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CONSTITUTIONAL LAW AND TAX EXPENDITURES: A PRELUDE

Johnny Rex Buckles*

INTRODUCTION

“A little learning is a dang’rous thing,” admonished Pope.¹ Judges who pen legal opinions drawing on tax expenditure theory should heed the neoclassical bard. Armed with the modest yet obligatory exposure to the concept of tax expenditures presented in the basic federal income tax course in law school, many judges indeed possess enough learning to be dangerous. The thesis of this Article is that tax expenditure theory must be applied with a skillful, critical, and cautious appreciation for nuance in constitutional cases. This conclusion holds even under the assumption that tax expenditure budgeting is a useful tool of fiscal analysis. For several reasons, features of tax expenditure analysis apply uneasily in constitutional adjudication.

This thesis is far from obvious, primarily because tax expenditure theory reigns from a lofty, storied throne in national tax policy.² Tax expenditure theory is largely grounded in the influential work of the late Stanley Surrey, an accomplished and prolific Harvard law professor who served as Assistant Secretary of the Treasury for Tax Policy.³ Surrey famously championed the

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1. ALEXANDER POPE, *An Essay on Criticism*, in ALEXANDER POPE: THE MAJOR WORKS 17, 24 (Pat Rogers ed., Oxford Univ. Press 2006) (emphasis omitted).

2. See Martin J. McMahon Jr., *Taxing Tax Expenditures?*, 2011 TAX NOTES (SPECIAL REPORT) 775, 776 (describing tax expenditure theory as “enshrined into law”).

3. See *id.* at 775 (“Stanley Surrey introduced tax expenditure analysis to U.S. tax and budget policy in the late 1960s.”); see also Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 705 (1970) [hereinafter Surrey, *Tax Incentives*].

concept of tax expenditures, catapulted tax expenditure theory to academic prominence, and successfully promoted tax expenditure budgeting as a mooring of fiscal stewardship.⁴ Surrey conceptualized tax expenditures as “those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives.”⁵ Tax expenditures take many forms—credits, deductions, exclusions, deferrals, and special rates.⁶ But whatever their form, their effect is to reduce tax liabilities relative to the tax that would be due in the absence of the provisions in question.⁷ Surrey pronounced this reduction in a taxpayer’s liability the equivalent of a subsidy to the taxpayer from the government.⁸

The logic of tax expenditure theory is, in Sherlockian tongue, elementary.⁹ Had the government collected taxes under a system that omitted the special credit, deduction, or other provision, the government would have collected more revenue. Having thus raised more tax revenue, the government then could transfer to the taxpayer a monetary amount equal to the reduction in tax liability enjoyed by the taxpayer in the system that features the credit, deduction, or other special provision. Under the hypothetically enhanced tax-and-spend model, the subsidy to the taxpayer is explicit. Tax expenditure theory posits that the subsidy is just as real when it is achieved through the mechanism of deduction, exclusion, or other statutory measure.¹⁰ Although

4. Under Surrey’s leadership, the United States Treasury Department seriously advanced and applied tax expenditure analysis beginning in 1967-68. See STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* 2 (1985). For a history of the Treasury’s Department’s implementation of tax expenditure theory, see generally STANLEY S. SURREY, *PATHWAYS TO TAX REFORM* (1973), and Surrey, *Tax Incentives*, *supra* note 3.

5. Surrey, *Tax Incentives*, *supra* note 3, at 706.

6. See SURREY & MCDANIEL, *supra* note 4, at 3. The Congressional Budget and Impoundment Control Act of 1974 adds special exemptions to the list of tax expenditures. See Pub. L. No. 93-344, § 3, 88 Stat. 299 (1974) (codified as amended at 2 U.S.C. § 622(3)).

7. See SURREY & MCDANIEL, *supra* note 4, at 3.

8. See *id.*

9. See J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437, 446 (2008) (describing tax expenditure analysis as “the essence of simplicity”); see also Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 410 (1999) (“The basic insight of tax expenditure analysis is very simple . . .”).

10. See SURREY & MCDANIEL, *supra* note 4, at 3.

the government has foregone revenue, it has just as surely subsidized taxpayers as in the case of a direct grant. The government has economically expended funds through the mechanism of a tax-reducing provision.¹¹ Hence, the government has made a “tax expenditure.”¹²

Tax expenditure theory has altered how the executive and legislative branches function.¹³ The Congressional Budget and Impoundment Control Act of 1974 (“Budget Act”)¹⁴ required that the President’s budget include a list of tax expenditures.¹⁵ The Department of the Treasury historically has prepared this list of tax expenditures, which is published by the Office of Management and Budget (“OMB”).¹⁶ Moreover, the Budget Act created the Congressional Budget Office (“CBO”) and requires it to report annually to the congressional budget committees the amount of tax expenditures under current law.¹⁷ In fulfilling its statutory mandate, the CBO relies on the analysis of the congressional Joint Committee on Taxation (“JCT”), which itself began issuing tax expenditure publications even prior to the formation of the CBO.¹⁸ Thus, both the Treasury Department and the JCT estimate revenue losses from tax expenditures.¹⁹ Further,

11. *See id.* at 1.

12. *Id.* at 25; U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-167SP, TAX EXPENDITURES: BACKGROUND AND EVALUATION CRITERIA AND QUESTIONS 3 (2012) [hereinafter GAO GUIDE FOR EVALUATING TAX EXPENDITURES].

13. *Cf.* SURREY & MCDANIEL, *supra* note 4, at 2 (observing the “rapidly growing recognition of the role of the tax expenditure concept both in budget policy issues and in tax policy issues”).

14. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601-13).

15. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297. This requirement appeared in Title VI of the Budget Act, which has been repealed. *See* Pub. L. No. 105-33, § 10118(a), 111 Stat. 695 (repealed 1997). The Treasury Department has continued to publish a tax expenditures budget.

16. *See* BENJAMIN H. HARRIS ET AL., TAX POL’Y CTR., EVALUATING TAX EXPENDITURES: INTRODUCING OVERSIGHT INTO SPENDING THROUGH THE TAX CODE 10 (2018), [<https://perma.cc/B9VR-BNYC>]; McMahon, *supra* note 2, at 776; *see also, e.g.*, OFF. OF TAX ANALYSIS, U.S. DEP’T OF THE TREASURY, TAX EXPENDITURES (2021) [hereinafter TREASURY REPORT], [<https://perma.cc/J5SR-X42Y>].

17. Pub. L. No. 93-344, §§ 201-02, 88 Stat. 302-04 (1974) (codified as amended at 2 U.S.C. §§ 601-02).

18. *See* STAFF OF JOINT COMM. ON TAX’N, 116TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020-2024, at 2 n.4 (2020) [hereinafter JCT TAX EXPENDITURES REPORT].

19. GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 4.

the Budget Act requires the budget committees of each house of Congress to request, evaluate, and report on tax expenditure studies as they develop congressional budget resolutions.²⁰ The Congressional Research Service (CRS) regularly prepares a committee print for the Senate Budget Committee to facilitate its compliance with the Budget Act.²¹

Tax expenditure theory also finds expression in case law. However, the United States Supreme Court has demonstrated remarkable ambivalence towards tax expenditure theory when deciding constitutional questions arising from nominal tax exemptions, deductions, and credits.²² In some decisions, justices write as though they were disciples at the feet of Stanley Surrey.²³ In others, justices distance their analysis from the apparent implications of the theory by distinguishing direct monetary subsidies from the indirect benefits reaped by those who avail themselves of various statutory mechanisms for reducing tax liabilities.²⁴ Tax expenditure theory has thus left a meandering

20. See §§ 101-02, 88 Stat. at 299-301.

21. See CONG. RSCH. SERV., 116TH CONG., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS, at III [hereinafter TAX EXPENDITURES: COMPENDIUM] (Comm. Print 2020).

22. See Edward A. Zelinsky, *Are Tax “Benefits” Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 380-81 (1998) [hereinafter Zelinsky, *Tax “Benefits”*] (stating that the Supreme Court “has equivocated” in decisions presenting the question of whether tax benefits and direct spending are the same).

23. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 148 (2011) (Kagan, J., dissenting) (“This novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations.”); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (Brennan, J., plurality opinion) (“Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers . . .”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 587-88, 592 (1983) (finding that Internal Revenue Code sections 501(c)(3) and 170 reflect a congressional desire “to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose,” and holding a private school’s admission policy forbidding interracial dating violated “fundamental public policy”); *Regan v. Tax’n with Representation of Wash.*, 461 U.S. 540, 544 (1983) (Rehnquist, J.) (“Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.”).

24. See, e.g., *Winn*, 563 U.S. at 144, 146 (holding that taxpayers lack standing to challenge the constitutionality of a state program providing tax credits for transfers to tuition organizations and rejecting the idea “that income should be treated as if it were government property even if it has not come into the tax collector’s hands”); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588-89 (1997) (holding that the Commerce Clause was violated by a state law that exempted the property of most

trail of scattered footprints in the pages of Supreme Court opinions.

Existing legal scholarship features different approaches to analyzing Supreme Court opinions that discuss tax expenditure theory or rely on its basic ideas.²⁵ Commonly, analysts discuss tax expenditure theory with a focused commentary on individual cases or distinct doctrinal areas of constitutional law.²⁶ Some scholars assume or assert the salience of tax expenditure theory to constitutional adjudication.²⁷ Others suggest a more cautious, even critical, view of employing tax expenditure concepts in constitutional cases. A few commentators argue that tax expenditure theory has limited value in at least some constitutional contexts.²⁸ Some offer a more systematized approach than others.²⁹ Each of these critical approaches

charities from taxation but denied the general exemption to charities that operated primarily for the benefit of nonresidents, and stating that “tax exemptions and subsidies serve similar ends” but “differ in important and relevant respects, and our cases have recognized these distinctions”); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 679-80 (1970) (holding that granting a property tax exemption to religious organizations along with other charities did not violate the Establishment Clause).

25. See, e.g., Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855 (1993); E.C. Lashbrooke, Jr., *An Economic and Constitutional Case for Repeal of the I.R.C. Section 170 Deduction for Charitable Contributions to Religious Organizations*, 27 DUQ. L. REV. 695 (1989); Zelinsky, *Tax “Benefits,” supra* note 22.

26. See, e.g., Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969) [hereinafter Bittker, *Churches*] (analyzing the constitutionality of tax exemptions for churches under the Establishment Clause); Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: “Constitutionalizing” the Internal Revenue Code*, 82 YALE L.J. 51, 61-74 (1972) (discussing how tax expenditure concepts relate to state action and the Due Process Clause of the Fifth Amendment in the context of private acts of discrimination); Sugin, *supra* note 9, at 413 (“This Article looks at the significance of the similarities and differences between tax benefits and direct spending for purposes of the equal protection and establishment clauses, with a particular focus on the charitable contribution deduction.”).

27. See, e.g., Adler, *supra* note 25, at 864-65; Lashbrooke, *supra* note 25, at 717-18.

28. In her thoughtful treatment of tax expenditures and the Constitution, Professor Linda Sugin offers four reasons that tax expenditure analysis “is problematic if applied unreflectively as a basis for constitutional adjudication.” See Sugin, *supra* note 9, at 415-30.

29. Professor Edward Zelinsky’s excellent article critiquing the typical, binary approach of either embracing or rejecting the constitutional equivalence of tax expenditures and government subsidies presents a framework for analyzing the underlying nature of the benefit under scrutiny. See, e.g., Zelinsky, *Tax “Benefits,” supra* note 22, at 400-13. His framework considers a benefit’s structural features (in terms of permanence, eligibility, and quantity) and how that benefit is perceived under three perspectives (that of the beneficiary as it receives funds, that of the government as it decides the scope and purpose of the provision, and that of the government as it conducts the process of dispensing benefits). See

meaningfully advances legal scholarship on tax expenditures and the Constitution.

Nonetheless, much existing scholarship tends to move quickly to how tax expenditure analysis has (or has not) informed, or should (or should not) inform, the resolution of specific cases or doctrinal areas. Only a few scholars have explored whether there may be excellent reasons to apply tax expenditure theory differently, or how tax expenditure theory presents unique challenges, in cases raising constitutional issues.³⁰ Certainly, a comprehensive treatment of the limits of tax expenditure theory in constitutional contexts at a high level of generality is wanting. Existing literature, as well as future judicial opinions, would benefit from a prelude. Such a prelude would alert the judiciary and the legal academy to a wide assortment of assumptions, lessons, and vagaries of tax expenditure theory relevant to deciding constitutional cases.

This Article is such a prelude. It discusses numerous reasons—most of which are interconnected—for applying tax expenditure analysis in constitutional cases with caution, qualification, and a critical eye. In doing so, it also suggests how judges should assess various aspects of tax expenditure theory in resolving constitutional questions.

The reader should understand *ab initio* what this Article is not. It is not a critique of tax expenditure theory as a fiscal tool, let alone a hostile assault on it generally. This Article necessarily probes tax expenditure theory and identifies special challenges that the theory presents for constitutional law. However, to interpret this Article as refuting the gist of tax expenditure theory or as rehashing old debates over it is to misread the Article. The argument assumes, *arguendo*, that tax expenditure theory is a valuable tool of fiscal policy.³¹

Further, this Article is not a detailed, case-specific analysis of the body of Supreme Court decisions accepting or rejecting

id. He then applies the framework to areas of constitutional law on a case-by-case basis. *See id.* at 413-32.

30. *See, e.g.,* Sugin, *supra* note 9, at 415-30; Zelinsky, *Tax “Benefits,” supra* note 22, at 380-81.

31. Therefore, both the strongest advocates for tax expenditure theory and its most vocal opponents should keep reading.

concepts embraced by tax expenditure theory. The Article refers to Supreme Court opinions when they illustrate a normative or descriptive point; however, the purpose of the paper is not to restate, deconstruct, or synthesize Supreme Court jurisprudence on tax expenditures. Neither is this Article primarily an analysis of specific constitutional cases or doctrinal areas. This Article is a prelude, one that is currently missing in legal scholarship. Building on this prelude, further work examining Supreme Court cases involving tax expenditures in discreet doctrinal areas is plainly warranted.

The structure of this Article is simple. Part I summarizes the basic idea and insights of tax expenditure theory, as well as the major objections to its features that are relevant to constitutional analysis. Part II explains why the application of tax expenditure theory to constitutional questions is uneasy. It also cautions courts against an indiscriminate, reflexive approach to the theory. Part III concludes.

I. FUNDAMENTAL INSIGHTS AND CRITICISMS OF TAX EXPENDITURE THEORY

A. Tax Expenditure Basics

In their classic, co-authored book, Stanley Surrey and Paul McDaniel describe the idea of tax expenditures as envisioning an income tax with “two distinct elements.”³² The first “consists of structural provisions necessary to implement a normal income tax.”³³ Examples include provisions that determine accounting rules, identify taxable entities, define net income, fix tax rates, set forth personal exemptions, and specify the scope of taxable international transactions.³⁴ The second major feature of a tax system consists of the “tax incentives,” the “special preferences found in every income tax.”³⁵ These items depart “from the

32. SURREY & MCDANIEL, *supra* note 4, at 3; *see also* Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 679, 679-80 (1976) (positing the same two elements of an income tax system).

33. SURREY & MCDANIEL, *supra* note 4, at 3.

34. *See id.*

35. *Id.*

normal tax structure”³⁶ and constitute “government spending” through tax laws for someone or something.³⁷ The spending takes the form of reductions in tax liabilities that otherwise would be due.³⁸

Examples of tax expenditures that appear in the 2021 tax expenditures budget published by the United States Department of the Treasury³⁹ are the credit for construction of energy efficient homes,⁴⁰ the excess of the deduction for percentage depletion⁴¹ over cost depletion for minerals,⁴² the exclusion of life insurance death benefits from the income of a beneficiary named in the policy,⁴³ various tax credits and exclusions for post-secondary education,⁴⁴ and the exclusion from an employee’s income of employer-paid health insurance premiums.⁴⁵ Clearly, the reductions in tax liability recognized as tax expenditures may be direct offsets to tax otherwise due (in the case of a tax credit) or adjustments to various income figures employed in calculating taxable income (for example, a gross income exclusion or a deduction from gross income or adjusted gross income). The form of the tax expenditure is irrelevant to its classification as such.⁴⁶

For each tax expenditure provision, the governmental entities responsible for compiling official lists of tax expenditures (the Treasury Department and the JCT) calculate the tax expenditure associated with the provision as the difference between income tax liability under existing law (i.e., with the provision in place) and the hypothetical tax liability that would exist without the provision.⁴⁷ This methodology is simple. The

36. *Id.*

37. *Id.*

38. See SURREY & MCDANIEL, *supra* note 4, at 3.

39. See TREASURY REPORT, *supra* note 16, at tbls. 1-4.

40. See *id.* at 7; I.R.C. § 45L.

41. See TREASURY REPORT, *supra* note 16, at 7; I.R.C. § 613.

42. See I.R.C. § 611(a).

43. See I.R.C. § 101(d).

44. See, e.g., I.R.C. §§ 25A, 117, 127, 529.

45. See I.R.C. § 106.

46. See SURREY & MCDANIEL, *supra* note 4, at 3.

47. See GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 4. The tax expenditure lists prepared by the Treasury Department and the JCT differ in six modest respects. See JCT TAX EXPENDITURES REPORT, *supra* note 18, at 15-16.

calculations of revenue loss for a single tax expenditure assume that other tax expenditures continue.⁴⁸ The calculations further assume that taxpayer behavior does not change when the tax expenditure is repealed.⁴⁹ Consequently, the revenue losses that tax expenditure budgets estimate do not likely equate to revenues the government would gain from repealing tax expenditures.⁵⁰

B. Critiques of Tax Expenditure Analysis

Critiques of tax expenditure theory have varied from the thoroughly unpersuasive to the intellectually sophisticated.⁵¹ This Section discusses two critiques that are most relevant to constitutional analysis.

1. *The Assumption of a Normative Tax Base*

Perhaps the most controversial feature of tax expenditure analysis is its reliance on a normatively correct base.⁵² The base of a tax is simply that upon which tax is assessed. For example, in a capitation tax, the tax base is human beings.⁵³ Under a real property ad valorem tax, the base is the value of land and structures built on it for residential and non-residential use.⁵⁴ In

48. See GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 5.

49. See *id.*

50. See *id.*

51. For a summary, see McMahon, *supra* note 2, at 778-80.

52. See J. Clifton Fleming, Jr. & Robert J. Peroni, *Can Tax Expenditure Analysis Be Divorced from a Normative Tax Base?: A Critique of the “New Paradigm” and Its Denouement*, 30 VA. TAX REV. 135, 142 (2010) [hereinafter Fleming & Peroni, *A Critique*] (describing the “strongest attacks” on tax expenditure theory as targeting the “baseline”). For critical assessments of the attempt to establish a normative income tax base, see Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 1992 TAX NOTES (SPECIAL REPORT) 1661, and David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 976 (2004) (“There is no such thing as a normative tax base.”).

