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Occupy Wall Street, Distributive Justice, and Tax Scholarship: An Ideology Critique of the Consumption Tax Debate

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Occupy Wall Street, Distributive Justice, and Tax Scholarship: An Ideology Critique of the Consumption Tax Debate

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“Economics, as it has been practiced in the last three decades, has been positively harmful to most people.”¹

“A theoretical approach with no place for a theory of power is not merely deeply deficient but actively pernicious, because mystifying.”²

“[E]fficiency . . . is . . . not an economic concept, though it’s called that. It’s really an ideological concept. And, you know, we all know it.”³

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1. HA-JOON CHANG, 23 THINGS THEY DON’T TELL YOU ABOUT CAPITALISM 248 (2010) (“[E]conomics has been worse than irrelevant. Economics, as it has been practiced in the last three decades, has been positively harmful for most people.”).

2. RAYMOND GEUSS, PHILOSOPHY AND REAL POLITICS 94 (2008).

3. Joe Friendly, *Noam Chomsky, Corporate Attack on Education at St. Philip’s Church of*

I. INTRODUCTION

A. The Basic Argument

This Article argues that the pro-consumption tax literature is wrong to claim that no legitimate fairness objections to the consumption tax exist.⁴ It

Harlem, YOUTUBE (Mar. 16, 2012), at 53:55, <http://www.youtube.com/watch?v=DbMP-cy1INA> (copy on file with author). To readers who might find this statement jarring, let me elaborate. Here, Chomsky is speaking about the corporatization of the educational system and mocking the notion of efficiency more generally. To illustrate this point, he uses the example of how the automation of customer service calls has been called “efficient” when this just means, as we have all experienced, putting the costs as much as possible on the consumer, on the public. Chomsky also debunks the notion of efficiency in the context of high technology (e.g., iPhones, the Internet, and automation). As he remarks, the actual value of such trumped technology is in its employment to increase the power and control of the ownership class over the rest of the population. See NOAM CHOMSKY, HOPES AND PROSPECTS 88 (2010) (“Within the state sector the technology [manufacturing technology during the Reagan administration] was designed in a specific way: to de-skill workers and enhance management control. That choice was not inherent in the technology and does not appear to have become more profitable.”); see also Freigeist 20789, *Noam Chomsky – For a Free Humanity*, YOUTUBE (Jan. 13, 2011), at 15:00–27:00, <http://www.youtube.com/watch?v=CozeSgbKR14> [hereinafter *Humanity*]. As Chomsky explains:

Automation . . . was highly inefficient and could not be developed through the market so it had to be developed through the state sector. We have a huge state sector of the economy here. It’s called the Pentagon. And its purpose is to protect rich people from market discipline. . . . Automation . . . was developed . . . through the Airforce, the Navy, and so on Automation was in fact designed specifically to deskill workers and to add levels of management. . . . [V]ery useful for class struggle.

Id. at 25:20–27:16. Chomsky’s position finds support in other analyses. See, e.g., Interview by Jayne O’Donnell with David Cay Johnston, Author, *The Fine Print: How Big Companies Use ‘Plain English’ to Rob You Blind* (Oct. 4, 2012), <http://www.c-spanvideo.org/program/CayJo> (discussing how telco companies use power to extort rents to create a system where U.S. consumers pay the highest price for the lowest levels of internet service in the developed world); CHANG, *supra* note 1, at 36, 31, 157 (noting that the washing machine was far more revolutionary than the Internet in economic terms and that a bus driver in India is much more productive than any Silicon Valley “entrepreneur”); JULIAN ASSANGE, CYPHERPUNKS: FREEDOM AND THE FUTURE OF THE INTERNET (2012) (arguing that the Internet is now solely a tool of social control by the corporate state). It should be noted that for over thirty years, Chomsky has been chronicling how tax and regulatory reform creates and increases economic inequality and social ill-welfare. Some of Chomsky’s work in this area is discussed below. See *infra* notes 7 and 10.

4. As discussed more fully in Part II, the literature’s argument that a consumption tax would be as fair as an income tax can be summarized as three parts. The first part could be called the “redistributive” argument that a consumption tax could meet any redistributive demand one might have. The second could be called the “equivalence” argument that a consumption tax is so much like an income tax that it could not possibly be more unfair than the income tax. The third could be called the “benefit” argument that since the only value of

argues that the persistent and widespread wariness about replacing our current hybrid consumption tax/income tax system with a pure consumption tax is, contrary to what the pro-consumption tax literature asserts, completely justified. In fact, our reservations about the consumption tax's fairness reflect legitimate concern about the role of capitalist power in America, particularly over the past thirty years. Indeed, the more the nation continues to experience the social welfare effects of increased capitalist power, the more compelling these objections become. History proves these concerns not just legitimate, but paramount. A full account, not a dismissal, of how capitalist power might benefit from a consumption tax is what would be required to meet these fairness objections. Part II of this Article fleshes out the fairness objections more fully and addresses the counter arguments that exist in the literature. In doing so, it seeks to reestablish the legitimacy of fairness objections to a consumption tax and encourage more robust and historically aware considerations of distributive justice in tax policy. Part II goes further and shows that the consumption tax literature gets it wrong in a particularly revealing way. Part II characterizes the pro-consumption tax literature's dismissal of serious fairness and distributive justice concerns as, essentially, ideological; the literature's very *framing* of the fairness issue precludes any serious consideration of the historical reality of capitalist power. Ideology, not argument, supports the claim that capitalist power is not a concern.

Tax scholars interested exclusively in the tax fairness argument should continue directly to Part II. The remainder of Part I places the ideology critique of the consumption tax debate in the context of Occupy Wall Street

holding even vast accumulations of wealth is what that person actually spends in the form of consumption (e.g., buying political favors, huge estates, and yachts) a consumption tax would tax (if structured as a sales tax or a tax on capitalist consumption) the entire *value* or *benefit* of owning the country that the capitalist experiences or could have. This Article criticizes the benefit argument almost exclusively. It argues that the pro-consumption tax literature radically underexamines the historical reality of how capitalist power actually operates to the benefit of the capitalist class. It further argues that the benefits of owning the country far, far exceed what any individual capitalist could ever spend in mere dollars. The way in which large accumulations of capital rig the system in favor of the owners of the country goes well beyond any narrow analysis of what any given capitalist might spend on buying a politician, a vote, or a mansion. To the extent an income tax, rather than a consumption tax, imposes a tax on capital accumulations as such, it can be seen as a surtax on the source of capitalist power: the ownership of the country by a tiny minority itself. Accordingly, this Article claims that there is, in fact, a very good reason behind the widely held intuition that a consumption tax is fundamentally unfair. The only way the pro-consumption tax proponents can argue otherwise is by framing their whole approach in a highly abstracted way that precludes consideration of the reality of how capitalist power actually operates historically. As explained in greater detail below (*see* discussion *infra* Part I.C–D), erasure of history and power is the hallmark of ideological social theory.

and introduces some recent work in critical theory. The point is to encourage legal scholars to reflect on the distinct possibility that much of the work on economic regulation in American law schools is similarly ideological—effectively promoting the interests of the capitalist class regardless of the actual social welfare effects. Part I(B) suggests that history, in the form of Occupy Wall Street, has already confirmed this grim legacy. Parts I(C) and (D) explore ways to overcome this legacy and introduce to the literature some recent work in critical theory that legal scholars of all stripes are encouraged to appreciate.

B. Occupy Wall Street (“OWS”) and American Legal Scholarship on Economic Regulation

OWS should cause us to reflect on the role of legal scholarship may have played in America’s rising inequality over the past thirty-odd years. Personally, my participation in OWS confirmed what I had suspected all along: that my own scholarship in tax and distributive justice was at best irrelevant and, at worst, part of an ideology of law designed to decrease rather than increase social welfare (or, if you like, “efficiency”).⁵ The casual discussions on law and distributive justice at OWS were far more rigorous in their social welfare analysis than anything I had experienced in law school or legal scholarship. The reason was simple. OWS was based in reality and pulled no punches in identifying capitalist rent seeking as the chief cause of America’s recent discontent. OWS dared to discuss publicly the very reasonable idea that over the past few decades the 1%⁶ simply sucked up the nation’s wealth through a relentless campaign state regulatory capture (“de-regulation” and “reform”) under the banner of bogus economic theory and

5. As a law professor, my areas of concentration were distributive justice and tax policy. However, my past scholarship is subject to the same criticism made of tax policy scholarship in this Article. See, e.g., Patrick Crawford, *Analyzing Fairness Principles in Tax Policy: A Pragmatic Approach*, 76 DENV. U. L. REV. 155 (1998); Patrick Crawford, *The Utility of the Equity/Efficiency Dichotomy in Tax Policy Analysis*, 16 VA. TAX REV. 501 (1997); Patrick Crawford, *The Genius of American Corporate Law*, by Roberta Romano, 49 BUS. LAW. 1955 (1994) (book review); Patrick Crawford, *Report on Prop. Regs § 1.1001-3: Modifications of Debt Instruments*, 47 TAX. LAW 987 (1994); Patrick Crawford, *Inefficiency and Abuse of Process in Banking Regulation: Asset Seizures, Law Firms, and the RICOization of Banking Law*, 79 VA. L. REV. 205 (1993); Patrick Crawford, *Indopco v. Commissioner: Form Over Substance in the Judicial Regulation of the Market for Corporate Control*, 12 VA. TAX REV. 121 (1992).

6. This Article uses the term “1%” to refer to the owners of the country—the capitalist class—who have taken almost all the gains from economic growth over the past decades. See *infra* notes 7 and 8. Similarly, this Article uses the term “99%” to refer to those controlled by the 1%—the labor class—who have seen their incomes, wealth, and overall welfare fall precipitously during this same period. *Id.*

other self-serving ideologies—a subject legal academics, perhaps understandably, would not broach.⁷

7. The OWS claim (always implicit, often explicit) that inequality is the intended result of legal and regulatory “reforms” over the past thirty years is recognized in the economic literature. Joseph Stiglitz’s recent book, *The Price of Inequality: How Today’s Divided Society Endangers Our Future*, is largely a restatement of the OWS theme. As Stiglitz writes:

American inequality didn’t just happen. It was created. . . . [O]ur growing inequality—especially the amounts seized by the upper 1 percent—is a distinctly American “achievement.” . . . Much of the inequality that exists today is the result of government policy, both what the government does and what it does not do.

JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 35 (2012). He continues:

Our political system has increasingly been working in ways that increase the inequality of outcomes and reduce the equality of opportunity. This should not come as a surprise: we have a political system that gives inordinate power to those at the top, and they have used that power not only to limit the extent of redistribution, but also to shape the rules of the game in their favor and to extract from the public what can only be called large “gifts.”

Id. at 32. Economists have a name for this behavior. It is called “rent seeking”—in other words, accumulating income without creating wealth for the rest of society. Emmanuel Saez, the economist almost solely responsible for actually measuring the increasing inequality in the U.S., put the point more delicately:

A number of factors may help explain this increase in inequality, not only underlying technological changes but also the retreat of institutions developed during the New Deal and World War II—such as progressive tax policies, powerful unions, corporate provision of health and retirement benefits, and changing social norms regarding pay inequality. We need to decide as a society whether this increase in income inequality is efficient and acceptable and, if not, what mix of institutional and tax reforms should be developed to counter it.

Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States* (2012), at 5, available at <http://elsa.berkeley.edu/~saez/saez-UStopincomes-2010.pdf>. As previously mentioned, Chomsky has also chronicled in detail how “deregulation” and “reform” over the past decades accomplishes the objective of “robbing public resources.” See Noam Chomsky, *Free Market Fantasies: Capitalism in the Real World*, Talk at Harvard University (Apr. 13, 1996) [hereinafter *Free Market Fantasies*] (transcript available at <http://www.chomsky.info/talks/19960413.htm>); *Humanity*, *supra* note 3. And as Chomsky explained back in 1997, it was explicit social policy through the tax and transfer system, and not the “market economy,” that spurred the rising inequality that necessitated OWS:

The United States has by far the highest level of inequality of any industrial society. . . . After having declined from 1945 to the 1970s, it is now increasing. [Inequality] is now back to around what it was in the 1920s—and still going up. That picture . . . is true but it’s good to disaggregate it—break it up into its components. Participation in the economy—what’s called “the market economy” and that’s misleading—

To put it bluntly, legal scholars of economic regulation should be as embarrassed as I was that it took such extreme inequality, social ill-welfare, and extraordinary acts of civil disobedience to bring this idea to the fore. Our staggering decline in social welfare was perfectly obvious to everyone, yet it took non-specialists to raise the most compelling and important social welfare analysis of the day.⁸ Neither the fact of inequality, nor the “market”

participation in the economy leads to a certain distribution of income. Okay, so you have a job, spend money and so on, and that leads to a certain distribution of income. Then comes the second factor, a social policy, which is taxes and transfers. . . . If you compare the U.S. with other industrial societies in market outcomes, what’s the inequality there? Well, it’s about the same as other societies . . . in terms of distribution of income from market outcomes. If you add the effect of social policy, the U.S. diverges radically. So you take into account taxes and transfers and you find the inequality growing very sharply because *that’s the nature of social policy* in the U.S. and increasingly in England. And that’s the Reagan-Thatcher Revolution. Well, okay, those are decisions, they are not laws of nature. . . . This is real and it is the domestic variant of the international picture.

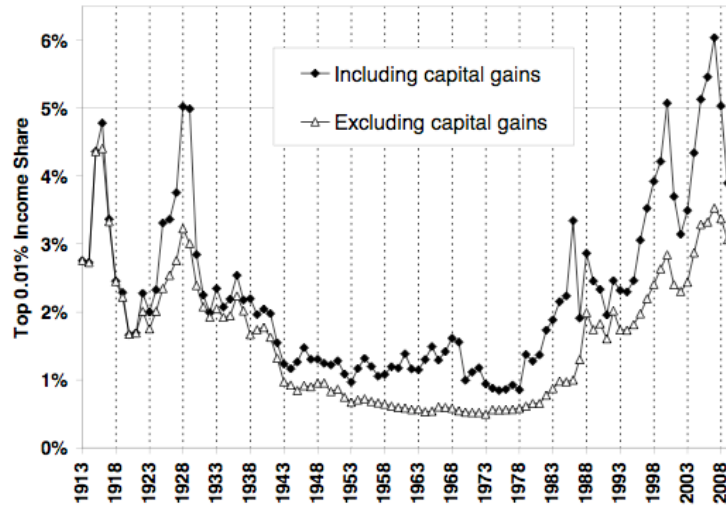
Santarchy, *Noam Chomsky: “Free Markets?”*, YOUTUBE (Dec. 6, 1997), at 14:00–16:00 [hereinafter *Free Markets?*], <http://www.youtube.com/watch?v=WHj2GaPuEhY>. None of this would be news to Adam Smith, of course, who pretty much thought it was an a priori truth that any law or regulation touched by capital is a social welfare disaster. As Smith put it:

To widen the market, and to narrow the competition, is always the interest of the dealers. . . . The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 267 (1976).

8. The distributional facts, in particular, were clear as day. As is often the case, though, it took economists outside the orthodox economic styles now taught in law schools to do the empirical work on inequality. The empirical work of economists Thomas Piketty and Emmanuel Saez in 2003 documented distributional trends using Internal Revenue Service (IRS) data. *See generally* Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 2003 Q. J. ECON. 1 (2003). The data in their article and its analysis have been updated several times. The most current version is a “summary for the broader public.” *See Saez, supra* note 7. The data establishes that concentration in the hands of the 1% (i.e., families with income above \$7,890,000) is particularly extreme:

reforms that caused it, were really ever raised as a topic of law school discussion, let alone comprehensively examined from a perspective of distributive justice in the academic literature (including, to a surprising extent, the so-called “critical legal studies” literature).⁹ Lack of interest in



Id. at 10 fig.3. The updated data also indicates that families in the 1% income class captured a full 93% percent of the gains in the “recovery” of 2009 to 2010. *Id.* at 6. Emmanuel Saez has said, with understatement, that “Such an uneven recovery can help explain the recent public demonstrations against inequality.” *Id.* at 4. Citing this work, The MacArthur Foundation named Saez a “Genius” Fellow in 2010. See Kathleen Maclay & Sarah Yang, *Two Young Faculty Members Named MacArthur “Genius” Fellows*, UC BERKELEY NEWS CTR. (Sept. 28, 2010), <http://newscenter.berkeley.edu/2010/09/28/macarthur/>.

9. I am speaking mostly of the area with which I am most familiar: tax law. There are here, as elsewhere, important exceptions of course that do discuss the role of regulatory “reform” in creating inequality. One relatively recent article discusses the distributional effects of lobbying. See C.M.A. McCauliff, *Didn’t Your Mother Teach You to Share?: Wealth, Lobbying and Distributive Justice in the Wake of the Economic Crisis*, 62 RUTGERS L. REV. 383 (2010). There are law review articles in the area of taxation addressing the relationship of increasing inequity and regulation as well as crucial historical analyses. But these do not reflect on the meaning of OWS for tax scholarship per se. See, e.g., Jonathan Barrett, *Wealth Transfer Tax Redux?*, 17 N.Z. J. TAX’N L. & POL’Y, 289 (2011) (examining the intellectual history of the wealth tax); Victor Fleischer, *Taxing Founder’s Stock*, 59 UCLA L. REV. 60, 76 (2011) (discussing an increase in income concentration and the taxation of founder’s stock); Edward J. McCaffery & James R. Hines, Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031 (2010) (discussing the political viability of a progressive consumption tax); James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129 (2008) (discussing tax system design given distributional trends); David Frederick, *Historical Lessons from the Life and Death of the Federal Estate Tax*, 49 AM. J. LEGAL HIST. 197 (2007) (discussing the history of the estate tax); Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793

the causes of inequality alone cannot account for this gap in the scholarship. The realities of distributive injustice are simply too blatant and important. One must look instead at the ideology of legal scholarship to understand the dynamics of such avoidance. This Article explains how ideology in legal scholarship operates to obscure, rather than illuminate, the most important distributive justice issue of our time.

Sustained ideology critique and critical reflection can help to ensure that our language of the law—the way lawyers, judges, politicians, and the public think and speak about the law—does not block out the type of serious normative legal analysis that OWS expressed. As things stand, the lack of a counter-narrative to, for instance, the “economic” analysis of the law, means that, quite often, the only voice in the courtroom, Senate hearing, or public debate is the voice of “free market fantasies”¹⁰—the voice of capital. It

(2005) (providing an intellectual history of fiscal policy and the evolution of the income tax); Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993 (2004) (explaining how tax policy progressed to contribute to distributional inequity); William G. Gale, *An Economic Assessment of Tax Policy in the Bush Administration 2001-2004*, 45 B.C. L. REV. 1157 (2004). In the body of legal scholarship on economic regulation more generally, reflection on what OWS might mean for scholarship—let alone an ideology critique of such scholarship in light of OWS—is almost entirely absent. Of all the scholarship mentioning OWS—over 110 articles—relatively few (the author could find only one) critically examine ideology or “patterns of thought” in legal scholarship on economic regulation with OWS in mind. See Matthew Titolo, *Privatization and the Market Frame*, 60 BUFF. L. REV. 493, 556 (2012) (attacking the neo-liberal market analysis and urging instead “productive intellectual engagement with the . . . world”). The critical legal studies scholarship, at least in its “critical tax theory” variant, is also largely silent on capitalist power, focusing instead on identity politics. See, e.g., BRIDGET J. CRAWFORD, *CRITICAL TAX THEORY: AN INTRODUCTION* (Anthony C. Infanti & Bridget J. Crawford eds., 2009). All but perhaps two of the articles in this compendium deal with issues of race, gender, or sexual orientation. None come anywhere near the type of realist analysis advocated in this Article—that is, an analysis that examines how capitalist power (be it gay/straight, white/black, or male/female) created the current, radically unequal, socio-economic environment. For a more thorough critique of the critical tax theory movement on these grounds, see Patrick Crawford, *What's So Critical About Critical Tax Theory?*, LAWCRIT (forthcoming 2014), <http://lawcrit.com/>.

10. Chomsky has long taken apart “free market fantasies.” As he puts it:

The very concept of capitalism and markets has virtually disappeared. . . . Those things [democracy and free markets] have given the U.S. a real “force multiplier” [in foreign relations]. It comes from “cold war investment in high technology” electronics, aviation, telecommunications, and so on. That’s our “free market enthusiasms and democracy!” Well, where did electronics, you know, aviation, and telecommunications come from? Well, from public funds! They don’t have anything to do with the free market. They came from public funds, which were transferred to high technology industry under the conscious guise—[an actual] deceit—of security. . . . And probably nobody notices [this deceit], you know, because the concept of capitalism, just like the concept of democracy, is just gone—nobody knows what it is. “Democracy” means “deceive

would be a rare thing indeed to hear anything like the following counterargument (admittedly made up here on the fly):

Your Honor, this “market analysis” has nothing to do with legitimate economic theory. It’s just a cover to argue for a wealth transfer from the public to this industry. Please include in the record this critique by [e.g., Stiglitz, etc.] that the market analysis by [e.g., Verizon in, say, *Verizon v. FCC* (invalidating net neutrality)] is bogus and self-serving. What Verizon calls the “free market” is really a state subsidy; what it calls “efficiency” is a wealth transfer. So let’s abandon any talk of markets or efficiency and focus on the real issue here: the ability of the FCC to regulate public resources for the public good.

The suggestion here is that legal academics are, in a very real way, responsible for distorting legal theory and the language of American law to foreclose any real social welfare analysis. As a consequence, they mostly serve only one interest—the interest of capital. As Joseph Stiglitz remarked:

A massive program to “educate” people, and especially judges [and Treasury Secretaries, and Presidents], regarding these new doctrines [Chicago school economics] of law and economics, partly sponsored by right-wing foundations like the Olin Foundation, was successful. The timing was ironic: American courts were buying into notions that markets were “naturally” competitive and placing a high burden of proof on anyone claiming otherwise just as the economics discipline was exploring theories that explain why markets often were *not* competitive . . . The influence of the Chicago school should not be underestimated. Even when there are blatant infractions—like predatory pricing . . . they’ve been hard to prosecute.¹¹

people into doing what the rich people want” and “markets” mean “make sure the public subsidizes the rich.”

Free Market Fantasies, *supra* note 7, at at 14:00–16:00.

11. STIGLITZ, *supra* note 7, at 44–45. Stiglitz has, of course, often ridiculed the Chicago school enthusiasts in his own profession. In one post-OWS lecture, he was particularly critical of professional economists’ responses to the problem of the unemployed and working poor, saying:

One out of six Americans can’t get jobs. . . . For the first time since the data has been collected in the U.S., more than forty percent of Americans

If anything, Stiglitz is being polite here.¹² Legal scholarship and teaching has strongly supported the most serious welfare disaster—the most unjust theft of public wealth—in more than half a century. Recall that normative legal theory is supposed to suggest how economic regulation might *enhance* social welfare. The trajectory of legal scholarship over the past thirty-odd years has been in precisely the opposite direction, strengthening rather than decrying the very “market based” ideologies of “reform” that attempt to justify the very serious, debilitating, and brutal effects on the general population.¹³ It is quite likely that in fifty years this entire body of legal scholarship on economic regulation will appear as obvious rank ideology, providing a framework for thinking about our legal system that was *designed* to provide cover for one of the biggest wealth transfers in history, *in the wrong direction*.¹⁴ Unless legal scholars seriously reflect on their own work from

who have been unemployed have been unemployed for more than six months. We used to have a dynamic labor market. . . . A new category has been originated called “ninety-nine weekers”—people who have been unemployed for more than ninety-nine weeks for which there is essentially no social safety net in the U.S. This is not the way a market economy is supposed to work. . . . It’s not supposed to lead to a massive misallocation of economic resources. Market equilibrium in the labor market means where demand equals supply and that means no unemployment. There are some schools of economic thought, believe it or not, that think what is going on now is not unemployment. They just think some people decided to enjoy a little bit more leisure [laughter in the audience]. And when I ask them “Why are they so unhappy?” they say, “That’s not a problem for economics. That’s a problem for psychiatry.”

