FISCAL ANTHROPOLOGY: PRODUCTION, CONSUMPTION, WEALTH & TAXATION

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ABSTRACT

Today's pandemic is a life-altering crisis that presents an opportunity to revisit first principles. Glossing those principles of social science (including law) as anthropology, this Article attempts to make sense of particularistic institutions, viz. tax legislation, in world-historical context. Now the potential legislation of a federal wealth tax has been a question for presidential candidates and the American electorate as well as legal scholars. By reviewing how civilizations have imposed taxes throughout history, this Article attempts to shed new light on the enduring question of the tax base and progressivity. Dividing human existence into four broad stages, the Article develops a typology for each stage of political economy and culture as well as taxation. The current stage is partially descriptive but partially predictive, an exercise in writing the history of the present. Briefly, civilization grew when modes of subsistence supported the progressively complex division of labor, formalization of law, and unifying ideation that constitute contemporary society. While tribute paid in kind from the produce of the peasant may have been the ancient form of revenue, the Industrial Revolution heralded progressive taxation of consumption and

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savings. In an economy of high technology, the taxation of wealth is not a question of whether but how much. Recent popular opposition to wealth taxes compared with historic support of wartime revenue bills raises questions of either "false consciousness" or a Durkheimian vision. Taxpayers have not voted against the rich, they have voted in favor of their nation. The underlying issue is the economic psychology of the taxpayer population whose floor is subsistence yet whose aspiration may be unlimited.

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I. INTRODUCTION

Throughout history, drought, pestilence, and plague have spelled an end to civilizations. In the time of the novel coronavirus pandemic exacerbated by civil strife, it becomes less clear that questions of law, here tax legislation, can be answered solely by analysis of received legal principles. As part of the social or human sciences, legal studies define the "institutional microstructure of society in relation to its . . . ideals."[1] Civilization-altering events offer an opportunity to revisit those ideals as well as the microstructures such as the U.S. Tax Code. The infectious disease is but one symptom showing that humanity remains "caught in the web of life—permanently and irretrievably—no matter how clever we are at altering what we do not like, or how successful we become at displacing other species."[2] Now the question becomes not just the internal logic of a statute but its relation to the human context. While it may be unconventional in a law review, this Article proceeds from basic source material in the human sciences, glossed titularly as anthropology.[3] Rather than any academic department or discipline, anthropology here means that particularistic institutions, including tax legislation, make sense in world-historical context.

At this juncture, the potential legislation of a federal wealth tax has been a question for presidential candidates, policymakers, and the American

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[1] ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 130 (1996) [hereinafter ANALYSIS].

[2] WILLIAM H. MCNEILL, PLAGUES & PEOPLES 9–17 (2010).

[3] *Cf.* René Reich-Graefe, *Anthropocenic Disruption, Community Resilience & Law*, 41 W. NEW ENG. L. REV. 411 (2019); *see also* James Ming Chen, *Anthropocene Agricultural Law*, 3 TEX. A&M L. REV. 745 (2016); Matthew Canfield, *From Colonialism to Collaboration: Disputing Biofuels in the Age of the Anthropocene* 4 (Max Planck Inst. Soc. Anthro., Working Paper No. 201, 2020) (discussing anthropologists' "reconceptualization of . . . political, economic, and legal systems").

electorate as well as legal scholars.[4] Essentially, the question is whether existing federal taxation is progressive enough to account for the property as well as the income of the wealthy. While some economists project an increasing inequality of wealth,[5] others have maintained that the "ability to pay or taxable capacity . . . is not a quantity susceptible of measurement."[6] Instead, this Article approaches the question of the tax base not through economic measurement but historical contextualization.

By reviewing how civilizations have imposed taxes throughout history (and pre-history), this Article attempts to shed new light on this enduring question. Part II establishes an historical and theoretical, if stylized, framework to apply to the question of the tax base and its progressivity in Part III. Dividing human existence into four broad stages, that is pre-historic, ancient, modern, and post-modern, the framework develops a typology for each stage of political economy and cultural psychology as well as taxation. While the first three stages may be conventional, the last is partially descriptive but partially predictive, an exercise in writing the history of the present. As depicted in Table 1 below, the framework extends comprehensively into archaeological, sociological, and futuristic thinking that could apply to a variety of questions of political economy of which Part III presents but one. The extent to which the framework could address other issues remains a topic for future research.

Briefly, the synopsis is as follows. Civilization grew when modes of subsistence or technology supported the progressively complex division of labor, formalization of law, and unifying ideation that constitute contemporary society. Taxation, or at least fiscal reciprocity, always has been the political-economic artery that fuels social life. Thus, the question of the tax base and its progressivity is in large part one of the economic psychology of the taxpayer population whose floor is subsistence yet whose aspiration may be unlimited.

Specifically, the implications of the theoretical framework for taxation are that distinct types of economic infrastructure support legal and tax regimes. While tribute paid in kind from the produce of the peasant may

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[4] *See* James W. Wetzler, *A Guide to the Wealth Tax Debate,* 165 TAX NOTES FED. 1963 (2019); David Kamin, *How Far to Go in Reforming the Taxation of Wealth: Revenue and Tax Avoidance,* 168 TAX NOTES FED. 1225 (2020).

[5] *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 571 (Harv. Univ. Press 2014) (". . . [T]he divergence in the wealth distribution is occurring on a global scale.") (discussed *infra* Pt.III); *see also* EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES & HOW TO MAKE THEM PAY 98 tbl.5.3 (The Upsurge in U.S. Wealth Inequality) (2019).

[6] Noboru Tanabe, *Taxation of Net Wealth*, 14 INT'L MONETARY FUND [IMF] STAFF PAPERS 124, 126 (1967). *Cf.* Bull v. United States, 295 U.S. 247, 259 (1935) ("Some machinery must . . . ascertain the amount due . . . taxes are the lifeblood of government . . . .").

have been the ancient form of taxation, the Industrial Revolution heralded progressive taxation of consumption and savings. In an economy of high technology, the taxation of wealth is not a question of whether but instead of how much to tax.

II. HISTORICAL & THEORETICAL FRAMEWORK

This Part of the Article divides history into four quasi-chronological stages based on modes of subsistence. While the first three stages reflect the past, the fourth stage in part speculates on the future. Given the four stages, Part II identifies the characteristics of each stage with respect to political economy, culture, and taxation. The quadri-partite typology may help to organize relevant information in a useful arrangement even if it is difficult to validate objectively. That is, the framework's intent is analytical rather than determinist or prescriptive.

Table 1. Theoretical framework

Quasi-periodization		**Political economy**				
		Economy		**Government**		
Stage of dev't	**Subsis-tence**	**Division of labor**	**Exchange**	**Org. of society**	**Leadership**	**Law**
Pre-hist.	Foraging	Forager	Barter	Band	Big-man	Custom
Ancient	Agricul-ture	Peasant	Market	Tribe	Chieftain	Natural
Modern	Industry	Wage worker	Money	State	Head of state	Contract
Post-modern	High tech-nology	Contractor	Infor-mation	Self-determ.	Philosopher-king	Inst'l im-agination
Quasi-periodization		**Psychology & culture**		**Tax**		
Stage of dev't	**Subsis-tence**	**Mentality**	**Ideology**	**Theory**	**Taxpayer**	**Base**
Pre-hist.	Foraging	*Pensée sauvage*	Totemic	Recipro-cal	Giver	Consump-tion
Ancient	Agricul-ture	Conformist	Feudal	Tributary	Share-cropper	Produc-tion
Modern	Industry	*H. econ.*	Capitalist	Fiscal	Dependent	Income
Post-modern	High tech-nology	Narcissist	Utopian	Biotech-nic	Digital customer	Wealth

A. QUASI-PERIODIZATION

The next couple of passages identify four conventionally named developmental stages based on four modes of food and related production: foraging, agriculture, industry, and high technology. These stages relate to technology rather than capital. The intent is not periodization in an historiographic or determinist sense but the identification of stages in an evolutionary or adaptive sense.

1. Modes of Subsistence

Historians have long observed that societies are characterized by their "Arts of Subsistence."[7] Probably, "the great epochs of human progress have been identified, more or less directly, with the enlargement of the sources of subsistence."[8] This focus on the work of subsistence is consistent with more recent "empirical findings [that] suggest that technological advances and population growth, rather than increases in savings, have accounted for the bulk of economic growth."[9] Later this Article will turn to the question of wealth and taxation, yet technology rather than capital is the starting point. As set forth below, the four modes of subsistence most pertinent to this Part's framework for tax evolution are foraging, agriculture, industry, and high technology.

a. Foraging

First came foraging. Originally, "all humans on Earth fed themselves exclusively by hunting wild animals and gathering wild plants[.]"[10] Nevertheless, "[d]ifferent peoples acquired food production at different times in prehistory[;]" or "never acquired it at all[,]" as in the case of the Aboriginal Australians; or persisted beyond prehistory, as in the case of the Blackfeet in nineteenth-century North America.[11] Presumably, the original hunter-gatherers lived off the fat of the land, while those who persist remain in the ecological margins of territorial states, discussed below, within whose boundaries virtually all land now lies.[12] Consequently, biological anthropologists' study of contemporary hunter-gatherers such as those in Southern Africa as "the most realistic models we have for reconstructing the challenges faced by our ancestors" who were "the hominins of the

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[7] *See generally* LEWIS HENRY MORGAN, ANCIENT SOCIETY 19–28 (1877).

[8] *Id.* at 19.

[9] Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 279 (1983).

[10] JARED DIAMOND, GUNS, GERMS & STEEL: THE FATES OF HUMAN SOCIETIES 86 (2013).

[11] *Id.*

[12] *See generally* ELEANOR B. LEACOCK & RICHARD B. LEE, POLITICS & HISTORY IN BAND SOCIETY (Cambridge Univ. PRESS 1982); JAMES SUZMAN, AFFLUENCE WITHOUT ABUNDANCE: THE DISAPPEARING WORLD OF THE BUSHMEN (2017).

Pleistocene[,]" poses interpretive problems.[13] Nevertheless, foraging for food was the first identifiable mode of subsistence.

b. Agriculture

About 10,000 years ago, the Agricultural Revolution started, eventually leading to the establishment of the first city at the Mesopotamian site of Uruk (Iraq).[14] According to archaeologists, the epoch when "man dominates his environment in its most important aspect, not physically but at the level of living things—plants and animals," heralded a "social revolution" because "it became necessary—for man to settle" geographically, giving rise to "civilization."[15] At the same time, humanity acquired the "lethal gift of livestock" as a stable source of protein as well as zoonotic diseases, of which the coronavirus pandemic is the current example.[16] Chronologically, most of history occurred under agricultural subsistence.

c. Industry

Centered in eighteenth-century England, the Industrial Revolution brought life-changing consequences. These were "an almost miraculous improvement in the tools of production, which was accompanied by a catastrophic dislocation of the lives of the common people."[17] The Industrial Revolution resulted from "the expansion of markets, the presence of coal and iron as well as a humid climate favorable to the cotton industry, the multitude of people dispossessed by the new eighteenth century enclosures, the existence of free institutions, the invention of the machines, and other causes."[18] Although not limited to food production, the Industrial Revolution mechanized farming, transforming the face of the earth in a mere two centuries.

Eventually, the Industrial Revolution spread beyond the North Atlantic region. For example, the Meiji Restoration reflected the transition in

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[13] SARAH BLAFFER HRDY, MOTHERS & OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING 273 (Harv. Univ. Press 2009).

[14] *See* JACOB BRONOWSKI, THE ASCENT OF MAN 60 (1973); Henri J.M. Claessen, *The Emergence of Pristine States*, 15 SOC. EVOLUTION & HIST. 3, 12 (2016).

[15] BRONOWSKI, *supra* note 14.

[16] DIAMOND, *supra* note 10, at 207.

[17] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 35 (1944).

[18] *Id*. at 42.

nineteenth-century Japan.[19] In the twentieth century, economies that continued to be agricultural became known as "underdeveloped."[20] Implicitly, that term incorporated a teleology that was not uncontested.[21] Thus, modern industry became hegemonic but not universal.

d. High Technology

Nowadays, global economic thought leaders identify certain factors that push production beyond the industrial mode. While the "Industrial Revolution used water and steam power to mechanize production[,]" later harnessing "electric power to create mass production[,]" the more recent mode applies "electronics and information technology to automate production[,]" eventually "blurring the lines between the physical, digital, and biological spheres."[22] While this fusion of high technology would not be limited to subsistence, it comprises food production inasmuch as you can now eat genetically modified organisms,[23] or choose organic alternatives.[24]

Since the Industrial Revolution, the "rise of China is no doubt one of the most important events in world economic history[.]"[25] Today, "China (instead of India) is well-positioned to overtake the United States in manufacturing and technological innovations in the [twenty-first] century because the Chinese government has helped create a gigantic market that is several times larger than the U.S. market."[26] Currently, the industrialization of the most populous country deploys both heavy machinery and high technology, establishing a central factor in contemporary world-historical political economy.

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[19] *See generally* Count Okuma, *The Industrial Revolution in Japan*, 538 NO. AM. REV. 677 (1900) (discussing the political, social, and industrial changes that occurred after the Restoration of 1868).

[20] *See* Andre Gunder Frank, *The Development of Underdevelopment*, 18 MONTHLY REV. 17 (1966).

[21] *See e.g.*, AMÍLCAR CABRAL, RESISTANCE & DECOLONIZATION (Dan Wood trans. 2016).

[22] Klaus Schwab, *The 4th Industrial Revolution: What it Means, How to Respond*, WORLD ECON. FORUM (Jan. 14 2016) https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond [https://perma.cc/8ML4-VMXJ].

[23] *See* 51 Fed. Reg. 23,302 (June 26, 1986).

[24] *See* 7 C.F.R. pt. 205 (2021) (codified at 7 U.S.C. §§ 6501–6522); *see also* Chen, *supra* note 3, at 747–50.

[25] YI WEN, THE MAKING OF AN ECONOMIC SUPERPOWER: UNLOCKING CHINA'S SECRET OF RAPID INDUSTRIALIZATION ix (2016); *see also* Wen, *The Making of an Economic Superpower: Unlocking China's Secret of Rapid Industrialization* 1 (Fed. Rsrv. Bank of St. Louis, Working Paper No. 2015-006B).

[26] *Id.*

2. Developmental Stages

The foregoing focus on the four modes of subsistence facilitates the identification of four stages of development in political economy, culture, and taxation that roughly correspond to historical epochs. However, these stages are not necessarily chronological or successive for all people everywhere. As discussed above, the modes of subsistence arrived in different places at different times. Nevertheless, it shall be analytically useful to analyze them in the order that they first appeared.

Each stage will have a set of characteristics coherent to the community at the time. Intellectual historians have observed that political as well as scientific communities achieve consensus under prevailing paradigms until the "existing institutions have ceased adequately to meet the problems posed by an environment that they have in part created."[27] Then political or scientific revolutions ensue, confirming the prior existence as well as the end of the previous paradigm, or here, the developmental stage.

At the same time, political philosophers have observed that economic development is "uneven."[28] In other words, "every social formation is affected by . . . the relations . . . with other formations of different economic, political and ideological maturity."[29] For example, the Bolshevik Revolution of 1917 exposed "internal" rifts as well as "the uneven economic development of Russia as compared with the West[.]"[30] As mentioned above, the perceived inadequacy of existing institutions creates the revolutionary condition. Thus, "uneven development" is not as much a "contradiction" of a pre-existing formation as "its most intimate essence."[31] Consequently, the utility of denominating developmental stages is precisely to identify the slippage between them.

After all, the nature of history is accretion. As sociologists have noted, "[a]mong the most advanced peoples we find traces of the most primitive social organization."[32] Moreover, stages and revolutions may be analytical concepts apart from their practical impact on individuals and families. Proverbially, revolutions may be civil wars that constitute fights of "brother

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[27] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 92 (2012).

[28] LOUIS ALTHUSSER, *On the Materialist Dialectic: On the Unevenness of Origins* (1963), *in* FOR MARX 161, 212 (Ben Brewster trans., 1969).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 204 (W.D. Halls trans., 1984) (1893).

against brother[.]"[33] Siblings may remain in different stages or on opposite sides of a revolution.[34]

For example, the case of an historic federal estate taxpayer was a basis for the critique of the statute discussed below.[35] In 1965, "William du Pont, Jr., great-grandson of the [1802] founder of E. I. du Pont de Nemours & Company, died" effectively leaving his five children as the heirs "of an aggregate family fortune worth almost a half billion dollars in 1966."[36] Ultimately, "the total of all estate and gift taxes paid on this aggregation of wealth, from its origins in nineteenth century DuPont Company profits until its receipt by the present generation . . . will be less than $25 million[,]" yielding "the combined effective tax rate for two generations" of "only 5 [percent]."[37] That is why the case supported a criticism of the effectiveness of the estate tax.

In terms of historical stages, William, Jr. was the grandson of the entrepreneurial generation. His grandfather General Henry du Pont "built the company to greatness with profits from Civil War munitions sales and the operation of the Gunpowder Trust in the 1870's and 1880's."[38] In turn, General du Pont's father was the industrial founder Eleuthère Irénée who fled France after the 1789 Revolution. On the 10th of August in 1792, Eleuthère's nobleman father Pierre Samuel remained "alongside the Swiss Guard" to "defend the palace" of Tuileries in Paris in the wake of the outgoing monarchs, Louis XVI and Marie Antoinette.[39] In short, the du Pont estate tax case encapsulates both the continuity and discontinuity between feudal nobility and industrial capitalism.

Turning to the developmental stages themselves, the four quasi-historical epochs that correspond most closely to the modes of subsistence delineated previously are the pre-historic, ancient, modern, and post-modern. These periods are pyramidal, not aliquot, since they covered hundreds of thousands of years, millennia, centuries, or decades, respectively.

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[33] J. Tracey Power, *Brother Against Brother: Alexander & James Campbells' Civil War,* 95 S.C. HIST. MAG. 130 (1994).

[34] *See, e.g.*, DUONG VAN MAI ELLIOTT, SACRED WILLOW: 4 GENERATIONS IN THE LIFE OF A VIETNAMESE FAMILY (2nd ed. Oxford Univ. Press 2017).

[35] *See infra* Pt.III.B.2.

[36] George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 162 (1977).

[37] *Id*. at 162.

[38] *Id*. at 212.

[39] Jos. Frazier Wall, ALFRED I. DU PONT: THE MAN & HIS FAMILY 24 (Oxford Univ. Press 1990).

a. Pre-Historic

About "half a million years ago[,]" the pre-historic epoch began.[40] At that time, *Homo sapiens* evolved, handling "stone tools" and "the use of fire[.]"[41] Hundreds of millennia passed until "the end of prehistory[,]" marked by the "Neolithic revolution" that introduced "a culture in which ground or polished stone tools replace chipped ones[,]" coincident with the "'farming revolution[,]" also known as the Agricultural Revolution discussed above.[42] Then the next epoch succeeded.

b. Ancient

Nineteenth-century authors first identified the hallmarks of the transition from pre-history. These "included the development of agriculture, metallurgy, complex technology, centralized government, and writing."[43] Then historians would subdivide ancient times into a narrower periodization. They labeled "the first millennium BC" as "antiquity."[44] For purposes of this Article, another millennium was still ancient.

Economic, political, and social transformations occurred during the long period of transition from the ancient to the modern stage. For instance, military history reflected the emergence of modern industry. To take "destruction as a mirror of production," the "strongest pressure for organizational and social transformation has occurred when a state pioneers or emulates developments requiring both the expansion of resources and the improvement of techniques."[45] In particular, this kind of state action "characterized the military rivalry of the Western powers from the Renaissance to the industrial revolution."[46] Then, bellicose mobilization would become a harbinger of peacetime productivity.

Meanwhile, culture as well as technology transformed. Between "the beginning of the Christian Era and the end of the Middle Ages, European attitudes toward a number of minorities underwent profound

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[40] DIAMOND, *supra* note 10, at 37.
[41] *Id*. at 38.
[42] J.M. ROBERTS, HISTORY OF THE WORLD 24–25 (Oxford Univ. Press 1993).
[43] DIAMOND, *supra* note 10, at 215.
[44] ROBERTS, *supra* note 42, at 128.
[45] ROBERTO MANGABEIRA UNGER, *Plasticity into Power: Social Conditions of Military Success*, *in* PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS 153, 154–55 (Cambridge Univ. Press 1987).
[46] *Id*.

transformations."[47] The change in the social tolerance of Jews, Muslims, homosexuals, and other distinct populations was also a part of the transition from "the ancient world" into the modern.[48] Thus, ancient technology, political economy, and culture all evolved characteristically between pre-history and modernity.

c. Modern

The next stage was modernity. This comprised "the era in which the modern Atlantic world emerged from the tradition-dominated, agrarian, superstitious and confined western Christendom of the Middle Ages."[49] While there are various definitions of modernity, this one corresponds most closely with the industrial mode previously set forth. In terms of uneven development, modernity took place in "England . . . very rapidly; in Spain it was far from complete by 1800, while much of eastern Europe was still hardly affected by it even a century later."[50] Nevertheless, the modern mode of industry became hegemonic throughout the world.[51]

d. Post-Modern

Next, the post-modern period arrived both chronologically and philosophically. Philosophers defined "*postmodern* as incredulity toward meta-narratives[.]"[52] In other words, "narrative knowledge" such as history, philosophy, and religion was displaced by "the rapid growth of technologies and techniques in the second half of the twentieth century, where the emphasis of knowledge has shifted from the ends of human action to its

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[47] JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE & HOMOSEXUALITY: GAY PEOPLE IN W. EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE 14TH CENTURY 3 (Univ. Chi. Press 1980).
[48] *Id.* at 17.
[49] ROBERTS, *supra* note 42, at 436.
[50] *Id.*
[51] *See e.g.*, Ross L. Malone, *Lawyers in the Sputnik Era*, 13 WYO. L.J. 101, 103 (1959) (affirming the "statement heard frequently in the U.S.S.R. that the industrial revolution which occurred over a period of 200 years in England was accomplished in Russia in 40 years"); Wei Li & Dennis Tao Yang, *Great Leap Forward [GLF]: Anatomy of a Central Planning Disaster*, 113 J. POL. ECON. 840, 841 (Univ. Chi. P. 2005) (recounting that in 1958 the Communist Party "proclaimed that the GLF would propel China to surpass Great Britain in industrial production in 15 years").
[52] JEAN-FRANÇOIS LYOTARD, *Introduction*, *in* THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE, at xxiv (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984).

means."[53] The epistemological triumph of science is consistent with the establishment of high technology as the mode of subsistence.

