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### 1969: The Birth of Tax Reform

Mark W. Cochran

*St. Mary's University School of Law*, [mcochran@stmarytx.edu](mailto:mcochran@stmarytx.edu)

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## 1969: THE BIRTH OF TAX REFORM

MARK WRIGHT COCHRAN\*

A small step, a giant leap,  
An oath that Nixon wouldn't keep,  
Manson, My Lai, Chappaquiddick,  
Biafra, Belfast, Vietnam,  
James Earl Ray and Sirhan sentenced,  
Justice Fortas under cloud,  
A trial of Chicago's Seven,  
Midnight Cowboy, Sundance Kid,  
Three days at Woodstock, Easy Rider,  
Vonnegut, the Miracle Mets,  
"Oh! Calcutta!," Jimi Hendrix,  
*I Know Why the Caged Bird Sings.*

A tumultuous end to a tumultuous decade,  
A crucible of social change  
Revolutionary in dimension.  
Amid the flotsam all but lost  
As just another novel concept  
In an ocean full of novel concepts  
Wailed an infant—Tax Reform.<sup>1</sup>

The name was new, but was it different  
From the twenty-five preceding changes  
Dating back for fifty years?  
Was Reform a new idea  
Or just a new name  
For "amendment"  
(Or perhaps a name  
For "big amendment,"  
Given its enormous scope)?<sup>2</sup>

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\* Professor, St. Mary's University School of Law. A.B.J., University of Georgia; J.D., Vanderbilt University; LL.M., University of Florida. Special thanks to John Teeter for recommending Robert Penn Warren's epic poem *Brother to Dragons* (New York 1979), which provided stylistic inspiration for this effort.

Like Romeo's rose—  
What's in a name?  
Is Reform by any other name as good,  
Or Tax Increase as bad?  
For fifty years it didn't matter.  
"Revenue" sufficed as package  
For revisions regular as rain.

Now "Reform"—  
A declaration of  
A higher aspiration.  
Each new law must have  
Its mission,  
And bear a title  
Like a woman's name:  
ERISA, ERTA, TEFRA, TAMRA,  
Like so many sisters  
Giving life to the statutory frame.<sup>3</sup>

And even "Revenue"  
Won't stand alone,  
But must be "Miscellaneous"  
Or "Reconciled."<sup>4</sup>

But putting aside  
The question of names  
And how much they matter,  
Assuming they do,  
Why Reform,  
In name or in substance,  
What catalyst caused it,  
Whence did it come?

Seven years before  
A Young President vowed  
"A major program of tax reform."  
But he equivocated,  
And Congress did not deliver.<sup>5</sup>

The minions at Treasury  
Toiled at a package  
But the Young President's  
War-weary successor  
Had other distractions  
And Tax Reform was not  
On his agenda.

But the package  
Was completed  
In Lyndon's lame-duck days  
And left  
To sink or swim  
With the new administration.<sup>6</sup>

Presenting the package,  
The Treasury Chief  
Put loopholes in the limelight  
When he spoke of those  
Who paid no tax  
On incomes in the millions.  
He warned of a revolt.<sup>7</sup>

The reform proposal,  
A would-be orphan,  
Was adopted and nurtured  
By a person positioned  
To give it a life—  
The Ways and Means Chairman,  
Who controlled the tax agenda  
(Until he met his Tidal Basin Waterloo).  
If Wilbur blessed it,  
It got done.  
And Wilbur blessed Reform.

With perceptive fingers  
On the public pulse  
Wilbur held forth  
About an acquaintance,  
A person with wealth,  
Who set out to cut his tax to zero  
Just to prove it could be done.  
He did, of course,  
And there were others  
Whose conduct mocked the system  
And its ideal of taxes  
Based on ability to pay.<sup>8</sup>

How could the Tax Code let this happen?  
What loopholes led to this result?  
Deductions, quite legitimate,  
But in larger doses  
Than anyone foresaw.

The wealthy could reduce their taxes  
In any (or all)  
Of a number of ways.  
Not the seedy, greedy shelters,  
No beaver pelts or almond groves,  
Just deductions and exclusions,  
Pure and simple,  
And without limit.

