Transferring Wealth Liberally

ERIC RAKOWSKI*

I. INTRODUCTION

Liberalism is a woolly doctrine, a canopy sheltering a colorful array of theories about the legitimate scope of state power and the just distribution of social resources and opportunities. Notwithstanding their lush variety, Edward McCaffery claims that liberal theories display a surprising double unity.1 Virtually all of them, he says, favor a redistributive tax on gifts and bequests, especially on transfers of wealth from older to younger generations. Yet, they all err in advocating a tax on gratuitous transfers. Liberal theorists stand united in unwittingly betraying the ends to which they are committed, by embracing a tool to reduce wealth disparities that does more harm to core liberal values than the good it accomplishes. In lieu of contemporaneous taxes on gifts and bequests, Professor McCaffery contends that liberals should call for taxes only on the expenditure of wealth or income for noninvestment purposes. They should, however, probably support a heavier tax on these expenditures if the money spent can be traced to a gift or bequest rather than to some other source.

This Article divides into two parts. Section II discusses Professor McCaffery’s account of liberal values, which, in his view, favor a consumption tax without a special tax on wealth transfers. I argue that his methods for deriving and justifying a set of liberal principles against which to measure proposed taxes are ill chosen or applied too casually. I further contend that some of the crucial premises on which he relies in defending the abolition of wealth transfer taxes—most especially, the claim that work and saving are objectively good and that extravagant consumption is objectively bad—have no place in leading liberal theories and should not command allegiance.

Section III focuses more narrowly on the tax scheme Professor McCaffery recommends. My aim is to uncover and question many of the empirical and normative assumptions on which his plan is premised.

* Professor of Law, University of California at Berkeley (Boalt Hall). For comments, I am grateful to Alan Auerbach, Babette Barton, Edward Halbach, Louis Kaplow, Daniel Shaviro, and a faculty audience at the University of Pennsylvania Law School.

After describing his proposal, noting its ambiguities and some of the administrative difficulties it poses, and explaining why its skeletal nature makes evaluation difficult, Section III examines Professor McCaffery’s views on several topics. These include: the importance of work and saving from the standpoint of a theory of social justice, the extent to which younger or unborn generations have moral claims against their elders that bear on tax policy, the attractiveness of John Rawls’ overriding concern with the worst off in crafting a theory of distributive justice, and the connections between earnings, luck, and redistributive taxation. Professor McCaffery’s progressive consumption tax with higher rates on the personal use of unearned wealth is one defensible way of resolving the clash of values that ought to shape taxes and state spending. But most liberals will not think it the right way. It will not please those who value current equality of resources or well-being more highly than Professor McCaffery does, and who would be more reluctant to leave present people worse off so that their children and grandchildren might reap a larger benefit even though their descendants would, presumably, be better off anyway. It also will likely repel liberal egalitarians who doubt the accuracy of Professor McCaffery’s lightly defended empirical assumptions about the responsiveness of rich people’s work and spending habits to changes in wealth transfer taxes. To convince liberals to abandon estate and gift taxes, Professor McCaffery needs a more compelling moral argument and better behavioral evidence than he supplies.

II.  Professor McCaffery’s Conception of Liberalism

Professor McCaffery offers two distinct justifications for the claim that liberalism’s views about individual liberties and social justice favor a consumption tax without a tax on wealth transfers at the time they occur and that the United States ought to adopt such a tax. The first relies on what he calls a “political-interpretive” theory of taxation, which attempts to tease out lessons for tax policy from the predominantly liberal principles that allegedly suffuse our laws, political institutions, and public opinion. Professor McCaffery’s second justification appeals to the views of paradigmatic liberal philosophers. From those views, he seeks to distill fundamental moral principles, which he then claims find more apt expression in his proposed consumption tax than in some rival scheme that incorporates a tax on wealth transfers. This Section criticizes both of these justifications before questioning some aspects of Professor McCaffery’s portrait of liberalism’s chief convictions about equality, political freedom, personal consumption, and hard work.
A. The Political-Interpretive Approach

A "political" theory, according to Professor McCaffery, employs "a style of analysis that eschews any reliance on formal, essentialist concepts like 'income' or 'consumption,' or on 'metaphysical' notions, such as of the natural rights to individual earnings or entitlements." A tax scheme arrived at by this method "takes seriously the idea that social and economic rules, at least within the broad constraints of basically just democratic structures, are up for grabs," and "looks for answers acceptable across a wide spectrum of comprehensive moral and political doctrines, without explicit invocation of any such doctrine, in part by looking to the generally implicit values of contemporary society." An "interpretive" theory is one that Professor McCaffery defines in an overlapping way: It is "a style of social theory that looks for norms in a society's actual practices and beliefs." The practices and beliefs to which Professor McCaffery gives greatest attention in announcing his adherence to this approach are the repeal of estate taxes in California, Australia, Canada, and Israel, and opinion polls in the United States showing considerable opposition to wealth transfer taxes. He takes these facts as evidence that estate and gift taxes are normatively suspect, perhaps unjust, in a liberal society.

It is tempting to dismiss Professor McCaffery's claim that Americans wish to scuttle wealth transfer taxes as unfounded. Occasional weakness of will notwithstanding, the best proof of what people believe is generally what they do, and the United States has not traded an income tax for a consumption tax or repudiated wealth transfer taxes despite decades of discussion. To be sure, representatives do not always vote as their constituents would prefer—though this caveat applies as well to the examples of legislative repeal Professor McCaffery offers as evidence that people dislike wealth transfer taxes—and many people doubtless would like to see estate and gift taxes scrapped. Nevertheless, the best interpretation of our adherence to federal gift and estate taxes on wealthy donors and decedents is arguably that a majority of Americans opposes, not supports, Professor McCaffery's proposed consumption-without-estate tax.

Even if Professor McCaffery were right in claiming that most Americans today deplore taxes on all gifts and bequests, however, that fact alone cannot ground an argument that wealth transfer taxes are unjust or immoral. The political-interpretive approach Professor McCaffery urges collides with Hume's familiar point that it is impossible to de-

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2 McCaffery, Uneasy Case, note 1, at 286 (footnote omitted).
3 McCaffery, Liberal Case, note 1, at 283.
4 McCaffery, Uneasy Case, note 1, at 286.
5 See id. at 328.
duce what ought to be from what is.\(^6\) Fifty years ago, officially sanctioned racial segregation was rife in the United States, but that hardly buttresses the assertion that segregation was morally permissible, let alone morally required. Likewise, the fact that a majority of the population in many parts of the United States today would prefer to penalize homosexual conduct cannot show, or even help to show, that they are right in doing so.

In determining which legal changes are possible, one cannot ignore a law's history or popular sentiment regarding it. Likewise, in determining which legal changes are not just possible but warranted, public opinion is crucial to fixing what the law ought to be, given our commitment to democratic legitimacy. The legitimating authority of public opinion varies with its character, however. Much depends on how deliberate and well-informed popular sentiments are, how much force should be accorded to the support one expects that a law would enjoy under certain counterfactual conditions when in actuality people oppose it, and what authority, as a matter of democratic political theory, decisions by elected representatives or referendum voters ought to have by comparison with survey reports of less thoughtful mass conviction.

But the question Professor McCaffery is trying to answer, as I understand his project, is divorced from these considerations of political expediency and legitimacy. The question is not which policy it would be wise for a member of Congress to back if she were vying for votes, or what she is beholden to do in her representative capacity. The question is what justice or morality demands in the way of wealth transfer taxes, taking certain facts about human motivation and ability as given. This is the question that a citizen or an independent-minded public official attempting to make up her mind about these issues must answer. Knowledge that other people hold one or another view might stimulate her thinking, but it certainly offers no confident answer as to where her thinking should tend.

Although Professor McCaffery notes that scholars seeking to understand the law's requirements have employed interpretive approaches in fields such as contracts, torts, and constitutional law,\(^7\) their interpretive work purports to be descriptive. It is not a brief for law reform. (When it becomes a brief for change, it moves beyond an interpretation and assumes a prescriptive character.) Interpretation does take on a normative dimension when a judge applies the law to a particular case, but deciding what the best reading of a law requires in a given instance differs in at least one critical respect from deciding which law


\(^7\) See McCaffery, Uneasy Case, note 1, at 286.
ought to be written. A judge is bound by his institutional role to interpret what constitutional authors, legislators, and courts whose decisions have precedential relevance have done when he attempts to divine the rights of the parties before him. His morally contestable conception of the proper interpretive method to apply to these materials and his convictions about the appropriateness of the measures he is called upon to judge will shape his decisions in difficult cases. His decisions are constrained, however, by the norms of his position and by pertinent legal materials in a way that an inquiry into the compatibility of a wealth transfer tax with liberal commitments is not. Neither a philosopher, nor a voter, nor a lawmaker concerned about what is morally best, is an interpreter in the way that a judge is, let alone the way that scholars are. The interpretive strand in Professor McCaffery's approach therefore appears out of place in an essay purporting to justify the abandonment of wealth transfer taxes.

The political character of his argument seems inapt as well, insofar as Professor McCaffery is trying to find the philosophically most defensible tax scheme. It would be, I think, a valuable accomplishment if Professor McCaffery were able to show that a sizable number of leading liberal theories about distributive justice and personal liberties converge in their prescriptions for tax policy. A demonstration of that kind might contribute to a broader consensus, by showing liberals of different stripes why they are mistaken in thinking that they are opponents rather than allies with respect to the design of a gift and estate tax. What must be remembered, however, is that proof of agreement on an outcome is by no means proof of the outcome's correctness. Liberals might concur yet all be wrong.

Of course, from the perspectives of both legislators and citizens, it might not matter that people subscribe to different moral premises if they endorse the same conclusions. And an academic addressing his argument only to liberals might ignore their discordant theories if the theories all funnelled into a single set of legal rules. But if agreement on outcomes is imperfect, as it certainly is with regard to wealth transfer taxation, then a political approach to setting policy rests on slippery soil. Either it means nothing more than counting heads and letting the majority prevail, or it amounts to taking sides without, by hypothesis, any normative reason for choosing a particular position, because the invocation of a substantive ethical principle would betray what Professor McCaffery has described as the political cast of his approach. Neither alternative has much to commend it if one's goal is constructing the soundest normative position rather than a stable political compromise.
Professor McCaffery's discussion of evidence that many Americans, perhaps a majority, oppose estate taxation illustrates the inadequacies of his political-interpretive approach. Proponents of an estate tax, such as Michael Graetz, sometimes attribute this popular animosity to unreasonable hopefulness. Many people dislike an estate tax, the argument runs, because they believe, in defiance of plain odds, that they will win a large lottery prize or enjoy stunning financial success and that they then will want to leave the rich remains of their luck or prowess to family or friends without making the government a beneficiary as well.

Professor McCaffery questions this explanation. He points out that there is no good empirical support for the assumption that people actually believe that they have a good chance of dying millionaires or of becoming the beneficiaries of wealthy decedents. But he then infers from equally poor evidence—widely scattered legislative repeals—that people overwhelmingly oppose estate and gift taxes and that they "are trying to bring our tax practices into closer alignment with reasonable liberal values." How could he know, without more discriminating data about their beliefs and motives? And even if he were right in saying that people who disapprove of an estate tax do so in the name of liberal values, why assume that these liberal values are the right values? Any normative argument for the abolition, modification, or retention of current wealth transfer taxes is necessarily independent of what any group of people believes. For this reason, neither Professor McCaffery's political-interpretive method nor an appeal to philosophical authority can hope to justify his proposal or any other tax plan.

Let me say in passing that the unpopularity of wealth transfer taxation in the United States, in my view, has a number of causes, although I admit that I have nothing more than common sense and anecdotal evidence to support my conjectures. One reason contributing to some people's opposition stems from the desire that the government not claim a large slice of their winnings should they strike it rich. In short, they meld hope with selfishness. Another reason is

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8 See id. at 327-28; McCaffery, Liberal Case, note 1, at 284-86.
9 Michael J. Graetz, To Praise the Estate Tax, Not to Bury It, 93 Yale L.J. 259, 285 (1983):
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 [the size of the majority supporting a repeal of the state's inheritance tax in a 1982 referendum] must believe that they will be in the wealthiest five to ten percent when they die.
10 See McCaffery, Liberal Case, note 1, at 286.
11 Id.; see also McCaffery, Uneasy Case, note 1, at 328 & n.170.
12 See note 9.
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ignorence. Many people do not realize how few decedents pay a substantial estate tax—only around 1% pay any federal estate tax at all— and wrongly believe that the odds of their heirs having to part with a sizable chunk of their inheritance are much higher than those odds actually are.

A closely related reason, however, to my knowledge, has escaped mention. Even those who do not believe they have more than a slight chance of becoming tycoons might favor the abolition of an estate tax on self-interested grounds. They might believe that the abolition of wealth transfer taxes would not hurt them, because other taxes, in fact, would not be raised to make up the shortfall in revenue (the government would borrow more or spend less instead), whereas repealing the estate tax could help them if they get lucky. If that belief is sensible, they might reasonably advocate ending wealth transfer taxes.

Of course, if they saw some clear pay-off from those taxes, they might join the other camp. Suppose, to make a very rough estimate, that the amount collected by the U.S. government in gift and estate taxes comes to around $100 per adult taxpayer annually. If taxpayers could choose between abolishing wealth transfer taxes and shaving $100 off their federal tax bills each year for life, my guess is that most people would take the money, at least once they were apprised of current estate tax rates and exemptions and the small probability that they would ever owe tax. But many of the people who have been surveyed in five-minute opinion polls might have regarded this trade-off as theoretical, not real, if indeed it ever occurred to them. They might well have believed that jettisoning the estate tax (or a state inheritance tax) would not impact their other tax bills. Whether that belief is correct hardly matters here. The important point is that this belief, rather than adherence to one contestable account of liberal ideals, might account for a fair share of popular opposition to maintaining or bolstering the estate tax.

There are further reasons for opposing wealth transfer taxes that Professor McCaffery does not consider. Some people might reject them for the putatively liberal reasons he recounts, but others do so because they are not liberals at all. They repudiate the notion that the state legitimately may tax some people’s earnings or accumulated wealth to bring about greater equality of opportunity. Indeed, no one could plausibly aver that most Americans share Professor McCaffery’s apparent allegiance to Rawlsian principles and think that social institutions should be arranged to the best advantage of the worst-off class. Even fewer would heed his call to “abandon theories of merit or de-

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13 See McCaffery, Uneasy Case, note 1, at 298 & n.56.
sert" that give those notions moral content independent of a set of socioeconomic rules chosen on other grounds;\textsuperscript{15} they could not be persuaded to favor whatever set of incentive payments and taxes would redound to the greatest benefit of those who are poorest, having no regard for how long or hard laborers work. Opposition to estate and gift taxes stems in substantial part from the decidedly illiberal beliefs of many Americans.