Post-modernity brought a changing role to the military-industrial complex. While the production of armaments may have heralded industrialization, the reverse may come true for high technology. In peacetime, industrial engineers have argued that "those countries which commit most resources to military R&D—namely, the United States and the former Soviet Union—tend to lag behind those with lighter defense burdens—namely, Japan and Germany—in cutting-edge civilian technologies[.]"[54] In this respect, the Cold War superpowers may be superseded by those disarmed due to vanquishment in World War II. The superpowers of the modern era may recede in post-modernity.

In the twenty-first century, the United States has a "post-modern estate tax."[55] As discussed below, the wealth transfer excise eroded from a progressive wartime revenue measure into a starkly diminished base.[56]

B. POLITICAL ECONOMY

The four stages of development help explain the evolution (but not teleology) of political economy.[57] Division of the expanse of human experience into a mere four stages necessarily entails a sweeping yet selective survey of the social science literature. Nevertheless, this passage attempts to identify useful themes of economy and government in turn.

1. Economy

Having identified the stages of development by modes of subsistence, this passage now explores more specific economic dimensions. These are the division of labor and the form of exchange.

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[53] Gary Aylesworth, *Postmodernism*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 5, 2015), https://plato.stanford.edu/entries/postmodernism [https://perma.cc/Q244-FD59] (paragraph two).

[54] Steve Chan, *Grasping the Peace Dividend: Some Propositions on the Conversion of Swords into Plowshares*, 39 MERSHON INT'L STUD. REV. 53, 67 (1995) (citing LLOYD DUMAS, *Economic Conversion: The Critical Link,* MAKING PEACE POSSIBLE 3 (1989)); *see also* Seymour Melman, *Disarmament, Economic Conversion & Jobs for All*, UNCOMMON SENSE 8 (Oct. 1995), https://njfac.org/index.php/us8 [https://perma.cc/WN9R-B2H5]; Seymour Melman, *Economic Alternatives to Arms Prosperity,* 351 ANNALS AM. ACAD. POL. & SOC. SCI. 121 (1964).

[55] David J. Herzig, *The Income Equality Case for Eliminating the Estate Tax*, 90 S. CAL. L. REV. 1143, 1166 (2017).

[56] *See id*. at 1168; *see also infra* Pt.III.B.2.

[57] *See generally* MORTON H. FRIED, EVOLUTION OF POLITICAL SOCIETY: AN ESSAY IN POLITICAL ANTHROPOLOGY (1967).

a. Division of Labor

Each mode of subsistence produces a different division of labor with a characteristic, if stereotyped, form of laborer. For this purpose, this passage glosses these as the forager, the peasant, the wage worker, and the contractor. Of course, these are not the only laborers in the economy, but they typify each stage.

i. Forager

In the hunting and gathering ecology, all consumers are foragers. Loosely speaking, even children can pick berries. This uniformity of economic role comports with what sociologists have called "mechanical solidarity."[58] In the undifferentiated population, the "common consciousness" of cultural practices, whether culinary or symbolic, becomes part of the "social bonds" that prompt a "mechanical reaction" in the people.[59] Similarity keeps hunters and gatherers together in their quest for subsistence in the forest and savannah.

ii. Peasant

In the agricultural economy, the primary producer tied to the land is the peasant. At that developmental stage, both "agricultural and artisanal work were essentially deemed 'adaptations' to nature, not transformations of it; they were forms of service."[60] While the peasants were still scratching the earth, landlords emerged in more advanced, yet still ancient, agrarian societies. In an extreme form of serfdom, "the slave existed only through the parasite holder, who was called the master."[61] The unskilled yet vast population of farmers sustained civilization for millennia.

At this point, mechanical solidarity may persist. "Agriculture, because it is of necessity a settled existence, already presumes a drawing together of the social tissues, but one still very incomplete," to the extent that each family farm remains a homogeneous productive unit.[62] Autarky may be agronomically typical.

Where the labor force remains undifferentiated, production is still limited. Economists contrast China's recent achievements to "the lack of a

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[58] DURKHEIM, *supra* note 32, at 31.
[59] *Id*. at 62.
[60] PERRY ANDERSON, PASSAGES FROM ANTIQUITY TO FEUDALISM 27 (1974).
[61] ORLANDO PATTERSON, SLAVERY & SOCIAL DEATH 337 (Harv. Univ. Press 1982).
[62] DURKHEIM, *supra* note 32, at 201–02.

well fermented market and intermediaries to organize India's massive number of autarkic and anarchic peasants to form organizations based on the principle of the division of labor" resulting in "India's failure to create its own supply" of manufactured goods.[63] Where modern machinery would be available in India, this is a current example of uneven development.

iii. Wage Worker

In the industrial economy, the machine is operated by the wage worker. Sociologically, the variation of tasks among workers, like cogs in the machine, produces "organic solidarity."[64] Writ large, "the more labour is divided up" making "the activity of each one of us . . . correspondingly more specialised," the more "each one of us depends more intimately on society."[65] Ultimately, "there exists a certain allocation of rights and duties that is established by usage and ends up by becoming obligatory."[66] Then "the rule" codifies "the state of mutual dependence in which the solidly linked organs are to be found[.]"[67] In short, organic solidarity cements a multifaceted division of labor.

For the wage worker, the experience was historically alienating at best. A precursor to urban ethnography described "the worker's activity . . . reduced to some paltry, purely mechanical manipulation, repeated minute after minute, unchanged year after year" in nineteenth-century England, the epicenter of the Industrial Revolution.[68] For example, "a man . . . in his thirtieth year . . . has made needle points or filed toothed wheels twelve hours every day from his early childhood."[69] Since "the introduction of steam" engines, the "worker's activity is made easy, muscular effort is saved, but the work itself becomes unmeaning and monotonous to the last degree."[70] In sum, the "division of labour has multiplied the brutalising influences of forced work."[71] Recent survey research confirms that "the share of workers considering their job to be socially useless is particularly high in jobs involving simple and routine

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[63] WEN, *supra* note 25, at 75.
[64] DURKHEIM, *supra* note 32, at 68.
[65] *Id*. at 85.
[66] *Id*. at 33.
[67] *Id*. at 302.
[68] FRIEDRICH ENGELS, THE CONDITION OF THE WORKING CLASS IN ENGLAND 197 (Elec. Book Co. 1998) (1887) (ProQuest).
[69] *Id*.
[70] *Id*.
[71] *Id*.

tasks."[72] Economically, the psychological and economic toll highlight the fact that the organic division of labor was exploitative.

Although they are distinct concepts, organic solidarity may be compared to ultrasociality. "Beehives and ant nests, with their separate castes of soldiers, scouts, and nursery attendants, are examples of ultrasociality, and so are human societies."[73] Arguably, biological interdependence could underlie sociological solidarity. Sociobiologically, the criteria for "eusociality" are narrower than the industrial division of labor. There, "some individuals reduce their own lifetime reproductive potential to raise the offspring of others[,]" supporting "the most advanced forms of social organization and the ecologically dominant role of social insects and humans."[74] Biological anthropologists have documented this behavior among grandmothers, past child-bearing age, who raise grandchildren.[75] The narrow "definitional criterion" of the "reproductive division of labour" may be the most important aspect of eusociality.[76] In turn, eusociality contributed to "the peculiarly cooperative natures that would distinguish . . . the genus *Homo* . . . as emotionally modern."[77] In terms of physical anthropology, "early humans domesticated themselves when they began to select friends and partners based on their ability to live within the tribe's moral matrix" to the extent that "our brains, bodies, and behavior show many of the same signs of domestication that are found in our domestic animals: smaller teeth, smaller body, reduced aggression, and greater playfulness, carried on even into adulthood."[78] While the economic division of labor can be alienating, social interdependence may be essentially human.

Chronologically, these anthropological aspects of the division of labor may appear at earlier stages. The reproductive division of labor may support the foraging economy, as among the Hadza in Tanzania.[79] Human castes formed under agrarian empires, as observed in sixteenth-century

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72 Robert Dur & Max van Lent, *Socially Useless Jobs*, 58 INDUS. RELS. 3, 14 (2019).

73 JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 235 (2012).

74 Martin A. Nowak, Corina E. Tarnita & Edward O. Wilson, *The Evolution of Eusociality,* 466 NATURE 1057, 1057 (2010).

75 Kevin R. Foster & Francis L.W. Ratnieks, *A New Eusocial Vertebrate?*, 20 TRENDS IN ECOL. & EVOL'N 363, 364 (2005).

76 *Id.*

77 HRDY, *supra* note 13, at 11.

78 HAIDT, *supra* note 73, at 245.

79 HRDY, *supra* note 13, at 106.

India.[80] The ultrasocial nature of the society as an organism may be a biological characteristic of the human species lately expressed in organic solidarity.[81]

iv. Contractor

After the industrial age of the wage worker comes the stage of high technology when the predominant form of production lies in the "knowledge industry."[82] Just as "craft workers—for instance, shoemakers, weavers, granite cutters and blacksmiths"—were "proletarianized" at "the end of the [nineteenth] and beginning of the [twentieth] centuries[,]" so now "professionals are becoming subject to layers of bureaucracy—think of . . . [s]oftware developers" who "may no longer work on their own or for small companies but for huge corporations like Facebook or Microsoft, where their responsibility is a minute task within a larger system."[83] In the age of technology, the intellectual worker confronts the commercial reality that quantity "has been transmuted into quality."[84] This Article adopts the term "contractor" to characterize the role of the professional information worker in the era of high technology, not for purposes of the federal employment tax, but as atomized specialists who lack the security of the regular wage.[85] Thus, those "who work within the knowledge industry today can also rarely look forward to the kind of lifetime employment for themselves or their children that many Americans used to enjoy."[86] While the contractor exercises independent professional judgment, she paradoxically experiences the alienation of corporate technocracy.

The contractor's reaction to alienation may differ from that of the wage worker. In post-World War II America, the "[m]iddle-class . . . professionals and managers" glossed in this Article as contractors "suffered in the economic dislocations" as "the extremes of wealth have

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[80] *See* A.L. BASHAM, THE WONDER THAT WAS INDIA: A SURVEY OF THE CULTURE OF THE INDIAN SUB-CONTINENT BEFORE THE COMING OF THE MUSLIMS 148 (1954).

[81] *See* Herbert Spencer, *The Social Organism*, *in* WESTMINSTER REV. (1860).

[82] John B. Judis, *A Warning from the '60s Generation*, WASH. POST MAG. (Jan. 21, 2020), https://www.washingtonpost.com/magazine/2020/01/21/i-was-60s-socialist-todays-progressives-are-danger-repeating-my-generations-mistakes [https://perma.cc/4B7V-57V3].

[83] *Id*.

[84] Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS sec. XV (Hannah Arendt ed., Harry Zohn trans., Shocken Books 1969) (1935).

[85] *Cf.* I.R.C. § 3121(d) (2018).

[86] Judis, *supra* note 82, at 14.

grown farther apart" toward the end of the century.[87] While "staying in the economic and social middle ground had become impossible for much of the working class," the contractors who were "white-collar professionals" found themselves "in a better position to negotiate higher pay to meet the rising costs of housing and education."[88] In the 1970s, the younger cohort of contractors "began to abandon the long, penurious path leading to professional status" as "[p]ublic-sector professionals, like doctors, social workers, and administrators," began to "switch over to the private sector" where they could "go for the money" as "yuppies."[89] Amidst rapidly changing technology, the contractor can clear a path, however precarious it may be.

The recent survey research confirms the ambiguous goals of the information worker, for whom anxiety is endemic. "Within business, the share of workers considering their job to be socially useless is particularly high in jobs . . . in finance, sales, marketing, and public relations," and moreover, "managers and workers do not differ much in how they evaluate the usefulness of their job, in contrast to what is sometimes thought."[90] On the other hand, "public sector . . . jobs in education, health, and the police force are rarely perceived to be socially useless."[91] Apparently, proletarianization has undermined professionalism among contractors in the for-profit knowledge industry.

Obversely, the contractor was freed from so-called wage slavery.[92] The contractor's role also represents the aspiration to a division of labor

> where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the

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[87] BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS 210 (First Twelve ed. 2020).

[88] *Id.*

[89] *Id.* at 211.

[90] Dur & Van Lent, *supra* note 72, at 14.

[91] *Id.*

[92] Actually, from ancient Athens and Rome to nineteenth-century Madagascar and Brazil, "wage labor contracts . . . turn out to be contracts to rent slaves . . . Free men and women thus avoided anything remotely like wage labor, seeing it as a matter, effectively, of slavery, of renting themselves out[.]" David Graeber, *Turning Modes of Production Inside Out: Or, Why Capitalism Is a Transformation of Slavery*, 26 CRITIQUE ANTHROPOLOGY 61, 68 (2006).

> evening, criticise after dinner, just as I have a mind, without ever becoming hunter, fisherman, herdsman or critic.[93]

This view spans from foragers and pastoral peasants to information workers. Yet it suggests that the freedom of the contractor will be ambiguous unless regulation effectively offers social insurance.

b. Exchange

Each type of laborer works with a corresponding type of exchange or trade. Drawing on economic and financial anthropology and sociology, this passage characterizes the forms of exchange as barter, market, money, and informational.

i. Barter

For the forager, exchange of food, stone tools, or like items in-kind may have been instinctive. Anthropologically, the "individualistic savage collecting food and hunting on his own or for his family has never existed[.]"[94] Philosophically, the "state of nature" may have been a figment of the Enlightenment imagination.[95] Archaeologically, "the institution of the market was fairly common since the later Stone Age," but its role was basically to facilitate barter.[96] This differs from the discernment of "fair market value" by a "willing buyer" and a "willing seller" as now codified in the federal estate tax regulation.[97] Instead, the "typical local market at which housewives procure some of their daily needs, and growers of grain or vegetables as well as local craftsmen offer their wares for sale," showed "an amazing indifference to time and place. Gatherings of this kind" were "not only fairly general in primitive societies," but remained "almost unchanged right up to the middle of the eighteenth century in the most advanced countries of Western Europe."[98] This incidence of uneven development reflects the natural economy, here glossed as barter, that has

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[93] KARL MARX, THE GERMAN IDEOLOGY pt.I.A.4.9 (Progress Publishers 1968) (1932) [https://perma.cc/UF7G-TU58].
[94] POLANYI, *supra* note 17, at 53.
[95] *See e.g.*, JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR THE PRINCIPLES OF POLITICAL RIGHTS bk.1, sec. 2 (Edward L. Walter, ed., Rose M. Harrington trans., New York, G.P. Putnam's Sons 1893) (1762).
[96] POLANYI, *supra* note 17, at 43.
[97] Treas. Reg. § 20.2031-1(b) (2021).
[98] POLANYI, *supra* note 17, at 62.

always been "submerged in . . . social relationships."[99] Thus, trade emerged incidentally to the reciprocity of the forager.

ii. Market

Properly speaking, market exchange emerged at the end of the ancient epoch. Organically, food trading posts had arisen before economic markets developed out of "external trade . . . where the carriers had to halt as at fords, seaports, riverheads, or where the routes of two land expeditions met."[100] According to West European economic historians, the "[d]eliberate action of the state in the fifteenth and sixteenth centuries foisted the mercantile system on the fiercely protectionist towns and principalities" where the guilds of the bourgeoisie guarded against outside goods such as "[s]pices, salted fish, or wine".[101] Starting then, "the running of society" became "an adjunct to the market."[102] This reversed the natural economy of forager such that now "social relations are embedded in the economic system."[103] Thus, the spectrum of market exchange extends from farmers' produce to imported goods.

Thereafter, market exchange proper ensues. This is "an economy directed by market prices[.]"[104] In the nineteenth century, "the gearing of markets into a self-regulating system of tremendous power was . . . the effect of highly artificial stimulants administered to the body social in order to meet a situation which was created by the no less artificial phenomenon of the machine."[105] As such, market exchange ballooned with the mechanical mode of production in the Industrial Revolution.

iii. Money

Upon the establishment of the market per se, the ubiquitous use of money as the medium of exchange further transformed society. Even as "the modern division of labour permits the number of dependencies to increase just as it causes personalities to disappear behind their functions," so money commerce moves "in the direction of making the individual more and more dependent upon the achievements of people, but less and less

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[99] *Id.* at 46.
[100] *Id.* at 60.
[101] *Id.* at 64–65.
[102] *Id.* at 57.
[103] *Id.*
[104] POLANYI, *supra* note 17, at 43.
[105] *Id.* at 57.

dependent upon the personalities that lie behind them."[106] In the experience of the wage worker, organic solidarity was alienating.

Obversely, money exchange was liberating. "Money, as an intermediate link between man and thing," freed "modern man" from "direct concern with things and from a direct relationship to them," while "at the same time making it infinitely easier . . . to dominate them and select from them" what he required.[107] Money favored those who could achieve an "abstract existence[.]"[108]

In particular, the "professional classes" emerged "only in the money economy."[109] Their "productivity lies outside the economy proper[,]" concerned "with specific intellectual activity such as" that of "teachers and literary people, artists and physicians, scholars and state officials."[110] The money economy created the conditions for those who would become intellectual workers or contractors, introduced above.

At the same time, money exchange made possible abstract accumulation in excess of organic need. As a mechanism, "the marketplace bestows" rewards that "depend on factors outside an individual's control."[111] For example, the "person who made the first hula hoop became rich while the person who made the last one probably became poor."[112] Pecuniary accumulation which may have rewarded industrial innovation in the money economy became distanced from both human needs and merit.[113]

iv. Informational

The emergence of the intellectual worker coincides with that of an economy based on knowledge. This Article glosses this as informational exchange. Financial anthropologists observe that markets "are made up of much more than finance, for example—they are assemblages of many forms

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[106] GEORG SIMMEL, THE PHILOSOPHY OF MONEY 296–97 (David Frisby ed., Tom Bottomore & David Frisby trans., 3d ed. 2004) (1907).
[107] *Id.* at 474.
[108] *Id.*
[109] *Id.* at 312.
[110] *Id.*
[111] Graetz, *supra* note 9, at 275.
[112] *Id.* at 276.
[113] Ultimately, abstract accumulation could become akin to an addiction. That behavior descends to the level of the laboratory "[r]ats who can press a button to deliver electrical stimulation to their reward centers[,]" a "dopamine response" that impels the rats to "continue pressing until they collapse from starvation." HAIDT, *supra* note 73, at 102.

of expertise and many kinds of technology."[114] In "the financial world," that is a post-money economy, "the market" is both "the artifact of knowledge and . . . evidence of its limits[.]"[115] For example, in the case of the Federal Reserve Bank, "the Fed's own technocratic agenda" includes factual declarations, "rendering analysis of economic performance increasingly refractory."[116] The development of the informational economy follows that of the corporate polity where "[b]ureaucratic administration means fundamentally domination through knowledge."[117] In the informational economy fueled by high technology, knowledge adds value.

2. Government

The four stages of development apply to various dimensions of government. These include the polity, leadership, and law.

a. Organization of Society

Each type of economy has a corresponding social formation to organize groups within their characteristic division of labor. The principles of organization that will support the political infrastructure are those of the band, tribe, state, or of self-determination. While the first three entities were identified by political anthropology, the last principle derives from political philosophy.

i. Band

Among foragers who may well be nomadic, the unit of society is the band.[118] "Hunting-gathering bands of some 25 to 40 or so people can

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[114] ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 11 (Univ. Chi. Press 2011).
[115] Annelise Riles, *Real Time: Governing the Market after the Failure of Knowledge* 5 (Nw. Univ. L. & Econs., Rsch. Paper No. 01-2, 2001).
[116] Douglas R. Holmes & George E. Marcus, *Fast Capitalism: Para-Ethnography and the Rise of the Symbolic Analyst*, *in* FRONTIERS OF CAPITAL: ETHNOGRAPHIC REFLECTIONS ON THE NEW ECONOMY 33, 43, 55 (Melissa S. Fisher & Greg Downey eds. 2006).
[117] Max Weber, *Monocratic Bureaucracy*, *in* ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 223, 225 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff trans., Univ. Cal. Press 1978) (1925). *See also* Shoshana Zuboff, THE AGE OF SURVEILLANCE CAPITALISM (2019) (discussing "information workplace," "information society," or "information civilization").
[118] *See* DIAMOND, *supra* note 10, at 268.

operate almost anarchistically," according to anthropologists.[119] In a population this small, personal relationships are primary.

ii. Tribe

Among subsistence farmers, the unit of society is the tribe. Upon "the development of agriculture more complex institutions are needed for ordering interpersonal relationships in villages of several hundred or more."[120] For an ethnographic example, in western Melanesia the "tribe" is "the ethnic-cultural entity" consisting "of many autonomous kinship-residential groups."[121] Thus, the autonomous band is superseded by the tribe which is multi-local yet still kin-based.

iii. State

When ancient civilizations developed under advancing forms of agriculture that yielded surplus crops, the state became the normative unit of modern society.[122] Sociologically, "a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory."[123] The conquest of territory has meant a long association between organized violence and state formation. As of the sixth century B.C.E. the Sanskrit text described the organic origin of a kingdom in these terms, for "they who have no king cannot fight."[124] The militaristic nature of the state will be a recurring question in social science.

