan guilt complex won't let me enjoy it."

54. In making this argument, I am indebted to Marjorie Kornhauser, who has argued that progressivity advances communitarian values but does so in a limited way that ought to be acceptable even to those with a more individualist bent. See Kornhauser, *supra* note 9, at 522 ("It is in ['Neoconservatives'] self-interest to support progressivity for it in turn will support the sense of community which is not only essential under a feminist vision but is also necessary as a precondition to the survival of the form of government the Neo needs.") My differences with Kornhauser are by and large matters of emphasis rather than philosophy. My vision is (not surprisingly) less tied to feminism than hers, and I emphasize the role of progressivity in responding to developments (notably economic globalization and domestic political changes) that



tries to reward ability and initiative but recognizes that it does not always do so, and reflects that recognition as a matter of substantive law. In a period when even a conservative can complain of "arrogant capital," such modesty is more important than ever.<sup>55</sup>

The concept of modesty might equally be applied to progressivity scholars. For it seems to me that scholars do better when they make the case for redistribution in simple, common sense terms than when they resort to ever-more sophisticated theoretical models, or divert attention to nonredistributive arguments which, while intellectually appealing, are unlikely to be as persuasive. That does not mean that economics is irrelevant, or that we should ignore alternate concepts like diminishing marginal utility, the benefit theory, and so on.<sup>56</sup> But in the end, as Blum and Kalven concluded, the argument for progressivity rests primarily on the intuitive appeal of redistribution, or in Henry Simons' memorable phrase, "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."<sup>57</sup> The events of the past generation, when considered rather than rationalized, if anything make this judgment still stronger. The argument can be made directly, and won.

4. *Studying Progressivity: Encompassing Race, Gender, and other Nontraditional Concerns.*—The discussion above emphasizes the rhetoric of progressivity: How should advocates of progressive taxation make their case and respond to flat tax supporters? But scholars do more than make arguments. They (or at least the serious ones) do original research, which sometimes supports existing positions, but is also valuable for its own sake. Sometimes their research leads them to abandon previously held positions and embrace new and even opposite ideas. What should the research agenda of progressivity scholars be, and how does it relate to the arguments noted above?

Three observations suggest themselves, two of them uncontroversial and the third perhaps somewhat less so. The first uncontroversial point concerns the need for more empirical work in order to update our understanding of progressive taxation and tax policy in general. We simply need more information on the nature and degree of economic inequality, public opinion regarding progressive and flat taxes, the effect of global economic changes, and similar issues in order to make the best possible arguments for and against a progressive regime. Additional comparative studies, borrowing from the experience of other countries, and further historical research – learning from our own past mistakes – would be of particular value. Such research is especially important with regard to the meritocracy (progressive taxation interferes with merit-based reward allocation) and globalization (progressive

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took place after she wrote.

55. Cf. Phillips, *supra* note 34, at 3-26 (identifying the increasing arrogance of political and economic elites as a dominant theme in recent American history).

56. See *supra* text accompanying note 4.

57. See Simons, *supra* note 29, at 18-19 (1938).

taxation cannot withstand the pressure of international competition) arguments against a progressive regime, for each of these arguments depends heavily on real-world changes in the past decades. To use a litigation analogy, progressivity scholars must be prepared to argue the facts as well as the law, and further empirical work would make their job that much easier.<sup>58</sup>

A second recommendation concerns the relationship between tax and nontax subjects. As noted above, much of the debate on progressive taxation is really a debate about governing philosophy and, more specifically, the role of government in combating social and economic inequality.<sup>59</sup> It follows that scholars should be somewhat less concerned with the progressivity of the tax system *per se*, and somewhat more concerned with the progressive or redistributive nature of government as a whole, including taxing, spending, and regulatory programs.<sup>60</sup> This is true both for broad numerical measures of progressivity and with respect to specific policy issues. For example, in studying the tax system's impact on poor people, scholars should take into account taxes, quasi-tax provisions (e.g., the earned income credit), and nontax provisions like the welfare or minimum wage laws in order to evaluate the government's overall effect on income distribution and the work/welfare tradeoff.<sup>61</sup> Taxation and health policy might similarly be studied together, not only for the technical interactions between the two subjects, but to compare the arguments for redistribution in both areas and to assess what each field can learn from the successes (or failures) of the other.<sup>62</sup> These sorts of combinations are standard fare for social scientists, but are often avoided by legal scholars, reflecting the sometimes arbitrary divisions within the law school curriculum. A more interdisciplinary approach is likely to be both more interesting and more effective.

