THE RISE, FALL, AND SURVIVAL OF THE HAIG-SIMON INCOME DEFINITION AS A POLICY GUIDE

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Revised Draft

October 20, 2025[1]

I. INTRODUCTION

When I first entered the U.S. tax policy field in the mid-1980s, a widespread consensus among experts enshrined a simple principle. To answer all sorts of normative questions, all one needed to do was apply the Haig-Simons definition of economic income. University of Chicago economist Henry Simons, in his classic 1938 work, *Personal Income Taxation*, had defined economic income as "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question."[2] In other words, income equaled consumption plus change in net worth, both measured by market value. To Haig-Simons proponents, tax policy's chief aim, leaving aside the important but less "scientific" question of how high and graduated tax rates should be, was simply to move taxable income closer to Haig-Simons income.[3]

In sum, Simons, by promulgating this concept, was thought to have defined for all time tax policy's main intellectual parameters. With the hard conceptual work having been completed, all that remained for Simons' successors was to address the many challenges posed by practical implementation.

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[1] Wayne Perry Professor of Taxation, NYU Law School. I am grateful to Conor Clarke, Ajay Mehrotra, and Lawrence A. Zelenak for helpful comments on an earlier draft.

[2] Henry C. Simons, *Personal Income Taxation: The Definition of Income As a Problem of Fiscal Policy* 50 (1938).

[3] The label "Haig-Simons income" reflects that Simons drew on Robert M. Haig, *The Concept of Income—Economic and Legal Aspects*, *in* The Federal Income Tax 1 (Robert M. Haig ed., 1921), which defined economic income as "the money value of the net accretion to one's economic power over two points in time." However, I focus in this article on Simons as he was the one whose work on the topic directly attracted widespread attention.

Haig-Simons proponents understood that equating taxable income with Haig-Simons income might often be unfeasible, either politically or administratively. Yet this in no way undermined its status for them as the "generally accepted foundation for modern day, normative analysis."[4] Hence, suppose one wanted to consider the proper tax treatment of such arguably merely "personal" items as medical expenditures, charitable contributions, state and local taxes paid, personal interest expense, casualty losses, gifts, and alimony.[5] This debate's "principal focus" would naturally boil down to choosing between "varying interpretations of the Haig-Simons definition."[6]

The above quotation comes from a law professor who was writing in 1988. By that time, leading economists had largely moved on from treating the Haig-Simons definition as so central or canonical. Two decades earlier, however, a number of leading public finance economists had been, if anything, more fervent Haig-Simons proponents than the great majority of tax lawyers.[7] Thus, Richard Musgrave explained that, while "the choice between income and consumption as the appropriate tax base involves value judgment, there is a clear case for the Henry Simons income definition once the income alternative is chosen."[8] Similarly, Joseph Pechman wrote that Haig-Simon was always "the basic concept used or implied in discussions of comprehensive income taxation," including his own.[9]

Among Haig-Simons acolytes, what Simons himself had said in *Personal Income Taxation* was often treated as having substantial, even if not entirely conclusive, evidentiary

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[4] Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 Tax L. Rev. 679 (1988).
[5] *Id.* at 681.
[6] *Id.* at 681.
[7] *See,* Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 Harv. Law. Rev. 925, 932 (1967).
[8] Richard A. Musgrave, *In Defense of an Income Concept*, 81 Harv. L. Rev. 44, 47 (1967).
[9] Joseph A. Pechman, *Comprehensive Income Taxation: A Comment*, 81 Harv. L. Rev. 63, 64 (1967). Pechman did not merely use Haig-Simons to define "comprehensive income taxation," but strongly favored the latter's adoption as the tax base.

weight.[10] It was almost as if one were quoting Freud among Freudians, or Marx among Marxists. To be sure, Simons had never claimed, like Freud or Marx, to have himself discovered radically new scientific principles. Rather, he saw himself as a synthesizer whose intellectual forebears, such as Georg von Schanz and Robert M. Haig, had earlier developed views highly consonant with his own.[11] Still, his status as an at least semi-revered prophet helped to show that Haig-Simons income was not just another item in the toolbox (as it remains today). Rather, it was both a fundamental benchmark and a locus of intellectual commitment.

Indeed, belief in the canonical status of Haig-Simons income became many tax scholars' core tenet as the members of an epistemic community – that is, "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge," based on a "shared set of normative … beliefs, which provide a value-based rationale" for their seeking to offer definitive counsel to policymakers.[12] The fact that Simons became, after his death, this community's supreme prophet for many decades– despite his having been, while alive, rather an outsider and intellectual outlier – reflected the panache with which he had performed such important functions, for a thriving epistemic community, as castigating dissenters and establishing a set of accepted boundaries for tax policy analysis.

While the rigidity of the tax policy community's adherence to its one-time tenets has mercifully faded in recent decades, the Haig-Simons income definition remains both cogent and useful. It has remained in the toolbox for good reasons. Indeed, it is still a frequent go-to when analysts want to measure, say, the tax system's progressivity in terms of people's economic

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[10] *See, e.g.,* Koppelman, *supra*, at 708 (for mixed business and personal items, "Simons has recognized in this circumstance that personal benefit is the theoretically correct standard").
[11] *See* Simons, *Personal Income Taxation*, *supra*, at 60-61.
[12] Peter M. Haas, *Introduction: epistemic communities and international policy coordination*, 46 KNOWLEDGE, POWER, AND INTERNATIONAL POLICY COORDINATION 1, 3 (Winter, 1992).

(rather than merely statutory) income.[13] Yet the Haig-Simons income definition's having seemed, during its heyday, to count for so much more demands our attention today. What might have fueled its rise and relative fall? And what do we learn going forward?

II. AN UNLIKELY UR-TEXT, BY AN UNLIKELY PROPHET

Simons' *Personal Income Taxation* is an unlikely ur-text to guide U.S. tax policy debate for the fifty years following its publication, for reasons relating to both the messenger and the message. As to the former, Simons is a surprising figure to achieve such "prominence as an intellectual architect of the income tax"[14] – which he thought should be used as "a means of mitigating economic inequality"[15] through "drastic progression."[16] He somehow combined this agenda with being a right-wing intellectual provocateur who hated the New Deal, blamed the Great Depression on labor unions, called himself "severely libertarian,"[17] worked closely with such foundational conservative icons as Friedrich Hayek and Milton Friedman,[18] and "had what one can only call the audacity to write a spirited defense of laissez-faire economic principles in 1934, at the very moment when they were at their all-time U.S. low-water mark due to the Great Depression."[19] As we will see, however, Simons' seemingly odd-couple combination between being "an extreme libertarian and a believer in massive wealth redistribution"[20] not only was less intellectually outré in the 1930s than it would be today, but also may help to account for Haig-

[13] *See, e.g.,* Eisinger, J., Ernsthausen, J., & Kiel, P. (2021, June 8). *The Secret IRS Files: Trove of never-before-seen records reveal how the wealthiest avoid income tax*. ProPublica. https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax (using billionaires' changes in net worth as computed by Forbes Magazine – in effect, their Haig-Simons income – to measure these individuals' effective income tax rates).
[14] Daniel Shaviro, *The Forgotten Henry Simons*, 41 Fla. L. Rev. 1, 3 (2013).
[15] Simons, *supra*, at 41.
[16] *Id.* at 18.
[17] Henry C. Simons, *Introduction: A Political Credo*, in Simons, *Economic Policy for a Free Society* (1948) at 1.
[18] *See* Shaviro, *The Forgotten Henry Simons*, *supra*, at 10.
[19] *Id.*
[20] Herbert Kiesling, *Taxation and Public Goods: A Welfare-Economic Critique of Tax Policy Analysis* 67 (1992).

Simons' capacity to exercise appeal across the ideological spectrum, rather than just (even if primarily) to those who are left of center.

Still, one might think at first glance that Robert Haig – the other Haig-Simons co-founder and one whose main contribution in this vein had come seventeen years earlier[21] – would have been a more promising candidate to become the definition's prime godfather. Haig was far more strongly networked in tax academia than Simons could ever hope to be, having succeeded his mentor Edwin R.A. Seligman[22] – "arguably … the preeminent U.S. tax economist since before Simons was born [in 1899]"[23] – to his chaired post at the Columbia University Economics Department, at a time when Columbia was preeminent. He also had connections that Simons lacked to rising leaders of the next generation in tax policy scholarship, such as Carl Shoup and William Vickrey.[24]

Moreover, Haig was a committed intellectual proponent of progressive tax (and other) legal and economic reform more generally – a far more mainstream intellectual position at the time than Simons' willfully provocative advocacy of laissez-faire economic principles "at the very moment when they were at their all-time U.S. low-water mark due to the Great Depression."[25] He also shared similar instincts to Simons' for giving the field exactly what it needed at the time: that is, a theoretically grounded focus on the *practical* implementation of a good-enough, workable monetary measure under real world conditions.[26] But, despite Haig's efforts to compose (with Shoup) a longer and far more detailed follow-up to his merely suggestive 1921 work,[27] he ended up being scooped by Simons, and that turned out to be it.

[21] *See* Haig, *The Concept of Income*, supra.
[22] Cite to Mehrotra at 389.
[23] Shaviro, *The Forgotten Henry Simons*, *supra*, at 30.
[24] *See* Mehrotra, *supra*, at 391.
[25] Shaviro, *The Forgotten Henry Simons*, *supra*, at 10.
[26] *See* Mehrotra, *supra*, at 392.
[27] *See id.* at 391

Successfully though Simons' *Personal Income Taxation* ended up exploiting the opening that Haig's dilatoriness had left for it, at first glance it appears a most unlikely candidate to serve as a call to arms that would resonate for decades. As Simons himself notes in the first sentence of its preface, it "combines strangely the characteristics of an academic treatise and a tract for the times," raising the well-founded concern that "it may serve neither of them well."[28] Among its other quirky features, the book spends many pages minutely assessing obscure German tax policy debates from the late nineteenth century. These pages are richly studded with long passages in untranslated German. At other points, while addressing subjects that remain of U.S. tax policy interest today, such as the income tax preferences for municipal bond interest and capital gains, its discussion is often too rooted in period-specific detail to offer later readers much detail that is distinctively useful. It thus comes as no surprise that later readers' engagement with *Personal Income Taxation* has tended to be decidedly selective. A few things evidently resonated, while the rest could be ignored.

Still, the success of *Personal Income Taxation* as a whole is far from being entirely mysterious. Simons managed, for example, to combine vehement conviction with a disarming willingness to admit that some of the problems his definition faced were "clearly hopeless."[29] He couldn't solve them, but no one else could either, and at least he was being candid about them. Moreover, he would not reject practical considerations, allow the perfect to be the enemy of the good, or claim to perfection when it plainly was unattainable. Practical and institutionally minded people, not ivory tower theoreticians, could therefore hope to profit from reading his work.

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[28] Simons, *supra*, at v.
[29] *Id.* at 53.

Simons also seems to have had an instinct for answering the needs of an emerging epistemic community that would need to police its boundaries and reward due conformity. As Ajay Mehrotra has noted, "building [the] consensus [that an epistemic community needs] requires disciplining outsiders to prevent fragmentation. By excluding or delegitimizing alternative interpretations, the community reinforces internal agreement and presents a unified front to policymakers."[30] Simons not only did this himself in *Personal Income Taxation*, but established a model for doing so that, as we will see, his followers would eagerly take up in the ensuing decades.

I next examine the main aspects of *Personal Income Taxation* that would attract such widespread buy-in and influence for many decades.

III. THE SOURCES OF *PERSONAL INCOME TAXATION*'S APPEAL

For all its wanderings and quirks, *Personal Income Taxation* also leaves enough breadcrumbs on the trail to help explain its many decades of preeminence. Sources of its appeal in the decades following its publication include the following:

A. Haig-Simons Income Definition

Chief pride of place among uses of *Personal Income Taxation* has always gone to the Haig-Simons income definition itself. Again, Simons defines economic income as the market value of the taxpayer's consumption plus change in net worth during the current accounting period (typically, a year). This was a clearer elaboration of Robert Haig's prior statement that it constituted "the money value of the net accretion to one's economic power over two points in time."[31] For decades after the publication of *Personal Income Taxation*, "[e]ven a cursory

[30] Email from Ajay Mehtrotra to author, October 6, 2025.
[31] *See* Haig. "The Concept of Income- Economic and Legal Aspects;" *supra*.

examination of the literature [would] disclose[] that the basic concept used or implied in discussions of comprehensive income taxation [wa]s the Haig-Simons definition."[32]

This definition proved salient for a number of reasons. In the eighty years before its publication, the U.S. had enacted brand new federal income tax systems three separate times. It also had added the Sixteenth Amendment to the U.S. Constitution, restoring the constitutionality of federal income taxation after a right-wing Supreme Court, panic-stricken about supposed "attack[s] upon accumulated property by mere force of numbers,"[33] had held it unconstitutional[34] in one of the Court's all-time "greatest breaches of *stare decisis* … [and judicial] restraint."[35]

But the tax law had never tried to define income crisply at a general, conceptual level. Indeed, the era's operative Internal Revenue Code provision circularly stated that gross income "includes gains, profits, and income … of whatever kind"[36] – thereby explaining that, yes, "income" includes "income." Meanwhile, the Supreme Court had wreaked further mischief, in the post-Sixteenth Amendment case *Eisner v. Macomber*,[37] by holding, in an exceptionally murky and incoherent opinion, that income from a capital investment was not within the Amendment's scope (and indeed, was not truly "income") unless it had been realized, which the Court took to mean "*severed from* the capital … being '*derived* – that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal."[38] While the Court had largely cribbed this opinion from a recently published article by Seligman,[39] that article's

[32] Pechman, *supra*, at 64.
[33] *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, 583 (1895), *affirmed on rehearing*, 158 U.S. 601 (1895).
[34] More specifically, *Pollock* held that federal income taxation was unconstitutional without apportionment between the states, a refinement that was widely viewed as practically and politically unfeasible.
[35] Bruce Ackerman, *Taxation and the Constitution*, 99 Columbia L. Rev. 1, 28-29 (1999).
[36] From §22(a) of the IRC as in force in 1938.
[37] 252 U.S. 189 (1920) (emphases in original).
[38] *Id.* at 207.
[39] Edwin R.A. Seligman, *Are Stock Dividends Income?*, 9 Am. Econ. Rev. 517 (1919).

incoherence stood in the way of properly defining income *legally*, while also inviting efforts to do the economics better than Seligman had.

Motivating the search for a proper income definition was the belief that (1) relative tax burdens should depend on people's "ability to pay," and (2) income offered the best measure of ability to pay.[40] Simons' proposed economic definition, through its reliance on the market values of the taxpayer's consumption and change of net worth, steered between Scylla and Charybdis in an important sense. On the one side, it avoided the idiotic narrowness of Seligman's insistence on the occurrence of formal realization events that might be wholly discretionary on the taxpayer's part. On the other side, it offered at least potential practicality. Market value – as compared with, say, psychic utility – is measurable, at least in principle. Moreover, in operationalizing "ability to pay," market value provides an at least plausible instantiation, if not one that is beyond criticism.[41] Also, it is plausible that taxing equal market values the same will tend to reduce socially wasteful tax planning, whereas taxing them unequally will tend to encourage it.

The Haig-Simons income concept also proved appealing to multiple intellectual (if not so much political) constituencies. On the left, people realized that it could be used to help make the tax system more genuinely, not just nominally, progressive. Rich people whose economic income was mainly excludable would pay far more tax if the tax base were broadened without lowering tax rates.