Joseph Stiglitz, 2011 Arnold C. Harberger Distinguished Lecture on Economic Development at the UCLA Burkle Center (Apr. 26, 2011), <http://web.international.ucla.edu/burkle/article/120926>.

12. For a more stinging indictment on the liberal intellectual class’s ideological function, see CHRIS HEDGES, *DEATH OF THE LIBERAL CLASS* 13 (2010).

13. An examination of the intellectual history of legal scholarship on economic regulation—from banking law to tax law—over the past thirty years is, of course, beyond the scope of this Article. Nevertheless, this claim seems accurate.

14. Capitalist rent seeking, of course, has always been one of America’s great traditions. As the late Gore Vidal noted, the United States has always been this way, varying only in degree. Vidal wrote:

There is only one party in the United States, the Property Party . . . and it has two right wings: Republican and Democrat. Republicans are a bit stupider, more rigid, more doctrinaire in their laissez-faire capitalism than the Democrats, who are cuter, prettier, a bit more corrupt . . . and more willing than the Republicans to make small adjustments when the poor, the black, the anti-imperialists get out of hand. But, essentially, there is no difference between the two parties.

GORE VIDAL, *MATTERS OF FACT AND FICTION: ESSAYS 1973-1976* 268 (1977).

the historical context of OWS and rising inequality, it seems likely that their efforts will be viewed as little more than a Malthusian deceit.¹⁵

C. How Best to Eliminate Pro-Capitalist Ideology in American Legal Scholarship

How does one who cares about American legal scholarship (and American social welfare) respond to this descent into rank ideology? Certainly revisionism is unsatisfactory.¹⁶ One possibility would be to just start *doing* legal scholarship on a more “realist” basis, examining in specific detail how power has operated over the past thirty years to effect socially

15. In England in the eighteenth and early nineteenth century, Thomas Malthus argued for reform of the Poor Laws of England that had brought relief to the poor through a tax in the parishes. See T.R. MALTHUS, *AN ESSAY ON THE PRINCIPLE OF POPULATION* (Geoffrey Gilbert ed., Oxford Univ. Press 1993) (1798); see also *English Poor Laws*, WIKIPEDIA, http://en.wikipedia.org/wiki/English_Poor_Laws (last visited Mar. 30, 2014) (providing a detailed explanation of the English Poor Laws). More specifically, Malthus argued:

The poor laws of England tend to depress the general condition of the poor in these two ways. Their first obvious tendency is to increase population without increasing the food for its support. . . .

Secondly, the quantity of provisions consumed in workhouses upon a part of the society that cannot in general be considered as the most valuable part diminishes the shares that would otherwise belong to more industrious and more worthy members, and thus in the same manner forces more to become dependent. If the poor in the workhouses were to live better than they now do, this new distribution of the money of the society would tend more conspicuously to depress the condition of those out of the workhouses by occasioning a rise in the price of provisions.

....
I feel no doubt whatever that the parish laws of England have contributed to raise the price of provisions and to lower the real price of labour. They have therefore contributed to impoverish that class of people whose only possession is their labour.

MALTHUS, *supra*, at 39–40. Historian Lynn Hollen Lees explains that Malthus’s arguments shaped social attitudes and policies in Britain for half a century, and “Malthusianism and the hostility to the poor laws it fostered set the intellectual tone for debate on the poor laws well into the 1840s.” See LYNN HOLLEN LEES, *THE SOLIDARITIES OF STRANGERS: THE ENGLISH POOR LAWS AND THE PEOPLE, 1700-1948*, at 91 (1998). However, Malthusian inspired reform of the poor laws did not lead to higher wages and higher employment. In fact, Malthusian “reform,” when implemented, actually depressed wages and was merely a part of a package of measures to “achieve a submissive . . . proletariat at minimal cost.” See K.D.M. SNELL, *ANNALS OF THE LABOURING POOR: SOCIAL CHANGE AND AGRARIAN ENGLAND 1660-1900*, at 123, 130 (1985). Malthus’s “starving the poor is for their own good” legal reasoning still resonates today in, for instance, the arguments against raising the minimum wage.

16. Indeed, the revisionism may have already begun. See, e.g., RICHARD POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009).

deleterious wealth transfers through legal “reform.”¹⁷ Another approach—the one taken in this Article—is to take apart existing scholarship through a sustained ideology critique demonstrating how such scholarship is, fundamentally, pro-capitalist ideology. It seems right that both strategies should operate simultaneously.

Directly criticizing American legal scholarship on economic regulation as a whole might seem inappropriate given the uniformity of the orthodox discourse. In response to any such criticism, I would just say that objections to tone, style, or appropriateness are almost always just ruses to reject the argument without seriously engaging it. In any event, there is simply no nice way to put the thesis that legal scholars carry water for the ruling class. Indeed, it behooves the legal scholar to take that indictment seriously. For if there is even a grain of truth to the claim that legal scholarship in America is

17. Guidance for such a realist approach to the law is provided by the philosopher Raymond Geuss, who has put forth a program of legal realism directly informed by the philosophical tradition of critical theory. Geuss’s work cannot be examined in detail in this Article but, in broad contour, Geuss’s analysis suggests that social theorists—including legal theorists—must give an adequate and historically informed account of how power (including capitalist power in the contemporary context) operates to shape laws, ideology, and social and economic life. In Part I(D), I introduce Geuss’s general approach by quoting Geuss’s own words as he attacks John Rawls’s political philosophy as pernicious ideology. I take Geuss’s ideology critique as showing what, from the perspective of critical theory and Geuss’s realist project, is wrong with social theory in America (particularly liberal theory), and how Geuss’s realist approach avoids these errors. That is, Geuss attacks Rawlsian theory for failing to account for the historical reality of power. Geuss’s own approach, which I endorse in this Article, provides an adequate account of the historical reality of power. Part II criticizes the pro-consumption tax literature as precisely the type of legal or social theory that Geuss rejects in his attack on Rawls. What Geuss says about Rawls can also be said of the consumption tax literature: ahistorical analysis lacking an adequate account of power makes rigorous analysis of issues of justice impossible and performs an ideological function. Interpreting Geuss’s work as establishing a form of legal realism is supported by the readings of Brian Leiter, though Leiter interprets Geuss much less sympathetically. See Patrick Crawford, *What It Means to Be a “Crit”: A (Re)-Introduction to Raymond Geuss’s Legal Realism*, 43 SW U. L. REV. 1 (forthcoming 2014). Among the works by Leiter that I criticize are: Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L.J. 865, 885–93 (2012); Brian Leiter, *Geuss on “Real Politics”*, LEITER REP: A PHIL. BLOG (Oct. 24, 2008, 1:46 PM), <http://leiterreports.typepad.com/blog/2008/10/geuss-on-real-p.html>; Brian Leiter, *Geuss’s Skepticism About Rawls*, LEITER REP: A PHIL. BLOG (Oct. 14, 2007, 6:50 PM), <http://leiterreports.typepad.com/blog/2007/10/geusss-skeptici.html>. Admittedly, this Article does not actually *do* the type of realist tax policy analysis it tries to defend. For empirically and historically based analyses of the tax system that feature robust accounts of power and expose the many ways that tax law supports rent seeking, exploitation, and other abuses, see DAVID CAY JOHNSTON, *THE FINE PRINT: HOW BIG COMPANIES USE “PLAIN ENGLISH” TO ROB YOU BLIND* (2012); DAVID CAY JOHNSTON, *FREE LUNCH: HOW THE WEALTHIEST AMERICANS ENRICH THEMSELVES AT GOVERNMENT EXPENSE* (2008); DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE* (2005).

pro-capitalist ideology, then the credibility of all that work is destroyed, as its effects on the legal system and the social welfare become all too clear. It is fair to say that much more than a grain of truth exists here. Thus, there is an urgent need for an alternative language of the law that practicing lawyers, government officials, law professors, and analysts can speak in place of the free market fantasies that now prevail. A viable alternative language must have within it the terms to demonstrate, on a moment's notice as it were, why talk of "free markets," "efficiency," and "governmental intrusion" are (almost always) bogus covers for crass, welfare minimizing wealth transfers.¹⁸

D. What Is Ideology Critique and Critical Theory?

Turning away from the general context, the specific thesis of this Article is that the pro-consumption tax literature is perniciously ideological.¹⁹ If this

18. For a good source on such demonstrations, see CHANG, *supra* note 1; see also *Free Market Fantasies*, *supra* note 7 (discussing "free market fantasies" and "what they don't teach you about capitalism"); Patrick Crawford, *Selected Arguments Against Market Theory for Lawyers*, LAWCRIT (forthcoming 2014), <http://lawcrit.com/>.

19. The term "pernicious ideology" is taken from Geuss's work on Frankfurt School critical theory. See RAYMOND GEUSS, *THE IDEA OF CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 12–13 (1981) [hereinafter *CRITICAL THEORY*] (describing the properties of "ideology in the pejorative sense" as distinguished from ideology in the descriptive sense). The term "ideology" can refer to any concept or theory or view of a group and therefore can be either a good thing or a bad thing. *Id.* The notion of "ideology critique" will be familiar to those who have read within the German critical tradition of Marx and the variants of Marxian theory. See *id.* at 5 (referencing the "vulgar Marxist distinction between (economic) base and (ideological) superstructure"). As previously stated, this Article uses Geuss's critique of Rawls's theory of justice as a model for the identification and critique of ideology in the pejorative sense in tax policy analysis. The claim here is, more generally, that what Geuss says of Rawls—"a theoretical approach with no place for a theory of power [which] is not merely deeply deficient but actively pernicious, because mystifying"—can be said with equal or greater force of the pro-consumption tax literature and of the treatment of economic regulation in the law review literature overall. See GEUSS, *supra* note 2, at 94. As readers may be unfamiliar with Geuss's work, some more introductory remarks may be in order. Geuss is arguably the leading English-speaking scholar of (among other important traditions in the history of philosophy) critical theory and the philosophical analysis of ideology (from Marx to Nietzsche to Foucault). His earlier work analyzed the properties of types of ideology in the pejorative sense and the possibility of a "critical theory" with exhaustive philosophical scrutiny. See, e.g., *supra* *CRITICAL THEORY*. In his later work, Geuss actually engages in "realist political philosophy" that "lays bare the forms of ideological thinking" so that we have actual examples of "ideology critique" to look to and a method to apply elsewhere. See Raymond Geuss, *Realism and Utopianism in Political Philosophy* (May 8, 2010), <http://philosophybytes.com/2010/05/raymond-geuss-on-realism-in-political-philosophy.html>. Geuss's work is directly relevant to normative legal theory and one could spend a fruitful career examining the connections and moving the field in a Geussian realist direction. A good general introduction to Geuss's thinking on such matters is his lecture on the phenomenon of

thesis is accurate, then, I believe, the same claim can likely be made against all of the scholarship on economic regulation as well.²⁰ If true, this thesis goes a very long way indeed in accounting for the oft-remarked fact that issues of distributive justice are significantly under analyzed in the tax policy scholarship and scholarship on economic regulation overall.