Moreover, the state was qualitatively different from the kinship societies that preceded it. This was so much so that "states may be classified according to whether they rest on the principle that the staff of men themselves own the administrative means, or whether the staff is 'separated' from these means of administration[,]" which "may consist of money, building, war materiel, vehicles, horses, or whatnot."[125] The relatively

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[119] Eleanor Burke Leacock, *Introduction* to FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE 1, 32 (Int'l Publishers 1972) (1884) [hereinafter OFPP&S].
[120] *Id.*
[121] Marshall D. Sahlins, *Poor Man, Rich Man, Big-Man, Chief: Political Types in Melanesia and Polynesia*, 5 COMPAR. STUD. SOC'Y & HIST. 285, 287 (Cambridge Univ. Press 1963).
[122] *See* DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION 3, 5 (2015).
[123] MAX WEBER, POLITICS AS A VOCATION (1919), *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds., trans., Oxford Univ. Press 1946) [hereinafter VOCATION].
[124] *Taittirīya Upanisad*, *reprinted in* Basham, *supra* note 80, at 81.
[125] VOCATION, *supra* note 123.

advanced state is de-personalized "in the same sense in which today we say that the salaried employee and the proletarian in the capitalistic enterprise are 'separated' from the material means of production."[126] Ultimately, the state becomes the objective essence of the social organism as distinct from the people and their kindred.

iv. Self-Determination

Although social organization became increasingly complex throughout history, political philosophers across the spectrum have agreed that the state ultimately should recede. The nineteenth-century Anglo-German critics of political economy envisioned the replacement of the "government of persons" by "the administration of things and the direction of productive processes" whence the state "withers" away.[127] The twentieth-century American exponents of classical liberalism maintained that the "minimal state" limited "to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts," is "the most extensive state that can be justified" without violating "people's rights."[128] As an uncharted gulf opens between these two poles, this Article glosses the common ground as self-determination. As the withered state limited itself to administering production, the minimal state would enforce contracts. Thus, both supervised economic activity rather than personal conduct, other than crime. Civil society would flourish either way. This principle of social organization would be consistent with the increasing autonomy of the labor force as independent contractors.

b. Leadership

Under the organizational principle of the band, tribe, state, or of self-determination, leadership is invested in the big-man, chieftain, head of state, or philosopher-king, respectively. Again, the first three offices were identified by political anthropology, while the last derives from political philosophy.

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[126] *Id.*
[127] FREDERICK ENGELS, HERR EUGEN DÜHRING'S REVOLUTION IN SCIENCE [ANTI-DÜHRING] 292 (C.P. Dutt, ed., Emile Burns trans., N.Y., Int'l Publishers 1894) (1878).
[128] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26, 149 (1974).

i. Big-Man

The primary form of leadership is that of the big-man. Ethnographically, the classic example of this type of leader is the "Melanesian big-man" who is a "cunning" and "rugged individual."[129] His personality is dispositive because in the band society, little "or no authority is given by social ascription: leadership is a creation . . . of followership."[130] Sociologically, the big-man's authority derives from his charisma, the "quality of an individual personality, by virtue of which he is set apart from ordinary men and treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities" that "are not accessible to the ordinary person, but are regarded as of divine origin or as exemplary . . . on the basis of" which the big-man "is treated as a leader" by the members of the band.[131] Where personal relations remain primary, the big-man distinguishes himself by force of personality.

ii. Chieftain

In the tribal society, the chieftain may be identified by bloodline. In the ethnographic case, the "chiefly lineage ruled by virtue of its genealogical connections with divinity, and chiefs were succeeded by first sons, who carried 'in the blood' the attributes of leadership."[132] When the society is organized by kinship, so is the leadership.

iii. Head of State

The first states were kingdoms. "Early states had a hereditary leader with a title equivalent to king, like a super paramount chief and exercising an even greater monopoly of information, decision making, and power."[133] Subsequently, "the development of the modern state" was "initiated through the action of the prince" who paved "the way for the expropriation of the autonomous and 'private' bearers of executive power who stand beside him, of those who in their own right possess the means of administration, warfare, and financial organization, as well as politically usable goods of

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[129] Sahlins, *supra* note 121, at 289.
[130] *Id*. at 290.
[131] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 358–59 (Talcott Parsons ed., A.R. Anderson & Talcott Parsons trans., 1947) (1922).
[132] Sahlins, *supra* note 121, at 295.
[133] DIAMOND, *supra* note 10, at 279.

all sorts."[134] Whereas the ancient kings would have owned their realms, the modern state represents complete "'separation' of the administrative staff, of the administrative officials, and of the workers from the material means of administrative organization[.]"[135] Then the head of state may be elected without birthright.

iv. Philosopher-King

The ancient Greeks hypothesized rule by reason rather than popularity or inheritance. In the fourth century B.C.E. Socrates' question was: Inasmuch as only philosophers are able to grasp the eternal and unchangeable, and those who wander in the region of the temporal crowds are not philosophers, I must ask you which of the two classes should be the rulers of our State?[136] While history never may have answered in the affirmative, the question endures as an ideal. Accordingly, the philosopher-king would be the ruler of the speculative post-modern stage populated by self-determined intellectual workers.

c. Law

The big-man, chief, head of state, or philosopher-king governs through typical notions of legality or jurisprudence. These signal legal principles are custom, natural, contract, or institutional imagination, respectively.[137] The first three are recognized nomothetic principles, while the last belongs to the speculative philosophy of the post-modern.

i. Custom

Sociologically, custom "forms the basis for" law.[138] Anthropologically, the "obligations imposed on individuals in societies where there are no legal sanctions will be regarded as matters of custom and convention but not of law . . . , although all have customs which are

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[134] VOCATION, *supra* note 123.
[135] *Id.*; *see also* Mauro F. Guillén, *Symbolic Unity, Dynastic Continuity, and the Countervailing Power: Monarchies, Republics, and the Economy*, 97 SOC. FORCES 607 (2018) (discussing "the implications of the persistence of traditional patterns of political authority").
[136] PLATO, THE REPUBLIC bk.VI, ¶ 484b (Paul Shorey trans., Harv. Univ. Press 1942) (c. 375 B.C.E.).
[137] *See generally* Daniel Blocq & Maartje van der Woude, *Making Sense of the Law & Society Movement*, 11 ERASMUS L. REV. 134 (2018) (discussing developments in postmodernism and critical legal studies).
[138] DURKHEIM, *supra* note 32, at 26.

supported by sanctions."[139] For example, in "many preliterate societies the penal sanction is applied principally if not solely to actions which infringe upon customs regarded by the community as sacred, so that the sanction itself may almost be regarded as a special form of ritual sanction."[140] When "litigious questions require a solution more closely defined[,]" then the customary practice "acquires the status of a written law and is codified[.]"[141] While discerning fine degrees of distinction, the legal realists referred to custom law.[142]

ii. Natural

In ancient civilizations when the social order followed kinship, natural law regulated a status-oriented society. Harking back to the Tang dynasty in 618 to 906 C.E. Professor Alford explains that

> traditional Chinese thought arranged the various instruments through which the state might be administered and social harmony maintained into a hierarchy ranging downward in desirability from heavenly reason (*tianli*), the way (*tao*), morality (*de*), ritual propriety (*li*), custom (*xixu*), community compacts (*xiang yue*), and family rules (*jia cheng*) to the formal written law of the state.[143]

Concepts like heavenly reason, morality, propriety, and community resonate with natural law in the West as contradistinguished from positive statutes or regulations.

Some foundations of natural law were articulated in thirteenth-century Europe.[144] St. Thomas Aquinas, for example, wrote that "man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law: *e.g.*, to shun ignorance" and "to avoid offending those among whom one has to live[.]"[145] In this view, God, man, nature, and law were harmonized.

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139 A.R. RADCLIFFE-BROWN, *Primitive Law*, *in* STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 212 (1952) (1933).
140 *Id*. at 213.
141 DURKHEIM, *supra* note 32, at 35.
142 *See* Ajay K. Mehrotra, *Law and the "Other": Karl N. Llewellyn, Cultural Anthropology, and the Legacy of* The Cheyenne Way, 26 L. & SOC. INQUIRY 741, 753 (2001).
143 WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 10 (Stan. Univ. Press 1995).
144 *See* THE NATURE OF LAW: READINGS IN LEGAL PHILOSOPHY 9 (M.P. Golding ed. 1966).
145 THOMAS AQUINAS, LAW AS AN ORDINANCE OF REASON ¶ XCIV, *reprinted in* THE NATURE OF LAW, *supra* note 144, at 19.

Vast philosophical differences separated the continents over the centuries. For purposes of this Part's framework nevertheless, scholars throughout the epoch justified social status by reference to a higher law alternately glossed as divine or natural.

iii. Contract

While custom and status may have formed the basis for law, ultimately law would move beyond those origins. "Thus the status of the Slave . . . has been superseded by the contractual relation of the servant to his master."[146] Second, the "status of the Female under Tutelage . . . has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract."[147] Third, "the status of the Son under Power has no true place in law of modern European societies" as to "the child of full age" unless "contract gives its legal validity."[148] In sum, "we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals."[149] Finally, "we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[150] Later, the contract of the wage worker would become a stepping-stone to the free-lancing of the independent contractor, as both would establish contractual rather than cultural relations with the employer.[151] Accordingly, this Article identifies contract as the characteristic principle of law emerging in the industrial age.

iv. Institutional Imagination

If customary, natural, and contractual law offered successive levels of removal from convention, the post-modern era should speculate on the next stage of jurisprudence. Contemporary Western legal critics have seized on the promise of the rule of law, hoping to advance "the project of a legal science that would reveal the in-built legal and institutional content of a free

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[146] HENRY SUMNER MAINE, ANCIENT LAW 169 (London, John Murray 1861).
[147] *Id.*
[148] *Id.* at 169–70.
[149] *Id.* at 169.
[150] *Id.* at 170.
[151] On the supposed volition of the contracted laborer, the landmark in U.S. legal history is *Lochner v. New York*, 198 U.S. 45, 48 (1905) (Holmes, J. dissenting) ("It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.").

society and police its boundaries against invasion by politics."[152] This vision of post-liberal legality asks "the jurist" to "imitate the artist who makes the familiar strange, restoring to our understanding of our situation some of the lost and repressed sense of transformative opportunity."[153] Similarly, the financial anthropologist evinces "the impulse to make what one studies strange but to do so with the eventual purpose of making it familiar again, though with a critical change in the reader's perception and understanding."[154] Meanwhile, the advent of high technology was first recognized by the "artist" who "picks up the message of cultural and technological challenge decades before its transforming impact occurs."[155] In this vein, this Article adopts the gloss of "institutional imagination" for the emerging legal principle in the polity of self-determination among intellectual workers under the persuasive rule of the philosopher-king.[156] The aspiration that law would free civil society from political strictures resonates with the common theme of autonomy in the withered or minimal state, discussed above.

C. PSYCHOLOGY & CULTURE

In classical scholarship, the counterpart to political economy would have been moral philosophy.[157] Now we address the latter issue of ethics or value, rather than production or utility, under the rubric of psychology and culture. This passage glosses the pertinent personal and public dimensions as mentality and ideology.

1. Mentality

As foragers, peasants, wage workers, and contractors become increasingly independent of their material circumstances, their psychology transforms. In the successive developmental stages, the typical state of mind is that of the savage, conformist, *Homo economicus*, or narcissist. These stylized figures derive from critical works of anthropology,

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[152] ANALYSIS, *supra* note 1, at 28.
[153] *Id*. at 133.
[154] GEORGE E. MARCUS & PETER DOBKIN HALL, LIVES IN TRUST: THE FORTUNES OF DYNASTIC FAMILIES IN LATE TWENTIETH-CENTURY AMERICA 3 (1992).
[155] MARSHALL MCLUHAN, *Challenge and Collapse, in* UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 13 (1964).
[156] ANALYSIS, *supra* note 1, at 129.
[157] *See* John Graham Brooks, *Philosophy & Political Economy*, 8 Q.J. ECON. 93, 93–94 (1893).

psychology, economics, and sociology to support a multi-dimensional characterization of the four stages.

a. *La Pensée Sauvage*

In the classic anthropological exposition, the forager was intellectually a handy-man rather than an engineer.[158] The *bricoleur* collected concrete facts "which have to some extent been transmitted in advance[.]"[159] As a legal analogy, the *bricoleur*'s reasoning was like that of "the commercial codes which are summaries of the past experience of the trade and so allow any new situation to be met economically, provided that it belongs to the same class as some earlier one."[160] By contrast, the scientific mind of the engineer or physicist would be "on the look out for . . . questions whose answers have not been rehearsed."[161] Thus, *la pensée sauvage* was suited to a lifestyle limited by the material conditions of subsistence.

Traditionally, political scientists viewed the savage mentality as a natural heritage. Since the seventeenth century, political theorists have posited a society of "Warre Of Every One Against Every One."[162] Drawing on twentieth-century primatology, political scientists focused on, "of the 4,000 mammal and 10 million or more other species," the "chimps and humans" who were the only species to "live in male-bonded, patrilineal communities in which groups of males routinely engage in aggressive, often murderous raiding of their own species."[163] At least one strain of primatology offered a natural foundation for what North Atlantic scholars long have perceived as man's innate aggression.[164] While primate science has moved on, savagery became a powerful metaphor in political science.

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[158] CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 17 (Univ. Chi. Press 1966).
[159] *Id*. at 20.
[160] *Id*.
[161] *Id*.
[162] THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORM AND POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL 63 (George Routledge & Sons 2d ed. 1886) (1651).
[163] Francis Fukuyama, *Women and the Evolution of World Politics*, 77 FOREIGN AFFS. 24, 25 (1998).
[164] Alternatively, "the state, in part through law, institutionalizes male power." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 645 (Univ. Chi. Press 1983); *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (Harv. Univ. Press 1989). *Cf.* Randall Haas et al., *Female Hunters of the Early Americas*, SCI. ADVANCES, no. 4, 2020, at 1, 5 (" . . . [M]odern gender constructs often do not reflect past ones.").

Nowadays, physical anthropologists may view aggression as environmental rather than innate.[165] In particular, primatologists now "dispute the claim that chimpanzee males have an innate tendency to kill outsiders, arguing instead that their most extreme violence can be tied to specific circumstances that result from disruption of their lives by contact with humans."[166] A recent review of data on chimpanzee killings previously "explained as attempts to diminish the number of males in rival groups" shows "that subtracting internal from external killings of males produces a reduction of outside males of only one every 47 years, fewer than once in a chimpanzee's lifetime."[167] In the twenty-first century, biological anthropologists ask, "how much sense would it have made for our Pleistocene ancestors eking out a living in the woodland and savannas of tropical Africa to fight with neighboring groups rather than just moving?"[168] Rather than innate instincts, the "preconditions that make war more likely include a shift to a more sedentary existence, a growing regional population, a concentration of valuable resources such as livestock, increasing social complexity and hierarchy, trade in high-value goods, and the establishment of group boundaries and collective identities."[169] While foraging was a low-density, nomadic lifestyle, aggressive competition may have been a function of tight environmental resources.[170]

Meanwhile, the foraging mode of subsistence remained with the concrete mentality. This is not to say there was no moral dimension. Rather, "people living in small communities lacking market integration or world religions—absences that likely characterized all societies until the Holocene" would "display relatively little concern with fairness or punishing unfairness in transactions involving strangers or anonymous others" whose "relationships" were not established by "kin, reciprocity, and status".[171] To foray "beyond individuals' local networks of kin and long-term relationships" would require evolution to "recalibrate our innate

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[165] *See generally* BRIAN HARE & VANESSA WOODS, SURVIVAL OF THE FRIENDLIEST: UNDERSTANDING OUR ORIGINS AND REDISCOVERING OUR COMMON HUMANITY (2020).

[166] R. Brian Ferguson, *War Is Not Part of Human Nature,* 319 SCI. AM. 76, 86 (2018).

[167] *Id.*

[168] HRDY, *supra* note 13, at 19.

[169] Ferguson, *supra* note 166, at 82.

[170] By analogy, compare "Europe's geographic balkanization" that "resulted in dozens or hundreds of independent, competing statelets and centers of innovation" with China's relatively undivided "geography [that] facilitated eventual conquest and unification over a vast area, followed by long periods of relative stability under imperial rule" that may have been "predisposing toward Confucian philosophy and cultural conservatism[.]" DIAMOND, *supra* note 10, at 416, 419, 432.

[171] Joseph Henrich et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, 327 SCI. 1480, 1483–84 (2010).

psychology for life in small-scale societies[.]"[172] In this sense, anthropologists identify kinship rather than aggression as innate. Pending evolution, both intellect and morality remained limited by known quantities in the psychology of the forager.

b. Conformist

Whereas the forager found subsistence in an environment beyond human control, the peasant who was tied to the arable land became comfortable with stability. The psychology of the agrarian society related "to the general lack of personal freedom, to the exploitation of the mass of the population by a small minority, to its narrowness which makes the peasant of the surrounding country a dangerous and suspected stranger to the city dweller—" all of which amounted to "superstitiousness and ignorance."[173] Obversely, pre-industrial society fostered "the sense of solidarity, the subordination of economic to human needs, the directness and concreteness of human relations," and in thirteenth-century Europe, "the supranational principle of the Catholic Church, the sense of security which was characteristic of man in the Middle Ages."[174] Pre-modern civilization ascribed to "a person . . . a distinct, unchangeable, and unquestionable place in the social world from the moment of birth . . . rooted in a structuralized whole," such that "life had a meaning which left no place, and no need, for doubt."[175] In particular, a "person was identical with his role in society; he was a peasant, an artisan, a knight, and not an individual who happened to have this or that occupation."[176] Moreover, the "social order was conceived as a natural order, and being a definite part of it gave man a feeling of security and of belonging. There was comparatively little competition" prior to the establishment of the money economy.[177] Previously, one "was born into a certain economic position which guaranteed a livelihood determined by tradition, just as it carried economic obligations to those higher in the social hierarchy."[178] Accordingly, this Article glosses the normative ancient psychology as that of the conformist.

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[172] *Id.* at 1480.
[173] ERICH FROMM, ESCAPE FROM FREEDOM 40 (Rinehart & Co. 1963) (1942).
[174] *Id.* at 41.
[175] *Id.*
[176] *Id.* at 41–42
[177] *Id.* at 42
[178] *Id.*

Paradoxically, the conformist enjoyed the individuality that posed no threat to the established order. Within "the limits of his social sphere the individual actually had much freedom to express" himself "in his work and in his emotional life."[179] Although "there was no individualism in the modern sense of the unrestricted choice between many possible ways of life (a freedom of choice which is largely abstract), there was a great deal of concrete individualism in real life."[180] By the nineteenth century, the concrete individualism in real life would take on a different valence.

For example, the development "of individuality in pre-modern . . . times" appeared in works of literature.[181] Unique characterization sometimes bordering on the grotesque was entertaining as in the Renaissance relation of the Anglo-Catholic pilgrims by Geoffrey Chaucer.[182] By then, ancient notions of order had established "the great lord's lifestyle" centered on "his household, and at the root, household peace based on personal ties, in which the behavior of each individual was both transparent and predictable to others."[183] Nevertheless, "self-consciousness did . . . exist" such that Chaucer's "major characters take . . . pleasure in private/individual life[.]"[184] Star-crossed lovers such as Troilus and Criseyde were among the "Medieval men and women" who "sought out their privacy in public."[185] While conformity still reigned in terms of social status, personal romance was irrepressible.

Ironically, individual conduct was to become so important in nineteenth-century Western Europe that it had to be regulated.[186] In the ancient epoch, individual dalliances would have been less important than the enduring role of the peasant as long as he retreated to the farm at the end of the day.

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[179] *Id.*

[180] *Id.* at 42.

[181] Denise Ming-yueh Wang, *Loci of Solitude: The Idea of "Pryvetee," in Chaucer*, 5 WENSHAN REV. LIT. & CULT. 99, 104 (2011) (citing Jacob Burckhardt, THE CIVILIZATION OF THE RENAISSANCE IN ITALY (1860)).

[182] *See* Geoffrey Chaucer, Canterbury Tales (1471), *reprinted in* THE COMPLETE WORKS OF GEOFFREY CHAUCER (Walter W. Skeat ed., Oxford, Clarendon Press 2d ed. 1899).

[183] Wang, *supra* note 181, at 104.

[184] *Id.* at 101.

[185] *Id.* at 116.

[186] *See e.g.*, MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 31 (Robert Hurley trans., Pantheon Books N.Y. 1978) (1976) (discussing the nineteenth-century French case of the "pettiness" of "a few caresses" bestowed by "a little girl" on a "simple-minded" farm-hand who became "the object . . . of a judicial action, a medical intervention, a careful clinical examination, and an entire theoretical elaboration.").

c. *Homo Economicus*

In the Industrial Revolution, conformity to ascribed roles would give way to individualism. While the peasant's personal motives had been less important than his station in the feudal order, the modern psyche would become that of the striving worker. The self-actualized individual experienced "the craving for fame and success and the drive to work" which "are forces without which modern capitalism could not have developed; without these and a number of other human forces man would have lacked the impetus to act according to the social and economic requirements of the modern commercial and industrial system."[187] Previously, "this striving which to-day seems so natural was little present in man of the medieval society" when ascribed status would have precluded advancement.[188] Then a new mentality evolved.

The modern era would bring forth an individual actualized by his own reason. Then the industrial epoch meant that the "more the middle class succeeded in breaking down the power of the former political or religious rulers, the more men succeeded in mastering nature, and the more millions of individuals became economically independent, the more" one came "to believe in a rational world and in man as an essentially rational being."[189] The subject of modern psychology would be a rational actor.

Under capitalism, the rational actor was motivated by self-interest. According to the eighteenth-century Scottish political economist, "the butcher, the brewer, or the baker" prepare the components of "our dinner . . . from their regard to their own interest" as tradesmen, not due "to their humanity" that might impel them to fulfill "our necessities."[190] The neo-classical economists clarified that the rational actor was one aspect of the "same man" considered "as a *homo economicus* for an economic study," who "may be considered as a *homo ethicus* for a moral study, as a *homo religiosus* for a religious study, etc."[191] Nevertheless, the psychology of the *Homo economicus* would engulf the modern economy.