[40] *See, e.g.,* James Alm, *Is the Haig-Simons Standard Dead? The Uneasy Case for a Comprehensive Income Tax*, 71(2) Nat'l Tax J. 379, 383 (2018). However, even if one accepts the first of these two premises – which requires defining what we mean by ability to pay – the second is highly contestable. Income is a kind of snapshot measure of ability to pay, which ignores both expected future income (effectively presumed to have zero current relevance) and one's wealth accumulated in the past (except insofar as it earns a current-period return).

[41] *See, e.g.,* Stephen Utz. *Ability to Pay*, 23 Whittier L. Rev. 867, 875 (2002), noting that "the great majority of technical commentators in [the United States] who invoke the ability to pay approach do so in loose conjunction with an acceptance of the Schanz-Haig-Simons definition of income."

On the right, this rationale for base-broadening naturally had less (if any) appeal. However, Simons' own example shows how a neutral tax base (as between same-market-value alternatives) could resonate for people with libertarian sentiments. As a 1930s libertarian, Simons "hated wealth inequality [and] concentrated economic power … [no less than] centralized political power."[42] Indeed, he hated both of these "for exactly the same reasons and in exactly the same way"[43] – i.e., as reducing people's true independence and autonomy. Thus, for him, breaking up huge economic fortunes stood on the same ground as paring back the government's exercise of regulatory power, or preventing labor unions from "behav[ing] monopolistically."[44]

Libertarianism has changed since then, in the direction of focusing almost exclusively on government, rather than private market, concentrations of power. But even today's libertarian conservatives may still appreciate the other great advantage, in Simons' view, of having a broad-based, relatively comprehensive income tax system. "Insofar as [such as system] treated all different types of income neutrally, it avoided engaging in selective economic regulation…. Taxing all income as alike as possible keeps the government out of the price-fixing and resource allocation business, thus preserving free market conditions and limiting centralized political power."[45] Decades later, when bipartisan cooperation helped yield the base-broadening Tax Reform Act of 1986, such considerations may have helped to win Republican support.

Adopting Haig-Simons as a benchmark also could have strong non-ideological appeal to people of an academic cast of mind. A case in point is Stanley Surrey, the renowned Harvard tax law professor (and high Treasury official under the Kennedy and Johnson Administrations) who,

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[42] Shaviro, *The Forgotten Henry Simons*, *supra*, at 4.
[43] *Id.*
[44] Henry C. Simons, *For a Free-Market Liberalism*, 8 U. Chi. L. Rev. 202, 205 (1941).
[45] Shaviro, *The Forgotten Henry Simons*, *supra*, at 24-25.

"[f]rom the 1950s through the early 1980s, … was tax law's prevailing … "crusade[r]" for Haig-Simons-based tax reform.[46] In his memoirs, Surrey describes his quest, while still a law student, to find "deeper intellectual meaning and consequence" in his legal studies, as distinct from the "deadly dull[ness]" that he found pervasive in such topics as civil procedure.[47] Enlisted by a tax law professor to help discern the "legal concepts" of income – in a joint study that also involved R.M. Haig setting forth the "economic concepts" – Surrey describes his experience of what I have called his "Saul-on-the-road-to-Damascus moment:"[48]

> I was forced to find the theoretical strands that held the structure [of the income tax] together. As a result I had the rare opportunity early on to obtain a sense of that structure as a whole and to understand that the structure could be analyzed and dealt with in logical terms. A rational framework could be devised for the structure and in turn structural errors could be perceived. I saw the income tax not as a random body of rules and edicts but as an internally consistent framework. All of my later work has been dominated by that approach.[49]

In short, Surrey's quest to find higher meaning and coherence in the income tax law, rather than just a "random body of rules," predisposed him to grasp excitedly at a theory that offered such meaning and coherence in readily digestible bites. He was just one of many who, for decades to come, would appreciate the Haig-Simons definition's capacity to answer this need.

B. Focus on Practical Considerations in Income Tax Implementation

Simons' provision of a relatively clear theoretical framework for thinking about income taxation was not all that he offered adherents. Crucially, he combined this with a strong practical focus on implementability. Thus, for example, he urged that the income definition a tax system

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[46] Daniel Shaviro, 'Moralist' Versus 'Scientist': Stanley Surrey and the Public Intellectual Practice of Tax Policy, 86 *Law and Contemporary Problems* 235-269 (2023) at 235.
[47] *Id.* at 240.
[48] *Id.*
[49] *Id.*

employed seek not only “fairness among persons,” but also “simplicity of its underlying rules, and … possibilities of effective enforcement.”[50] He continually emphasizes this in his discussion of particular issues, while also refusing to chase unneeded and unattainable theoretical perfection.

For example, for all of his harsh criticism of deeming realization a theoretical prerequisite for finding income, Simons accepts that it “may properly be introduced as a practical expedient,”[51] given that one faces a practical “problem in valuation: When should value changes be recognized?”[52] At the same time, however, “[t]he reconciliation which the realization criterion postpones must be effected some time, if wholesale avoidance is to be prevented; and many considerations, especially the fact that property must be appraised for probate and/or for estate and inheritance taxation in any event,”[53] supported imposing realization at death.

One of Simons’ most controversial tax reform proposals, even among his supporters, likewise reflected considerations of administrative practicality. He argued that all gifts, if sufficiently valuable to be worth the administrative trouble, should be taxed to the recipient in addition to being nondeductible by the donor – leading to “double-counting” of gifts’ value that he argued should not be a concern.[54] However, this was not just based on the theoretical point that – as he noted – a gift makes the recipient better-off, while for the donor it is a voluntary and hence consumption-like expense.[55] In addition, the donee exclusion for gifts that the U.S. federal income tax has always featured makes it “necessary to distinguish among an individual's receipts according to the intentions of second parties. Gratuities denote transfers not in the form of

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[50] Simons, *Personal Income Taxation, supra, at 129-130.*
[51] *Id.* at 100.
[52] *Id.*
[53] *Id.* at 165.
[54] *Id.* at 134.
[55] *Id.* at 139.

exchange – receipts not in the form of 'consideration' for something 'paid' by the recipient…. [N]o objective test would be available; and, if the distinctions may be avoided, the income concept will thus be left more precise and more definite."[56]

While Simons' proposed tax treatment for gifts has won few adherents, his claim that it would eliminate the thorny problem of identifying true gifts is well-taken. More generally, by emphasizing, throughout *Personal Income Taxation*, the need for simple, clear, practical rules that are merely equitable enough to pass muster, Simons both set a model for adherents to follow and gave his work credibility as a guide that one could practicably embrace.

C. Acknowledging Insoluble Conundrums

One of the most famous passages in *Personal Income Taxation* is its invocation of the German writer Kleinwächter's conundrum of the Flugeladjutant. In discussing the question of whether the value of employees' in-kind job-related benefits should be included as taxable compensation, Simons relates:

> We are asked to measure the relative incomes of an ordinary officer serving with his troops and a Flugeladjutant to the sovereign. Both receive the same nominal pay; but the latter receives quarters in the palace, food at the royal table, servants, and horses for sport. He accompanies the prince to theater and opera, and, in general, lives royally at no expense to himself and is able to save generously from his salary. But suppose, as one possible complication, that the Flugeladjutant detests opera and hunting.[57]

We see here a conflict between market valuations of consumption benefits, which would call for full inclusion of most if not all of these perks, with the posited lack of subjective value

[56] *Id.* at 57.
[57] *Id.* at 53.

placed on them by the Flugeladjutant, which might call for a far smaller inclusion. This problem is indeed a familiar one in income tax administration.[58]

Simons' response to the conundrum gains credit here, not from its offering a distinctive solution, but from his tone, which combines candid acknowledgement of its difficulty with suggesting that the problem is really no big deal:

> The problem is clearly hopeless. To neglect all compensation in kind is obviously inappropriate. On the other hand, to include the perquisites as a major addition to the salary implies that all income should be measured with regard for the relative pleasurableness of different activities – which would be the negation of measurement…. Fortunately, however, such difficulties in satisfactory measurement of relative incomes do not bulk large in modem times; and, again, these elements of unmeasurable psychic income may be presumed [although, on what basis??] to vary in a somewhat continuous manner along the income scale.[59]

In short, against any implication that this is a conceptually serious problem, Simons offers what trial lawyers would call a demurrer, to the effect that, even though true, it is largely immaterial. He thus defuses the conundrum far more effectively than if he were to deny that there was any problem at all.

This strategy's effectiveness can be discerned from the fact that, as John R. Brooks has noted, "Simons is usually read as effectively rebutting Kleinwächter,"[60] whereas in fact he does nothing of the sort. Instead, all he does is "assume[] away the problem"[61] by "just decid[ing] that it does not matter."[62] But getting the credit for "resolving important definitional questions" when

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[58] Under U.S. federal income tax law, *see, e.g., Benaglia v. Commissioner*, 36 BTA 838 (1937) and Internal Revenue Code section 119.
[59] Simons, *Personal Income Taxation*, *supra*, at 53.
[60] John R. Brooks, *The Definitions of Income*, 71 Tax L. Rev. 253, 255 (2017).
[61] *Id.* at 263.
[62] *Id.* at 264.

in truth one has merely "either dismiss[ed] them or rephrase[d] them,"[63] is no mean rhetorical achievement.

Still, as a matter of intellectual substance, Simons' "refutation" of Kleinwächter is all hat and no cattle. And indeed he missed the best available line of response to one who had so tellingly identified measurement problems that (as Simons conceded) were "clearly hopeless."[64] This would have been to argue, first, that "we do not need a pure definition of income to make policy choices,"[65] and, second, that Kleinwächter was wrong to think that he could really avoid such problems, rather than merely push them out of sight, by taxing (as he advocated) consumption instead of income.[66] After all, consumption is a part of economic income, and indeed is the part (as opposed to changes in net worth) to which his conundrums apply.

D. **Attack on Utility- and Welfare-Based Analysis**

"Know your audience" is the standard advice given to stand-up comedians when they are just starting out. One shouldn't go over their heads, just as one shouldn't aim too low by their lights. And it helps if one's taste is indeed genuinely aligned with theirs.

Such an alignment in taste arguably aided the historical influence of *Personal Income Taxation*. Simons was an economist who taught at a law school, and whose target audience consisted chiefly of lawyers, policymakers, and economists of an institutional, rather than an abstractly theoretical, bent. In general, this was not an audience keen to explore the latest mathematical refinements in abstract economic theory about utility maximization, including what Simons calls "hedonistic welfare economics."[67]

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[63] *Id.* at 259.
[64] Simons, *Personal Income Taxation*, *supra*, at 53.
[65] Brooks, *supra*, at 266.
[66] Kleinwächter reportedly expressed support for consumption taxation, in lieu of income taxation, on fairness as well as administrative grounds.
[67] Simons, *Personal Income Taxation*, *supra*, at 13.

With this in mind, consider some of the things that Simons has to say about the use of utility and related terms in tax policy analysis:

--Concepts such as “sacrifice,” “ability,” and “faculty” in the public economics literature have “contributed about as much confusion, with respect to the ethics of public policy, as has ‘utility’ with reference to the explanation of human behavior.”[68]

--“[V]otaries of hedonistic welfare economics … [need to avoid] revealing the crucial importance of [certain] step[s] in the argument.”[69]

--“[T]he case for equality (for less inequality) is enormously stronger than any utility foundation on which it can be rested; indeed … hedonistic ethics … shrivels almost to absurdity” upon close examination. [70]

--"To assert that considerations of utility determine the allocation of consumption funds explains nothing at all but merely says, with egregious extravagance of language, that people consume what they consume.”[71]

--“[N]o ideas of utility … have any place in [an] ultimate, ideal conception [of income].”[72]

Viewed from a modern perspective that is more sympathetic than Simons was to the value of utility and welfare conceptions in promoting clear and consistent thinking (if not determinate answers to anything), these jibes can have an off-putting air of jeering know-nothingism. But, whether or not they were intellectually well-conceived, they may have helped to boost *Personal Income Taxation*’s appeal to an educated, yet technically untrained and

[68] *Id.* at 5.
[69] *Id.* at 12.
[70] *Id.* at 14.
[71] *Id.* at 95.
[72] *Id.* at 106 n. 6.

middlebrow, mid-twentieth century audience that was made uneasy by advanced and seemingly arcane philosophical and often mathematical treatments of utility and welfare.

5. Attack on inequality for unspecified reasons

Perhaps the main rival to the Kleinwächter reference for the title of second most famous passage in *Personal Income Taxation* (after the income definition itself) is Simons' explanation of why he abhors inequality, and thus favors "drastic progression" through the tax system. To place this explanation in context, it comes only after he has spent many pages denouncing tax policy writers whose bogus, in his view, grounds for favoring greater equality reveal that they are "dissembl[ing]" their true underlying beliefs by "maintain[ing] a pretense of rigorous, objective analysis untinctured by mere ethical considerations."[73] These aspiring, but fake, scientists "religiously eschew a few proscribed phrases, clutter up title-pages and introductory chapters with pious references to the science of public finance, and then write monumental discourses upon their own prejudices and preconceptions."[74]

Having scathingly disposed, at least to his own satisfaction, of all the main grounds in the existing literature for favoring progressive redistribution, Simons turns to his own rationale for it. In a word, he proposes simply to be forthright about his own prejudices. Then comes the famous sentence: "The case for drastic progression in taxation must be rested on the case against inequality – on the ethical or aesthetic judgment that the prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is *distinctly evil or unlovely*"[75] (emphasis added). And with that said, Simons moves on to discussing tradeoffs and methods of implementation.

[73] *Id.* at 1.
[74] *Id.* at 2.
[75] *Id.* at 18-19.

On its face, this explanation seems distinctly unsatisfying. As Walter Blum and Harry Kalven noted in their famous 1952 study *The Uneasy Case for Progressive Taxation*, "[t]his approach … of necessity forecloses any further discussion."[76] Moreover, it suggests a purely aesthetic analysis, akin to taking a stance on whether or not men's clothing can tastefully mix stripes and plaids.

Yet it arguably helped burnish *Personal Income Taxation*'s mid-twentieth century stature, in much the same way as Simons' closely related attack on utility- and welfare-based analysis did so. He both avoids narrowing the book's appeal by putting controversial cards on the table, and appeals again to middlebrow skepticism that highfaluting experts, with their abstruse and complicated models, could have anything of value to teach the rest of us.

Indeed, Blum and Kalven themselves, despite their apt response to Simons' ex cathedra pronouncement, do something similar in their own analysis. After questioning all the arguments for progressive taxation that they find in a vast literature, they conclude that the case for it is "stubborn but uneasy. The most distinctive and technical arguments advanced in its behalf are the weakest …. however intricate their formulations."[77] Even the case for reducing inequality, which they view as having "stronger appeal" than all the rest, is "itself perplexing."[78] Yet they continue, it seems, to "f[i]nd the notion of progression … congenial,"[79] and the sentiments in its favor too "stubborn"[80] to just dismiss, despite the difficulties that they discern in detecting any sound "basis on which an idea [so] initially attractive … can be justified."[81]

[76] Walter Blum and Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417, 488 (1952).
[77] *Id.* at 519-520.
[78] *Id.* at 520.
[79] *Id.* at 418.
[80] *Id.* at 419 and 519.
[81] *Id.* at 419.