Consider, for instance,  
A person of means  
Whose sole source of income  
Was interest on bonds.  
If all of the bonds  
Were municipal issues  
The tax would be zero  
Even though  
The interest was millions.

And interest paid on money borrowed  
Might exceed current income  
If one borrowed to invest  
In growth stocks  
On a grand scale.

An owner of property  
Might give it away  
And satisfy charitable urges  
While deriving a greater benefit  
Than by selling it for cash.<sup>9</sup>  
And donations large and regular  
Could wipe out all income  
Under a rule enacted  
For a Philadelphia nun.<sup>10</sup>

Hence Reform.  
To shore up the system  
And enhance the ideal  
Of contributions to the fisc  
Proportionate to the resources  
Of the contributor.

No more charitable deductions without limit.  
No exception for the nun.  
New restrictions  
On in-kind donations.  
And limits on deducting interest  
On money borrowed to invest.<sup>11</sup>

As a second line of defense,  
Assurance that all would pay  
Something,  
A Minimum Tax  
On so-called "preference items."<sup>12</sup>

This was not the end  
But just the beginning.  
Three times since,  
"Reform" has been invoked  
To cast out demons  
And rebuild trust.  
To curb the abuses  
And broaden the base.<sup>13</sup>

Which brings us again  
To the question of names  
And whether  
Reform was real.  
Why did they need to  
Reform again  
When they just got through  
Reforming?

Was Reform an Ideal  
Or a cynic's contrivance  
To foster a scheme  
Of bargaining benefits  
For interest-group lucre?<sup>14</sup>

The threat of reform  
Is powerful leverage,  
And those being threatened  
Will certainly pay.  
But such is the nature  
Of representative democracy  
(Until reform reaches  
to campaign finance).

And the task begun  
Was incomplete.  
The problem of shelters  
Was clear.  
And getting worse.  
Reform.<sup>15</sup>

They first attempted  
To curtail the shelters  
By limiting write-offs  
To actual risk.  
But the rule had exceptions,  
And the shelters persisted  
As stubborn reminders  
Of the work that remained.  
Reform.<sup>16</sup>

And then the big Showdown,  
The Biggest Reform,  
Reform of a magnitude  
Not before known.  
Tax shelters demolished,  
Deductions repealed,  
A quantum leap forward  
Toward the Ideal.  
Reform.<sup>17</sup>

Along with the shelters  
Fell personal write-offs—  
For sales tax  
And interest  
On personal debt.<sup>18</sup>

But, alas, disappointment.  
A lower rate  
Times a broader base  
Equaled little change for most,  
Who must have expected  
To pay less  
When Congress caught  
“That fellow behind the tree.”<sup>19</sup>

What's in a name  
Indeed,  
If Reform  
Means more of the same.



And if desire to catch  
The fellow  
Behind the tree  
Fuels the engines  
Of Reform,  
Will the engines stall  
When we discover  
That fellow  
Behind the tree  
Is Me?

Or were they really onto something  
Five and twenty years ago?  
A small step  
On a long road  
But a giant leap  
Toward an Ideal,  
Maybe unattainable  
Given the constraints  
(Political and Economic,  
Fiscal and Practical),  
But still an Ideal.  
Reform.

A Sisyphean boulder,  
Perhaps.  
A system doomed  
To perpetual Reform  
Because of its nature  
And the nature of  
The political process.

But a goal nonetheless.  
A consciousness raised  
By naming the task.  
Reform.

Dateline Washington  
 Associated Press  
 IRS reports nearly eight hundred  
 Paid no tax in 1990  
 On incomes in excess  
 Of two-hundred-grand.<sup>20</sup>

Plus ça change,  
 Plus c'est la même chose?

Reform.

### NOTES

1. The Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, was signed into law by President Richard M. Nixon on December 30, 1969.

2. Subsequent to the enactment of the income tax in 1913 and prior to the Tax Reform Act of 1969, there were 25 tax acts, including a codification in 1939 and a recodification in 1954. Most of these acts were designated simply "Revenue Act of 19XX." The Tax Reform Act of 1969 was the first to carry the more ambitious designation, "Tax Reform Act." The House Ways and Means Committee Report on the Act indicates that the Committee was "not aware of any prior tax reform bill of equal substantive scope." H.R. REP. NO. 91-413, 91st Cong., 1st Sess., pt. 1, at 1 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1645, 1645. A synopsis of tax legislation from 1913 through 1987 was published by Commerce Clearing House to commemorate the 75th anniversary of the federal income tax. *The First 75: The Internal Revenue Code from Wilson to Reagan*, 75 Standard Fed. Tax Reports, No. 6, part II (CCH) (1988).