The specific argument against the pro-consumption tax literature is quite simple. The claim here is that the pro-consumption tax literature is clearly wrong to claim to have answered all distributive justice objections to shifting the tax burden from capital to labor. In fact, the very mode of analysis of this literature is *designed to* erase any serious consideration of distributive justice in the first place. When your worldview itself precludes any consideration of distributive justice, the conclusion that there is no distributive justice issue is hardly surprising. The ideology critique in this Article identifies the aspects of the pro-consumption tax discourse that make serious consideration of distributive justice impossible. In general, it is a lack of “realism” in favor of abstraction that hampers this discourse. More specifically, this lack of realism consists of: (1) a lack of historical analysis, perspective, or consciousness, and (2) a lack of an adequate account of power.

This Article suggests that these two elements are markers for pro-capitalist ideology in American legal scholarship more generally. I believe that recent work on ideology critique and critical theory backs up this claim. Specifically, Raymond Geuss’s explication of critical theory supports this claim.²¹ Geuss’s work on critical theory is rather extensive and detailed,²² but what Geuss says about American academic political theory and theories of justice can be said equally about the pro-consumption tax literature’s treatment of distributive justice as well. I ask the reader to consider carefully Geuss’s criticism of Rawlsian theory and ask, “doesn’t this criticism apply exactly to the types of analyses that now dominate American academic legal culture?”²³ I believe what Geuss says about the dominant strain in American

wishful thinking. See Raymond Geuss, Talk at the University of Minnesota Institute for Advanced Study: Realism, Wishful Thinking, and Utopia (May 6, 2010) (transcript available at <https://events.umn.edu/001415>). As mentioned, Geuss’s critical, realist legal theory has been recognized as such, though it has been grossly mischaracterized and, therefore, has not heretofore been applied, to the author’s knowledge, in any accurate manner in American legal scholarship. See Crawford, *supra* note 17.

20. This claim follows from the reasonable assertion that the pro-consumption tax scholarship represents the best and most sophisticated of the economic analysis of law in the literature. As goes it, so goes the rest.

21. I say “believe” because I do not know if Geuss would agree that his analysis and his “realism” can be so simply applied and extended to American legal scholarship the way I am doing.

22. See *supra* note 19 and accompanying text.

23. I should say it also applies to so-called “crit” work as well, in so far as it is not focused on a historically based analysis of power and class struggle.

political philosophy applies with equal force to the consumption tax debate and, by extension, all discussions of fairness in the orthodox literature on economic regulation. Geuss writes:

Is it, though, or should it be, of any significance that the “normative” moral and political theory of the Rawlsian type has nothing, literally nothing, to say about the real increase in inequality, except perhaps “so much the worse for the facts”? This is not a criticism to the effect that theoreticians should *act* rather than merely thinking, but a criticism to the effect that they are not thinking about relevant issues in a serious way.

.....

For a small number of English-speaking philosophers, then, the only way to make discernible progress in political philosophy is by studying history, social and economic institutions, and the real world of politics in a reflective way. This is not incompatible with “doing philosophy;” rather, in this area, it is the only sensible way to proceed. After all, a major danger in using highly abstractive methods in political philosophy is that one will succeed merely in generalizing one’s own local prejudices and repackaging them as demands of reason. The study of history can help to counteract this natural human bias.

.....

For those of us with views like these, Rawls is not a major moral and political theorist, whose work self-evidently deserves and repays the most careful scrutiny. Rather, he was a parochial figure who not only failed to advance the subject but also pointed political philosophy firmly in the wrong direction.²⁴

Geuss also writes:

In real politics, theories like that of Rawls are nonstarters, except, of course, as potential ideological interventions. A theoretical approach with no place for a theory of power is not merely deeply deficient but actively pernicious, because

24. RAYMOND GEUSS, *OUTSIDE ETHICS* 38–39 (2009).

mystifying. This is not a criticism of some individual aspect of Rawls's theory, but a basic repudiation of his whole way of approaching the subject of political philosophy.²⁵

Simply replace "Rawls" with "economic analysis of law" or "analyses of fairness on legal scholarship generally" and you get the same indictment. They all lack an adequate account of history and power and, in so doing, can be viewed as ideological interventions.

Part II of this Article shows exactly how the pro-consumption tax literature ignores history and denies, rather than refutes, distributive justice objections to shifting the tax base away from the 1% and even more fully on to the 99%.²⁶ Such scholarship plays much the same role in our intellectual culture as Rawlsian political philosophy; it allows liberal academics to feel like they are talking about justice while they avoid actually identifying the source of the injustice and, in so doing, upsetting the trustees. Unlike the pro-consumption tax literature, rigorous distributive justice analysis addresses the reality of capitalist power and how, if left unchecked, it drives the country into serfdom. And this focus on capitalist power brings us back to OWS's message to legal scholarship on economic regulation: a non-ideological analysis of economic regulation should address the distributive justice issues of inequality directly, placing them in the real historical context of class struggle, capitalist rent seeking, and regulatory capture by the 1%.²⁷

II. AN IDEOLOGY CRITIQUE OF THE CONSUMPTION TAX LITERATURE

This Part refutes the pro-consumption tax literature's claim that any and all fairness objections to shifting from an income to a consumption tax are rubbish. It shows that, *of course* the consumption tax raises very serious fairness objections; *of course* lightening the load on capitalists while increasing the burden to labor raises fairness objections; and *of course*, as Smith might say, a tax reform that is backed by lobby groups like the American Enterprise Institute is presumptively unjust, "com[ing] from an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed

25. GEUSS, *supra* note 2 at 94.

26. This characterization is unfair since the pro-consumption tax literature claims a consumption tax would not increase labor's burden. Part II doubts this claim, however, and argues that the literature's fairness analysis is incomplete.

27. See *Declaration of the Occupation of New York City*, OCCUPY WALL STREET N.Y.C. GEN. ASSEMB. (Sept. 29, 2011), <http://www.nycga.net/resources/documents/declaration>.

it.”²⁸ The point here is not that the consumption tax would necessarily be unjust, for it may very well be the best and most just system of taxation when properly implemented. The pro-consumption tax literature may be perfectly correct in its ultimate conclusion that the consumption tax is fairer and more efficient than the current system. In fact, many of the best progressive tax analysts outside of the legal academy have concluded just that.²⁹ The point here, rather, is that the way the pro-consumption tax scholarship gets there—the way it reaches its conclusion that no fairness objections exist—is problematic.

Put another way, this Part criticizes the style and not (so much) the substance of the pro-consumption tax literature’s approach to fairness. It argues that the pro-consumption tax literature frames its analysis in a manner that makes appreciation of the fairness objections to the consumption tax impossible. The pro-consumption tax literature uses a highly abstracted form of econometric analysis that, like Rawlsian political theory, is radically ahistorical and, lacking an account of how capitalist power actually operates, cannot be expected to address concerns about the possibility of increased capitalist power under a consumption tax. This erasure of the historical realities of capitalist power is the source of its erroneous claim that our intuitions against the consumption tax are wrong. In this way, the pro-consumption tax literature marginalizes fairness claims and, in so doing, has an ideological character.

Part II’s ideology critique of the pro-consumption tax literature has implications for the law review literature on economic regulation overall, I believe. Part II, in effect, asks legal scholars to reflect on how their own language, their own framing of fairness issues, might, like Rawlsian theory or the pro-consumption tax literature’s econometric analysis, prevent rather than confront the role that capitalist power plays in shaping welfare-minimizing laws and regulations. Might other scholarship on economic regulation that ignores the historical reality of capitalist power also serve an ideological function? Might this ideological function explain why this scholarship virtually ignored income inequality and the problem of capitalist rent seeking during the very same historical period where they had reached crisis levels?³⁰ Might a story about the ideological role of American legal scholarship provide an opportunity to bridge the gap between the American academic class and the general public, the 99% and OWS? Might critical reflection on these matters

28. SMITH, *supra* note 7, at 267.

29. See, e.g., Robert H. Frank, *The Progressive Consumption Tax: A Win-Win Solution for Reducing American Economic Inequality*, SLATE (Dec. 7, 2011, 7:12 AM), http://www.slate.com/articles/business/moneybox/2011/12/the_progressive_consumption_tax_a_win_win_solution_for_reducing_american_economic_inequality_.html.

30. See *supra* notes 7, 8, and 10 and accompanying text.

help to ensure that American legal scholarship on economic regulation avoids the legacy of Malthusian theories of law?³¹

Admittedly, these questions are rather suggestive. Part II does not prove that the trajectory of American legal scholarship on economic regulation has been ideological. Rather, it sticks to what it knows and examines the ideological aspects of the pro-consumption tax discourse. And even here, the claim is limited. Part II does not claim to do justice to the pro-consumption tax literature overall, which is quite excellent, very sophisticated, and, by and large, unassailable. For instance, and as previously noted, Part II's ideology critique is perfectly consistent with the claim that a consumption tax could in fact be fairer and more efficient than our current income tax (through, for instance, a progressive consumption tax of a high rate of one hundred percent or more).³² That being said, the pro-consumption tax literature, and indeed the consumption tax debate overall, can tell us much about what ideology in American legal scholarship looks like and how we can use legal realism and critical theory of the Guessian variety to expand and enhance the literature.

Part II(A) summarizes the redistributive fairness argument made in Joseph Bankman and David Weisbach's groundbreaking work, *The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax*, accepting it in principle but offering some criticism from a critical realist perspective.³³ Part II(B) turns to the two other major fairness arguments in the literature, which are defended in Daniel Shaviro's definitive *Replacing the Income Tax with a Progressive Consumption Tax*.³⁴ Part II(B) is skeptical of both these arguments, but is particularly critical of the second one. Part II(B)(1) addresses what can be called the equivalence argument that a consumption tax is so much like an income tax that the shift would not raise fairness issues. Part II(B)(2) discusses what can be called the benefits argument that exempting capital accumulation from taxation is fair because the capitalist only benefits from capital expenditures and does not benefit at all from capital ownership and accumulation per se. This Article's ideology critique focuses almost exclusively on the benefits argument.

Since Part II(B)(2) contains the core arguments of this Article, it is useful to summarize them here. Mainly, it criticizes the claim that the benefits of

31. See *supra* note 15 and accompanying text.

32. Indeed, Robert Frank has argued that a consumption tax of one hundred percent (or greater, theoretically) might be the best way to address inequality and would adequately meet the distributive justice demands of progressives. See Frank, *supra* note 29. I thank Duncan Foley for this point.

33. Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax*, 58 STAN. L. REV. 1413 (2006).

34. Daniel N. Shaviro, *Replacing the Income Tax with a Progressive Consumption Tax* 8–9 (N.Y.U. L. Sch. Pub. L. & Legal Theory Res. Series, Paper No. 70, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=444221.

ownership can be measured by expenditure alone. The benefits argument would have us believe that the benefit of capitalist ownership can be reduced to the actual dollar amount the capitalist ends up spending in a given year. Bankman, Shaviro, and Weisbach dismiss the idea that capital accumulation and property ownership as such confer value to the capitalist and reduce the capitalist class power to the dollar amount the capitalist actually spends in any given time horizon. Ownership as such, they say, is “Monopoly money,” conferring neither power nor control to the capitalist class (the 1%).³⁵ Part II(B)(2) counters that the Monopoly money argument understates the benefits conferred on capitalists by virtue of their capital ownership. Instead, it argues that the full extent of benefits capitalists enjoy can only be understood by reference to actual systems of capitalist power in our history. That is, our system is specifically designed, from the outset, to benefit the 1%. Furthermore, this system of power is dynamic, with some periods, such as the present, particularly exemplary of the negative effects of increased capitalist influence and control. The benefits argument ignores these realities and thus fails to understand, let alone address, intuitions that a consumption tax would only further increase capitalist power. Part II(B)(2) contrasts its critique of the Monopoly money argument with the critiques previously offered by liberal ethical philosophers Liam Murphy and Thomas Nagel. It shows that, much like Rawlsian approaches to justice, Murphy and Nagel’s ahistorical approach fails to acknowledge the realities of capitalist power, and also fails to seriously counter the ideological Monopoly money argument.³⁶ Thus, Part II(B)(2) criticizes both the neo-Rawlsian liberal and the Chicago-school econometric sides of the consumption tax debate, illustrating just how outside the norm a Geussian critical theory of the law would be. Finally, Part II(C) concludes by commenting on the intellectual history of the consumption tax debate, identifying in the work of David Bradford a long tradition of marginalizing distributive justice under the banner of rigorous analysis.