In short: they like reducing inequality just because it is an instinctive preference that they happen to have. And their attacking all of the leading justifications for their own instinctive preferences, without changing sides, provides a performance of the most high-minded intellectual rigor and honesty. Better to do this than, in Simons' earlier words, to "maintain a pretense of rigorous, objective analysis"[82] that in truth merely reflects one's own unstated "prejudices and preconceptions."[83]

It is on such grounds that Simons' seemingly merely aesthetic aversion to inequality, like Blum's and Kalven's slightly later arrival at a similar place, may have significant curb appeal despite what one might deem to be its intellectually threadbare character. But a further irony is that Simons actually had a lot more to say about why he objected to inequality. He just didn't happen to say it in *Personal Income Taxation*. Thus, it would remain unknown to his readers unless they were acquainted with his other, mainly nontax, writings.

As it happens, the words "evil" and "unlovely" in *Personal Income Taxation* are directly lifted from Simons' earlier (1934) libertarian cri de coeur, *A Positive Program for Laissez-Faire*[84] – a piece which, outside the tax field, was in that era his best-known work.[85] Simons drops a breadcrumb relating to *Positive Program* in a footnote at the start of *Personal Income Taxation*, where he calls taxation "only a small element" in his broader social policy views, and states that his "argument regarding income taxation … may … [be] better understood, as part of [the broader] scheme" that *Positive Program* lays out.[86]

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[82] Simons, *Personal Income Taxation*, *supra*, at 1.
[83] *Id.* at 2.
[84] *See* Henry Simons, *A Positive Program for Laissez-Faire* 51-52 (1934.
[85] Aaron Director, Prefatory Note to Henry C. Simons, *Economic Policy for a Free Society* v, vi (1948).
[86] Simons, *Personal Income Taxation*, *supra*, at 2 n. 2.

In both *Positive Program* and related work, Simons lays out sustained denunciations, both of centralized economic planning as leading inexorably to dictatorship, and of private monopoly power as equally odious and dangerous.[87] This, in turn, reflects his adherence to classic (i.e., nineteenth century) liberalism as a system that "gives special place to liberty (and nearly coordinate place to equality) as a 'relatively absolute absolute.'"[88] These two values are linked, moreover, by the difficulty of having either one without the other. "Freedom without power, like power without freedom, has no substance or meaning."[89] And this presumably applies to economic freedom no less than to political freedom, given Simons' practice of linking the two. In his view, therefore, an overly economically unequal society, even if brought about by free market outcomes rather than by the exercise of government power, is one in which people at the bottom are intolerably unfree.

This is a horizontal, or even a leveling, vision of both economic and political power. Simons does not like plutocrats rising far above the peasants any more than he likes Washington bureaucrats telling private economic actors what to do. Its intellectual roots may lie in the pre-World War I Gilded Age of Simons' childhood.[90] This was an era whose concerns about the over-powerful rich seem far timelier today, amid our ongoing second Gilded Age, than they did to mid-twentieth century Americans – amid the era's Great Easing of high-end inequality[91] – when Simons' direct intellectual influence was at its peak. But again, one could read *Personal Income*

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[87] *See* Simons, *Positive Program, supra*, at 40-51.
[88] *See* Simons, *Introduction: A Political Credo, supra*, at 2.
[89] *Id.* at 6.
[90] *See* Sherry Davis Kasper, Why Was Henry Simons Interventionist: The Curious Legacy of a Chicago Economist 5 (June 22, 2011) (unpublished manuscript), *available at* http://www.learningace.com/doc/5293928/7fbcc044dab921c837d7204dff3865e7/paper11kasper.
[91] On the Great Easing, *see, e.g.,* Daniel Shaviro, *Literature and Inequality* 5 (2020).

Taxation very carefully without discerning what lies behind what may seem merely a refined aesthete's instinctive shuddering at inequality's "unloveliness."[92]

E. Discussions of Prior Tax Policy Literature

Unsurprisingly, Simons' ruminations regarding untranslated passages from turn-of-the-twentieth-century German tax scholars left little evident mark on U.S. tax policy debate. However, *Personal Income Taxation* also notably critiques two major American intellectual figures, in each case for advocating a prominent alternative to Haig-Simons income taxation. One of these critiques is harsh and contemptuous, the other deftly respectful, but each helps to dramatize the case for Simons' preferred approach.

1. The attack on Edwin R.A. Seligman

When *Personal Income Taxation* came out, Edwin R.A. Seligman not only had been the preeminent U.S. tax economist for more than forty years, but had strong progressive credentials. "By leading the theoretical movement for a permanent, progressive income tax" in lieu of tariffs, Seligman and his peers had "bec[o]me the architects or visionaries of the modern American fiscal state."[93] They thereby "helped shift the burden of financing a modern, industrial democracy onto those segments of early 20th century American society that had the greatest taxpaying ability, namely wealthy citizens in the North and Northeast."[94] Given that Seligman, "the son of one of New York's most affluent banking families,"[95] belonged by birth to the social group most directly targeted by this shift, this certainly showed a willingness on his part to take a large view, rather than a narrowly selfish one.

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[92] Much of this paragraph and the prior one are taken from Shaviro, *The Forgotten Henry Simons, supra*, at 23-24.
[93] Ajay Mehrotra, *Edwin R.A. Seligman and the Beginnings of the U.S. Income Tax*, __ Tax Notes 933, 934 (2005).
[94] *Id.* at 933.
[95] *Id.*

Seligman had also, however, more recently become notorious for his intervention in *Eisner v. Macomber*,[96] which even his colleague and former student Robert M. Haig saw as "leading toward a definition of income so narrow and artificial as to bring about results which from the economic point of view are certainly eccentric and in certain cases little less than absurd."[97] What motivated this intervention by Seligman remains unclear, as it arguably set back his policy aim of strengthening the income tax, and as he recognized that it was an open question in the field whether or not "income" required realization.[98] Perhaps it was just the more or less random fruit of Seligman's broader intellectual penchant for murky, ponderous, and self-satisfied abstract theorizing.

Seligman's (and the Supreme Court's) claim that unrealized income was not actually income stood in sufficiently sharp contrast to the view taken in *Personal Income Taxation* to demand a response from Simons, and indeed it gets one. Simons does not hold back. His merciless mockery of this eminent elder stateman in his field brings to mind an aggressive young heavyweight brutally pummeling a creaky ex-champion. For example:

--Seligman assumes what he needs to in order to supply the end result he wants, "then moves merrily to his conclusion."[99]

--Seligman starts by defining income as consumption, but "[b]efore long . . . income becomes something more familiar—savings being slipped in quite unceremoniously."[100]

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[96] It is unclear from the record how direct a role Seligman meant to play in *Eisner v. Macomber*. His American Economic Review piece conveniently came out while the case was pending before the Supreme Court, and was submitted by the taxpayer, along with its brief, as part of the case file, but I know of no indication that Seligman himself had any financial or other relationship with the taxpayer or her counsel in connection with the proceedings.
[97] Haig, *The Concept of Income—Economic and Legal Aspects*, *supra*.
[98] Edwin R.A. Seligman, *Introduction*, The Federal Income Tax vii–viii (Robert M. Haig ed., 1921).
[99] Simons, *Personal Income Taxation*, at 85.
[100] *Id.*

--At one point in Seligman's argument, "income" depends on value, but soon enough this "ceases to be true."[101]

--A periodicity requirement for income is "essential" at two points in Seligman's argument, but at another point "is excluded utterly."[102]

--"Seligman's differentiation between the growth of a herd and the growth of a forest is one of the less obscure features of his argument."[103] Later on, "[i]ncome depends on the number of trees cut—but only provided they do not cut too many!"[104]

--"After an extended parade of dogmatic assertions—put forward as necessities of logic—the author [adds yet another extraneous argument] . . . rather casually."[105]

--"Professor Seligman's insistence both upon 'realization' and upon depreciation deductions seems to involve serious logical difficulties."[106]

--"Of course, it goes without saying that, after dragging in an amazing variety of income concepts and choosing useful attributes from different ones at will, Seligman finds little difficulty in throwing out an item like stock dividends, which was almost defenseless from the start."[107]

Ruthlessly trashing an overrated big name – be it Seligman or, by proxy, the U.S. Supreme Court majority that had so ingenuously joined him in shambling through a bucolic metaphorical host of trees and forests, herds and fruit[108] – is a well-established way of making one's own bones as a reliable commentator as well as of establishing an epistemic community's

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[101] *Id.* at 86.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 87.
[105] *Id.*
[106] *Id.* at 88.
[107] *Id.*
[108] *See Eisner v. Macomber, supra*, at 207.

mandated beliefs. But Simons' far more respectful critique of Irving Fisher, his second adversary in the U.S. tax reform debate, further adds to the impact, by showing that he is capable of due discrimination between the exponents of rival viewpoints.

2. The more respectful critique of Irving Fisher

Having briskly disposed of Seligman, Simons turns to the other leading contemporary intellectual opponent of Haig-Simons income taxation, Irving Fisher. Here he is hunting a very different class of game, and he evidently knows it.

Today, "Fisher is widely regarded as the greatest economist America has produced. A prolific, versatile and creative scholar, he made seminal and durable contributions across a broad spectrum of economic science."[109] Among other things, he was "America's first mathematical economist"[110] and, as Simons acknowledges (minus the laudatory adjective), had engaged in pathbreaking "analysis of the problem of capital and interest …. [through] time-preference theory."[111] From this work, Fisher had reached the conclusion – universally accepted in public economics today although "weak[ly]" and uncomprehendingly contested at the time by such contemporaries as Richard Musgrave[112] – that an income tax discourages saving, whereas a consumption tax can be neutral between consuming now and saving now to fund consumption later.

Suppose, for example, that X and Y each receive $91 today. X spends this amount immediately, but Y saves the $91 for a year (at just below 10 percent interest) and thus earns another $9. Under an income tax, both will pay tax on the $91 receipt, but only Y will owe tax in

[109] James Tobin, *Irving Fisher 1867-1947*, 64 Am. J. Econ. & Sociology 19 (2005).
[110] *Id.*
[111] Simons, *Personal Income Taxation, supra*, at 89.
[112] John B. Shoven and John Whalley, *Irving Fisher's Spendings (Consumption) Tax in Retrospect*, 64 Am. J. Econ. & Sociology 215, 219 (2005).

a year on the additional $9. Hence – whether or not there is anything wrong with this result – Y is taxed more than X, thus demonstrating that an income tax disfavors saving relative to immediate consumption.

Based on this indisputable (albeit, at the time hotly disputed) truism, Fisher had further concluded that taxing Haig-Simons income, which includes returns to saving and thereby discourages it, was "extremely socially destructive"[113] and should be avoided. He thereby proposed, decades before any other leading economist, that the U.S. adopt what we would now call a progressive cash-flow consumption tax, which would essentially start from income but then allow taxpayers to deduct all savings, while requiring them to add to "income" all dissaving.[114]

In *Personal Income Taxation*, Simons disputes the "wisdom of graduating personal taxes according to consumption rather than according to a more inclusive measure of economic power …. [when] there is an urgent social and political problem of preventing excessive and persisting inequality of power."[115] In his response to Fisher, however, he relies less prominently on this concern than on a neatly executed bit of semantic jujitsu.

In arguing for what we would call consumption taxation, Fisher had asserted that it was not only both feasible and desirable, but also expressed the actual true form of an "income" tax. In Fisher's view, an income tax, as conventionally defined to include both consumption and returns to saving, involves the "fallacy of double counting," because it applies twice to assets' capitalized value – first when they are received, and then again when they generate annual consumption or cash returns. "[S]avings may be invested in land or in confectionery. The only

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[113] Shoven and Whalley, *supra*, at 216.
[114] *See id.* at 219-223.
[115] Simons, *Personal Income Taxation, supra*, at 229.

true income is the use of the land or the use of the confectionery. To include also the value of the land or the value of the confectionary is to count as income the capitalization of income."[116] Thus, taxing returns to saving was not merely a bad policy idea (although it was that as well), but also was actively fallacious, reflecting the "confusions"[117] promulgated by sloppy writers.

Thus, restating the prior example, suppose that today I receive a right to be paid $100 in a year. At just below a 10 percent interest rate, this right is worth $91 today. In Fisher's view, taxing me both on $91 today and on the $9 accretion in a year is double taxation, because it reaches the value of the same thing twice. After all, $91 is merely the discounted present value of $100 in a year. To this, however, Richard Musgrave later responded that "[i]nterest on accumulation is a further accretion, and the tax thereon is [thus] a new tax on new income."[118]

In the decades since Fisher took this stance, it has become clear to all that there is absolutely nothing to be gained from debating whether or not this constitutes "double taxation" of the same thing. Instead, Fisher's basic point can be put as follows. Once one has received the $91 present value, one can choose to either (a) spend it immediately, such as by realizing cash that one uses to fund immediate consumption, or (b) save for a year and receive the additional $9 accretion in due course. However, under an income tax, course (b) will generate a higher overall tax liability than course (a). Hence, as shown above, income taxation discourages saving.

One could then further argue (as consumption tax advocates have) that the tax on the saver's $9 of income is horizontally inequitable. Returning to X and Y above, we might regard them as equally well-off over time even though X chooses to spend $91 immediately, while Y chooses to spend $100 in a year. After all, they both faced the same choice and merely, it

[116] Irving Fisher, *The Nature of Capital and Income* 108-09 (1906).
[117] *Id.* at 107.
[118] Richard Musgrave, *The Theory of Public Finance: A Study in Public Economy* 162 (1959).

appears, had different intertemporal consumption preferences. This, in turn, might support concluding that Y should pay the same tax (in present value) as X, not more by reason of her happening to have chosen course (b) rather than course (a).

Debates between this view, and the pro-income tax response holding that Y was indeed $9 better-off than X by reason of the interest income, have continued to the present day. However, Fisher's claim of internal self-contradiction and double-counting, such that "income" does not properly include both the discounted $91 and the $9 accretion, opened the door for Simons to answer Fisher semantically.

He starts by noting that Fisher "recognizes clearly the income concept which we have tried to define and only inveighs against its being called income instead of earnings."[119] Thus, their disagreement is "essentially one of terminology rather than of logic."[120] While the question of how to define a given term is "only that of choice among verbal symbols …. it seems a hardly debatable proposition that usage is already too firmly established to permit our accepting Fisher's proposal"[121] regarding what "income" actually means. It "comes all too tardily in the history of our language; and his pleas have been, and must be, without effect upon our courts, legislatures, accountants, and men of affairs—not to mention the economists."[122]

Here Simons clearly has a point. "Income" had indeed, by the 1930s, acquired the common meaning that he gives it. Fisher's semantic argument amounts to saying that accepted usage ought to be revised because of what he views as its defects in consistent internal logic. But words generally mean what they mean. Fisher's intellectual successors in support of progressive

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[119] Simons, *Personal Income Taxation, supra*, at 89.
[120] *Id.*
[121] *Id.* at 98.
[122] *Id.* Much of this paragraph and the prior one are taken from Shaviro, *The Forgotten Henry Simons, supra*, at 26-27.

consumption taxation – for example, Nicholas Kaldor in the 1950s[123] and David Bradford in the 1980s[124] – evidently recognized this. Conceding the semantic point, they would speak instead of taxing "expenditure" or "consumption" in lieu of income.

For Simons, however, Fisher's focus on semantics permits a more telling dismissal of his arguments than might have resulted from Simons' foregrounding the policy issues posed by the income versus consumption tax choice. He manages to combine respectful treatment of an economist who was far more intellectually formidable than poor Seligman, with no less strongly suggesting that the posited alternative to Haig-Simons income can be rejected out of hand as absurd. But once again, he offers the lesson that his antagonist's views lie outside the proper realm of debate within the still-fledgling epistemic community of U.S. income tax scholars.