The rational actor persisted for two centuries of modernity. The analytic assumption that humans act as cost-benefit computers who optimize their consumer (or producer) choices became rhetorically

[187] FROMM, *supra* note 173, at 11.
[188] *Id*. at 10.
[189] *Id*. at 5.
[190] ADAM SMITH, THE WEALTH OF NATIONS bk.1, ch. 2, ¶ 2 (R.H. Campbell et. al. eds., Liberty Classics 1981) (1776).
[191] VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY 12-13 (Ann S. Schweir & Alfred N. Page eds., Ann S. Schweir trans., Augustus M. Kelley Publishers 1971) (1906).

pervasive if statistically unproven. It was not until 2002 that an academic psychologist garnered the Nobel Prize in economics for pointing out, among other phenomena, the "biases of intuition" that make us "prone to overestimate how much we understand about the world and to underestimate the role of chance in events."[192] After a couple of centuries, *Homo economicus* was devolving.

d. Narcissist

Whereas the Industrial Revolution championed rationality, however improbable, late capitalism would bring individualism to an emotional extreme. "Having overthrown feudalism and slavery and then outgrown its own personal and familial form, capitalism has evolved a new political ideology, welfare liberalism, which absolves individuals of moral responsibility and treats them as victims of social circumstance," according to a late twentieth-century American social historian.[193] Beyond conformity and rationality, this high-tech version of capitalism "has given rise to a new . . . narcissistic culture of our time, which has translated the predatory individualism . . . into a therapeutic jargon that" justifies "self-absorption as 'authenticity[.]'"[194] In "business corporations . . . professional advancement" has "come to depend less on craftsmanship or loyalty to the firm than on 'visibility,' 'momentum,' personal charm, and impression management."[195] That is, the "dense interpersonal environment of modern bureaucracy" appears "to elicit and reward a narcissistic response—an anxious concern with the impression one made on others, a tendency to treat others as a mirror of the self."[196] With respect to public life, the "narcissist divides society into two groups: the rich, great, and famous on the one hand and the common herd on the other."[197] Then the narcissist worships "heroes only to turn against them when" they disappoint him.[198] This caustic diagnosis applies when post-modern psychology has supplanted natural, social, and economic facts.

Political psychology confirms the desuetude of rational self-interest, if only as an ideology. Empirically, "decades of research on public opinion

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[192] DANIEL KAHNEMAN, THINKING: FAST & SLOW 4, 14 (2011).
[193] CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS 218 (2018).
[194] *Id.*
[195] *Id.* at 239 (afterword).
[196] *Id.*
[197] *Id.* at 83.
[198] *Id.*

have led to the conclusion that self-interest is a weak predictor of policy preferences."[199] Instead, "people care about their groups, whether those be racial, regional, religious, or political."[200] Thus, political "opinions function as 'badges of social membership.'"[201] Whereas the modernist era would have taken pride in a cold calculus, the narcissist culture ironically would retreat to primeval instinct. In this sense, the post-modern combined the worst of individualism and collectivism. The narcissist could be sure of personality but not agency, yielding to the lowest common denominator. Through evolution, the pro-social had become more of an instinct than the rational, inasmuch as reputation "was more important for our ancestors' survival" than "truth."[202] The current rise of populism around the globe is not inconsistent with this turn.[203] Uneven development brings psychology to a full circle.

This psychology can help explain public opinion on the wealth tax. A generation or so ago, a U.S. presidential candidate proposed to increase taxation of inherited wealth.[204] Then the widespread reaction was opposition to the proposal, resulting in popular resistance to a proposed "tax on the wealthiest minority of citizens."[205] This policy preference against self-interest confounded commentators. A renowned tax law scholar wrote ironically: "The only convincing explanation that has occurred to me for this phenomenon lies in the optimism of the American people. In California, at least, sixty four percent of the people must believe that they will be in the wealthiest five to ten percent when they die."[206] Another respected legal economist responded that people's "intuitions may well favor the careful bequest saver over the conspicuous spender, and they may feel that inheritance is a natural and salutary process, at least within very wide ranges."[207] Instead of narrow self-interest, the policy opposition to the proposed tax may have represented not the belief of any particular voter that she would be among the wealthiest, but rather that she could identify with someone who was. Sociologists would call this one of the "contemporary

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[199] HAIDT, *supra* note 73, at 85.
[200] *Id.*
[201] *Id.*
[202] *Id.* at 83.
[203] *See generally* STEVEN LEVITSKY & DANIEL ZILBLATT, HOW DEMOCRACIES DIE (2018) (discussing the rise in authoritarian governments around the world).
[204] Graetz, *supra* note 9, at 285.
[205] Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation,* 104 YALE L.J. 283, 365 (1994).
[206] Graetz, *supra* note 9, at 285.
[207] McCaffery, *supra* note 205, at 329 n.170.

and topical illustrative examples of false consciousness."[208] In any case, this policy preference was not that of the rational actor.

When the social critic adopted the term, narcissism was a prophetic pronouncement of American decadence.[209] Professor Lasch lamented that "a theatrical conception of politics" as "a new mode of self-dramatization" had "driven more rational conceptions from the field."[210] Now it has reached the highest office in the land.[211]

2. Ideology

Parallel to the psychology of the savage, conformist, rational actor, or narcissist would be the corresponding ideology of the time. Each epoch's form of social representation would offer superstructure to the band, tribe, state, or autonomous polity. The four ideologies are totemic, feudal, capitalist, or utopian, derived from ethnology, history, economics, and philosophy, respectively.

a. Totemic

Ethnologists gave "the name of totemism" to a meaningful phenomenon.[212] As adopted by the nineteenth-century French sociologist, totemism lies between "the human individual and the physical world," like "some other reality" or a "variety of delirium which" is "religion . . . in a sense," that "has a significance and an objective value."[213] This "elementary form of the religious life" consists of the "representations which express" the ways of action imposed by society "within each of us" at a level of "intensity which no purely private states of consciousness could ever attain;

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[208] Steven Lukes, *In Defense of "False Consciousness,"* 2011 UNIV. CHI. LEGAL F. 19, 25 (citing MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (Princeton Univ. Press 2005)).

[209] *See* R.Z. Sheppard, *The Pursuit of Happiness*, TIME (Jan. 8, 1979) http://content.time.com/time/subscriber/article/0,33009,919972,00.html (reviewing Lasch's book like the word of "a biblical prophet").

[210] LASCH, *supra* note 193, at 83.

[211] *See e.g.*, Greg Sargent, *Trump's Narcissism Is Endangering His Reelection. His Own Advisors Admit It*, WASH. POST (Apr. 10, 2020, 7:24 AM), https://www.washingtonpost.com/opinions/2020/04/10/trumps-narcissism-is-endangering-his-reelection-his-own-advisers-admit-it [https://perma.cc/J5PC-H7V8]; René Reich-Graefe, *supra* note 3, at 414; Justin A. Frank, TRUMP ON THE COUCH: INSIDE THE MIND OF THE PRESIDENT (2018).

[212] EMILE DURKHEIM, ELEMENTARY FORMS OF THE RELIGIOUS LIFE 107 (Joseph Ward Swain trans., George Allen & Unwin Ltd. 1915) (1912).

[213] *Id.*

for they have the strength of the innumerable individual representations which have served to form each of them."[214] Through totemism it "is society who speaks through the mouths of those who affirm" the social institutions; "and the voice of all has an accent which the voice of one alone could never have."[215] Thus, "it is in the midst of these effervescent social environments and out of this effervescence itself that the religious idea seems to be born."[216] Psychologists now can locate the seat of "Durkheim's collective sentiments" in "mirror neurons" which are perfectly suited for "the emotional 'electricity' of collective effervescence."[217] Typically an animal symbolic of the band, the totem became the visible realization of the social organism.

b. Feudal

In agrarian civilization, the peasant toiled under a belief system that could ultimately be characterized as feudal. Social and psychological conformity were enforced by "[e]xtra-economic coercion of a military-political character" that was "freely utilized by the patrician oligarchies who came to rule the medieval towns" as in thirteenth-century Italy.[218] These "armed expeditions" were typical of "the structural *fusion* of economy and polity that defined the feudal mode of production[.]"[219] In the feudal epoch, conformity was mandatory.

Conversely, deviation was intolerable. Especially when "catastrophe" struck "the ancient world," "angry or anxious peoples have . . . repeatedly vented their negative emotions on the odd, the idiosyncratic, and the statistically deviant."[220] Specifically, "in the collapsing and insecure Rome of the sixth century or Paris in the later fourteenth, any deviation from the norm took on a sinister and alarming mien and was viewed as part of the constellation of evil forces bringing about the destruction of the familiar world order."[221] On the other hand, in "the vibrant Rome of the first century or the bustling Paris of the twelfth, Jewish or gay nonconformists apparently

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[214] *Id*. at 238.
[215] *Id*.
[216] *Id*. at 250.
[217] HAIDT, *supra* note 73, at 273.
[218] ANDERSON, *supra* note 60, at 192.
[219] *Id*. In contemporary agrarian society, "vertical dyadic" or "patron-client ties" may override class conflict. Fernando Nakpil Zialcita, Kinsmen and Voluntary Associations in Two Ilocano Communities 130 (Dec. 1984) (Ph.D. dissertation, University of Hawaii), *microfilmed on* Dissertation Abstracts Int'l No. DAI-A 47/07 (Univ. Microfilms Int'l).
[220] BOSWELL, *supra* note 47, at 28, 38.
[221] *Id*. at 38.

struck their contemporaries as part of the variegated fabric of life, contributing their distinctive portions to a happy whole".[222] Evidently, individuality was condoned when there was no threat to the status-based order discussed above. In the end, the hierarchical ideology could be enforced physically by the feudal lords.

c. Capitalist

The past couple of centuries have witnessed a neo-classical celebration of the triumph of mechanized industry over the natural environment. In particular, the "affluence of Western man is a . . . unique phenomenon" since he broke "loose from the shackles of a world bound by abject poverty and recurring famine" to realize "a quality of life which is made possible only by relative abundance."[223] Moreover, "[a]fter 1945" the West was contradistinguished from the East in "a world seemingly divided into two camps, one led by the USSR, one by the United States."[224] In the latter, "mass markets offered endless potential for growth and appealed to all Americans."[225] Collaterally, mass consumerism "spawned some important grassroots, democratic political action, most notably the civil rights movement that began as a drive for access to public—often commercial—accommodations in the North right after World War II."[226] Then activists argued that if "citizens had a patriotic responsibility to consume . . . denying them was a violation of both a free market and a free society[.]"[227] Thus, capitalism culminated in mass consumerism in a free market of ideas.[228]

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[222] *Id.*
[223] DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY 1 (Cambridge Univ. Press 1973).
[224] ROBERTS, *supra* note 42, at 829.
[225] Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America,* 31 J. CONSUMER RES. 236, 238 (2004); *see also* LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 10 (2003) (critiquing "an economy of inexhaustible abundance").
[226] Cohen, *supra* note 225, at 239.
[227] *Id.*
[228] *See* Kevin Boyle, *THE UAW AND THE HEYDAY OF AMERICAN LIBERALISM, 1945–1968*, at 61 (2nd ed. Cornell Univ. Press 2017) (chronicling union labor's endorsement of "mass buying power").

Between the Civil Rights Act of 1964 and the Obama Administration, the American half-century hosted a sort of golden age.[229]

This golden age lasted only so long. Recent economic research shows that during the Reagan Administration in the United States a so-called family man required only "30 weeks of the median weekly wage to afford a three-bedroom house at the 40th percentile of a local market's prices, a family health-insurance premium, a semester of public college, and the operation of a vehicle."[230] By the time of the Trump Administration, the wages needed in weeks' worth "had increased to 53—a full-time job was insufficient to afford these items, let alone the others that a household needs."[231] At the crest of capitalism, "a male full-time worker" could "meet the major costs of a typical middle-class household[,]" but "now he cannot."[232] The triumph of capitalism has come and gone.

d. Utopian

Next, this Article glosses the post-modern ideology as utopian. The various political philosophers who envisioned the withering of the state into a minimal form, discussed above, offer the utopian yet foggy view.[233] One version of this view may have emerged in the late-twentieth century as the shortcomings of American capitalism continued to become manifest. Then the activists who protested those shortcomings "believed they were putting into place a sophisticated neo-Marxist politics" yet "their activity most clearly resembled that of [seventeenth-century] American Protestant sects who imagined themselves as congregations of visible saints in a sinful world."[234] While their ideology may have been internally inconsistent, the

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[229] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *see also* CHRISTOPHER CALDWELL, AGE OF ENTITLEMENT: AMERICA SINCE THE 60S, at 23 (2020) (critiquing "a vanished golden age of harmony between whites and blacks").

[230] Oren Cass, MANHATTAN INST., THE COST-OF-THRIVING INDEX: REEVALUATING THE PROSPERITY OF THE AMERICAN FAMILY 4 (2020), https://media4.manhattan-institute.org/sites/default/files/the-cost-of-thriving-index-OC.pdf [https://perma.cc/J4ZQ-2KU2]. Harking back to a patriarchal ideal, "Seventy-two percent of men and 71% of women say that the ability to support a family financially is very important for a man to be a good husband, compared with 25% of men and 39% of women saying the same about being a good wife." *Id.* at 17 (citing Kim Parker & Renee Stepler, *Americans See Men as the Financial Providers, Even as Women's Contributions Grow*, PEW RSCH. CTR. (Sept. 20, 2017), https://www.pewresearch.org/fact-tank/2017/09/20/americans-see-men-as-the-financial-providers-even-as-womens-contributions-grow [https://perma.cc/YAP3-7WA7]).

[231] *Id.*

[232] *Id.* at 17, 19.

[233] *See* NOZICK, *supra* note 128, at 298.

[234] Judis, *supra* note 82, at 17.

activists identified the problems in the oppression and profiteering of the past, modeling a solution in the collective effervescence that transcends history. Idealism, even if naïve, may be the stuff of institutional imagination.[235]

D. TAX

The four developmental stages help analyze taxation in a few dimensions. Before proceeding to tax policy in Part III, this Subpart introduces the underlying theory of taxation and type of taxpayer relative to the economic psychology commensurate with each stage. From here, the final issue is which base matches the stage of taxation and economic development.

1. Theory of Taxation

The barter, market, money, or informational economy at each developmental stage corresponds to a form of taxation. Before discussing the specific elements of tax policy per se, especially the base as well as the rates, credits, deductions, or other provisions in Part III below, this passage proceeds with an overall characterization of the four styles of revenue collection (and implicitly, appropriation). Inasmuch as the earlier stages may not have imposed tax as such, the characterization is necessarily broad. Rather, taxation would be an aspect of the economy in a band, tribe, state, or self-determined polity under customary, natural, contractual, or institutionally imaginative law. The corresponding theory of taxation would be reciprocal, tributary, fiscal, or biotechnic, as derived from economic anthropology and sociology.

a. Reciprocal

Foraging for subsistence, the hunter or gatherer would not have experienced taxation as such. Instead, whatever food the forager collected was shared by the band. In classic ethnographic examples such as those in Western Melanesia or the Trobriand Islands, the basis for what would become taxation was "provided in the main by two principles of behavior

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[235] *See, e.g.*, Shirin Ebadi, *I Thought the Iranian Revolution Would Bring Freedom: I was Wrong*, WASH. POST (Feb. 25, 2020), https://www.washingtonpost.com/opinions/2020/02/25/i-thought-iranian-revolution-would-bring-freedom-i-was-wrong [https://perma.cc/57YM-Q3PB] ("In our idealism, we were naive enough to think that the cleric Ruhollah Khomeini was the man to make our dreams come true."); *see also* SAÏD SAYRAFIEZADEH, WHEN SKATEBOARDS WILL BE FREE: A MEMOIR (2009) (recounting 1970s boyhood in an Iranian-American socialist scholar's family).

not primarily associated with economics: reciprocity and redistribution[.]"[236] Membership in a society, however small, was a reciprocal concept.

b. Tributary

Agrarian civilization brought the conquest of arable land on which the production of crops took place. By the second millennium, B.C.E. Scriptural sources confirm the imposition of tax laws such as the "law concerning the land in Egypt . . . that a fifth of its produce belongs to Pharaoh."[237] "We do not know if the Egyptians invented tribute, but they were operating a fairly advanced tribute system long before the time of Moses[.]"[238] Peasants supported the original kingdoms to which they paid tribute.

c. Fiscal

Leading into the industrial economy, the tax law expanded from an instrument for the support of the tribe into a policy tool. In 1918, the Austrian economist wrote that it was "not merely that economic policy has, up to the turn of the century, been motivated primarily by fiscal considerations: exclusively fiscal motives, determined, for example, the economic policy of Charles V" that "led in England up to the sixteenth century to the domination of foreign merchants under the protection of the state[.]"[239] Since the Holy Roman Empire, fiscal pressure "created economic forms, human types, and industrial situations which would not have grown in this manner without it."[240] Thus, the "tax state" was a creature of "fiscal sociology."[241]

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[236] POLANYI, *supra* note 17, at 49.

[237] *Genesis* 47:26 (New International).

[238] CHARLES ADAMS, FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION 38 (First Madison ed. 2001); *see also* AARON B. WILDAVSKY & CAROLYN WEBBER, A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD 39 (1986).

[239] JOSEPH A. SCHUMPETER, THE CRISIS OF THE TAX STATE (1918), *reprinted in* THE ECONOMICS AND SOCIOLOGY OF CAPITALISM 99, 101 (Richard Swedberg ed., Princeton Univ. Press 1991).

[240] *Id.*

[241] *Id.*

d. Biotechnic

For the post-modern stage of taxation, "biotechnic" is a term from the prophetic sociology of the urban planner on the eve of World War II.[242] "Under the biotechnic economy . . . [i]nstead of wages and income directing market demand, vital demand determines level of income and directs production into socially useful channels."[243] For instance, in "terms of housing, the minimum standards are set by objective criteria of air, water, sunlight, heat, privacy, and so forth[.]"[244] While traditional tribute and then the modern fiscal state had distanced tribes and nations from both their natural and economic needs, the biotechnic policy would return taxation to the organic standards of living within the post-industrial economy. "Where such standards have been set to a greater or less degree . . . one of two things must happen: either incomes in industry will rise to the necessary level, or the state will tax the larger incomes and make the re-apportionment directly in the form of subsidies[.]"[245] Conceived during the industrial era, the biotechnic policy rose "[a]gainst the wasteful duplication of mechanical equipment, the aimless productivity," and "the random expansiveness of production under pecuniary canons of success[.]"[246] Instead, "the biotechnic economy erects rational goals" which are "the best possible environment for human nurture and culture: the primacy of consumptive and creative activities over the instrumental processes" and "the denial of 'success' embodied in the destructive facilities of war and the mounting certificates of debt which mark the prevalence of a pecuniary economy."[247] The biotechnic policy anticipates the advance of peacetime engineering over the money economy, discussed above. These goals would befit the rationality of the philosopher-king.

At the same time, the biotechnic vision predicted the arrival of the intellectual worker. "Whereas the pecuniary economy expanded the rôle of the machine," high technology would allow "the biotechnic economy" to enlarge "the rôle of the professional services: a greater proportion of the income and free energy go into the support of the artist, the scientist, the architect and technician, the teacher and physician, the singer, the musician, the actor."[248] Previously, the capitalist ideology had touted the triumphs of

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[242] LEWIS MUMFORD, THE CULTURE OF CITIES 461 (Harvest/HJB 1970) (1938).
[243] *Id.*
[244] *Id.* at 462.
[245] *Id.* at 463.
[246] *Id.*
[247] *Id.*
[248] *Id.* at 465.

abundance and affluence, or "conspicuous consumption" by the property owners at least.[249] Going forward, the biotechnic utopia would be relatively egalitarian if less glamorous and even potentially mediocre.

As quoted above, the biotechnic theory envisions redistribution through a progressive income tax. Critics may argue that progressive taxes, especially those on wealth, would "hit at work and savings and induce consumption, especially the large-scale, distortionary consumption of the very wealthy."[250] Paradoxically, the specific policy design could undermine the theory or intent of the tax.