53. *Poll Tax*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A fixed tax levied on each person within a jurisdiction. . . . Also termed . . . *capitation* [or] *head tax*.”); see also Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 841 (2009).

54. *Ad valorem Tax*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A tax imposed proportionally on the value of something (esp. real property), rather than on its quantity or some other measure.”). See generally 71 AM. JUR. 2D *State and Local Taxation* § 18 (2022) (stating that *ad valorem* taxes are taxes “levied according to the value of property as determined by an assessment or appraisal” and are “invariably based upon ownership of

a retail sales tax, the tax base is consumption measured at point of sale to the ultimate consumer.⁵⁵

Although tax expenditure analysis applies regardless of the type of tax at issue,⁵⁶ its most celebrated and rigorous implementation has occurred in evaluating the federal income tax.⁵⁷ Plainly, deciding on the normative income tax base is necessary to tax expenditure analysis for a simple reason: the very idea of an indirect subsidy taking the form of a “special” provision that departs from what the tax would otherwise be assumes the existence of a norm.⁵⁸ There can be no deviation unless first there is a standard, or norm, from which to stray.⁵⁹ It is thus instructive to consider how Surrey approached the task of identifying a normal income tax base in his tax expenditure analysis. His starting point was a concept of economic income.

The most widely accepted theoretical construct of economic income in this country is the Haig-Simons concept.⁶⁰ Henry Simons defined personal income as follows: “the algebraic sum of (1) the market value of rights exercised in consumption and (2)

property”; such taxes are “payable regardless of whether the property is used or not although the value may vary in accordance with such a factor”).

55. *Sales Tax*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A tax imposed on the sale of goods and services . . . Also termed *retail sales tax*.”). See generally 67B AM. JUR. 2D *Sales and Use Taxes* § 1 (2022).

56. See GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 3 n.6; SURREY & MCDANIEL, *supra* note 4, at 233. Professor Boris Bittker expressed skepticism that the tax expenditure concept could improve the federal estate tax. See Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244, 260 (1969) [hereinafter Bittker, “*Tax Subsidies*”].

57. See Fleming & Peroni, *A Critique*, *supra* note 52, at 138 n.7.

58. See SURREY & MCDANIEL, *supra* note 4, at 3-4; TREASURY REPORT, *supra* note 16, at 1; Bittker, *Churches*, *supra* note 26, at 1296; Fleming & Peroni, *supra* note 9, at 450-51.

59. See GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 3; TREASURY REPORT, *supra* note 16, at 1.

60. See, e.g., Boris I. Bittker, *A “Comprehensive Tax Base” as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 932 (1967) (observing that commentators advocating a comprehensive tax base state or imply that Congress should strive to enact the Haig-Simons concept of income to the extent possible); Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 46 (1990) (stating that the “income concept that is now widely accepted by analysts” is the Haig-Simons concept). Although Henry Simons’s concise articulation of income is the one that is most often cited, it is referred to as the “Haig-Simons” concept to acknowledge the prior work of Robert Haig. See *id.* See generally Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, in THE FEDERAL INCOME TAX 1, 1-28 (Robert Murray Haig ed., 1921).

the change in the value of the store of property rights between the beginning and end of the period in question.”⁶¹ A short-hand expression of this definition of income is accumulation plus consumption for the taxable period. Surrey himself embraced this notion of income and argued that it embodied the basic norm underlying the federal income tax.⁶²

But nailing down the breadth of this norm for purposes of applying tax expenditure theory has proven more challenging than a casual reading of the Haig-Simons definition suggests. When pressed by the late Professor Boris Bittker,⁶³ Surrey admitted that tax expenditure theory did not rely exclusively on the Haig-Simons definition of income.⁶⁴ Both practical administrative realities and public acceptance of taxation bear upon the standard, deviations from which are counted as tax expenditures.⁶⁵ For example, the Simons definition of income includes unrealized appreciation of assets, but not even Simons thought it practical to insist on trying to tax unrealized appreciation.⁶⁶ Neither did Surrey classify this unrealized appreciation as a tax expenditure.⁶⁷ Moreover, Surrey did not consider the progressive income tax rate schedules or the deduction for the personal exemption as tax preferences to those who benefit from them, but rather as components of “the structure of an income tax system based on ability to pay.”⁶⁸ At a minimum, then, the standard by which tax expenditure theory identifies “deviations” may reflect norms—including administrative norms and the ability-to-pay norm—that deviate

61. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938).

62. See SURREY & MCDANIEL, *supra* note 4, at 4-5, 186-88.

63. See Bittker, “Tax Subsidies,” *supra* note 56, at 247-51, 260-61.

64. See Stanley S. Surrey & William F. Hellmuth, *The Tax Expenditure Budget—Response to Professor Bittker*, 22 NAT’L TAX J. 528, 531 (1969).

65. See Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1165-66.

66. *Id.*

67. Surrey justified the non-inclusion of unrealized appreciation in the tax expenditure budget by appealing to public conceptions of income, the historical treatment of realization as integral to income, and administrative simplicity. See SURREY & MCDANIEL, *supra* note 4, at 198-99. However, he encouraged periodic reassessment of this item. See *id.*

68. See Surrey & Hellmuth, *supra* note 64, at 529. Similarly, both the Treasury Department and the JCT do not classify the personal exemption as a tax expenditure. See GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 4.

from economic income as captured by the Haig-Simons concept.⁶⁹

When an income standard is constructed by trying to account for an unspecified and incommensurable aggregate of various legitimate norms of tax policy, the precise boundaries of income are difficult to determine.⁷⁰ Surrey acknowledged as much. He wrote that “[t]he precise contours of the dividing line will of course be uncertain.”⁷¹ He also approvingly cited an analysis recognizing that exclusions from the tax expenditure listing “are to some extent arbitrary” and that the list should not include “highly complicated or controversial items.”⁷² Such language bespeaks an awareness that reasonable minds can differ on the finer points of the income standard by which tax expenditures are measured.

Notwithstanding the uncertainties surrounding the analytical borders of income, Surrey argued for “a very large area of tax law which can be considered within the guidelines” of the Treasury’s tax expenditure analysis.⁷³ Many have agreed with him. Still, the lack of precision in the scope of the income standard has long opened space for questioning not just omissions from the tax expenditure budget, but also inclusions in it. For example, the late Professor William Andrews is well known for focusing on the element of income consisting of personal consumption.⁷⁴ Andrews pressed the point that not all non-business-related

69. Surrey classified some provisions that deviate from the Haig-Simons concept of income as other than tax expenditures because they comport with the ability-to-pay norm. But not all features of tax law consistent with this norm escape classification as a tax expenditure. See Boris I. Bittker, *The Tax Expenditure Budget—A Reply to Professors Surrey & Hellmuth*, 22 NAT’L TAX J. 538, 539 (1969) [hereinafter Bittker, *A Reply*].

70. See Charlotte Crane, *The Income Tax and the Burden of Perfection*, 100 NW. U. L. REV. 171, 185 (2006); cf. TREASURY REPORT, *supra* note 16, at 2 (“[D]eciding whether provisions are exceptions, therefore, is a matter of judgment.”).

71. Surrey & Hellmuth, *supra* note 64, at 531.

72. *Id.* at 529-30 (quoting the *1969 Economic Report of the President: Hearings Before the Joint Econ. Comm.*, 91st Cong. 33 (1969)) (statement of Joseph W. Barr, Secretary of the Treasury).

73. *Id.* at 533.

74. William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972). For a summary of Andrews’s understanding of income and how personal deductions figure into an income base, see Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 366-77 (1989).

transfers represent personal consumption.⁷⁵ Andrews made a thoughtful case, albeit a controversial one, that charitable contributions are best viewed as other than personal consumption.⁷⁶ Under Andrews's logic, if income is accumulation plus consumption, and a charitable contribution is not personal consumption, then a taxpayer's taxable income should not include her charitable contributions.⁷⁷ It follows that a deduction for charitable contributions is appropriate in calculating the donor's taxable income.⁷⁸ So understood, the charitable contributions deduction is not a tax expenditure; rather, it is a mechanism for arriving at the proper tax base.

This position is, of course, contrary to the tax expenditure lists promulgated by the federal government⁷⁹ and to Surrey's assessment of the charitable contributions deduction.⁸⁰ But it is nonetheless representative of serious scholarship taking issue with some fairly basic assumptions underlying the income standard on which tax expenditure analysis hangs. Andrews highlighted a foundational conceptual issue in what is meant by income: if the "income" subject to taxation is that which is consumed or saved, then income that a taxpayer does not save or consume (in the sense of appropriating goods and services purchased or exchanged in a market transaction for the taxpayer) is not part of the income standard.⁸¹ A vigorous debate has ensued as to whether this understanding of the Haig-Simons concept of income has any legs.⁸² The present point is not that Andrews was

75. See Andrews, *supra* note 74, at 313-15.

76. See *id.* at 344-75.

77. See *id.* at 346.

78. See *id.*

79. See, e.g., JCT TAX EXPENDITURES REPORT, *supra* note 18, at 9; TREASURY REPORT, *supra* note 16, at 14 (item 104), 17 (item 129).

80. See SURREY & MCDANIEL, *supra* note 4, at 79, 169-70; Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 384-85 (1970).

81. See Andrews, *supra* note 74, at 325.

82. For critiques of the analysis of Andrews on the role of personal deductions generally or the charitable contributions deduction specifically, see Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1414-26 (1988), and Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831 (1979), and Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679 (1988). For more sympathetic assessments of Andrews's arguments, see Johnny Rex

right and Surrey was wrong about the charitable contributions deduction. The point is that there is serious debate about what the Haig-Simons concept of income even means, or should mean when it is employed to craft a legal definition of income, with respect to non-purchased consumption. At a minimum, there is at least some reason to question the vastness of the domain of Surrey's "very large area of tax law which can be considered within the guidelines" of tax expenditure analysis.

2. *The Effect on Behavioral Changes and Resulting Revenues*

Tax expenditure budgets do not attempt to quantify the real revenue effects of eliminating the targeted tax provisions because they do not account for changes in taxpayer behavior likely to result from a change in the law. As Professor Boris Bittker argued long ago, the informational value of tax expenditure budgets so constructed is limited.⁸³ The government does not know how much revenue it loses through a tax provision without knowing what taxpayers would do in response to eliminating the provision.⁸⁴

One intuitive response to this observation is that some information is probably better than none, and tax expenditure budgets provide some basis for comparing direct spending alternatives and support through tax provisions.⁸⁵ Further, the practical reality, acknowledged by the Treasury Department, is that computing an accurate estimate of revenue loss after considering taxpayer behavioral changes is difficult, if not impossible.⁸⁶ For Bittker, this fact alone calls into question the decision to label a tax provision a "tax expenditure."⁸⁷ At a minimum, the unrealistic assumption of tax expenditure budgeting that taxpayer behavior remains unchanged means that

Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947 (2005), and Jeffrey H. Kahn, *Personal Deductions—A Tax "Ideal" or Just Another "Deal"?*, 2002 L. REV. MICH. STATE U. DETROIT COLL. L. 1 (2002).

83. See Bittker, "Tax Subsidies," *supra* note 56, at 247.

84. See *id.*

85. See Fleming & Peroni, *supra* note 9, at 521-22.

86. See Bittker, "Tax Subsidies," *supra* note 56, at 247.

87. See *id.*

any comparison between tax expenditure budgets and direct appropriations must be qualified.⁸⁸

II. THE UNEASY APPLICATION OF TAX EXPENDITURE THEORY IN CONSTITUTIONAL CONTEXTS

Surrey and McDaniel devote an entire chapter in their co-authored book to discussing how courts have analyzed cases involving tax expenditures.⁸⁹ Their position—indeed, nearly the entire analytical depth of their reflection—is encapsulated in the first paragraph of the discussion. They assert that, because “tax expenditures are government assistance programs, it would seem almost axiomatic” that constitutional doctrines governing direct government spending and those who accept it also apply to “tax expenditure benefits and to private entities receiving them.”⁹⁰

Surrey and McDaniel frame the issue common to numerous constitutional contexts as “whether tax assistance is equivalent to direct assistance.”⁹¹ They conclude the answer “must be” yes “under rational governmental and judicial decisions.”⁹² Moreover, in an analytical quantum leap, they insist that a court need not independently analyze tax provisions to determine if they are a form of assistance.⁹³ Courts should simply accept the tax expenditure lists appearing in the federal budgets.⁹⁴ Further, equating the Senate Budget Committee’s characterization of tax expenditures with the “congressional view” itself,⁹⁵ Surrey and McDaniel maintain that “it would seem difficult—and wrong—for courts to apply different rules to direct programs and to tax expenditures.”⁹⁶

88. *See id.*

89. *See* SURREY & MCDANIEL, *supra* note 4, at 119-55.

90. *See id.* at 118.

91. *See id.* at 119.

92. *Id.*

93. *See id.*

94. *See* SURREY & MCDANIEL, *supra* note 4, at 119.

95. *Id.*

96. *Id.* Such language tends to feed into criticisms of tax expenditure theory. *See, e.g.,* Kahn & Lehman, *supra* note 52, at 1662 (“What is disturbing about the language of tax expenditures is its tone of moral absolutism.”).

In this summary articulation of their position, Surrey and McDaniel thus do little more than assert that judges deciding constitutional questions are duty-bound to accept the executive's (or a legislative committee's) characterization of a tax provision as equivalent to a cash subsidy.⁹⁷ But it turns out that Surrey's ultimate view is that judges do have a bit of freedom; he permits them to *add* to the tax expenditure list, insofar as the tax expenditure budget does not purport to be exhaustive.⁹⁸ Surrey's methodology is therefore a one-way ratchet under which judges "rationally" cannot question the executive's characterization of a tax provision as a cash subsidy equivalent, but apparently they can and should rationally employ the tax expenditure concept to expand the official list.

Surrey's discussion of specific cases adds little to this synopsis. Representative of Surrey's view is his description of *Regan v. Taxation with Representation*,⁹⁹ which he praises for its reflection of tax expenditure insights.¹⁰⁰ In *Regan*, the Court upheld the constitutionality of the requirement in section 501(c)(3) of the Internal Revenue Code (the "IRC") that "no substantial part" of a tax-exempt charitable organization's activities consist of "carrying on propaganda, or otherwise attempting to influence legislation."¹⁰¹ Writing for the majority,

97. In his review of Surrey & McDaniel's book, Professor Bernard Wolfman offers a similar, more general, assessment. See Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 HARV. L. REV. 491 (1985) (book review). Wolfman states that "the book is more rigid and dogmatic than it is persuasive and pragmatic." *Id.* at 495. He continues:

Instead of demonstrating in case upon case that tax expenditure analysis is a useful tool and arguing that it should therefore be used more often than not because of the practical benefits it offers, the authors insist that government must utilize tax expenditure analysis as a matter of logical necessity.

Id. (emphasis omitted).

98. See SURREY & MCDANIEL, *supra* note 4, at 144.

99. 461 U.S. 540 (1983).

100. See SURREY & MCDANIEL, *supra* note 4, at 120-22.

101. *Regan*, 461 U.S. at 542 n.1 (emphasis omitted). An extensive academic commentary discusses the political speech constraints on charities under section 501(c)(3) of the Internal Revenue Code. See, e.g., PHILIP HAMBURGER, LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH (2018); Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (1999); Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843 (2001); Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 UNIV. COLO. L. REV. 143 (2016); Samuel D. Brunson, *Reigning in Charities:*

Using an Intermediate Penalty to Enforce the Campaigning Prohibition, 8 PITT. TAX REV. 125 (2011); Johnny Rex Buckles, *A Rawlsian Critique of the Political Speech Constraints on Charities*, 16 FIU L. REV. 479 (2022); Johnny Rex Buckles, *The Penalty of Liberty*, 25 TEX. REV. L. & POL. 159 (2020) [hereinafter Buckles, *The Penalty of Liberty*]; Johnny Rex Buckles, *Curbing (or Not) Foreign Influence on U.S. Politics and Policies Through the Federal Taxation of Charities*, 79 MD. L. REV. 590 (2020); Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?*, 84 IND. L.J. 447 (2009); Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 RICH. L. REV. 1057 (2008); Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, 75 CIN. L. REV. 1071 (2007); Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169 (1985); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217 (1992); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990); Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RESV. L. REV. 685 (2012); Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; to What End?*, 42 B.C. L. REV. 903 (2001); Alan L. Feld, *Rendering unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931 (2001); Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1 (1990); Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561 (2013); Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867 (2011); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269 (1993); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); Michael Hatfield, *Ignore the Rumors—Campaigning from the Pulpit Is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125 (2006); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1 (2003); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001); Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145 (2006); Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391 (2000); Benjamin M. Leff, *"Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*, 28 VA. TAX REV. 673 (2009); Jill S. Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE W. RESV. L. REV. 757 (2012); Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407 (2011); Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1 (2007); Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137 (2009); Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35 (2003); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42

then-Associate Justice Rehnquist opined that both federal income tax exemption and the ability to receive donations that are deductible by donors under IRC section 170 constitute forms of governmental subsidy.¹⁰² Echoing Surrey without citing him, Justice Rehnquist explained that, by conditioning the favorable tax benefits on complying with the lobbying limitations, “Congress has merely refused to pay for the lobbying out of public moneys.”¹⁰³ Surrey expressed hope that the reasoning employed by Justice Rehnquist in *Regan* would influence future cases.¹⁰⁴

Notwithstanding Surrey’s assertions to the contrary, that judges should defer in knee-jerk fashion to the characterization of a tax provision in the executive’s tax expenditure budget—unless, of course, a judge seeks to add to the list of tax expenditures—is far from “axiomatic.” Further, a judge’s exercise of judgment as to the nature of a tax provision when deciding constitutional cases hardly seems “wrong.” Rather, exercising judgment sounds exactly like what Article III of the United States Constitution requires judges to do. Surrey simply declined to explore reasons that constitutional questions might require a judge to analyze tax provisions on the tax expenditure list differently from how Treasury and OMB officials sensibly approach the compilation of tax expenditure budgets.

This Section of the Article explores reasons that standard tax expenditure theory fits uneasily in constitutional analysis. Some of these reasons are fairly obvious. Some are not. When numerous nuances are explored, Surrey’s declaration of the

B.C. L. REV. 733 (2001); Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL’Y 145 (2007); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313 (2007); Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code’s Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395 (1986); Joel E. Davidson, Note, *Religion in Politics and the Income Tax Exemption*, 42 FORDHAM L. REV. 397 (1973); Joseph S. Klapach, Note, *Thou Shall not Politic: A Principled Approach to Section 501(c)(3)’s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504 (1999); Judy Ann Rosenblum, Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 FORDHAM L. REV. 536 (1981).

102. See *Regan*, 461 U.S. at 544.

103. *Id.* at 545.

104. See SURREY & MCDANIEL, *supra* note 4, at 122.

“axiomatic” equivalence of tax expenditures and direct cash subsidies for purposes of constitutional law is unsustainable.