A. The Redistributive Fairness Argument

Bankman and Weisbach show that an income tax creates inefficiency and claim that a consumption tax avoids such inefficiency and could be structured to meet any redistributive demand a society might have.³⁷ Relying on commodity pricing modeling done by Stiglitz in the 1970s,³⁸ Bankman

35. See discussion *infra* pp. 163–73.

36. See *id.*

37. Bankman & Weisbach, *supra* note 33, at 1413.

38. A.B. Atkinson & J.E. Stiglitz, *The Design of Tax Structure: Direct Versus Indirect Taxation*, 6 J. PUB. ECON. 55 (1976).

and Weisbach show that a tax on capital returns as accrued (i.e., an income tax) causes economic actors to purchase commodities earlier than they otherwise would have, and that this creates a loss of social value—an “inefficiency” or “deadweight loss.”³⁹ A consumption tax structured as a pure wage tax could avoid this inefficiency. Bankman and Weisbach contend that a consumption tax could be designed to meet *any* revenue requirement and *any* redistributive demand.⁴⁰ Therefore, they argue, a

39. Bankman & Weisbach, *supra* note 33, at 1419. “To illustrate this numerically,” Bankman and Weisbach use the following example:

Consider an individual, Z, who earns \$100 in period one and is considering whether to spend the sum in period one or two. Assume arbitrarily that the pretax rate of interest is 5%. Absent taxes on interest income, Z could either consume \$100 of goods in period one or save the \$100, earn 5%, and consume \$105 of goods in period two. The \$105 of goods in period two has a present value to the individual of \$100. Assume now that the return to savings is taxed at a 40% rate and is thus reduced to 3%. Z now must choose between consuming \$100 in period one or \$103 in period two.

Id. By contrast, a tax of 2% on consumption of either \$100 now or \$105 later would impose a uniform tax on these commodities (e.g., a commodity purchased now versus a commodity purchased later).

The effective tax rate levied on future-consumed goods increases as the time of consumption grows longer. If, in the above example, consumption is deferred for three years, the tax reduces available consumption from \$116 to \$109—the equivalent of a sales tax of 6.4%. After thirty years, the amount available is reduced from about \$430 to \$240. This is equivalent to a sales tax of approximately 80%. The choice between an income tax and a consumption tax can be restated as . . . whether such a sales tax is desirable. As such, this question is part of the general issue of whether and when nonneutral commodity taxes are desirable.

Id.

40. *See id.* at 1430. Some, however, have doubted this claim. *See, e.g.*, LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 96–109 (2002). It does appear that Bankman and Weisbach fail to take account of the necessity for even a consumption tax to start digging into capital appreciation via a consumption tax of more than one hundred percent. Take, for example, a 100 person society where 1 person (“Mr. Capitalist”) owns 100% of the property, earns \$1000 a year from this property, does not work, and spends \$100 on consumption per year. Of the rest, 51% (“the Lumpen Proletariat”) enjoy the benefits of a “free” labor market and earn a survival wage of \$5 each (\$255 total). The remaining 48% (“the 48%”) do not work and need \$5 each (\$240 total) just to survive. In this stark reality, not that much different from our own, if we were not to force the Lumpen Proletariat into starvation, one would have to tax Mr. Capitalist on 240% of his consumption in order to keep the population from starving. Apparently, in this society, a tax on capital would be required to meet the demands of redistribution. As discussed earlier, Robert Frank has argued that a consumption tax of one hundred percent (or greater, theoretically) might be the best way to address inequality and would adequately meet the distributive justice demands of progressives. *See supra* note 32.

consumption tax is more efficient and at least as redistributively fair as any income tax.⁴¹ They write:

[T]he argument [for the redistributive fairness and efficiency of a consumption tax] does not depend on the relative degree of inequality in our society or our preferences for redistribution. Therefore, the recent increases in inequality have no bearing on the choice between an income tax and a consumption tax. Similarly, one's views on the appropriate extent of redistribution have no effect on the argument.⁴²

It is important to note that Bankman and Weisbach are not showing with this argument alone that a consumption tax can meet *all* fairness demands—only redistributive ones. They also limit their conclusions in other crucial ways, putting to the side, for instance, the problems of administration and compliance.⁴³

When compared with their otherwise carefully reasoned analysis, Bankman and Weisbach's conclusion regarding fairness appears cavalier. For instance, Bankman and Weisbach enthusiastically endorse Shaviro's argument (discussed more fully in Part II(B)(2)) that fairness objections to letting the 1% sit on their fortunes tax free (and only taxing them *to the extent* they actually spend some of the corpus) are “confused non sequitur[s].”⁴⁴ Thus, they go out on quite a limb and tell us that our fairness reservations about letting capital be accrued tax free are not just wrong but, in fact, loopy. Part II(B)(2) suggests that when Smith was bemoaning the influence of the masters of mankind,⁴⁵ he was concerned about more than the annual expenditures that the capitalist class may make in any given year. He was concerned about the historical reality of capitalist power, a reality that cannot be reduced to an entry in an accounting ledger.

Before turning to Bankman and Weisbach's argument, it may be useful to examine their rhetorical and general approach. These features, I believe, are widely shared in the scholarship on economic regulation and can be viewed as markers for the type of abstract, ahistorical argumentation that is the hallmark of ideology from the realist perspective of critical theory. Paying attention in this way to the rhetoric and framing of the analysis in legal scholarship can help one to see the value and importance of

41. See Bankman & Weisbach, *supra* note 33, at 1430.

42. *Id.*

43. *Id.* at 1415.

44. See Shaviro, *supra* note 34, at 48.

45. SMITH, *supra* note 7, at 448 (“All for ourselves, and nothing for other people, seems, in every age of the world, to have been the vile maxim of the masters of mankind.”).

incorporating historical awareness and a full account of class power into the analysis and scholarship on economic regulation.

Indeed, it is hard not to notice the very abstract, even metaphysical, quality of Bankman and Weisbach's fairness analysis. That is to say, they view the world as an economic model and ignore the historical reality of capitalist power and class struggle. This sort of abstraction, particularly when it occurs in the face of rising inequality and capitalist regulatory capture, raises some suspicion from a realist critical theory perspective. From a post-OWS perspective as well, their approach seems a little like smoke and mirrors since their analysis ignores what was literally occurring right outside their window: rising inequality and increasing regulatory capture. These suspicions are not helped by the fact that pro-consumption tax advocates seem practically giddy at the possibility of structuring a consumption tax as a *pure* labor tax!⁴⁶ Finally, Bankman and Weisbach's approach follows the tradition in tax policy analysis of comparing ideal tax bases as a way to real world tax reform. Under the historically grounded approach defended in this Article, comparing how ideal tax bases would play out according to abstract mathematical models is not the optimal strategy for identifying unfairness in our tax system or effective reform proposals.⁴⁷

Additionally, Bankman and Wiesbach's employment of Stiglitz in the fight for a consumption tax is itself problematic. For instance, one might ask whether Stiglitz would himself endorse Bankman and Weisbach's pro-

46. See Bankman & Weisbach, *supra* note 33, at 1420. That a consumption tax could be structured as a wage tax numerically equivalent to an income tax is easily shown. While the pure form of a consumption tax would be a sales tax, a consumption tax is *economically* equivalent and could also be implemented as a tax on wage earnings under some (at least simple) assumptions. A consumption tax is the same as an income tax on labor. For instance, if I earn \$100 and am taxed at 30%, this decreases my purchasing power by exactly the same amount as if I had not been taxed on my earnings but was taxed when I spent the full \$100 and had to pay 30% sales tax. Showing this equivalence to hold in the real world, however, is another matter. For instance, one might doubt the viability of such a simple version of neoclassical general equilibrium theory, which the pro-consumption tax literature relies on. See, e.g., INETeconomics, *Duncan Foley – Mathematical Formalism and Political-Economic Content*, YOUTUBE (Apr. 26, 2010), <http://www.youtube.com/watch?v=BqF3HQmGtWY> (copy on file with author) (identifying the "Samuelsonian vice" of letting the abstract model trump the data in a "garbage in - garbage out" methodology and describing the economy as a whole as "a complex, adaptive system far from equilibrium"—if viewed as a mathematical model). It is under this assumption that there appears to be an equivalence between taxing consumption and income. Suffice it to say that a realist analysis might view wages in a very different light. In the Marxist tradition, for instance, wages are determined by convention or subsistence and not according to a rarified thermodynamic model of equilibrium. See, e.g., PRABHAT PATNAIK, *THE VALUE OF MONEY* (2009).

47. Chomsky's tax policy analysis, by contrast, focuses on the realities of our existing tax and transfer system that operates, to a great extent, to transfer social resources and control to private capital and private power. See *Free Markets?*, *supra* note 7 and accompanying text.

consumption tax project?⁴⁸ After all, Stiglitz himself describes decreases in the capital gains rate as “the most egregious aspect of recent tax policy.”⁴⁹ Stiglitz recently even seemed to propose a surtax on capitalist rent seeking: “[I]f you could target taxes on that kind of rent seeking, you actually generate income and improve economic efficiency. So, to the extent that you can target those kinds of rents, you oughta tax that as close to 100% as you can.”⁵⁰ More generally, Stiglitz is very critical of such “law and economics” approaches as not only bad economics but also, essentially, propaganda for the rich.⁵¹ Stiglitz himself might be quite reserved about basing real world tax reform on highly abstract models which are not designed to reflect the full complexity of our historical reality, even if such models are his own.

These critical comments are only suggestive, however, and it may very well be that the Stiglitz model does show that a consumption tax is superior and can, in fact, meet any redistributive demands. Thus, this Article does not take issue with the redistributive argument as such. Part II(B) discusses the two other fairness arguments in turn, strongly criticizing the second argument as ideological.

B. The Equivalence and Benefits Fairness Arguments

1. The Equivalence Argument: The Consumption Tax “Gets At” Capital Accumulations

As Shaviro puts it:

[I]ncome and consumption taxation are less different than had been previously thought, because they differ only in their treatment of the riskless rate of return, which the income tax reaches but the consumption tax excludes, and

48. There are many contrasts between Stiglitz’s sensibilities and those of Bankman and Weisbach. One would be very surprised, for instance, to hear Stiglitz reduce the world of culture to a commodity the way Bankman and Weisbach do. Viewing culture as a commodity, they even entertain a surtax (for “technical reasons”) on “[l]ong, abstract novels and plays, modern art, and classical music.” Bankman & Weisbach, *supra* note 33, at 1453 (“[B]y taxing indicator goods, we can tax those of high ability in ways that a wage tax cannot.”). It is hard to imagine Stiglitz proposing a surtax on the arts. In fact, one would expect Stiglitz to argue for increasing their subsidy by the state.

49. STIGLITZ, *supra* note 7, at 71.

50. Institute for New Economic Thinking, *A Conversation on the Economy: Stiglitz and Krugman on the Financial Crisis and the Future of Economics*, THE INST. BLOG (Oct. 26, 2012), at 1:09, <http://ineteconomics.org/blog/inet/conversation-economy-stiglitz-and-krugman-financial-crisis-and-future-economics>.