F. The View of Savings

While Simons' principal response to Fisher is semantic, he takes care to address as well the normative view underlying Fisher's claim that, in terms of the above example, X and Y should pay the same tax in present value. Suppose that, under a 20 percent consumption tax, X would pay $18.20 upon consuming $91 in Year 1, while Y would pay $20 upon consuming $100 in Year 2. These two amounts have the same present value at a nearly 10 percent interest rate, supporting the claim that consumption taxation can be neutral as between (a) consuming now, and (b) saving now so as to consume later.

Fisher's time-preference theory helped to explain his view that X and Y ought to pay the same amount of tax in present value terms. The main idea is that, due to "impatience" that may include both rational and irrational elements (such as unduly discounting the future), people

[123] *See* Nicholas Kaldor, *An Expenditure Tax* (1955).
[124] *See* David F. Bradford and the U.S. Treasury Tax Policy Staff, *Blueprints for Basic Tax Reform* (2nd ed., 1984).

generally prefer to consume sooner, even though they may decide to defer consumption due to the positive interest return that they can earn by doing so.[125]

This theory was an important step on the way towards the development, thirty years later, of a full-blown life cycle model, based on postulating that all savers seek to smooth consumption over the lifetimes, based on the marginal utility that they ascribe to the next unit of consumption in each period.[126] The impulse to smooth reflects the fact that, for example – impatience notwithstanding – one might prefer (a) one dinner plus one place to sleep both tonight and a year from now, to (b) two dinners and places to sleep tonight and none next year.[127] However, while impatience and smoothing are two distinct things,[128] Fisher fully anticipates his successors' view that, when one defers consumption and thus saves, one is trading off between consumption in different periods.

This approach draws Simons' ire in *Personal Income Taxation*:

> Time-preference theories are also interesting for their emphasis upon consumption as the unique end of all economic behavior. The discounting process is conceived in terms of choices between present and future consumption goods, as though all saving were intended as redistribution of consumption through time. Now the observable fact is that many people save instead of consuming, just as some smoke pipes instead of cigarettes; and it seems reasonable to hold that the choices are of the same order in the two cases. To assert that considerations of utility determine the allocation of consumption funds explains nothing at all but merely says, with egregious extravagance of language, that people consume what they consume.[129]

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[125] *See* Irving Fisher, *The Theory of Interest* 72-73 (1930).
[126] On the life cycle model, *see* Richard Thaler, *Irving Fisher: Modern Behavioral Economist*, 87 Am. Econ. Rev. Vol 2, Papers and Proceedings 439 (1997); Daniel Shaviro, *Time is, Time Was: Evaluating the Use of the Life Cycle Model as a Fiscal Policy Tool*, in Frank Fagan and Saul Levmore (eds.), *Research Handbook on Law and Time* 232-233 (2025).
[127] Shaviro, *Time is, Time Was, supra*, at 235.
[128] *See* Thaler, *supra,* at 239.
[129] Simons, *Personal Income Taxation*, *supra*, at 95.

One can see two distinct elements at work in Simons' skepticism about the time-preference view of saving. First, he rejects standard neoclassical assumptions about rational optimization. "Many people save merely because it is the thing to do, because it is expected of them."[130] So there is simply no point to advanced economic analysis that is based on positing optimization across long periods of time.

Second, even insofar as people have rational aims in mind when they save, these might not pertain to future consumption. Greater savings "may mean increase of power, greater freedom, security, prestige, and respectability. These are as much objectives of endeavor as are lapels on one's coat or diamonds on shirt fronts."[131] This, rather than rejecting economic analysis as such, sounds themes that are logically reconcilable with rational choice, and that income tax proponents would continue to sound in the future. Thus, consider the following from Liam Murphy and Thomas Nagel's *The Myth of Ownership* (2002), questioning Fisher-style arguments for consumption taxation:

> Does wealth find a place in the most appropriate metric for the collective political assessment of social outcomes? …. [While all agree that] consumption will be part of the best metric …. it should be obvious that wealth is an independent source of welfare, quite apart from the fact that some of it may be consumed later…. [For example, unconsumed wealth augments] security, political power, and social standing…. [Hence,] savings and wealth are [not just] subsidiary to consumption and [do not] derive their value entirely from it .[132]

[130] *Id.* at 96-97.
[131] *Id.* at 97.
[132] Liam Murphy and Thomas Nagel, *The Myth of Ownership* 114 (2002).

I have dubbed this the "ancillary benefits" view of the relationship between savings, consumption, and welfare, and noted the continuing lack of any definitive resolution in the literature regarding such benefits' pertinence to the income versus consumption tax debate.[133]

All told, Simons, in his responses to Seligman and Fisher, follows what one might call a middle course regarding the use of standard economic reasoning to illuminate the proper choice of tax base. Seligman, for all his credentials and decades of eminence, is not economist enough for him. All the woolly-minded bucolic nonsense about trees and forests, herds and fruit, is ludicrously disqualifying. But Fisher is too much the modern rational choice economist for Simons, given both his assumption that people optimize across time and his use of a relatively narrow optimizing framework for intertemporal choice. In the future, Simons' advocacy of Haig-Simon income taxation would often stand tallest with those who liked a bit of economic reasoning, but not too much.

D. A Newly Canonical Text in a New Era

Personal Income Taxation's great good fortune, as it turned out, came from its spanning several distinct eras. Simons had been working on it since the late 1920s, initially as a never-completed Ph.D. dissertation, amid "great doubts" among his colleagues that it would ever come out.[134] However, while this made it a Great Depression work product with underlying Gilded Age overtones, it would not fully emerge as a "tract for the times" until the very different post-World War II era had begun.

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[133] *See* Daniel Shaviro, *Ancillary Benefits and Income Versus Consumption Taxation in Liam Murphy's and Thomas Nagel's 'The Myth of Ownership'* (2023), available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4459236.

[134] Shaviro, *The Forgotten Henry Simons*, *supra*, at 6 (quoting Aaron Director, *Simons on Taxation*, 14 U. CHI. L. REV. 15, 15 (1946).

World War II started in Europe the year after *Personal Income Taxation*'s 1938 release. Pearl Harbor came two years after that, and the four ensuing wartime years were no time for deep academic reflection. But once ordinary intellectual life had resumed post-1945, *Personal Income* proved well-situated to attract widespread academic attention.

In this regard, its prospects were perhaps aided by its reticence concerning Simons' self-proclaimed "extreme libertarian[ism]." While both the Chicago School of economics, of which George Stigler later proclaimed him the "Crown Prince,"[135] and Simons' close intellectual comrade Friedrich Hayek, whose anti-government tract *The Road to Serfdom* had come out in 1944, were active and prominent in the early postwar period, it was probably just as well for *Personal Income Taxation* that Simons' connections to them were little to be seen in the book. After all, this was not the market segment where its main prospects lay.

Simons' tragic 1946 death from an overdose of sleeping pills may also have helped the book's prospects. The point was not so much death's reputed efficacy as an authorial career move, as its leaving the book to stand for itself, without its image being complicated by potentially discordant associations.[136]

Meanwhile, in the post-World War II world, *Personal Income Taxation* faced a very different political and intellectual environment from those in which it had been conceived and written. In particular, the following three great changes would prove broadly transformative:

1) "Mass tax" rather than "class tax": As Joseph Thorndike has noted, World War II "transformed the very nature of the individual income tax. The levy had long been used to tax the rich — that was its traditional function. But under the stress of war, political leaders expanded

[135] George J. Stigler, *Henry Calvert Simons*, 17 J.L. & ECON. 1 (1974).
[136] Simons' Chicago colleagues did oversee the posthumous publication of his book *Federal Tax Reform* in 1950. However, this book, which largely aims to convert the approach of *Personal Income Taxation* into a more detailed practical program, does not appear to have attracted significant attention.

the levy, pushing it down the income scale. The number of people paying it increased sevenfold over the course of the war. The 'class tax' became a "mass tax.'"[137] This in turn "changed the politics. Debates over the income tax were always contentious. But for most people, they had been arguments about taxes that someone else — someone rich — would pay. After the war, these debates were suddenly personal for millions of new taxpayers."[138]

2) The "Great Easing" in U.S. high-end inequality*:* In the aftermath of World War II, the United States experienced what has been called the Great Easing, in which high-end inequality declined significantly and remained low, by historical standards, for the next three decades.[139] In particular, people in the 50th through 90th percentiles enjoyed large absolute and relative gains,[140] while even the working poor benefited, albeit to a lesser degree, from wage compression.[141] Meanwhile, the top 1 percent's share of pretax income declined significantly, and would not rebound to its prior levels during this period.[142]

3) Rise of the academic research sector*:* In the years after World War II, American universities, as well as law schools, experienced explosive growth. The G.I. Bill, along with a surge in federal funding for research and education, helped to finance massive increases in student enrollment and research infrastructure – perhaps mostly in the hard sciences, but also more broadly across the social sciences and humanities. This helped to create greatly increased research output. Moreover, as academic scholarship grew, specialization became more

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[137] Joseph Thorndike, *Timelines in Tax History: From 'Class Tax' to 'Mass Tax' During World War II*, Tax Notes, 9/19/2022, available online at https://www.taxnotes.com/tax-history-project/timelines-tax-history-class-tax-mass-tax-during-world-war-ii/2022/09/16/7f3s2.
[138] *Id.*
[139] *See* Daniel Shaviro, *Literature and Inequality* 5 (2020); Matthew Fisher-Post, *Examining the Great Leveling: New Evidence on Midcentury American Inequality*, January 2020, World Inequality Lab, WID.world Working Paper no. 2020/01, available online at https://wid.world/document/examining-the-great-leveling-new-evidence-on-midcentury-american-inequality/.
[140] *See* Fisher-Post, *supra*, at 41 (Figure 24).
[141] *Id.* at 43.
[142] *Id.*

pronounced, with scholars focusing on specific areas of expertise and often publishing in specialty journals. These broader trends helped to ensure that, in tax law and public economics as well as elsewhere, a sizable professoriate could now be expected to participate in public policy debate, claiming (perhaps reasonably) to have the special knowledge and distinctive expertise of a well-established epistemic community.

Each of these trends helped to shape *Personal Income Taxation*'s rise to canonical status in the tax policy field. Unsurprisingly, however, what devotees took from the book was not entirely the same as what Simons himself had meant to put into it, thus helping to show that one of its key attributes was a normative under-specification that allowed for ideological flexibility.

1) "Mass tax" rather than "class tax": When Simons wrote *Personal Income Taxation*, tax preferences directly affected only rich people, whose effective rates they lowered relative to statutory rates. This was a concern if one wanted them to pay more, or for the federal income tax to raise more revenue. But the great majority of voters might readily see rich people's tax benefits as lacking direct relevance to their own lives.

After World War II, with the rise of a mass tax, middle class voters now had their own tax benefits, such as home mortgage interest, medical deductions, and the exclusion from income of employer-provided health insurance. In two main ways, this changed the landscape for demanding the sort of base-broadening that *Personal Income Taxation* supported and helped rationalize.

First, it opened up a distinctive role for academic tax experts, involving pushback against the public's natural inclination to like its own tax preferences. "Broaden the base and lower the rates" became the experts' "frequently heard call."[143] While this was not the most promising

[143] Alm, *supra*, at 380.

stance from the standpoint of political efficacy, it could offer experts a potent sense of group identity and solidarity, as the ones who knew better because they were taking a broader and more comprehensive view.

Second, the emergence of a mass tax transformed the critique of tax preferences that rich people still disproportionately enjoyed. Now the typical claim was not that the rich should collectively pay more (as they might not, if one broadened the base but lowered the rates), but rather that some among their number were unfairly paying lower effective rates than middle-class people. This often proved more salient than merely railing against high-end privilege in the abstract.

As an example of the new approach to tax preferences and high-end inequality, in 1956 *Collier's*, the prominent though by then struggling mass-market popular magazine,[144] published a feature by Stanley Surrey entitled "Do Income-Tax Exemptions Make Sense?"[145] Surrey leads with the following pitch:

> The American taxpayer is a lucky man. Given the necessity of paying federal taxes, he pays them in the fairest possible way – on the basis of his income…. The theory – and the strength – of our income tax is that each man pays in terms of what he makes. If he makes what another man makes, he pays what the other man pays. If he makes more, he pays more.
>
> But recent practice has strayed dangerously far from this theory. The United States Congress is itself creating ways for certain people to escape the very taxes it imposes…. [But a]s special favors are granted, the income-tax system becomes unfair, and thus loses respect. As it loses respect, it loses effectiveness, until finally it does not work at all.[146]

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[144] According to Wikipedia, *Collier's* circulation had been nearly 3 million right after World War II, but had then begun a steady decline. At the beginning of 1957, less than a year after the appearance of Surrey's column, it ceased publication.
[145] *Collier's,* March 30, 1956, pages 26-29.
[146] *Id.* at 26.

Having smuggled in broad-based income taxation through the phase "each man pays in terms of what he makes," Surrey then turns to the wealthy:

> According to the tax tables, anyone who makes $1,000,000 or more a year pays an overall tax of 87 per cent: There are many millionaires in the United States, yet figures indicate that few of them pay taxes …. [and] that the average over-all tax paid by our wealthiest groups is less than 50 per cent! … [And] one individual with overall income of $14,000,000 from 1943 through 1947 paid taxes of only $80,000 over that period – a rate of less than 0.6 per cent.[147]

But Surrey's point isn't that one should soak the rich. Rather, the wide variations which he then demonstrates between the taxation of wealthy people who earn $100,000 in a variety of different ways offers "a clear illustration of our current income-tax schizophrenia. In one moment, Congress sets high rates. In the next, it creates ways to escape those rates. Obviously, Congress must believe that the very rates it has created are too high. So, often when a special group vigorously complains about them, Congress listens sympathetically and almost every time grants the group relief."[148]

Surrey then emphasizes the economic benefits of lower rates, such as their improving incentives to work and invest.[149] Moreover, "[o]nly when we have lower tax rates will we be rid of the special privileges and tax dodging that high rates create."[150] Indeed, doing so would permit us, with constant overall revenues, to "cut all existing income-tax rates *by about one-third*."[151]

He does not dwell on the tax preferences that middle class taxpayers would lose if Congress were to "eliminate all present departures from the basic rate table, all of the various

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[147] *Id.*
[148] *Id.*
[149] *Id.* at 28.
[150] *Id.* at 29.
[151] *Id.* (emphasis in original).

exemptions of special items, and all of the deductions for personal, nonbusiness expenses."[152] He does, however, note that repealing just one item, the exemption for municipal bond interest, would raise $3 billion, thereby enabling Congress, "in addition to lowering top rates … [to] lower all rates sufficiently to save every taxpayer at least $50 a year" (close to $600 in today's dollars).