The suggestions above are modest in nature, and I suspect that most tax scholars would support them. A third recommendation is likely to be more controversial, for it involves the very definition of progressivity, and its relationship to race, gender, and other noneconomic concepts. Before proceeding to this item, a bit of background is in order.

The concept of progressivity has always depended upon the tax base, i.e., the definition of taxable income, as well as tax rates. Thus, marginal tax rates of 50% or higher, which prevailed for much of the Century, resulted in

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58. See Michael Livingston, Confessions of an Economist-Killer: A Reply to Kronman's "Lost Lawyer," 89 Nw. U. L. Rev. 1592, 1602-07 (1995) (emphasizing lawyers' skills as fact-gatherers and problem-solvers and their relevance to legal scholarship).

59. See *supra* text accompanying notes 14-15.

60. Scholars have made several sophisticated attempts to measure the combined progressivity of taxing and spending, although they have at times been frustrated by methodological issues. See *supra* note 12.

61. See, e.g., Anne L. Alstott, The Earned Income Credit and the Limitations of Tax-Based Welfare Reform, 108 Harv. L. Rev. 533 (1994).

62. See, e.g., Katharine Pratt, Funding Health Care with an Employer Mandate: Efficiency and Equity Concerns, 39 St. Louis U. L.J. 155 (1994).

less progressivity than they appeared to because of the numerous opportunities for tax shelters and tax avoidance.<sup>63</sup> By contrast, the 1986 tax reform act, which collapsed tax rates and thus reduced the nominal progressivity of the system, is sometimes described as increasing (or in any event, not reducing) progressivity, because it reduced tax shelter opportunities and thus made it more difficult for the wealthy to escape paying tax.<sup>64</sup> Nomenclatures vary, some writers use the term progressivity to refer exclusively to tax rates and preferring "vertical equity" to describe this broader picture, but tax rates obviously mean little without including substantive tax provisions in the analysis.

In recent years there has emerged a "critical tax scholarship" which emphasizes the effect of tax policy on women, minorities, and other disadvantaged groups. For example, feminists have studied the role of various tax provisions, including joint returns and the nondeductibility of child care expenses, in discouraging women from entering the marketplace and achieving economic equality.<sup>65</sup> Minority scholars have similarly evaluated the impact of purportedly neutral tax rules on African-Americans and other minority groups.<sup>66</sup> For example, the favorable tax treatment afforded to investment as opposed to salary income, although ostensibly a race-neutral distinction, arguably discriminates against African-Americans, who tend to have fewer investments than whites with similar incomes.<sup>67</sup>

Although the critical tax project crosses traditional lines, it is typically perceived as raising issues of horizontal equity, that is, arguments that women

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63. Henry Simons likened the combination of high tax rates and a leaky tax base to "digging deeply . . . with a sieve." See Simons, *supra* note 29, at 219.

64. Prior to 1986, there were eleven different rates on individual income, ranging from 11% to 50%. After 1986, there were three rates, which have since expanded to five (15, 28, 31, 16, and 39.6%); but enactment of the passive loss rules and other tax shelter limitations arguably make the tax system more progressive than it was before 1986. See generally Edward Yorio, *Equity, Efficiency, and the Tax Reform Act of 1986*, 55 *Fordham L. Rev.* 395 (1987) (evaluating the fairness and efficiency impact of the Tax Reform Act of 1986); Joseph A. Pechman, *The Future of the Income Tax*, 80 *Am. Econ. Rev.* 1 (1990) (approving of the 1986 Act but calling for further base-broadening measures, including taxation of fringe benefits and reduction of mortgage interest and other personal deductions, in order to restore progressivity to its mid-1970s levels).

65. See, e.g., Grace Blumberg, *Sexism in the Code: A Comparative Study of the Income Taxation of Working Wives and Mothers*, 21 *Buff. L. Rev.* 49 (1972) (assessing the role of various tax provisions in discouraging women from seeking employment outside the home); Nancy C. Staudt, *Taxing Housework*, 84 *Geo. L.J.* 1571 (1996) (proposing taxation of unpaid housework with a credit to ameliorate potential regressive impact). For a comprehensive treatment of gender issues in taxation, emphasizing the need to consider women at different income levels, see Edward J. McCaffery, *Taxing Women* (1997). Although there is no deduction for child care expenditures, a limited tax credit, not exceeding \$1,440 per family, is provided for such expenses I.R.C. § 21.