In addition, some liberals themselves espouse the view that a person's just earnings are his to spend on himself or on others, without paying any tax over and above what he owes on the earnings themselves. His choosing to substitute another person's consumption for his own, in this view, should not give everyone else a greater entitlement to share in the fruits of his efforts or risk taking.\textsuperscript{16}

 Opposition to the current estate tax is thus likely to have a tangle of roots, and not be amenable to the simple explanations that Professors Graetz and McCaffery offer. The political-interpretive approach, because it is too abstract and conjectural, is little help in finding out what those roots actually are. More important, even if one somehow managed to compile an exhaustive list of people's reasons for rejecting wealth transfer taxes, that list could not tell us which (if any) of the majority's reasons is morally compelling. No justification can avoid making moral claims about how social resources and opportunities should be divided up; merely reporting people's claims is not enough.

\textbf{B. Invocation of Leading Liberal Philosophers}

Professor McCaffery's second justification for a consumption-without-estate tax is not outlined clearly, but it seems to run as follows. He begins by claiming that all or most major liberal philosophers subscribe to a number of principles about social justice. This is a purely descriptive claim. Professor McCaffery nowhere lists these shared principles in definitive form, but he invokes versions of them in de-

\textsuperscript{15} McCaffery, Uneasy Case, note 1, at 341; see Section III.D.

\textsuperscript{16} This view stands at one end of a spectrum of proposals for taxing the receipt or consumption of bequests or gifts. For a recent expression of this view, see Peter Vallentyne, Self-Ownership and Equality: Brute Luck, Gifts, Universal Dominance, and Leximin, 107 Ethics 321, 333 (1997); for a more tentative endorsement, see Stephen R. Munzer, A Theory of Property 395-96 (1990). Most liberals congregate at the spectrum's other end. One of the most widely discussed proposals for taxing inherited wealth more steeply than earned income and for taxing wealth derived from more remote ancestors at higher rates than wealth derived from more immediate ancestors was that of Ernest Rignano, which spawned a number of similar schemes. See Alan A. Tait, The Taxation of Personal Wealth 106-23 (1967) (discussing Rignano's plan and related proposals). Professor McCaffery himself seems to lean towards different rates on the consumption of earned and inherited wealth. See McCaffery, Uneasy Case, note 1, at 352-33 & n.246. For further discussion of his views on this subject, see Section III.A.
fending his proposal and he evidently takes them to define a liberal egalitarian view about the distribution and use of social resources.

The rule by which he includes or excludes philosophers from this group is obscure. John Rawls, Ronald Dworkin, and Bruce Ackerman are named, though Rawls is identified as the "paradigmatic" liberal for unstated reasons. John Stuart Mill is identified as an author of "[t]he traditional liberal egalitarian tax scheme," even though he was one of the architects of utilitarianism and Professor McCaffery says elsewhere that "solid and traditional" liberal principles do not rest on "utility, liberty, or wealth-maximizing efficiency grounds." As best I can tell, a philosopher counts as a leading liberal thinker for Professor McCaffery's purposes if his work is discussed frequently in philosophy journals, he advocates some type of redistributive taxation to advance equality of wealth or opportunity, and his reasons for the redistribution he urges are individualistic, in the sense that they appeal to the self-interested benefits likely to flow to each individual affected by the proposal and thus can be captured by some form of contractarian reasoning that is not extensionally equivalent to utilitarianism.

Step two is to say that these principles are, generally speaking, correct. This is a normative claim. In attributing this view to Professor McCaffery, I rely on inference, for he does not explicitly endorse any of the liberal egalitarian views to which he refers. It is, however, reasonable to think that he agrees with one or another of them. He needs a normative premise to get to the conclusion that the United States ought to adopt a consumption-without-estate tax, and the arguments he offers in support of this conclusion all appeal to what he regards as liberal principles.

The last stage of the argument is to claim that, however much liberal egalitarians feud over details, the convictions they hold in common point to the abandonment of wealth transfer taxes and their

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17 See McCaffery, Uneasy Case, note 1, at 290.
18 See McCaffery, Liberal Case, note 1, at 281.
19 McCaffery, Uneasy Case, note 1, at 295.
20 McCaffery, Liberal Case, note 1, at 289.
21 For a good account of the assumptions underlying contractarian moral theories, see T.M. Scanlon, Contractualism and Utilitarianism [hereinafter Contractualism], in Utilitarianism and Beyond 103 (Amartya Sen & Bernard Williams eds., 1982) [hereinafter Utilitarianism].
22 I suppose it is possible that Professor McCaffery conceives of himself as performing a service for liberal egalitarians, by showing them where their views lead even though he thinks those views misguided—as an atheist might help a believer formulate the strongest case for God's existence. The tenor of his articles, however, leaves little doubt that Professor McCaffery sympathizes with liberal egalitarian views, and it seems improbable that someone who thinks liberal egalitarianism unsound would lavish so much attention on spelling out its practical ramifications and urging their acceptance.
replacement by a consumption tax with rates on consumption funded by donated wealth higher than those on the consumption of earned income. This is, I take it, why Professor McCaffery believes he need not take sides in intramural liberal disputes: All roads have the same terminus, so far as the overall shape of the tax system is concerned. Professor McCaffery seems to think that this is true, moreover, as a matter of ideal theory, not just given the conditions that prevail in our imperfect world.23

If Professor McCaffery could sustain it, this would be a surprising conclusion, viewed simply as a descriptive claim about what liberal egalitarians are committed to in the way of taxation. As he admits, liberal philosophers who address issues of distributive justice are virtually unanimous in supporting wealth transfer taxes.24 These philosophers, moreover, are highly intelligent thinkers who might be expected to delineate the implications of their views accurately. It is therefore disappointing that Professor McCaffery does not work through any specific theorist's views carefully (let alone a number of them) to show where Professors Dworkin, Nagel, or some other writer went astray and why he would repudiate wealth transfer taxes if he

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23 Although I take Professor McCaffery's claim to be that the progressive consumption tax he proposes is the best expression of the liberal principles he seems to endorse, even in an ideal world in which wealth and income are distributed justly, his own statements about what his arguments show vacillate. For example, he says at one point that "a stronger wealth transfer tax [which he opposes] may not be preferable even on ideal liberal grounds," McCaffery, Uneasy Case, note 1, at 288, which suggests that the question is close and that a stiffer estate tax might, in fact, be preferable. In the very next sentence, however, Professor McCaffery says that his proposal "comport[s] better with liberal first principles," id., which would preclude a stronger estate tax's being preferable from a liberal perspective. Yet, on the following page, Professor McCaffery says only that his plan "comports reasonably with the dictates of liberal egalitarianism." Id. at 289. This statement echoes his claim in his article in Philosophy & Public Affairs that his plan is "consistent with... a reasonable political liberal conception," McCaffery, Liberal Case, note 1, at 284, and it suggests that Professor McCaffery is advancing the weaker claim that his proposal is one of many that might pass muster with liberals, not necessarily the best one from a liberal point of view. His assertion that "it is possible to make out a strong argument against wealth transfer taxation sounding in ideal theory," McCaffery, Uneasy Case, note 1, at 295, further suggests that he is unsure whether the argument is decisive. But his claim that "the best and most feasible tax system on liberal grounds is one that does not include any wealth transfer tax" cuts the other way. Id. at 326. So too does his assertion that "[t]he real threats to liberty and equality from private possession [of wealth]... can be addressed—indeed, can best be addressed—in a tax system without an estate tax." Id. at 296.

Professor McCaffery's inconsistent language leaves one uncertain about how much he believes his argument proves. Nevertheless, I shall assume that he believes that a consumption-without-estate tax is the best embodiment of liberal ideals for the United States today. There would be little point in attempting to demonstrate that a collection of principles that plausibly can be labeled "liberal" yield a consumption-without-estate tax if one did not believe that those principles were true or if one believed that the most compelling interpretation of those principles produced some other prescription for taxation.

24 See, e.g., McCaffery, Uneasy Case, note 1, at 290-92.
reasoned more lucidly. I strongly suspect that it would prove a fruitless exercise, for reasons I discuss in Section III.

Nevertheless, even if Professor McCaffery does not and could not show that most liberal egalitarians would champion a consumption-without-estate tax if they realized the implications of certain convictions they hold, his own normative argument for that tax scheme has independent interest. In the remainder of this Section, I try to lay out the main elements of Professor McCaffery's conception of liberal egalitarianism and say to what extent liberals, in my judgment, would accept his account of their views. These principles, taken together, do not specify a unique answer to the question of whether wealth transfer taxes are desirable. Section III therefore turns to Professor McCaffery's attempt to derive a consumption-without-estate tax from these highly abstract principles and questions many of the intermediate assertions on which he relies in arguing for the extinction of wealth transfer taxes.

C. The Elements of Professor McCaffery's Liberalism

Four propositions stand out in Professor McCaffery's account of liberalism. All of them help contour his proposal. No doubt there are other commitments implicit in his argument, as well as other ways of dividing and counting the principles backing his claims. These four propositions, however, seem the most prominent supports underlying the vision of liberalism from which Professor McCaffery extracts his tax recommendations.

1. Equality of Material Wealth

Liberal egalitarians typically believe that justice requires those who are lucky through no merit of their own to share the material benefits of their uncourted good fortune with those who are blamelessly worse off. They disagree on the extent to which good and bad luck that is not the result of voluntary gambles imposes a duty on those who fare

25 For a description of liberal commitments that diverges in some respects from Professor McCaffery's, see Michael B. Levy, Liberal Equality and Inherited Wealth, 11 Pol. Theory 545 (1983). Professor Levy concludes that a number of possible wealth transfer taxes are compatible with liberal views. See id. at 557-59. He seems not to regard the abolition of wealth transfer taxes as an attractive option for liberals.

better to help those whom fortune cheats, as well as on the extent to which whatever principle of redistribution they endorse should yield to competing values. Likewise, their views diverge over whether inequality is itself an evil, or whether inequality is only to be deplored when it signals that those who are worse off could have their situations improved by giving them some of the resources possessed by those who are better off.\textsuperscript{27} Furthermore, liberal egalitarians have not coalesced around a common measure of the respects in which people ideally ought to be made equal or more equal than they now are; the issue remains contested.\textsuperscript{28}

Nevertheless, a stout battalion of liberal philosophers favors the redistribution of wealth to make people’s prospects more nearly equal. To be sure, not all do. Libertarians such as Robert Nozick and Jan Narveson reject the idea that the state ought to take from some and give to others to even out the influences of natural luck;\textsuperscript{29} liberals who pattern distributional rules on the outcome of a bargaining game in which natural abilities can skew the results, such as David Gauthier,\textsuperscript{30} likewise distance themselves from this principle. But Professor McCaffery is right to insist that an overwhelming number of liberal egalitarians agree that justice demands greater equalization than nature supplies of people’s chances to acquire and achieve. Because gifts and bequests are a salient cause of existing inequalities of wealth, particularly when they pass from parents to children,\textsuperscript{31} philosophers who advocate reducing disparities in luck to make opportunities more equal are inclined to limit gratuitous transfers by taxes or other devices.

Professor McCaffery errs when he says that “\[a\]n important point of commonality is that all liberal egalitarians see intra-generational uses

\begin{footnotes}
\item[27] See Larry S. Temkin, Inequality 245-82 (1993).


\item[29] See Robert Nozick, Anarchy, State, and Utopia 265-75 (1974) [hereinafter Anarchy]; Jan Narveson, The Libertarian Idea 232-44 (1988). Fifteen years after the publication of \textit{Anarchy, State, and Utopia}, Nozick moderated his view, endorsing what is essentially Righano’s idea that gifts and bequests of property that the owner received by way of gift rather than earned may be confiscated by the state and redistributed, to bring about greater equality in people’s starting points. Robert Nozick, The Examined Life 30-32 (1989).


\item[31] See, e.g., Munzer, note 16, at 387-94; McCaffery, Uneasy Case, note 1, at 308.
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of wealth in a different light than inter-generational transmissions.  
What unites them, rather, is that they regard the use or possession of wealth acquired through effort or voluntary choices differently from the use or possession of wealth obtained purely by chance. For them, justice demands that the undeservedly lucky share their good fortune with those who are faultlessly unfortunate, to make their opportunities to flourish more equal. Intragenerational transmissions of wealth warrant the same treatment as inter-generational transmissions to the extent the recipient has not earned the transfer through his efforts or decisions. Because liberal egalitarians focus on what individuals have or have not chosen, on what they are responsible for through their efforts and risk taking as opposed to what has come to them unbidden, they generally support an accessions tax on donative transfers rather than a tax on the total value of an estate, a tax on a donor's lifetime giving, or an increase in income tax rates across the board.

2. Political Liberty

The second liberal proposition on which Professor McCaffery calls is that the state should discourage or forbid actions that threaten fair democratic political participation, the exercise of individual liberties,

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32 McCaffery, Uneasy Case, note 1, at 290 (footnote omitted).
33 Professor McCaffery's distinction between inter- and intragenerational transfers of wealth, although irrelevant to most liberal egalitarians as a theoretical matter, aligns in our society with an important distinction that flows from the significance liberals assign to voluntary action. For most liberals, by far the most common example of gifts that have not resulted to a substantial degree from the recipient's voluntary choices are intergenerational transfers from parents to children. By contrast, intragenerational gifts, such as those between spouses or friends, often depend more heavily on recipients' free and knowing choices and thus are less objectionable on liberal egalitarian grounds. Liberal egalitarians may readily approve a marital exemption to the estate and gift taxes, see IRC §§ 2056, 2523, without giving children any break at all.

This alignment, however, is imperfect. Some intergenerational gifts are expressions of gratitude for acts of friendship or services performed—imagine a bequest to a much younger colleague or long-time personal assistant—and thus cause liberals comparatively little worry. Some intragenerational gifts, such as those between siblings, might owe much to accidents of birth, prompting liberal egalitarians to call for their reallocation.

34 See David G. Duff, Taxing Inherited Wealth: A Philosophical Argument, 6 Can. J.L. & Juris. 3, 20, 45-54 (1993). Professor Murphy argues in his Commentary that this account of liberal egalitarian commitments with respect to distributive justice is too narrow and that liberal egalitarianism also fairly encompasses theories that tailor the allocation of social resources to the well-being of a community's poorly-off members, regardless of the cause of their low level of welfare. See Liam B. Murphy, Commentary, Liberty, Equality, Well-Being: Rakowski on Wealth Transfer Taxation, 51 Tax L. Rev. 473 (1996). My aim here is not to provide a comprehensive, definitive account of liberal egalitarianism, and I have no objection to Professor Murphy's roomier description. My goal is to show that what is now the dominant conception of liberal egalitarianism is hard to square with Professor McCaffery's consumption-without-estate tax, notwithstanding his contrary assertions. Professor Murphy's helpful terminological corrective does not undermine this point.
or a competitive market economy.\textsuperscript{35} This proposition has a broad following. It approves government efforts to limit the political or market power of wealthy individuals. Of course, to the extent that the evils concentrated wealth might pose can be forestalled directly—by campaign spending limits or antitrust laws, for example—this second proposition does not significantly strengthen the case for wealth transfer taxes. More precise remedies can be employed even if gifts and bequests go untaxed. To the extent, however, that these threats cannot be so tamed, measures designed to dissipate large concentrations of private wealth might be useful in protecting political and personal freedoms.