Surrey's *Collier's* piece, despite its being uncharacteristically (for his work) tailored to a mass, rather than an expert, audience, used the basic tax reform sales pitch and blueprint that he would be offering for decades as the leading public champion of broad-based income taxation. Indeed, as Surrey reports in his memoirs, when he met four years later with president-elect John F. Kennedy in a successful bid to secure an appointment to a high Treasury position, he offered an updated version of his *Collier's* analysis:

> Kennedy . . . seemed to have trouble in pinning down the significance of tax equity and tax fairness. I responded by . . . pointing out that persons with the same income pay vastly different income taxes . . . [For example, a person with $100,000 of municipal bond interest income has a rate of zero], a person with $100,000 of capital gains has a rate of 25%, a married person with $100,000 of oil income has a rate of 32%, a married person with $100,000 of dividend income has a rate of 47%; a married person with a salary or professional income has a rate of 66%. Kennedy liked this illustration of tax unfairness and thought it a useful way to present the picture.[153]

Characteristically for Surrey, he appeals to horizontal equity (HE) – the equal treatment of equals – rather than to progressivity or vertical equity (VE). Thus, on the face of things, he is complaining about the under-taxation of *some* rich people compared to *other* rich people.

[152] *Id.*
[153] *See* Stanley S. Surrey, *A Half-Century With the Internal Revenue Code: The Memoirs of Stanley S. Surrey* 189 (Lawrence Zelenak & Ajay Mehrotra eds., 2022).

Middle-class taxpayers are nowhere in the picture if one is talking about people who earned $100,000 in 1956, which is the inflation-adjusted equivalent of more than $1 million today.

There is something peculiar about Surrey's reliance on HE here. It suggests that the true victims of the unfairness are highly-taxed rich people – not, say, the average *Collier's* reader, whose tax treatment, compared to that of rich people, raises VE rather than HE issues in Surrey's framework. This raises the question of why such readers, most of whom probably could not realistically imagine themselves ever earning $100,000 in a year, should be expected to lavish sympathy on those who (even after-tax) are so much better-off than themselves.

Presumably, a more salient comparison for such readers would have been to their own tax liabilities. In this sense, the underlying concern is actually more about VE than HE, reflecting a view among the non-hoi polloi that some rich people are being unfairly undertaxed in comparison to themselves. But Surrey's focus on HE makes up for its seeming misdirection away from the most salient concern, by allowing the critique to have a more anodyne, less politically divisive, character than if it had been more overtly class-based.

For another example of the same rhetorical phenomenon, consider the case of Mrs. Anna Thompson Dodge, which was "often cited during the twentieth century" by base-broadening's proponents.[154] Having inherited $59 million from her husband in 1920, and invested this entire amount in municipal bonds, Mrs. Dodge never had to pay any Federal income tax on income that averaged $1.5 million per year.[155] While the case of Mrs. Dodge helped to inspire proposals to raise taxes just on tax-avoiding rich people in particular, not on all rich people as a class, it seems

[154] Joe Mysak, *Encyclopedia of municipal bonds: a reference guide to market events, structures, dynamics, and investment knowledge* 51 (2012).
[155] *See* New York Times, *Mrs. Horace Dodge Dies at 103*, June 4, 1970, page 41, available online at https://www.nytimes.com/1970/06/04/archives/mrs-horace-dodge-dies-at-103-among-worlds-richest-women-conflicts.html.

unlikely that the outrage this example evidently inspired was centered on the HE affront to other rich people.

To be sure, viewing Mrs. Dodge's tax posture as an outrage of any sort required ignoring two salient facts. First, municipal bonds generally earn lower pre-tax returns than taxable bonds, because capital markets price in at least some of the benefit of earning tax-exempt income. In effect, Mrs. Dodge was playing an "implicit tax," to the Congressionally intended benefit of state and local governments (the bond issuers), in view of a literal cash tax that Congress could then have directly paid over to those governments. Second, by holding just municipal bonds, she ended up far less wealthy down the road than if she had held a diversified stock portfolio. The stock market averaged a more than 10 percent annual return between 1920 and her death in 1970, as compared to her own roughly 2.5 percent annual return. Thus, even after-tax, her average annual return would likely have been more than three times as high (given capital gains rates, along with the deferral of unrealized stock appreciation) had she held such a stock portfolio in lieu of the bonds.

Be that as it may, Haig-Simons proponents could achieve two things at once by focusing on HE violations within the upper classes. The first was to tap populist resentment about particular rich individuals who ostensibly had paid too little tax. Second, an HE focus allowed them to steer clear of the ideological controversies around the use of generalized "soak-the-rich" rhetoric.

2) The "Great Easing" in U.S. high-end inequality: Surrey's focus on rich people's tax preferences, but not on increasing their overall taxes as a group, fit well with an era in which high-end inequality had diminished significantly. This was no longer an era for railing against "malefactors of great wealth" – a catchphrase used by both Theodore Roosevelt in 1907 and Franklin Roosevelt in 1936. A cooler message, in the Marshall McLuhan sense, was now needed.

Haig-Simons supporters in academia were quite aware that progressive slogans from the 1930s – such as calling inequality "evil and unlovely" – offered less purchase in the post-World War II era than they had before. Thus, Walter Blum, a proponent of "leaning over backwards before allowing any … [tax preferences] to remain in the law,"[156] also commented that "today … horizontal inequities … overshadow" any vertical distributional concerns.[157] Blum added that "the important problem of economic inequality in our society is not at the top of the income pyramid but at the bottom."[158] But even insofar as poverty mattered a lot, the federal income tax was not going to be a prime player in addressing it given that, in an era before refundable tax credits, exempting poor people was the most it could do for them.

On its face, the tax reformers' chief aim – in Blum's words, "compressing rates and extending the base"[159] – was hardly the stuff of left-wing fever dreams. One still needed rich people like Mrs. Dodge to serve, in effect, as poster children for the existing system's defects. But a call for lowering rich people's marginal tax rates, which at the time reached as high as 91 percent,[160] while holding their aggregate tax liabilities roughly the same, offered more of a soothingly technocratic, than a stridently progressive, critique of the federal income tax system.

3) Rise of the academic research sector: The Haig-Simons standard's rise to canonical status also gained force from the post-World War II expansion of the academic research sector. Tax law scholars, among others, were now publishing regularly, both in general interest law

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[156] Walter J. Blum, *Federal Income Tax Reform - Twenty Questions*, 41 Taxes 672, 679 (November 19630.
[157] *Id.* at 688.
[158] *Id.* at 687.
[159] *Id.* at 672.
[160] *See* Surrey in *Collier's* at 26.

reviews and newly created specialty journals such as NYU's Tax Law Review, which was founded in 1945. Their work might often be purely descriptive. But insofar as it aspired to be normative, Haig-Simons income taxation was a natural signpost for tax law professors to adopt. Moreover, the fact that applying it involved some largely intuitive economic reasoning but not too much (or any math) surely counted in its favor. Tax law academics to this day often combine keen awareness of economics' high pertinence to analyzing tax rules' effects, with resistance to any implication that it requires more economics training than they have.[161]

For economists who were Haig-Simons proponents, such as Richard Musgrave and Joseph Pechman, its simplicity had a different set of advantages. In good economic tradition, one could employ its parsimonious premises to draw far-reaching policy conclusions that were readily communicable to policymakers. In addition, Haig-Simons' reliance on objective market values allowed them to steer clear of relying too directly on interpersonal utility comparisons, of which economists in the 1950s tended to be far leerier[162] than subsequent age cohorts of economists since at least the 1970s.

By the mid-1960s, Haig-Simons income taxation had become enough of a dominant party line in academia to draw contrarian jibes from Boris Bittker, "the tax law's great 'fox' who saw many things, and scourge of all the 'hedgehogs' who saw one big thing."[163] Bittker noted that, "[s]ince World War II, our ablest commentators on federal income taxation have repeatedly attacked the 'exceptions,' 'preferences,' 'loopholes,' and 'leakages' in the income tax provisions

[161] *See* Daniel Shaviro, *Lawyers, Economists, and Tax Scholarship*, 77 Nat'l Tax J. 565, 566 (2024), noting that tax lawyers' awareness of economics' importance can "lead [them] astray by encouraging them either to practice second-tier, watered-down economics without a license … or to indulge in the opposite response of preemptively disparaging and dismissing economics', and economists', relevance to legal analysis.'

[162] *See, e.g.,* Musgrave, *The Theory of Public Finance, supra*, at 108 (acknowledging the problematic nature of interpersonal utility comparisons, although arguing that "the new welfare economics [of the 1950s] may have gone too far in its categorical rejection of [them]."

[163] Daniel Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 Tax L Rev.. 187, 203 (2004).

of the Internal Revenue Code and have called upon Congress to reverse the 'erosion of the income tax base' caused by these 'special provisions.'"[164] In short, he was rebelling against the strict intellectual boundaries of the tax epistemic community in which he found himself.

As Bittker's use of scare quotes signified, her aimed to demolish these boundaries, by critiquing what he viewed as his peers' simplistic over-reliance on this approach. As we will see, however, leaders of the epistemic community fought back, and it would be many years before his critique won significant academic acceptance, rather than mainly being viewed as just Bittker being Bittker.

IV. THE PUSH FOR A "COMPREHENSIVE TAX BASE"

A. From Simons to Surrey

Henry Simons' 1946 death had, in effect, left a vacancy in the position of Chief Haig-Simons Advocate. By the late 1950s, however, Stanley Surrey had definitively filled this slot. This gave rise to the following irony. Simons, the "extreme libertarian" and close Friedrich Hayek associate, had nonetheless favored "drastic progression" through income taxation. But Surrey, a "product of New Deal and Great Society liberalism,"[165] supported only "moderate progressivity"[166] and disliked "fantastically high rates."[167]

Surrey thus pioneered and helped to trigger tax reform proponents' widespread adoption of what James Alm has dubbed the "'Broad-based, Low-rate' … tax reform strategy, in which the income tax base is broadened by eliminating exclusions, adjustments, deductions, exemptions, and other tax preferences, in exchange for which marginal tax rates are imposed at lower rates on

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[164] Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform, supra*, at 925.
[165] Lawrence Zelenak and Ajay Mehrotra (eds.0, STANLEY S. SURREY, A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY xxxi (2022).
[166] Shaviro, *'Moralist' Versus 'Scientist', supra,* at 25*6.*
[167] Surrey in *Collier's, supra,* at 29.

the now broader tax base."[168] As Surrey's writings make clear, this was not just a prudent nod to the centrist politics of the early post-World War II era, but a matter of personal conviction. Having "generally pro-market and meritocratic sentiments …. [Surrey deemed himself] not hostile to wealth, … [but] hostile to greed."[169]

Surrey also had developed a sophisticated political science critique of why Congress was so prone to combining high statutory tax rates for the rich with a narrow, gap-filled base. Part of the problem was classic interest group politics. Influential taxpayer groups seeking tax favors for themselves would generally face no private sector opposition whatsoever. "[I]t is [always] the Treasury versus percentage depletion, the Treasury versus capital gains, the Treasury versus this constituent, the Treasury versus that private group. The effect on the congressman as referee is inevitable. He simply cannot let every battle be won by the Treasury."[170]

Yet Surrey deemed this only a secondary reason for the political system's yielding so narrow a tax base. The primary factor was the "high rates of the individual income tax …. The point is that the average congressman does not basically believe in the present rates of income tax in the upper brackets. When he sees them applied to individual cases, he thinks them too high and therefore unfair. Any argument for relief … [thus finds] a sympathetic listener."[171]

Things might have been different, he posited, "with a congressman who firmly believed in a ninety-one-per-cent top tax rate. But most congressmen apparently do not believe in such a rate - certainly not in the concrete and perhaps not even in the abstract. Since they are not,

[168] Alm, *Is the Haig-Simons Standard Dead?, supra,* at 380.
[169] Shaviro, *'Moralist' Versus 'Scientist', supra,* at 256 (quoting Surrey protégé Donald Lubick).
[170] Stanley S. Surrey, *The Congress and the Tax Lobbyist: How Special Tax Provisions Get Enacted*, 70 Harv. L. Rev. 1145, 1165 (1957).
[171] *Id.* at 1149-1150.

however, willing to reduce those rates directly, the natural outcome is indirect reduction through special provisions."[172]

Walter Blum helped to flesh out the full analysis here. "High surtax rates are to many persons a singularly vivid symbol of an intensely held ideal of a more equalitarian society. Comprehensive reform would demolish that symbol…. [Yet] the symbolic high rates defeat progressive taxation's practical function of retarding accumulations of great wealth."[173] So they offered only empty symbolism, in lieu of substance.

B. The Comprehensive Tax Base (CTB) Debate

1. Rise of the CTB as a Tax Reform Approach

By the late 1950s, Surrey's tax reform idea – combining Haig-Simons income taxation (unrealized appreciation and gifts aside) with significantly lower top rates – was starting to receive serious attention outside of academia. In Bittker's words, it had "come to be the major organizing concept in most serious discussions of our federal income tax structure."[174] For example, it "dominated [a] Tax Revision Compendium published in I959 by the House Committee on Ways and Means and the hearings based on this collection of papers … its exploration is a major task of [a] Special Committee on Substantive Tax Reform [organized by] the ABA's Tax Section; [and] it was a major Leitmotiv in the responses of economists and others when the Joint Economic Committee in I965 asked them to comment on the 'fiscal policy issues of the coming decade.'"[175]

In short, support for a comprehensive tax base (CTB) had achieved academic orthodoxy, reflecting both how "tempting [it is] to seize on to a simplifying notion … in order to specify

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[172] *Id.* at 1150.
[173] Blum, *supra*, at 687.
[174] Bittker, *A "Comprehensive Tax Base,' supra,* at 925.
[175] *Id.*

how the base of the income tax should be defined …. [and] the intellectual attractiveness of Simons' arguments."[176] But then, "[j]ust when reformers … seemed serenely secure in the righteousness of their cause – irritated only now and then by the expected objurgations from outside the walls – lo, an academician himself took us to task"[177] in the form of Bittker's 1967 Harvard Law Review broadside, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*.

The splash this made within academia surely reflected the fact that, to put it in horror film terminology, the call was coming from inside the house. Bittker's piece drew prompt answers from two leading economists[178] and a prominent tax law professor,[179] all likewise published by the Harvard Law Review (along with a Bittker sur-reply) and then appearing together in a book volume[180] that attracted much attention at the time and for more than a decade afterwards.[181]

As this debate foreshadowed the playout over the next three decades of the Haig-Simons standard's fall from central organizing concept to merely a useful tool among others, its brief review here helps to advance the broader story. Bittker's broadside won the battle, lost the ensuing campaign, but ultimately won the war.