66. See, e.g., Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 *Wis. L. Rev.* 751.

67. See *id.* at 759-72 (assessing tax benefits for wealth and wealth formation and their impact on black and white taxpayers).

or minorities are treated differently by the tax system than similarly situated white males. Indeed, traditional scholars have at times been rather dismissive of critical scholarship on these grounds. Thus, it has been suggested that deductibility of child care expenses would discriminate against married couples who have only one, presumptively male, breadwinner—essentially, a horizontal equity argument—and that investment tax incentives are justified for fairness and efficiency reasons quite apart from their alleged racial impact.<sup>68</sup> Only rarely have these debates been linked to progressive taxation, and indeed, some critical scholars themselves have expressed skepticism about the whole progressivity concept.<sup>69</sup>

My own belief is that critical tax scholarship is more about vertical than horizontal equity, so that attacks by traditional scholars miss the point to a considerable degree. The argument is not that women or minorities are treated differently from similarly situated white men, but that they are not similarly situated in the first place because of the historic real-world disadvantages that adhere to these groups.<sup>70</sup> That is why provisions that adversely effect women or minorities are more suspect than provisions that discriminate between corporations in Michigan and Texas, why the statements that "joint returns discourage women from working" or "the pension rules discriminate against African-Americans" are both different and more powerful than the statements that "joint returns harm some middle-income couples" or "the pension rules discriminate against people with adequate incomes but low retirement savings."<sup>71</sup> That is not to say that progressivity and feminism (or critical race theory) are the same thing: by no means are all women and minorities poor, and it is certainly possible to support progressive taxation without any special solicitude for particular groups. Yet the two issues are related on both a practical level, because a disproportionate number of women and minorities are in the lower income brackets, and a theoretical level, because of the perceived unfairness in allocations of income and power, especially when they correlate with race, gender, and other irrelevant factors. To put the matter in historical terms, critical tax scholarship may be seen as an expanded form of vertical equity analysis, to encompass a society in which race and gender as well as mathematically defined income categories are an important aspect of the economic and social structure. It emphasizes the tax base side of the equity

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68. For a summary of the mainstream critique of critical tax theory, with just a bit of bile thrown in, see Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. Rev. 1521 (1998).

69. See *supra* text accompanying note 19.

70. See Michael A. Livingston, *Radical Scholars, Conservative Field: Putting "Critical Tax Scholarship" in Perspective*, 76 N.C. L. Rev. 1791, 1797 (1988) (opining that the starting point for critical scholarship is the dissimilarity of status between racial and gender groups).

71. Cf. Blumberg, *supra* note 65 (assessing the role of joint returns, the "marriage penalty," and other tax provisions in discouraging women from working outside the home); Moran & Whitford, *supra* note 66, at 783-91 (assessing the impact of pension tax provisions on Black and White taxpayers).

question, reminding us that graduated tax rates alone may not be sufficient to achieve a progressive tax system. In many respects, it is the Blum and Kalven of the Twenty-first Century.

Given this background, both parties would benefit if the work of critical tax scholars were integrated with the mainstream debate on progressive taxation, rather than being treated as a separate, essentially peripheral concern.<sup>72</sup> I don't mean that women and minorities should pay lower taxes than white males (although suggestions of this kind have been made by very serious people).<sup>73</sup> I do mean that race and gender-based data should be taken into account, along with purely economic statistics, both in measuring the overall progressivity of the tax system and in assessing specific legislative proposals. Thus, in evaluating, for example, a consumption or flat tax system, scholars would consider its effect on women and minorities as well as on taxpayers in different economically defined income brackets. A tax system would be considered progressive only if it were fair to lower-income individuals, regardless of race or gender, but also if it dealt fairly with disadvantaged groups. Particular attention would be paid to provisions (such as joint returns and the capital gain rules) that have disproportionate effects on disadvantaged groups. For their part, critical scholars would recognize the significance of progressivity as a society-wide concept, rather than focusing their attention entirely on group-specific concerns.

Expanding the progressivity concept would improve both the moral and political case for progressive taxation. The moral case would improve because the argument for redistribution is strongest when inequality results from immutable characteristics, like race, gender, and immigrant status, rather than individual failing. By showing concern for group as well as individual fairness, scholars would demonstrate that progressive taxation is neither anachronistic nor wholly symbolic in nature, but incorporates an active concern for injustice in all of its forms.<sup>74</sup> The political case would improve because the constituencies favoring some form of redistribution would develop a common agenda rather than working at cross-purposes. Progressive taxation may have a special appeal for those who wish to correct race and gender-based disadvantages but are skeptical of affirmative action programs, which benefit the wealthy along with the poor and frequently stigmatize their own intended beneficiaries. It is the ultimate income-based program, providing assistance to

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72. A somewhat less developed version of this argument is presented in Livingston, *supra* note 70, at 1812-16.

73. See McCaffery, *supra* note 65, at 277 (calling for changes designed to "tax married men more, and married women less" although noting that this effect could be achieved by at least facially gender-neutral means).