3. Since 1969, there has been a discernible trend toward more descriptive names, such as: the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829; the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, 95 Stat. 172; the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324; and the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. No. 100-647, 102 Stat. 3342. Only three times since 1969 has Congress fallen back on the old standby, "Revenue Act." Congressman Bill Archer (R. Tex.) put an interesting spin on the importance of names in a speech to the American Society of Association Executives (ASAE) in 1990. According to Representative Archer, "If Congress puts 'reform' in the title of legislation, you'd better look at it carefully, because you are liable to end up with something worse rather than something better." See Ellin Rosenthal & Eliot Rosen, *Gideon Joins House Taxwriters in Urging Caution on UBIT Reform*, 56 TAX NOTES 1241, 1241 (Mar. 12, 1990) (quoting Representative Archer's comments to ASAE on March 6, 1990).

4. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342; Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 400.

5. JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 158 (1985). President John F. Kennedy's 1962 Economic Message promised:

Later this year, I shall present to Congress a major program of tax reform. This broad program will re-examine tax rates and the definition of the income tax base. It will be aimed at simplification of our tax structure, the equal treatment of equally situated

persons, and the strengthening of incentives for individual effort and productive investment.

*Id.* at 158 (quoting from *Public Papers of the President, John F. Kennedy, 1962* (Government Printing Office 1963)). The President's proposal ultimately emphasized rate cuts more than reforms, and most of the reform provisions were left out of the package that was ultimately enacted in 1964. *See id.* at 155-65 (discussing events leading to Revenue Act of 1964).

6. *See id.* at 166 (explaining development of tax reform package).

7. *See id.* (quoting speech by outgoing Treasury Secretary Joseph Barr).

8. *See* 115 CONG. REC. H6978 (daily ed. Aug. 6, 1969) (quoting statement of Rep. Wilbur Mills).

9. Assume, for example, that Taxpayer owns an asset worth \$500.00 for which Taxpayer paid \$100.00. A sale of the asset for cash would yield a gain of \$400.00, which would result in a tax of \$280.00 (assuming a 70% rate). This would leave the Taxpayer with \$220.00 after tax (\$500.00 of sale proceeds less \$280.00 of tax). Compare the result if Taxpayer were to contribute the asset to charity and were allowed a deduction for its fair market value. The deduction would result in a tax benefit to Taxpayer worth \$350.00 (\$500.00 times 70%).

10. Prior to 1969, charitable contributions were deductible only to the extent that they did not exceed 30% of the taxpayer's adjusted gross income. An exception provided that the limitation did not apply to taxpayers whose charitable contributions plus income taxes exceeded 90% of taxable income for 8 of the 10 years preceding the tax year in question. This provision reportedly was enacted to benefit a nun who had inherited an income interest in a trust and paid all the income to her order pursuant to a vow of poverty. Representative Mills described the origins of the "Philadelphia Nun" exception in his remarks to the Committee of the Whole House. 115 CONG. REC. 22,562-63 (1969). As Representative Mills explained, this well-intentioned exception enabled many wealthy taxpayers to wipe out their income entirely through charitable contributions of appreciated assets. *Id.* The exception was originally enacted in 1924. *See* Revenue Act of 1924, Pub. L. No. 68-176, § 214(10)(E), 43 Stat. 253, 271 (stating exception to charitable contributions).

11. The Tax Reform Act of 1969 eliminated the "Philadelphia Nun" exception, making all individuals subject to the limitation of charitable contribution deductions to 50% of adjusted gross income. *See* I.R.C. § 170(b)(1) (1988) (limiting individual itemized deduction for charitable contributions); Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a)(1)(B), 83 Stat. 487, 549-53 (increasing limit on deductible contributions from 30% of adjusted gross income to 50% of taxpayer's contribution base); *see also* I.R.C. § 170(e) (1988) (limiting deductibility for contributions of certain types of property to cost basis); Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a)(1)(B), 83 Stat. 487, 555-56 (substituting provisions covering contributions of ordinary income and capital gain property for prior provisions setting out special rules for contributions); I.R.C. § 163(d) (1988) (limiting investment-interest deductions); Tax Reform Act of 1969, Pub. L. No. 91-172, § 221(a), 83 Stat. 487, 574-76 (passing, for first time, limits on deductions for investment interest based on net investment income).