A. The Question of Budgetary Purpose

Perhaps the greatest utility of tax expenditure theory, at least if history is an insightful guide, is its use in budgeting. Surrey emphasized that, because tax expenditures had long existed as hidden government subsidies, they should be brought to light and explicitly considered in the budgeting process.¹⁰⁵ Congress and the Treasury responded positively to Surrey’s persuasion.¹⁰⁶ Now, tax expenditure budgets are published annually.¹⁰⁷ Both government officials and the general public can readily observe what Surrey argued was just another variant of government spending.

At a minimum, the publication of tax expenditure budgets should equip the federal government to better decide how much to budget for direct appropriations.¹⁰⁸ For example, in deciding the types of green energy projects to subsidize directly and the magnitude of green energy grants, Congress and the OMB could identify what indirect subsidies already exist through various income tax credits by scrutinizing the tax expenditure budgets. Although the tax expenditure budget does not take into account expected behavioral changes by taxpayers were a specific incentive eliminated, the budget does provide at least a reasonable idea of taxpayer activities that government is already incentivizing and the degree to which government is foregoing revenues in order to stimulate those activities.¹⁰⁹ This information is surely instructive to government officials in deciding whether and how much to spend directly to stimulate

105. See Surrey & Hellmuth, *supra* note 64, at 528 (recounting that Surrey had identified the need for a “full accounting” of tax expenditures by the late 1960s).

106. For an overview of the Budget Act and its treatment of tax expenditures, see SURREY & MCDANIEL, *supra* note 4, at 45-47.

107. See *supra* notes 13-21 and accompanying text.

108. Surrey argued that the OMB should better coordinate tax expenditures and direct spending programs. See SURREY & MCDANIEL, *supra* note 4, at 33.

109. Cf. GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 20 (“Coordinated reviews of tax expenditures with related federal spending programs . . . could help policymakers reduce overlap and inconsistencies and direct scarce resources to the most effective or least costly methods to deliver federal support.”).

these and other taxpayer activities. Even if some provisions of the IRC, currently denominated tax expenditures, are more accurately classified otherwise, the tax expenditure budget still conveys information helpful in establishing budget priorities.¹¹⁰

The role of the tax expenditure concept in the budgeting process is apparent.¹¹¹ Surrey even once identified this role as the purpose of the tax expenditure budget.¹¹² However, this budgetary function has little or no relevance to the courts in deciding constitutional issues.¹¹³ Courts obviously do not have the power to tax,¹¹⁴ but only to interpret tax statutes and regulations and to decide their constitutionality. Relatedly, courts do not bear responsibility for disbursing funds to advance public policies.¹¹⁵ For example, whether Congress should spend more to defray the cost of higher education tuition, given current tax incentives for the same,¹¹⁶ is not for judges to decide. Perhaps the tax expenditure concept would be relevant to a court in deciding the proper scope of legislation that imposed spending limits on certain categories of expenditures. But beyond that, it is difficult to link the budgetary value of tax expenditure analysis to the judicial task.

This modest point hardly establishes that the tax expenditure concept is irrelevant in court. But it does suggest a general qualification to consider, and perhaps even a presumption to avoid, in applying tax expenditure theory. That the tax

110. *Cf.* Sugin, *supra* note 9, at 415 (describing tax expenditure theory as “an immensely important policymaking tool”). Indeed, Professors David Weisbach and Jacob Nussim have urged rejecting the “normative consequences” of the tax expenditure label in favor of asking what information is “useful.” *See* Weisbach & Nussim, *supra* note 52, at 976.

111. *See* JCT TAX EXPENDITURES REPORT, *supra* note 18, at 2 (“Estimates of tax expenditures are prepared for use in budget analysis.”).

112. *See* Surrey & Hellmuth, *supra* note 64, at 530.

113. *Cf.* Sugin, *supra* note 9, at 413 (“[T]ax expenditure analysis is well suited to legislatures but not to courts.”).

114. Only Congress has the federal power to tax. *See* U.S. CONST. art I, § 8.

115. *Cf.* Sugin, *supra* note 9, at 417 (stating that courts “do not get to pick and choose from among a variety of policy alternatives” in ruling on legislation).

116. *See, e.g.*, I.R.C. § 25A (granting the American Opportunity Tax Credit and the Lifetime Learning Credit); I.R.C. § 117 (excluding qualified scholarships from gross income); I.R.C. § 127 (excluding reimbursement of employee education expenses from gross income); I.R.C. § 529 (providing numerous tax benefits to qualified tuition programs, their beneficiaries, and their donors).

expenditure idea importantly aids the legislative and executive bodies in performing budgetary functions does not imply that the concept equally, analogously, or even meaningfully informs the judicial function in nonbudgetary matters.¹¹⁷ To determine the relevance of tax expenditure theory in constitutional cases, one must scrutinize its features, premises, and limits.

B. The Question of the Normative Tax Base

The reliance of tax expenditure theory on a normative baseline has generated enormous commentary.¹¹⁸ Although the difficulties of establishing the normative tax base surely have budgeting implications, they present unique challenges for courts, especially in constitutional cases. This Section explores these challenges. It first discusses several indeterminacies of the normative tax base. It then discusses how resolving these indeterminacies poses special problems for judges. Finally, this Section identifies a systemic problem that tax expenditure theory foists on the judiciary.

1. Indeterminacies of Surrey's Own Admission

The starting point for appreciating the difficulties that judges face because of the indeterminacy of normative baselines under tax expenditure theory is Surrey and McDaniel's own words. The uncertain boundaries of the normative income tax base, for example, are not merely the imaginary goblins of Surrey's critics. The tax expenditure analysis of Surrey and McDaniel with respect to the federal income tax suggests that identifying tax expenditures is fraught with indeterminacy at the margin.

Surrey and McDaniel argue that the Haig-Simons definition is the "accepted norm" in countries with a modern income tax, but they acknowledge that this concept "covers only basic aspects

117. Cf. Sugin, *supra* note 9, at 412 (distinguishing the utility of tax expenditure analysis for policymakers from its more limited relevance to courts).

118. See, e.g., Henry Aaron, *What Is a Comprehensive Tax Base Anyway?*, 22 NAT'L TAX J. 543, 547-48 (1969); Bittker, *supra* note 60, at 925; Bittker, "Tax Subsidies," *supra* note 56, at 251; Bittker, *A Reply*, *supra* note 69, at 538; Crane, *supra* note 70, at 185; Fleming & Peroni, *A Critique*, *supra* note 52, at 142; Surrey & Hellmuth, *supra* note 64, at 529-33; Thuronyi, *supra* note 65, at 1163-70.

and a few details.”¹¹⁹ They further recognize that numerous factors bearing upon the income tax “have produced numerous questions of detail, some of them involving quite difficult classification questions.”¹²⁰ To construct a complete list of tax expenditures thus requires “an extension” of the Haig-Simons concept to address issues that have arisen since the initial articulation of the concept.¹²¹ But just how, and how far, to extend Haig-Simons is unclear.

Another question is the significance of public consensus as to the ideal tax base. Surrey and McDaniel state that the application of the Haig-Simons definition in federal income tax law is “tempered” by “the generally accepted structure of an income tax.”¹²² Apparently, establishing the normative tax base requires a determination of just what is “generally accepted.” Determining this acceptance, and how much of it is sufficient to rise to the requisite level of generality, remains elusive. As discussed more fully below, “general acceptance” for Surrey and McDaniel ultimately means public consensus, although they appear loathe to say so explicitly.¹²³ They tend to defer to the judgment of the agency legislatively tasked with compiling the tax expenditure budget, but they never explain the connection between compiling that list and discerning public acceptance.

119. SURREY & MCDANIEL, *supra* note 4, at 5.

120. *Id.*

121. *Id.*

122. *Id.* at 4 (quoting U.S. DEP’T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR FISCAL YEAR ENDED JUNE 30, 1968, at 327 (1969)).

123. It is not abundantly clear under Surrey’s explication of tax expenditure theory just whose notions of the public’s perception of the normative tax base should control. The first entity that comes to mind is Congress, for its members are elected by the public. At times, Surrey seems to charge Congress with implementing public perception. *See, e.g.*, Surrey & Hellmuth, *supra* note 64, at 537. But to rely on Congress to implement the norm or norms controlling the definition of income and the structure of the federal income tax system is potentially problematic for Surrey; doing so lends credence to the positivism of Bittker, who suggests that the normative tax base is what Congress subjects to tax. Another candidate for discerning and advancing the public’s perception of the normative tax base is the executive branch. Surrey did urge great deference to the Treasury and OMB. *See* SURREY & MCDANIEL, *supra* note 4, at 113-15. If the Treasury Department and OMB must announce the public’s idea of the normative income tax, the determination is made by appointees not directly accountable to the voters whose acceptance is key. One may reasonably question administrative agencies’ ability to discern and implement popular conceptions of the income tax base.

Regardless of who has responsibility for gleaning public acceptance of the normative income tax, how to harvest the knowledge of general acceptance is also a mystery.

Thus, Surrey and McDaniel themselves identify several respects in which tax expenditure theory is indeterminate: (1) some items are difficult to classify under the Haig-Simons ideal; (2) the Haig-Simons ideal is not itself an absolute baseline, for it requires extension; and (3) the Haig-Simons ideal must be modified to some degree to better comport with public acceptance of the tax base.¹²⁴ The third point of indeterminacy is further complicated by the absence of any clear method for discerning public acceptance of the base.

The point is not that these indeterminacies render tax expenditure theory useless. The point is that these indeterminacies are real. In constitutional cases that turn in part on whether tax provisions are properly viewed as indirect subsidies, judges inevitably must consider the implications of these indeterminacies.

2. Indeterminacies of Textual Structure in Resolving Indeterminacies

A judge who must decide the constitutional implications of a tax provision that may or may not qualify as a tax expenditure faces a formidable task. Courts commonly analyze the text and structure of a statute to determine its meaning. If deciding whether a statutory provision is a tax expenditure were simply a matter of interpreting a statute's text and structure, the task would readily fall within the competence of judges. Unfortunately, identifying the proper classification of a tax provision is not so simple.

The structure of legislative text—what it sets forth as the general rule, followed by exceptions—is of limited use in identifying tax expenditures. Consider a general rule that taxes compensation income, followed by exceptions that exclude the portion of compensation income that the taxpayer invests in special accounts. Taken together, for a taxpayer whose sole

124. See SURREY & MCDANIEL, *supra* note 4, at 187-88.

source of income is compensation, the provisions have the effect of taxing the taxpayer's consumption, not income.¹²⁵ If provisions governing other forms of income are drafted similarly, the legislature's normative tax base is apparently consumption, not economic income. That the legislation structures the exclusions as "exceptions" to general provisions does not mean that the "special exceptions" should be conceptualized as deviations from the ideal base.¹²⁶

As argued by Boris Bittker, a discomfiting circularity exists in announcing that special deductions, exclusions, etc., are deviations from a base only after first assuming a broad base from which deviations tautologically follow.¹²⁷ To illustrate, assume the legislature of a newly admitted state decides to raise revenue by imposing a state tax on at least some property. The structure of the legislation sets forth a general rule that all property located in the state or owned by a resident natural or legal person is subject to the state tax. But there are exceptions to the general rule. One exception is for personal property. Another exception is for any property owned by individuals and trustees of trusts. A third exception is for any property owned by nonprofit entities. If the tax base is conceptualized as "all property located in the state or owned by a resident natural or legal person," then each of the nominal "exceptions" is a tax expenditure. However, if the tax base is conceptualized as real property owned by business entities, no exception described above is a tax expenditure. The nominal exceptions are really just structural mechanisms for specifying the tax base.¹²⁸

As Surrey recognized, which concept of tax expenditures is best is a question of the normative "image" one has in mind for the tax.¹²⁹ But more is required than simply announcing that the exceptions are objectionable because they are inconsistent with one possible "image"—all property located in the state or owned

125. If a taxpayer can deduct savings from income, the resulting tax base is consumption. See Fleming & Peroni, *supra* note 9, at 508-09.

126. Cf. Edward A. Zelinsky, *Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 836 (2001) ("[M]uch tax exemption is best understood as base defining.").

127. See Bittker, *Churches*, *supra* note 26, at 1304.

128. See *id.* at 1291.

129. See Surrey & Hellmuth, *supra* note 64, at 537.

by a resident. To do so is to engage in circular reasoning, for the selection of the “image” dictates whether the “exceptions” are (or at least might be) tax expenditures. If the alternative image—real property owned by business entities—better captures the thoughts of all who play a role in adopting the tax, the “exceptions” are normatively compelled, not tax expenditures.¹³⁰

Thus, an analysis of the structure of a text cannot establish the normative tax base. Exceptions in form could represent deviations from the ideal base. However, they just as likely could be the drafter’s mechanisms for arriving at the normative base.

3. Indeterminacy in How to Resolve Indeterminacies

The previous discussion identifies several indeterminacies in establishing or recognizing a normative tax base. However, a still more vexing problem remains, one that has not received adequate attention by courts or commentators: precisely whose judgment should control the resolution of whether a tax provision is properly conceptualized as a tax expenditure in a constitutional case? This question is basic, yet it is trickier than meets the eye.

Conducting an independent assessment of what should be the normative tax base is hardly the proper role of the judiciary, so that approach can be dismissed summarily. Another option, well within the competency of the judiciary, is to analyze the text and structure of tax legislation in hopes of determining whether a provision constitutes a tax expenditure in the judgment of Congress. However, for reasons already explained, analyzing the structure of a statute is doomed to produce indeterminacy, for a provision enacted as a statutory exception may simply be the mode of defining the normative tax base.¹³¹ Moreover, the text of a statute never begins, “Congress hereby pronounces the following a tax expenditure.”¹³²

130. Professor Bittker argued similarly with respect to the taxation of real property. *See* Bittker, *A Reply*, *supra* note 69, at 540.

131. *See supra* Section II.B.2.

132. The Budget Act, which requires the compilation of a tax expenditure budget, does not define the normative base. *See* GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 3.

A more promising idea is that a judge should decide what a legislature intends as the normative tax base in view of all available evidence. However, even that inquiry is problematic. Because tax statutes do not explicitly announce the precise normative base, courts must look elsewhere, such as committee reports and congressional hearings, for clues. Courts frequently consult legislative history in deciding tax cases;¹³³ doing the same to discern the presence of a tax expenditure is within the realm of judicial competence. But, commonly, these legislative sources do not reveal Congress's view of the normative tax base. Further, even if legislative history does speak to the normative tax base, the familiar critiques of trying to mine the intent of the full Congress by pulling nuggets from committee reports and statements of select lawmakers cast at least some doubt on how determinative such a judicial approach really is. Moreover, a subsequent Congress may let a previously enacted tax provision stand not because they agree with the prior Congress's rationale for enacting it as a subsidy, but because they view the provision as reflecting the normative tax base. No legislative history would necessarily document that determination.

As another option, one favored by Surrey,¹³⁴ courts could just defer to the judgment embodied in governmental tax expenditure budgets.¹³⁵ For example, in the case of the federal income tax, the tax expenditure budget prepared by the JCT or by the Treasury Department could receive authoritative status. At least this approach provides objective answers. Further, career legislative staffers and Treasury officials (and their counterparts at the state level) surely have a better idea of the normative tax base than most judges. But this approach presents its own problems. It essentially confers on either legislative committee staffers or executive agencies authority to resolve one of the crucial questions that must be analyzed by a court in deciding constitutional cases involving tax provisions that may or may not be indirect subsidies. Absolutely deferring to the opinions of nonjudicial public servants on matters requiring constitutional

133. See, e.g., *Harrison v. N. Tr. Co.*, 317 U.S. 476, 479 (1943).

134. See SURREY & MCDANIEL, *supra* note 4, at 119.

135. This approach is possible only when a tax expenditure budget exists, of course.

judgment should give any judge pause, even though the Senate Budget Committee has stated that tax expenditures “may, in effect” be viewed as a government outlay.¹³⁶ After all, courts ultimately decide constitutional questions, not Congress, and not the executive branch.¹³⁷ The prospect that an executive agency may politicize the compilation of tax expenditure lists further counsels against absolute judicial deference to their determinations.¹³⁸

Another alternative is for a court independently to assess an open host of factors to discern the “image” of the normative tax base that appears to underlie the statutorily enacted tax. That sounds more like metaphysics than constitutional law. A court might try it, but it is hardly likely to generate the ideal tax base envisioned by the public—if it exists at all.

Thus, one returns to the observation that began this Section. Deciding whose substantive judgment should receive controlling weight in determining whether a tax provision is properly classified as a tax expenditure for purposes of constitutional law is complex. As a formal matter, courts have the final say. But how they decide cases ultimately is affected by their willingness to defer to executive agencies and legislative committees, as well as by their interest in exploring legislative intent, statutory design, and other potentially relevant factors.

136. *See id.* at 119, 262. Surrey & McDaniel place great weight on governmental tax expenditure budgets. They go so far as to say that courts would be “wrong” to treat direct grants differently from tax expenditures in view of how the latter are reflected in the budget and are conceptualized by the Senate Budget Committee. *See id.* at 119. But the argument is unconvincing. That the tax expenditures budget describes tax expenditures as an “alternative” to other forms of aid, including direct assistance, in no way establishes that they are legally equivalent. A fine may be an alternative to incarceration, but the two are not the same. The statement of the budget committee that tax expenditures “may, in effect, be viewed” as the equivalent of taxation and spending is a far cry from insisting on their legal equivalence. The statement is tentative, non-descript as to who is doing the viewing, and focused only on a first-order economic effect (not design, and not real-world consequences). Further, the OMB, the Treasury Department, and the Senate Budget Committee do not speak for the full Congress on the nature of tax expenditures.

137. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178-80 (1803).

138. *See Sugin, supra* note 9, at 426.

4. *Why Indeterminacy Matters Greatly in Constitutional Cases*

The foregoing discussion highlights the indeterminacy of the normative base and list of tax expenditures, as well as the difficulties courts face in resolving those indeterminacies.¹³⁹ For Congress and the executive branch, this indeterminacy is hardly a fatal problem.¹⁴⁰ Members of each of these two branches of government can decide whether and to what extent the appearance of an item in a tax expenditure budget is relevant to their spending priorities and proceed accordingly. That is their business.

But the business of courts is different, and the indeterminacy of the normative tax base is more troublesome when a court must decide the constitutional implications of a tax expenditure.¹⁴¹ If a provision is truly best conceptualized as a deviation from the normative tax, it is plausible to view it as a form of government subsidy. Once a court has determined that an indirect subsidy exists, the analysis can then proceed to an evaluation of the constitutional implications of this indirect subsidy. But if the provision is best conceptualized as a structural mechanism for arriving at the normatively correct tax base, treating it as a subsidy is error. Erring when constitutional rights and duties are at stake is more disturbing than merely mischaracterizing an item when compiling a budget.

This issue is not one that a court will rarely encounter. Surrey recognized the existence of many details of a tax for which there is no easy test of normativity.¹⁴² Courts decide cases involving such details. Indeed, hard cases routinely come before a court. Courts must therefore be prepared to closely examine a provision to determine whether it is plausibly conceptualized as a

139. *Cf. id.* at 419 (referring to the “theoretical impossibility” of identifying tax expenditures); GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 3 (“Determining whether a tax code provision meets the definition of a tax expenditure requires judgment.”).