51. See *supra* note 11 and accompanying text.

which has historically averaged only about 1% a year above the inflation rate.⁵² [A consumption tax would tax] . . . Bill Gates in similar degree as the income tax, although his burden under the consumption tax might be less obvious.⁵³

Because a consumption tax “gets at” all but one percent of the amount of the capital so consumed, it largely replicates the income tax, while remaining different enough to appreciably increase efficiency. Thus, the equivalence argument asserts a consumption tax would leave Gates and the laborer in the same relative positions tax-wise that they would be under an income tax.

52. The riskless return argument is that Microsoft founder, Bill Gates, is only specially taxed on 1% under an income tax because he can get a loss deduction on an investment and because he can “gross up” his investment to account for any taxes. As Bankman and Weisbach explain:

Suppose that a taxpayer makes a bet with a 50% chance of winning \$100 and a 50% chance of losing \$100. If, under an income tax, winnings and losses are both taxed at a 30% rate (losses being deducted at that rate), the bet is reduced from a \$100 bet to a \$70 bet. If the taxpayer wins \$100, he keeps \$70 after paying taxes. If he loses \$100, he gets the benefit of the \$100 deduction, reducing his after-tax losses to \$70. The taxpayer, however, can increase the size of the bet so that the bet will be worth \$100 after taxes. In particular, if the taxpayer increases the size of his bet by $1 / (1 - t)$, where t is the tax rate, he restores his pretax position. With our numbers, the taxpayer makes a \$143 bet, which produces winnings and losses of \$100 after taxes.

Bankman & Weisbach, *supra* note 33, at 1431. Again, it would be useful to have this shown in reality.

53. Daniel Shaviro, Op. Ed., *David Bradford*, WALL ST. J. (Mar. 1, 2005), <http://online.wsj.com/news/articles/SB110964406044966694>. To show a consumption tax and an income tax are equal, consider the following example. If I save \$100 at 5% at a 40% income tax rate I have \$103 to consume. This is the equivalent of a sales tax of 2% in that year. This near equivalence holds in other contexts as well. In Gates’s case, for instance, one might view his wealth as arising from a transfer of social resources to him (e.g., IT developed by the military industrial complex) and the extraction of monopoly rents from society. In this case, the initial \$100 capital in the example would have no basis and the entire \$105 would be taxed under an income tax when consumed (i.e., when the asset is sold) for a total post tax consumption value of \$42. This would be equivalent to a consumption tax of roughly 40%. This equivalence argument can be criticized in various ways. *See e.g., supra* note 46 (discussing criticism of equilibrium theory). From the perspective of this Article, the main objection is that the equivalence argument is too abstract and ignores how power, not markets, creates “entrepreneurial” wealth. Thus, one could argue that Gates received his wealth from state subsidy of high technology development and pure luck. Also, it is doubtful that capitalists “gross up” their investments in a systematic or rational way as the example supposes. Finally, what about the possibility that Gates’s extraordinary returns actually come from monopoly rents and other regulatory capture? Are these historically supportable suggestions properly accounted for in Bankman and Weisbach’s analysis?

The equivalence argument is based on finance economics and perhaps can only be evaluated in these terms. Nevertheless, when one considers how it might play out in the real world, one cannot help but be skeptical. For instance, just how is it exactly that a consumption tax will “get at” a billionaire’s fortune in the same way that, say, a wage tax “gets at” all the money in the impoverished world of a chicken processing plant worker in Arkansas? After all, to mention only one difference, even the most extravagant billionaire spends only a tiny fraction of his fortune over one exalted lifetime.⁵⁴ Is a consumption tax really equal to the income tax in these regards? Bankman does indeed worry that “the wealthy will almost certainly benefit disproportionately from the shift to a consumption tax.”⁵⁵ In his work with Weisbach, however, he seems more comfortable with the “trust-fund baby problem.”⁵⁶ This is the same problem as the Gates problem: how to “get at” Gates’s capital accumulation under a consumption tax and thereby mollify fairness objections? Bankman and Weisbach describe the trust-fund baby problem as follows:

[E]limination of the tax on savings and replacing it with a more progressive wage tax would seem to be manna from heaven [for the trust-fund baby]. Both [the wealthy retiree and the trust-fund baby] benefit from the elimination of tax on investment income, and neither have significant amounts of wage income. Similarly, Bill Gates pays himself a very small salary.⁵⁷

Bankman and Weisbach dismiss the trust-fund baby problem as “misleading” and claim, cryptically, that the “intuition behind the example is wrong.”⁵⁸ But their argument for why the “intuition is wrong” (whatever that might mean exactly) is rather unclear. It *seems* that Bankman and Weisbach are

54. Bankman and Weisbach sometimes write as if this were not actually a problem. *See, e.g.,* Bankman & Weisbach, *supra* note 33, at 1437 (“[T]o the extent that Gates’s stock value reflects his labor income, it is taxed under a properly structured [sales-tax based] consumption tax. The . . . problem can readily be solved.”). The author confesses not to understand this claim. Since the extent of Gates’s labor contribution is very small, how can consumption and labor equivalence get us anywhere? Even if it were significant, how can anything but a fraction of Gates’s stock value be taxed at all under a sales-based consumption tax during his mortal life? And if Bankman and Weisbach are talking about infinite time horizons, then is this equivalence really relevant for actual tax reform proposals?

55. Bankman & Fried, *Winners and Losers in the Shift to the Consumption Tax*, 86 GEO. L. REV. 539, 568 (1998).

56. Bankman & Weisbach, *supra* note 33, at 1436, 1437.

57. *Id.* at 1436.

58. *Id.*

saying that the trust-fund baby and the Gates problem are solved by assuming a wage-based consumption tax that has been in place over an infinite time horizon.⁵⁹ But assuming an infinite time horizon does not help one bit in addressing the fairness objections to shifting to a consumption tax in America in 2014. But even if you could go back an infinite time horizon, you still could never get at all capital accumulation through the consumption tax. This is immediately obvious from the historical realist point of view: go back a mere three hundred years and even if we had had a pure wage-based consumption tax, we would not get at the trust-fund baby's corpus of today for the simple reason that the trust-fund baby's corpus was never actually earned but was actually stolen from (for instance) the Native Americans. Most of the land and resources of this country were acquired by murder and theft, with zero earnings, and zero tax. The same goes for any other country in history, in fact. In a similar idealization, Bankman and Weisbach claim that "[m]ost of [Gates's] net worth comes from his labor."⁶⁰ One does want to encourage the introduction of a labor theory of value among law and economics scholars, for it would at least introduce a measure of reality and re-connect them with the tradition of political economy from Ricardo to Marx. But Weisbach (at least) insists on ignoring historical reality and painting a Horatio Aldger scenario for America. If history is any judge, Gates's fortune, like the fortune of almost any capitalist in history, probably arose more from the exercise of power than anything else. In Gates's case, for instance, one could reasonably argue that Microsoft was, and is, a highly subsidized venture. After all, is it not the case that Microsoft essentially privatizes high technology developed through the state sector, exploits monopoly rents and generous intellectual property laws, and benefits enormously from a distinctly pro-business and anti-labor socio-economic environment? These historical realities of capitalism are entirely absent from Bankman and Weisbach's analysis. But without addressing them, it seems impossible to support the claim that the consumption and income tax are actually equivalent. This is because the equivalence argument is based, at least to some extent, on claims like "[m]ost of [Gates's] net worth comes from his labor,"⁶¹ and these claims are not well supported by historical reality.

59. *See id.* at 1438.

60. *Id.* at 1437. It would be quite ironic for Bankman and Weisbach to be asserting a labor theory of value here, although, from the perspective of critical theory or political economy, this would be a welcomed development. For an introduction to the labor theory of value in the context of Marxist economic theory, *see* DUNCAN FOLEY, UNDERSTANDING CAPITAL: MARX'S ECONOMIC THEORY 15–16 (1986).

61. *See* Bankman & Weisbach, *supra* note 33, at 1437.

2. The Benefits Argument: Reifying Capitalist Power

The pro-consumption tax literature's ultimate argument against fairness objections (and its second argument for the fairness of a tax exemption for the 1%) is that the very idea that the fortunes of billionaires should be taxed, as such, is nonsense. According to Bankman, Weisbach, and Shaviro, even if we cannot "get at" Gates's fortune, we need not concern ourselves since any ethical objection to exempting capitalist ownership from tax is not only wrong but, as Shaviro puts it, a "non-sequitor."⁶² Bankman and Weisbach endorse Shaviro's characterization as "ably" stated.⁶³

However, Shaviro does not spell out the non-sequitor here and never tells us what it is exactly that does not follow from what? He does say that the benefits of capitalist ownership derive only from what one can actually buy with capital. Certainly, reducing the power of capital to expenditure makes some sense, if one sees capitalist ownership very abstractly as merely a very large pile of cash. But Shaviro goes further and says that the value of ownership reduces *entirely* to actual expenditures. According to Shaviro, ownership itself, even ownership of an entire nation's resources by a tiny oligarchy, confers no benefit as such, and is as worthless as (in Shaviro's Orwellian phrase⁶⁴) "Monopoly money."⁶⁵ From this characterization of capitalist power, it is easy to see how Bankman, Shaviro, and Weisbach can conclude that exempting capital accumulation from tax and only taxing expenditures fully captures the full benefit of capital to the capitalist. By denying that capital ownership as such confers any power or benefit to the capitalist, they claim to have met the fairness objection that a consumption tax would be a windfall to the 1%. Indeed, they claim to have rendered it nonsense.

Shaviro sets up his argument as a response to his colleagues Liam Murphy and Thomas Nagel in the philosophy department at New York University, who were contributing to the tax scholarship as—so to speak—the resident experts on distributive justice. Adding Murphy and Nagel to the debate on the fairness of the consumption tax reflects the hope among many tax scholars that interdisciplinary work in tax policy would improve our understanding of distributive justice issues in tax law. It reflects the endorsement of "division of labor under which legal tax scholars confine

62. See Shaviro, *supra* note 34, at 48.

63. Bankman & Weisbach, *supra* note 33, at 1449.

64. After all, the game of Monopoly is itself a satire on the absurdities and abuses of capitalist power and control. The term "monopoly" obviously also denotes typical abuse of capitalist power. It is Orwellian to use "monopoly" as a metaphor in denying the existence of capitalist power and control.

65. Shaviro, *supra* note 34, at 44, 47–48.

themselves to the nuts and bolts of the system and leave it to those in the humanities and social sciences to provide insight into the larger political issues.”⁶⁶ Furthermore, as Rawls and the “Rawls industry” (recall that Nagel himself was a student of Rawls) so dominates the American academic discourse on distributive justice and fairness, more often Rawlsian analysis does the heavy lifting on distributive justice and “larger political issues.” Obviously, from a Geussian realist perspective, using Rawlsian style analysis to gain insight into the injustice or justice of real systems of power is a cure worse than the disease. As Geuss might put it, using “highly abstractive methods in political philosophy” to evaluate distributive justice issues will only “generalize one’s own local prejudices and repackage them as demands of reason.”⁶⁷ This Part shows that this is exactly what happens when Murphy and Nagel contribute to the consumption tax debate. Rather than supplementing Bankman’s, Shaviro’s, and Weisbach’s work with historically informed insights into the distributive *injustices* created and perpetuated by capitalist ownership and control of America, Murphy and Nagel end up only reifying America’s particular system of economic and social power as the best of all possible worlds.⁶⁸

Accordingly, Murphy and Nagel’s defense of fairness objections to exempting capital from taxation is rather weak. They write:

[I]t should be obvious that wealth is an independent source of welfare, quite apart from the fact that some of it may be consumed later. As Henry Simons famously put it, in 1938, “In a world where capital accumulation proceeds as it does now, there is something sadly inadequate about the idea of saving as postponed consumption.” Commentators typically mention such factors as security, political power, and social standing.⁶⁹

66. Joseph Bankman, *The Politics of the Income Tax*, 92 MICH. L. REV. 1684, 1685 (1994).

67. GEUSS, *supra* note 24, at 38–39.

68. MURPHY & NAGEL, *supra* note 40, at 181 (writing that the market system is “the best method we have for creating employment, generating wealth, allocating capital to production, and distributing goods and services”). Murphy and Nagel might resist this characterization of their work, pointing to its central claim that “the idea of a nongovernmental market world that could be used as a baseline for fairness in government economic policy . . . [remains] . . . a fantasy.” *Id.* at 108. As the discussion herein indicates, however, Murphy and Nagel end up endorsing the abstraction of a “capitalist market economy[.]” thereby effectively endorsing the superiority of our current system as a matter of course and without much independent justification. For a more comprehensive evaluation and critique of Murphy and Nagel’s work, see Patrick Crawford, *Book Review: The Myth of Ownership (Myths within Myths)*, LAWCRIT (forthcoming 2014), <http://lawcrit.com/>.