74. Cf. Brown & Fellows, *supra* note 19, at 9-10 (arguing that progressivity has limited value as a concept because of its failure adequately to consider poorer taxpayers and other reasons). An expanded definition of progressivity would, I believe, be capable of addressing these concerns.

women, minorities, and white males alike when they are genuinely disadvantaged, but ignoring these factors when not relevant to a person's particular situation.<sup>75</sup>

It may be objected that a focus on race and gender undermines the consensus for progressive taxation, which is popular precisely because it cuts across political lines. But that consensus is fraying. Race and gender are part of the progressivity debate whether or not we want them to be. Addressing them directly and forcefully is probably a better strategy than pretending they do not exist.

It may further be objected that I have stretched "progressivity" too far: That a solicitude for women or minorities, however admirable on its own terms, is simply different from progressive taxation and must remain conceptually separate in order to avoid doctrinal confusion. This argument ignores the large volume of work on progressivity/vertical equity as a matter of both tax base and tax rates, together with the work of nontax legal scholars, who have demonstrated that inequality may take social or psychological as well as purely economic forms.<sup>76</sup> To some extent, it ignores the work of Blum and Kalven themselves, who, like Henry Simons before them, recognized that tax policy existed in a broad social context and saw progressivity as part of a wider effort to create a just and stable society.<sup>77</sup> Expanding the definition of progressivity, to encompass more contemporary forms of inequality, is merely updating the work of these scholars. Like traditional measures, this new information does not guarantee political success or even specify what level of progressivity is desired. But it does increase our understanding, resulting in a better debate and the prospect of a more enlightened tax policy.

#### *B. Implementing Progressivity: Toward an International Strategy*

Whatever the arguments for progressive taxation, the globalization of economic life makes it more difficult to achieve. With borders increasingly porous, a country that maintains high tax rates may see investment flee to other, low-tax jurisdictions, reducing tax revenues and impoverishing the country.

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75. See Richard J. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 *UCLA L. Rev.* 1913 (1996) (arguing for a limited form of affirmative action on the basis of economic disadvantage rather than race).

76. On the importance of social or psychological as well as purely economic inequality, see generally *Feminist Jurisprudence* (Patricia Smith ed., 1993) (describing feminism as a struggle against subordination of women on social and economic grounds); *The Politics of Law* (David Kairys ed., 3<sup>rd</sup> ed. 1998), (collection of articles assessing inequality and other political biases in various areas of law).

77. The need to defend redistribution without embracing Soviet-style collectivism forced Blum and Kalven to be quite careful at times in their selection of words. See Blum & Kalven, *supra* note 2, at 488-90 (stating that an examination of socialism "would . . . go far beyond the tolerable bounds of an essay of this sort" but assuring readers that mitigating inequality "has not been a socialist monopoly").

This is already true of taxes on businesses and investment, which are relatively easy to shift to other countries.<sup>78</sup> In a borderless world, it will be increasingly true of individual taxes as well, particularly for highly skilled (and hence highly paid) individuals who are most likely to take their talents from one jurisdiction to another.<sup>79</sup> Nations will thus find their freedom to impose steeply progressive tax rates restricted, much like states within a traditional federal system. Globalization also provides arguments in favor of progressive taxation, since it results in increased inequality (at least in the short run) and thereby enhances the case for redistribution; but these arguments have the force of moral suasion only, while the raw economic logic appears to push in a different direction.<sup>80</sup>

Is globalization the death knell of progressivity? It depends on whom you ask. Conservative economists, together with much of the business community, appear to think so, citing practical experience and the supposedly inevitable logic of global markets. They point to the reduction in marginal tax rates in the United States, the United Kingdom, and other countries during the past two decades, while taxes on lower and middle income groups, especially when payroll and other social insurance taxes are included, have held steady and in some cases have actually increased.<sup>81</sup> They note further that the factors encouraging compression of tax rates, including improvements in communications and the use of transfer pricing and similar tax-shifting mechanisms, have accelerated in recent years.<sup>82</sup> Liberal observers are less certain. They note that a variety of factors affect the flow of investment, including financial services, infrastructure, technological sophistication, and the availability of a trained and motivated workforce. Any of these factors may be more important than marginal tax rates, so that a "tax and spend" jurisdiction may actually wind up more competitive than a low-tax, low-services area.<sup>83</sup> These observers tend to see globalization as an excuse rather than a reason for regressive tax and spending policies. Both liberals and conservatives point to the experience of American states, which have conducted the expected "race to the bottom" in some cases, but several of whom have maintained relatively high

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78. See *supra* note 23.