140. *See* Sugin, *supra* note 9, at 416-17.

141. *See id.* at 413 (“The definitional difficulties inherent in the tax expenditure concept . . . make tax expenditure analysis too unreliable for constitutional adjudication”); *id.* at 417 (stating that the difficulties of defining the tax base “make tax expenditure analysis an inadequate guide for deciding individual lawsuits”).

142. SURREY & MCDANIEL, *supra* note 4, at 5.

mechanism for implementing a normatively correct tax or instead as an indirect form of subsidy.

For example, if the charity income tax exemption is properly conceptualized as (in part) a federal grant to churches to carry out their general religious purposes, the exemption raises questions under the Establishment Clause.¹⁴³ But this conceptualization of the exemption is problematic. A plausible argument exists that the income tax by design primarily reaches natural persons, directly or indirectly (i.e., through ownership of business entities),¹⁴⁴ and that taxing charitable entities is inappropriate.¹⁴⁵ Moreover, although Surrey eventually concluded otherwise,¹⁴⁶ the charity income tax exemption is not classified as a tax expenditure by the Department of the Treasury or the JCT,¹⁴⁷ a fact that, under the JCT's methodology, implies its conclusion that no reasonable basis exists for a contrary classification.¹⁴⁸

143. See *id.* at 132; Adler, *supra* note 25, at 912-14. For an excellent study of the Founding era understanding of church taxes and the Establishment Clause, see generally Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111 (2020) (arguing that the history of publicly funding religious schools while objecting to the payment of church taxes means only that the Founding generation understood disestablishment to preclude funding that was specifically aimed at advancing religion, not funding intended to supply broader public goods provided by religious persons or entities). For an argument that tax exemptions for religious entities are constitutional, see Zelinsky, *supra* note 126, at 807 (“[T]ax exemption does not subsidize churches, but leaves them alone.”).

144. Professor Steven Bank has argued that policymakers historically viewed the tax on corporate income as an indirect tax on shareholders. See Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 WM. & MARY L. REV. 447, 527-33 (2001).

145. See Bittker, *Churches*, *supra* note 26, at 1289-91; Bittker, “*Tax Subsidies*,” *supra* note 56, at 256. Professor Bittker later argued for the federal income tax exemption of most nonprofit entities under the theory that their income is not measurable under conventional concepts. See, e.g., Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 307 (1976). In response, Professor Henry Hansmann has argued that the conceptual difficulties that Bittker and Rahdert raise are not insurmountable. See Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Tax*, 91 YALE L.J. 54, 58-62 (1981).

146. See, e.g., SURREY & MCDANIEL, *supra* note 4, at 219-20 (“[T]he U.S. tax treatment of nonprofit organizations should be classified as a tax expenditure. . . . Because it is likely that the revenue cost of the exemption for nonprofit organizations is substantial, the omission from the U.S. tax expenditure lists is a serious one and should be rectified.”).

147. See JCT TAX EXPENDITURES REPORT, *supra* note 18, at 9.

148. See *id.* at 2 (“A provision traditionally has been listed as a tax expenditure by the Joint Committee staff if there is a reasonable basis for such classification and the provision results in more than a *de minimis* revenue loss . . .”).

Further, the charity income tax exemption has a long history in this country, suggesting—to borrow from Surrey’s test of public acceptance—that both the Congress and the public think of the charity income tax exemption as a standard feature of the federal income tax system.¹⁴⁹ In the view of this Author, the better view is that the income of charities—at least certain categories of them—is not in the first instance properly included in the federal income tax base.¹⁵⁰ But the question is debatable, and thoughtful analysts reach opposite conclusions.¹⁵¹ A court that fails to wrestle with the proper characterization of the exemption risks reaching an erroneous decision. And the consequences of reaching a wrong decision are hard to rectify once they become constitutionally embedded by the Supreme Court.

When congressional staffers or Treasury officials mistakenly characterize a tax provision as a tax expenditure, it tends to cause more open scrutiny, and hence public debate, over the provision. When courts make the same mistake in a constitutional case, it often will likely remove the provision from legislative debate because of mootness; such mischaracterization may render the provision unconstitutional. When congressional staffers and Treasury officials err in their judgment of what

149. Bittker and Rahdert explain that charity income tax exemptions date from the Revenue Act of 1894, and they were reenacted in subsequent legislation (including the Revenue Act of 1913, which imposed a federal income tax after the adoption of the Sixteenth Amendment). See Bittker & Rahdert, *supra* note 145, at 301-04.

150. See Buckles, *supra* note 82, at 947, 979 (explaining that the charity income tax exemption and the charitable contributions deduction may reflect a decision not to tax income attributed to the community in general); see also Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585, 586 (1998) (arguing that § 501(c)(3) reflects a governmental recognition of a charity’s sovereign prerogative to operate free from governmental intrusion).

151. A number of scholars embrace some form of subsidy theory of the charity income tax exemption and the charitable contributions deduction. See, e.g., Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1351 (2015) (“[M]ost tax theorists consider sections 170(c) and 501(c)(3) subsidies for the charitable sector.”); see also Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 601, 605, 610 (1990); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430-32 (1998); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO STATE L.J. 1379, 1383-88 (1991); Hansmann, *supra* note 145, at 54-55. Professor Rob Atkinson has mostly renounced his altruism theory. See Rob Atkinson, *Tax Favors for Philanthropy: Should Our Republic Underwrite de Tocqueville’s Democracy?*, 6 WM. & MARY POL’Y REV. 1, 48-49 (2014).

belongs in the normative tax base, the result may simply mean less direct funding for the “favored” activity. When courts err similarly, they may wrongly subject income to taxation, and hence penalize the activity generating the income—even when the item involves constitutionally protected activity. When congressional staffers or Treasury officials make mistakes, their counterparts who serve a few years later can correct those mistakes. But the stability that is generally desirable in constitutional case law also tends to fossilize a court’s mistakes in characterizing tax provisions as indirect subsidies.

This discussion of the normative tax base demonstrates that tax expenditure theory poses special challenges for courts, including those that are generally underemphasized by judges. Determining the normative base is complex, especially at the margin,¹⁵² and reaching the wrong result in constitutional cases is uniquely troubling.¹⁵³

5. The Judicial Problem of Assuming an Extra-Statutory Normative Tax Base

One final problem concerning the normative tax base looms large in constitutional cases. The preceding discussion highlights the challenges of determining tax expenditures at the margin. The gravest problem, however, is more fundamental. Tax expenditures exist only when tax provisions deviate from an assumed normative base. Just as St. Augustine conceived of evil as a privation of the good, Surrey conceived of tax expenditures as a privation of the normative tax base.¹⁵⁴ If federal income tax law reflected the normative income tax base, no tax expenditures would exist. To assert the existence of tax expenditures under the federal income tax is to assert non-normativity in the law as it has

152. Professor Sugin concludes that courts have often “wisely resisted” tax expenditure analysis because of its ambiguities. See Sugin, *supra* note 9, at 418.

153. See *id.* at 419.

154. See AUGUSTIN, *Book Third*, in A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 60, 64 (Philip Schaff ed., Buffalo, The Christian Literature Co. 1886). The analogy to Augustine’s view of sin does not mean that Surrey judged all tax expenditures as “bad” policy. Surrey did not do so. See SURREY & MCDANIEL, *supra* note 4, at 5-6. The analogy to Augustine compares analytical interrelationships, not moral or policy judgments as to the advisability of a tax expenditure.

been enacted by Congress and the President. Similarly, to characterize various provisions of a law implementing another tax system as tax expenditures is to maintain that the enacted tax base is non-normative.

Thus, to insist that courts identify certain tax provisions as tax expenditures and then declare them as equivalent to cash subsidies for purposes of constitutional analysis is to demand that courts constitutionalize an image of a normative tax base that lawmakers have decided not to enact. Speaking of the “normative tax base” is a fancy way of saying “the tax base that the legislature should adopt,” or at least the tax base that they “should adopt under tax policy norms apart from other policy goals.”¹⁵⁵ Reduced to its essence, the assertion that courts deciding constitutional cases must equate tax expenditures with cash subsidies is tantamount to the claim that courts must decide constitutional cases according to what lawmakers should tax but decided not to tax.¹⁵⁶ This methodology smacks of requiring courts to think like super-legislatures.¹⁵⁷

155. Some commentators have tried to escape this conclusion, but in the opinion of this Author, it is inescapable. To illustrate, as a thought experiment, let us replace the phrase “should adopt” with “could adopt” and test its coherence. To say that a tax expenditure is equivalent to taxing and spending merely because the legislature “could adopt” the broader base would subvert the entire tax expenditure enterprise. If “could adopt” means what a legislature could actually accomplish in the real world, one would be forced to ponder whether enacting the broad base is politically viable. Tax expenditure theory has never tried to make that showing. On the other hand, if “could adopt” means only that a legislature hypothetically could enact the normative base, tax expenditure theory becomes nondirective. A legislature “could adopt” a base so broad that it taxes the imputed income from leisure and household services, or even that attributable to the taxpayer’s decision to stay in a more satisfying job than one in which the taxpayer could command a higher salary. Any decision not to tax income under this base that “could be” would then be a tax expenditure. But few tax expenditure champions would accept this approach as a credible way of identifying tax expenditures. Thus, classical tax expenditure theory does not contemplate merely the base that a legislature “could adopt.” It assumes a base that conforms to the normative ideal, the base that “should be” under the proper implementation of tax policy norms.

156. Some would prefer a less poignant phrasing of the essential inquiry, perhaps akin to “the tax base that lawmakers should adopt strictly under tax policy norms.” But that base is also hypothetical, one that lawmakers did not actually enact. So the more polite inquiry still asks courts to find a subsidy based on an ideal that the legislature refused to implement under the actual tax.

157. Surrey’s recommendation—that judges (at a minimum) accept whatever the OMB and Senate Budget Committee declare to be tax expenditures—is not a real solution. *See SURREY & MCDANIEL, supra* note 4, at 119. That approach just shifts super-legislature status to the executive branch or a single congressional committee (or both).

It is reasonable for the Senate Budget Committee to publish a tax expenditures budget to inform congressional colleagues of what it believes is equivalent to indirect subsidies. It is also sensible for the Department of the Treasury to inform the Congress and the public of what it considers to be the normative ideal, and thus the indirect subsidies that result from deviations from that ideal. But it does not follow that the courts should be making constitutional law according to what someone thinks the tax base should be when no lawmaking body has adopted it.

This point is not the same as the reductionist claim that a specific credit or deduction is merely a refusal to tax. The greater problem is systemic. The intrinsic problem of equating all tax expenditures with direct cash subsidies in constitutional cases is that it forces courts to ground their analysis on an idea of a tax base that “should be” rather than encouraging them to scrutinize the tax base that “is.” How a legislative body has crafted the tax base may well be constitutionally suspect. But requiring a court to resolve a constitutional question according to an unenacted tax ideal is suspect.

C. The Question of Shifting Consensus

The previous Section introduced Surrey’s reliance on public acceptance as a legitimate constraint on implementing the Haig-Simons concept of income under the federal income tax.¹⁵⁸ No good reason exists to confine his argument to the income tax; presumably, Surrey would maintain that tax expenditure analysis of any tax base should also account for public acceptance. As explained previously, this reliance on public acceptance in tax expenditure theory poses challenges to constitutional analysis.¹⁵⁹ This Section expounds on this problem at a deeper level.

That Surrey relied on public acceptance is manifest in his writings, and serious students of tax expenditure theory must not brush the point aside merely because it is inconvenient. Surrey distinguished between (1) an economic concept of income, and (2) “widely accepted definitions of income” and the “generally

158. *See supra* Section II.B.1.

159. *See supra* Section II.B.4.

accepted structure of an income tax.”¹⁶⁰ He illustrates the distinction between the two with imputed income. Although economic income includes imputed income from a taxpayer’s property and self-provided services, in the United States, these are “not yet within the general understanding of the proper structure of an income tax.”¹⁶¹ Excluding imputed income from the tax base is considered “normative” in Surrey’s tax expenditure analysis because it has “not been commonly regarded as income for tax purposes.”¹⁶² Stated another way, imputed income is “not yet within the general understanding of the proper structure of an income tax.”¹⁶³ Surrey similarly writes that people “would in general be puzzled by the inclusion of the exemption of gifts and bequests as a tax expenditure.”¹⁶⁴ It is difficult to perceive why an economist, or even a member of Congress, would find the inclusion of gifts in the normative income tax base “puzzling.” He also refers to the initial stage of developing the margins of an income tax structure, when “most people” would reject a proposal based on some economic concept of income.¹⁶⁵ Thus, when Surrey speaks of “common regard,” “wide acceptance,” “most people,” and “general acceptance,” he is not likely speaking merely of the views of legislators, legal experts, or economists. He apparently means the consensus of the general public.¹⁶⁶ For Surrey, tax expenditure theory does not stop with the Haig-Simons ideal. Tax expenditure theory “tempers”¹⁶⁷ the ideal by treating as normative those forms of income, and presumably deductions, that at least a majority of the general public in the United States accept as proper for an income tax.

Surrey’s distinction between economic income and the public’s view of a proper income tax base amplifies the concerns

160. Surrey & Hellmuth, *supra* note 64, at 532; *see also id.* at 528 (quoting a speech by Surrey in which he described tax expenditures in terms of “deliberate departures from accepted concepts of net income”).

161. *Id.* at 532.

162. SURREY & MCDANIEL, *supra* note 4, at 4.

163. Surrey & Hellmuth, *supra* note 64, at 532.

164. *Id.*

165. *Id.*

166. Apparently, Surrey thought legislators should consider the views of the general public as they enact tax legislation. He placed responsibility for developing the proper “image” of the tax structure on legislators. *See id.* at 537.

167. *Id.* at 531-32.

of the previous Section regarding judicial deference to another governmental branch's taxonomy of tax expenditures.¹⁶⁸ But Surrey's appreciation for the importance of public acceptance raises another issue. Public perceptions are not static, a fact that Surrey recognizes and even seems to welcome.¹⁶⁹ He writes that this "standard of general acceptance of course results in changes over time" as the public warms to concepts of economic income.¹⁷⁰ Accordingly, the scope of the income tax structure is "an evolutionary matter."¹⁷¹ The import of this analysis is that, as the general public increasingly embraces economic concepts of income but the law does not yet reflect this understanding with a broader tax base, the list of tax expenditures correspondingly increases.¹⁷²

Thus, at least for Surrey, the list of tax expenditures (1) depends in part on public consensus, and (2) changes with public opinion of the proper income tax base and structure. These finer points of crafting the tax expenditure budget present no major hurdles for Congress or the executive branch. They can revise the budget as they see fit, according to their perceptions of public opinion.¹⁷³

But these finer points pose some difficulties for constitutional adjudication. First is the institutional position and role of the courts. Unlike Congress, federal courts are largely insulated from popular consensus on matters of public concern. If Congress aggressively legislates in a direction contrary to public opinion, the public tends to vote their representatives out of office. This reality is constitutionally designed.¹⁷⁴ But the federal judiciary is constituted independently of the ballot box—except in the indirect sense of initially being nominated and

168. See discussion *supra* Section II.B.3.

169. See SURREY & MCDANIEL, *supra* note 4, at 198-99.

170. Surrey & Hellmuth, *supra* note 64, at 532.

171. *Id.*

172. *Cf. id.* (discussing the "second stage" of a change in the taxation of an income item, in which the economic concept of the item is recognized as normatively proper, but its exclusion is retained in the tax law and classified as a tax expenditure).

173. See SURREY & MCDANIEL, *supra* note 4, at 198-99.

174. See U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .").

confirmed by elected officials. The independence of the federal judiciary is also constitutionally designed, presumably to encourage judicial decision-making that transcends popular opinion.¹⁷⁵ The idea that courts would resolve constitutional questions by deferring to public consensus on the normative tax base (or anything else) at any moment is problematic.¹⁷⁶

Relatedly, deferring to public consensus on the boundaries of income—and hence the classification of a federal tax provision as a tax expenditure—risks a lack of stability not anticipated by Surrey. Surrey’s writings reveal that he envisioned the evolution of tax expenditure theory in a linear fashion, as the public gradually embraces an economic concept of income.¹⁷⁷ Surrey did not explore other possible forms of evolutionary development of public opinion. One is that, over time, public opinion might vacillate in its acceptance of economic income. What becomes widely accepted in one span of two or three decades might change course over the next twenty to thirty years.¹⁷⁸ Another possibility is that public opinion might swell in support of other norms important to the design of the income tax, such as the ability-to-pay norm or administrative norms. As public consensus changes, these norms might move the income tax system away from one that broadly reflects economic income. In either case, the linear pathway of tax expenditure analysis imagined by Surrey would not materialize.¹⁷⁹

Congress and the executive branch can respond to a lack of stability in the public’s understanding of a normative tax base

175. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”); U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

176. Although judges and legal scholars hold different perspectives on the scope and value of originalism, Gallup polls—as an extreme example—should not control constitutional analysis.

177. See, e.g., Surrey & Hellmuth, *supra* note 64, at 532.

178. In fact, since the zenith of Surrey’s influence, federal income tax statutory law has moved away from a comprehensive income tax base in many respects. See Sugin, *supra* note 9, at 428-30.

179. Relatedly, elected public officials and their appointees may, for political reasons, alter tax expenditure lists, thereby promoting instability in the normal tax base. See *id.* at 424-27.

easily enough. They can modify federal tax laws, revise tax expenditure lists, and adjust spending priorities as needed. But if the courts were beholden to a public consensus that did not develop as Surrey imagined, but instead evolved unpredictably, perhaps even cyclically,¹⁸⁰ constitutional law would suffer. A lack of stability in the public's concept of income, and hence the list of tax expenditures, could promote the resolution of important constitutional issues in an erratic fashion over time if judges calibrated constitutional analysis to popular thought. The disparate outcomes would not result from changing judicial philosophies, but simply from whatever "general acceptance" happens to be, or is perceived to be, when a case makes its way to a court.¹⁸¹

In short, Surrey's willingness to account for the general public's acceptance of income tax norms in formulating the list of tax expenditures could compromise judicial independence and stability in constitutional doctrine if courts simply embraced at face value the tax expenditure budget of the day in deciding constitutional cases.

D. The Question of Legislative Purpose

Some constitutional questions require a court to examine governmental purpose in deciding whether governmental action violates the Constitution.¹⁸² Caution is in order when a court must

180. Tax legislation tends to behave in a cyclical pattern—towards, and then away from, a norm. See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 4 (1990).

181. Since Surrey first championed its use, the tax expenditure budget has not changed in a way that suggests a widespread public endorsement of economic income as the federal income tax base. Congress has continued to implement policies through provisions identified as tax expenditures, and the public tolerates—some might say even encourages—the practice. This chronic resort to enacting tax expenditures is some evidence that the public behind the Congress has little appetite for subjecting all economic income to taxation. To the contrary, the enactment of tax provisions that are more consistent with a consumption tax base (e.g., providing for the expensing and accelerated depreciation of business assets, and expanding methods for deferring income reserved for future retirement) suggests resistance to a comprehensive income tax base.

182. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 591-92 (2014) (holding that a New York town did not violate the Establishment Clause by opening its board meetings with the prayers of local clergy on a rotating basis). In this case, the Court commented on

decide whether an unconstitutional legislative purpose to subsidize exists merely because an item has appeared on a tax expenditure list.

First, an item listed as a tax expenditure does not necessarily reflect legislative purpose to favor an activity by implementing a deviation from the normative tax base.¹⁸³ Tax expenditure budgets are published by the OMB (using the analysis of the Treasury Department) and the JCT.¹⁸⁴ However “legislative purpose” is deduced, a Congress that enacts a provision pronounced to be a tax expenditure by one or more of these governmental bodies may not have a purpose to enact a deviation from the normative tax base. As explained previously, the normative income tax base and structure are not perfectly defined.¹⁸⁵ Even Surrey backed away from the Haig-Simons model as absolutely controlling.¹⁸⁶ Certain provisions enacted into law simply may reflect a legislative judgment that some income items should be excluded from income, or some transfers should be deducted from income, to arrive at the proper income tax base.

For example, a Congress that expands the charitable contributions deduction may do so with the understanding that amounts dedicated to charitable purposes are not properly included in the normative tax base. Perhaps Congress is persuaded by the logic that personal consumption means purchased consumption enjoyed or controlled by a taxpayer, and thus it does not include charitable contributions.¹⁸⁷ Or perhaps the Congress supports the charitable contributions deduction as

governmental purpose as follows: “Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.” *Id.* at 585. For discussions of governmental purpose in constitutional cases, see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297 (1997), and Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1 (2007).

183. See Zelinsky, *Tax “Benefits,” supra* note 22, at 411 (distinguishing tax base determinations from purposive subsidies).

184. See *supra* notes 13-21 and accompanying text.

185. See discussion *supra* Section I.B.1.

186. See discussion *supra* Section I.B.1.; see also discussion *supra* Section II.B.1.

187. See, e.g., Andrews, *supra* note 74, at 346.

normative on ability-to-pay grounds.¹⁸⁸ Or maybe, relying on Surrey's notion of general acceptance,¹⁸⁹ Congress perceives that the general public holds one or both of these views. Whether Congress is correct in its assessment is beside the point. Congress might be wrong. But when legislative purpose is what a Court must scrutinize, that Congress had no purpose to confer an indirect subsidy on charitable donors, but only to properly derive the income tax base, is surely relevant.

The force of this argument is not undermined by the response that, whatever congressional purpose may be, Congress knows that some taxpayers will benefit from the provision in question. An awareness that a provision benefits a taxpayer is not tantamount to an intent to subsidize the taxpayer through the income tax system. The point is easily illustrated by the deduction for trade or business expenses.¹⁹⁰ Obviously, taxpayers benefit from deducting the expenses of producing business income.¹⁹¹ Congress surely recognizes this reality. But the deduction for trade or business expenses is not properly viewed as a "subsidy" administered through the income tax system. As Surrey rightly explained, the deduction is a necessary mechanism in implementing a normatively correct income tax.¹⁹² When a court examines legislative purpose, the question is not simply whether Congress knows that a taxpayer benefits from a statutory provision in question.

Even when lawmakers adopt a mechanism with the aim of benefitting taxpayers through a deviation from what some legislators consider the normative tax structure, tax expenditure analysis does not resolve all relevant questions about legislative purpose. Consider again the federal income tax. Numerous tax

188. A taxpayer who has transferred wealth to a charitable organization during the year obviously has less wealth at the end of the year with which to pay taxes. That the taxpayer, prior to the transfer, had the power to consume or save the amount transferred does not alter this end-of-year financial reality. The real question for policymakers concerned with ability-to-pay is how to treat a taxpayer's voluntary reduction in wealth.

189. See discussion *supra* Section II.C.

190. See I.R.C. § 162.

191. See Fleming & Peroni, *A Critique*, *supra* note 52, at 142 (recognizing that § 162 is not a tax expenditure although it provides a benefit to taxpayers claiming the § 162 deduction).

192. See SURREY & MCDANIEL, *supra* note 4, at 222.

expenditures cannot credibly be justified as consistent with an income tax base informed by tax policy norms. One example is the allowance of a deduction for the full cost of a business machine in the year of purchase.¹⁹³ Although this provision is surely properly characterized as a tax expenditure in an income tax system,¹⁹⁴ it may well be that a majority of Congress in any given session support this provision because they favor a consumption tax over an income tax for broad policy reasons. Excluding the costs of business machines from the tax base is consistent with a consumption tax base.¹⁹⁵ For these legislators, the purpose of maintaining the expensing provision may be to move the tax system towards a consumption base for an increasing number of business taxpayers, not to subsidize business purchasers through a deviation from the normative income tax base.¹⁹⁶

Thus far, the examples offered in this Article to establish the complexity of the legislative purpose inquiry have reflected an ambiguity in the tax base or a desire to move the system away from a recognized tax base towards another. However, the legislative purpose inquiry remains complex even when tax expenditure theory plainly points to an intent to subsidize. Consider the deduction for the excess of percentage depletion over cost depletion for certain mineral deposits.¹⁹⁷ Percentage depletion is theoretically incorrect under either a normative

193. See I.R.C. § 179.

194. See, e.g., TAX EXPENDITURES: COMPENDIUM, *supra* note 21, at 435-41 (discussing the history of IRC § 179 and its possible policy justifications).

195. Savings and investments, whether business-related or not, are properly excluded from a consumption tax base. See William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1149 (1974); Fleming & Peroni, *supra* note 9, at 508-09.

196. Many provisions characterized as tax expenditures are consistent with a consumption tax base. See Sugin, *supra* note 9, at 429. Our current system is a hybrid income-consumption tax in a number of respects. See Andrews, *supra* note 195, at 1120, 1128. See generally Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145 (1992) (arguing that a hybrid income-consumption tax system is likely superior to either an income tax or a consumption tax because the hybrid system can differentially treat life-cycle, precautionary, and bequest savings).

197. This difference is often a tax expenditure. See TREASURY REPORT, *supra* note 16, at 5.

income tax based on economic income or a consumption tax.¹⁹⁸ The provision surely reflects legislative intent to subsidize mineral extraction.¹⁹⁹ But discerning a legislative intent to subsidize does not end the purpose inquiry. Although a cynic might say the provision is designed merely to reward a powerful political lobby, perhaps a majority of Congress believe that this mechanism is necessary to ensure a degree of national energy security.²⁰⁰ More broadly, even when tax expenditure analysis leads one to discern a purpose to subsidize an activity, the inquiry must proceed to explore the ultimate goal of the subsidy.²⁰¹ Properly placing an item on a tax expenditure list provides only modest insight as to the ultimate legislative purpose for enacting the provision. Similarly, that a good argument exists for identifying a provision as a tax expenditure, notwithstanding its current omission from the list, is not enough to glean the legislative purpose for its omission.

Thus, when a legislative purpose of a tax expenditure is indeed to subsidize, the design of the provision for purposes of constitutional law should be analyzed in its broader legislative context. All kinds of contextual factors might justify a subsidy.²⁰² To name just a few, perhaps the benefits reaped by taxpayers engaging in an indirectly subsidized activity are necessary to accomplish critical national goals that benefit a much broader segment of the public. Another possibility is that Congress has determined to subsidize an activity indirectly through tax law to

198. For a discussion of percentage depletion, see TAX EXPENDITURES: COMPENDIUM, *supra* note 21, at 113-18. Cost depletion is a form of capital recovery. *See id.* at 113. In contrast, percentage depletion allows a deduction for a fixed percentage of the gross revenues from sales of the mineral. Consequently, aggregate depreciation deductions over time typically exceed the actual capital investment. *See id.* at 113-14.

199. *Cf. id.* at 114 (“The difference between percentage depletion and cost depletion is considered a subsidy.”).

200. The Congressional Research Service identifies this rationale and then critiques it: Percentage depletion has been justified on national security grounds and the volatile nature of oil and gas prices. In either case, it is likely the concerns could be more adequately addressed through other means. For example, to address national security concerns, one alternative is an oil stockpile program such as the Strategic Petroleum Reserve. TAX EXPENDITURES: COMPENDIUM, *supra* note 21, at 118.

201. *Cf. GAO GUIDE FOR EVALUATING TAX EXPENDITURES*, *supra* note 12, at 8 (observing that the purpose of a tax expenditure is not always clear).

202. *See, e.g., id.* at 9 (discussing multiple reasons for allowing a deduction of interest on home mortgage indebtedness).

offset the cost of burdens that government has imposed on taxpayers through non-tax law (e.g., through environmental regulation, consumer protection statutes, etc.). Or perhaps one special provision afforded one type of taxpayer is intended to offer a benefit similar to that of another provision aiding a different type of taxpayer; but for various reasons, perhaps even those grounded in constitutional norms, Congress believes it appropriate to employ both provisions.

A plausible example of this last scenario is the enactment of both the exclusion of the rental allowance for parsonages for members of the clergy (and the exclusion of the rental value of a parsonage provided in kind)²⁰³ and the exclusion of the value of lodging furnished to employees for the convenience of the employer on its business premises.²⁰⁴ The parsonage allowance under IRC § 107 has recently faced judicial scrutiny.²⁰⁵ Considered in its broader statutory context, § 107 likely reflects a congressional desire to extend to church ministers a benefit similar to that enjoyed by employees of secular employers,²⁰⁶ but in a way that minimizes church-state squabbles over the location of a church's "business premises" and that maintains neutrality over the church's decision to compensate in kind or with money for rent.²⁰⁷ This broader legislative design is relevant, even if these provisions are properly classified as tax expenditures.

In summary, that a provision benefits a taxpayer does not necessarily establish a legislative purpose to subsidize. Moreover, classifying a provision as a tax expenditure does little to establish legislative purpose.²⁰⁸ A legislative body might disagree with an executive agency's determination of the precise elements of a recognized normative tax base or might reject the normativity of a commonly accepted tax base. Further, even

203. See I.R.C. § 107.

204. See I.R.C. § 119.

205. See, e.g., *Gaylor v. Mnuchin*, 919 F.3d 420, 436-37 (7th Cir. 2019) (upholding the constitutionality of IRC § 107(2)).

206. See *id.* at 428-32.

207. See Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633, 1659-1661 (2012).

208. See Sugin, *supra* note 9, at 424.

when the intent to subsidize exists, the inquiry is not complete. A court must probe much more deeply than any tax expenditure budget when deciding constitutional questions.

E. The Question of Taxpayer Behavioral Adjustments and Tax Incidence

The tax expenditure budget attempts to quantify revenue losses from tax expenditures.²⁰⁹ But it does not attempt to account for behavioral changes of taxpayers that would result were the provision repealed, nor does it attempt to account for inter-relationships among the various tax preferences were all tax expenditures repealed.²¹⁰ In other words, the tax expenditure budget does not measure the actual revenue effects that would likely result from the repeal of any one tax expenditure or all tax expenditures.²¹¹ Further, the tax expenditure budget does not illumine the economic incidence of taxation and tax expenditures.

That the tax expenditure budget fails to account for behavioral changes and the incidence of taxation is relevant to constitutional analysis.²¹² When a particular tax expenditure is presented in the tax expenditure budget as “costing” the government, say, \$10 billion, it does not mean that the activity being “subsidized” necessarily would suffer a corresponding loss of taxpayer participation in the absence of the tax expenditure. The effect on taxpayer behavior depends on how responsive taxpayers are to the provision in question. Furthermore, who ultimately benefits from a provision may be different from the taxpayer who is immediately affected by the provision.²¹³

209. See SURREY & MCDANIEL, *supra* note 4, at 6.

210. TREASURY REPORT, *supra* note 16, at 1-2.

211. See *id.*; Bittker, *A Reply*, *supra* note 69, at 541. For a broader discussion, see *supra* Section I.B.2.

212. Identifying tax incidence is not easy. Nominally exempt entities may indirectly incur burdens of taxation. For example, Professor Bittker suggests that churches may indirectly assume burdens of taxation because of their inability to shift costs to others. See Bittker, *Churches*, *supra* note 26, at 1306-07.

213. See GAO GUIDE FOR EVALUATING TAX EXPENDITURES, *supra* note 12, at 16 (“A tax expenditure intended to benefit a particular activity, industry, or class of people may wind up benefiting others not targeted by the tax expenditure by changing prices and incomes.”).

A classic example is the exclusion of interest income on bonds issued by state and local governments under IRC § 103.²¹⁴ The immediate “tax beneficiary” of § 103 is the bondholder, but the intended ultimate beneficiary of § 103 is the governmental issuer, who theoretically can obtain financing at below-market interest rates because bondholders are willing to receive a lower stated rate of interest (i.e., because it is not subject to taxation).²¹⁵ One might think that the repeal of § 103 “costs” bondholders economically, but if their non-taxed, below-market interest received on state and local bonds is no greater than the after-tax returns on taxable bonds, the real loser from repeal of the tax expenditure would be state and local government. Alas, even this analysis is too simplistic. In fact, to secure adequate financing, state and local governments issue bonds bearing interest rates that are high enough to attract not just taxable investors in the highest marginal income tax bracket, but also those in lower tax brackets.²¹⁶ The return on state and local bonds is actually higher than the after-tax interest income that upper-income taxpayers receive on taxable securities, and therefore, they have captured some of the benefit of the tax expenditure intended for government issuers.²¹⁷ Repeal of § 103 therefore might not just harm state and local issuers, but also upper-income bondholders.²¹⁸ The point is that the tax expenditure budget does not convey a great deal of information about the real effects of tax expenditures or their repeal.

214. For an extended discussion, see Michael J. Graetz, *Assessing the Distributional Effects of Income Tax Revision: Some Lessons from Incidence Analysis*, 4 J. LEGAL STUD. 351 (1975); see also Fleming & Peroni, *supra* note 9, at 446-48.

215. For a critique of IRC § 103 because governmental issuers are economically forced to share far too much of the benefits of exempting interest with bondholders, see Calvin H. Johnson, *Repeal Tax Exemption for Municipal Bonds*, 117 TAX NOTES 1259, 1259 (2007).

216. The evidence indicates that high-income bondholders have indeed captured most of the benefit of § 103, for tax-exempt bonds pay interest at a discount from taxable interest rates well below the highest marginal income tax rate. See *id.* at 1260.

217. See *id.*

218. If, on the other hand, state and local governments did not need to raise interest rates to attract taxable investors who are not in the highest marginal income tax bracket, it is likely that the economic burden of repeal of the § 103 exclusion would fall primarily on governments.

When the constitutionality of a tax provision depends on its effects,²¹⁹ classification of an item as a tax expenditure is often non-dispositive. That classification does not answer the question of what effects are produced by the tax expenditure. A court must analyze the real economic and other effects of the provision in question. Surrey's largely dismissive treatment of the relevance of tax incidence in tax expenditure analysis²²⁰ will not do in constitutional adjudication.

For example, consider the possible effects of repealing the charitable contributions deduction. The benefit that charitable donees, such as churches, receive from the ability of their donors to deduct contributions to them depends on various factors. Charitable donations by taxpayers who do not itemize their deductions, typically lower-income taxpayers, presumably would not in the first instance be affected directly by repeal of the deduction, for their donations are not generally deductible in any event.²²¹ But donations by upper-income taxpayers, who more commonly claim itemized deductions, would become more expensive on an after-tax basis were the deduction repealed. Thus, one would expect charities funded primarily by the wealthy to suffer more than charities funded largely by lower-income taxpayers as result of repealing the charitable contributions

219. For many years, in Establishment Clause cases, the Court often applied the *Lemon* test, one prong of which scrutinized the main effect of governmental action. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)) (holding that the Establishment Clause requires that the “principal or primary effect [of state action] must be one that neither advances nor inhibits religion”). The Supreme Court has recently announced that the *Lemon* test was “long ago abandoned.” *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022). But even *Kennedy v. Bremerton School District* does not categorically dismiss the relevance of the effects of governmental action, for the opinion extensively analyzes the non-coercive nature of the high school football coach's prayers at issue. *See id.* at 2428-32.

220. *See, e.g., SURREY & MCDANIEL, supra* note 4, at 88 (pointing out the difficulty of quantifying “third level” effects of tax expenditures and characterizing the inquiry as distracting).

221. The charitable contributions deduction is authorized by IRC § 170, and it is not identified as a deduction in computing adjusted gross income. *See* I.R.C. § 62. Hence, it is a so-called “itemized deduction.” I.R.C. § 63(d). Individuals who do not elect to itemize deductions generally can claim only the standard deduction. *See* I.R.C. § 63(b)(1). Lower-income taxpayers generally are better off claiming the standard deduction; their limited incomes typically cannot generate larger itemized deductions. A small charitable contributions deduction is available to non-itemizers for a limited time under special COVID-related relief legislation. *See* I.R.C. §§ 63(b)(4), 170(p).

deduction, at least when donations are sensitive to the tax cost of giving.²²²

Perhaps, then, the charitable contributions deduction benefits secular, elite charities more than churches. Churches and broadly supported redistributive charities (e.g., the American Red Cross) tend to receive a greater portion of support from less affluent donors than do charities advancing higher education and the arts.²²³ Thus, in part because churches are supported by non-itemizers to a greater degree than are charities operating in the arts and humanities, the charitable contributions deduction probably disproportionately benefits charities promoting the arts and secular education.²²⁴

Repeal of the charitable contributions deduction could foreseeably harm elite, secular charities more than churches for other reasons. The religious ethic of giving to religious bodies, grounded in the biblical tithe²²⁵ but extending well beyond it under New Testament theology,²²⁶ provides a compelling reason for many donors to meet the financial needs of their churches. Naturally, the ethic of the tithe also motivates giving to synagogues, and an ethic of giving is taught in religious faiths besides Judaism and Christianity, as well.²²⁷ This ethic may prompt donors to meet the needs of their religious bodies even when giving becomes more costly. Granted, repeal of the

222. Cf. Paul R. McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for Income Tax Deduction*, 27 TAX L. REV. 377, 391 (1972) (“[T]he data show that high income individuals and low income individuals do not give to the same charities.”).

223. See Aprill, *supra* note 101, at 845-46.

224. See *id.* at 868 (stating that the charitable contributions deduction “favors the charitable activities favored by the wealthy”); Charles T. Clotfelter, *Tax-Induced Distortions in the Voluntary Sector*, 39 CASE W. RES. L. REV. 663, 685 (1989) (“Charities favored by the rich simply receive more favorable rates of subsidy through the itemized deduction than those favored by the poor.”); Todd Izzo, Comment, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2373-75 (1993) (arguing that the charitable contributions deduction enables wealthy taxpayers to dictate the charities that the federal government subsidizes most); Edward H. Rabin, *Charitable Trusts and Charitable Deductions*, 41 N.Y.U. L. REV. 912, 922 (1966) (summarizing arguments that the law favors wealthy taxpayers’ charities of choice).