2. Taxpayer

The reciprocal, tributary, fiscal, or biotechnic tax system each comes with a characteristic type of taxpayer whose attitude is sylvan, conformist, rational, or narcissistic. Whether the taxpayer fits into the respective role of forager, peasant, wage worker, or information contractor affects the level of collection compliance achieved in the band, tribe, state, or autonomous polity under the rule of customary, natural, contractual, or institutionally imaginative law. The corresponding taxpayer personae are those of the giver, sharecropper, dependent, or digital customer, derived from economic anthropology.

a. Giver

The hunter or gatherer who catches food or related goods must be prepared to share with the band. As an incentive, to give "is a point of honor" as in the classic ethnographic case of "the potlatch of the Kwakiutl" where the big-man would "display his wealth of hides and to distribute them; but he does this also in order to place the recipients under an obligation" of reciprocity.[251] If the incentive does not work, there is a customary form of enforcement. "Acutely aware of how divisive and potentially dangerous status-striving and self-aggrandizing tendencies" such as those of big-men "can be, hunter-gatherers almost everywhere are known for being fiercely egalitarian . . . for reflexively shunning, humiliating, even ostracizing or executing those who behave in stingy, boastful, or antisocial ways."[252] For example, "[i]nsulting the meat is one of the central practices of the Ju/'hoansi that serves to maintain

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[249] THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 60–61 (ROUTLEDGE 2017) (1899).
[250] McCaffery, *supra* note 205, at 365.
[251] POLANYI, *supra* note 17, at 53.
[252] HRDY, *supra* note 13, at 20.

egalitarianism."[253] By verbally down-playing the magnitude of the catch, the Namibian band minimizes "the tendency toward self-praise" by "some men [who] are much better hunters than others," molding "their behavior . . . to channel their energies into socially beneficial activities."[254] Behavioral economists could learn from the carrot & stick method that prompts hunters to be givers.

b. Sharecropper

Historically, the peasant who tilled the soil did so under various forms of serfdom or debt peonage lately known in nineteenth-century America as sharecropping.[255] The model was instituted eight centuries earlier in Western Europe when "serfs [who] had juridically restricted mobility" were subject to "extra-economic coercion, taking the form of labour services, rents in kind or customary dues owed to the lord by the peasant[.]"[256] The extraction of tribute in kind was an intrinsic imperative of feudal lords on both sides of the Atlantic where the appropriation of crops took place on the plots of those who grew them. Although a sharecropper now may work for a private landlord, this Part of the Article adopts the term to characterize the role of the peasant who pays tribute to an agrarian state.

c. Dependent

In the modern bureaucratic state, the wage worker was to become a creature of the money economy. Then "any economically productive" yet "poor person . . . is surrounded by dependents who must be supported."[257] Their "dependency . . . creates a disincentive to work and degrades human capital . . . , is a drag on productivity, and it makes workers unable to be economically active" or "to search for better jobs." In turn, the poor worker falls victim to "passivity," unable to engage in "entrepreneurship and risk-taking."[258] This passive worker becomes the "wage slave" who by default pays tax through withholding, the key to compliance with the modern income tax.[259] To the extent that it offers a "safety net," the fiscal state takes

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[253] RICHARD B. LEE, THE DOBE JU/'HOANSI 57 (4th ed. 2013).
[254] *Id.*
[255] THE READER'S COMPANION TO AMERICAN HISTORY 838 (Eric Foner & John A. Garraty eds., 1991).
[256] ANDERSON, *supra* note 60, at 147.
[257] JAMES FERGUSON, GIVE A MAN A FISH: REFLECTIONS ON THE NEW POLITICS OF DISTRIBUTION 29 (Duke Univ. Press 2015).
[258] *Id.*
[259] *See* Graeber, *supra* note 92, at 69; *see also* I.R.C. § 3402.

on the poor worker as a dependent.[260] To be clear, this gloss is a metaphor of economic anthropology, not the statutory term for the household member for whom the federal Internal Revenue Code historically allowed a personal exemption deduction.[261] The wage worker is a hapless dependent as the passive object of both fiscal extraction and welfare appropriation.

d. Digital Customer

In the post-modern era of biotechnic taxation, the taxpayer's ability to pay as well as standard of living would be the object of information technology. Taking the dependent taxpayer's persona one step further, the contractor's receipts and expenses logically would reduce to a digital profile of the producer-*cum*-consumer. This reductive profile would bring to a culmination, beyond the fiscal state, what had been conceived as the exercise of pan-optic surveillance in the eighteenth-century Kingdom of England.[262] The deployment of bureaucratic control through information would come through historic developments. In antebellum America, commercial reporting firms pioneered the information collection that would become the twentieth-century consumer credit score as the numerical index of "financial identity" especially among impecuniary borrowers.[263] Subsequently, financial anthropologists would ethnographically describe among American business dynasties "the complex world of highly specialized expertise" that "through an elaborate division of labor . . . created doppelganger facsimiles" of heirs' identities "variously constituted as clients, beneficiaries of trusts, wealth shares in computerized strategies of investment, and accountants' files[.]"[264] Nowadays another iteration of financial identity has become common when the taxpayer's disembodied digital persona is subject to "identity theft."[265] These epistemological and algorithmic developments lead to the digital identity of the taxpayer.

Now the biotechnic hypothesis would render the digital taxpayer as both producer and consumer. In the Restructuring & Reform Act of 1998 ("RRA"), the U.S. Congress mandated the Internal Revenue Service ("IRS") to train employees in "customer service," thereby denominating the

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260 FERGUSON, *supra* note 257, at 29.
261 *See* I.R.C. § 152.
262 *See* MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 195 (Alan Sheridan trans., 1995).
263 *See* JOSH LAUER, CREDITWORTHY: A HISTORY OF CONSUMER SURVEILLANCE AND FINANCIAL IDENTITY IN AMERICA 29–50 (2017).
264 MARCUS & HALL, *supra* note 154, at 145.
265 *See* I.R.S. Pub. 5199 (Rev. 8-2017), https://www.irs.gov/pub/irs-pdf/p5199.pdf [https://perma.cc/LCZ7-7FMS].

taxpayer as a customer.[266] Without intended irony, that legislation adopted the terminology of mass consumerism in the case of the producer.[267] As uneven development progresses, the biotechnic utopianism may overtake the narcissistic consumerism in the financial identity of the digital customer. Accordingly, this Article glosses the post-modern persona of the taxpayer, who may be not only the object of withholding but the beneficiary of refundable credits, as the digital customer.[268]

3. Tax Base

The reciprocal, tributary, fiscal, and biotechnic forms of taxation set the stage for the tax base, or the medium of which an amount allows the measurement of the ability to pay. In barter, market, money, or informational exchange, then consumption, production, income, or wealth respectively appeared as economic results. At each stage, the particular base was not the exclusive source of revenue, but it distinguished the level of development. This was what the giver, sharecropper, dependent, or digital customer could contribute to society. Successively, the tax laws would incorporate combinations of these measures.

a. Consumption

When the mode of subsistence was foraging for food, consumption would have been the only economic measure. The practice of barter would not have facilitated the realization of "gain and profit made on exchange" which until the establishment of the pecuniary market "never before played an important part in human economy."[269] Instead, the sharing of food may have been a natural consumption tax.

b. Production

Civilizations arose when the farming of staple crops could feed large populations. Recently, anthropologists have confirmed that the "unique characteristics" of "cereal grains," namely visibility, susceptibility to storage, and divisibility, all contributing to collectibility, made them "the

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[266] *See* Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1205(b)(1), 112 Stat. 722.

[267] The RRA was "the only direct accomplishment of [Speaker of the House] Gingrich's Contract for America and its attacks on the IRS." W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY 214 (2d ed. 2004).

[268] *See* I.R.C. §§ 31–37 (refundable credits).

[269] POLANYI, *supra* note 17, at 45.

major tax commodity essential to early state building."[270] Economic historians agree that while "all archaic kingdoms made use of metal currencies for the payment of taxes[,]" they "relied for the rest on payments in kind from granaries and warehouses of every description, from which they distributed the most varied goods for use and consumption mainly to the nonproducing part of the population," namely, "to the officials, the military, and the leisure class."[271] Throughout the ancient world, this "was the system practiced in ancient China, in the empire of the Incas, in the kingdoms of India, and also in Babylonia. Under feudal conditions also this principle held".[272] That is, the in-kind payment of tax mostly took the form of agricultural products, meaning the base of the tax would have been production.

c. Income

The taxation of agricultural commodities laid the foundation for the income tax, perfected in the industrial age. After all, when "the Romans and Egyptians took a percentage of the harvest, they were taxing income, except they taxed the estimated gross production; there were no deductions for costs and expenses and no allowances for a bad harvest."[273] Gradually, the emergence of the money economy and money taxes made possible the "fixed residences of princes, which require centralization . . . for taxes paid in kind cannot be transported and they are appropriate only to a wandering court which consumes them as it goes."[274] Consequently, "modern tax policy tends to leave taxes on real property to local authorities, and to reserve income tax for the state."[275] Income taxation focused "the tax demands of the central power upon the money income of the individual," grasping "precisely the kind of property with which it has the closest relation."[276] By 1404, Britain had imposed a "late medieval" version of the income tax, later reinstated "as a war tax measure to meet the terrible fiscal demands" of the Napoleonic Wars.[277] The 1803 law included a "form of income tax withholding" which later travelled from the Mother Country to

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[270] JAMES C. SCOTT, AGAINST THE GRAIN: A DEEP HISTORY OF THE EARLIEST STATES xiii (Yale Univ. Press 2017).
[271] POLANYI, *supra* note 17, at 54.
[272] *Id.*
[273] ADAMS, *supra* note 238, at 449.
[274] SIMMEL, *supra* note 106, at 186.
[275] *Id.*
[276] *Id.*
[277] ADAMS, *supra* note 238, at 450.

North America.[278] In short, income taxation developed in parallel to the industrial state.[279]

d. Wealth

The measurement of wealth, as distinct from production, became possible after the proliferation of agriculture made landownership an essential element of property in the economy. Ancient land taxes set the precedent for the wealth taxes that proliferated in the twentieth century.

When the differentiation of society afforded private ownership of arable land, that became the measure of ability to pay. Until then, as in ancient Egypt most "agricultural land was owned by the state and leased out to peasant farmers subject to the harvest tax, which was not based on the actual production but on what the production should be."[280] Subsequently, "the coming of commodity production[,]" at first in livestock among the ancient Greeks, led individuals "to cultivate the soil on their own account, which soon led to individual ownership of land."[281] Then the land tax became "one of the most ancient forms of taxation in both Europe and Asia, and up to the early part of this century it still provided the principal source of revenue in the countries of the Middle East, India and Japan" where agricultural production prevailed.[282] In the agrarian economy which imposed it, the land tax functioned as a wealth tax.

Through the fourth century B.C.E., the Athenian democracy imposed a war tax on real property that would have had the effect of a wealth tax.[283] Similar in principle to today's federal voluntary assessment,[284] "the city required the man of wealth to submit an estimate of his assets' value for purposes of the *eisphora*" war-tax.[285] According to classicists, the "wealthy had little difficulty in concealing the value of their assets from the public"

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[278] Ajay K. Mehrotra, *From Contested Concept to Cornerstone of Administrative Practice: Social Learning & the Early History of U.S. Tax Withholding*, 7 COLUM. J. TAX L. 144, 153 (2016).

[279] *See generally* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS & THE RISE OF PROGRESSIVE TAXATION, 1877–1929 (Cambridge Univ. Press 2013); *see also* ADAMS, *supra* note 238, at 450–51.

[280] ADAMS, *supra* note 238, at 33.

[281] OFPP&S, *supra* note 119, at 175.

[282] Nicholas Kaldor, *Will Underdeveloped Countries Learn to Tax?*, 41 FOREIGN AFF. 410, 413 (1963).

[283] ADAMS, *supra* note 238, at 125–26.

[284] *See* Treas. Reg. § 20.6011-1 (general requirement of return, statement, or list).

[285] Matthew R. Christ, *Liturgy Avoidance & Antidosis in Classical Athens,* 120 TRANS. AM. PHILOLOGICAL ASS'N 147, 158 (1990).

especially by converting "to cash" their "land and other real property[.]"[286] Nonetheless, "the state's future claims" on his property to pay the tax made personal "extravagance on the part of a wealthy man . . . an offense against the city."[287] The suspicion of evasion and perception of extravagance continue to animate the wealth tax debate discussed below.[288]

From the second century B.C.E., the Sinhalese kingdom that became Sri Lanka imposed a tax on land, which would have been the applicable measure of wealth in the agricultural economy.[289] Then there was the "maral" tax to be paid at death.[290] Ancient civilization offered these precedents for wealth and transfer taxes.

By the thirteenth century C.E., the Swiss cantons would establish their form of the wealth tax, with which they "have had a continuous experience" since then.[291] For context, Switzerland is a rich country whose Gross Domestic Product ("GDP") is well above average in the European Union ("EU"), the industrial economies of the Organisation for Economic Cooperation & Development ("OECD"), and the nations of the world mentioned in this Article listed in Table 2 below.

In the informational economy, when consumption, production, income, and wealth are all available as measures of ability to pay, jurisdictions around the world impose taxes on various combinations of them. "Taxes on wealth are in effect in most developed countries, although wealth transfer taxes are more common than net wealth taxes."[292] The United States imposes an estate and gift tax that is effectively an excise on the transfer of wealth at death or during life.[293] As listed in Table 3 below, net wealth taxes persist in only a few industrial or agrarian countries. According to commentators, other countries "repealed their wealth taxes" since "they raised little revenue, created high administrative costs, and induced an outflow of wealthy individuals and their money" and arguably

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286 *Id.*

287 *Id.* at 157.

288 *See infra* Pt.III.A.1.

289 *Tax System in Ancient Sri Lanka,* SRI LANKA INLAND REV. DEP'T, http://www.ird.gov.lk/en/about%20IRD/SitePages/Tax%20in%20Ancient.aspx [https://perma.cc/H6YC-2EHA].

290 *Id.*

291 Tanabe, *supra* note 6, at 126.

292 Rebecca S. Rudnick & Richard K. Gordon, *Taxation of Wealth, in* 1 TAX LAW DESIGN & DRAFTING ch. 10, p. 3 (Victor Thuronyi ed., IMF 1996), https://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch10.pdf [https://perma.cc/8P9Q-5MGG].

293 *See infra* Pt.III.B.2.

"damage[d] economic growth."[294] Despite these commentators' concerns, the jurisdictions where wealth taxes remain include rich industrial economies as well as developing nations. Even where net worth is not singled out, wealth is a component of the tax base in countries around the world now that it would no longer be defensible to exclude any particular base.

Table 2. GDP per capita (PPP) & tax ratio (GDP as % of revenue) 2017[295]

Country	GDP ($)	Tax ratio
Afghanistan	1,935	9.25
Australia	49,629	21.92
Austria	53,937	25.35
Belgium	50,221	23.28
Botswana	17,785	22.15
Gr. Britain	45,379	25.45
Brazil	15,662	12.70
Canada	46,723	12.52
China	16,782	9.20[296]
Colombia	14,507	15.19
Denmark	54,283	33.37
Finland	46,735	20.76
Fiji	10,329	24.61
France	42,256	23.81
Germany	52,055	11.47
Greece	28,580	25.97
Iceland	57,303	24.16
India	7,169	11.18
Indonesia	12,279	9.88
Ireland	77,596	18.27
Israel	38,866	24.58
Italy	41,830	23.05

[294] Chris Edwards, *Taxing Wealth & Capital Income,* TAX & BUDGET BULL., Aug. 1, 2019, at 3, https://www.cato.org/sites/cato.org/files/pubs/pdf/tbb85_final_edit.pdf [https://perma.cc/9GPT-7GZZ]; *see also* David G. Duff, *The Abolition of Wealth Transfer Taxes: Lessons from Canada, Australia & New Zealand,* 3 PITT. TAX REV. 71, 73–74 (2005).

[295] *See GDP per capita [Purchasing Power Parity] PPP (current international $)*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD [https://perma.cc/89NY-GZKT]; *Tax Revenue (% of GDP)*, WORLD BANK, https://data.worldbank.org/indicator/GC.TAX.TOTL.GD.ZS [https://perma.cc/4W92-3EBY].

[296] 2016 data (2017 data is not available).

Japan	41,959	11.64
Jordan	9,241	15.03
So. Korea	38,824	15.38
Luxembourg	110,589	25.29
Macao	116,371	28.83
Mexico	19,424	13.05
Namibia	11,104	30.11
Netherlands	54,503	23.10
New Zealand	40,439	27.77
Norway	65,511	22.48
Pakistan	5,242	N/A
Papua N. Guinea	4,353	12.61
Peru	13,771	13.19
Philippines	8,340	14.24
Russian Fed.	25,767	10.26
Saudi Arabia	53,693	3.38
Singapore	96,552	14.19
Solomon Isls.	2,338	27.79
So. Africa	13,438	26.97
Spain	38,889	13.86
Sri Lanka	12,879	12.45
Sweden	51,879	27.60
Switzerland	66,396	10.40
Tanzania	3,090	11.83
Thailand	17,917	14.81
U.S.	59,928	11.76
Uruguay	22,728	19.74
Vanuatu	3,124	17.13
World avg.	17,152	14.66
EU avg.	42,187	20.31
OECD avg.	44,202	15.79

Table 3. Annual net wealth taxes on individuals[297]

Country	Introduced	Repealed
Austria	1954	1994
Colombia	1935	--
Denmark	1903	1997
Finland	1919	2006
France	1982	2017
Germany	1922	1997
Iceland	1970	2015
India	1957	2016
Ireland	1975	1978
Japan	1950	1953
Luxembourg	1934	2006
Netherlands	1914	2001
Norway	1892	--
Pakistan	1963	2003
Spain	1977	--
Sri Lanka	1959	1992
Sweden	1910	2007
Switzerland	1719	--
Uruguay	1964	--

[297] *See* Edwards, *supra* note 294, at 3 tbl.1; OECD, ROLE & DESIGN OF NET WEALTH TAXES 24 tbl.1.1 (2018); Tanabe, *supra* note 6, at 159–66 app.II; L. 1739, diciembre 23, 2014, DIARIO OFICIAL [D.O.] (Colom.); Finance Act, 2015, § 2 (May 14, 2015) (India); Finance Act, No. 1 of 2003, THE GAZETTE OF PAKISTAN EXTRAORDINARY, June 17, 2003; Surcharge on Wealth Tax Act, 1989 (Act No. 8/1989) (Sri Lanka); L. 18,083, Art. 39, enero 18, 2007 D.O. (Uru.).

E. DISCUSSION

As charted in Table 1 above, this Part's exercise of enumerating four developmental stages in a dozen dimensions will be fruitful if it helps envision the future by describing the past and present. One implication of the theoretical framework is that in freedom, there is uncertainty. Whereas the prehistoric, ancient, and modern taxpayers were bounded by their roles as giver, sharecropper, or dependent, today's digital customer is dynamic as both a producer and consumer. In the workplace, the contractor is both a supervisor and employee who seeks to invent technology or at least create techniques. Ties to society and authority that have become more abstract and attenuated leave the narcissist both self-actualized and exposed. Post-modernity represents both opportunity and risk.

Likewise, tax policy presents both opportunity and risk. Rather than oracular, the goal of this Article is probabilistic in terms of identifying probable expectations as well as reasonable aspirations in the informational economy as it continues to develop. To pursue the description of the present, today's taxpayer already has acquired characteristics of the digital customer who, if narcissistic through her acquisitive lifetime, ultimately faces partially effective wealth taxes in the form of the federal estate tax, not to mention local property taxes.[298] Meanwhile, the biotechnic policy begins to take shape in the form of the withholding of tax on income upon production (before actual receipt), mirrored by the refundability of credits for children, earned income, and health coverage.[299] From 2020 to 2029, the cost of these provisions in revenue foregone by the U.S. Treasury will be $581.6, 52.3, and 44.2 billion, respectively.[300] Through these provisions, the somewhat pan-optic tax system automatically measures at least certain aspects of production and consumption.[301] As a policy matter, the tax expenditures have both pros and cons, but either way they offer material for institutionally imaginative legislation that has already started to turn the revenue apparatus into a disbursement system.[302] Thus, the speculative

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[298] *See infra* Pt.III.B. On the "neo-medieval vision" of today's reactionaries, see Katherine Stewart, *The Roots of Hawley's Rage*, N.Y. TIMES, Jan. 17, 2021, at SR-6.

[299] *See* I.R.C. §§ 24(d), 32, 36(b).

[300] *See* OFF. MGMT. & BUDGET, ANALYTICAL PERSPECTIVES BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2021, at 164 tbl.13-2B ll.128, 135, 155 (2020), https://www.govinfo.gov/content/pkg/BUDGET-2021-PER/pdf/BUDGET-2021-PER.pdf [https://perma.cc/V335-BJ69].

[301] *See supra* Pt.II.D.2.d.

[302] *See* Eric A. San Juan, *The Distributive State & the Function of Tax Expenditures*, 71 TAX LAW. 673, 679 (2018).

developmental stage of the post-modern proceeds from a description of the present.

Current events underscore the social-scientific question. This year, the coronavirus pandemic has prompted more tax rebate legislation as a form of relief for the novel influenza patients and related victims, underscoring the unique role of government in response to challenges to the social organism as a whole.[303] Both sides of the aisle have rallied to this sort of legislation at times of crisis, whether natural as in the case of COVID-19, or artificial as in the case of the financial recession of 2008.[304] From 2021 to 2031, the revenue cost of the American Rescue Plan Act will be $584 billion (not to mention the budgetary impact); from 2020 to 2030, the revenue cost of the tax provisions in the Coronavirus Aid, Relief & Economic Security ("CARES") Act and Families First Coronavirus Response Act will be $557 and $105 billion, respectively.[305] From 2009 to 2019, the revenue foregone by the tax provisions in the American Recovery & Reinvestment Act was $326 billion.[306] Nevertheless, it remains unclear that the opposing sides agree on a lasting vision of a polity that offers both stability and autonomy.

Historically, the fiscal state has swollen in times of national emergency, natural disaster, and war. In U.S. history, the federal income tax swelled into a mass tax to fund the American effort in World War II.[307] This became "a marriage of convenience that survived" to support post-War superpower status.[308] While empires have fallen and regimes have changed, the state as an organizational form has not withered away. Probable expectations counter-balance reasonable aspirations.

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[303] *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2 (2021); Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020); Families First Coronavirus Response Act ("Families First Act"), Pub. L. No. 116-127, 134 Stat. 178 (Mar. 18, 2020).

[304] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 134 Stat. 178.

[305] *See* STAFF OF J. COMM. ON TAXATION [JCT], 117TH CONG., ESTIMATED REVENUE EFFECTS OF H.R. 1319, THE "AMERICAN RESCUE PLAN ACT OF 2021" 3 (Mar. 9, 2021); STAFF OF JCT, 116TH CONG., ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 748, "CARES" ACT 2 (Apr. 23, 2020); STAFF OF JCT, 116TH CONG., ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN DIVISION G OF H.R. 6201, "FAMILIES FIRST CORONAVIRUS RESPONSE ACT" 1 (Mar. 16, 2020).

[306] *See* STAFF OF JCT, 111TH CONG., ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN THE CONFERENCE AGREEMENT FOR H.R. 1, AMERICAN RECOVERY AND REINVESTMENT TAX ACT OF 2009 7 (2009).

[307] *See* Carolyn Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685, 686–87 (1989).

[308] I.R.S. Pub. 1694, IRS HISTORICAL FACT BOOK: A CHRONOLOGY 1646–1992, at 135 (1993).

The current pandemic takes place on the world-historic stage. There the underlying transformation due to the twenty-first-century industrialization in the Pacific promises to rival the eighteenth-century Industrial Revolution of the Atlantic as both economically productive and socially disruptive. This shift is superseding the post-World War II bipolarization of the political globe. In response, parties across the continents have retreated to instinctive versions of populism and nationalism.[309] Reportedly, autocrats around the world have seized the opportunity to impose political restrictions alongside the epidemiological quarantine.[310] The news always becomes history.