79. See Tanzi, *supra* note 23, at 32-41 (assessing the link between labor mobility and personal income tax rates).

80. See *supra* text accompanying note 22 (opining that globalization may cause economic harm to individuals through no fault of their own and thereby enhance the moral case for redistribution).

81. See Steinmo, *supra* note 23 (stating that countries ranging from the United States to the United Kingdom and Sweden have cut tax rates on high income individuals during the past decades, typically replacing these revenues with increases in consumption taxes or social insurance fees).

82. See Tanzi, *supra* note 23, at xii-xiii (citing transportation and communication advances, together with the lowering of tariff and other barriers, as factors increasing global economic integration); Editorial, *The Taps Run Dry*, *The Economist*, May 31, 1997, at 21 (noting that transfer pricing and similar tax avoidance mechanisms make it difficult for Governments accurately to determine the taxable income of multinationals).

83. See *supra* note 24.

taxes and services while maintaining or even improving their competitive position.<sup>84</sup>

One obvious response to tax competition is for governments to cooperate in the fixing (somewhat euphemistically called "harmonization") of tax rates. A form of harmonization is now in effect in Europe, where the European Union (EU) sets minimum and maximum rates for the valued added tax (VAT) and individual nations are permitted to vary their VAT rates only within the approved range.<sup>85</sup> The EU has been less successful in harmonizing personal and corporate income taxes, owing to significant differences in tax bases and to member states' reluctance to surrender tax policy as a fiscal and political tool. Poorer nations in particular have argued that they need reduced tax rates to compete with wealthier countries (such as France and Germany), and are likely to demand some form of compensation in return for cooperation in this area. American states have similarly cooperated on various tax issues but have never approached a uniform system of tax bases or tax rates, on a national or even a regional basis.<sup>86</sup>

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84. For example, a number of smaller states, particularly in the South and West, have attracted business with a mix of low taxes, low wages, and a permissive regulatory atmosphere, but many larger states (e.g., New York and California) have enjoyed strong growth using a relatively high-tax, high-wage model, the disadvantages of which are, or so they argue, compensated for by the presence of a highly skilled and educated work force. See Reich, *supra* note 24, at 37 (contrasting "low-wage" and "high-wage" approaches to economic development and suggesting only the latter can create long-term economic growth). For theoretical models of interstate competition within a federal system, see William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 *Geo. L.J.* 201 (1997) (suggesting that previous models have overstated the advantages of interjurisdictional competition and that uniform Federal programs may be superior to state policies in some cases).

85. See European Union: Economic and Social Committee: Opinion on Direct and Indirect Taxation ¶ 1.1.2 (July 3, 1996), reprinted at 96 *Tax Notes Int'l* 129-28 (1996). On the broader issue of tax harmonization within the European Union, and its implications for North America, see Tracy A. Kaye, *European Tax Harmonization and the Implications for U.S. Tax Policy*, 19 *B.C. Int'l & Comp. L. Rev.* 109 (1996); Stephen G. Utz, *Taxation Panel: Tax Harmonization and Coordination in Europe and America*, 9 *Conn. J. Int'l L.* 767 (1994). A value added tax (VAT) is an excise tax on the incremental value added to goods (and some services) at each stage of production. For example, if a wood processor bought \$10,000 of lumber and sold it as finished wood for \$50,000, tax would be imposed on \$40,000, (\$50,000 - \$10,000). If a furniture-maker turned the wood into cabinets selling for \$500,000, tax would be imposed on \$450,000 (\$500,000 - \$50,000), and a tax would be imposed on any additional profit beyond the \$500,000 cost to a retail cabinet seller. As a general rule, VATs are easier to harmonize than income taxes because they tend to be essentially flat-rate and (at least in a European context) have relatively similar tax bases; they are also easier than income taxes to impose on imports and rebate on exports and thus tend to be popular wherever there is a high level of international commerce. The United States has traditionally resisted imposition of a national VAT although state sales taxes have some similar features.

86. Examples of voluntary cooperation between states include the Multistate Tax Compact, an organization which advises states on various tax matters, and agreements between specific states (e.g., New Jersey and Pennsylvania) to collect and (where possible) enforce each other's taxes. A measure of enforced cooperation also results from the American federal system,