225. See, e.g., *Leviticus* 27:30-33.

226. See, e.g., *Mark* 12:41-44; *Acts* 2:42-47; *2 Corinthians* 9:1-15; *1 Timothy* 6:17-19.

227. For example, the third pillar of Islam is Zakat, which requires people of a specified means to give a percentage of their wealth to others. See Imam Mufti, *The Third Pillar of Islam: Compulsory Charity*, THE RELIGION OF ISLAM (June 25, 2019), [<https://perma.cc/AC28-FJYS>].

charitable contributions deduction would likely encourage some itemizers to reduce their donations to churches. But one must not dismiss another possibility. Perhaps upper-income donors would mostly maintain their current giving to churches and reduce only (or mainly) their donations to secular charities were Congress to repeal the charitable contributions deduction. Modifying their giving pattern in this manner would enable these donors to maintain the after-tax cost of their total giving at the same levels. Further, even if wealthier itemizers reduced their charitable giving proportionately across the board, lower-income taxpayers with a strong religious ethic might simply give more to their churches to compensate for any budget shortfalls caused by the reduced giving of their wealthier counterparts. In either case, the primary effect of repealing the charitable contributions deduction could be to diminish support for secular charities rather than churches.

Thus, the charitable contributions deduction, which on its face seems to benefit churches in the same way that it advantages elite universities and opera houses,²²⁸ might on an after-tax basis have the effect of much more significantly propping up the donative status of high-brow, secular charities. Correspondingly, the repeal of this provision, even if properly labeled a tax expenditure, could seriously impair the fundraising of non-religious charities while leaving religious charities largely unscathed.

In summary, to characterize a feature of tax law as a tax expenditure reveals neither the ultimate beneficiary of the provision nor the consequences that would result from its repeal.²²⁹ Those who appear to benefit from the provision may economically do so less than others (or not at all), and the repeal of a provision may have a far greater impact on certain nominal beneficiaries of a tax expenditure than others. Indeed, repealing a tax expenditure may economically harm the class of nominal

228. See I.R.C. § 170(c)(2)(B) (describing eligible donees, in relevant part, as entities “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes”).

229. Similarly, Professor Sugin has observed that characterizing an item as a tax expenditure says nothing about its distributional effects. See Sugin, *supra* note 9, at 424.

beneficiaries less than others who have captured the economic benefit of the tax provision.

When the effects of a law are relevant to constitutional analysis, a court must account for these realities. A judge should not simply assume that the primary effect of a tax expenditure is to benefit the “nominally subsidized” class, or to benefit members of that class equally.

F. The Question of Appropriative Power

Tax expenditure theory tends to skim over, or at least superficially treat, a distinction between direct expenditures and tax expenditures that is important in constitutional doctrine: the locus of appropriative power. Tax expenditure theory posits how Congress “should or could have” acted, not how Congress “would have” acted.²³⁰ The thinking is that a statutory provision conferring a tax benefit places the taxpayer in the same position in which she would have been had Congress taxed her without the preference and then transferred the added tax revenue to her in the form of a direct subsidy equal to the tax savings in the world featuring the tax preference (i.e., the tax world that is).²³¹ But tax expenditure analysis does not assume that Congress really would appropriate funds for this purpose in the absence of the tax provision at issue. Perhaps Congress would not so appropriate funds that the government truly collects.

For Surrey, that Congress would not directly appropriate funds correspondingly to tax expenditures is a reason to question their wisdom on policy grounds.²³² But for purposes of constitutional analysis, that a legislature would not likely directly appropriate in the manner corresponding to the tax expenditure highlights that the primary appropriative decisionmaker is not the government, but instead a private decisionmaker (the taxpayer). The absence of legislative appropriation reveals a reason to

230. See SURREY & MCDANIEL, *supra* note 4, at 1.

231. *Id.* at 82.

232. Surrey discusses the upside-down subsidy effect of tax expenditures, apparently in part to contrast them with the way direct grants typically operate. *Id.* at 71-72, 80-82. The plain implication is that upside-down direct grants would be highly objectionable.

question the equivalence of tax expenditures and direct funding in constitutional cases.

In constitutional law, the identity of the one holding the power to decide upon an appropriation is important. When this person with the power of appropriation—the appropriative decisionmaker—is a private person, rather than a governmental entity or official, indirect governmental support is often upheld as constitutional. Under the logic of a growing body of constitutional law, the presence of a private appropriative decisionmaker who determines to what degree someone benefits from a tax expenditure strengthens the case for the constitutionality of the indirect support (if any) provided through the tax expenditure.

An illustrative case is *Mueller v. Allen*.²³³ In *Mueller v. Allen*, the Court upheld the constitutionality of a state income tax law permitting a deduction for payments of tuition, books, and transportation enabling the taxpayers' children to attend school.²³⁴ On the whole, parents of children enrolled in private religious schools likely received much of the benefit of the deduction. One of the reasons that the Court found the deduction permissible under the Establishment Clause is that the indirect benefit that private schools reaped from the law arose “only as a result of decisions of individual parents.”²³⁵ The presence of these private appropriative decisionmakers meant that the state government had not signified approval of any one religion, or of religion in general.²³⁶

Mueller v. Allen is not an isolated case. The presence of a private appropriative decisionmaker has been a significant factor in several Supreme Court opinions.²³⁷

233. 463 U.S. 388 (1983).

234. *See id.* at 395-97, 400, 402-03.

235. *Id.* at 399, 400 (stating that the “historic purposes” of the Establishment Clause “simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents,” that inured to parochial schools from a neutrally available state income tax deduction).

236. *See id.* at 399.

237. *See, e.g.,* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 142-43 (2011) (holding that taxpayers lack standing to challenge the constitutionality of a state program providing tax credits for transfers by private persons to tuition organizations); *Zelman v. Simmons-Harris*, 536 U.S. 639, 653, 662-63 (2002) (upholding the constitutionality of a governmentally funded school-voucher program enabling students to attend private schools).

Tax expenditure theory's reliance on what Congress "should or could have" done fares poorly in the jurisprudence controlling at least some constitutional provisions (e.g., the Establishment Clause). Indeed, what is perceived as a negative attribute in tax expenditure theory—the absence of direct legislative control of appropriations when the law features the mechanism of a tax expenditure—is in certain contexts a positive factor in analyzing a tax expenditure's constitutionality. The tax provision marks the boundaries, but taxpayers' choices dictate ultimate recipients of funds within those boundaries. Constitutional doctrine has assigned significance to these private choices.

G. The Question of Tax Penalties

Tax expenditure theory posits not only "positive" spending, but also "negative" spending—the imposition of penalties—through special statutory tax mechanisms.²³⁸ The idea follows from the assumption of a normative tax base and structure.²³⁹ If a deduction or exclusion is normatively correct because it is necessary to measure income, then to deny the deduction or

of their choice); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10, 13-14 (1993) (finding that a governmental program requiring a school district to provide sign-language interpreters to help deaf students did not violate the Establishment Clause even when a deaf student was enrolled in a private Catholic school, relying in part on the fact that the choice of school was made by the student's parents rather than the government); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487-89 (1986) (finding no Establishment Clause violation by a state scholarship program that aided a student studying for the ministry at a religious institution where any benefit realized by the religious entity resulted from the student's private, independent choice). The Court's analysis in *Zelman v. Simmons-Harris* is representative:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious [institutions] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Zelman, 536 U.S. at 652.

238. See SURREY & MCDANIEL, *supra* note 4, at 222-24.

239. See *id.* at 222.

exclusion is effectively to impose a tax penalty.²⁴⁰ Surrey went so far as to analyze tax penalties as “functional equivalents of direct government regulatory or financial penalty rules.”²⁴¹ Surrey identified a number of tax penalties, including the denial of a deduction under IRC § 162 for fines, lobbying expenditures, and contributions to political campaigns, when all of these are business-related.²⁴²

The Supreme Court has appeared slow to recognize the punitive nature of negative tax expenditures when considering their constitutionality. For example, in *Cammarano v. United States*,²⁴³ decided prior to the prominence of the tax expenditure idea, the Court upheld the constitutionality of a Treasury regulation that denied a deduction for lobbying expenses, including grass roots lobbying, paid in the course of carrying on a trade or business²⁴⁴—a denial now statutorily implemented.²⁴⁵ The Court justified the denial of a deduction by reasoning that the taxpayers “are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do.”²⁴⁶ According to the Court, the provision just reflects the view that “everyone in the community should stand on the same footing as regards its purchase [of publicity over legislation] so far as the Treasury of the United States is concerned.”²⁴⁷

The problem under tax expenditure theory is that the decision of *Cammarano* does not leave all community members standing “on the same footing . . . so far as the Treasury of the United States is concerned.”²⁴⁸ Expenditures to influence legislation that a taxpayer makes for reasons unrelated to the objective of producing income are non-deductible personal

240. *See id.* (discussing the propriety of deducting costs of producing business income).

241. *Id.*

242. *See id.* at 222-24.

243. 358 U.S. 498 (1959).

244. *See id.* at 512-13.

245. *See* I.R.C. § 162(e)(1)(A), (C).

246. *Cammarano*, 358 U.S. at 513.

247. *Id.*

248. *Id.*

consumption.²⁴⁹ Non-business taxpayers properly pay for attempts to influence legislation with after-tax dollars.²⁵⁰ But a taxpayer's business-related lobbying expenditures are expenses of producing income, and hence deductible (or at least capitalizable) under the normative tax structure based on economic income, or indeed any common understanding of business profit.²⁵¹ To deny a deduction (or at least basis) for business taxpayers is to penalize them. What appears as a system placing everyone on the "same footing" to the eye untrained by Surrey is really a system that penalizes business taxpayers—to those who peer through the lens of tax expenditure theory. Even many years after the decision in *Cammarano*, the Supreme Court still failed to grasp the punitive nature of denying the business deduction for lobbying expenses.²⁵²

One may attempt to justify the result in *Cammarano* on various policy grounds, but none is highly satisfying under tax expenditure theory or existing constitutional law. One option is to admit that the denial of a lobbying expense deduction made for business reasons is a penalty but then to argue that it is nonetheless constitutional when balanced against the potential harm to democracy if only business lobbying is untaxed.²⁵³ However, if the denial of the deduction is intended to penalize business-motivated political speech, the denial raises serious constitutional concerns. Advocating before the general public, the type of lobbying at issue in the statewide referenda described in *Cammarano*, implicates core First Amendment values.²⁵⁴ It is

249. See I.R.C. § 262.

250. See I.R.C. § 262.

251. See SURREY & MCDANIEL, *supra* note 4, at 222.

252. See *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 546 (1983) ("Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for . . . lobbying.").

253. Any such argument is in tension with recent Supreme Court precedent, which rejects anti-distortion rationales for limiting corporate speech in the form of independent expenditures for electioneering. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 349-53 (2010).

254. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); see also, e.g., *Meese v. Keene*, 481 U.S. 465, 465-66, 480, 484-85 (1987) (holding the Foreign Agents Registration Act of 1938 constitutional and reasoning that "Congress did not prohibit, edit, or restrain the distribution

hardly a serious suggestion that penalizing political speech is constitutional simply because it is motivated by the desire to make money.²⁵⁵

The analyst is thus left with justifying the result in *Cammarano* on some grounds other than that it constitutionally tolerates a penalty on speech. But understanding *Cammarano* as properly characterizing the denial of the business deduction for lobbying as other than a penalty does not bode well for the role of tax expenditure analysis in constitutional law. The position implies that denying a deduction for expenses of income-producing lobbying (while also denying their capitalization) is part of the normatively correct tax base.²⁵⁶ That explanation undermines the force of tax expenditure theory itself, and Surrey knew it.²⁵⁷

In considering whether various tax penalties can be conceptualized as features of the normative income tax structure, Surrey ultimately concluded that going down this intellectual road would have no end.²⁵⁸ To begin rationalizing them under sundry policy norms invites the same exercise for all negative tax expenditures, and it would be impossible to decide which public policies produce “normal” tax provisions and which create tax penalties.²⁵⁹ For Surrey, then, all denials of an income tax

of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit”).

255. *Cf. Citizens United*, 558 U.S. at 340, 365-66 (holding that laws that burden political speech are subject to strict scrutiny; holding unconstitutional a law that limited corporate independent expenditures for electioneering). According to the Court in *Citizens United*, “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” *Id.* at 349. First Amendment protection extends to the speech of corporations. *See id.* at 342-43.

256. Perhaps administrative expediency justifies this notion of the tax base. The argument would be that ascertaining whether a taxpayer’s motive to influence legislation is personal or business-related is too difficult.

257. Critics of tax expenditure theory understand well the point that disallowing a deduction for an expense to produce income reflects a normative judgment. *See, e.g., Kahn & Lehman, supra* note 52, at 1661-62 (“The disallowance of a deduction for illegal bribes confirms that we think they are naughty.”). For critics, these tax provisions just affirm that the enacted tax law is itself the normative base chosen by the public. *See id.*

258. *See SURREY & MCDANIEL, supra* note 4, at 223.

259. *See id.* More broadly, and under essentially the same logic, to rationalize denials of deductions for expenses incurred to produce income on a normative basis invites the same exercise for all tax expenditures. If one norm justifies classifying one of Surrey’s tax penalties as part and parcel of the normative tax base, another norm just as surely justifies

deduction for expenses incurred to generate income must be characterized as tax penalties.²⁶⁰

A still deeper problem exists. Tax penalties sometimes present more troublesome state action than tax expenditures. In the case of tax expenditures, even if it is assumed that the provisions are deviations from the normative tax structure, the most that often can be said is that government is supporting the exercise of private choices. Some, perhaps many, of these choices are exercises of rights enjoying enhanced constitutional protection. So a tax expenditure often represents, at most, government support of the exercise of constitutionally protected rights.²⁶¹ But some tax penalties target constitutionally protected behavior. Phrased more pointedly, through some tax provisions, government penalizes the exercise of constitutionally protected rights.²⁶² The nature of the state action thus is at times much more suspect in the case of tax penalties because they may suppress constitutionally protected activity.

This discussion shows that one feature of tax expenditure theory—the concept of tax penalties—fits uncomfortably with existing Supreme Court precedent. Yet the concept of tax penalties is part and parcel of the overall logic of tax expenditure analysis. Further, although existing Supreme Court precedent does not reflect this observation, tax penalties probably present greater constitutional concerns than positive tax expenditures in a number of contexts.

H. The Question of Tax History and Historical Inquiry in General

Tax expenditure theory, at least as explained by Surrey, is underdeveloped in assessing the relevance of tax history in

classifying one of Surrey's tax expenditures as an element of the proper base. There is hardly a terminus to the exercise. If there is a conceptual end, it might simply be the one that Bittker perceived—that tax law “is made, not discovered.” Bittker, *A Reply*, *supra* note 69, at 541.

260. See SURREY & MCDANIEL, *supra* note 4, at 223.

261. See *id.* at 118.

262. See, e.g., HAMBURGER, *supra* note 101, at 190-213 (arguing that IRC § 501(c)(3) penalizes the speech, petition, and religious exercise rights of charitable and religious organizations). For a detailed (and critically supportive) review of Professor Hamburger's arguments, see Buckles, *The Penalty of Liberty*, *supra* note 101.

determining the normative tax structure. On the one hand, as noted previously, Surrey envisioned an expanding list of tax expenditures, and then eventual repeal of newly identified tax expenditures, as the public generally comes to accept economic concepts of income.²⁶³ This aspect of Surrey's analysis positively assesses historical developments. On the other hand, Surrey's recognition that the normative structure of the income tax *at any given point in time* also reflects general acceptance and normative factors beyond economic concepts of income²⁶⁴ suggests that historical views of income and tax policy also serve some role in determining the normative tax. These two aspects of Surrey's thinking raise interesting questions in evaluating the role of tax expenditure theory in constitutional law.

One question is whether the duration of a provision nominally structured as an exclusion, deduction, or exemption should influence the classification of the provision as a tax expenditure. For example, in the arc of federal income tax history, the charitable contributions deduction and the charity income tax exemptions are ancient.²⁶⁵ That these provisions have existed for so long is surely some evidence that Congress, and the general public that elects its members, view them as part of the normative income tax structure.²⁶⁶ In other words, the longstanding presence of these provisions may suggest the "public acceptance" of their normativity—a factor Surrey claimed was relevant.²⁶⁷

A related inquiry is even more important for purposes of this Article: beyond tax expenditure theory proper, how is the constitutional analysis of a tax provision affected by its duration? History matters mightily in some—and some would say most or

263. See Surrey & Hellmuth, *supra* note 64, at 532.

264. See *id.* at 531-32.

265. The charitable contributions deduction was enacted in 1917. See War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). The charity income tax exemption appeared not only in the first internal revenue statute enacted after the adoption of the Sixteenth Amendment but also in previous revenue acts. See Bittker & Rahdert, *supra* note 145, at 301-03.

266. Of course, as a logical matter, the evidence is not conclusive. Perhaps the public both recognizes the non-normativity of a tax provision as a matter of tax policy and yet supports the tax provision on non-tax-related policy grounds.

267. See *supra* Section II.C.

all—constitutional contexts. For example, in a growing number of cases, the Court has relied on the history of a practice in assessing whether it survives Establishment Clause scrutiny.²⁶⁸ The long history of the charity income tax exemption and the charitable contributions deduction bode well for these provisions under the Court’s growing reliance on historical acceptance. Charity property tax exemptions likewise have a long history, a point that figured prominently in *Walz v. Tax Commission of New York*.²⁶⁹

A similar question is to what degree historical inquiry in general should guide constitutional analysis of tax expenditures. As to the federal income tax, Surrey plainly preferred to account for evolving notions of income in conducting tax expenditure analysis.²⁷⁰ Applied in constitutional contexts, this preference suggests dynamic constitutional interpretation. But the current Court is heavily influenced by originalism.²⁷¹ Thus, in resolving constitutional questions involving tax expenditures under the federal income tax, the Court would likely consider both the history of the tax provision at issue and the historical context of the adoption of the constitutional provision bearing upon the tax provision.

268. See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415-16, 2426 (2022) (holding that a school district violated the First Amendment rights of a high school football coach by forbidding him from praying at midfield after games had ended); *id.* at 2428 (“An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some ‘exception’ within the ‘Court’s Establishment Clause jurisprudence.’”); *Town of Greece v. Galloway*, 572 U.S. 565, 591-92 (2014) (holding constitutional a township’s practice of opening official meetings with prayer by invited clergy members). According to the Court, “to define the precise boundary of the Establishment Clause” is unnecessary when history supports the permissibility of the specific practice under examination. *Id.* at 577.

269. 397 U.S. 664, 675-80 (1970) (citing the long history of tax exemptions for property owned by religious entities as supporting the constitutionality of such exemptions under the Establishment Clause).