Now the challenges to the social organism are international, whether natural, political-economic, or both, for instance in the case of climate change.[311] To organize public resources rather than accumulate private wealth as a defense against disaster and civil strife, it may take a philosopher-king who understands that "ethos, thesis, and persuasive rhetoric" may be more effective than a self-interested calculus "to build unity" in the face of "civic crisis."[312] By analogy, those who are prepared for disaster also may be best prepared for healthy peacetime.

III. CONSUMPTION, PRODUCTION, WEALTH & TAXATION

The foregoing Part II of this Article identified the four developmental stages of economic, political, and social dimensions by mode of subsistence, that is consumption and production. The developmental stages are accretions of history in which the successive imposition of tax on consumption, production, income, and wealth formed layers such that legislation now combines aspects of all these bases. Where the paradigm of public finance may yield self-contained propositions, the framework of Part II offers socio-historical grounding.

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[309] *See e.g.*, Michael Birnbaum & Terrence McCoy, *Concerns for Democracy as Leaders Seize New Powers*, WASH. POST, Apr. 13, 2020, at A1.

[310] *See generally* Thomas Hale et al., *Variation in Government Responses to COVID-19,* (Univ. Oxford Blavatnik Sch. Gov't, Working Paper No. BSG-WP-2020/032 version 6.0, 2020).

[311] *See generally* U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: 2 IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES (2018), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf [https://perma.cc/YRY2-K4AV]; *see also* Reich-Graefe, *supra* note 3, at 412, 427, 434.

[312] Michael J. Cedrone, *Cicero & Barack Obama: How to Unite the Republic without Losing Your Head,* 20 NEV. L.J. 1177, 1206–07 (2020); *see also* Jed W. Atkins, *Cicero on the Relationship between Plato's "Republic" & "Laws,"* 117 BULL. INST. CLASSICAL STUD. 15, 26 (2013) ("Plato is able to demonstrate the limits of rationality in human affairs precisely by painting a rational regime which ignores these very limits.").

This Part III addresses the use of consumption, production or income, and wealth as the tax base. That is, the base should be the measure of ability to pay tax. While the base amount is susceptible of economic measurement, the appropriate magnitude of tax may remain a policy value. Historically, income and consumption tax regimes have added wealth components to reflect the ability to pay more completely or more progressively. Now that economists have highlighted the inevitably increasing inequality in wealth, the question of progressivity has sharpened. Nevertheless, the proper rate of progressivity also eludes measurement as a policy value. Instead, this Part will set the economic and policy debate in the broader developmental context.

Recently, economic scholars have presented the issue of inequality in wealth. As a general rule, the rate of return on capital exceeds the growth in the economy, with historic exceptions in the Industrial Revolution and, as of late, the industrialization in China.[313] Logically, "capital tends to reproduce itself and accumulates exponentially."[314] Consequently, "the entrepreneur always tends to turn into a rentier" regardless "of whether the wealth" was originally "inherited or earned".[315] Economists marshalled significant empirical support for this conclusion, which may be contested in kind.[316] However much the amounts may be, capital accumulation naturally leads, if not to "ill-gotten gains" at least to "unjustified wealth" on which "a tax on capital would be a . . . systematic instrument" of correction as a policy matter.[317] In short, the wealth tax has appeared as an imperative of the nature of capital accumulation.

Part III discusses three topics in turn. First comes the economic effect of taxing wealth as opposed to consumption or income. Around the world, the wealth tax complements the income and consumption taxes. Assuming that a developed economy taxes wealth as well as consumption and income, the second topic examines the current mix of wealth, consumption, and income taxes in America and its States to assess the relative merit of direct or indirect wealth tax design. Third, this Part addresses the constitutional debate that has arisen over the recent wealth tax proposals. The wealth tax

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[313] PIKETTY, *supra* note 5, at 563.
[314] *Id.* at 499.
[315] *Id.* at 566.
[316] *See e.g.*, Diana Furchtgott-Roth et al., INCOME INEQUALITY IN AMERICA: FACT & FICTION (Manhattan Inst. 2014) [https://web.archive.org/web/20170310214523/https://economics21.org/files/e21ib_1.pdf]; *see also* ANTI-PIKETTY: CAPITAL FOR THE 21ST CENTURY (Jean-Philippe Delsol, Nicolas Lecaussin & Emmanuel Martin eds., Cato Inst. 2017) (critiquing PIKETTY, *supra* note 5).
[317] PIKETTY, *supra* note 5, at 566.

proposal presumes that the existing income and estate taxes are inadequately progressive. What remains unclear is why legislators would enact a new wealth tax but not tighten the existing federal estate and gift tax. Perhaps wealth could be different from income or inheritance as a matter of public perception.[318]

A. ECONOMIC EFFECTS

This passage discusses three topics. First is a comparison of the inherent incentives of consumption, income, and wealth taxes. Second comes the response to the abstract approach of the micro-economic paradigm, to the effect that the theoretical drawbacks of wealth taxation may not be realistic. Third is a quantitative and qualitative discussion of progressivity. In sum, the wealth tax is neither cancelled theoretically nor resuscitated practically. Whether larger or smaller, wealth is a component of tax policy.

1. Incentives & Disincentives

The pertinent merits of consumption, income, or wealth as the tax base may be compared micro-economically. A consumption or expenditure tax poses no impediment to the "possibility of holding wealth and of leaving an estate" which "no doubt induces some highly paid work[.]"[319] Either "consumption taxes or general income taxes of equal yield" reduce "the possible return on savings" less sharply than wealth taxes "because property income is only a small part of all personal income."[320] Similarly, taxes "on realized income or on consumption expenditure" are more "conducive to investment in growth stocks and similar items" than wealth taxes.[321] Further, a consumption or "expenditure tax seems likely to be less damaging to investment incentives than an income tax unless the latter includes extraordinarily liberal provisions for loss offsets, flexible amortization, and

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[318] *See* Lily Batchelder, *Leveling the Playing Field Between Inherited Income and Income from Work Through an Inheritance Tax*, *in* TACKLING THE TAX CODE: EFFICIENT & EQUITABLE WAYS TO RAISE REVENUE 43, 46 (Jay Shambaugh & Ryan Nunn eds., Brookings Inst. 2020) (distinguishing imposition of taxes on heirs rather than benefactors as a "silver spoon tax"); *see also* Herzig, *supra* note 55, at 1145 (harmonizing elimination of "the estate tax with raising taxes on the income of the wealthy").

[319] Richard Goode, *Income, Consumption & Property as Bases of Taxation*, 52 AM. ECON. REV. 327, 332 (1962).

[320] *Id.* at 328.

[321] *Id.* at 330.

averaging."[322] Regarding these realized investment incentives, both a "tax on consumption expenditures of high-income groups" and a "tax on investment income" may be inferior to a wealth tax.[323] With respect to human capital, which encompasses education, "most expenditure tax" provisions "do not treat the formation of human capital as saving," which "discriminates against this kind of capital formation," as does an income tax that "does not allow costs of education and other outlays that contribute to future earning capacity to be amortized against taxable income."[324] On the other hand, wealth or property taxes "discriminate in favor of human capital inasmuch as the capital value of expected earned income is not considered property."[325] Thus, the received economic logic points to the deleterious effect of wealth taxation.

Further concerns with the wealth tax are as follows. As just discussed, this tax impinges on "the productive work and savings efforts of our wealthiest citizens," as well as on capital investment (except education).[326] Logically, a policy preference for "earnings and savings" but not "excessive private use" means that the tax regime "must allow the rich to pass on their wealth[.]"[327] Otherwise, the taxation of wealth would have the effect of "a transfer from those with a greater propensity to save to those with a greater propensity to consume, thereby lowering the capital stock."[328] These arguments leave little room for wealth taxes.

Neo-classically, these economic postulates reflect their own paradigm. Micro-economically, the rational actor may be subject to marginal behavioral change due to tax incentives or disincentives. Yet the rational actor no longer characterizes the mentality of the current era; and previously, she was an intellectual ephemera.[329] As a practical matter, the concern about reduction of earning, saving, and capital seems less dispositive when rich jurisdictions have long imposed wealth taxes as listed in Table 3 above. Though logical in their own right, the economic disincentives would not cancel the wealth tax as a practical matter.

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[322] *Id*. at 331.
[323] *Id*.
[324] *Id*. at 331–32.
[325] *Id*. at 332.
[326] McCaffery, *supra* note 205, at 364.
[327] *Id*. at 296.
[328] *Id*. at 348.
[329] *See supra* Pt.II.C.1.c.

2. Practical Effects

On its own terms, the foregoing economic logic is subject to criticism. First, the concerns like those above about "labor-to-leisure or saving-to-spending distortions" are logical propositions rather than empirical observations.[330] In fact, "the highest-income taxpayers who produce the lion's share of capital income"[331] empirically appear "to be able to circumvent both existing labor income and consumption taxes with some ease".[332] This criticism resonates with the case of the historic du Pont estate taxpayer discussed above.[333] Thus, "taxing capital income is likely to be one of the best options available for supplementing labor income or consumption taxes in order to raise revenue from the best-off taxpayers."[334] Nonetheless, the criticism seems to be more one of effective enforcement than of accurate measurement of ability to pay.

Likewise, advisors to presidential candidates have pointed to the inadequacy of existing federal income taxation. They say that the federal "income tax simply does not tax all types of income that wealthy people have[,]" especially "asset appreciation . . . in years when assets are not sold[.]"[335] The answer would be, if not "wealth taxation[,]" then "mark-to-market taxation (sometimes known as 'accrual' taxation)" to restore "fairness to the U.S. tax system by preventing the super rich from escaping progressive levels of taxation[.]"[336] Specifically, the concern appears to be the realization requirement of the federal income tax law.[337]

On enforcement, policymakers have recommended increased efforts under existing tax law. One estimate is that if the IRS increased the "audit rates for those earning $1 million or more annually . . . between 2020 and 2029, the additional tax revenue collected from this approach would be

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330 David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income and Wealth*, 68 TAX L. REV. 355, 355 n.2 (2015).
331 *Id.* at 416–17.
332 *Id.* at 431.
333 *See supra* Pt.II.A.2.
334 Gamage, *supra* note 330, at 431.
335 Steve Wamhoff, *A Wealth Tax Might Be Easier to Implement than You Think*, INST. TAX'N & ECON. POL'Y (Jul. 31, 2019), https://itep.org/a-wealth-tax-might-be-easier-to-implement-than-you-think [https://perma.cc/FB88-GYEF].
336 David Gamage, Five Key Research Findings on Wealth Taxation for the Super Rich 1, 7 (July 27, 2019) (draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3427827.
337 *See infra* Pt.III.B.2; *see also* Joseph M. Dodge, *Replacing the Estate Tax with a Reimagined Accessions Tax*, 60 HASTINGS L.J. 997, 1033–35 (2009).

nearly $535 billion."[338] By reference to Table 4 below, the proposal could increase individual income tax revenue by roughly a third. However, even increased enforcement would not address the concern that the exclusion from gross income of unrealized appreciation undermines progressivity. Simply put, the wealthy are not over-taxed.

Table 4. Federal revenue collection, FY 2018[339]

Type of tax	**Net collection ($ Bn)**	**% of total**
Estate & gift	22.9	0.8
Excise	72.4	2.4
Business income	202.7	6.8
Employment	1,129.3	37.6
Individual, estate & trust income	1,574.2	52.4

3. Progressivity

The existing level of progressivity in federal taxation is reflected in Table 5 below. In terms of 2014 federal income, supplemented by payroll and excise taxes, the richest 20 percent of taxpayers received 55 percent of income of which they paid 27 percent in liability, amounting to 70 percent of revenue. The lowest-income fifth received 4 percent of income of which they paid 2 percent in liability, contributing less than 1 percent of federal revenue. In any case, the proper rate of progressivity may not be as much as matter of measurement as of policy values.

Although the appropriate progressive level may not be quantified, economists have asserted an appropriate ratio of tax overall. In 1963, Lord Kaldor observed that "the 'developed' countries collect 25 to 30 percent of their G.N.P. in taxation," whereas "the underdeveloped countries typically collect only 8 to 15 percent."[340] At the time, he criticized the failure of land reform in persisting agricultural economies where the contemporary income

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338 Natasha Sarin & Lawrence H. Summers, *Shrinking the Tax Gap: Approaches & Revenue Potential* 14 (Nat'l Bur. Econ. Rsch. Working Paper No. 26475, 2019), http://www.nber.org/papers/w26475 [https://perma.cc/XR46-WH9P]; *see also* Chas. O. Rossotti, Natasha Sarin & Lawrence H. Summers, *Shrinking the Tax Gap: A Comprehensive Approach*, 169 TAX NOTES FED. 1467 (2020) (estimating that investment of "less than $100 billion in the IRS over a decade will generate $1.2 trillion to $1.4 trillion in additional tax revenue, primarily from high-income individuals, who are disproportionately responsible for underpayment of owed tax liabilities").

339 *See* I.R.S. Pub. 55-B, DATA BOOK 3 tbl.1 (2018).

340 Kaldor, *supra* note 282, at 410.

tax was not as effective as the land tax had been in the past.[341] As listed in Table 2 above, the so-called tax ratio has become a "national virility symbol" indicating "the proportion or share of national income transferred to the government sector to meet budgetary requirements so as to increase the tempo of economic development without causing inflation."[342] The ratio contextualizes the tax question within the size of the national economy. While its tax ratio would be "underdeveloped" in Kaldor's view, the United States is a wealthy country whose GDP is above average among the industrial economies in the OECD as well as the nations of the world.[343] As the exception proves the rule, Table 2 reflects high tax ratios for some economies that are still agrarian. In any case, undue wealth depends on the magnitude of the economy.

Qualitatively, the progressive rationale is as follows. Economists working on tax design around the world have expressed concern that "the very wealthy may be able to influence government, either through legal or illegal means, in a manner far disproportionate to their numbers; such influence may result in government actions designed to protect the interests of the propertied elite."[344] Philosophically, Professor Rawls taught that imposts such as those on estates and gifts "correct the distribution of wealth" and "prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity."[345] Thus, the taxing of wealth is justified to the extent that it precludes undue influence on the state and public life.

How much wealth is undue? By reference to the stages of development established in Part II above, wealth became significant when agricultural production facilitated the accumulation of surplus. As landownership became the measure of wealth, the naturally progressive land tax was imposed in ancient history.[346] After the Industrial Revolution, in "the United States or in Britain . . . progressive taxation was imposed" when the ability to pay was measured by the labor income of the wage worker or the capital income of the property owner.[347] With respect to the mode of

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[341] *See id.* at 413.

[342] D.D.M. Waidyasekera, *Taxation in Sri Lanka: Current Trends and Perspectives* 43, 49 (Inst. Pol'y Stud. Sri Lanka Working Paper, Paper No. 25, 2016).

[343] *See supra* tbl.2.

[344] Rudnick & Gordon, *supra* note 292, at ch. 10, p. 5.

[345] JOHN RAWLS, A THEORY OF JUSTICE 245 (revised ed. Harv. Univ. Press 1999) (1971).

[346] *See supra* Pt.II.D.3.d.

[347] Kaldor, *supra* note 282, at 415; *see also* Patrick O'Brien, *The Political Economy of British Taxation, 1660–1815*, 41 ECON. HIST. REV. 1, 18 (1988) ("Eighteenth-century fiscal policy might be depicted as a holding operation against the introduction of an income tax—or, what was in effect the same thing, a reform of the land tax.").

production, undue wealth may depend on the size of the agricultural or industrial economy (GDP). With respect to undue influence, a jurisdiction governed by hereditary monarchy or one party could politically disenfranchise rich but dissenting citizens. In the so-called money economy where acquisitive individualism becomes detached from organic need, there may be no limit on accumulation in principle.[348] Although academic researchers have identified market failure, executive compensation continues to exceed performance measures.[349] While many souls might be satisfied by the respect of their peers, the money medium flattens all achievements into a potentially infinite quantity.[350] That is why this Article above proposed to supersede the money economy with the informational economy that might track personal profiles more closely.[351] What is undue may be a matter of personal propriety.[352]

Assuming that wealth is the object of taxation, a secondary issue is efficient design. "Wealth taxes can be grouped into three major categories[.]"[353] Directly, the tax may apply to "the holding or stock of wealth[,]" or indirectly, to the transfer of property.[354] Third is the aforementioned tax "on wealth appreciation."[355] For example, the direct

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[348] *See supra* Pt.II.B.1.b.iii.

[349] *See* LUCIEN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 73 (Harv. Univ. Press 2004); David Yermack, *Flights of Fancy: Corporate Jets, CEO Perquisites & Inferior Shareholder Returns*, 80 J. FINANCIAL ECON. 211, 241 (2006); *see also* Lawrence Mishel & Jori Kandra, *CEO Compensation Surged 14% in 2019 to $21.3 Million: CEOs Now Earn 320 Times as Much as a Typical Worker,* ECON. POL'Y INST. (Aug. 18, 2020), https://files.epi.org/pdf/204513.pdf [https://perma.cc/MLC8-VE2L].

[350] At higher income levels, "there is consumption satiation" when "work is done for reasons barely connected with the income it provides to the 'labourer'." J. A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation,* 38 REV. ECON. STUD. 175, 176 (1971).

[351] *See supra* Pt.II.B.1.b.

[352] What became the capitalist ideology that rewarded the maximum utilization of resources may have made sense when the map had yet to be conquered. Harking back to the dawn of civilization in the Fertile Crescent, the "people who, in Mesopotamia, Greece, Asia Minor and elsewhere, destroyed the forests to obtain cultivable land, never dreamed that by removing along with the forests the collecting centers and reservoirs of moisture they were laying the basis for the present forlorn state of those countries." Engels, *The Part Played by Labour in the Transition from Ape to Man* [1876], *in* OFPP&S, *supra* note 119, at App.251, 260–61. Today geographers confirm that the "eastern Mediterranean societies . . . committed ecological suicide by destroying their own resource base." DIAMOND, *supra* note 10, at 411. Now the post-modern geography of diminishing natural resources may call for a biotechnic matching of human need with sustainable production. *See supra* Pt.II.D.1.d.

[353] Natalia Chatalova & Chris Evans, *Too Rich to Rein in? The Under-utilised Wealth Tax Base*, 11 E-J. TAX RES. 434, 436 (2013).

[354] *Id.*

[355] *Id.*

wealth taxes may include those listed in Table 3 above in Norway and Switzerland. The second category would comprise "gift taxes, inheritance taxes (when imposed on the recipient of wealth on the death of the transferor) and estate taxes (when the tax is levied on the estate of the deceased)."[356] Including the United States, "[m]ost OECD countries currently have such transfer taxes."[357] As discussed above, all wealth taxes are subject to the criticism that they disincentivize earning, saving, and investing.[358] Taxes both directly on net wealth and on appreciation increase the frequency of the valuation that becomes an administrative issue only on transfer in the second alternative. Nevertheless, "factors influencing the adoption of net wealth taxes have been the desire to curb undue concentration of wealth, encourage more productive capital, minimize the disincentive effects of net income taxation," and "promote greater efficiency in income tax administration[.]"[359] As a practical matter, the question of wealth tax design has been coupled with integration into income and consumption tax regimes. As discussed below, all three bases are taxed in America.[360]

To recapitulate, progressivity may be addressed quantitatively and qualitatively. Ultimately, the appropriate progressive level would be a matter of personal and policy perception.

Table 5. Federal Income & Tax Distribution, CY 2014 (%)[361]

Inc. quint.	**Share of inc. rec'd**	**Avg. tax rate**	**Share of tax pd.**
Lowest	4	2	<1
2nd	9	9	4
Middle	13	14	9
4th	20	18	17
Highest	55	27	70

356 *Id*. at 437.
357 *Id*.
358 *See supra* Pt.III.A.1.
359 Tanabe, *supra* note 6, at 126.
360 *See infra* Pt.III.B.1.
361 CONG. BUDGET OFF., No. 53597, THE DISTRIBUTION OF HOUSEHOLD INCOME, 2014, at 14–15 (2018), https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53597-distribution-household-income-2014.pdf [https://perma.cc/6J2E-93C9].

4. Summary

In sum, the wealth tax entails theoretical, practical, and policy considerations. Despite theoretical contraindications, the wealthy are not over-taxed as a practical matter. Since ancient times, wealth has persisted as a measure of taxation. Yet the role of wealth as a component of tax policy is not simply determined by economic postulates.

B. STATE & FEDERAL TAXATION

This passage discusses state and federal taxes in turn. First is a brief overview of consumption, income, and wealth tax by the States. Second is a discussion of the federal estate and gift tax. As set forth below, American taxpayers pay a variety of liabilities that may reflect wealth at least partially. In the end, the federal framework raises the question of proportional contribution by the several States.[362] The current regime lays the foundation for the question where to find further progressivity.

1. Consumption, Income, and Wealth Taxation by the States of the Union

The fifty states of the federal union impose a variety of consumption, income, and wealth taxes. Reflecting regional policy choices, state legislation affects the aggregate amount and progressivity of tax paid by the American taxpayer.

While the U.S. may be unusual among industrialized countries, most of which impose a Value-Added Tax, consumption taxes are widespread throughout the states in the form of sales taxes.[363] Starting with Mississippi in 1932, forty-five states (as well as the District of Columbia ("DC") and

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[362] The union of the fifty sovereign states within the American nation-state exemplifies what lawyers call Federalism; geographers, fragmentation; and social anthropologists, segmentary opposition. Geographic fragmentation occurs when the country may "be broken up into groups that compete with one another while maintaining relative free communication—like the U.S. federal government system, with its built-in competition between our 50 states." DIAMOND, *supra* note 10, at 438. Obversely, segmentary opposition allows complementary units of a society to unite against a common enemy yet "automatically return to the state of disunity—local autonomy—and remain there when competition is in abeyance." Marshall D. Sahlins, *The Segmentary Lineage: An Organization of Predatory Expansion*, 63 AM. ANTHROPOLOGIST 322, 326 (1961).