The European and American experiences suggest that harmonization efforts are likely to be most successful when they involve relatively low-rate taxes and are undertaken by jurisdictions that are at similar economic levels and have a long history of cooperation in other spheres. The issue accordingly becomes more complicated when we move from VATs to progressive income taxes, and from Europe to Asia, Latin America, and to other developing regions. These latter countries may be less concerned about progressivity than about using lower taxes and regulatory standards to attract new business and encourage economic development. On a practical level, they are likely to demand a range of tax and nontax concessions as the price for harmonizing tax rates or participating in more limited, anti-avoidance efforts. On a philosophical level, they may question the importance of progressivity itself, arguing that redistribution between citizens of wealthy countries is insignificant unless it is coupled with substantial transfers between rich and poor nations. Yet the cooperation of such countries is important if progressive tax regimes are to be maintained rather than undermined in wealthy societies. For example, NAFTA opens the United States' market to goods manufactured in Canada, Mexico and potentially to other Latin American countries, creating fears that these countries may take business from the United States by a combination of low wages, low taxes, and less stringent environmental and other standards.<sup>87</sup> Tax cooperation with these countries may be considerably more difficult than within a more homogenous area like the European Union.

All this suggests that cooperation in maintaining progressive tax rates remains a distant goal, the principal challenges being political rather than academic in nature. Yet scholars can play an important role in this process, by asking the right questions and laying the intellectual foundations for the right answers. To do this requires both a short and a long-term strategy.

In the short-term, academics should emphasize support for progressive taxation within their own countries and begin a dialogue with like-minded scholars in other (including Third World) nations, regarding their vision of progressivity and a strategy for maintaining it in a border-free world. These

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under which courts have interpreted the Due Process and Commerce Clause of the Constitution to impose limits on state taxing authority. The presence of a strong federal government differentiates the American experience from the international realm, in which multinational organizations must rely more extensively on voluntary agreements. See generally, Walter Hellerstein, *State and Local Taxation of Electronic Commerce: Reflections on the Emerging Issues*, 52 U. Miami L. Rev. 691, 721-23 (1998) (addressing federal Constitutional issues in the taxation of internet commerce).

87. See generally *Colloquium on NAFTA and Taxation*, 49 Tax L. Rev. 525 (1994); Arthur J. Cockfield, *Tax Integration Under NAFTA: Resolving the Conflict Between Economic and Sovereignty Issues*, 34 Stan. J. Int'l L. 39 (1998). The NAFTA countries have begun negotiations with other Western Hemisphere nations on the coordination of trade and tariff policies, but have not yet achieved European-style levels of tax harmonization; accordingly "regulatory emulation"—essentially response by Mexico, Canada, and other nations to U.S. initiatives—remains the predominant mode in this area. See *id.* at 45-46.

steps, together with the research agenda described above, are necessary in order to build a base for further cooperation in the construction of a global, progressive tax system. As part of this interim effort, academics should support tax shelter and other anti-avoidance provisions that make it difficult to avoid progressive tax rates by shifting income to low-tax jurisdictions. Indeed international tax provisions—like provisions that disproportionately affect women or minorities—should become a regular part of the progressivity debate, together with domestic tax rate and tax base issues. For example, the debates over tax haven corporations, transfer pricing, and similar arrangements are at least partially over the reach of progressive taxation, and worthy of more attention from progressivity scholars.

In the long-term, it seems to me that progressivity can be maintained only by active, ongoing cooperation between the major industrial and, eventually, developing nations. Here academics can play both a crucial practical and a theoretical role.

On a practical level, academic contacts may provide an important first step toward coordination of tax policy between different political cultures. By exchanging ideas and information, scholars will not only improve their understanding of different tax systems, but also will constitute a powerful lobbying group in favor of cooperation, balancing the influence of local interests who will typically seek to undermine or evade progressive taxation. Something like this has already happened with respect to taxation of specific transactions involving the Internet and emerging financial products, and there is no reason it cannot happen with respect to fundamental tax structure and rates.<sup>88</sup>

Scholars are also uniquely poised to investigate the theoretical questions posed by progressive taxation in the new global economy. A fully international tax system, involving systematic redistribution both between and within different countries, is at least a generation away.<sup>89</sup> For now, the crucial issue is tradeoffs: What concessions can the wealthier countries be expected to make in order to secure the cooperation of poorer nations in the coordination of tax systems and the maintenance of progressive tax rates? Will the United States and its allies be willing to compensate the countries of Latin America, Asia, and Africa for refraining from overly aggressive tax competition, in much the way that the European Union "buys" the cooperation of its poorer members with redistributive spending programs, or the U.S. Federal Government

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88. See generally Symposium on Taxation and Electronic Commerce, 52 *Tax L. Rev.* 267 (1997).