Although wealth transfer taxes are among those measures, it is by no means clear that they are the most effective tool or part of the best package of rules designed to shrink or stunt the growth of family fortunes. High taxes on income, consumption, capital gains, or wealth itself might alone or together prove more efficacious. The argument for estate and gift taxes cannot lean heavily on this second liberal proposition without demonstrating that wealth transfer taxes are better at curing these ills than alternative measures are. Professor McCaffery does not attempt this comparison. He therefore seems right in acknowledging this liberal worry but not relying on it in any important way in making the case for his tax plan.

3. \textit{Conspicuous Consumption}

The third proposition on which Professor McCaffery grounds his case for a consumption-without-estate tax is both much more controversial and, for him, far more important. He maintains that a liberal state may curb “large-scale or conspicuous consumption”\textsuperscript{36} for “objective” political and ethical reasons:\textsuperscript{37}

Society may have objective ethical concerns with large-scale spending, and may prefer any (or at least most) other uses of resources to such excessive private preclusive use. . . . Extravagant use can distort the allocation of social resources, increase the costs of relative poverty and deprivation, and simply lack much objective urgency.\textsuperscript{38}

\textsuperscript{35} See, e.g., McCaffery, Uneasy Case, note 1, at 333.
\textsuperscript{36} McCaffery, Liberal Case, note 1, at 302.
\textsuperscript{37} McCaffery, Uneasy Case, note 1, at 341.
\textsuperscript{38} McCaffery, Liberal Case, note 1, at 302.
Professor McCaffery's consistent use of the word "may" leaves it unclear whether he believes that liberals ought to constrain spending for these reasons or, if they have no duty to do so, what moral considerations should tip their decision for or against measures aimed at restricting the private use of justly accumulated wealth. The sole example he offers of lavish spending that a liberal state may restrict for objective ethical reasons is Ross Perot's self-financed campaign for President in 1992. And that, he acknowledges, was objectionable under the second proposition as well, because it was "dangerous to prior liberties." It is therefore obscure exactly which uses of wealth Professor McCaffery believes can be proscribed on account of their objective unworthiness.

Professor McCaffery does not define the adjective "objective," but his allusion to an essay by Thomas Scanlon suggests that he has in mind reasons for limiting use that appeal to conceptions of individual well-being that do not define personal welfare exclusively in terms of the satisfaction of actual or idealized preferences. They regard individual well-being instead as depending, at least in part, on the goodness or badness of character traits or actions regardless of whether their goodness or badness is recognized by the person who possesses or performs them. One of the justifications for limiting use (not the only one) is that the satisfaction of certain preferences is unimportant, however much people might want to satisfy those preferences, and that society would be better off if it preserved wealth that otherwise might be spent for trivial purposes and used it for better ends instead.

For someone who adheres to a political-interpretive approach, a ban on "large-scale spending" on personal projects, or especially heavy taxation of that spending, seems an awkward proposition to endorse. There is little evidence that this view is popular, and it seems no accident that it has never been cemented in American law. As for Professor McCaffery's second test for liberal lineage—the ideas of typical liberal thinkers—he fails to name a single liberal philosopher who defends the claim that self-indulgent personal spending properly may be restrained, or ought to be restrained, by a liberal state.

The only liberal thinker Professor McCaffery cites in this regard is Thomas Scanlon. Yet Professor Scanlon does not endorse constraints on how people use their property. In *Preference and Urgency*, Professor Scanlon speaks to two different matters. First, he contends that a

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39 Professor McCaffery also says that liberals "may indeed care about use and be willing to interfere with it" and that "the political liberal state may reasonably cede to this concern." McCaffery, Uneasy Case, note 1, at 341 (emphasis added).
40 Id.; see also McCaffery, Liberal Case, note 1, at 302.
41 See McCaffery, Uneasy Case, note 1, at 289 n.14, 341 (citing T.M. Scanlon, Preference and Urgency, 72 J. Phil. 655, 658-61 (1975)).
society that aspired to make everyone equally satisfied could not justly rely on a purely subjective measure of the strength and importance of people's preferences in measuring personal satisfaction. For then somebody who developed "special interests or unusually refined or expensive tastes" might have to be given a much larger share of social resources than others to bring him to the same plane of satisfaction and that, Professor Scanlon assumes, would be unjust. A theory of justice that embraces maximum equal satisfaction as its goal must incorporate an objective evaluation of the worth of individual preferences.

Second, Professor Scanlon suggests that a community appropriately may judge that certain needs are more pressing than others when helping the poor:

The fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat (even assuming that the sacrifice required of others would be the same).

At no point does Professor Scanlon recommend overriding the preferences of the rich to limit the uses to which they can put their just allotments. Nor can I name an influential liberal theorist who argues that an already just state should limit spending by those with ample means to bring consumption into line with a person’s true needs, apart from highly specific paternalistic restraints like requiring motorcycle riders to buy helmets or banning the purchase of dangerous or addictive substances.

Perhaps Professor McCaffery wishes to pave the way. Many moral philosophers now accept the view that an individual's personal interest is best defined in terms of what Derek Parfit calls an “objective list” of goods (which generally includes the satisfaction of someone's actual preferences), rather than exclusively in terms of preference satisfaction. But it is a leap from that view to the claim that a liberal society is warranted in restricting the uses to which a member can put his just holdings. As traditionally conceived, liberalism protects peo-

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43 Scanlon, Preference and Urgency, note 41, at 659-60.

ple’s freedom to make mistakes with their property and their lives once they have satisfied any obligations of justice and fair cooperation they owe to others. Professor McCaffery has not explained why this traditional conception is mistaken. Nor has he explained why, if it is, the correct view implies that consumption past a certain point should be prohibited or taxed at a high rate, regardless of how someone spends his money. His reasoning seems to support, instead, a tax targeted at the consumption of luxuries.

Professor McCaffery also suggests that restricting consumption by the wealthy can be justified not by an interest in the moral well-being of the well-to-do, but by a conventional liberal concern for the welfare of others. Spending by the rich, he says, can harm the poor: “It can drive up the costs of basic sustenance, and it also can increase the price of what Adam Smith referred to as ‘appearing in public without shame.’” This is, however, a weak prop for a program whose goal is tying the purse strings of Thorstein Veblen’s leisured elite. Lavish spending by the richest 1% is unlikely to have much impact on the price of food and other staples consumed by the poor, and the poor hardly need feel embarrassed if they fail to wear diamonds and designer suits in public. Try to name someone who is truly ashamed of driving a Honda merely because some people own Bentleys.

More significantly, this argument derived from the harm suffered by the poor in no way appeals to the allegedly objective badness of consuming one’s wealth. It appears to be a claim about what the poor are owed in addition to any payments prescribed by the theory of distributive justice encompassed by Professor McCaffery’s first proposition. If, however, one assumes that material equality already has been approached as nearly as it can be consistent with any competing values that inform a liberal theory of justice, it seems that there is nothing more that society may or should do to even the score further. It is hard to see how additional restrictions can be imposed on the use of property by the rich without offending a liberal conception of fair shares. For that reason, Professor McCaffery’s third proposition is one which few liberals would embrace. I think they would be right not to do so.

\[\text{McCaffery, Liberal Case, note 1, at 291 (citing Amartya Sen, Inequality Reexamined 114-16 (1992)).}\]

\[\text{Should the comparison be to someone who has no car at all? The answer is “no,” because of the assumption that wealth and income are distributed justly. (That is the point of separating Professor McCaffery’s third proposition from his first.) Most liberal egalitarians believe that, in the United States today, justice requires transfers from those who are better off, sufficient to give the poorest citizens a decent income.}\]
4. The Objective Goodness of Work and Saving

Professor McCaffery's other highly controversial premise resembles its predecessor and is open to similar objections.

Even if wealth is indeed "fairly earned," society may nonetheless have objective, political reasons for opposing estate taxation. Simply put, and finessing metaphysical questions over desert and entitlement, liberal society likes earnings and savings, both of which contribute to a certain metaphoric "common pool." Earnings and saving each represent goods to the liberal majority, whereas use represents an individual imposition on the collective and is therefore not a liberal good. Put conversely, claims of inequality are most compelling vis-à-vis the use of resources; the justice of earnings is logically and ethically distinct from the justice of use.47

It is not clear what Professor McCaffery means when he says that society "may" (does?) have objective reasons for approving of earnings and savings (let alone what it means to finesse matters of desert). The claim might be that work and thrift are good because they help inculcate Weberian Protestant virtues. This claim, however, sits ill with political liberalism, which is inclined to leave the fostering of individual virtue to the private sphere rather than make it a public policy. Liberalism's rejection of the notion that the state is an apt religious or moral tutor historically has been one of its defining features, and it is one that most liberals wish to preserve. This claim also does not square with Professor McCaffery's statement that earnings and savings are good because they add to a pool of resources that, through investment or possibly later consumption, will profit other people.

If the idea, though, is that people should be encouraged to work and save because these activities produce capital that in time will augment other people's consumption and that they should be nudged to do so even given a just distribution of resources, then the argument is apparently that the state should seek to improve the welfare of the poor more than justice requires. Yet, it is difficult to imagine what liberal reason there might be for tampering with what is assumed to be a just allocation of the benefits and burdens of social life. Professor McCaffery asserts the possibility of such a reason, but he does not state it plainly or offer an argument for it. To the extent that his recommended tax scheme depends on it to show its superiority over rival approaches, it is unlikely to win the assent of many liberal egalitarians.

47 McCaffery, Uneasy Case, note 1, at 295-96.
5. **Summary**

Of the four propositions that Professor McCaffery alleges are central to the liberal egalitarian position, only the first two—the claim that a liberal state should redistribute income to promote equality of material resources and of opportunity and the claim that it should safeguard political and economic liberties—have garnered widespread support from liberal philosophers. Some liberal writers argue that these two propositions yield a powerful case for stiff wealth transfer taxes when conjoined to observed facts about human motivation and behavior.\(^4^8\) That claim may or may not be true; a great deal depends, as Section III makes clear, on the theory of distributive justice to which one subscribes and the empirical hypotheses one believes are correct. Professor McCaffery's proposed consumption tax stripped of wealth transfer levies perhaps can be sustained by a plausible theory of justice coupled with a concern for protecting individual liberties. But it cannot be justified by all liberal egalitarian theories and it is inconsistent with some of the most powerful of them. Moreover, if Professor McCaffery needs to rely on claims about the appropriateness and perhaps the desirability of a liberal state's legislating to advance the allegedly objective ethical value of work and saving and to combat the objective ethical disvalue of flagrant consumption, he will find that few liberals are willing to follow him. They will balk not because there is anything improper in combining deontological and consequentialist considerations in devising a scheme of taxation, nor will they stand fast because they deny the objectivity of values. They will hold their ground because the values to which Professor McCaffery appeals, in their judgment, would compromise rather than supplement a liberal egalitarian theory of justice.

III. **Why, When and How Much Should a Liberal State Tax Transfers of Material Wealth?**

Governments impose taxes and spend the proceeds for four main reasons. Tracing the links between the source of revenue and the ends to which it is devoted is often impossible in practice, because taxes typically flow into a single pot from which the government pays its bills. Rarely do laws demand that certain taxes be spent in specific ways. Nevertheless, with all but the third justification for taxation I describe and some instances of the second, it is crucial to the normative propriety of the scheme that the tax collected be used for a given purpose.

\(^{48}\) See, e.g., Duff, note 34.
First, governments tax people to fund collective undertakings, such as outfitting an army or building roads; alternatively, the state may provide people with tax preferences to encourage them to perform some socially beneficial activity. Important issues of justice arise in determining which undertakings the state permissibly may support and how the costs ought to be apportioned, but these issues have virtually no bearing on wealth transfer taxes. The only way they could possibly be seen to intersect is by viewing the maintenance of a well-functioning democracy as a public good to be furthered by splitting up clusters of purchasing power. That would be a strained way to justify wealth transfer taxes, given more direct ways of curbing the political power of accumulated wealth.

Second, governments tax various activities to ensure that the agent bears the full cost of his actions given extant property and tort laws. A tax on carbon monoxide emissions is one example. If legal rights so provide, proceeds from the tax should be used to compensate those who are injured by the agent's conduct; in other cases, the efficient, just result might require taxing certain behavior without compensating those adversely affected by it. Plainly, the goal of internalizing externalities is remote from gift and estate taxation.

Third, governments sometimes levy taxes on behavior they wish to discourage, often with the asserted goal of benefiting the actor. Taxes on alcohol, tobacco products, and gambling sometimes are justified in this way. The appropriateness of paternalistic and moralistic taxes in a liberal state is debatable, but that debate need not be joined here. Wealth transfer taxes cannot plausibly be seen as aimed at curbing vice. Generosity towards other people in general and one's family in particular is rarely thought wrong, and though some people spoil their children or their spouses, taxes are crude and ineffective devices for making them act better.

Finally, governments make some citizens pay to help others, with the aim of redistributing wealth and the opportunities it affords. This is the principal justification liberals give for taxes on gratuitous transfers.

In the remainder of this Article, I focus exclusively on the fourth reason for taxing wealth transfers: redistribution aimed at achieving a more just allocation of resources. I cannot explore all of the questions Professor McCaffery's proposal raises, and so will concentrate on those issues that bear on the justice of his plan for taxing wealth transfers. It should quickly become obvious that many liberal egalitarians would dissent from Professor McCaffery's ideal, even if his proposal falls within the wide spectrum of liberal egalitarian views.
A. Professor McCaffery’s Proposed Progressive Consumption Tax With a Possible Deferred Progressive Accessions Tax

Professor McCaffery claims that “[m]any, and maybe all, of the normative problems with the private possession of wealth turn out to relate to possession qua actual or potential use.” What ought to matter to liberals, insofar as they are egalitarians, is that people be made equal in their consumption of resources or in their opportunity to acquire resources to consume, subject to whatever constraints on redistribution other values impose. How a person acquired the wealth he consumes, however, might affect the moral permissibility of his using it. “Society,” McCaffery contends, “may actually have a greater concern with the inequities of inherited wealth” than with the unequal possession or consumption of wealth by those who created it. Furthermore, “[s]ociety may have some worry over imprudent investment decisions by heirs.” One might think that the best way to tackle these moral and practical concerns is to tax at least some gifts and bequests and put the proceeds in the hands of equally undeserving consumers or more responsible investors. But that, in Professor McCaffery’s view, would be a grave mistake. What these worries suggest, he says, is that a tax solely on consumption must be modified slightly to ensure that the personal use of unearned wealth is spread around more justly and that its investment is targeted wisely. Thus, Professor McCaffery arrives at “a specific comprehensive tax reform proposal: a progressive consumption-without-estate tax, possibly supplemented by a separate and higher rate structure on spending out of gifts or bequests, and a regulatory regime loosely monitoring nominally private investment decisions.”