12. The Minimum Tax provisions appear in Internal Revenue Code §§ 55-59. I.R.C. §§ 55-59 (1988 & Supp. IV 1992). Charitable contributions of appreciated property gave rise to Minimum Tax liability under the statute as originally enacted. Tax Reform Act of 1986, Pub. L. No. 99-514, § 701, 100 Stat. 2085, 2333-35. A temporary exception was carved out in 1990, however, for gifts of tangible personal property (presumably to foster contribution of art works to museums). Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, § 11344, 104 Stat. 1388-400, 1388-472. The 1993 Tax Act made this exception permanent, and extended it to real property and intangible property. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13171, 107 Stat. 312, 454-55.

13. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

14. Professors Doernberg and McChesney suggest that more frequent tax reform legislation provides a way for legislators on the tax-writing committees to derive larger campaign contributions from interest groups seeking to prevent the elimination of favorable tax provisions. Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 933-45 (1987).

15. See generally H.R. REP. NO. 658, 94th Cong., 2d Sess. 1-10 (1975), reprinted in 1975 U.S.C.C.A.N. 2897, 2897-2907 (summarizing and discussing purposes of Act in limiting abuses of tax-sheltered investments).

16. The Tax Reform Act of 1976 added Internal Revenue Code § 465, which limits deductions from certain activities to the taxpayer's "amount at risk." Tax Reform Act of 1976, Pub. L. No. 94-455, § 204, 90 Stat. 1520, 1531-33. The effect of this limitation was to preclude deductions based on nonrecourse debt, which had previously played a major role in tax shelters. See Boris I. Bittker, *Tax Shelters, Nonrecourse Debt, and the Crane Case*, 33 TAX L. REV. 277, 282-83 (1978) (detailing birth of many tax shelters that based current deductions on asset bases purchased with nonrecourse borrowings). As originally enacted, § 465 applied only to a few enumerated activities. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 204, 90 Stat. 1520, 1531-33 (limiting deductions to amounts at risk in certain oil and gas, film and video, leasing, and farm activities). The Revenue Act of 1978 expanded the scope of § 465, but real estate activities were provided a special exemption. See Revenue Act of 1978, Pub. L. No. 95-600, § 201, 92 Stat. 2763, 2814-16 (extending § 465 at-risk rules to all activities other than real estate). The 1976 and 1978 changes proved ineffective in eliminating tax shelter abuses. According to one source, "tax shelter sales are believed to have jumped from less than \$2 billion in 1976 to over \$20 billion in 1983." JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* 10 (1987).

17. The Tax Reform Act of 1986 effectively shut down tax shelters by adding § 469, which currently provides that losses from "passive activities" may be deducted only against income from similar sources. I.R.C. § 469 (1988 & Supp. IV 1992); see Tax Reform Act of 1986, Pub. L. No. 99-514, § 501, 100 Stat. 2085, 2233-41 (adding § 469, "Passive Activity Losses and Credits Limited"). "Passive activity" is an oxymoronic term which includes limited-partnership interests and similar vehicles typically used for tax shelters. I.R.C. § 469(c) (1988 & Supp. IV 1992).

18. Deductions for property taxes and home mortgage interest proved too popular for repeal. See JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* 57 (1987) (discussing home mortgage interest); *id.* at 113-116 (discussing property taxes).

19. See Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and The Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 896 n.32 (1987) (quoting Senator Russell B. Long). In debate over the Tax Reform Act of 1976, Senator Long said, "I have always felt that tax reform is a change in the tax law that I favor, or if it is the other man defining tax reform it is a change in the tax law that he favors." 122 CONG. REC. 18,553 (June 16, 1976), cited in JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 192 (1987).

20. *Rich Folk Avoid Taxes on Incomes*, SAN ANTONIO EXPRESS-NEWS, June 30, 1993, at 1A.