[363] *See* OECD, CONSUMPTION TAX TRENDS 193 Annex A (2018) ("All OECD countries levy VAT, except the United States, where resale sales taxes are levied at the sub-national level . . . .").

the Commonwealth of Puerto Rico ("PR")) now impose sales taxes, generating about a third of each state's revenue.[364]

Individual income taxes are imposed by forty-one states (as well as DC and PR).[365] New Hampshire and Tennessee tax capital, but not labor income.[366] The individual income taxes also generate about a third of each state's revenue.[367]

Most states do not impose a property tax, which is the primary revenue source for county and municipal governments.[368] The division between property tax for the local collector and income tax for the national collector fits the geographic fragmentation introduced above.[369] Given that the home is the most widespread form of wealth in America, the real property tax may have the effect of a wealth tax.[370] Originally, the land tax measured wealth in the Classical city-state that condensed the local and national polity.[371]

Until recently, at least one state imposed an intangible property tax.[372] From 1931 to 2006, Florida legislation taxed stocks, bonds, and other financial assets, ultimately at a rate of half a mill (0.05 percent) with a $250,000 exemption (for a single filer).[373] In part, the state intangible tax measured capital accumulation.

Currently, "estate taxes represent only a small percentage" of state revenue.[374] Until the federal repeal, all fifty states imposed an estate tax corresponding to the federal credit allowed therefor.[375] Essentially, the Economic Growth & Tax Relief Reconciliation Act of 2001 ("EGTRRA

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364 *See* NAT'L CONF. OF STATE LEGISLATURES [NCSL], TAX POLICY HANDBOOK FOR STATE LEGISLATORS 6 (3d ed. 2010).

365 *Id*. at 4.

366 *Id*.

367 *See id*. at 4.

368 *See id*. at 21.

369 *See supra* Pt.II.D.3.c.

370 *See* Matteo Iacoviello, Fed. Rsrv. Bd., *Housing Wealth & Consumption* 1 (Int'l Fin. Discussion Paper, Paper No. 1027, 2011) (U.S. "housing wealth accounts for almost two thirds of the total wealth of the median household.").

371 *See supra* Pt.II.D.3.d.

372 *See* JUDITH LOHMAN, CONN. GEN. ASSEMB. OFF. LEGIS. RSCH., FLORIDA INTANGIBLE PERSONAL PROPERTY TAX, 2007-R-0197 (2007), https://www.cga.ct.gov/2007/rpt/2007-r-0197.htm [https://perma.cc/T3YG-H584].

373 *See* 2006 FLA. LAWS 312.

374 *See* NCSL, *supra* note 364, at 19.

375 *See* Claire Arritola, *Repealing the Federal Credit for State Estate Taxes Was Bad Policy*, STATE TAX NOTES, Aug. 11, 2014, http://www.taxhistory.org/www/features.nsf/Articles/16E6FA5BBB1E6B2185257E1C00498796 [https://perma.cc/QSQ4-4BXN].

'01") repealed Internal Revenue Code Section 2011.[376] As discussed below, estate taxes measure wealth transferred at death.

In sum, state taxes complement federal taxation. Almost all of the States impose a consumption tax, which tends to be regressive; and the localities, a property tax, which tends to be progressive; neither of which the federal government collects.[377] While both the states and the Union impose income taxes, only the IRS collects employment tax, which funds Social Security, the national insurance (reflected as the second largest collection in Table 4 above).[378] Finally, death taxes, which tend to measure wealth, are no longer prevalent among the states. For that, this Part now turns to federal taxation.

2. Federal Estate & Gift Tax

It may be telling that the existing federal transfer tax has largely escaped the current wealth tax debate.[379] In 2000, then-U.S. presidential candidate George W. Bush campaigned against the "death tax."[380] Under his signature 2001 tax cut enacted at an economic high point, the federal estate and gift tax was to expire in a decade.[381] After two terms, the younger President Bush exited in the wake of the financial market crisis that was to be known as the Great Recession.[382] In 2011, the wealth transfer tax narrowly escaped the scheduled repeal when the Bush-era sunset was quietly followed by an Obama Administration sunrise.[383] In short, the U.S. Congress cut the tax in the time of plenty yet re-imposed it in the time of need.

This history of the first couple of decades of the twenty-first century is not inconsistent with that over the prior century. The federal death tax began as the war revenue enactment of the estate tax. Over the twentieth

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[376] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 532, 115 Stat. 38, 73–75 [hereinafter EGTRRA '01] (extended by Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296, 3297–98 [hereinafter TRUIRJCA '10]; and made permanent by American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 125 Stat. 2313, 2315–18 [hereinafter ATpRA '12]).

[377] *See supra* Pt.II.D.3.d.

[378] *See* I.R.C. §§ 3101–3128.

[379] *See generally* GRAETZ & SHAPIRO, *supra* note 208, at 122–23.

[380] *See id.* at 121.

[381] EGTRRA '01, Pub. L. No. 107-16, § 511, 115 Stat. 38, 69–71

[382] *See* Robert Rich, Fed. Rsrv. Bank of Cleveland, *The Great Recession December 2007–June 2009,* FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-of-200709 [https://perma.cc/Y2YX-HSKQ].

[383] ATpRA '12, Pub. L. No. 112-240, § 101, 125 Stat. 2313, 2315–18.

century, the U.S. Congress supplemented it by the gift and generation-skipping transfer ("GST") taxes. Along the way, the Congress announced a progressive intent for what became the unified wealth transfer tax.

In 1916, the U.S. Congress enacted the estate tax "to defray the cost of preparedness" for "the military situation" of the impending World War I.[384] In 1924 and 1932, Congress enacted the gift tax statutes to preempt *inter vivos* gifts in depletion of the gross estate.[385]

The history of the estate tax is parallel to that of its avoidance. In a 1964 legal history of the "dynastic trust," Professor Friedman wrote that a "well-drafted testamentary trust lasting several generations is subject to only one estate tax, upon the death of the settlor."[386] In 1977, Professor Cooper, paraphrasing Congressional testimony offered by Professor Casner, dubbed the estate tax a "voluntary tax" due to "the technique of estate freezing" as well as "gift-giving, manipulating valuations and exploiting charitable deductions" among others "well known to estate planners[.]"[387] Generally, the tax law may set aside a device lacking in economic substance.[388] For a trustee or executor, the business purpose may be the preservation of assets for the benefit of the heirs.[389] It would be odd if an heir could complain that a fiduciary unnecessarily exposed the corpus to taxation.[390] Nevertheless, planning to avoid estate tax may be lawful.[391]

In 1976, Congress enacted the GST tax to preclude giving in trust to avoid the estate tax.[392] In 1981, Congress stated that the intent of the estate tax was to "break up large concentrations of wealth."[393] In 1987, Congress

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384 S. REP. NO. 64-793, pt. 1, at 1 (1916), 1939-1 C.B. (Pt. 2) 28.

385 *See* BORIS BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES & GIFTS ¶ 120.1.1 (2019).

386 Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 549 (1964).

387 Cooper, *supra* note 36, at 164.

388 *See* I.R.C. § 7701(o) (clarifying the economic substance doctrine).

389 "The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." RESTATEMENT (SECOND) OF TRUSTS § 176 (AM. L. INST. 1959).

390 *See id.* at § 176 cmt. b ("It is ordinarily the duty of the trustee to pay taxes . . . on the trust property."); *see also* Eric C. Chaffee & Karie Davis-Nozemack, *Corporate Tax Avoidance and Honoring the Fiduciary Duties Owed to the Corporation and its Stockholders*, 58 B.C.L. REV. 1425, 1428 (2017) ("fiduciary duties" do not "require . . . tax avoidance").

391 *See* Goldburn P. Maynard Jr., *Perpetuating Inequality by Taxing Wealth,* 84 FORDHAM L. REV. 2429, 2432–36 (2016) (pt.I.B) (regarding estate plan techniques).

392 *See* I.R.C. §§ 2611–2614 (enacted by Tax Reform Act of 1976, Pub. L. No. 94-455, § 2006, 90 Stat. 1520, 1879–90 [hereinafter TRA '76]).

393 S. REP. NO. 97-144, at 124 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 105, 226.

imposed an estate tax on interests manipulated by the estate freezing technique, but repealed it three years later.[394]

Together with the GST, the estate and gift taxes add progressivity to the federal income tax. This happens by taxing unrealized appreciation, among other property, on transfer.[395] That feature may have been at a high in 1970 when commentators calculated that "the estate and gift taxes . . . contributed nearly one-third as much to the progressivity of our tax structure as did rates in excess of the average individual income tax even though the estate tax imposed a smaller levy on inheritances than would have been imposed if bequests had been taxed as ordinary income."[396] Thus, the importance of the transfer tax may be to complement the income tax rather than generate revenue.

Broadly speaking, the gross estate contains all of the decedent's property. This comprises the real or personal, tangible or intangible, including insurance, annuities, and other interests.[397] In 2017, stock and real estate constituted over half of all gross estates.[398] Thus, the classic forms of capital predominate in the post-modern economy of wealth.

Most property is appraised at fair market value. However, there are special allowances for the family farm or closely-held business.[399] These preferences may indicate that the entrepreneurial image looms large in the legislator's sympathy.[400] Yet the du Pont case above embodies the question whether the estate tax threatens hard-won earnings as much as inherited wealth.[401] If the disincentive of the looming estate tax had delimited the

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[394] *See* I.R.C. § 2036(c) (enacted by Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10402, 101 Stat. 1330, 1431–33 [hereinafter OBRA '87], repealed by Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11601, 104 Stat. 1388, 1878–79 [hereinafter OBRA '90]).

[395] *See* Edward J, McCaffery, *A Voluntary Tax? Revisited*, 93 ANN. CONF. NAT'L TAX ASS'N 268, 365 (2000).

[396] Graetz, *supra* note 9, at 271–72.

[397] *See* I.R.C. § 2031.

[398] I.R.S. Pub. 5332 (Rev. 2-2021) (2018), https://www.irs.gov/pub/irs-pdf/p5332.pdf [https://perma.cc/SS5Q-Q9Q9].

[399] *See* I.R.C. § 2032A.

[400] *See* H.R. REP. NO. 94-1380, at 21, 22 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 3356, 3364; *see also* James C. Swindler, *The Family Farm and Use Valuation*, 1977 B.Y.U. L. REV. 353, 356, 368 (citing Congressional testimony while conceding that "there is no direct empirical evidence as to the actual extent of this effect of the estate tax" on the "liquidation of the farm"); John M. Dietrich, *Estate Planning for Farmers and Ranchers*, 40 MONT. L. REV. 189, 216 (1979) ("[T]he enactment of I.R.C. § 2032A was at the behest of the family farmer-rancher in response to his plea that there should not be a confiscation of the ranch as the result of federal estate taxation . . . ."); Howard Zaritsky, *The Estate & Gift Tax Revisions of TRA '76*, 34 WASH. & LEE L. REV. 353, 378–81 (1977).

[401] *See supra* Pt.II.A.2.

behavior of the decedent, she would not have amassed a fortune over the filing threshold. In the end, estate tax preferences subsidize the heirs. The capitalist ideology may mask a vestige of feudalism.[402]

Valuation is contentious. Administratively, questions "of valuation and ownership structure are persistent and complex, and taxpayers often choose to litigate because of the large stakes and the basic indeterminacy of the valuation and other questions involved."[403] Under the estate tax, valuation disputes arise once in a lifetime.[404] Under the gift tax or proposed accumulation tax, they could arise annually.

The statute claws back certain property into the gross estate. This applies to gifts made within three years of death, along with reverters, revocable transfers, and property over which the decedent could change beneficial interests (in other words, held the power of appointment).[405]

Meanwhile, a deduction has replaced the repealed credit for state death tax discussed above.[406] Additional deductions include charitable and marital deductions, which are unlimited for donations to charity or the surviving spouse.[407] Until 1981, the marital deduction was only 50 percent.[408] Historically, the marital deduction had "allowed equalization for common law and community property spouses[.]"[409] Since then, the unlimited deduction affords unmoored generosity toward wealthy widows.

The charitable deduction incentivizes tax avoidance. As economists have observed with respect to wealth tax design across the globe, "a blanket exemption for charitable institutions could be taken advantage of by family foundations that, even if restricted to charitable purposes, can involve family control over wealth[.]"[410] In U.S. legislative history, concern over family control of wealth perpetuated by private foundations was codified in

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[402] *See supra* Pt.II.C.2.

[403] McCaffery*, supra* note 205, at 302.

[404] *See e.g*., Estate of Strangi v. Comm'r, 85 T.C.M. (CCH) 1331 (T.C. 2003), aff'd sub nom. Strangi v. Comm'r, 417 F.3d 468 (5th Cir. 2005); *see also* Mitchell M. Gans & Jonathan G. Blattmachr, *Family Limited Partnerships and § 2036: Not Such a Good Fit*, 42 ACTEC J. 253, 253 (2017) ("Use of family limited partnerships to achieve estate-tax discounts is a very common estate planning strategy.").

[405] *See* I.R.C. §§ 2035, 2036, 2038, 2041.

[406] *See* I.R.C. § 2058.

[407] *See* I.R.C. §§ 2055, 2056.

[408] *See* I.R.C. § 2056(c)(1) (before amendment by Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 172, 301–04).

[409] Herzig *supra* note 55, at 1155, 1173 (discussing the "Equalization Act of 1946").

[410] Rudnick & Gordon, *supra* note 292, at ch. 10, p. 12.

the Chapter 42 penalty excises enacted by the Tax Reform Act of 1969.[411] Consequently, private charity has become an ongoing enforcement issue.

Generally, the federal estate tax imposes a rate of 40 percent on the taxable estate, net of expenses.[412] Necessarily, the liability is paid out of the gross estate, resulting in a tax-inclusive base. By contrast, an inheritance tax would impose the liability on the heirs.

Each decedent's estate is allowed a credit against tax on property worth $11,580,000 in 2020.[413] This reflects the doubling of the previous credit by the Tax Cuts and Jobs Act of 2017.[414] Given an extremely high threshold, estate tax returns are the most infrequent of the various IRS filings shown in Table 6 below.

Under prior law, the credit could go unclaimed. Especially in cases of intestacy, estates would not claim the credit when either the deceased spouse was not the title owner or the marital deduction covered the widow's inheritance.[415] Where estate planners segregated the applicable amount, the credit effectively doubled for wealthy survivors whose subsequently matured estates would not include that amount from the first decedent.[416] After 2010, legislation affords to the widow or widower the benefit of the deceased spouse's unused exclusion amount by election on the estate tax return, essentially saving the first decedent's credit without the need for trusts or other legal devices, even if the decedent's estate fell below that amount in the first place.[417] Simply combining the marital deduction with the exclusion amount means that a married decedent need not incur estate tax.

Likewise, the federal gift tax applies to lifetime transfers at the same 40 percent rate.[418] The gift tax statute also allows the credit introduced above against transfers worth $11,580,000, which thus functions as a "unified" credit for transfers of wealth whether during life or on death.[419] Nevertheless, the living donor can pay the gift tax without reducing the amount transferred, that is the tax-exclusive base, which the decedent

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[411] *See* I.R.C. §§ 4940–68 (enacted by Tax Reform Act of 1969, Pub. L. No. 91-172 § 101, 83 Stat. 487, 492–94).
[412] *See* IRC § 2001.
[413] *See* IRC § 2010.
[414] *See* Pub. L. No. 115-97 § 11061, 131 Stat. 2054, 2091.
[415] *See* Herzig *supra* note 55, at 1167.
[416] In any case, the survivor's estate may claim a credit for tax on transfers in the past decade such as the inheritance received from the decedent. *See* I.R.C. § 2013.
[417] *See* I.R.C. § 2010(c)(4), (c)(5) (enacted by TRUIRJCA '10, Pub. L. No. 111-312, § 303, 124 Stat. 3296, 3302–04).
[418] *See* I.R.C. §§ 2501, 2502.
[419] *See* I.R.C. § 2505.

cannot do with respect to the estate. Although the estate and gift tax is a unified wealth transfer regime with respect to the rate and the credit, the transfer of the estate is effectively more expensive because the base is tax-inclusive.[420]

Similar charitable and marital deductions apply to gifts,[421] and likewise, the statute deems the exercise of a power of appointment as a transfer.[422] Exclusions apply to gifts to minors and for educational or medical expenses.[423] In 2015, legislation exempted gifts to civic leagues, trade associations, and labor unions,[424] as well as political parties, which were already so designated.[425]

Annually, each donor can exclude up to $15,000 per recipient.[426] Spouses can split their contributions to each recipient.[427] As economists have observed, many "gift tax regimes deal with small gifts by granting the donor an annual gift exemption" which, however, "can erode the tax base."[428] To avoid tax on *inter vivos* transfers, benefactors can essentially amortize a large amount through self-cancelling installment notes ("SCINs") or like devices that estate planners may create from time to time.[429] Moreover, legal commentators assert that the "very presence of the estate tax induces certain unjust behavior, such as large *inter vivos* gifts[.]"[430] To effectuate the "voluntary" aspect of the transfer tax, a widow or widower, gradually using the annual gift tax exclusions, could transfer into trust the excess over the unified credit exclusion amount.

Generally, the GST tax applies to transfers to grandchildren or younger beneficiaries even in trust.[431] These are subject to the same 40 percent rate

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[420] *See* Batchelder, *supra* note 318, at 52; *see also* Graetz, *supra* note 9, at 260.

[421] *See* I.R.C. §§ 2522, 2523.

[422] *See* I.R.C. § 2514.

[423] *See* I.R.C. § 2503(c), (e).

[424] *See* I.R.C. § 2501(a)(6) (enacted by Protecting Americans from Tax Hikes (PATH) Act of 2015, Pub. L. No. 114-113, § 408, 129 Stat. 2422, 3123); *see also* Ellen P. Aprill, *Once and Future Gift Taxation of Transfers to § 501(c)(4) Organizations: Current Law, Constitutional Issues, and Policy Considerations*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 296–97 (2012); Matthew A. Melone, *Gift Taxes on Donations to Social Welfare Organizations: De-politicizing Social Welfare Organizations or Politicizing the IRS?* 12 DEPAUL BUS. & COM. L.J. 51, 84–88 (2013).

[425] *See* I.R.C. § 2501(a)(4).

[426] *See* I.R.C. § 2503(b).

[427] *See* I.R.C. § 2513.

[428] Rudnick & Gordon, *supra* note 292, at ch. 10, p. 45 & nn.206, 207.

[429] *See* Frane v. Comm'r, 998 F.2d 567, 568 n.1 (8th Cir. 1993).

[430] McCaffery, *supra* note 205, at 347.

[431] *See* I.R.C. § 2601.

and unified credit.[432] To the extent that trust beneficiaries are children rather than grandchildren, there would be no GST, yet the children could be obliged to apply some of their unified credit to avoid the estate tax. Thereafter, subsequent generations could repeat the "voluntary" cycle.

As introduced above, the estate freezing technique is as follows. The object is to transfer an appreciating asset while retaining a stable interest, thereby freezing the value that remains in the gross estate.[433] For example, an owner could give common stock to his heirs, retaining preferred stock in his family business.[434] In 1987, legislation effectively included the appreciating asset in the gross estate despite the transfer.[435] In 1990, Congress replaced this strict legislative inclusion with a more forgiving gift tax on the transfer under special valuation rules.[436] From 1991 to 1995, this legislative change bore a revenue cost of $775 million.[437] As a matter of enforcement, valuation is a factual matter subject to case-by-case litigation.[438]

As discussed above, significant wealth escapes estate taxation due to an income tax rule.[439] In 1920, the U.S. Supreme Court ruled in *Eisner v. Macomber* that gross income did not include appreciation "[s]hort of liquidation, or . . . dividend declared," establishing the economic realization requirement.[440] Under this requirement, the appreciation escapes income taxation.

In 1921, a dubious legislative intent resulted in the so-called "step-up" in basis at death.[441] This meant that the date-of-death fair market value

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432 *See* I.R.C. §§ 2641, 2631.

433 *See* STAFF OF JCT, 101ST CONG., FEDERAL TRANSFER TAX CONSEQUENCES OF ESTATE FREEZES 9 (Comm. Print 1990).

434 *See id.* at 2.

435 *See* I.R.C. § 2036(c) (enacted by OBRA '87, Pub. L. No. 100-203, 101 Stat. 1330); *see also* STAFF OF JCT, 101ST CONG., PRESENT LAW & PROPOSALS RELATING TO FEDERAL TRANSFER TAX CONSEQUENCES OF ESTATE FREEZES 20 (Comm. Print 1990).

436 *See* I.R.C. §§ 2701–04 (enacted by OBRA '90, Pub. L. No. 101-508, 104 Stat. 1388); *see also* Laurence Keiser, *Thaw on Estate Freezes: The Repeal of Section 2036(c)*, CPA J., Apr. 1991, http://archives.cpajournal.com/old/10691643.htm [https://perma.cc/EM9Y-6LZA].

437 *See* STAFF OF JCT, 101ST CONG., BUDGET RECONCILIATION (H.R. 5835) REVENUE PROVISIONS AS REPORTED BY THE CONFEREES 2 ¶ 2(a) (Comm. Print 1990).

438 *See e.g.*, Estate of Dieringer v. Comm'r, 146 T.C. 117, 128 (2016), aff'd, 917 F.3d 1135 (9th Cir. 2019).

439 *See* McCaffery, *Taxing Wealth Seriously*, 109 ANN'L CONF. NAT'L TAX ASS'N 1, 19–20 (2016).

440 Eisner v. Macomber, 252 U.S. 189, 208 (2020).

441 *See* Lawrence Zelenak, *The Tax-Free Step-Up in Basis at Death and the Charitable Deduction for Unrealized Appreciation: The Early Mistakes*, *in* FIGURING OUT THE TAX: CONGRESS, TREASURY, AND THE DESIGN OF THE EARLY MODERN INCOME TAX 83 (Cambridge Univ. Press 2018).

governs not only the inclusion in the gross estate but subsequent income taxation of the heirs.[442] In 1976 and 2001, the Congress enacted legislation to reverse the step-up but respectively repealed each measure in 1980 and 2012 before it took effect.[443] As a result, those who inherit an appreciated asset are subject to income tax only to the extent of later growth.[444] In 2019, the effective exclusion from gross income of the appreciation was worth $36.8 billion in revenue foregone by the U.S. Treasury.[445] Gross income also excludes the bequest itself.[446] Although the gross estate would include the appreciation, the estate tax liability accrues only if the decedent's estate could not reduce it by the above techniques.