89. Redistribution between nations might take the form of actually sharing revenues, through foreign aid or similar programs, or (less dramatically) by adjusting specific tax provisions that are deemed oppressive by poorer countries. Cf. *supra* text accompanying notes 85-86 (discussing existing efforts at domestic or regional tax harmonization).

redistributes income (however mildly) between richer and poorer regions?<sup>90</sup> Should such compensation take the form of direct foreign aid spending, or merely of a greater solicitude for poor country claims with respect to taxing jurisdiction, tax havens, and other technical issues?<sup>91</sup> At what point does it become realistic to speak, however gingerly, about an international taxing authority and the supranational determination of tax rates? These are hard questions, involving a mixture of law, economics, and political theory; but for that reason uniquely suited to academic lawyers, who make their living addressing precisely such interdisciplinary conundra.<sup>92</sup> But they are questions that have to be answered if the game is to be won. On both a moral and a practical level, progressivity will become increasingly difficult to sustain in individual countries without addressing its international aspect. Either scholars and politicians will address the issue directly or it will be lost by default.

The experience of environmental law and, to a lesser extent, labor law provides an interesting precedent here. Like progressive taxation, environmental and labor law are the products of national reform movements designed to protect citizens from pollution and economic exploitation at the cost of governmental intervention and, perhaps, some loss of economic efficiency. As in the tax area, there is the fear that globalization will undercut domestic reform efforts, as countries with lax regulatory standards are able to undersell those with more stringent requirements. Policy-makers have wrestled with the question of what concessions should be made to poorer nations as the

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90. The European Union (EU), while imposing unitary standards on its member nations in numerous areas, also compensates poorer countries by means of agricultural support payments and other community-wide subsidy programs. See generally *The European Union: Policies & Legislation: EU Agricultural Policy*, <http://www.eurunion.org/legislat/agweb.htm> (Mar. 14, 2000).

91. The U.S. has frequently placed domestic tax policy goals, such as prevention of tax avoidance and neutrality between domestic and foreign investments, ahead of the interests of developing countries in formulating its international tax policy, resulting in some resentment on the part of Third World nations. See generally Karen B. Brown, *Transforming the Unilateralist Into the Internationalist: New Tax Treaty Policy toward Developing Countries*, *Taxing American* (Brown & Fellows eds.), *supra* note 19, at 214-32.

92. See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 1-162 (1993) (describing prudence and "practical wisdom" as the key attributes of academic and practicing lawyers); Livingston, *supra* note 58, at 1602-07 (advocating a tax scholarship that emphasizes lawyers' fact-finding and problem-solving abilities). From a philosophical perspective, the arguments for redistribution within individual societies are often equally strong between them: while it is possible to argue that our obligations to other human beings become less extensive the further they are removed from us, it is hard to argue that they are reduced to zero, or that there is a sudden dropoff from an extensive obligation to all citizens of the same country to one of no obligation, whatsoever, outside that country's borders. The argument becomes especially difficult when "globalization" is touted as the principal theme of contemporary history. In order to maintain this position, one must argue that the world is a single entity for wealth creation purposes but reverts magically to separate entities where distributional issues or other moral and political questions are concerned. See generally Amartya Sen, *Development as Freedom* (1999) (suggesting the global nature of economic development and related political issues).

price for securing their cooperation in international labor and environmental initiatives.<sup>93</sup> Both environmental and labor law scholars have begun the transition from a domestic field with some international aspects to a global field with due attention to domestic concerns.<sup>94</sup> Tax scholars must do the same if progressivity is not to be overrun by the force of international commerce. Capital has already developed a new global consciousness; progressive tax supporters likewise must learn to maintain one.

#### V. PROGRESSIVE TAXATION AND AMERICAN "PROGRESSIVE" DISCOURSE

In the pages above, I have offered a broad overview of progressive taxation, where I think it is headed in coming years, and how supporters of progressivity can best prepare to defend it. My conclusion is that the case for progressive taxation remains theoretically strong, but faces significant practical obstacles which place its future in serious and continuing doubt. Specifically, I have argued that progressivity advocates must respond to a conservative political climate, a change in the nature and degree of economic inequality; and an increasingly global economy which, if left unchecked, creates a powerful momentum against progressive taxation. My recommendation is that proponents confront these issues directly, updating their arguments and research agenda to reflect such matters as the emerging winner-take-all society, the role of progressive taxation in an merit-based system, and the continuing role of race, gender, and immigrant status in pretax income allocations. I have further suggested that progressivity scholars must shift from a domestic to an international focus which considers income distributions between countries as well as within them, and that they build links with foreign scholars who share their interest in at least modest income redistribution. The strategy I have outlined goes against the grain of much contemporary tax scholarship, since it crosses both geographic and disciplinary lines and invokes avowedly political

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93. See *supra* text accompanying note 87 (regarding NAFTA and broader Western Hemisphere trade negotiations).