69. MURPHY & NAGEL, *supra* note 40, at 114 (citations omitted). In fact, this naturalization and praise of capitalist systems of power is very common in interdisciplinary

It is rather striking that Murphy and Nagel do not flesh out exactly why commentators such as Simons worried about capitalist power. In fact, what

work in tax policy. Bruce Ackerman and Ann Alstott's book, *The Stakeholder Society*, is another example. See BRUCE ACKERMAN & ANN ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999). In this work, Ackerman and Alstott practically bend over backwards to reassure their readers that they *are not* advocating any real change to the existing socio-economic order. "Through stakeholding," they write, "[o]ur initiative does not seek to reverse world economic forces. It fully endorses the open economy." *Id.* at 14. Ackerman and Alstott propose giving each citizen a one-time grant of \$80,000 in early adulthood to be financed by an annual 2% wealth tax. *Id.* The justification for this redistribution is purely equality of opportunity to participate as "stakeholders" in the "free enterprise system." *Id.* Ackerman and Alstott are "interested in opportunities, not outcomes." *Id.* at 24. They seem to think that such a thing as the "free market" actually exists and they seem to view it rather quaintly as a system of "social cooperation." *Id.* at 14. Their description of American capitalism is very abstract and lacking any historical context or description. They view the system as an open space where individuals are free to make their own decisions and where regulatory capture, labor exploitation, and class conflict do not exist. As they put it:

[T]he free enterprise system did not drop from thin air. It has emerged only as the result of a complex and ongoing scheme of social cooperation. The free market requires heavy public expenditures on the police and the courts and much else. Besides, without billions of voluntary decisions by Americans to respect the rights of property in their daily lives, the system would collapse. All Americans benefit from this cooperative activity—but some much more than others.

Id. One might ask whether Ackerman and Alstott would also insist that all slaves benefited from the "cooperative activity" of slavetrading? Ackerman and Alstott even come close to virtually ignoring exploitation and issues of inequality by describing the "worldwide division of labor" exclusively as "bestowing great wealth." *Id.* at 7. Ackerman and Alstott do acknowledge that "Our vision of economic citizenship is rooted in the classical liberal tradition. It is up to each citizen—not the government—to decide how she will use her fair share of the nation's patrimony." *Id.* at 3. From the perspective of critical theory, of course, such liberalism (used in this way) is nothing more than the ideology of capitalism. It assumes that the capitalist system is not heavily dependent on a nanny state itself. The salient point here, however, is simply that their view of the world does not go far enough in ascertaining the reality of the socio-economic system and is thus incapable of evaluating its equity or suggesting real alternatives. In contrast to their approach, the work of Gar Alperovitz is a good example of the type of political theory that would be more consistent with the realist approach advocated in this paper. As Alperovitz writes:

Some Liberals continue to hope against hope that somehow a revival of progressive politics can one day reverse the decaying trend. But clearly, if serious after-the-fact redistributive measures are no longer viable, something much more fundamental is needed. . . . [I]f change is ever to occur, an assault must ultimately be made on the underlying relationships that have produced the inequality trends in the first place—especially those involving ownership and control of the nation's wealth.

GAR ALPEROVITZ, *AMERICA BEYOND CAPITALISM: RECLAIMING OUR WEALTH, OUR LIBERTY, AND OUR DEMOCRACY* 19 (2011).

Simons actually said about capitalist power seems far more critical and far more historically grounded and realist than anything Murphy and Nagel would say. Thus, there is some irony in Murphy and Nagel's deployment of Simon against the pro-consumption tax position. This is because while Simons was famous for his attack on the corrupting influence of capitalist domination and control in contemporary America,⁷⁰ Murphy and Nagel tend to cut the other way, describing our system more abstractly and positively as a "capitalist market economy" (read: "the particular system of economic power we happen to live under") which is "the best method we have for creating employment, generating wealth, allocating capital to production, and distributing goods and services."⁷¹ Even in light of the growing inequality and social dislocation and despair all around them, Murphy and Nagel describe economic reality in highly abstract, ahistorical, and distinctly deferential and complimentary terms. Absent from Murphy and Nagel's analysis is any examination of the historical reality of socio-economic conditions in the United States or the dominant force (i.e., capital) that creates it. Written in 1998, their analysis ignores the massive program of deregulation (i.e., rent seeking), which resulted in the stark distributional trends (i.e., shifting government expenditure away from the public good to subsidize private capital) that had occurred from the 1970s on, as had been well documented by Chomsky and other competent analysts.⁷² Murphy and Nagel seem to resist the critical implications of their own claim that there is no such thing as the free market—that everything is regulated through and through.⁷³ For instance, at times they speak as if there is something like a

70. In his essay, *A Positive Program for Laissez Faire*, Simons wrote:

Eliminate all forms of monopolistic market power, to include the breakup of large oligopolistic corporations and application of anti-trust laws to labor unions. A Federal incorporation law could be used to limit corporation size and where technology required giant firms for reasons of low cost production the Federal government should own and operate them. . . . Promote economic stability by reform of the monetary system and establishment of stable rules for monetary policy. . . . Reform the tax system and promote equity through income tax. . . . Abolish all tariffs Limit waste by restricting advertising and other wasteful merchandising practices.

HENRY C. SIMONS, *A POSITIVE PROGRAM FOR LAISSEZ FAIRE: SOME PROPOSALS FOR A LIBERAL ECONOMIC POLICY* 40 (Harry D. Gideonse ed., 1934).

71. MURPHY & NAGEL, *supra* note 40, at 181.

72. See *supra* notes 3, 7, and 10 and accompanying text (discussing Chomsky's work in this area).

73. As previously mentioned, Murphy and Nagel acknowledge that "the idea of a nongovernmental market world that could be used as a baseline for fairness in government economic policy . . . [remains] . . . a fantasy." MURPHY & NAGEL, *supra* note 40, at 108. If only they were as critical of the notion of a "capitalist market economy" as well.

“capitalist market economy”—which needs regulations superimposed in order to correct for the “large economic and social inequalities . . . [it] inevitably generates.”⁷⁴ But it could be countered that there is no such thing as a “capitalist market economy” and that there is no “inevitability” to the inequalities “it” creates. As Simons, or a review by Murphy and Nagel of contemporary history, would make clear, inequalities are here by design—the intentional result of economic regulation, capitalist rent seeking, and success in class struggle. In fact, some of Murphy and Nagel’s analysis actually minimizes the benefits of capitalist domination and control by reminding us just how much the poor in fact benefit in such a system! They all but deny class power when they call for a “serious discussion of the general phenomenon of social class” but explicitly limit the terms of such a discussion to the effect of class standing on an individual’s metric of psychological well-being (i.e., whether being in a higher class makes one feel better!).⁷⁵ While minimizing capitalist power and control, Murphy and Nagel nevertheless insist on reminding us of the great benefits conferred on the poor. They write, “though the very poor benefit less from government than the rich, they still benefit greatly as against the baseline of the war of all against all”⁷⁶ One might ask whether Murphy and Nagel also think that the slaves in America benefitted from the system? It seems pretty clear that Murphy and Nagel’s analysis suffers from the Rawlsian vice of repackaging prejudices in favor of the current system as the reasoned conclusions of a rigorous and objective justice analysis.

Thus it is hardly surprising that Murphy and Nagel do not seriously challenge Shaviro’s claim that capitalist ownership and control is “Monopoly money.”⁷⁷ Murphy and Nagel pretty much give up any counterargument entirely when they themselves seem to reduce capitalist power to an expenditure. As they write, “Wealth leads to political power in the United States, since the possibility of significant contribution to a politician’s funds encourages special treatment.”⁷⁸ Just like Shaviro, they reduce the phenomenon of capitalist power in America to the dollar amounts capitalists happen to contribute to a campaign! Capitalist power, influence, exploitation, and control go well beyond the paltry amount spent on campaigns, of course. But Murphy and Nagel, in effect, deny this and like good neo-Rawlsians simply erase historical reality and force themselves to remain silent on issues of inequality and distributive justice. Murphy and Nagel simply do not share the common intuition (universal in my estimation

74. *Id.* at 181.

75. *Id.*

76. *Id.* at 18.

77. Shaviro, *supra* note 34, at 44, 47–48.

78. MURPHY & NAGEL, *supra* note 40, at 115.

at OWS) that a surtax on capital would be the least we could do to internalize just a tiny fraction of the enormous social costs imposed by self-serving capitalist domination, control, and exploitation of our socio-economic resources, our politics, and, indeed, of the earth's very ecology. In a radical understatement of capitalist power, they write, "Whether wealth should be a target of taxes for this reason [of undue influence on the system] is doubtful, since effective control of campaign financing would seem to be the preferable remedy."⁷⁹ Unlike OWS or the historically based realist analysis advocated in this Article, Murphy and Nagel are actually rejecting a surtax on capital as being, in effect, too harsh!⁸⁰

With opponents like Murphy and Nagel, it is hardly surprising that Shaviro has little trouble dispensing with their objections. As Shaviro puts it:

Murphy and Nagel are undoubtedly correct that people value wealth not only because, while it remains unconsumed, it may give them security, political power, and social standing. . . . The problem with their raising these points in relation to the income versus consumption tax choice, however, is that in this setting the points are complete non-sequiturs.

Why does wealth offer security, political power, and social standing? The answer can only be: because of its value—that is, because of what it can be used to buy. . . . Murphy and Nagel fail to recognize that savings and wealth are indeed subsidiary to consumption, in that they derive their value entirely from this potential use whether its exercise is proximate or not. This ability to buy things is, after all, the difference between real money and Monopoly money.

Accordingly, the argument that a consumption tax fails to reach the indirect benefits of wealth-holding, because wealth means more than simply the opportunity to consume later, must be rejected as a confused non sequitur. It appears to rest on money illusion, or the mistaken belief that a dollar has inherent value, rather than being worth what it can buy.

. . . .