Professor McCaffery does not say by what standards, and using what administrative machinery, the state should regulate the investment of property obtained by gift or bequest. He describes as “a lim-

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49 McCaffery, Uneasy Case, note 1, at 348. Professor McCaffery does not say why it remains unclear whether all or merely many of the normative problems regarding the private possession of wealth have this origin. I assume that he has in mind some moral issue that is difficult to classify, but I have no idea what it is.
50 Id. at 349.
51 Id.
52 Id. at 350. Professor McCaffery elsewhere notes that David Bradford proposed ending wealth transfer taxation and replacing income taxation with a consumption tax. See McCaffery, Liberal Case, note 1, at 300 n.32 (citing David F. Bradford & U.S. Treasury Tax Policy Staff, Blueprints for Basic Tax Reform 122-25 (2d ed. 1984)). Michael Boskin suggested pairing a broad-based progressive consumption tax with an accessions tax having a “very large exemption.” Michael J. Boskin, An Economists’ Perspective on Estate Taxation, in Death, Taxes and Family Property 56, 66 (Edward C. Halbach, Jr. ed., 1977) [hereinafter Death, Taxes and Family Property]. Professor Boskin’s proposal therefore differs from Professor McCaffery’s in taxing accessions to wealth when they occur, rather than when unearned wealth is finally spent.
iting example” a requirement that property secured in this way be placed into a blind trust to gain the benefit of deferred taxation, but says that “any qualified form of savings accounts will do.” It is hard to believe, however, that Professor McCaffery would, on further reflection, insist that people place their inheritances into designated savings vehicles to postpone taxation. For example, it would be contrary to the ends he lauds to require heirs to a family business to sell the enterprise and put the proceeds in a bank to defer taxes. The disincentive to giving and investing (by both donors and recipients) created by government controls, along with the inefficiencies and compliance costs they would create, would have to be weighed against whatever benefits Professor McCaffery perceives investment regulation to have. Yet, aside from the suggested savings accounts, which might be mandated for gratuitous transfers of cash and securities—though not without loss and certainly not in the case of most other gifts—Professor McCaffery offers no clue as to how he would strike the balance between liberty to invest and community control.

Nor does he say how high tax rates ought to be as a matter of justice. Professor McCaffery notes that setting rates “may require difficult and ultimately somewhat arbitrary decisions,” which is true, but he does not offer any approximations or sketch the reasoning that a legislator or moral philosopher ought to engage in when making hard choices about rates and bracket sizes. It seems likely that if a consumption tax without a wealth transfer tax succeeded in making the able and wealthy work harder, invest more, and pass more property on to their progeny—and if it did not, his enthusiasm for it presumably would fade—then rates, at least initially, would have to be set higher than current income tax rates to keep revenues steady. Although there is no way to say a priori how high they would have to float, it seems probable that rates would have to go up or the government would have to borrow more. If, contrary to the lessons of the 1980’s, Professor McCaffery’s plan caused a trickle-down boost in worker productivity and the incomes of poor workers actually rose, rates eventually might come down. In the meantime, however, one can only guess where he thinks the greatest increases are warranted. Given his arguments, the top marginal rate almost certainly would have to exceed 40% on the consumption of earned income until well after the transition to a consumption tax.

A second, higher rate on the consumption of assets received as gifts or bequests, Professor McCaffery notes, would be equivalent to “a

53 McCaffery, Uneasy Case, note 1, at 349. He takes as his model the “loose form of government oversight of the current pension and charitable activity sectors.” Id.

54 Id. at 350.
type of consumption-model accessions tax."\textsuperscript{55} It differs from a conventional accessions tax in that the tax would be levied, not at the time wealth was transferred, but only once it was used. Professor McCaffery envisions "a simple scheme: Consumption is deemed to come out of current period earnings, savings attributable to prior period earnings, and inheritance, in that order,"\textsuperscript{56} although he wishes "to leave precise details to another day."\textsuperscript{57} He declines to say whether something like the scheme he describes is desirable—whether higher rates ought to be imposed on the consumption of wealth received gratuitously.

Professor McCaffery’s description of his proposal leaves numerous questions unanswered. He does not disclose how much weight he assigns to the pursuit of equality of consumption, or even why he values equality of consumption. It is even more unclear why he values equality \textit{only} of consumption.\textsuperscript{58} Professor McCaffery seems to believe that the feelings of security, power and self-respect that people typically experience when they own considerable wealth, regardless of whether they spend it,\textsuperscript{59} should be ignored or given scant weight in determining whether people are treated as equals. But he never addresses the question of why this substantial source of people’s well-being and of their perceptions of inequality at best should play a trifling part in specifying justice’s demands. It is a salient omission.

In addition, Professor McCaffery does not explain why a liberal egalitarian community might endorse a higher rate of tax on the consumption of unearned wealth than on the consumption of earned wealth. He proposes a dual-schedule consumption tax without saying plainly why consumption made possible by unearned wealth should be taxed more heavily than consumption with a different pedigree, even

\textsuperscript{55} Id. at 352.
\textsuperscript{56} Id.
\textsuperscript{57} Id. Two details it would be important to address are whether earnings derived from the investment of unearned wealth would count as current earnings or unearned income and whether the amount of unearned receipts would be adjusted upward for inflation until they were finally spent.
\textsuperscript{58} It could be that Professor McCaffery believes that liberal egalitarians should have as one of their goals not equality of consumption, but equality of opportunity to obtain objects of consumption by employing the same labor and effort as others. His fuzzy descriptions of liberal egalitarianism do not allow one to say precisely which version of the theory he supports.
\textsuperscript{59} As Stephen Munzer observes:

\begin{quote}
Wealth is important not just for the manifold pleasures of consumption. It also provides unearned income, confers security and many sorts of power, and serves as a material foundation of opportunities and self-esteem. . . . It is no surprise that the inequalities can wound self-esteem, create justified moral resentment, distort the legal and political process, and reinforce myths offensive to equal moral worth.
\end{quote}

Munzer, note 16, at 398.
though the two constitute equivalent withdrawals from the stock of social resources. Nor does Professor McCaffery disclose why, if there is good reason to tax the first sort of consumption more severely, he hesitates to embrace this option. Is he unsure whether he accepts some moral principle that would mandate a higher rate? If so, which one? Does he hesitate because he is concerned about the effects of a higher tax on donors' capital accumulation and giving? If so, what set of empirical findings would alter his recommendation, and why? In the absence of further elucidation, any assessment of Professor McCaffery's proposal is bound to be conjectural and incomplete.

Professor McCaffery speaks only of one schedule of taxes on the consumption of wealth obtained by gift or bequest. It is unclear whether he does so because he favors a uniform set of rates without exceptions, or whether he has just not engaged in the fine-tuning that would be necessary in fleshing out a comprehensive reform proposal. Many would favor making special provision for generation-skipping transfers, distinguishing relatives from other recipients, or taxing lightly (or not at all) transfers to needy parents, disabled children, and other groups whose expenditures are not frivolous or politically destabilizing.

Some proponents of wealth transfer taxes advocate higher rates on gifts and bequests to grandchildren and other remote descendants than on gifts to immediate family members, such as children and siblings. See, e.g., W.D. Andrews, What's Fair About Death Taxes?, 26 Nat'l Tax J. 465, 466-67 (1973); William Andrews, The Accessions Tax Proposal, 22 Tax L. Rev. 589, 613-27 (1967); Edward C. Halbach, Jr., An Accessions Tax, 23 Real Prop., Probate & Trust J. 211, 214-15, 227-29, 240-70 (1988). Concern about the creation of dynasties of wealth stretching over centuries through the creation of well-crafted trusts that escape most wealth transfer taxes, along with a desire to tax similarly families that pass wealth from one generation to the next successively and families that pass wealth from grandparents to grandchildren by leapfrogging children, led to the enactment of the current generation-skipping transfer tax. Subject to significant exceptions, most importantly a $1 million exemption per donor, the generation-skipping transfer tax is imposed at the maximum estate and gift tax rate of 55% on qualifying gifts and bequests. IRC § 2641. Somewhat oddly, given its aims, the generation-skipping transfer tax does not impose a higher rate on transfers that skip two generations than on transfers that skip only one.

Some egalitarians might favor taxing gifts to children and other relatives (except spouses) at higher rates than gifts to spouses and unrelated people, because gifts to friends and spouses typically result from a long series of voluntary actions on the part of recipients and are thus less the product of recipient's blind luck than gifts to children, siblings, and other relatives. Nevertheless, the practice in states that tax inheritances is typically the reverse. Where rates vary with the identity of recipients, close relatives are taxed more lightly than distant relatives and unrelated friends. See W. Leslie Peat & Stephanie J. Willbanks, Federal Estate and Gift Taxation: An Analysis and Critique 5-6 (2d ed. 1995). Tax preferences for property passing to surviving spouses, parents, lineal descendants, and in some cases brothers and sisters have been a part of many states' inheritance taxes since their inception in the nineteenth century. See William J. Shultz, The Taxation of Inheritance 98-121 (1926).

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Professor McCaffery does not discuss the various administrative problems his proposal would encounter, but state regulation of private investment decisions by recipients of inherited wealth—a surprisingly illiberal and probably unworkable suggestion, if it had any teeth—is not the sole difficulty. Recordkeeping and monitoring could pose larger problems. The following discussion is speculative, because Professor McCaffery does not outline the way in which his proposal would actually work, but the prognosis for easy administration looks bleak.

Gifts and bequests fall into three categories. (1) Transfers of investment assets presumably would not be taxed under Professor McCaffery's proposal, contrary to current law. A consumption-without-estate tax therefore would simplify their tax treatment. The same is not true, however, of the other two categories of gifts and bequests.

(2) In the case of cash gifts, recipients would have to keep track of all gratuitous transfers. Cash gifts would be like earned income—taxable unless invested—except that, if a separate set of rates applied to the consumption of gifts and bequests, they would have to be accounted for separately and continuously. This is a burden that recipients of cash gifts do not currently bear. Correspondingly, transferors would have to keep records and claim a deduction for bequests and inter vivos gifts of cash from their current year's income, because Professor McCaffery, I assume, would not wish to treat cash transfers as consumption expenditures by donors.63 Otherwise, he would impose a tax that is functionally the same as the current estate and gift tax, which he is at pains to avoid.64 Gifts of money that had been kept in the form of cash since before the start of the current tax year would pose less of a problem for transferors, if they already would have been taxed on this amount because retaining income in the form of cash was treated as consumption and if Professor McCaffery would oppose taxing this money a second time. Recipients, however, would still

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63 I assume that Professor McCaffery's consumption tax would generally take the form of a cash flow tax. See William D. Andrews, A Consumption-Type or Cash Flow Personal Income Tax, 87 Harv. L. Rev. 1113 (1974).

64 This requirement would also go beyond the Code's current demands in the case of cash gifts that do not trigger gift or estate tax liability because they do not exceed $10,000 per donor per donee, IRC § 2053(b), unless Professor McCaffery would favor taxing gifts of similar amounts to the donor as a form of consumption to make administration and compliance less burdensome.
need to keep records if they chose to invest rather than spend the cash and wanted to insure that it was not later taxed when disinvested.

(3) Likewise, gifts of noninvestment items—jewelry, cruise tickets, Pekingese—presumably would be taxed to the donee if they were paid for out of current income (including money obtained from the sale of investments). Unless the donee sold them and invested the proceeds, a tax apparently would be imposed on their value at the donee's special consumption tax rates, Professor McCaffery's stacking rules notwithstanding. If an item were new, it seems that the donor would be entitled to a deduction for all of the purchase price; if the donor purchased the item from current income but used it prior to disposing of it, only part of the purchase price would be deductible. If the non-investment item had been purchased out of a previous year's income, presumably, it would have been treated as a consumption expenditure by the donor and he already would have been taxed on it. The transferee, I assume, would not be taxed on the receipt of that item, unless Professor McCaffery would prefer to apportion its consumption and the corresponding tax liability between donor and donee, which would require awarding a tax credit to the transferor.65

In seeking a feasible administrative approach to gifts of cash or consumption items out of current income (including money obtained from disinvestment), Professor McCaffery faces a choice he does not discuss in his articles. He could insist that donors and recipients record and report all gifts and bequests (however minor) of cash or non-investment items, to ensure that no tax is levied until consumption occurs and that the tax is assessed on the right person's consumption. That rule would make compliance arduous for taxpayers and verification by tax authorities impossible in many instances, especially inasmuch as it would require matching the returns of donors and donees, which the current system avoids by not treating gifts or bequests as income to recipients. Alternatively, Professor McCaffery could treat transfers of noninvestment items as consumption by donors, and thus as neither deductible by them, nor as entering into donees' receipts for the year in calculating annual consumption and saving. That

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65 It is, of course, possible to tax the consumption of a single tangible item by two people twice. See Joseph M. Dodge, Taxing Gratuitous Transfers Under a Consumption Tax, 51 Tax L. Rev. 529, 550-61 (1996). If Wendy bought a table for $1,500 and gave it to Susan when it was worth $1,000, one might tax Wendy on $1,500 worth of consumption and then Susan on another $1,000 worth of consumption. Professor McCaffery's justification for a consumption tax, however, is based in large part on the assertion that it is only proper to tax actions that take from the "common store." See McCaffery, Uneasy Case, note 1, at 338-41. This commitment suggests that he would oppose a new tax on the consumption of an item by a second person after its consumption by the first person already had been taxed.
would render gifts taxable when made, and thus apparently run counter to the spirit of his proposal.

Perhaps Professor McCaffery could justify taxing donors but not recipients, however, in the following way, at least with respect to gifts of little value. Many small gifts take the form of consumption items—jewelry, clothing, food, and entertainment—the purchase of which would be taxed in the year of the gift in any case, whether to the donee or the donor. Even if in theory the donee’s tax rate should apply, the fact that at least some noncash gifts are not chosen by the donee might make taxing those gifts at her marginal rate seem unfair to her. Perhaps it would be fairer to tax the donor at his consumption tax rate instead. For these reasons, the government might mandate that all gifts of noninvestment assets below a certain value be treated as consumption by the donor. One could imagine treating small cash gifts in the same way to streamline tax administration, because often they are spent shortly after receipt.

Notice, though, that larger gifts of cash and property could not be handled in this manner without undermining Professor McCaffery's proposal. In those instances, compliance with his consumption-without-estate tax inevitably would be more onerous than compliance with current law, because both donors and donees would have to maintain records. His proposed tax also would be harder for the Service to police, as donors attempted to claim deductions while donees neglected to take corresponding amounts into their consumption tax base—a problem that does not arise under the current rule.