94. See Andrew L. Strauss, *From Gatzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. Int'l Econ. L. 769 (1998) (opposing "environmental isolationism" and calling for cooperation on environmental issues through the WTO and other multinational organizations); Francis Lee Ansley, *Rethinking Law in Globalization Labor Contexts*, 1 U. PA. J. Lab. & Employment L. 369 (1988) (describing the globalization of labor markets and calling for national and supranational efforts to combat the reduction in labor and safety standards resulting from the globalization process). Another interesting parallel is provided by international trade policy, which raises many similar issues to tax policy, but which has historically been categorized by more formal dispute resolution procedures. See Robert A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 Yale J. Int'l Law 79 (1998) (comparing substantive and procedural aspects of the international tax and trade policy regimes).

arguments on behalf of a progressive tax system. Yet only by confronting these arguments can scholars rebuild the case for progressivity and ultimately carry the day.

The findings above have implications beyond the progressivity area. The case for progressivity has, in my judgment, been weakened by two widespread tendencies in both tax scholarship and the broader legal academy: (i) compartmentalization of diverse but related subject matters, e.g., tax and spending, domestic and international affairs, etc., and (ii) an often exaggerated reliance on theoretical models drawn from nonlegal disciplines, most notably economics and moral philosophy, at the expense of empirical studies and all too often, common sense. Each of these tendencies has benefits but also serious costs. Theory is important, but arguments about public policy are inherently practical discussions, requiring healthy doses of historical and political context in addition to more abstract economic and philosophical analyses. Tax policy is likewise impossible to separate from the broader debate regarding government and its priorities. An apolitical scholarship, focusing exclusively on specific issues and attempting to "prove" its point by deduction from specific nonlegal theories, is thus unlikely to resolve the problem. An interdisciplinary, empirical scholarship, which borrows from various disciplines and gathers the greatest possible evidence regarding real-world developments, is likely to be more effective.<sup>95</sup>

A second implication pertains to the American Left, or to those who retain an interest in "progressive" public policy. In a conservative period, there is an understandable tendency for liberals to retreat from partisan advocacy into a more reflective and even defensive mode. This may take the form of avoiding engagement on distributive issues such as progressive taxation, health care and welfare reform. Those who are too committed to retreat often attempt to recharacterize these issues in moderate, neutral-sounding language. The problems with the former approach are obvious. But the latter approach is equally dangerous, for it threatens to rob the Left of political and emotional energy, trading modest short-term gains for a long-term, strategic defeat. The effort to "depoliticize" progressive taxation and to present it as a consensus, welfare-maximizing policy and to play down its redistributive aspect as well as its implicit race and gender implications, may at times fall into this category. I wonder if this effort is not partially responsible for the defensive posture of progressivity today. One cannot argue the Left's program in the language of the political Right. An honest commitment to redistribution, even if it alienates some observers, in the long run will be more successful than a stealth argument. Progressive taxation is but one example of this phenomenon. Finally, progressive taxation reminds us that the localization of much of the political Left, its nationalist tendencies and its preference for identity-based grievances

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95. See Livingston, *supra* note 11, at 397-409 (laying grounds for a "practical reason" tax scholarship that involves a substantial amount of empirical and interdisciplinary work).

over policies that might build broader multinational coalitions, has become self-defeating in nature.<sup>96</sup> The flat tax is appealing, in part, because it is tied to a vision of global capitalism that transcends national boundaries and promises prosperity to everyone. By contrast much of the Left still defines progressivity, fairness, and similar concepts in exclusively national or subnational terms. If it is to level the ideological playing field, the Left, too, must globalize, and begin to see issues from a universal rather than a local perspective. The transition is a difficult one. Will U.S. auto workers ever find common cause with Mexican peasants? Will the latter ever see the former as disadvantaged in any meaningful way? Yet these questions must be confronted if the Left is to become more than a pleasant anachronism. On no issue, whether it be taxation, trade, environment, can a progressive movement succeed without facing this issue.

What I am seeking is the revival of liberal discourse on tax and other public policy issues, emphasizing traditional problems, but recognizing that times have changed and that old questions must be debated in a new and different context. Rather than retreating, scholars should forcefully engage these issues, treating the end of the Cold War and the rise of a global economy as an opportunity rather than a cause for lament. Intellectuals and politicians should look forward to a changing world rather than backward to an aging and broken consensus. Nostalgia is never as good as it used to be. On this point, at least, Blum and Kalven would surely agree.

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96. Whether to adopt a more universalist or nationalist stance is currently a major topic of debate among left-liberal thinkers. See Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth Century America* (1998) (arguing for liberal nationalism as a framework for advancing distributive justice and other progressive policy goals).