270. See SURREY & MCDANIEL, *supra* note 4, at 197-209.

271. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242-43 (2022) (holding that the Due Process Clause of the Fourteenth Amendment does not confer a right to abortion because it fails the test of being “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty”); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2122, 2126 (2022) (holding that New York’s licensing regime, which required an applicant to demonstrate a special need for self-defense to carry a hand gun outside of the home, violates the Second and Fourteenth Amendments, stating that a regulation burdening an individual’s right to bear arms must be “consistent with this Nation’s historical tradition” to survive constitutional scrutiny).

In brief, the history of a tax provision is often important to constitutional analysis. But in tax expenditure theory, the significance of tax history is not well developed. A study of the history of a provision of tax law is probably warranted in determining the normative tax base, and it may be important for other reasons in applying relevant constitutional doctrines. Further, the history of the constitutional text under which a tax provision must be analyzed by a court is also relevant. To the extent that other branches of government have not accounted for legal history in compiling tax expenditure budgets, judicial deference to tax expenditure lists in constitutional cases is all the more problematic.

I. The Question of Mechanical Interchangeability

Tax expenditures can take various forms—exclusions, deductions, deferrals, credits, and special nominal rates.²⁷² One of these forms can often be expressed in another form to produce an identical result. In some contexts, understanding this mechanical interchangeability among tax expenditure forms is necessary. This Section first illustrates mechanical interchangeability and then explains why mechanical interchangeability is sometimes important.

Consider the equivalence between partial exclusions of gains and reduced rates of tax. One way the federal income tax system encourages investments in capital is by imposing a special rate of tax on net capital gain.²⁷³ Assume a taxpayer has \$100,000 of net capital gain taxed at the rate of 20% when the taxpayer is in a 50% marginal income tax bracket. The preferential rate gives rise to a tax expenditure of \$30,000—the product of the gain and the difference between the marginal tax rate and the preferential tax rate.²⁷⁴ Instead of taxing net capital gain at the rate of 20%, Congress could confer an equivalent benefit by excluding 60% of the taxpayer's net capital gain from income and taxing the

272. The Congressional Budget and Impoundment Control Act of 1974 identifies these forms, as well as special exemptions, as tax expenditures. See Pub. L. No. 93-344, § 3(a)(3), 88 Stat. 297, 299 (codified as amended at 2 U.S.C. § 622(3)).

273. See I.R.C. § 1(h).

274. The tax expenditure is $(0.5-0.2) \times \$100,000 = \$30,000$.

remaining gain at the normal rate of 50%.²⁷⁵ The two formal mechanisms produce the same benefit to the taxpayer.

Congress also has a choice of providing for a credit or a deduction. Assume a deduction is allowed for up to \$5,000 of college tuition paid by a taxpayer on behalf of the taxpayer's children. Further assume that the highest marginal income tax rate is 50%. To the taxpayer in the 50% marginal income tax bracket, this deduction produces a tax benefit of \$2,500.²⁷⁶ Instead of permitting a deduction for tuition, Congress could enact a tax credit equal to 50% of the total cost of tuition paid, subject to a \$5,000 tuition ceiling. Thus, when this taxpayer pays tuition equal to or exceeding \$5,000, her tax liability otherwise due is offset by a credit of \$2,500.²⁷⁷ For our taxpayer in the 50% marginal income tax bracket, the deduction and the credit produce equivalent after-tax benefits.

The mechanical interchangeability of these various forms of tax expenditures is important to recognize. What might at first glance seem like a remarkable "giveaway" might not be such a bonanza upon further scrutiny. For example, consider a state tax credit for private school tuition equal to 100% of the first \$1,000 of tuition paid on behalf of the taxpayer's children. One might react to the credit as a windfall for parents sending their children to private schools, insofar as a credit is a dollar-for-dollar reduction in tax liability. But the mechanical interchangeability of tax expenditures should temper this reaction. For a taxpayer in the 50% income tax bracket, a 100% tax credit for up to \$1,000 of tuition paid is equivalent to a deduction for private school tuition paid up to a \$2,000 ceiling.²⁷⁸ For a taxpayer in the 50% marginal tax bracket who incurs \$10,000 of private school tuition, a tax credit of \$1,000 for tuition paid equaling or exceeding \$1,000 is a much smaller tax expenditure than a full deduction. This taxpayer would prefer a full deduction for all tuition paid,

275. The tax expenditure is the amount of tax foregone on the excluded portion of the gain, or $0.5 \times (0.6 \times \$100,000) = \$30,000$.

276. The taxpayer's income subject to tax is reduced by \$5,000, for a tax benefit of $0.5 \times \$5,000 = \$2,500$.

277. The tax credit is $50\% \times \$5,000 = \$2,500$.

278. Deducting tuition of \$2,000 produces a tax savings of $0.5 \times \$2,000 = \$1,000$.

for the full deduction would produce a tax benefit five times the benefit of the \$1,000 tax credit.²⁷⁹

Mechanical interchangeability among various tax expenditures is also important to recognize when a base-defining provision is expressed in a less familiar form. To illustrate, assume that, contrary to the limitations on the deductibility of state and local taxes under current law,²⁸⁰ and contrary to the assumptions underlying current tax expenditure budgets,²⁸¹ Congress determines that the normative federal income tax base does not include income transferred to pay state and local governments. One obvious way to implement this conclusion is to provide for a full deduction for the payment of state and local taxes.²⁸² But perhaps Congress is concerned that it will be unjustly accused of favoring the wealthy, whose high marginal tax rates render a deduction more valuable to them than to lower-income taxpayers.²⁸³ So Congress replaces the deduction with a tax credit for state and local taxes paid in an amount equal to the product of such taxes and the highest marginal income tax rate. If state and local taxes are properly excluded from the normative income tax base, and hence a deduction for state and local taxes is normative, this credit mechanism does not produce a tax expenditure for taxpayers in the highest marginal income tax bracket. It produces a tax result equal to a full deduction. The credit mechanism described would, however, produce a tax

279. For the taxpayer in the 50% marginal income tax bracket, a full income tax deduction produces a tax benefit of $\$10,000 \times 50\% = \$5,000$.

280. See I.R.C. §164(b)(6)(B) (limiting, through 2025, an individual taxpayer's deduction for most state and local taxes to \$10,000).

281. See JCT TAX EXPENDITURES REPORT, *supra* note 18, at tbl. 1; TAX EXPENDITURES: COMPENDIUM, *supra* note 21, at 1071-78; TREASURY REPORT, *supra* note 16, at 9-10, 21.

282. The deduction for state and local taxes has received thoughtful academic commentary. See, e.g., Brookes D. Billman, Jr. & Noel B. Cunningham, *Nonbusiness State and Local Taxes: The Case for Deductibility*, 28 TAX NOTES 1107 (1985); Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes Under the Federal Income Tax*, 82 VA. L. REV. 413 (1996); Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 UCLA L. REV. 1389 (2004); Edward A. Zelinsky, *The Deductibility of State and Local Taxes: Income Measurement, Tax Expenditures and Partial, Functional Deductibility*, 6 AM. J. TAX POL'Y 9 (1987).

283. The greater value of deductions to high-income taxpayers explains the familiar argument that tax expenditures confer upside-down subsidies. See, e.g., SURREY & MCDANIEL, *supra* note 4, at 72-82.

expenditure for those in lower-income tax brackets, in proportion to the difference between their marginal rate and the highest marginal rate. This conclusion follows because the normative tax system postulated would simply grant these taxpayers a full deduction, but the credit mechanism—based as it is on the top marginal tax rate—grants them a greater tax benefit than would a full deduction for taxes paid.

The implications for constitutional analysis are apparent. First, a “dollar-for-dollar” credit based on a taxpayer’s expenditures subject to a ceiling does not necessarily imply as much governmental support as one might initially suspect. Secondly, a credit or special tax rate that approximates the same results as a tax base-defining deduction or exclusion should be analyzed accordingly. The mere presence of a credit does not necessarily imply the existence of an indirect government subsidy or a legislative intent to subsidize. Indeed, and perhaps counterintuitively, a credit mechanism can have the effect of a negative subsidy (i.e., a penalty). If (i) a legislature enacts a partial tax credit in lieu of a deduction, but (ii) the deduction would generate a larger tax benefit than a credit to the taxpayer in question, and (iii) the full deduction is consistent with the normative tax base, then it follows that (iv) the credit mechanism functions in part as a tax penalty.²⁸⁴

The form of a tax provision may reflect legislative goals, compromises, and values that have little to do with an intent to confer an indirect government subsidy on some or all of those who rely on the provision to compute their tax liabilities. Constitutional analysis must not stop with a cursory look at the mechanical form of a tax provision, including one that appears on a tax expenditure list.

J. The Question of Changes in Tax Rates and Taxability Thresholds

Tax expenditure theory does not assume a certain tax rate or rate structure as normative independently of the rate structure

284. Surrey & McDaniel acknowledged a similar point. *See id.* at 80 (observing that the denial of a normatively required deduction functions as an upside-down penalty).

congressionally established.²⁸⁵ To the contrary, Surrey emphatically maintained that it was folly to criticize tax expenditure theory on the grounds that it assumes all income belongs to the government—an assumption equivalent to insisting that any tax rate below 100% must be a tax expenditure.²⁸⁶ Similarly, standard allowances that shield a minimum of income from taxation—the standard deduction²⁸⁷ and (when effective) the personal exemption²⁸⁸—are not informed by tax expenditure theory.²⁸⁹ Tax expenditure theory just accepts these subsistence allowances as extraneous realities, determined from time to time legislatively.²⁹⁰

One anomaly that follows from this perspective is that the size of the tax expenditure budget is a function of tax rates and the subsistence allowances, even though they are regarded as independent of the process of identifying tax expenditures. Surrey himself declared tax expenditures “hostage to the regular rate structure.”²⁹¹ He recognized that reductions in tax rates, the allowance of the standard deduction, and the allowance of personal exemptions diminish the “scope and cost of tax expenditures.”²⁹² The reason is simple math.

When Congress reduces tax rates on a grand scale, the tax expenditure budget correspondingly diminishes. The reduction

285. *See id.* at 220 (stating that, in a general-rate structure, neither a zero-rate bracket nor any other rate of tax below the highest marginal rate is a tax expenditure, explaining that “changes in the general positive rates do not involve tax expenditures”).

286. *See id.* at 60-61.

287. *See* I.R.C. § 63(b)(1), (c).

288. *See* I.R.C. §§ 63(b)(2), 151. For taxable years 2018-2025, the deduction for personal exemptions is zero. *See* I.R.C. § 151(d)(5)(A).

289. *See* SURREY & MCDANIEL, *supra* note 4, at 220. Surrey & McDaniel discuss the propriety of both the personal exemption and a zero-rate tax bracket. *See id.* The standard deduction is the functional equivalent of the latter. *Cf.* JCT TAX EXPENDITURES REPORT, *supra* note 18, at 4 (stating that the JCT “views the standard deduction and the personal exemptions as defining the zero-rate bracket that is a part of normal tax law”).

290. *Cf.* McMahon, *supra* note 2, at 776 (stating that, because the Haig-Simons concept of income “does not address issues such as accounting methods, taxable units, exemptions levels, or inflation adjustments, those issues must also be addressed in designing a normal income tax”). Professor Bittker was quick to observe that the Haig-Simons concept “provides no guidance to many structural issues that must be decided in any income tax law.” Bittker, “*Tax Subsidies*,” *supra* note 56, at 251. Bittker counted “tax exemptions” among such structural provisions. *See id.* at 260.

291. SURREY & MCDANIEL, *supra* note 4, at 103.

292. *See id.* at 104.

follows mathematically from lowering rates. The hypothetical transfers from taxpayers to the government, and then back from the government to taxpayers, are lesser than they would otherwise be because the tax rates—and hence hypothetical tax revenues—are lower than they were before the rate reduction.²⁹³ This reduction in tax expenditures attributable to an overall reduction in tax rates does not necessarily result from any conscious choice to reduce indirect subsidies.²⁹⁴ Similarly, when Congress raises tax rates, the primary reason it does so is likely to increase actual collections, not necessarily to enhance indirect support across the board for activities benefitting from tax expenditures. But the mathematical result of raising rates, all else held constant, is to expand the tax expenditure budget.

Similarly, raising subsistence allowances reduces the size of the tax expenditure budget. To take an extreme example, imagine that Congress raised the standard deduction to \$100,000. Nobody with adjusted gross income of \$100,000 or less would have any reason to itemize personal deductions.²⁹⁵ Thus, these taxpayers would claim no deductions for most state and local income or property taxes,²⁹⁶ mortgage interest expense,²⁹⁷ charitable contributions,²⁹⁸ or medical expenses.²⁹⁹ As a result, the tax expenditure budget would shrink. Simply raising the subsistence allowance reduces indirect government spending through the tax system under tax expenditure theory.

At any moment, then, how much “subsidy” flows indirectly through the federal tax system to support various activities is in part a function of legislative priorities that likely have little if anything to do with a conscious choice to enhance or cut support for such items as charity, medical care, housing, and state taxes.

293. *See id.* at 60. This analysis assumes all else is constant. Clearly, if lowering tax rates stimulates economic activity sufficiently, tax revenues may well increase.

294. Surrey & McDaniel speculate that, when tax rates were dramatically reduced in the early 1980s, Congress was “probably unaware” that the change reduced tax expenditures. *Id.* at 104.

295. Taxpayers may either claim the standard deduction or elect to itemize personal deductions. *See* I.R.C. § 63(b).

296. *See* I.R.C. § 164.

297. *See* I.R.C. § 163(h)(3).

298. *See* I.R.C. § 170.

299. *See* I.R.C. § 213.

Major changes from year to year in the tax expenditure budget reveal little about conscious legislative subsidy choices when they are attributable to alterations to general tax rates and subsistence allowances.³⁰⁰

Constitutional analysis should account for these nuances. When intent matters, a court should recognize that the main legislative objective of a change in tax rates or subsistence allowances is likely not to influence taxpayer activities that tax expenditure theory views as publicly subsidized. Concededly, some legislators, at least those on tax-writing committees, should have some sense for how changes in rates and allowances might affect all kinds of taxpayer behavior. But if Congress intends to alter specific aspects of taxpayer activity, the more precise way to do so through taxation is to modify the conditions of tax expenditure provisions most likely to influence such behavior. To assume that Congress appreciates this reality is reasonable.

K. The Question of Economic Equivalence

Another question to consider is the relevance of economic equivalence. That a tax expenditure is economically equivalent to full taxation coupled with the granting of a subsidy equal to the tax benefit is now platitudinal. Under the simplistic assumptions of tax expenditure theory, the point is obvious. To illustrate, if the normal marginal rate of tax on income is 50% but dividend

300. Taxpayer behavior in response to changes in tax rates and subsistence allowances may compound unintended effects on tax expenditures. For example, as measured by the tax expenditure budget, charitable giving receives a greater subsidy as tax rates rise. Such is the mathematical result of allowing a charitable contributions deduction to taxpayers now paying a higher rate of tax. But if charitable giving to churches is more inelastic than giving to secular charities, the effect of the government's raising income tax rates or lowering the standard deduction may be to stimulate contributions to secular charities more than to spur giving to religious entities. In a period of gradually rising income tax rates, and all else remaining constant, the tax expenditure budget would show increased subsidies to charitable donees. But when taxpayer behavior is considered, it might be that the rise in tax rates causes secular charitable giving to increase more than religiously motivated support. Similarly, lowering income tax rates, and expanding the standard deduction, may on balance hurt secular charities more than religious groups. When tax rates decline over time, perhaps religious giving stays more constant than secular charitable giving, which wanes as the value of the deduction declines with tax rates. But it is not likely that the primary legislative purpose in modifying tax rates or the standard deduction is to rebalance public support of religious and secular charities.

income is taxed at 25%, a taxpayer who receives a dividend of \$1,000 during the taxable year and thus pays tax of \$250 at the preferential 25% rate is in the same economic position as a taxpayer in a world without tax expenditures who pays tax of \$500 on the \$1,000 dividend at the normal 50% rate but receives a \$250 direct subsidy from the government. This observation of economic equivalence is mathematically correct. But it is also largely irrelevant to constitutional analysis.

All kinds of economic equivalencies exist, but they establish little or nothing. Consider a taxpayer subject to a normal marginal rate of income tax of 30%. Assume the taxpayer earns \$100,000 subject to the highest marginal tax rate, and therefore she pays tax of \$30,000 and is left with \$70,000 on this band of income after taxes. She is in the same position that she would have been in had the government taxed this band of income at the normal marginal rate of 50% and then transferred a subsidy to her of \$20,000. The two systems produce the same economic result to her—she winds up with \$70,000 when the dust settles. The same would be true were the highest normal marginal tax rate 75% and the hypothetical subsidy \$45,000, or were the highest normal marginal tax rate 90% and the hypothetical subsidy \$60,000.

For purposes of constitutional law, to insist that a court find existential significance in one or more of these economic equivalencies is silly. That one can illustrate economic equivalence among these various options means only that one has mastered grammar school-level math, not that economic equivalence is itself important.

Tax expenditure theory relies on economic equivalencies, but it is not established by them. Surrey castigated the objection to tax expenditure theory that it assumed the government's entitlement to all income—a claim which is tantamount to asserting that any tax rate below 100% would be a tax expenditure.³⁰¹ Surrey understood the selection of an ordinary, typically progressive, tax rate schedule as distinct from the tax expenditure inquiry.³⁰² If economic equivalence established the presence of a tax expenditure, Surrey's rebuttal would lack merit.

301. See SURREY & MCDANIEL, *supra* note 4, at 60-61.

302. See *id.* at 190-92.

The payment of tax on income at any rate below 100% is mathematically equivalent to a payment at the rate of 100% coupled with a subsidy. But Surrey would have none of that, for the objection rests on the faulty premise that tax expenditure theory assumes that the government is entitled to all taxpayer income in the first instance. Economic equivalence in this example proves nothing.

The deductibility of expenses that are necessary to arrive at the normative tax base further illustrates that economic equivalence does not establish the presence of a tax expenditure. The classic example is the deduction for ordinary and necessary trade or business expenses.³⁰³ The deduction for these expenses is economically equivalent to a system that provides for no deduction but confers a subsidy equal to the product of the tax rate and the amount of such expenses (capped at business gross income). But this economic equivalence does not render the IRC § 162 deduction for business expenses a tax expenditure.³⁰⁴

In addition, economic equivalence does not imply other forms of equivalence,³⁰⁵ such as legislative appropriative process equivalence,³⁰⁶ lobbying equivalence,³⁰⁷ financial liquidity and

303. See I.R.C. § 162.

304. See SURREY & MCDANIEL, *supra* note 4, at 187 (explaining that the authorized deductions for expenses of producing income are consistent with the Haig-Simons concept of income).

305. Even opinions of the Court that are friendly to tax expenditure analysis have recognized this point. See, e.g., *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 544 n.5 (1983) ("In stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical.").

306. See Zelinsky, *Tax "Benefits," supra* note 22, at 401. Removing a benefit from the appropriations process may reduce governmental transaction costs, enhance stability in the law, and reduce political conflict that would ensue from annually revisiting the subsidy issue. See *id.* at 401-03.