If a separate set of progressive rates applied to spending by recipients that stemmed from earlier gifts and bequests, the burden of keeping records would increase dramatically, because taxpayers would have to maintain lists of everything they received over the course of their entire lives. Tracing by tax authorities would become an even more formidable task. Of course, under any progressive accessions tax, including the influential proposals by William Andrews and Edward Halbach, lifetime recordkeeping would be necessary, so long as the recipient of others' largess had not yet reached the top marginal rate. But Professor McCaffery’s addition of stacking rules to determine when consumption was paid for from unearned wealth, along with the deferral of tax until consumption, would complicate the task considerably.

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66 If the administrative costs of doing so were low, the government instead might allow the donor to decide how to characterize small gifts for tax purposes.

67 See note 60.

68 The stacking rules might lead to practical difficulties beyond recordkeeping problems. For example, if people often consume their savings late in life and if they have commingled earned and unearned wealth over the years, they might be unpleasantly surprised to find a
B. Methodological Issues

Assessing the normative appeal of Professor McCaffery's proposal is daunting, for four interrelated reasons. First, the proposal itself is exceedingly indefinite. Not only is it unclear exactly what he is recommending in the way of taxation—What would the basic rate structure look like? Would there be one set of rates or two? What limitations would be imposed on investments?—but his articles do not indicate how revenue obtained for the purpose of redistribution should be spent. It is impossible to evaluate the justice of any tax scheme without knowing how the proceeds will be used.

Second, even if Professor McCaffery's plan were made more concrete, its ramifications necessarily would be highly speculative. For some liberal theorists, this uncertainty is comparatively unimportant, because they have firm ideas about the degree to which inheritance should be permitted and how revenue from a wealth transfer tax should be allocated. For other liberals, however, this empirical uncertainty is critical, because they measure the justice of a scheme by the resulting distribution of wealth, income, or opportunity, as Rawls does in focusing on the flow of primary goods to a representative member of the least advantaged group. Liberals of this second stripe can offer only a tentative reaction to Professor McCaffery's proposal. The contested nature of many of his empirical claims only amplifies their insecurity.

Third, liberals of the second sort are apt to say that parts of a tax package cannot be judged independently of the remaining parts. For them, it is the overall pattern of burdens and benefits that matters, so that an estate tax cannot be evaluated without also knowing how wealth, income, consumption, and other activities are taxed. Because Professor McCaffery does not sketch other facets of his liberal ideal, a final assessment of his plan is impossible for many liberals.

Fourth, the two liberal values Professor McCaffery invokes most frequently—the importance of rendering the distribution of consumption and opportunities more equal than would an unrestricted market and the importance of safeguarding personal liberties, including those associated with democratic participation—fail to specify a unique collection of rules or principles for taxing and spending. They are simply too vague. Which policies for redistributing income are best therefore depends on which of numerous competing, more precise principles are correct with respect to the justice of amassing and transferring wealth.

steep tax applied to their meager spending on food, shelter, and medical care, the result of their spending inheritances they had received many years before. Perhaps they should have looked ahead and provided for that high tax burden earlier, but, in fact, many people would never do so.
Unfortunately, Professor McCaffery does not choose sides in debates among liberals like Professors Rawls and Dworkin and say which specific principles of redistribution he thinks are right. Perhaps he believes that the “political” cast of his proposal requires him to find a way to satisfy partisans of rival liberal theories rather than to join one or another camp. This lack of specificity, however, also makes his proposal hard to assess, and it leaves unsupported his assertions that fundamental liberal values entail his consumption-without-estate tax. One can only guess at how Professor McCaffery gets from first principles to tax policy. It is, I believe, possible to do so if one endorses a number of more fine-grained principles and makes various assumptions about how people will respond to certain incentives. By making his reasoning and proposal more definite, though, it seems overwhelmingly likely that Professor McCaffery will lose the allegiance of many of the liberals for whom he claims to be speaking.

In the remainder of this Section, I discuss several matters of distributive justice that bear crucially on the design of wealth transfer taxes and examine, to the extent that it is possible to distill his views, Professor McCaffery’s stand with respect to them. My sole concern is the structure of taxes in a just world; the question of how best to alter what we have, given the practical obstacles to change, lies outside the scope of this Article. I assume throughout that liberal egalitarians are at least suspicious of gifts and bequests, because, to a significant degree, they typically represent accessions to someone’s resources that the recipient did not earn through her efforts or decisions. Liberals might conclude that the benefits of permitting gratuitous transfers of wealth outweigh the damage to their egalitarian goals, but I assume that they find these unearned accessions prima facie objectionable. The question, then, is why gifts and bequests should be permitted and, if they are allowed, why they should not be taxed heavily, to spread material good fortune more widely than donors desire. In addressing these issues, with one notable exception,69 I sidestep the question of whether liberals should favor taxes on income, consumption, or both, to prevent the issues from becoming confusingly entwined.70

69 See Section III.D.

70 I also assume, as liberals typically do, that parents and their children ordinarily should not be treated as a single taxpaying unit, without taking sides in the dispute over whether income or consumption taxes should be levied on individuals or couples. In addition, I follow Professor McCaffery in ignoring the possibility of imposing a periodic wealth tax in lieu of or in addition to wealth transfer taxes or his consumption-without-estate tax. The administrative and liquidity problems that a substantial wealth tax would create, combined with its failure to distinguish earned from unearned income, make it an unappealing option. For an opposing view and an outline of a plan for enacting a straightforward, low-rate personal wealth tax, see Edward N. Wolff, Top Heavy: A Study of the Increasing Inequality of Wealth in America (1995).
C. Work, Savings, and the Plight of the Poor

1. A Liberal Egalitarian Lodestar

Suppose that people were equally lucky as regards the many aspects of their lives they cannot choose, and that setbacks people cannot reasonably avoid or fully insure against afflict everyone in equal measure. Unless they have brought injury or disease upon themselves, they enjoy equally fine health; their parents are equally loving, supportive, and instructive; their talents are cut from the same die, their education uniform, their beauty no more radiant or dull than anyone else’s. Imagine further that they receive equally valuable allotments of cash or property when they reach the age of responsible majority, and that the same smorgasbord of opportunities beckons to each of them. Collectively, they embody the liberal egalitarian’s ideal of equality in matters for which they cannot be accorded credit or blame.\(^7\)

Now suppose that people begin making gifts to one another, transfers they are not obligated to make by dint of some contractual agreement or by an egalitarian theory of justice.\(^7\) Most (though by no means all) liberal egalitarians would see these gifts as a threat to the equality of fortune people previously enjoyed. To be sure, gifts span the spectrum of desert. Some (at one end of the scale) are rewards for friendship or other benefits the recipient earlier conferred; some are at least partly investments in what the donor hopes are future tangible or nonmaterial rewards; some (at the scale’s opposite end) are prompted by a sense of familial duty that is insensitive to the worthiness of the gift’s recipient. The basic point, however, is simple: To the extent that gifts are unearned, most liberal egalitarians view them as tipping the level plane of opportunity justice demands.

If he could morally ignore competing goods and transfer wealth costlessly, the egalitarian would respond by confiscating the unearned

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\(7\) As Professor Nagel says:

What seems bad is not that people should be unequal in advantages or disadvantages generally, but that they should be unequal in the advantages or disadvantages for which they are not responsible. Only then must priority be given to the interests of the worse off. Two people born into a situation which gave them equal life chances can end up leading lives of very different quality as a result of their own free choices, and that should not be objectionable to an egalitarian.

Nagel, note 26, at 71.

\(7\) Some theories of justice insist that parents have an obligation to provide their offspring with certain goods and not place the burden of caring for them on other members of their community. See Rakowski, note 26, at 153-55; Steiner, note 26, at 278-80; see also J.J. Waldron, Locke’s Account of Inheritance and Bequest, 19 J. Hist. Phil. 39 (1981) (arguing that Locke’s view implies that dependent children have a natural right to support from a deceased parent’s estate but that, apart from this case, there are no natural rights to succession).
portion of gifts and dividing it equally among the populace, to restore the equal opportunity to enjoy and achieve that trails, however imperfectly, equality of material resources. Allowing people to receive the average amount of unearned gifts over a lifetime and taxing away any addition, for redistribution to those whose take falls short of the norm, would be an equivalent way of righting the balance. There are, however, at least two significant normative obstacles to implementing this policy even if one abstracts from the varied costs of administration, evasion, and legal enactment.

The first is that there seems to be a great many people to be a conflicting, nonconsequentialist moral principle that modifies the result prescribed by the principle of equality alone. This conflicting principle declares that people may use their justly acquired property to enhance the welfare of others rather than themselves, without having to share their bounty with every other person should they elect to substitute another's consumption for their own. Not all liberal egalitarians subscribe to this principle, and Professor McCaffery does not mention it as a possible bar to the pursuit of egalitarian goals, though it is perhaps implicit in his example of Mr. Spendthrift and Ms. Thrifty. Yet, it nevertheless commands popular assent. This moral conviction probably underlies much public opposition to wealth transfer taxes today, and might well loom larger as a reason for limiting their scope in a more just world.

Moreover, to the extent that people would overwhelmingly endorse an amendment to an egalitarian principle of justice, collective consent affords a further reason for restricting its reach. People might wish to temper strict egalitarianism because they believe moral principles other than principles of justice require some softening of equality's demands. Or perhaps, instead, they simply prefer rules for sharing social goods that facilitate the formation of affective ties by excluding some gifts from the reach of an egalitarian redistributive principle. The egalitarian imperative thus might be compromised by common agreement.

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73 Whether confiscated gifts should be shared by everyone alive, only by adults alive when the gift was made, only by members of the same generation as the intended recipient who are alive at that time, or by some other group is a question to which egalitarians have given little serious thought.

74 Some do, of course. This view lies behind Rignano's proposal and similar schemes, see note 16, and it has many partisans today. See generally Munzer, note 16, at 395-96; Vallentyne, note 16; Steiner, note 26, at 250-58 (defending the weaker claim that, while people have a moral right to pass property to others while alive, they have no equivalent right to do so at their death).

75 His discussion of that example leaves one unsure of his point. See McCaffery, Uneasy Case, note 1, at 342-44.

76 For elaboration of these points, see Rakowski, note 26, at 162-63.
The second moral obstacle to the rigid pursuit of egalitarian ends is that in many people's minds the consequences of seizing all unearned transfers above a certain amount would be undesirable. Almost every writer committed to equalizing people's chances by equalizing the resources they control worries about the effects of confiscatory taxes on family ties. Many scholars and policymakers fear that if people cannot pass property to their kin but only show their love and concern in other ways, blood bonds will loosen and people's emotional lives ultimately will suffer impoverishment. Most worry even more about the effects on the material well-being of people in the future. They are anxious that the confiscation of most gratuitous transfers will sap the work effort of potential donors (although an equal-yield income tax would too) and increase their propensity to consume whatever wealth they have acquired, so that they pass on much less to those who follow them than they would if gifts were taxed more lightly. Writers disagree about the importance of equality relative to other values and about the likely consequences of different tax schemes, but nobody can responsibly ignore the impact of estate and gift taxes on the welfare of people in the near and distant future.

2. Professor McCaffery's Main Worry

The tendency of wealth transfer taxes to depress the productivity of potential donors and to induce them to save less and spend more on noncapital assets provokes Professor McCaffery's chief objection to levying estate and gift taxes when wealth is transferred. These effects, he says, do not furnish a decisive reason to oppose wealth transfer taxes, but it is clear that capital formation's "important effects on intra- as well as intergenerational well-being" are for him the leading

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Edward Halbach puts the point this way:

[One argument] is that inheritance is natural and proper as both an expression and a reinforcement of family ties, which in turn are important to a healthy society and a good life. After all, a society should be concerned with the total amount of happiness it can offer, and to many of its members it is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them. Furthermore, it is argued, giving and bequeathing not only express but beget affection, or at least responsibility. Thus, society is seen as offering a better and happier life by responding to the understandable desire of an individual to provide for his or her family after death.

Edward C. Halbach, Jr., An Introduction to Chapters 1-4, in Death, Taxes, and Family Property, note 52, at 3, 5. But see Ascher, note 62, at 111-12 (arguing that strict limits on rights to inherit need not pose a serious threat to family cohesion).

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McCaffery, Uneasy Case, note 1, at 304.
reason to scupper estate and gift taxes. Although "a complete and efficacious shutting down of wealth transfers may increase work and savings incentives at the lower generations, with possibly beneficial effects on capital," Professor McCaffery appears convinced that the dampening effect on potential donors' incentives to work and save wisely would be substantially more powerful than the spur to potential recipients' industry and savings. On balance, less would be devoted to capital investment, which would mean that trickle-down benefits to poorer workers would dry up and future generations would be less richly endowed than if wealth could be transferred without impediment. The best way to mitigate these evils while raising revenue, he argues, is to substitute for wealth transfer taxes a progressive consumption tax at above-normal rates on the noninvestment spending of gifts and bequests transferees have received.

3. Three Challenges to Professor McCaffery's Claims

Professor McCaffery's assertion that liberal egalitarians should oppose wealth transfer taxes because of their effects on work effort, saving, and the welfare of indigent laborers is open to three main challenges. Two are empirical, one is normative.

a. Impact on Work Effort and Saving

The first empirical challenge concerns the degree to which people who were capable of earning and saving would leave a smaller surplus of production over consumption if donative transfers were taxed than if they bore no tax but their subsequent consumption was taxed at prevailing consumption tax rates (or, as Professor McCaffery appears to favor, at above-normal rates). I shall not survey field studies that

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79 Professor McCaffery also invokes what he calls "objective political reasons" for favoring a regime that encourages capital formation, claiming that, "[p]erhaps most important, citizens in a political liberal state may reasonably like capital and what it provides," id., and that even a rights-oriented liberal egalitarian might oppose "increased leisure and consumption." Id. at 305.

I find it difficult to separate the first of these reasons from anxiety about the effects of reduced capital formation on the material well-being of present and future generations. Why would citizens desire capital formation apart from those effects? As for the second reason, insofar as it differs from the first, it appears tantamount to a condemnation of a more materialistic life-style than Americans today pursue. If Professor McCaffery so intends it, few liberals would join him in hurling stones. They would instead leave it to individuals to decide how to divide their time between labor and leisure, with as little distortion of that choice by governmental regulation as is practicable. See Subsection II.C.4.

80 McCaffery, Uneasy Case, note 1, at 321.
bear on this issue to try to determine whether Professor McCaffery's prediction is correct. I will make two points, however.