2. What Was the CTB Debate About?

Bittker begins his broadside by identifying the tax policy field's pro-CTB consensus, with all the crucial terms in the standard analysis, such as "exceptions," "preferences," "loopholes,"

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[176] John Bossons, *The Value of a Comprehensive Tax Base as a Tax Reform Goal*, 13 J. Law & Econ. 327, 327 (1970).
[177] Charles O. Galvin, *More on Boris Bittker and the Comprehensive Tax Base; The Practicalities of Tax Reform and the ABA's CSTR*, 81. Harv. L. Rev. 1016, 1016 (1968).
[178] Richard A. Musgrave, *In Defense of an Income Concept*, 81 Harv. L. Rev. 44 (1967); Joseph A. Pechman, *Comprehensive Income Taxation: A Comment*, 81 Harv. L. Rev. 63 (1967).
[179] Galvin, *supra*.
[180] Boris I. Bittker, Charles O. Galvin, R. A. Musgrave and Joseph A. Pechman *A Comprehensive Income Tax Base? A Debate* (1968).
[181] *See, e.g.,* Earl A. Thompson, *Review of A Comprehensive Income Tax Base? A Debate*, 24 J. Finance 789 (1969); Henry Aaron, *What Is a Comprehensive Income Tax Anyway?*, 22 Nat'l Tax J. 543 (1969); Bossons, *supra*; John G. Head, *The Comprehensive Tax Base Revisited*, FinanzArchiv / Public Finance Analysis, New Series, Bd. 40, H. 2, pages 193-210 (1982).

and “leakages,” being duly bracketed by scare quotes.[182] He notes that CTB proponents want to “eliminate ‘preferences’ ruthlessly, no matter how persuasive or seductive their individual appeals may be.”[183] The word “ruthlessly” alone signals where we are headed – one can almost visualize Bittker shaking his head here with deep aesthetic disparagement. But he then turns to the full attack. CTB proponents who argue that Congress must resist all “attempts to ‘erode’ the tax base … [because] ‘one exception inevitably breeds another,’”[184] invariably ignore the “distressing vagueness in the use of terms like ‘preference.’”[185] He then develops three main claims:

i) Haig-Simons income taxation is often undesirable. For example, while Simons persuasively argued that gift receipts constitute Haig-Simons income, “the dominant mood [even among CTB proponents] is acquiescence in existing law [which excludes them] … whether … because they think it is a ‘good’ preference or out of political realism.”[186]

ii) What Haig-Simons income taxation even means is often ambiguous. “[W]e cannot comply with Blum's advice to ‘lean over backward’ to avoid ‘preferences' because … the [theoretical] income tax structure cannot be discovered, but must be constructed; it is the final result of a multitude of debatable judgments.’[187]

iii) CTB proponents themselves fail to follow their own advice to eliminate “preferences” ruthlessly. For example, Richard Musgrave favored deductions for disaster expenses, such as high medical costs from being injured or sick, because they create "situations where taxpayers with equal incomes and family size have strikingly different needs."[188] Yet “[f]idelity to the

[182] Bittker, *A “Comprehensive Tax Base,” supra*, at 925.
[183] *Id.* at 926.
[184] *Id.* at 927.
[185] *Id.*
[186] *Id.* at 945.
[187] *Id.* at 985.
[188] Bittker, *Comprehensive Income Taxation: A Response*, 81 Harv. L. Rev. 1032, 1035 (1968) (quoting Musgrave).

Haig-Simons definition" would seem to require treating such expenses as nondeductible personal consumption.[189] Hence, all that we really have in CTB proponents' deliberately selective tax preference hit lists is a "compilation of everyone's favorite complaints."[190]

For all these reasons, Bittker concludes that CTB proponents owe us, at the least, a "drastic revision of their rhetoric, including a renunciation of the claim that we can or should eliminate all, or even most, 'preferences' & 'special provisions' from the Internal Revenue Code…. A truly comprehensive base would be a disaster…. [And while i]t may be argued that the rhetoric of the CTB approach does not matter: we are used to political slogans & exhortations that contain a kernel of truth"[191] – that is a job for politicians, not academic experts, whose proper mission involves providing accurate, unbiased analysis.

Bittker further concludes that "we cannot avoid an examination of each [provision] on its merits in a discouragingly inconclusive process that can derive no significant assistance" from the CTB proponents' arguments.[192] This may sound relatively mild, but, in context, its thorough rejection of a then-dominant mode of scholarship was anything but. One is therefore unsurprised by the vehemence of some of the responses it drew from defenders of the Haig-Simons epistemic community. Joseph Pechman, for example, comments on Bittker's evident "great satisfaction from taunting the proponents of comprehensive income taxation,"[193] and responds by charging him with "setting up straw men"[194] and an "inability to understand what the Haig-Simons definition does and does not imply."[195]

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[189] *Id.*
[190] Bittker, *A "Comprehensive Tax Base," supra*, at 931.
[191] *Id.* at 982.
[192] *Id.*
[193] Pechman, *Comprehensive Income Taxation: A Comment, supra,* at 66.
[194] *Id.* at 63.
[195] *Id.* at 65.

Despite the vigor and exhaustive detail of Bittker's critique, a contemporary reviewer found it "somewhat difficult to decipher what the debate is all about…. [I]t is not quite clear from [Bittker's] original paper exactly what his criticism is."[196] After all, the dueling papers suggest little definite disagreement about any of the myriad particular issues that arise in the course of the discussion. And all agreed that income within the Haig-Simons definition should be taxed in many cases but not all.

It is partly an aesthetic dispute, especially on Bittker's part, regarding the proper rhetorical norms for scholarship that ostensibly provides objective analysis but also has elements of advocacy. Underlying this, however, is a fundamental disagreement regarding experts' role and responsibilities in public policy debate. Surrey, along with many others in the pro-CTB camp, held the "meritocratic belief that credentialed experts both can and should establish the basic conceptual categories that others will then dutifully accept."[197] Bittker, by contrast, would spend decades arguing that "intuition and political preferences must be the basis for analysis because scholars, alas, can legitimately claim little more authority than the average citizen."[198]

3. Bittker Wins the Battle But Loses the Ensuing Campaign

While "[t]he participants in the [CTB] debate failed to convince each other, which is not unusual,"[199] there was a relatively clear, if split, public verdict. Judged as a debate, Bittker seems to have won the laurels. For example, a contemporary book review lauds his "brilliant" and "convincing"[200] performance, while criticizing Musgrave for "abandon[ing[subtle economic

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[196] Thompson, *Review, supra*, at 789.
[197] Daniel Shaviro, *'Moralist' Versus 'Scientist': Stanley Surrey and the Public Intellectual Practice of Tax Policy*, 86 Law & Contemporary Problems 235, 265 (2023).
[198] Boris I. Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?*, 16 San Diego L. Rev. 735, 748 (1979).
[199] Aaron, *supra*, at 543.
[200] Thompson, *supra*, at 789.

analysis" in favor of "naïve slogans,"[201] and Pechman for relying on a "non sequitur" that "contradicts just about all previous work on the subject, including Pechman's."[202] Later writers might refer to Bittker's "penetrating criticism,"[203] or to his "well-known and persuasively argued critique of the comprehensive tax approach."[204] Decades later, his Yale colleague John Simon, in a memorial essay on Bittker, took a victory lap on Bittker's behalf by citing the CTB debate as case in point regarding his "relentless scrutiny of conventional wisdom" and "resistance to some of the vogue-ish nostrums in tax reform policy."[205]

Yet, even decades later, "the comprehensive tax base tradition [would] remain[] the dominant *leitmotiv* in tax reform proposals."[206] Moreover, rather than being joined at the hip to Haig-Simons, it survived the rise of academic support for progressive consumption taxation, with CTBs "now com[ing] in two flavors: income CTBs and consumption CTBs."[207] Both versions aimed "to provide a broad tax base that has few or no exceptions, preferences, or loopholes"[208] – words presented here without Bittkerian scare quotes – largely if not wholly based on underlying definitions of income and consumption, and each widely thought to be capable of "substantial[ly] improv[ing] … government policy."[209]

Even in the nearer aftermath of the CTB debate, tax reform discussion continued much as before, with efforts focused on the Surrey approach of broadening the income tax base to fund lowering the rates. This was the core feature of the highly influential Bradley-Gephardt Fair Tax

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[201] *Id.* at 790.
[202] *Id.*
[203] Yoshihuro Masui and Minoro Nakazato, *Personal Income Taxation* 139, 142 (1999), available online at https://reference.findlaw.com/lawandeconomics/6050-personal-income-taxation.pdf.
[204] Head, *The Comprehensive Tax Base Revisited*, *supra*, at 199.
[205] John G. Simon, *Let Us Count the Ways: A Tribute to Boris Bittker*, 115 Yale L.J. 751 (2006).
[206] Graeme S. Cooper, *An Optimal or Comprehensive Income Tax?*, 22 Fed. L. Rev. 414, 415 (1994).
[207] David A. Weisbach and Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 Yale L.J. 955, 967 (2004).
[208] *Id.*
[209] *Id.*

Act of 1983, which added the principle that tax reform should be "both revenue and distribution neutral (that is … raise the same total revenue as the current law, and [with] each individual income class, and corporations taken as a group, pay[ing] the same tax as under the current law)."[210] A Republican version, the Kemp-Kasten FAST Tax, followed the next year. Both parties then collaborated on the landmark Tax Reform Act of 1986, which likewise significantly lowered tax rates and broadened the base – albeit more sloppily due to political accommodations, and without extending revenue neutrality to corporations.

While Bittker himself peevishly endorsed calling the 1986 Act a "bad new tax law" that deserved none of its encomia,[211] this remained a distinctly minority view in academia right after its passage. Thus, while he had seemingly won the battle (the debate itself), he had evidently lost the ensuing campaign regarding what desirable tax reform should be taken to mean.

This doubtless reflected that (as Musgrave observed) Bittker offered only the uninspiring "principle … that matters of income definition should be decided on an ad hoc basis."[212] It often takes a theory to beat a theory, and Bittker was too anti-theory to meet any such need. Nonetheless, with time, the skepticism he urged regarding academic enshrinement of the Haig-Simons income definition would spread sufficiently to illustrate John Simon's memorial encomium that "Boris was often ahead of the curve – he often presaged innovation."[213] The intellectual developments that led to Haig-Simons' partial eclipse started in the early 1970s, but would gain broader notice in the years after the 1986 tax reform.

V. BEYOND HAIG-SIMONS

[210] Joseph Minarik, *How Tax Reform Came About*, Tax Notes Special Report, December 29, 1987, at 11, available online at https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/TRA86.How-Tax-Reform-Came-About.pdf.

[211] Boris I. Bittker, in Henning Gutmann's *The Bad New Tax Law: An Exchange*, New York Review of Books, July 16, 1987, available online at https://www.nybooks.com/articles/1987/07/16/the-bad-new-tax-law-an-exchange/.

[212] Musgrave, *supra*, at 62.

[213] Simon, *supra* at 752.

Perhaps it was inevitable that, in the aftermath of the 1986 Tax Reform Act, some of the bloom would go off the rose. Or, to change the metaphor, it mattered that the dog had finally caught the car. But that high-water mark for the Surrey version of Haig-Simons income tax reform provided only one of the main reasons for Haig-Simons' decline as a canonical touchstone.

A. Post-1986 Malaise

Once the 1986 Act had passed, to "almost universal surprise,"[214] given the political obstacles it faced, its core idea of combining rate cuts with significant base-broadening was no longer plausibly the next big thing. Congress had now been there and done that. And even as the 1986 act's Great Compromise inevitably unraveled, with new preferences being added to the Internal Revenue Code and rates creeping back up, the notion of doing it all over failed to regain its prior fresh appeal.

This was partly due to dissatisfaction with the experience. Many academics found the politically compromised end-product deeply disillusioning. Thus, Michael Graetz, by then perhaps the most nationally prominent U.S. tax law professor, announced in a 1988 speech that he was going to "tell the truth about this tax reform."[215] The main "truth" he offered was that, notwithstanding all the "hyperbole" emanating from "people who should know better,"[216] the 1986 Act had "fail[ed] in what has been claimed to be its shining achievement – the restoration of horizontal equity to the income tax. One can search long and hard for a unifying horizontal

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[214] Henry J. Aaron, *The Impossible Dream Comes True: The New Tax Reform Act*, 3 The Brookings Review 3, 3 (1987).
[215] Michael J. Graetz, *The Truth About Tax Reform*, 40 U. Fla. L. Rev. 617, 618 (1988).
[216] *Id.*

equity theme in the 1986 legislation … [W]hat has been produced instead is a series of complex, unwieldy, and often inequitable political compromises."[217]

A broader lesson, which many besides Graetz had learned, was that, even if Haig-Simons-based tax reform remained a good idea in principle, the political system was unlikely ever to do it any better than this. Meanwhile, prospective tax reformers would not lack other directions in which they could turn, especially given the rising "calls of economists and conservative (and even some 'neoliberal') politicians to replace [the income tax] with a consumption tax."[218]

The case for trying to proselytize to Congress about Haig-Simons-based tax reform had also taken a hit. It had always been viewed as a political longshot, going against the grain as it did by targeting narrow tax benefits with dedicated interest group constituencies in exchange for general rate reduction. Or as Henry Aaron put it: "Like the bewitched princess who watched endless suitors perish in the dragon's fire, advocates of tax equity and efficiency have despaired for decades as the occasional brave politician marched off on a futile quest for tax reform."[219] But it is one thing to be a prophet toiling romantically, if almost hopelessly, on behalf of an underappreciated vision, and something else, far less uplifting, to be saying, in effect, about an at best ambivalent recent experience: "Let's try that again!"

Moreover, once the dog had caught the car, the lead political actors who would need to be convinced were now newly jaded about ambitious tax reform, rather than just generally dubious about it. In the run-up to 1986, politicians on both sides of the aisle had feared that those on the other side would steal a march on them by embracing something like Bradley-Gephardt or

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[217] *Id* at 632.
[218] *Id* at 638.
[219] Aaron, *The Impossible Dream Comes True*, *supra*, at

Kemp-Kasten. But during the two-year enactment process, political leaders on both sides increasingly came to realize, that as Richard Gephardt put it, it just was "not that good a story" for them.[220] Tax reform survived — and barely, at that, on several occasions — only due to what Henry Aaron called the ''dead cat'' problem.[221] Despite a lack of public enthusiasm about the legislation, political leaders who let the "cat" die on their doorsteps risked being viewed, not only as failed leaders, but also as having sold out to nefarious special interests.[222] The 1986 Tax Reform Act therefore presented the striking irony of legislation that, once the process had gathered momentum, leaders felt politically constrained to support, even though their interest group allies mainly disliked it, while voters were indifferent about it at best.[223] This was not a good background for proposing that Congress try it again.

B. Advancements in the Legal Literature

Well before 1986, the academic tax law literature, growing ever more interdisciplinary and intellectually ambitious, had begun to move away from the view that one should devote one's efforts to choosing between "varying interpretations of the Haig-Simons definition."[224] An influential early example of the urge to gaze a few turtles lower on the stack[225] was William D. Andrews' *Personal Deductions in an Ideal Income Tax* (1972),[226] arguing that medical deductions (as well as charitable deductions) were proper adjustments to measuring income, notwithstanding Stanley Surrey's strictures to the contrary.

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220 Jeffrey H. Birnbaum and Alan S. Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform* 110 (1987).
221 Daniel Shaviro, *1986-Style Reform: A Good Idea Whose Time Has Passed*, 131 Tax Notes 817, 821 (2011).
222 *See id.* at 821 n. 27.
223 *See id.* at 821 n. 30.
224 Koppelman, *supra*, at 681.
225 I refer to the old story of the woman who claimed that the earth rests on the back of a turtle and, when asked what the turtle rests on, responded that it was "turtles all the way down."
226 86 Harv. L. Rev. 309 (1972).

Andrews accepted Surrey's premise that medical expenses involved consumption, supporting the view that they should not be deductible under a Haig-Simons measure. He argued, however, that having high medical expenses is primarily evidence of the taxpayer's poor health status, rather than of her taste for undergoing medical procedures. For example, if two people earn the same gross income, but only one of them breaks her leg and thus needs to pay for surgery plus physical therapy, one would rightly conclude that this has left her the worse-off economically of the pair.