307. See *id.* at 401-02. Citizens receiving tax benefits under provisions that are mainstays of the IRC likely need not expend as much time and money lobbying legislators as they would in a world in which they are fully taxed but must seek direct legislative grants annually.

security equivalence,³⁰⁸ fiduciary risk equivalence,³⁰⁹ and symbolic sponsorship equivalence.

The differences between direct legislative appropriations and tax expenditures are especially stark. Tax expenditures quite clearly do not bear the marks of a special legislative appropriation. As to the latter, a government body decides in advance both the identity of recipients and how much they receive of limited funds.³¹⁰ But taxpayers ultimately determine whether they benefit, and to what extent, under a tax expenditure—within the confines of the statutory definitions, of course. This distinction has not escaped the attention of the Supreme Court.³¹¹ Moreover, the annual appropriations process leaves funding “up for grabs,” whereas provisions conveying tax benefits tend to endure with less congressional wrangling.³¹² This stability itself may reflect, as well as reinforce, the normativity of longstanding tax expenditures; rather than prolonging a subsidy that should be subjected to annual spending discipline, perhaps the choice of structuring some tax benefits as deductions, exclusions, credits, etc., points to the consensus that they are normative and should be beyond the pale of annual appropriative tinkering.

Moreover, Congress by its own actions testifies against the equivalence of appropriations and tax expenditures. Consider the battle over whether to include the Hyde Amendment in the general appropriations bill during the Biden administration.³¹³

308. *Id.* at 402. When a taxpayer computes a lower-income tax liability because of a tax expenditure for year X , and the taxpayer then pays the tax liability in April (or October, with a filing extension) in year $X + 1$, the taxpayer can continuously retain cash equal to the tax savings from the tax benefit. But if the taxpayer is instead fully taxed for year X and then forced to seek a direct grant from the government when the taxpayer files a return in Year $X + 1$, the taxpayer is without the use of the cash benefit from the date of filing the return to the date of receiving the grant from the government. Thus, the taxpayer has less cash on hand (for a time) and assumes the risk of not receiving the grant on a timely basis. Moreover, a taxpayer cannot secure money due under a grant until the taxpayer receives it.

309. *Id.* at 403. If a taxpayer retains the cash generated by a tax expenditure, there is no risk that the cash benefit will be mismanaged, wrongly recorded, or misappropriated by a government agent, as in the case of money due under a grant.

310. *See supra* Section II.F; *see also* Zelinsky, *Tax “Benefits,” supra* note 22, at 403-13.

311. *See* *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142-43 (2011).

312. *See* Zelinsky, *Tax “Benefits,” supra* note 22, at 401-03.

313. *See* Chandelis Duster, *Top Democrats Disagree on Including Hyde Amendment in Economic Bill*, CNN: POL. (Oct. 3, 2021, 6:09 PM), [<https://perma.cc/F7F5-7DG9>];

Under the Hyde Amendment, congressional appropriations for Health and Human Services may not fund most abortions.³¹⁴ Congress has enacted some version of the Hyde Amendment since the country's bicentennial.³¹⁵ Thus, Congress has for nearly half a century prohibited direct federal subsidies for abortion under Medicaid.³¹⁶ But during that same time, Congress has consistently permitted Planned Parenthood Federation of America, Inc., the nation's leviathan of abortion services,³¹⁷ to maintain its federal income tax exemption as a § 501(c)(3) entity and to receive donations deductible by donors under IRC § 170.³¹⁸ Nothing in the law requires Planned Parenthood to pay for its abortions from sources distinct from revenues enhanced by these tax provisions. Congress manifestly does not equate these IRC sections with direct appropriations for the abortion procedures executed by Planned Parenthood. Surely Congress, better than any other governmental body, knows whether tax provisions are tantamount to direct appropriations of federal funds. After all, Congress creates them both.

Economic equivalence simply does not control the proper characterization of an item—as a tax expenditure or not—or the consequences of such characterization.³¹⁹ That fact alone limits its usefulness in tax expenditure analysis, constitutional or otherwise. But in constitutional cases, courts must qualify tax

Darragh Roche, *Joe Biden Heading Toward Clash with Progressives over Hyde Amendment*, NEWSWEEK (Oct. 6, 2021, 4:49 AM), [<https://perma.cc/MLD9-AJ4Z>].

314. Roche, *supra* note 313.

315. See Kelsey Snell, *Ban on Abortion Funding Stays in House Bill as 2020 Democrats Promise Repeal*, NPR (June 13, 2019, 5:01 AM), [<https://perma.cc/2FJW-MF68>].

316. For a brief history of the Hyde amendment, see *Harris v. McRae*, 448 U.S. 297, 300-03 (1980).

317. Planned Parenthood is reported to provide more abortions than any other abortion-services entity. See Julie Rovner, *Planned Parenthood: A Thorn in Abortion Foes' Sides*, NPR (Apr. 13, 2011, 12:02 AM), [<https://perma.cc/TZY7-FQRW>].

318. *Frequently Asked Questions: Is My Gift Tax Deductible?*, PLANNED PARENTHOOD, [<https://perma.cc/RH9Z-ZAN8>] (last visited Feb. 20, 2023).

319. Cf. Zelinsky, *Tax "Benefits," supra* note 22, at 412 ("Any such equivalence is a conclusion of the inquiry, not a means to finding a solution.").

expenditure analysis for reasons, and in ways, not recognized by Surrey. Economic equivalence does not alter this imperative.³²⁰

L. The Question of Constitutional Norms

Tax expenditure theory and constitutional law have distinct normative foundations. One should not expect the same normative analysis to direct constitutional law and the selection of ideal tax bases for budgetary purposes. At least two major reasons explain why.

First, different tax systems themselves rely on and prioritize different norms. While some broad norms apply to all kinds of taxes (e.g., administrability, equity, and efficiency), how these norms apply differs across types of taxes.³²¹ For example, in an income tax, the norm of vertical equity³²² is much more likely to serve a prominent role than in a retail sales tax.³²³ In the federal income tax, administrability is often invoked to justify the realization requirement because without it, annual valuations (or an economically similar proxy) would be necessary, and performing annual valuation is traditionally thought impracticable.³²⁴ But under the typical ad valorem tax on real

320. See Sugin, *supra* note 9, at 472 (stating that “the economic equivalence of tax benefits and direct spending is not the most important factor” in interpreting the Establishment Clause).

321. For a classic exposition of income tax policy norms, see Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567 (1965).

322. For a discussion of vertical equity, see *id.* at 581-86, and Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081 (1980) (arguing that the norm of distributional equity does not compel the conclusion that a consumption base is superior to an income base).

323. Lower-income taxpayers generally pay a larger portion of their incomes in retail sales taxes than do higher-income taxpayers because the former simply cannot save as much of their income as can the latter. Further, except for special taxes on luxury goods, retail sales tax rates imposed on consumer goods are generally uniform. There is no progressive rate structure for purchases of Chicken McNuggets.

324. See, e.g., JCT TAX EXPENDITURES REPORT, *supra* note 18, at 5. Numerous options that would at least partially address concerns based on the administrability of annual valuations are available, however. To name a few, the system could easily value financial assets that are publicly traded. Real estate could be presumptively valued consistently with local ad valorem taxation in many states. Other, non-wasting assets (e.g., art and collectibles) could be valued at cost or in accordance with valuation under the transfer tax system, annually modified to reflect a market-based return reflected in an agreed index. Alternatively, the proceeds of assets that are eventually sold could be adjusted upward by an interest factor to reflect the time value of money and the revenue loss to the government from

property, the administrability norm does not preclude annual valuations; they are routine.³²⁵ The neutrality norm is often listed as a norm underlying income taxation,³²⁶ but some taxes—for example, those imposed on sales of cigarettes—are intentionally non-neutral. These three examples—and countless, unnamed others—show that tax bases rely on different normative priorities. When tax bases themselves build on different normative frameworks, it is logically impossible for constitutional law to possess the same normative framework as every tax base.

Moreover, and just as importantly, constitutional law is governed by norms that often are not the same as those that undergird tax bases. Depending on the constitutional provision under consideration, key constitutional norms include government neutrality, free expression, liberty of movement, religious liberty, associational choice, autonomy, privacy, equal protection, separation of government powers, representative government, fairness of governmental process, and self-preservation. While an ideal tax base may reflect one or more of these norms, other norms serve important, even controlling, roles in selecting the base.

For example, the normative income tax base is customarily thought to begin with the Haig-Simons concept of income, modified to reflect certain norms of tax policy such as administrability and ability-to-pay and further qualified by what the public is willing to accept.³²⁷ However, outside the context of the Sixteenth Amendment, the Constitution rarely requires courts to ponder the scope of economic income, let alone how Henry Simons thought of it.³²⁸ The Constitution simply does not rise

the deferral of unrealized gains. For a thorough discussion of ways to implement accrual taxation under the federal income tax, see David J. Shakow, *Taxation Without Realization: A Proposal for Accrual Taxation*, 134 U. PA. L. REV. 1111 (1986).

325. See, e.g., TEX. TAX CODE ANN. § 23.01(a) (West 2020) (requiring annual appraisals of taxable property).

326. See, e.g., Fleming & Peroni, *supra* note 9, at 460-61.

327. See SURREY & MCDANIEL, *supra* note 4, at 186-88.

328. See, e.g., Bittker & Kaufman, *supra* note 26, at 64 (“But if the Fourteenth Amendment did not enact Herbert Spencer’s principles of political economy, it is equally unlikely that it was intended to enact the Haig-Simons definition of income.”).

and fall with concepts of economic income. Other norms are foundational to constitutional law.³²⁹

A court thus should not expect or demand the norms that converge to identify an ideal tax base, and consequently a list of tax expenditures, to control the meaning and scope of numerous constitutional provisions. That a tax provision may be viewed as a form of indirect subsidy for budgeting purposes does not mean that it should be analyzed as a similar cash grant would be analyzed under norms of constitutional law.³³⁰ To illustrate, in *Goldberg v. Kelly*,³³¹ the Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibits termination of cash welfare benefits without affording the welfare recipient the opportunity for an evidentiary hearing before the relevant government official has decided to cut off aid.³³² The Court's rationale was that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."³³³ That certain tax provisions, such as the earned income tax credit ("EITC"),³³⁴ function as aid to the working poor³³⁵ does not necessarily mean that an IRS official processing a tax return must grant the EITC claimant a hearing before deciding that she improperly claimed the credit. The EITC regime providing an indirect tax subsidy differs in meaningful ways from the strictly need-based welfare system subject to due process norms.³³⁶

329. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1130-32, 1147 (1990) (arguing that courts should robustly interpret the Free Exercise Clause to ensure that religious minorities are truly treated neutrally along with religious majorities).

330. Cf. Zelinsky, *Tax "Benefits," supra* note 22, at 383 (urging that courts analyze the equivalence (if any) between tax benefits and direct spending in part by considering "the perspective appropriate for the particular constitutional norm at issue").

331. 397 U.S. 254 (1970).

332. See *id.* at 264 ("[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.").

333. *Id.* (emphasis omitted). For a thoughtful analysis of the intersection of equal protection and due process in contexts involving wealth inequality, see Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019).

334. See I.R.C. § 32.

335. The earned income tax credit has been described as "the largest cash-transfer program for low-income workers with children." Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 LAW & CONTEMP. PROBS. 285, 285 (2010).

336. Most obviously, the EITC is a delayed benefit, whereas welfare support is necessary for daily survival. See *Goldberg*, 397 U.S. at 264.

The EITC is a tax expenditure.³³⁷ It functions even more closely to a cash grant than many other tax expenditures because it is refundable in cash—even if a taxpayer has no income tax liability for the year.³³⁸ Thus, there is no credible argument that the EITC is necessary to reflect the normative income tax base. It is not just “like” a cash grant; it effectuates a literal transfer of cash in many cases. Further, it benefits the working poor, many of whom no doubt rely on it to pay for subsistence items. But the mere timing of the benefit provided by the EITC is likely enough to distinguish it from direct cash assistance for purposes of analyzing a recipient’s due process rights when a government agent is determining eligibility. The constitutional norm is tied to the immediacy of the need of the recipient, not the mere fact that some type of subsidy exists.

The Court has sometimes appreciated the need for normative analysis when considering tax provisions. In *Walz v. Tax Commission of New York*,³³⁹ the Court held that granting property tax exemption to religious organizations, among other charitable organizations, did not violate the Establishment Clause.³⁴⁰ *Walz* observed the “indirect economic benefit” of tax exemption,³⁴¹ but distinguished it from direct subsidies.³⁴² An important portion of the Court’s analysis was its assessment that the purpose of the property tax exemption was “neither the advancement nor the inhibition of religion”³⁴³ and that it “creates only a minimal and remote involvement between church and state and far less than taxation of churches.”³⁴⁴ Thus, the Court invoked two constitutional norms that historically have guided interpretation of the Establishment Clause—neutrality and separation of church and state. The point is not that the Court correctly applied these

337. See JCT TAX EXPENDITURES REPORT, *supra* note 18, at tbl.1; TAX EXPENDITURES: COMPENDIUM, *supra* note 21, at 947-60; TREASURY REPORT, *supra* note 16, at 20.

338. See TAX EXPENDITURES: COMPENDIUM, *supra* note 21, at 947.

339. 397 U.S. 664 (1970).

340. See *id.* at 679-80.

341. See *id.* at 674.

342. *Id.* at 675-76.

343. *Id.* at 672.

344. *Walz*, 397 U.S. at 676.

constitutional norms,³⁴⁵ but that the Court in fact applied them. The Court avoided the superficial reasoning that tax exemption equals cash subsidy, equals aid to religion, equals violation of the Establishment Clause.³⁴⁶ Instead, the Court scrutinized the constitutional permissibility of religious property tax exemptions through the prism of norms underlying the Establishment Clause. In this respect, the Court's methodological approach was sensible.³⁴⁷

A final principle follows from the conclusion that a tax expenditure presenting constitutional questions should be analyzed under the norms that underlie the relevant constitutional texts. Just as the norms that inform selection of an ideal tax base may differ from the norms upon which a specific constitutional provision rests, different norms inform different constitutional clauses. Not all constitutional provisions rest on the same normative foundations.³⁴⁸ Although some have argued for consistently characterizing tax expenditures in constitutional analysis,³⁴⁹ a purported tax expenditure that raises a constitutional issue in one context may demand a different normative analysis when that same tax provision presents a constitutional issue in another context.³⁵⁰ In any case, the appearance of the item on the tax expenditure list is not alone determinative. Courts should not expect a tool of fiscal policy developed primarily to assist the President and congressional budget committees to unify constitutional jurisprudence.

345. The better view is that the Court did correctly decide the case, but I reserve a comprehensive analysis of the Court's reasoning for another day. The argument I am advancing here is methodological, not doctrinal.

346. Cf. Bittker, *Churches*, *supra* note 26, at 1288 (arguing that the constitutionality of church tax exemptions depends on how they fare under the relevant Establishment Clause test and rejecting the idea that the mere existence of a church tax exemption implies a constitutional violation).

347. See Zelinsky, *Tax "Benefits," supra* note 22, at 412 (arguing that the issue in *Walz* was properly analyzed under the meaning of the Establishment Clause, not by equating direct aid and tax expenditures).

348. Cf. McConnell, *supra* note 329, at 1137 ("Different clauses of the Constitution perform different functions and have different logical structures.").

349. See, e.g., Adler, *supra* note 25, at 869, 886.

350. Professor Edward Zelinsky has argued this point well. See Zelinsky, *Tax "Benefits," supra* note 22, at 413.

CONCLUSION

The greatest champion of tax expenditure theory, Stanley Surrey, powerfully influenced the budgetary operations of the executive and legislative branches of the federal government. He triumphantly made the case for employing tax expenditure theory in the federal budgeting process. His work merits study and respect.

However, Surrey unwisely proclaimed that tax expenditure theory also establishes the equivalence of tax expenditures and direct spending in constitutional analysis. He did so without even so much as exploring reasons to question the application of tax expenditure theory in constitutional adjudication, and even as he denied judges the right to exercise their own assessment of the nature of tax provisions appearing on executive agencies' tax expenditure lists. The mighty Surrey thereby erred, and he erred mightily.³⁵¹

For numerous reasons, tax expenditure theory applies uneasily in constitutional contexts. Judges should not assign presumptive constitutional significance to tax expenditure designations by the JCT, the Treasury Department, and the OMB. The primary purpose of compiling tax expenditure lists—to serve as a tool in creating governmental budgets and exercising spending choices—has little or no relevance in adjudication. Problems of determining the normative tax base are magnified when judges must analyze the constitutional significance of a provision that an executive agency has conceptualized as indirect spending because of its notion of an unenacted ideal. These problems go to the heart of how judges decide hard cases, whether and to what degree they defer to the opinions of other branches, and even how they define their institutional role under the Constitution.

351. That Surrey erred in this respect does not detract from the significance of his body of work. His constitutional missteps do, however, reveal that he tried to extend tax expenditure theory too far. Alas, to return to the poet whose proverb introduces this article, “[t]o err is human, to forgive, divine.” POPE, *supra* note 1, at 33; *cf. Isaiah* 53:6 (“We all, like sheep, have gone astray, each of us has turned to our own way; and the LORD has laid on him the iniquity of us all.”); 1 *John* 1:8-9 (“If we claim to be without sin, we deceive ourselves and the truth is not in us. If we confess our sins, he is faithful and just and will forgive us our sins and purify us from all unrighteousness.”).

Adding to these challenges, tax expenditure theory relies on a nebulous connection to public acceptance of a normative tax base that is in tension with the need for stability in constitutional law. Further, differentially applying tax expenditure theory would often contravene existing constitutional doctrines that require an analysis of legislative purpose, the probable effects of laws, and the locus of appropriative power. The concept of tax penalties poses unique challenges to courts, who have thus far largely not understood it. Moreover, tax expenditure theory is underdeveloped in accounting for legal history, and this deficiency is especially problematic in constitutional cases that must be resolved in part by historical inquiries.

A court that must decide the constitutional implications of a tax provision that may be a tax expenditure must also guard against misanalysis on three fronts. One is the mistake of assuming that the form of the tax provision necessarily controls its nature. The concept of mechanical interchangeability aids in this regard. Another mistake to avoid is assigning significance to changes in the magnitude of tax expenditures that are attributable to adjustments to general tax rates and taxability thresholds. A third mistake to avoid is assuming that the economic equivalence of a tax provision and a direct grant means that the former is best conceptualized as a subsidy for purposes of constitutional law. A close analysis proves that this economic equivalence means little or nothing.

Finally, the normative foundations of tax expenditure theory and those of constitutional law are distinct. Courts should not expect the same normative analysis to direct constitutional law and the selection of ideal tax bases for budgetary purposes. To apply tax expenditure theory as though its normative principles correspond to those underlying one or more constitutional clauses is both naïve and illogical. Constitutional norms, history, and constitutional text must inform constitutional analysis—not a vision of economic income as modified by incommensurable tax policy norms and the willingness of the public to embrace some lesser variant of the vision.