First, Professor McCaffery offers no concrete evidence of how wealthy individuals and people able to earn high incomes would respond to higher wealth transfer taxes. (The two classes may, and often do, overlap.) Given that his argument depends crucially on the assumption that both earnings and, more importantly, savings evince a strong negative elasticity with respect to estate and gift tax rates, the paucity of support he offers for this assumption is surprising. Professor McCaffery notes that wealthy individuals spend considerable sums on legal advice to reduce their estate taxes. But the fact that they are rational enough to spend a certain sum of money to obtain even larger tax savings tells us next to nothing about whether talented or rich people would react to higher estate taxes by working harder and saving more, so that they could sustain the after-tax value of the legacies they leave, or whether they would instead labor less or spend more on themselves, passing on less to their children. Many writers who favor strengthening our wealth transfer tax regime suppose, contrary to Professor McCaffery, that even if gift and estate taxes were increased substantially, high earners would continue to work much as they now do and wealthy people would still invest almost as much as they currently do, so that intergenerational savings would not decline dramatically. Professor McCaffery offers little reason to think their

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82 See McCaffery, Uneasy Case, note 1, at 313-18.
83 See, e.g., Ascher, note 62, at 100-11; Duff, note 34, at 34-37; Graetz, note 9, at 280-81; D.W. Haslett, Is Inheritance Justified?, 15 Phil. & Pub. Aff. 122, 144-48 (1986). Gerald Jatscher offers several reasons for thinking Professor McCaffery is mistaken in assuming that work and savings respond strongly to wealth transfer tax rates:

[C]onsider the characteristics of a person who would be discouraged from working by an increase in death taxes. He must be someone whose fortune gives little pleasure during his life, apart from the pleasure that he feels when he reflects on his bequests. He must also lack interest in increasing his consumption, but must be attracted by leisure.

It is unlikely, I think, that a lot of these qualities will often be found in one person. That a man who hoards wealth is apt to be indifferent to current consumption seems not unnatural; but it looks out of character for the same man to regard leisure as an attractive alternative to labor, as he must if death taxes are to discourage him from working. He is more likely to be a compulsive worker and accumulator, indifferent to or even ignorant of the taxes that will fall upon his estate.

Or if his motive for saving really is to leave a large estate behind him, why does he wish to do so? If to found a dynasty of wealth that will bear his name, is he likely to be indifferent to the power and prestige that the mere possession of wealth, apart from its use, confers on him while he lives? Would a man who fixes his gaze so unwaveringly on immortality and who so esteems the respect and envy of future generations not also covet the respect and envy of his fel-
contrary views mistaken. That is not to say that his speculations are wrong; they might be right. But it is hard to believe that the decrease in saving he fears would be momentous if donees could receive $100,000 to $200,000 apiece at low rates of tax, if rates on further transfers were high but did not approach 100%, and if large contributions to charities were permitted.84

My second point regarding this empirical challenge to Professor McCaffery's assertion about the adverse impact of gift and estate taxes on work and saving is that his own proposal seems no less threatening than the taxes he condemns. Professor McCaffery proposes exempting donative wealth transfers from taxation while imposing progressive rates on recipients' consumption of that wealth. Those rates, he believes, probably should be higher than rates on the consumption of earned income.85 He contends that this proposal is superior to the schemes most liberal egalitarians favor in that it would not curtail work effort and saving as much as they do. The bulk of his argument pivots on this comparison. Yet, Professor McCaffery's reasons for believing his plan a better prod to labor and investment lack force.

If the reason why he wishes to leave a large estate is to secure the comfort of his family rather than to found a dynasty . . . he is unlikely to be indifferent to their current consumption, although he may be to his own. In that case a reduction in death taxes is not apt to lead to either a decrease or an increase in work since he is already strongly motivated to work in order to maintain a high level of family consumption.


84 Several proponents of tougher estate and gift taxes have argued that the effects of their recommended changes on work and investment would be small. See Munzer, note 16, at 406-07 (recommending a lifetime accessions tax with a $100,000 exclusion (in 1990 dollars) and marginal rates beginning at 20% and rising to 65% on lifetime accessions of $1 million or more); Ascher, note 62, at 121-49 (advocating (in 1990) a $5,000 annual gift tax exclusion per donee with a minimum tax-inclusive tax rate of 50% on larger gifts and, with small exceptions, a limit of $250,000 on bequests for each decedent, with confiscation by the government of estates larger than that amount); Duff, note 34, at 26-28, 39 n.216 (proposing progressive lifetime accessions tax allowing the receipt of "a moderate amount free of tax," a modest annual exclusion for transfers received from each individual donor" of around $1,000 (in 1993), and assorted exemptions for transfers with certain purposes, such as education or maintenance of children); Haslett, note 83, at 137, 152-53 (calling for an annual exclusion per donee of some unspecified amount less than $10,000 (as of 1986) and a lifetime accessions quota, after which transfers would be confiscated by the government, "equivalent in amount to the average dollar value (rounded off to the nearest thousand) of all the estates of all Americans who, at age twenty-one or over, died during the five years previous to the year in which the quota is to be applied").

85 See McCaffery, Uneasy Case, note 1, at 352.
Before turning to Professor McCaffery's reasoning, it is important to notice an enormous gap in his argument for the relative superiority of a consumption-without-estate tax: Professor McCaffery never says what he assumes will remain constant so that the different effects of substituting new revenue sources for current wealth transfer taxes (or the income tax to which they are appended) may be compared. At a minimum, for a comparison of the behavioral consequences of two tax systems to be fair, one must suppose that they generate revenue of the same present value over a given period of time. Thus, Professor McCaffery's consumption tax, with its special rates on the consumption of gifts and bequests, must raise the same amount over a period of years as whatever tax it replaces, whether that tax is a consumption tax with an accessions tax levied when wealth changes hands, a consumption tax that taxes gifts and bequests at the same rate as other consumption (or that exempts them from taxation altogether), an income tax coupled with an accessions tax, an income tax that treats gifts and bequests as income to recipients, an income tax that exempts gifts and bequests from taxation, or some other formula for raising revenue. Unfortunately, this minimum requirement goes only a short way to ensuring a fair comparison, because too many variables are left unfixed. If the burden of Professor McCaffery's basic consumption tax (leaving gifts and bequests out of account) falls on different groups than does a rival income tax proposal (again leaving gifts and bequests out of account), then adding different wealth transfer taxes to the two different bases prevents them from being compared fairly. Therefore, in the remainder of this Section, I assume that some form of consumption tax is unalterably in place and compare only potential additions to it—Professor McCaffery's special consumption tax on gifts and bequests, an accessions tax imposed on wealth transfers, an estate tax, and so on—that raise the same revenue in present value terms.

In arguing that his proposal will not curtail work and saving as much as alternative taxes on wealth transfers, Professor McCaffery poses the key question for himself as follows, "why is not the chilling effect on capital accumulation or work effort equally strong under the progressive consumption-without-estate tax (especially with a higher rate schedule on spending out of inheritance) as it is under the more commonly recommended consumption-plus-estate tax, or even under the income-plus-estate tax system?" Sadly, this question misses the central issue. Professor McCaffery is free to compare the special consumption tax on unearned wealth he favors to an estate tax. What is far more important is that he compare it to what most liberal egalitarians consider its principal competitor: a progressive accessions tax lev-

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86 Id. at 353-54.
ied when wealth is transferred. Professor McCaffery avoids this comparison without offering any explanation. Its omission is significant.

It is nevertheless worth considering the five answers Professor McCaffery gives to the question he puts to himself, for, in the absence of sound empirical evidence that his behavioral predictions are right (and evidence is lacking), they compose the heart of his case for a consumption-without-estate tax. When one expands the range of options from a simple estate tax to more attractive alternatives to Professor McCaffery’s consumption tax, his argument falters.

First, he says, “the rate structure [of his consumption tax proposal] would encourage dispersion among bequests, as donors saw the lower rates that were available to a wider range of donees.” This is true, and it gives his plan an edge over an estate tax. It offers no advantage, however, over an accessions tax, an inheritance tax (which, unlike an accessions tax, is not based on cumulative receipts), or the income taxation of gifts and bequests at donees’ rates, all of which base tax liability on donees’ receipts rather than the overall amount of wealth transferred by a single donor.

Second, “there is much evidence to support a general tendency of earnings to revert to the mean, inter-generationally. . . . The rational saver might thus expect her child to be in a lower consumption tax bracket than she is in herself.” Professor McCaffery’s reasoning here is elusive. Even if this tendency exists, why should it argue for a consumption-without-estate tax? Remember that Professor McCaffery advocates a consumption tax with higher rates on consumption expenditures funded by gifts than on consumption expenditures funded by earned income. Even though a child predictably might earn less than a financially successful parent, it does not follow that the tax rate on the child’s consumption of unearned wealth will be lower than the rate on the parent’s consumption of earned wealth. So, under Professor McCaffery’s scheme, the tendency he identifies does not plainly offer parents (one would need to know more about rates than he discloses) an incentive to substitute a child’s consumption for their own.

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87 Id. at 354.
89 McCaffery, Uneasy Case, note 1, at 354.
More telling, perhaps, is the lack of any clear connection between Professor McCaffery's point about the tendency of incomes to revert to the mean and the alleged superiority of a consumption-without-estate tax to rival tax schemes. If donors knew that the present value of the tax imposed on their gratuitous transfers would be the same under all of the rival regimes—which is essential for any comparison to be fair—why would they work and save more under Professor McCaffery's plan? And what bearing can his point about the likely lowering of recipients' incomes have on this choice? Professor McCaffery offers no reason to believe that his proposed consumption tax will result in more work and saving by donors than an accessions tax or any other tax on donative transfers with the same yield.\textsuperscript{90}

Third, "the revised law could have provisions for the deductibility of certain expenses, such as medical and educational expenses," which would encourage giving for these purposes and thus, more important for Professor McCaffery, saving to make those gifts possible.\textsuperscript{91} Again, however, deductions for these and other purposes could be incorporated just as readily into an accessions tax, an estate tax, or any of the main rivals to Professor McCaffery's proposal.\textsuperscript{92} His scheme enjoys no advantage over its competitors in this respect.

Fourth, Professor McCaffery says:

\begin{quote}
[T]here might be "fiscal illusions," or benefits to a putative donor from being able to bequeath a large amount of money in nominal terms, that counterbalance the discounting of the ultimate consumption flow suggested by the tax system. This effect may not be wholly rational, but it fits with a mass of evidence from cognitive decision theory that people value wealth that they think they own more highly than wealth that they think they do not own.\textsuperscript{93}
\end{quote}

This form of donor irrationality, if indeed it exists, might privilege Professor McCaffery's consumption tax over an estate tax, although it seems odd to base a claim of superiority upon possible donors' cor-

\textsuperscript{90} Of course, payment of a consumption tax would be delayed relative to payment of an accessions tax. But if the taxes yield the same revenue in present value terms, postponing payment should not leave recipients better off under Professor McCaffery's proposed scheme (unless their investment yields regularly exceed the discount rate, which seems unlikely). Donors, therefore, would not have a stronger incentive to pass on wealth than they would have under an accessions tax.

\textsuperscript{91} McCaffery, Uneasy Case, note 1, at 354.

\textsuperscript{92} These exemptions already are part of the current gift tax and generation-skipping transfer tax. See IRC \$ 2503(e) (exclusion from gift tax of educational tuition payments and expenditures for medical care); \$ 2642(e)(3) (removal of gifts that are nontaxable under \$ 2503(e) from the generation-skipping transfer tax inclusion ratio).

\textsuperscript{93} McCaffery, Uneasy Case, note 1, at 354-55 (citation omitted).
rectable myopia. These so-called fiscal illusions, however, do not render his consumption-without-estate tax superior to an inheritance tax, to the income taxation of gifts and bequests, or to the accessions tax most liberal egalitarians favor. In all of these cases, recipients pay the tax at rates that rise as the value of gifts or the use of gifts increases. If donors pay no attention to what will happen after money passes into donees’ hands, they should be equally blind in each of these cases.

To be sure, under an accessions tax, an inheritance tax, or an income tax extended to wealth transfers, recipients frequently would owe tax sooner than under Professor McCaffery’s plan, and this in turn, he might imagine, could cause would-be donors to balk more at conferring gifts, since they would stand a greater chance of seeing their money pass into the state’s coffers; in consequence, they might labor and save less themselves. If donors’ unhappiness at actually seeing tax collected is the worry, however, it is not one that applies to decedents, and most wealth transfers take place at death. In any case, it is hard to believe that the difference in their work effort or disposition to give would be considerable under present value, equal-yield tax systems. Certainly, Professor McCaffery adduces no reason to expect any difference.

Fifth, Professor McCaffery declares that “a rational potential donor may even expect that tax rates might someday go down, as they might indeed if the law attained some of its goals, such as a greater capital stock.” This reason sits uncomfortably alongside his fourth reason, which rests on potential donors’ irrationality. Even if Professor McCaffery were right about a rational potential donor’s expectations, though, how much realistically would these expectations affect their behavior? Professor McCaffery’s argument here depends on the prediction that large numbers of potential donors will be more inclined to save to make gifts to their children and other beneficiaries because they think that the marginal increase in investment occasioned by the displacement of an accessions tax (or an estate tax, an inheritance tax, or an expanded income tax) by his equal-yield consumption tax on gifts will slightly lower the tax rates their children will someday face. This is a frail prop for as weighty a change as Professor McCaffery advocates.

In the end, Professor McCaffery’s case for preferring a tax on donees deferred until consumption to an accessions tax imposed when wealth is transferred or to the income taxation of wealth transfers is very thin. He defends a plan that has no clear advantage over these alternative taxes, judging from the reasons he offers. At the same time...
time, it possesses what some liberal egalitarians regard as the serious drawback of leaving untouched the value that many recipients derive from the mere possession, prior to use, of donated wealth. Whether deferring taxes until gifts or bequests are used for personal consumption would increase work and invested savings significantly is ultimately an empirical issue, but Professor McCaffery’s observational evidence and speculative reasoning instill little confidence in his forecast.

b. Trickle-Down Benefits to the Poor

Notwithstanding these deficiencies, assume for a moment that Professor McCaffery is right. Work effort and private saving would increase, thanks to the substitution of a targeted progressive consumption tax for a wealth transfer tax. The second serious empirical challenge to Professor McCaffery’s proposal stems from uncertainty about the effects of this presumed increase in work and saving. Professor McCaffery avers that greater toil and investment by able workers and wealthy individuals will augment the wages of the poorest workers or, less directly, enhance government benefits flowing to them now and in the distant future more than an accessions tax or an estate tax would. For this reason, he says, liberal egalitarians should endorse his proposal, particularly those with Rawlsian leanings who give great weight to the material well-being of society’s worst-off groups.