Incurring medical expenses therefore was not akin to spending money on a nice dinner or vacation. It was more like the playout of one's underlying physical bad luck. This, in turn, convinced Andrews that, if A and B faced equivalent circumstances, except that A (but not B) had spent $X on health care, then A was $X worse off than B, by reason of having had to pay to restore her health to the same assumed baseline level. He viewed this as making a compelling case for the deductibility of medical expenses, even though the likes of Surrey were right in classifying them as consumption rather than business outlays.[227]

Given still-prevalent intellectual fashions, *Personal Deductions in an Ideal Income Tax* devotes startlingly many pages to discussing the Haig-Simons income definition, along with Simons' own views as expressed in *Personal Income Taxation*. These remained, at the time, near-sacred sources of wisdom. But Andrews argued that "Simons' definition [merely] indicates the direction in which meaning should be elaborated and where the real problems of tax policy are to be found."[228] One needs "creative elaboration to effectuate the practical implementation of the purposes of the tax."[229] So the right answer followed from evaluating medical expenses' effect on

[227] *See* Daniel Shaviro, *New Frontiers in Medicine and the Income Tax's Role as a Backup Health Insurance System*, 77 Tax L. Rev. 123, 125 (2023).
[228] *Id.* at 324.
[229] *Id.*

ability to pay[230] if, as Andrews posited, the most probative comparison lay between a healthy individual and a sick one who were otherwise at the same income level.

While Musgrave had argued similarly in favor medical deductions amid the CTB debate[231] – allowing Bittker to mock his lack of "[f]idelity to the Haig-Simons definition"[232] – Andrews was taking an important methodological step forward. He argued that "the precise content of the [income] ideal [is] too important for us to be able to accept any general, a priori definition as a final formulation."[233] Instead, one must reflect about the "intrinsic objectives of the tax."[234]

Even in its cautiously presented way, this was actually a bold declaration of independence from treating the Haig-Simons definition as a conclusive normative touchstone. If the tax's "intrinsic objectives" were what mattered, one had a license to steer as far away from Haig-Simons as far as one liked, so long as one had sufficiently compelling reasons for doing so. And indeed this line of inquiry led Andrews, in his next article, to explore replacing income taxation with consumption taxation.[235]

Close to two decades later, Louis Kaplow took the medical expenses debate the next step forward. He argued that Simons, Surrey, and even Andrews had all erred methodologically by "appealing to definitions…. Definitions cannot give meaning to policy unless informed by the

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[230] Andrews expressed dislike for the term "ability to pay," but what he looked at instead (people's material wellbeing) was not much different in practice. *See* Shaviro, *New Frontiers in Medicine, supra*, at 138 n. 79.
[231] *See* Musgrave, *supra*, at 56.
[232] Bittker, *Comprehensive Income Taxation: A Response*, *supra*, at 1035.
[233] Andrews, *supra*, at 312.
[234] *Id.*
[235] William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 Harv. L. Rev. 1113 (1974). The notion that one needed to look at least a turtle deeper than just at the Haig-Simons definition also guided the most prominent and spirited response to Andrews: Mark Kelman's *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).

objectives underlying the definitions."[236] He then proposed shifting the discussion from looking ex post at the taxpayer's circumstances given her medical outlays, to looking at medical expense deductibility's ex ante effects on efficiency and taxpayers' welfare. He concluded that, if one makes the empirical assumptions of rational choice and the full availability of private health insurance, allowing a medical deduction worsens both the functioning of health insurance markets and people's ability to choose the level of health insurance coverage that they actually want, given its cost.[237] Therefore – albeit, conditioned on the accuracy of the underlying empirical assumptions – allowing medical deductions was undesirable for reasons that had nothing whatever to do with the definition of "income."

Other contemporary work often rested on similar methodological premises to Kaplow's. For example, Thomas Griffith argued that both Surrey's and Andrews' views of medical deductions "share[d] a critical flaw: [neither] is grounded on a coherent normative principle."[238] For example, Surrey "does not explain why adopting a net income tax base or preserving a progressive rate structure is desirable."[239] As for Andrews, while he had doffed his cap to the "fundamental goals of the tax system,"[240] he had failed, in Griffith's view, to do this adequately.[241] Meanwhile, other subsequent work, such as my own, has explored how conclusions such as Kaplow's would change if – with ample support from the medical research literature – one rejected the empirical accuracy of assuming rational choice and the full availability of private health insurance.[242]

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[236] Louis Kaplow. *The Income Tax as Insurance: The Casualty Loss and Medical Expense Deductions and the Exclusion of Medical Insurance Premiums*, 79 Cal. L. Rev. 1485, 1486-1487 (1991).
[237] *See* Shaviro, *New Frontiers in Medicine, supra*, at 125.
[238] Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 Hastings L. J. 343, 345 (1989).
[239] *Id.* at 366.
[240] *Id.* at 368.
[241] For example, while Andrews "rejects ability to pay as a principle to justify progressive taxation, [he] does not present any alternative principle." *Id.* at 369.
[242] *See* Shaviro, *New Frontiers, supra.*

While medical expense deductibility is just one issue among many, it illustrates the broader point that defining Haig-Simons income has long since ceased to be deemed a canonical approach in the legal literature – even though it remains of interest as one input into a broader analysis. For another example, consider the income tax treatment of gifts. Simons was clearly correct that, in terms of ability to pay, an altruistically motivated gift makes the donee better-off, while being a discretionary outlay in the nature of consumption, rather than a loss in the ordinary sense, on the donor's part. But this is just one input into a broader analysis that also might need to incorporate the relevance of altruistically motivated gifts' creating positive externalities (since both the donor and donee derive a benefit from the same funds).[243] So applying the Haig-Simons framework to gifts is just one step in the analysis, subject to being reversed by other considerations, and the Haig-Simons religion is gone.

C. Advancements in the Economics Literature

Advancements in the economics literature likewise displaced the Haig-Simons income definition from its decades-long perch. Here, however, it was less a case of "the god that failed" than of changing interests and methodologies that stripped away most of its relevance and appeal.

a) Rise of optimal income tax theory: The rise of optimal income tax (OIT) theory upon the publication of James Mirrlees' foundational 1971 article[244] betokened a fundamental shift away from the interests that economists such as Musgrave and Pechman had been pursuing just a few years earlier. It is true that OIT includes the word "income tax," but here it meant a wage tax, in a one-period model that did not allow for saving, and thus did not permit distinguishing between income and consumption taxation.

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[243] *See, e.g.,* Louis Kaplow *A Note on Subsidizing Gifts*, 58 J. Pub. Econ. 469 (1995).
[244] James Mirrlees, *An Exploration in the Theory of Optimum Taxation*, 38 Review of Economic Studies 175 (1971).

Mirrlees effectively presumes a "comprehensive" wage tax in which all earnings are treated the same – subject to the unstated borderline between work and leisure, the latter of which might include rendering household services in the absence of a market transaction. By 1976, however, the OIT literature would add an important anti-CTB refinement, through a second foundational article, Anthony Atkinson's and Joseph Stiglitz's *The Design of Tax Structure: Direct Versus Indirect Taxation*.[245] In one key respect, Atkinson-Stiglitz strengthens the case for a CTB – leaving aside for now its implications for the choice between income and consumption taxation, which I discuss below. It shows that, if the preferences in people's utility functions are at least weakly separable between consumption and labor,[246] and if nonlinear labor income taxation is available,[247] then differentiated commodity taxation is unnecessary. This finding was of interest because a famous 1927 article by Frank Ramsey – focusing purely on efficiency considerations, without regard to distribution – had found that, the more elastic the supply of a given commodity, the lower its optimal tax rate would be.[248]

Avoiding differentiated commodity taxation is equivalent to imposing a uniform CTB – leaving aside for now the model's implications, discussed below, for taxing capital income. However, the non-separability requirement helped to show the desirability of indirectly addressing work-leisure distortions by lowering taxes on leisure substitutes and raising them on leisure complements.[249]

[245] 6 J. Pub. Econ. 55 (1976).
[246] Essentially, weak separability means that one's decision how much to work does not affect one's relative preferences as between different consumption items.
[247] Nonlinear simply means applying non-uniform marginal rates as the aggregate amount of one's labor income changes.
[248] Frank P. Ramsey. *A Contribution to the Theory of Taxation*, 37 Econ. J. 47 (1927).
[249] The idea of taxing leisure substitutes at a lower rate than leisure complements dates back to W.J. Corlett and D.C. Hague, *Complementarity and the excess burden of taxation*, 21 Rev. Econ. Studies 21 (1953).

Alongside any of this, the methodological gulf between Haig-Simons-focused and OIT-based scholarship was far more fundamental than just a matter of whether, say, restaurant meals should face a lower tax rate than groceries because the latter require leisure time for food preparation. The two are almost from distinct universes. Haig-Simons is a static concept, focused on achieving a definitional ideal, and looking directly neither at utility nor at the tax system's incentive effects. OIT is about optimizing incentive effects and behavior amid systemic informational constraints.

Haig-Simons and OIT also rest on very different normative foundations. Horizontal equity, which 1960s economists such as Musgrave, no less than tax lawyers such as Surrey, had viewed as perhaps the foremost reason for favoring Haig-Simons income taxation, fared poorly in this role over the next two decades. First, in 1976, Martin Feldstein reinterpreted HE as requiring, not uniform taxation, but rather an absence of tax law changes. Thus, consider the tax exemption for municipal bond interest. If market forces yield equal after-tax returns for taxable and tax-exempt bonds, then there is no HE violation after all. But unexpectedly *repealing* the exemption would unfairly (by HE's lights, as reinterpreted by Feldstein) disadvantage the holders of formerly tax-free bonds.[250] Feldstein thereby deftly turned the tables on Haig-Simons proponents – whom he expressly had in his sights – by positing that "[t]he elimination of tax subsidies creates [rather than eliminates] horizontal inequities because individuals make commitments based on existing tax laws."[251]

Next, in 1989, Louis Kaplow's influential piece, *Horizontal Equity: Measures in Search of a Principle*,[252] made the case that "HE … is in conflict with the social welfare tradition"[253] and

[250] *See* Martin Feldstein, *Compensation in Tax Reform*, 29 N.T.J. 123 (1976).
[251] *Id.* at 124.
[252] 42 N.T.J. 139 (1989).
[253] *Id.* at 139.

lacks any direct normative justification" from a utilitarian or other welfarist standpoint. Thus, Feldstein's as well as Musgrave's usage of HE entirely lacked merit. A crucial precondition for this critique's having the weight it did was OIT's methodological commitment to the "hedonistic welfare economics" that Simons had so vehemently disparaged. For example, Mirrlees' 1971 piece explores how social welfare would be optimized, within the boundaries of a model in which people's utility functions are specified, under social welfare functions that either are purely utilitarian or else assign varyingly positive weight to more egalitarian outcomes. The departure from Simons' own methodological preferences could scarcely be starker.

b) The life cycle and optimal capital taxation models: OIT is just one example of leading economists' work growing more formal and rigorous by the 1980s, and increasingly thereafter, to the detriment of Haig-Simons orthodoxy. In this regard, work developing the analytical relevance of the passage of time under neoclassical behavioral models proved to be especially important.

As noted earlier, Simons had shrugged off the relevance of Irving Fisher's theory of impatience, based less on any rival intertemporal model than on the equivalent of "Models? We don't need no stinkin' intertemporal models here!"[254] But such a stance would prove harder to maintain as life cycle models were increasingly incorporated into mainstream economic thinking. The basic life cycle model had indeed emerged by the mid-1950s,[255] but its relevance to the income versus consumption tax debate took up to three decades – allowing generational turnover to occur – to sink in fully.

[254] I refer here to a famous line from John Huston's film *The Treasure of the Sierra Madre* that is often rendered as "Badges? We don't need no stinkin' badges!" (uttered by bandits who are pretending to be police).
[255] Franco Modigliani & Richard Brumberg, *Utility Analysis and the Consumption Function: An Interpretation of Cross-Section Data*, *in* POST KEYNESIAN ECON. 388 (Kenneth K. Kurihara ed., 1954): Milton Friedman, *A Theory of the Consumption Function* 20-37 (1957).

Haig-Simons income is a current-period measure. It asks: How much did one earn in *this period*? It thus wholly leaves aside the question of how one's expected *long-term* resources might relate to one's expected *long-term* needs. Yet, if one is thinking about ability to pay – open-ended though that term may be – the notion that only current-period resources and needs would be relevant to an individual's material wellbeing requires extreme myopia to be plausible.

Indeed, even from a purely current-period standpoint, it is not entirely obvious why an "ability to pay" measure should look solely to one's Haig-Simons income – thus excluding one's wealth, apart from the current-period *return* to wealth. After all, if one has (say) money in the bank, the entire bank account, not just this year's interest accrual, is in principle spendable to meet one's current-period needs and wants. So why wouldn't the right snapshot measure for ability-to-pay purposes be, not income, but wealth plus current-period consumption?

One common answer is that preexisting wealth presumably was taxed in the prior periods when it accrued. Thus, current-period wealth taxation, unlike income taxation, would involve the dreaded double taxation. This has a lot in common with Irving Fisher's claim – which Simons and subsequent income tax proponents rejected – that taxing a future receipt's discounted value today, and then also its accretion between now and the time of its future receipt, would constitute "double taxation." Only, here it applies just to constant nominal amounts, not to their growth over time at an ordinary rate of return.

Whether or not this move can be rationalized – on grounds that seemingly would take us far from focusing on "ability to pay" – it still involves an unexplainedly ad hoc departure from the notion of looking just at the current period in isolation. How does one explain ignoring all past and future periods, in order to focus purely on the current one, with the exception of looking backwards to avoid "double taxation" of nominally constant wealth? Once multi-period models are on the table, a more fundamentally grounded and less ad hoc analysis is likely to seem necessary.

Through its treatment of intertemporal choice, the life cycle model tends strongly to support consumption taxation in lieu of income taxation. But even short of fully pursuing these connections, the rise of economic models that assumed long-term, rational choice-based thinking undermined Haig-Simons' credibility as a policy norm. In particular, what became known as the optimal capital income tax literature dealt two major blows to the cause.

First, Atkinson's and Stiglitz's *The Design of Tax Structure* shows that, under its assumptions, the case against differentiated commodity taxation (leaving aside labor-leisure issues) rebuts the need for income taxation (including the taxation of saving) to achieve desired distributional goals. After all, if saving is just deferred consumption, then taxing saving amounts to imposing higher tax rates on future than on current consumption.[256] This conclusion proved to have wide intellectual influence in tax policy circles even though Atkinson and Stiglitz have themselves rejected it.[257]

Second, two influential papers from the mid-1980s, by Christopher Chamley[258] and Kenneth Judd,[259] employed a dynamic, infinite-horizon model with rational agents and no market imperfections to show that, under their assumptions, the optimal long-run tax rate on capital income is zero. Key to the analysis was the fact that even distortions that might seem small when considered on just an annual basis – such as an income tax's discouragement of saving –

[256] *See* Joseph Bankman and David Weisbach, *The Superiority of an Ideal Income Tax Over an Ideal Consumption Tax*, 58 Stanford L. Rev. 1413 (2006).
[257] *See* Anthony Atkinson, *Inequality: What Can Be Done?* (1976); Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (2013).
[258] Christopher Chamley, *Optimal Taxation of Capital Income in General Equilibrium with Infinite Lives*, 54 Econometrica, 607 (1986).
[259] Kenneth L. Judd, Kenneth L., *Redistributive taxation in a simple perfect foresight model*, 28 J. Pub. Econ. 59 (1985).

compound and become immense over the long run. While the Chamley-Judd result is not generally accepted, due to its requiring such challengeable assumptions as an effectively infinite-lived agent and perfect foresight,[260] it helped to undermine the case for income taxation of any kind, and in particular that based purely on applying a static definition.

c) Policy concerns about inadequate savings and growth: In a different environment than that of the 1980s and thereafter, income taxation's adverse effect on the incentive to save might have been viewed as posing merely an abstract or theoretical problem. Suppose, for example, that policymakers had feared there was a "capital glut" like that of the 1930s. Then any adverse effect on saving might have been deemed innocuous, at least at the aggregate social level.