Wealth is only worth what it can buy; otherwise, it might as well be Monopoly money.⁸¹

79. *Id.*

80. *Id.*

81. Shaviro, *supra* note 34, at 44, 47–48.

As I have already mentioned, it is rather unclear what the non-sequitor is here. Shaviro can assert that the problem of capitalist power and control reduces to capitalist expenditure, but he certainly has not shown this. For Shaviro's claim to hold up, he would also have to show that in a feudal society, or in a slave society, the power of ownership could be reduced to expenditure. And this, he would clearly never do. The only reason, I am suggesting, he reduces the power of the 1% in America to the pittance they actually spend is because there is ideology at play. But we should remind ourselves that the benefits of ownership are much greater than any actual expenditure. Ownership is really about controlling state power and having that state power set up in a way to exploit the general population and the social resources and enforce property rights. The exercise of state power to control a slave or a factory worker occurs, as it were, automatically by design and neither the slave owner nor the capitalist has to actually spend a dime for the privilege. Contrary to Shaviro, it is perfectly reasonable for, say, a participant at OWS to say, "I think capitalist power is the main cause of this whole disaster. I'm worried that a consumption tax will only increase capitalist control and exploitation in the system. I do not see how my being gassed or kicked or beaten can be analyzed by merely looking at campaign contributions (though that may be a good place to start). Capitalist power is much more than any amount actually spent on consumption and the problem of capitalist power is much, much bigger than just campaign finance. I am worried that this reform proposal is just another pro-capitalist "reform." From this perspective it is, to say the least, rather paternalistic and dismissive to characterize such concerns as non-sequitors, irrational, or meaningless. On the contrary, they highlight precisely the historical reality that Bankman, Weisbach, and Shaviro deny: the injustice of unfettered capitalist power in contemporary America. The phenomenon of capitalist power can only be appreciated by a historical analysis showing how it really operates. Even as a preliminary matter, it seems obvious that reducing capitalist power to expenditure is incorrect. To reiterate a point made previously, consider the claim that the entire system is set up, or rigged, to benefit the capitalist class. To benefit from this, the capitalist need not spend a dime. And we all know that the mere threat of exercise of power is enough to extort rents from the population. To crush the labor movement in America, Reagan had to do little more than break one air controllers strike. The returns on this action were enormous and the expenditure very slight. Add to this the impact of media control, the role of the educational system and the like and it becomes clear that reducing capitalist power to an expenditure is a mistake. Put yet another way, would we accept an analysis that reduced the power and benefits of being Michael Corleone to the actual amounts he happens to spend in any given year?

On the contrary, one would want to tax Corleone as much as possible as a penalty for his abuse of power. In a similar way, we feel compelled to tax capital ownership as such on fairness grounds. The fairness objection to the consumption tax supports the argument for a surtax on capital for the cost (to the 99%) of doing its business. Seen in this light, the fairness claim seems very modest and reasonable; a surtax on capital is the least we can do to check, or penalize, capitalist power. This is hardly a radical idea. As mentioned, Stiglitz comes pretty close to expressing this very idea, in fact. As previously quoted, Stiglitz recently said, “[I]f you could target taxes on that kind of rent seeking, you actually generate income and improve economic efficiency. So, to the extent that you can target those kinds of rents, you oughta tax that as close to 100% as you can.”⁸² Indeed, even David Bradford, whom Shaviro describes as the “father of modern consumption tax philosophy,”⁸³ acknowledged at least the legitimacy of the intuition that large accumulations of wealth may “endanger the functioning of democracy,” though he described it as “rarely, if ever, supported by quantitative reasoning.”⁸⁴ He continued, “Nor is it clear that the problem is controllable at all through taxes. But if so, one would expect it to be an issue only in the case of very large accumulations.”⁸⁵ Remarkably, Bankman,

82. Institute for New Economic Thinking, *A Conversation on the Economy: Stiglitz and Krugman on the Financial Crisis and the Future of Economics*, THE INST. BLOG (Oct. 26, 2012), at 1:09, <http://ineteconomics.org/blog/inet/conversation-economy-stiglitz-and-krugman-financial-crisis-and-future-economics>.

83. Shaviro, *supra* note 53.

84. DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 164 (1999).

85. *Id.* Bradford’s work is a “Committee for Economic Development Publication.” The Committee for Economic Development (“CED”) is an organization founded, funded, and run by big business, and its purpose is to advocate for the self-interest of big business. See Charles Kolb, *The American Business Community’s Collective-Action Problem*, HUFFINGTON POST BUS. (Jan. 6, 2012, 12:38 PM), http://www.huffingtonpost.com/charles-kolb/the-american-business-com_b_1187205.html (urging support of Simpson-Bowls and asking big business to support policies opposing the “shake down” of “their organizations . . . by the taxpayer-funded professional politicians who dominate our Congress”). During his career, Bradford was affiliated with the American Enterprise Institute (“AEI”) and his work was backed by AEI as well as the John M. Olin Foundation (both big business advocacy groups). See *David Bradford (Economist)*, WIKIPEDIA, http://en.wikipedia.org/wiki/David_Bradford_%28economist%29 (last visited Mar. 28, 2014) (listing AEI as a funding source); see also David F. Bradford & Derrick A. Max, *Implicit Budget Deficits: The Case of a Mandated Shift to Community-Rated Health Insurance*, in 11 NAT’L BUREAU ECON. RES. 129, available at <http://www.nber.org/chapters/c10907.pdf> (noting financial support from the John M. Olin Foundation). He was a member of George H. W. Bush’s Council of Economic Advisors and was on the Advisory Board of the Brookings Institution as well. His consumption tax work was endorsed and promoted by AEI and the Cato Institute. See, e.g., Alan D. Viard et al., *The X Tax: The Progressive Consumption Tax America Needs?*, AM. ENTER. INST. (Dec. 17, 2008), <http://www.aei.org/article/economics/fiscal-policy/the-x-tax-the-progressive-consumption-tax-america-needs/>. Bradford was active in the Cato Institute, being on the advisory board of the

Weisbach, and Shaviro seem to move the discussion backwards from even the modest claims of the relatively conservative Bradford. They certainly seem far from the moderate Stiglitz.

Indeed, this moving backwards is itself indicative of the ideological character of the consumption tax literature. This literature exemplifies the more general trend of abandoning even the modest historically based critiques of capitalist power by the likes of Simon and Bradford.⁸⁶ The problem is not just that the literature seems to the right of Bradford. Rather, it is that the literature operates on a different plane altogether, denying even the rationality of objections to the historical reality of capitalist domination and control. In this way, the literature can be characterized, like Rawlsian analysis, as primarily ideological in nature, pointing fairness analysis in exactly the wrong direction.

C. A Comment on the Pro-Consumption Tax Literature's Intellectual History: Bradford's Positivism

If one is emphasizing history, it seems appropriate to pay some attention to the intellectual history of the consumption tax debate itself. Accordingly, this Part concludes with some comments in this regard. First, it is worth keeping in mind that the pro-consumption tax literature's intellectual history is based on direct and active financial support of corporate and capitalist lobby groups such as the American Enterprise Institute and the John M. Olin Foundation⁸⁷—the very type of propaganda intervention in economic and legal theory decried by Stiglitz.⁸⁸ As previously mentioned, Bradford, the philosopher for the pro-consumption tax scholarship, at least recognized the legitimacy of the fairness objection to not taxing large capital accumulations.⁸⁹ Bradford's way of dispensing with this fairness objection was different than Shaviro's, however. Bradford recognized that people

institution's publication Regulation. Bradford supported what he called "the X-tax," a "better-designed version [of the Hall-Rabushka flat tax] that could be more progressive than the flat tax, if desired" See Shaviro, *supra* note 53.

86. Unfortunately, very extreme forms of economic analysis have come to dominate distributive justice analysis in the tax scholarship. Louis Kaplow and Steven Shavell have even offered a formal proof that claims to show that economic analysis of a particularly ahistorical and derivative variety is the *only* legitimate way of evaluating *any* fairness argument in *any* area of law. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2006). For a critique of this project (as well as the scholarship in the book), see Patrick Crawford, *Kaplow and Shavell's Imperialism: Debunking Fairness Versus Welfare*, LAWCRIT (forthcoming 2014), <http://lawcrit.com/>.

87. See *supra* note 85 and accompanying text.

88. See STIGLITZ, *supra* note 7, at 44–45.

89. See Shaviro, *supra* note 53.

make such fairness claims—and he recognized fairness “intuitions” as legitimate. Bradford did not take up such objections, however, because they could not be determined with scientific certainty. In Bradford’s positivism, value judgments are not given serious weight because they cannot be quantified. As Bradford writes:

It is tempting to argue that having twice as much income makes one twice well off, and therefore at least twice as able to bear taxes. But such a view really expresses no more than that the observer believes it. . . . The extra utility generated by adding a bit of cake to an individual’s consumption is asserted to be smaller the larger is the individual’s amount to begin with. . . . Economics has long since recognized that there is no observable quantity called utility. Indeed, the only meaning one could give to the idea in this context would be as a measure to reflect the particular distributional views of the observer. If I say the extra utility Jane gets from an extra dollar exceeds the extra utility Dick gets from an extra dollar, I am saying nothing more than I would regard the result of giving an extra dollar to Jane as better than that of giving an extra dollar to Dick.⁹⁰

Putting aside the irony of the Marie Antoinette metaphor (which is astonishingly similar in its unintended irony to Shaviro’s Orwellian Monopoly metaphor), the vulgar positivism is clear. Bradford is saying that distributional justice claims have little or no rational force and are just as up for grabs as my preference for cake. This sort of positivism in the social sciences has been famously criticized in the very tradition of critical theory upon which the ideology critique in this Article relies.⁹¹ Suffice it to say, Bradford is quite selective about which “value judgments” he thinks have standing (i.e., those that support a move to a consumption tax) and which do not (i.e., those that oppose a move to a consumption tax). Thus, Bradford wrings his hands over the injustice of taxing differently those with “exactly the same opportunities . . .” (i.e., taxing savers more than spenders).⁹² But he apparently thinks it is impossible to evaluate the fairness of Marie Antoinette’s suggestion that the peasants eat cake. The point here is simply that there appears to be a tradition of dismissing distributive justice concerns

90. BRADFORD, *supra* note 84, at 386, 152–53.

91. The critique of such positivism in the social sciences was an integral part of the philosophical tradition of critical theory. *See generally* CRITICAL THEORY, *supra* note 19 (evaluating the Frankfurt School’s “critical theory”).

92. *See* BRADFORD, *supra* note 84, at 165.

in the consumption tax literature. In fact, Bankman, Shaviro, and Weisbach go even further than Bradford and dismiss fairness objections as non-sequiturs. After all, Bradford at least *acknowledges* the legitimacy of the fairness objection to his program. Indeed, he takes them so seriously that he sees it necessary to “extensively discuss” them.⁹³ While his “extensive discussion” seems little more than a dismissal, at least he was writing in an intellectual environment where we felt compelled to at least try.

III. CONCLUSION

This Article argues that, contrary to Joseph Bankman’s hope in 1997, the present focus of tax scholarship may in fact be “necessarily bad.”⁹⁴ This is because the econometric-analysis-supplemented-with-liberal-social-theory formula obscures rather than illuminates the historical reality of power necessary to evaluate the justice of economic regulation. In the same way that Rawlsian theories of justice allow us to pretend to talk about justice while ignoring historical reality and the injustices all around us, the ideology of American scholarship on economic regulation makes it almost impossible to adequately address fairness concerns. This Article’s ideology critique of the consumption tax literature demonstrates how ideology operates in legal scholarship to obscure distributive justice issues. What holds for the consumption tax debate, one would surely bet, holds for most of the legal scholarship on economic regulation over the past thirty-odd years. The past thirty-odd years have made clear that ignoring historical developments such as capitalist rent seeking and regulatory capture can contribute to severe declines in social welfare. Moving away from both abstract econometric analysis and Rawlsian-type approaches to distributive justice will be important if the legal scholarship on economic regulation wishes to establish itself as a constructive player in the public discourse to improve our laws and regulations for the benefit of the general welfare. This Article’s ideology

93. *Id.*

94. As Bankman wrote:

The present focus of legal scholarship [in tax] is not necessarily bad. The tax law is enormously complicated, and inconsistencies within the law that are not brought to light can cost the fisc billions of dollars and distort behavior in ways that are undesirable under any political theory. Moreover, by focusing with increasing economic sophistication on the operation of the tax law, legal tax scholars are doing what they do best. One might therefore applaud a division of labor under which legal tax scholars confine themselves to the nuts and bolts of the system and leave it to those in the humanities and social sciences to provide insight into the larger political issues.

Bankman, *supra* note 66, at 1684.

critique is meant to identify what this would take and encourage legal scholars to critically reflect on their own role in the current crisis of inequality and broad-based disenfranchisement.