Why believe him? Professor McCaffery provides no detailed data in support of his claim. He appears to rely instead on the widely accepted idea that increased private capital investment will augment the return to labor, boosting wages over time, and that one effect of heightened growth rates will be hugely elevated real wages decades hence.\(^95\) Transferring wealth to the poor now, in what I take to be Professor McCaffery’s view, injures workers in the long run, because it throttles socially beneficial work and investment by those best able to produce and save, and it puts money in the hands of people more inclined to spend than invest. Professor McCaffery must also assume that government borrowing could not raise the incomes of the poor now without crowding out socially beneficial investment by wealthy savers, so that the state cannot help them at no cost to future poor people.

There is no way to know whether these speculations are valid. If the present value of tax revenues is assumed to be the same under Professor McCaffery’s plan and others with which it is compared, and

\(^{95}\) See id. at 304-06, 323, 337, 348.
if government policies were designed in all cases to further the Rawlsian end of maximizing the stock of goods owned by the poorest segment of society, then Professor McCaffery's plan, if it actually prompted beneficial capital investment more successfully than other proposals, indeed might redound to the greatest benefit of future workers, given his assumption about the baneful effects of government borrowing to raise the incomes of the poor. If Professor McCaffery is right, however, his plan seems less likely than its rivals to work to the maximum benefit of those who currently earn the least. Savings have to come at the expense of somebody. Presumably, if wealth transfer taxes were collected sooner rather than later and the proceeds transferred to those who are least fortunate, some of the current poor—the older poor, certainly, and perhaps subgroups of the younger poor—would enjoy better lives than if taxes and transfers were deferred to foster capital growth. It also might happen that any increase in investment caused by Professor McCaffery's plan, relative to other options, would hurt the very poorest while yielding larger benefits to members of higher economic groups. It is impossible to say for sure. The upshot of this second empirical challenge is merely that Professor McCaffery has not constructed a tight case for the conclusion that his consumption-without-estate tax would be best for those groups whose welfare he deems most important.96

c. Professor McCaffery's Questionable Moral Assumptions

Regardless of whether either or both empirical doubts about Professor McCaffery's argument are sound, liberal egalitarians might assail his proposal on several moral grounds. One is that, by looking solely to the effects of tax and expenditure policies on the goods available to members of different income groups, without regard to how people ended up in those groups, his analysis fails to respect principles of desert and entitlement that a liberal egalitarian ought to honor. I

96 Professor McCaffery does not say whether he is concerned about the size of the gap between the very wealthy and the middle class, which is of concern to many people. His proposal, by allowing the very wealthy to defer payment of wealth transfer taxes relative to the current tax regime, presumably would increase the size of the gap between the richest Americans and the middle class unless consumption tax rates on inherited wealth were much higher than current estate tax rates (or tax rates on the consumption of earned income were more steeply progressive than current income tax rates). Professor McCaffery, however, says nothing about higher taxes on wealthy consumers. It is unclear how his silence should be interpreted. He obviously faces a dilemma if government revenue is to remain steady: Either tax rates on wealthy consumers must increase above current income tax rates, which would imperil the work and saving incentives Professor McCaffery is at pains to create, or tax rates on the less wealthy must rise to make up the shortfall, creating an even larger divide between most Americans and the very wealthy. Egalitarians would not agree on which of these options is more unsavory.
take up that complicated objection in the following Subsection. Here I mention two others.

The first moral objection centers on Professor McCaffery’s apparent endorsement of Rawls’ "difference principle" for judging the justice of social arrangements. The difference principle, part of the second of Rawls’ two principles of distributive justice, holds that social and economic inequalities are unjust unless they maximize the material expectations of a representative member of the least advantaged socioeconomic group. Professor McCaffery takes Rawls as his "paradigmatic ‘liberal’ egalitarian," but, in fact, it is difficult to name another liberal egalitarian philosopher who accepts Rawls’ desideratum without qualification. Most agree with Professor Nagel that the difference principle is too rigid and that slight gains to the worst-off rightfully can be forgone to bring about larger gains to people who are better off. A minority believes that Rawls’ view is not egalitarian enough, and that justice sometimes demands that the poorest go without some benefit if they can have it only on the condition that those who already are better off than they are will receive an even larger benefit. If Professor McCaffery’s consumption-without-estate tax were effective in ushering in a Rawlsian utopia, it would offend many of the liberal egalitarians to whom his argument is addressed. It is conceivable, of course, that Professor McCaffery could persuade them that their views are misguided and that they ought to share his enthusiasm for Rawls’ theory or some subtle variation of it, but that seems a gossamer possibility.

The second normative objection to Professor McCaffery’s proposal is perhaps more serious. What principally distinguishes Professor McCaffery’s scheme from wealth transfer taxes is the deferral of tax collection to stimulate capital investment. A marginal increase in investment, he believes, will redound to the material advantage of future generations of people falling in the lowest income stratum; with luck, it also will benefit poor people who are now young and who therefore stand some chance of reaping a benefit before they die. What is striking about this goal is not only that it is not Rawlsian,

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97 See McCaffery, Uneasy Case, note 1, at 293; McCaffery, Liberal Case, note 1, at 281.
98 See Rawls, note 14, at 75-83.
99 See McCaffery, Liberal Case, note 1, at 281.
100 See Nagel, note 26, at 73.
102 Professor Rawls does believe that societies sometimes have an obligation to save so that future generations may prosper more. See Rawls, note 14, at 284-93. He also recognizes that this saving usually will come at the expense of the poorest members of earlier generations. See id. at 292-93. He stresses, however, that this duty applies only until a
despite Professor McCaffery's claim to piggyback on Rawls' theory of justice, but that it privileges the lot of the future poor over that of the present poor. It does so, moreover, even though one reasonably can assume that, in most industrialized countries, future people will live materially richer lives than people now do, thanks to technological progress, cultural advances, and industrial and infrastructure investments. Yet why, under a principle that ostensibly seeks to maximize the material well-being of the worst off, should those who are now worst off be asked to sacrifice for their future counterparts who predictably will be better off than they are whether they sacrifice or not? What principle of justice or fairness can justify this imperative?

Somebody who accepted Rawls' general approach to distributive justice apparently should wish to make the material means available to the poorest citizens as substantial as possible, whenever they happen to live. Suppose that one wanted to maximize the material resources available to a representative worst-off person living at any time over the next few centuries. It would seem sensible to give special solicitude to the current poor. For, in the absence of any corrective action by the government, they likely will preside over a smaller store of social wealth than members of future generations, barring calamity or the introduction of inconceivably strict limits on wealth transmission. In particular, the current poor will have less than future poor people. If government policies in other respects remain unchanged, however, helping the current poor might well require stiffer wealth transfer taxes than at present, not the abolition of those taxes. That is precisely the opposite of what Professor McCaffery recommends.
Professor McCaffery never attempts to reconcile the priority he gives to the well-being of future indigent people with the Rawlsian view of justice he takes as paradigmatic of liberal egalitarianism. This is a potentially disabling shortcoming of his argument from the perspective of most egalitarians. There are, to be sure, paths to the conclusion Professor McCaffery favors. The most obvious route is to imagine people who are forced to choose a social investment policy in ignorance not only of their personal attributes but of when they will exist. Suppose that it would be rational for them to attempt to maximize the material resources at their disposal, perhaps subject to some basic minimum below which nobody at any time must be permitted to fall. Given that constraint, they might reasonably trade smaller gains to one group of poor people for larger gains to another group if they face the same probability of ending up in either group. If the difference between the two sets of gains was large enough, they might do so even if the second group was, independent of this trade, better off than the first.

This reasoning, however, is inconsistent with the high degree of risk aversion Rawls assumes that people would exhibit if they were choosing principles of justice in ignorance of their particular preferences, convictions, and station. Moreover, even if one rejects Rawls' controversial assumption about risk aversion, the view that principles of justice can be established by appealing to what people would choose if they were stripped of all personal knowledge seems to lead not to liberal egalitarianism but to utilitarianism or its near kin. That is not, understandably, a theory of morality and justice Professor McCaffery embraces. It is hard to see, though, how he can defend his prescriptions without abandoning liberal egalitarian aims for utilitarian goals.

D. Luck and Desert

One large issue remains over which liberal egalitarians often disagree: how desert should be understood and what role it should play in but rather to sacrifice gains to the current poorest for larger gains to people who one day will find themselves among society's least affluent. At least this is so if one assumes, as I have supposed Professor McCaffery must, that the government cannot borrow to help the current poor without sacrificing some of the future growth Professor McCaffery seems unwilling to forgo.

104 See generally Rawls, note 14, at 150-61.

allocating social wealth. Professor McCaffery seems aware that liberal egalitarians divide over this topic, but his offhand statements about material prosperity and restrictions on consumption suggest that he does not grasp fully how complicated the connections are, or are conceived by liberal egalitarians to be, between talents, effort, and the justice of market earnings.

As I noted above, liberal egalitarians typically distinguish between inequalities arising from chance events, the risks of which people could not reasonably avoid running, and those arising from voluntary conduct or occurrences against which people could have insured completely. Inequalities of the first kind provide a prima facie reason to compensate those who fared poorly at the expense of those who did better, whereas inequalities of the second kind do not. The difficulty is in deciding how to classify the monetary returns to labor or investment in a free and fair market.

Liberal egalitarians need to address at least six distinct questions in staking out a position on the justice of market rewards. The range of replies to these questions is wide.

**First,** even though no one deserves the talents with which she is born, is she nevertheless entitled to keep whatever gains her special abilities enable her to earn? Unlike libertarians such as Robert Nozick, most liberal egalitarians believe that she is not, because they regard the distribution of talents as morally arbitrary. They contend that society ought in justice to compensate people who are poorly endowed by taxing those whose more enviable unearned endowments allow them to earn more. Nevertheless, some liberal egalitarians embrace a more robust theory of self-ownership and deny that people who secure greater material resources thanks to their natural gifts may be forced to share with people who faultlessly are unable to command the same wage; people with poorer innate abilities might justly claim a larger share of the world’s natural resources, but they have no right to share in the fruits of others’ labor or abilities.

**Second,** do workers deserve higher earnings to the extent that their greater effort produced those additional earnings? Some writers con-

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106 See Subsection II.C.1.
108 See, e.g., Rawls, note 14, at 100-02; Dworkin, Equality, note 26, at 292-304; Cohen, Currency, note 26, at 916-34; Rakowski, note 26, at 73-77, 120-48; Van Parijs, note 26, at 58-88; Roemer, Theories, note 26, at 263, 308-10. Liberal egalitarians who favor compensating the poorly endowed for their lower earning capacity nevertheless might oppose extending this principle of compensation to other unmerited inequalities. For example, they might very well reject taxing people whose personal attributes, such as physical attractiveness or a cheerful disposition, allow them to lead more enjoyable lives apart from their higher incomes to compensate those whose personal lives are less flourishing.
109 See, e.g., Vallentyne, note 16, at 327-34.
tend that the ability to work more intensely than others—to try harder or accomplish more over a given period of time—is either an innate talent, like musical ability, or an ability acquired and fixed in youth. It is not a quality of people’s wills over which they exercise substantial control (over time if not at any given moment) and thus not a capacity for which they can be deemed accountable. As an unchosen, unearned ability, in their view, it warrants the same treatment within a theory of justice as other instances of good or bad fortune that people did not merit or against which they could not defend themselves.¹¹⁰

Other philosophers come to the same conclusion by a slightly different route. Even if, in theory, the rewards flowing from greater effort can be disentangled from those attributable to the exercise of greater talents, they assert, in practice no distinction reliably can be drawn. The sensible course therefore is to lump the rewards to greater effort with the rewards to desired talents.¹¹¹ Still others reject these views, maintaining that effort can be distinguished practically as well as theoretically from unchosen abilities, at least across a limited but significant

¹¹⁰ This is one possible interpretation of some of Professor Rawls’ remarks in A Theory of Justice. For example, Rawls writes:

The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases.

Rawls, note 14, at 104. Other passages in Rawls’ book, however, support the different claim that the effects of brute luck and individual responsibility cannot in practice be distinguished even though in theory they should be treated differently; hence, social rules must rely on generalizations and cannot achieve perfect justice. For instance, he says:

The precept which seems intuitively to come closest to rewarding moral desert is that of distribution according to effort, or perhaps better, conscientious effort. Once again, however, it seems clear that the effort a person is willing to make is influenced by his natural abilities and skills and the alternatives open to him. The better endowed are more likely, other things equal, to strive conscientiously, and there seems to be no way to discount for their greater good fortune. The idea of rewarding desert is impracticable.

Id. at 312 (emphasis added) (footnote omitted). For further discussion of this exegetical point and Rawls’ views, see Cohen, Currency, note 26, at 912-16; Rakowski, note 26, at 112-19.

¹¹¹ Professor Nagel defends this claim. Although he holds that effort, “being a manifestation of the will, is . . . to be regarded as the individual’s personal responsibility,” Nagel, note 26, at 106, effort, in his view, may be influenced by the external, unchosen factors of discrimination, class, and talent and its effects are in any case always bounded by these factors and the varied limitations of an established social system. See id. at 105. Notwithstanding the fact that Professor Nagel “believe[s] that, apart from pathological conditions, the level of someone’s effort is the result of free choice,” id. at 118, he also is persuaded that “it is impossible in practice to disentangle the effects of talent from the effects of effort, since effort is expended through the exercise of talent, and talent develops into a valuable ability only through effort,” id. at 119. He concludes that “the prospect of limiting social inequality to the goods for which their possessors are responsible seems remote.” Id. This also might be Rawls’ view. See note 110.
range of cases, and thus, that it furnishes title to the larger material rewards effort often enables people to reap.\textsuperscript{112}

Third, do people who work longer than others thereby acquire a right to the product of their additional labor? Imagine two people who are identical, except that the first works five more hours than the second. Does the first have a just claim to retain what he produces in those additional hours, without having to share with his idle colleague? Or must he nevertheless give part of his extra product to the second person? The argument for this duty would be that both desire additional resources, he does not mind working longer hours as much as the second person does—if their preferences were the same, their hours would be too—and neither can be held responsible for the strength of their preferences for work and leisure. So the diligent should help the indolent.

The contrary view that additional productive work entitles someone to the income that flows from it might be based on the conviction that preferences for work and leisure are sufficiently within most people's power to shape over time that they rightfully can be held accountable for actions that spring from those preferences and thus are deserving of the material rewards that attend those actions. Alternatively, one might maintain that it does not matter what the origin of someone's propensity to trade work for nonremunerative activity happens to be, provided that everyone faces the same set of choices between labor and leisure. If one person labors less, cognizant that she therefore will have a smaller stock of resources, then, in this view, she cannot complain, because she would not trade her combination of labor and leisure for anyone else's. She does not envy her industrious colleague in any sense that matters to the justice of their material well-being, because she would not swap her free time for his extra work hours and his added cash.\textsuperscript{113}

Both of these dissenting views may be challenged, although reasonable minds can disagree over the strength of these criticisms. The first

\textsuperscript{112} See, e.g., Rakowski, note 26, at 107-12.
\textsuperscript{113} See, e.g., Dworkin, Equality, note 26, at 304-06; see also Nagel, note 26, at 118 n.38 (agreeing with Dworkin). Defending a libertarian theory that condemns taxing hard-working people to assist those who choose more leisure time, Robert Nozick asks:

Why should we treat the man whose happiness requires certain material goods or services differently from the man whose preferences and desires make such goods unnecessary for his happiness? Why should the man who prefers seeing a movie (and who has to earn money for a ticket) be open to the required call to aid the needy, while the person who prefers looking at a sunset (and hence need earn no extra money) is not? Indeed, isn't it surprising that redistributionists choose to ignore the man whose pleasures are so easily attainable without extra labor, while adding yet another burden to the poor unfortunate who must work for his pleasures?