Instead, however, two widespread concerns helped to make income taxation's discouragement of saving seem vitally important. The first was the view that individuals, out of myopia, may be prone to saving inadequately for their own long-term welfare.[261] The second was that, in a global economy, countries may be competing with each other for scarce capital that would yield positive externalities if invested domestically,[262] thus making income taxation an especially harmful instrument if imposed on mobile business investment.

In the United States, significantly lower savings rates in the 1980s and thereafter than those that had prevailed in earlier decades helped to give practical force to these concerns. So did slowing per capita GDP growth, starting at around the same time, whether or not the two phenomena were causally linked. These trends lent support to the view that taxing returns to

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[260] *See, e.g.,* Emmanuel Saez and Stefanie Stantcheva, *A Simpler Theory of Optimal Capital Taxation*, 162 J. Pub. Econ. 120 (2018).
[261] *See, e.g.,* Daniel Shaviro, *Multiple Myopias, Multiple Selves, and the Under-Saving Problem*, 47 Conn. L. Rev. 291 (2015).
[262] *See, e.g.,* Dani Rodrick, *The Globalization Paradox: Democracy and the Future of the World Economy* (2011).

saving, as under a comprehensive Haig-Simons income tax, might be a costly social policy mistake, rather than part of an appropriate normative benchmark.

d) Measuring income for purposes of distributional analysis: Alongside all the reasons for economists' losing interest, in recent decades, in the Haig-Simons income definition, one factor has pushed the other way. The rise of U.S. high-end inequality in recent decades has created a boom industry in seeking to measure and quantify its current level and recent trend line. Relatedly, interest has grown in measuring the tax or overall fiscal system's degree of progressivity and effects on inequality.

These measurement efforts often look specifically at *income* inequality, although there has also been interest in such other metrics as wealth and lifetime spending power.[263] While the choice of income as the measurement rubric tends not to be specifically rationalized, other than implicitly as a matter of custom, once it has been chosen it naturally raises the question of what "income" ought to mean for measurement purposes.

In this regard, the Haig-Simons measure, with its claims of comprehensiveness, naturally comes to mind.[264] However, "no current measures of the income distribution use (or could use)" it given (i) measurement difficulties, (ii) the need to make "controversial methodological choices" in any measure that aspires to comprehensiveness, and (iii) concerns about the degree to which it "would capture the most important distributional details that society should rightly value."[265]

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[263] For a discussion of lifetime spending power and the rationale for using it, *see* Alan J. Auerbach, Laurence J. Kotlikoff, & Darryl Koehler, *US Inequality and Fiscal Progressivity: An Intragenerational Accounting*, 131 J. Pol. Econ. 1249 (2023).
[264] Conor Clarke and Wojciech Kopczuk, *Measuring Income and Income Inequality*, 39 J. Econ. Persp. 103, 103 (2025).
[265] *Id.* at 103-104.

While Haig-Simons nonetheless exerts some influence as a guidepost, it can prove both too broad in some respects and too narrow in others to guide measurement efforts more than very loosely. On the one hand, "[n]arrower income concepts have better data and are easier to measure."[266] Indeed, the best-known distributional studies, by Thomas Piketty and Emmanuel Saez, initially used taxable income,[267] despite its conceded under-inclusiveness.[268]

But on the other hand, if one is aiming to go broad, there may be no reason to stop where Simons did, by requiring market measures of value. Thus, a recent paper by Conor Clarke and Wojciech Kopczuk notes that one could also include in distributional estimates rough inclusions for such categories as household production, and even "the value of leisure (based on time-use survey averages and multiplied by an index version of the federal minimum wage)."[269] Indeed, Clarke and Kopczuk note that one could "imagine adding yet more hard-to-value components of welfare on top of that (sleep, happiness, health, and the like)."[270]

While this might make sense aspirationally, at least insofar as what one would really like to measure is the societal distribution of welfare, it discards the feature of the Haig-Simons definition that most underlay its appeal in the post-World War II years. That is its distinctive way of trying to steer between the Scylla of formalistic narrowness and the Charybdis of imponderable vagueness and subjectivity, by relying on observable market prices – an approach that is inherently more pertinent to tax administration than to seeking a general empirical understanding of economic inequality. Thus, even when today's economists are interested in constructing a very broad conception of income for measurement purposes, Simons' distinctive

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[266] *Id.* at 121.
[267] *See id.* at 116.
[268] In response to the under-inclusiveness problem, however, later papers by Piketty and Saez, joined by Gabriel Zucman, start with a broader income concept from the National Income and Product Accounts.
[269] *Id.* at 106.
[270] *Id.*

focus on practicality, and his underlying contempt for utility as a relevant concept, make the use of Haig-Simons today more of a name check than a true return to his archaic conceptual framework.

VI. INCOME TAXATION WITHOUT HAIG-SIMONS?

What I have called "Bittker's pendulum"[271] refers to the tendency, noted by Boris Bittker nearly fifty years ago, for "today's … theorists [to] differ from their parents but resemble their grandparents."[272] This phenomenon makes it no surprise that, in the years since Atkinson-Stiglitz and Chamley-Judd first seemed to raise the possibility that capital income simply should not be taxed, there has been substantial pushback in the other direction. Leading arguments in favor of taxing normal returns to saving[273] have included the following:

--"There appears to be a positive correlation between labor skill level (wage rate) and savings …. implying that those with higher earnings abilities save more. [This suggests that] … taxation of saving helps with the equity–efficiency tradeoff by being a source of indirect evidence about who has higher earnings abilities."[274]

--As what is called the new dynamic public finance literature has shown, saving has negative revenue externalities, because it enables potential high-earners who can live off their savings to "camouflage" their ability by working less. Accordingly, the prospect that Period 2 savings will be taxed may reduce the inefficiency that results from taxing labor income in Period 1.[275]

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[271] Daniel Shaviro, *Bittker's Pendulum and the Taxation of Multinationals*, 104 Tax Notes Int'l 535 (2021).
[272] Bittker, *Equity, Efficiency, and Income Tax Theory, supra*, at 737.
[273] A consumption tax framework, which exempts the normal return, in principle should reach all "excess" returns to saving – say, Mark Zuckerberg's extraordinary returns on his initial Facebook investment.
[274] Peter Diamond and Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, 25 J. Econ. Persp.165, 180 (2011).
[275] *See, e.g.,* Daniel Shaviro, *Beyond the Pro-Consumption Tax Consensus*, 60 Stanford L. Rev. 745, 777 (2007), describing findings in the new dynamic public finance literature.

--Ex post expropriation of wealth can be efficient, since the savings behavior has already occurred, so long as prospective savers see reasons for not expecting it to recur. Moreover, while the government can face credibility problems if it pledges not to expropriate again, doing so once can actually reduce – rather than increase – the perceived likelihood of a recurrence, by reason of its reducing both continued revenue needs and the level of high-end inequality.[276]

--As Murphy and Nagel have argued, if "wealth is an independent source of welfare, quite apart from the fact that some of it may be consumed later," then arguably a proper distributional measure should reach it distinctly from consumption.[277]

--Suppose that high-end income or wealth inequality results in negative externalities of any kind. Then taxing such income or wealth may be supported by the standard Pigouvian case for setting positive tax rates in light of the marginal harm caused.[278]

One might think that such arguments would bring the Haig-Simons income definition back into vogue. And perhaps, to a degree, they have. But each of them differs importantly from the Simons-Musgrave-Pechman framework in which one should tax "income," as an end in itself, because it best measures ability to pay. Instead, each of the arguments implies that one might focus on whichever particular types of saving fuel the underlying concerns.

Suppose, for example, that one is concerned about negative externalities from high-end wealth concentration, but views them as relating mainly to gifts and bequests that generate long-lasting multigenerational dynasties. Then one might to focus – and not necessarily through the income tax – on donative transfers within wealthy families, while allowing individuals' life-cycle smoothing, such as through retirement saving, to occur without any tax penalty.

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[276] Daniel Hemel, *Capital Taxation in the Middle of History*, 99 NYU L. Rev. 1554 (2024).
[277] Murphy and Nagel, *supra*, at 114.
[278] *See, e.g.,* Daniel Shaviro, *Ten Observations About Income Inequality*, forthcoming 2025 in Rita de la Feria (ed.), *Taxation and Inequalities*.

On the other hand, suppose one views saving for life cycle smoothing purposes as correlated with high earning ability, while viewing gifts and bequests as generating positive altruistic externalities. Then one might want to tax life cycle saving, while offering more favorable treatment to saving for purposes of funding intergenerational wealth transmission.

The "new" reasons for taxing saving also may weaken the case for taxing returns to saving under the same rate structure as that for labor income. Under a Simons-Musgrave view, with its current-period focus (apart from exempting already-taxed wealth), both types of income equally create ability to pay and thus should be taxed the same. But this changes if one has distinctive reasons for taxing particular returns to saving.

In consequence, some recent tax reform models, such as the late Edward Kleinbard's dual business enterprise income tax (BEIT) proposal, tax normal returns to saving at lower rates than labor income.[279] While such a proposal would be gratuitous or even irrational if one were aiming simply to implement the Haig-Simons income definition, it fits well within the bounds of reasonable debate under more contemporary rationales for taxing the normal return to saving.[280]

VII. SUMMING UP: A GREAT IDEA WHOSE TIME HAS MAINLY PASSED?

The Haig-Simons income definition's mid-century, multi-decade, run of almost theological preeminence in the tax policy field is almost embarrassing to contemplate now. Yet it captured so large and devoted a following for good reasons, reflecting (but not limited to) its especial value in helping to create a tax policy-focused epistemic community. Moreover, it remains to this day a useful item to have in one's toolkit.

[279] Edward D. Kleinbard, *The Right Tax at the Right Time*, 21 Fla. Tax Rev. 2008 (2023).
[280] *See, e.g.,* Eric Jay Toder, *Ed Kleinbard's Business Enterprise Income Tax: How Well Does It Solve the Problem of How to Tax Capital Income?*, 75 N.T.J. 395, 421 (2022) (calling Kleinbard's BEIT proposal a "major contribution to the literature on capital income taxation, which has received less attention than it deserves," while noting that it "reduces the distortion between present and future consumption inherent in an income tax by providing for a lower tax rate on income from capital than on earnings.").

Public economics scholarship was in a decidedly mixed state when Simons wrote. This was a field in which, less than twenty years before, so leading a figure as Edwin R.A. Seligman had both wanted and been able to publish, in so eminent a journal as the American Economic Review, "analysis" that was based on such bucolic musings as: "Each foal is separate from the mare and cannot possibly be confused with its mother…. The mare is, so to speak, a bundle of inchoate or unborn foals."[281] But it was also a field in which, by the time Simons wrote, the likes of Frank Ramsey and Irving Fisher had made sophisticated contributions that remain influential to this day. Against this background, the Haig-Simons definition's decidedly middlebrow character did not prevent it from making – but, rather, enabled it to make – major contributions to tax policy analysis.

Even without the mess that the Supreme Court had made in *Eisner v. Macomber*, there would still have been a need for a broad theoretical gauge explaining, for example, why in-kind compensation and unrealized gain fall within any reasonable mapping of the income concept, even if Congress might reasonably decide not to tax them. And it was helpful, in the income tax's formative days especially, for Simons to focus on questions of practical administrability, as well as to model for his audience not getting too flummoxed about, say, Kleinwächter's conundrum of the Flugeladjutant, which highlighted a genuine problem but one that was effectively insoluble.

Over the next few decades, the Haig-Simons definition continued to serve important purposes of two sorts. First, it helped to create a group identity and role for tax policy experts in both economics and law. Second, it offered a policy guide that was often well-directed, especially given the flaws in the tax legislative process that Surrey had identified. Even Boris Bittker, while helping to push back against the excessive academic orthodoxy that Haig-Simons

[281] Seligman, *supra*, at 519.

had by then fostered, disagreed with its proponents far more at a broad theoretical level than with respect to any specific topic areas that it was being used to address.

By a few decades down the line, however, its appeal as a comprehensive touchstone had grown significantly tarnished for several distinct groups:

--Academic tax lawyers didn't want to just keep writing articles saying that this tax preference or another ought to be repealed, even if they continued to believe this. Moreover, they had noticed Haig-Simons' inadequacy for addressing such questions as how the tax system, or more importantly the overall fiscal system, should address a variety of issues, such as the distributional relevance of one's health status or medical outlays.

--Economists had been developing more advanced models that were dynamic rather than static, and that emphasized incentive effects as well as the relevance of rational choice, operating over long time periods. Again, Haig-Simons income is a snapshot measure, apart from its ignoring preexisting wealth for reasons that are not rationalized within a consistent broader framework.

--While the Haig-Simons income definition long gained curb appeal from its using some economic reasoning but not too much, intellectual advancements in the field gradually moved the goalposts on how much economic analysis was 'just right."

--The underwhelming experience of 1986 tax reform diminished the appeal of broadening the income tax base while lowering tax rates. Moreover, post-1986, with lower rates and greater high-end inequality, people on the left had less reason than previously to favor tax rate reduction as the price to pay for income tax base-broadening, while those on the right came to favor never-ending rounds of additional rate reduction, without funding it through tax base expansion.

--Heightened concerns about the tax system's effects on saving and investment emerged, not just from the life cycle model, but also from the observations of reduced national saving and rising global competition for scarce capital.

Despite all this, however, the Haig-Simons income definition remains a useful concept in several respects. In particular:

-- Imposing the same tax burdens on alternative types of consumption, and on alternative types of capital income, avoids creating tax bias between them. This may serve both efficiency and distributional goals.

--In cases where there is either an observable market transaction or an implicit one (such as effectively "renting" one's own home to oneself), the price can indeed, as Simons insisted, stand in as a rough measure of the taxpayer's utility. For example, if I buy a restaurant meal for $100, it is plausible that I expected its value to me to be at least that high. Market prices therefore can stand in for utility, facilitating income measurement, at least in cases where an effectively standalone transaction can be observed. However, Kleinwächter 's Flugeladjutant conundrum shows the limits of this approach's usefulness. There the problem is that the Flugeladjutant may not be receiving the in-kind compensation by reason of its subjective value to him, given its relationship to his simply doing his job.

--The Haig-Simons framework helps to remind us that, whatever role realization ought to play in the tax law owing to its administrative advantages, unrealized gain is indeed conceptually income. Efforts to treat it as outside the scope not only do violence to the income concept by violating its best rationales, but risk miring us anew in the stupidities that Seligman brought so unstintingly to the task. This point will be well worth keeping in mind in coming years, as a corrupt U.S. Supreme Court, whose "bad faith and bias"[282] in support of right-wing political causes has grown increasingly clear, considers taking up future opportunities to hold that "realization is required for an income tax."[283]

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[282] Jennifer Rubin, *MAGA justices already gave Trump de facto immunity — and disgraced the court*, Washington Post, 6/24/2024, available online at https://www.washingtonpost.com/opinions/2024/06/24/trump-immunity-supreme-court/.
[283] *See Moore v. United States*, 602 U.S. __, __ (2024) (in a case involving the attribution of corporate income to shareholders, declining to decide whether "realization is required for an income tax").