In sum, the federal wealth transfer tax has proven "voluntary" due to legislative provisions. These comprise the extravagant exclusion amount, the unlimited marital deduction, and the annual gift tax exclusion. In effect, the result is the tax-free estate planning of well-advised testators.

Although the Congress has not sustained measures that could curtail avoidance, that result is within the reach of legislation.[447] Historically, the Congress reversed itself multiple times. In 1980, 1990, and 2011, the Congress reversed legislation that would have tightened wealth taxation, to wit, the pending income taxation of inherited gain, the thawing of the estate freeze, and the expiring estate and gift tax. The repeated reversals of wealth tax provisions raise the question whether lobbyists for the wealthy may have undue influence on the legislature.[448] In any case, these decisions may make more sense in terms of the contemporaneous pressures on the legislators than in the abstract terms of economic principles.

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[442] *See* I.R.C. § 1014.

[443] *See* I.R.C. § 1014 (amended by TRA '76, Pub. L. No. 94-455, § 2005, 90 Stat. 1520, 1872, repealed by Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223 § 401, 94 Stat. 229, 299–300); I.R.C. § 1022 (enacted by EGTRRA '01, Pub. L. No. 107-16, § 542, 115 Stat. 38, 75–85, repealed by ATpRA '12, Pub. L. No. 112-240, § 101, 125 Stat. 2313, 2315–18); *see also* Zelenak, *supra* note 441, at pt.II, ch. 5, p. 110.

[444] *See* Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 363 (1993).

[445] *See* CONG. RSCH. SERV., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL, S. PRT. NO. 114-31, at 421 (Comm. Print 2016).

[446] *See* I.R.C. § 102.

[447] For legislative proposals, see e.g., Samuel D. Brunson, *Afterlife of the Death Tax*, 94 IND. L. J. 355 (2019); David G. Duff, *Alternatives to the Estate and Gift Tax*, 57 B.C.L. REV. 893 (2016).

[448] *See* GRAETZ & SHAPIRO, *supra* note 208, at ch. 1 (describing a coalition between "savvy Washington insiders" & "antitax zealots").

Table 6. Selected IRS return filings, FY 2018[449]

Form	Type of tax	Number (K)
706	Estate	34.1
709	Gift	245.6
720 & others	Excise	1,049.5
1120 series & others	Corporate income	2,127.7
1041	Estate & trust income	3,096.8
941 & others	Employment	30,942.7
1040 series	Individual income	152,937.9

C. The Constitutionality of Taxing Wealth

The combined ineffectuality of the income and estate taxes against unrealized appreciation has propelled proposals for a new wealth tax. Commentators have questioned the constitutionality of a proposed wealth tax, and academically agile proponents have responded.[450]

The U.S. Constitution authorizes taxation in Article I. Section 8, clause 1, states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]"[451] Next, Article I requires the apportionment of direct taxes. Section 9, clause 4 states: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[452] Section 2, clause 3 amplifies this apportionment rule by stipulating that along with Congressional Representatives, "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."[453] In this context, direct tax was a concept of

[449] *See* I.R.S. Pub. 55-B, *supra* note 339, at 4 tbl.2.
[450] *See* Wetzler, *supra* note 4.
[451] U.S. CONST. art I, § 8, cl. 1.
[452] U.S. CONST. art I, § 9, cl. 4.
[453] U.S. CONST. art I, § 2, cl. 3.

federalism as much as public finance. Without apportionment, a state could receive a disproportionate requisition for the federal treasury.[454]

In 1880, the U.S. Supreme Court defined direct taxes in a landmark case, *Springer v. United States*.[455] The court explained that "direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate[.]"[456] Other than these poll and property imposts, taxes "within the category of an excise or duty" were not subject to constitutional apportionment.[457]

In 1895, the constitutionality of the predecessor to the current federal income tax came into question.[458] In *Pollock v. Farmers' Loan & Trust Company*, the Court held: "[a]n annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."[459] Substantively, the income tax was a direct tax subject to apportionment. Then the income tax failed constitutionally. In 1913, the States ratified the Sixteenth Amendment stating: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[460] Three years later, the Congress enacted the federal income tax.[461]

In 1921, the constitutionality of the federal estate tax came before the Court. *New York Trust Company v. Eisner* opined that the tax on the transfer of wealth or inheritance "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy."[462] Namely, a tax imposed on death was not akin to a tax directly on the head or the property itself. Consequently, the Court sustained the federal estate tax even though it was not apportioned among the States.

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[454] *See* Calvin H. Johnson, *A Wealth Tax Is Constitutional*, A.B.A. TAX TIMES, Aug. 8, 2019, https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/19aug/19aug-pp-johnson-a-wealth-tax-is-constitutional [https://perma.cc/2AGX-7CDG] ("Under the Articles [of Confederation], the Congress had no power to collect tax revenue from any individual or transaction other than through requisitions on the states.").

[455] *See* Springer v. U.S. 102 U.S. 586, 602 (1880).

[456] *Id.* at 602.

[457] *Id.*

[458] *See* Bruce Ackerman, *Taxation and the Constitution* 99 COLUM. L. REV. 1, 56 (1999) (questioning the application of the direct tax clauses to income and wealth taxes); *see also* BRUCE ACKERMAN & ANNE ALSTOTT, STAKEHOLDER SOCIETY (Yale Univ. Press 2000).

[459] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 581 (1895).

[460] U.S. CONST. amend. XVI.

[461] *See* Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756.

[462] N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.) (quoting Knowlton v. Moore, 178 U.S. 41, 81 (1900)) ("Upon this point a page of history is worth a volume of logic.").

Likewise, the Supreme Court considered the constitutionality of the federal gift tax. In 1929, the Court held "that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned[.]"[463] Thus, the tax on the *inter vivos* donative transfer again was not a tax directly on the property itself.

As repeatedly articulated by the Supreme Court, the unapportioned federal estate and gift taxes were constitutional because they were not direct taxes. Instead, these excises were imposed on the transfer of wealth either at death or during life, but not directly on the property itself. On the other hand, the currently proposed wealth tax would necessarily apply to retained, unrealized appreciation. Its proponents could not argue that the new wealth tax was an excise on transfer. Rather, the proposal would be a tax directly on property.[464]

Consequently, the recent wealth tax proposals call for constitutional apportionment. For example, one proposal envisions that "the federal government would collect a wealth tax at a uniform rate and retain the constitutionally apportioned share of the tax. The excess unapportioned share, if any, would be returned to the state of origin via a state-level 'pick up' tax" in the amount of the former federal credit for state death taxes.[465] This proposal "complies with the bedrock principle of horizontal equity by ensuring a uniform state and federal tax burden."[466] Under a variant proposal, the "apportionment requirement would then result in different state-specific federal wealth tax rates, with these state-specific federal rates being set lower in wealthier states and higher in less-wealthy states[.]"[467] Either way, the Congress could enact constitutional wealth tax legislation.

Alternatively, advocates argue that the proposed tax on unrealized appreciation should be considered an extension of the existing federal income tax. These commentators argue that "the 16th Amendment should

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[463] Bromley v. McCaughn, 280 U.S. 124, 136 (1929).

[464] *Cf.* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2393 (1997) ("Direct [taxes] . . . are assessed upon the property, person, business, income, etc., of those who are to pay them . . . ." (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 5 (Chicago, Callaghan & Co. 1876))). *But see* Johnson, *supra* note 454 ("Apportionment of a wealth or land tax by population would now require the injustice of substantially higher tax rates in poorer states: when that happens, under the Founders' standards, the tax is not a direct tax for which apportionment is required.").

[465] John T. Plecnik, *The New Flat Tax: A Modest Proposal for a Constitutionally Apportioned Wealth Tax*, 41 HASTINGS CONST. L.Q. 483, 510 (2014).

[466] *Id.*

[467] John R. Brooks & David Gamage, *Why a Wealth Tax is Definitely Constitutional*, GEO. U. L. CTR., at 1, 7–8 (2020), https://scholarship.law.georgetown.edu/facpub/2227/ [https://perma.cc/8RR6-PA4V].

be interpreted broadly to encompass wealth tax reforms—as well as encompassing mark-to-market reforms, progressive consumption tax reforms, and other reform proposals designed to assess tax based on comprehensive measurements of ability to pay."[468] That is, the constitutional exception to apportionment that empowered Congress to enact the 1916 federal income tax should apply to accrual taxation as an amendment within the income tax code.[469] This proposal, presumably by legislation, would require reversal of the well-settled realization doctrine.

Alternative proposals and arguments for the constitutionality of the wealth tax address a presumptive legal impediment. In America, jurisprudential modernity is enshrined in the written Constitution, perceived as the incorporation of the institutional imagination. That is, the Framers must have envisioned if not specific future legislation at least its permissible scope. According to legal scholars, "the American Constitution has enabled the Supreme Court to combine an almost unfettered legislative function—although one of a negative character—with the appeal to the written law."[470] Haunted by the ghost of the contract metaphor above, this curious doctrine has become the talisman for the rule of law as contradistinguished from government by feudal status, notwithstanding the archaic terms as in Article I, Section 2 quoted above.[471] In the case of tax apportionment, presumably the federalist concern would be over-taxation of the poor States.[472] Query whether the alternative proposal to tax net accumulation would satisfy this concern.[473] Constitutionalism has either hobbled the institutional imagination or inspired ingenious legal artisanry.

Meanwhile, legislation to tighten the taxation of gain and of transfers is within the power of the Congress. In particular, the legislators could amend the existing federal income, estate and gift tax regime. Even when "there is a strong case for addressing wealth inequality through the tax system[,]" that begs the question why "broad-based personal capital income

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[468] *Id*. at 3.

[469] *See* Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 720, 736–44 (2020) ("Congress could instead tax wealth indirectly by adjusting a taxpayer's income tax liability on account of her wealth . . . .").

[470] WOLFGANG FRIEDMANN, LEGAL THEORY 538 (5th ed. Colum. Univ. Press 1967).

[471] *See supra* Pt.II.B.2.c.iii.

[472] *Cf.* Calvin Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENTARY 295, 325 (2004).

[473] "Apportionment instead would entail dividing the nation's aggregate tax bill on whatever is the object of the tax—income or net worth—by the relative population of the states and imposing it unequally on taxpayers depending on their state of residence. This would unfairly burden residents of poorer states." Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 117 (2018).

taxes and well-designed inheritance and gift taxes" are insufficient.[474] The question thus becomes whether effective provisions to tax wealth have not been imagined and designed or if the Congress would not entertain them. Over the years, the Congress alternately has loosened or tightened the applicable measures. A not insignificant factor has been the popular view of the taxation of wealth. Historically, policy values, rather than legal specifications, may have ruled the day.

D. DISCUSSION

Tax historians have characterized the peacetime persistence of a war revenue act as the "marriage of convenience that survived[.]"[475] Since its enactment at World War I, the federal estate tax persists under this characterization. The persistence is consistent with the military theory of state formation.[476] Governments grow to defend national territory, remaining to support the peacetime economy.[477] Hypothetically, the state could then wither into minimal form.[478] Alternatively, the fiscal apparatus could persist to preserve a nominal level of equality.

Empirical research has confirmed that war efforts rather than egalitarianism have spurred wealth taxes through history. From 1816 to 2000, nineteen industrial countries yielded data recently analyzed by political scientists showing "that mass mobilization for war has been a major force leading to heavy taxation of inherited wealth[.]"[479] At the time of World War I, Professor Pigou offered the rationale for this phenomenon by observing: "[t]he fact that old men excel young men so greatly in financial strength suggests that the balance might be partly adjusted, and something less unlike equality of sacrifice secured, by a special levy whose incidence would in the main fall upon persons exempted from military service[.]"[480] When the "industrial countries . . . shifted away from fighting large wars with mass armies the argument for a conscription of wealth has

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[474] OECD, *supra* note 363, at Exec. Summ.

[475] *See* I.R.S. Pub. 1694, *supra* note 308, at 135.

[476] *See supra* Pt.II.B.2.b.iii.

[477] *See supra* Pt.II.A.2.b.

[478] *See supra* Pt.II.B.2.b.iv.

[479] Kenneth Scheve & David Stasavage, *Democracy, War & Wealth: Lessons from Two Centuries of Inheritance Taxation*, 106 AM. POL. SCI. REV. 81, 100 (2012). "The countries included in the sample are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Korea, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States." *Id.* at 85 n.12.

[480] *Id.* at 4 (quoting Arthur Pigou, *A Special Levy to Discharge War Debt*, 28 ECON. J. 135, 145 (1918)).

no longer had such salience. This may provide one important reason . . . why so many governments have lowered taxes on top fortunes over the last few decades."[481] This historical observation may be more explanatory than the economic contraindications of the wealth tax set forth above.[482] Meanwhile, egalitarianism in the form of "democracy generally, and expansion of the franchise specifically," was not a significant factor in wealth tax enactment.[483] Historically, the populace has not rallied for wealth taxes.[484]

While taxation has not tended toward the egalitarian, neither has the state withered away. On the contrary, recent econometric research shows that "state antiquity," the age of the formal polity, "is significantly correlated with measures of political stability and institutional quality, with income per capita, and with the rate of economic growth" even controlling for "other measures of institutional quality, conventional explanatory variables, and region dummies[.]"[485] The origin of civilization in the agricultural mode of production organized in the polity of the state continues to yield wealth.[486] Whether that becomes a shared egalitarian patrimony remains the work of institutional imagination.

Then comes the question of equality.[487] History has brought ever increasing complexity to the division of labor, at least differentiating economic classes if not creating political inequality.[488] Enforced equality is the psychology of the least developed mode of subsistence, that of the forager.[489] Even there, however, the taxpayer mentality may have been that of reciprocity rather than self-interest.[490] Rather than reducing the taxpayer

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[481] *Id*. at 101.
[482] *See supra* Pt.II.D.3.d.
[483] Scheve & Stasavage, *supra* note 479, at 85.
[484] *See* Mayling Birney, Michael J. Graetz & Ian Shapiro, *Public Opinion and the Push to Repeal the Estate Tax,* 59 NAT'L TAX J. 439, 457 (2006) (analyzing "common misperceptions of self-interest" coupled with appeal to "principles of fairness").
[485] Valerie Bockstette, Areendam Chanda & Louis Putterman, *States & Markets: The Advantage of an Early Start,* 7 J. ECON. GROWTH 347, 347–48 (2002) ("Such differences may carry over to a market setting—contrast, for instance, the late 20th Century economic development of Japan and South Korea, modern countries with ancient national histories, with that of the Philippines, a nation that lacked a state before its 16th Century colonization by Spain."); *see also* Eric A. San Juan, *Making Filipino History in a "Damaged Culture,"* 37 PHILIPPINE SOC. REV. 1, 1 (1989) (discussing "[n]ational development" when "traced to the historic lack of a state").
[486] *See supra* Pt.II.B.2.a.iii.
[487] *See generally* JOSEPH E. STIGLITZ, THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM (2015) (discussing the gap in wealth between rich and poor).
[488] *See supra* Pt.II.B.1.a.
[489] *See supra* Pt.II.D.2.a.
[490] *See supra* Pt.II.D.1.a.

to a sharecropper or a dependent, query whether the future could restore the intuition of reciprocity which had been lobotomized from *Homo economicus*, who would devolve into narcissism.[491] In lieu of conformity, rough equality of subsistence may facilitate the appreciation of individual differences.[492]

IV. CONCLUSION

Today's pandemic is a life-altering crisis that presents an opportunity to revisit first principles. Here, the first purpose of taxation is to collect revenue.[493] In this time of obvious need, wealth could become a salient tax base. At the same time, crisis has been the occasion for tax cuts.[494] Stereotypically, when the market drops, the irrational investor executes panic sales yet gains the confidence to buy when the market rises.[495] When there is risk, the narcissist can rely only on unfalsifiable emotion.[496] Ironically, government bail-outs in time of desperation could be the preface to tax cuts when profits soar, regressively socializing loss and privatizing gain.[497] Nevertheless, the peacetime persistence of wartime tax legislation has allowed states to grow to imperial proportions.[498] Despite the theoretical efficiency of the consumption tax, wealth continues to be an irresistible revenue base.[499] Then the question is whether the state supports the taxpayer or vice versa. Accordingly, the framework above introduced the speculative terminology of self-determination by a digital customer rather than a dependent.[500]

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[491] *See supra* Pt.II.C.1.c & d.

[492] *See supra* Pt.II.C.1.b.

[493] *See* DANIEL L. SIMMONS ET AL., FEDERAL INCOME TAXATION 3 (7th ed. 2017).

[494] *See supra* Pt.II.E.

[495] *See, e.g.*, Gary Ran, *Avoid the Buy-High, Sell-Low Trap*, KIPLINGER (May 25, 2018), https://www.kiplinger.com/article/investing/t047-c032-s014-avoid-the-buy-high-sell-low-trap.html [https://perma.cc/TA9N-K79T].

[496] *See supra* Pt.II.C.1.d.

[497] *See* Adam J. Levitin, *The Politics of Financial Regulation & the Regulation of Financial Politics,* 127 HARV. L. REV. 1991, 2030 (2014) ("In the modern world, a highly leveraged financial system will inherently privatize gains and socialize losses beyond capital, so the only thing preventing bailouts is a more robustly capitalized financial system.").

[498] See NIALL FERGUSON, COLOSSUS: THE PRICE OF AMERICA'S EMPIRE 267 (2004) ("Traditionally, empires faced a choice between guns or butter—between military expenditures and consumption"). *Cf.* VLADIMIR I. LENIN, IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM (1917).

[499] *See supra* Pt.III.A.1.

[500] *See supra* Pt.II.D.2.

The future alternatives are prefigured by those of the past. One possibility is continued reliance on the tax incentives to the rational actor who could be propelled to create new technology to increase wealth that would trickle down to raise the tide that floats all boats.[501] Conceivably, new technology could address the ever-changing environment through innovation in the production of energy and the like. An alternative focus is on the current wealth that would be more than sufficient to satisfy the subsistence of the entire population if distributed equitably, but for the undue influence of the concentration that results in relative poverty, exacerbated by cultural divisions.[502] Arguably, investment in public infrastructure such as national health services would be cost effective in the long run without disincentivizing the taxpayers who are so wealthy that they are subject to consumption satiation.[503] These alternatives would not be new.

What may make a difference is popular appeal.[504] To compare the "false consciousness" in opposition to wealth taxes with the support of wartime taxes discussed above, taxpayers have not voted against the rich, they have voted in favor of their nation.[505] Glossed as totemism above, this popular support vindicates "the Durkheimian vision of society."[506] In an irony of uneven development, the collectivist vote may obtain in an economy that professes an individualist ethic, at least as to property ownership.

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[501] *See e.g.*, Sinclair Davidson, *Election 2016: Trickle-down Economics Is the Rising Tide that Lifts All Boats,* FIN. REV. (July 1, 2016, 12:00 A.M.), https://www.afr.com/policy/election-2016-trickledown-economics-is-the-rising-tide-that-lifts-all-boast-20160630-gpv5ux [https://perma.cc/U2BZ-43G5].

[502] *See supra* Pt.III.A.3. On cultural divisions, compare IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (N.Y.U. Press 2006), with Kenneth B. Nunn, *"Essentially Black": Legal Theory and the Morality of Conscious Racial Identity*, 97 NEB. L. REV. 287 (2018). *See also* Dorothy A. Brown, *Race & Class Matters in Tax Policy*, 107 COLUM. L. REV. 793 (2007). *See generally* Noel Ignatiev, HOW THE IRISH BECAME WHITE (2015 ed.).

[503] After World War II made public medical access a necessity, Britain established the National Health Service ("NHS"). *See Origins of the NHS*, U.K. NAT'L ARCHIVE, http://www.nationalarchives.gov.uk/cabinetpapers/alevelstudies/origins-nhs.htm.

[504] *See* Martin A. Sullivan, *K-Pop Stars Promote South Korean Tax Compliance*, TAX NOTES (July 8, 2020), https://www.taxnotes.com/opinions/k-pop-stars-promote-south-korean-tax-compliance/2020/07/08/2cpl3 [https://perma.cc/3YFE-E68L] ("Whether it is rooted in fear or in patriotism, taxpayer morale is a critical component of tax administration.").

[505] *Compare supra* Pt.II.C.1.d, *with supra* Pt.III.D.

[506] HAIDT, *supra* note 73, at 214.

Either way, the state does not wither away.[507] Instead, society becomes more complex and interdependent. Possibly, the state becomes indistinguishably intertwined in civil society as in the case of tax expenditures, non-governmental organizations, public-private partnerships, the government bail-outs of industry, and the turn from public education to federally guaranteed student loans with forgiveness clauses.[508] Arguably, this sort of organic solidarity allows for greater self-determination, yet there is no return to the state of nature.[509]

This Article's evolutionary framework argued that there was no state of nature. Instead, humans drew subsistence from their environment through reciprocity among the population. Their ultrasociality created the conditions for an interdependent division of labor to produce and ultimately consume wealth.[510] The economic psychology adapted to, but not determined by, more or less hospitable environments set the stage for complex civilization later governed by contract and codified as law. Now taxpayer compliance behavior and policy preferences reflect the accretion of values not simply modeled by *Homo economicus*.

This Article's attempt to lay a comprehensive foundation for political economy extends beyond the current wealth tax debate. Many aspects of the theoretical framework may not directly apply to the wealth tax.[511] Henceforth, future research on new topics under the same framework could complement the conclusions here.

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[507] *Cf.* Karen C. Burke & Grayson M.P. McCouch, Book Review, 107 TAX NOTES 1583, 1583 (2005) (reviewing GRAETZ & SHAPIRO, *supra* note 208) ("According to the antitax creed, the end of progressive taxation is inextricably linked with the end of big government.").

[508] *See* San Juan, *supra* note 302, at 697–99, 702–11.

[509] *See supra* Pt.II.B.2.a.iv.

[510] *See supra* Pt.II.B.1.a.iii.

[511] *See supra* tbl.1.