Nozick, note 29, at 170.
view might be faulted for exaggerating the extent to which people can influence their liking for certain sorts of labor. If some people just happen to enjoy work more than others, some would say, it hardly seems right to reward them with the entire marginal product of their extra working hours, given that they probably already reaped greater welfare from the baseline number of hours they and others all worked. Making them share their additional output might be expected, in the run of cases (if not in every one), to help equalize well-being in the face of preferences for which people cannot be held entirely responsible.

The second view is also vulnerable. Given any set of trade-offs between labor and leisure, people will sort themselves according to their preferences and establish an equilibrium that leaves nobody envying anyone else’s package of work and free time. The question, however, is which set of trade-offs people ought to confront and whether different people should face the same schedule of rewards for work. Liberal egalitarians can reasonably offer conflicting answers to this question.114

Fourth, and relatedly, even if one assumes that everyone is equally talented, possesses the same opportunities, and works the same hours, workers’ monetary compensation almost certainly will be unequal because people’s preferences for various professions and tasks will diverge and consumers will want some products and services more than others. Should market outcomes be modified, to redistribute income from higher to lower earners, because it is a matter of unchosen luck, impossible to insure against, that the aggregation of consumers’ desires favors the work that some people like to do over the work that others prefer?115 Or is the satisfaction or onerousness that people find in different types of labor no concern of a theory of justice, so long as people confront the same set of opportunities and are not motivated by drives or desires so narrow, obsessive, and disapproved of by themselves that they properly are considered handicaps?116

Fifth, should market returns be corrected to take account of the fact that individuals’ creations are never due to their efforts and prowess

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114 For an interesting discussion of this issue, see Van Parijs, note 26, at 92-102.
115 Professor Graetz argues that “[i]t is very difficult to justify the market’s distribution as ethical,” in part because “even when the market is functioning perfectly, returns to both capital and labor inputs depend upon the demand for the product or service being produced,” so that “[t]he rewards the market place bestows depend on factors outside an individual’s control.” Graetz, note 9, at 275.
116 Numerous writers have argued that an individual’s liking or loathing for her work should be irrelevant to the size of her distributive share, except in the limited sense that she contributes to the aggregation of workers’ and consumers’ preferences that sets market wages. See, e.g., Dworkin, Equality, note 26, at 288, 304-23; Cohen, Currency, note 26, at 923-34; Rakowski, note 26, at 107-12.
alone, but rather depend on a society’s past investments, its infrastructure, previous inventions and ideas, a certain cultural milieu, and other factors for which producers can claim at best slight credit? Or are social contributions to people’s productivity irrelevant to the justice of the resulting distribution of earnings, so long as people have equal opportunities to profit from a society’s cultural and economic achievements and provided that the costs of creating the technical and cultural setting for economic competition were apportioned in a way that does not unfairly benefit certain people?

Sixth, inframarginal workers in a free labor market with an upward-sloping supply curve will earn more than is needed to coax them to work, because economic theory declares that, if all of those performing the same task earn the same wage, their compensation will equal the wage agreed to by the most reluctant worker who accepts the job. Focus only on inframarginal workers who earn more than the social average (adjusting, if that is possible, for the unpleasantness of their work using some non-personalized measure of preferences). Does justice demand that they be taxed to the point at which they are indifferent between working and not working, with the surplus redistributed to those who are less well off? Or is there no injustice in some high income workers’ being paid more than is needed to keep them working, since their preferences for different kinds of work, or for leisure as opposed to work, are either within their control or of no relevance to the justice of the resulting distribution of work and wealth?

For a statement of this argument (without full acceptance) along with citations to its proponents, see Duff, note 34, at 54-56; see also Ascher, note 62, at 86-87 (arguing that society has “a major stake in all accumulated wealth” and “need not continue to allow decedents nearly unlimited control over the disposition of their property after death” because social institutions make possible the acquisition and retention of wealth); Graetz, note 9, at 275-76.

That economic rents ought ideally to be shared by all members of society is a view advanced even by some with only weak egalitarian leanings. See, e.g., Gauthier, note 30, at 272-76. For further discussion of this issue, see Philippe Van Parijs, Free-Riding Versus Rent-Sharing: Should Even David Gauthier Support an Unconditional Basic Income?, in Ethics, Rationality, and Economic Behavior 159, 169-76 (Francesco Farina, Frank Hahn & Stefano Vannucci eds., 1996) (describing several possible measures of factor rent and some implications for distributive justice); G.A. Cohen, Self-Ownership, Freedom, and Equality 216-23 (1995).


Professor Nagel notes that liberal egalitarians committed to something like Rawls’ principle that inequalities can be justified when they benefit members of the least advantaged group are bound to find that, within a society governed by that principle, their personal, acquisitive goals and their political, moral ideals clash:
These are some of the crucial questions regarding desert one needs to address in determining which redistributive taxes ought to be levied and how their proceeds should be apportioned. My aim here is not to defend or denounce certain answers to them. Instead, I have laid them out to help assess Professor McCaffery's claims about how personal earnings should be related to consumption in a market economy. These claims bear more directly on the justice of taxing consumption or income than they concern the justice of taxing gifts and bequests, so long as one believes that people lack a moral right to pass their just earnings to others if they would rather not spend the money on themselves. But because so much of Professor McCaffery's argument centers on the distinction between acquiring and using wealth, it would be remiss not to examine his views about desert and economic power.

Professor McCaffery approaches economic desert obliquely. After announcing the controversial view that society may have "some moral or political reason for disliking private, preclusive consumption, perhaps particularly the excessive, conspicuous consumption of the very wealthy,"\footnote{McCaffery, Uneasy Case, note 1, at 339.} he notes that critics might reply that the consumption of earned wealth is less offensive than the consumption of wealth obtained in some other way. Indeed, many liberals would say that the consumption of one's just earnings cannot properly be penalized by society acting through its political institutions, however much individuals privately might decry some people's expenditures.\footnote{For further discussion, see Subsection II.C.3.} Professor McCaffery answers this criticism by trying to tap a wedge between the justice of market earnings and the justice of their use.

In a just economy, Professor McCaffery says, "earnings represent the preferences of autonomous others"; they are "fair precisely because they . . . respond fairly to individual preferences."\footnote{McCaffery, Uneasy Case, note 1, at 340.} By satisfying the desires of other people, workers acquire just possession of

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The motivational problem for committed egalitarians in all this is that the egalitarian sense of fairness must make us regard as unfortunate those very inequalities which as economic actors we are bent on getting the benefit of, which our acquisitive demands make necessary, and which therefore are required for the benefit of the worse off. An economically competitive egalitarian with the appropriate partition of motives is supposed to reflect . . . that although it's a shame that business talent such as his should command such rewards while others are scraping by, there is no help for it, since he and his peers have to be allowed to earn this kind of money if the economy is to function properly. A most unfortunate situation, really, but how lucky for him!

Nagel, note 26, at 116. Professor Nagel regards this division of motives as "not strictly intelligible" and as lacking "the character of an integrated moral outlook." Id. at 117. He suggests no way of healing the fracture.
material resources. A liberal society could well want rock stars and professional athletes to earn millions of dollars, Professor McCaffery declares, because “[t]o deny or discourage these earnings is to deny [autonomous members of society], whose preferences lead to the price, the services of [these performers], while not even necessarily harming these putative millionaires, who will rationally substitute leisure of up to equivalent psychic value as tax rates increase.” But the use of justly obtained resources, Professor McCaffery contends, “presents a different, indeed opposite, paradigm from work or earnings,” because use “takes away from others . . . and diverts resources to private preferences.” We can bless earnings while discouraging consumption, he says, “[o]nce we abandon theories of merit or desert and adopt instead a more nuanced, political, and objective theory of distributive justice.”

Why we should discard “individualistic, subjective, and even metaphysical notions of earnings, entitlements, and desert,” Professor McCaffery never exactly says. Nor is it clear what discarding them entails. One can only guess which notions Professor McCaffery has in mind, because he does not describe the conceptions of desert he so sweepingly rejects or distinguish the six questions posed above. The breadth of his pronouncements, however, suggests that Professor McCaffery views as chimerical all conceptions of desert that regard it as a ground of rights independent of whatever distributional rules a society adopts. Yet, he fails to explain why desert cannot be fully as objective a moral notion (whatever objectivity amounts to for him) as poor people’s just claim to a larger share of society’s wealth, which he seems to accept. For that matter, why is Professor McCaffery’s frequently voiced assertion that the personal use of earned wealth “may not be as offensive” as the personal use of unearned, inherited wealth, and

123 McCaffery, Liberal Case, note 1, at 305.
124 McCaffery, Uneasy Case, note 1, at 341.
125 Id.
126 Id. at 345; see also id. at 286 & n.8.
127 For one attempt to sort out these relations and to defend the view that desert, as a property grounding a claim to social resources, should be understood as specified by a set of social rules arrived at without regard to an independent notion of moral entitlement other than a theory of distributive justice, see T.M. Scanlon, Jr., The Significance of Choice, in 8 The Tanner Lectures on Human Values 149, 185-201 (Sterling M. McMurrin ed., 1988).
128 McCaffery, Uneasy Case, note 1, at 348. Confusingly, within the space of two lines, he says both that this view is “well founded” and that “skepticism over the relevance or meaning of ‘earnings’ weakens this point, perhaps fatally.” Id. I do not know how Professor McCaffery would reconcile these statements.
that the same is true of its bare possession,\textsuperscript{129} not itself among the atavistic, nonobjective moral convictions one can safely renounce?

At times, Professor McCaffery seems to suggest that whatever a majority wants acquires an objective moral quality, that if society prai\textsuperscript{s}es work and scorns expensive dining, those activities are, respectively, objectively good and bad. But that cannot possibly be his considered opinion. No liberal egalitarian is a majoritarian about morality—how could he be when most people are not liberal egalitarians?—and the utilitarian morality that might support certain kinds of majoritarianism is antithetical to most liberals' firmest convictions. Moreover, even this view harbors its own claim to objectivity, one not based merely on popularity. Thus, one is left with a puzzle about what Professor McCaffery understands moral objectivity to be, why he values it, and how he conceives its relation to individual desert. If, like most liberal egalitarians, one believes that some principles of presocial entitlement or desert are valid, one will deny that the state is as free as Professor McCaffery seems to believe to lay down rules restricting earning and spending to reinforce certain conceptions of worthwhile and wanton behavior.

Take, as an example, Professor McCaffery's verdict on Shaquille O'Neil.\textsuperscript{130} He applauds paying O'Neil millions of dollars to shoot hoops because his performances please paying fans who together shell out tens of millions of dollars to watch him play. Yet, Professor McCaffery frowns on O'Neil's spending tens of millions of dollars himself. Why privilege fans' consumption decisions over O'Neil's? Buying basketball tickets and sports paraphernalia means forgoing socially productive investments to exactly the same degree as occurs when O'Neil buys cars and houses and hotel rooms for himself. Both sets of expenditures aim to increase people's enjoyment. So why not discourage fans' spending as much as O'Neil's?

Professor McCaffery's answer seems to be that O'Neil's expenditures are, beyond a point he has long since reached, self-indulgent and frivolous,\textsuperscript{131} whereas buying basketball tickets is not. As I said, that moralistic view is not one that most liberal egalitarians will eagerly adopt, at least as a matter of state policy rather than individual judg-

\textsuperscript{129} Society's "concerns over the possession of unearned wealth by later generations . . . may be greater than those over possession alone at the earlier generation." Id. at 349. Professor McCaffery does not indicate why people might be justified in worrying more about future possession than about current possession when both are divorced from use.

\textsuperscript{130} See McCaffery, Liberal Case, note 1, at 305-06. The reasoning of this section is also set forth in McCaffery, Uneasy Case, note 1, at 352-53.

\textsuperscript{131} See McCaffery, Liberal Case, note 1, at 306-07; McCaffery, Uneasy Case, note 1, at 353.
But what is essential to bear in mind for those who share Professor McCaffery’s conviction is that it is impossible to sunder earnings from their uses in turning this moral judgment into tax legislation. The extent to which paychecks will serve as incentives to socially productive activity depends upon how they can be spent; in deciding whether to perform some task, a rational worker will take into account what he will be enabled to do by completing the job. Professor McCaffery is aware of this point, but supposes that most people capable of earning large sums will continue to do so in the face of high taxes or limits on personal consumption so long as they are permitted to pass their earnings on to others, who (under his plan) would be taxed according to an even higher schedule of rates when they spent their inheritances.

Why accept Professor McCaffery’s supposition? Either it must be based on a hunch about what set of rules will most likely realize Rawls’ idea of a just distribution (if, in fact, Professor McCaffery accepts Rawls’ theory). Or it must stem from a wish to modify the best Rawlsian rules to reflect an antiliberal disapproval of abundant consumption by a small minority, at the cost of sacrificing some gains to society’s worst off. Professor McCaffery’s text is ambiguous. What is clear is that he needs to offer empirical evidence and moral reasons for whichever supposition he makes, along with reasons for dismissing concerns about desert altogether. Until he does so, he will find few liberal philosophers eager to see his consumption-without-estate tax become law.

IV. Conclusion

What is most unsettling about Professor McCaffery’s call for a progressive consumption-without-estate tax is its indefinite and ungrounded character. Professor McCaffery never makes clear which principles of distributive justice he endorses and why he does so, nor does he offer much proof, based on experience and controlled observation, that some type of consumption tax with a deferred accessions tax will implement a particular collection of liberal egalitarian ideals most effectively. This is not the way to argue for fundamental law reform. I have tried in this Article to outline some (by no means all) of the basic moral issues a responsible reformer must address in defending from the roots up a scheme for regulating wealth transfers. These critical moral choices, which many academics and legislators shy away from discussing and making explicitly, are where both par-

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132 See Subsection II.C.3.
133 See McCaffery, Uneasy Case, note 1, at 353.
tisans of the status quo and would-be revolutionaries must begin. No collection of moral values, and no concrete reform measure, will command universal assent, but that is surely no reason to refrain from articulating a set of principles and proposals and seeing how people respond. As a society, we need to reach a decision, even if we ultimately choose to keep what we have. In approaching that choice, we gain more from understanding what divides us than from papering over our differences, hoping the cracks won’t show.