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Tax Advice for the Second Obama Administration

Paul L. Caron*

Twenty-five of the nation's leading tax academics, practitioners, journalists, and public intellectuals gathered in Malibu, California on the Friday before President Obama's second inauguration¹ to plead for tax reform.² The papers published in this issue of the *Pepperdine Law Review* provide very different prescriptions for America's tax ills. But there is a unanimous diagnosis that the country's tax system is sick indeed. A re-elected president's inauguration offers a particularly propitious moment to put politics aside and embark on a treatment plan. If our lawmakers are interested in healing our tax wounds, the ideas presented in these pages offer a good place to begin. They run the gamut from relatively minor procedures to total transplantation. But all would improve the health of our current tax system.

* Charles Hartsock Professor of Law, University of Cincinnati College of Law; D & L Straus Distinguished Visiting Professor of Law, Pepperdine University School of Law. E-mail: paul.caron@pepperdine.edu. I join the many speakers who began their remarks by praising the *Pepperdine Law Review* students for pulling off the best-run symposium that any of us have ever attended. Many students provided tireless and cheerful service, but I want to give particular thanks to Editor-in-Chief Margot Parmenter and Symposium Editor Michael Wood. Due in large part to the students' efforts, the symposium broke Pepperdine symposia attendance records, as the law school had to open *nvo* overflow rooms to handle the crowds. As of March 26, 2013, the video of the event (available at <http://new.livestream.com/pepperdinesol/lawreviewsymposium>) has been viewed 778 times, and the conference drafts of the nine symposium papers available on SSRN have been downloaded 727 times.

1. The Symposium took place on January 18, 2013. President Obama's second inauguration occurred the next Monday—January 21, 2013.

2. For the symposium brochure see PEPPERDINE LAW REVIEW, TAX ADVICE FOR THE SECOND OBAMA ADMINISTRATION (Jan. 2013), available at <http://law.pepperdine.edu/news-events/events/tax-advice/TaxAdvicefortheSecondObamaAdministrationbrochure.pdf>. For the symposium schedule, see *Schedule*, PEPP. U. SCH. L., <http://law.pepperdine.edu/news-events/events/tax-advice/schedule.htm> (last visited Mar. 26, 2013). For coverage of the symposium, see William Hoffman, *Globalization Poses New Challenges for Tax Reform*, 138 TAX NOTES 429 (2013); Robert Goulder, *The Pepperdine Papers: Advice for Obama's Second Term*, TAX ANALYSTS (Jan. 25, 2013, 12:45 PM), www.taxanalysts.com/taxcom/taxblog.nsf/Permalink/RGOR-948M2Z.

After Deanell Tacha³ and Christopher Bergin⁴ opened the symposium with brief remarks on behalf of our co-sponsors—Pepperdine University School of Law and Tax Analysts—Michael J. Graetz⁵ delivered the keynote address.⁶ He reminds us that since 2013 marks the 100th anniversary of the modern income tax,⁷ we should remember that 1913 was the culmination of a two-decade effort to achieve greater tax justice.⁸ Indeed, 1913’s public debate over “justice” and “virtue” mirrors our debates a century later over using the tax system to redistribute or create wealth.⁹ Unlike many,¹⁰ Graetz does not advocate 1986-style tax reform to solve today’s problems.¹¹ Instead, he views the 1986 reform as merely a “temporary marriage between the forces of ‘justice’ and ‘virtue.’”¹² In light of 2013’s political and economic realities, distributional neutrality and revenue neutrality can no longer be our tax lodestar.¹³ Moreover, today’s economic circumstances demand that we forswear the use of business taxes or debt as “pots of gold” to finance individual tax reform.¹⁴ Graetz contends that the 1986 Act was a promise failed: “I do not believe that the best path for tax reform is simply to improve the income tax. Changes in the past 25 years make this a dead end.”¹⁵

Graetz frames the “daunting” tax challenge facing President Obama and Congress: “to reduce deficits and debt in the long-run, and simultaneously to

3. Duane and Kelly Roberts Dean and Professor of Law, Pepperdine University School of Law.

4. President and Publisher, Tax Analysts.

5. Wilbur H. Friedman Professor of Tax Law and Columbia Alumni Professor of Tax Law, Columbia Law School; Justus S. Hotchkiss Professor Emeritus of Law, Yale Law School.

6. Michael J. Graetz, *Tax Advice for the Second Obama Administration*, 138 TAX NOTES 631 (2013).

7. The anniversary has sparked a number of tax symposia and conferences. See, e.g., Symposium, *The Internal Revenue Code at 100*, 66 TAX L. REV. (forthcoming 2013) (schedule available at <http://www.law.nyu.edu/tax/lecturesandspecialevents/internal-revenue-code-at-100/index.htm>); Symposium, *USC Gould School of Law 2013 Tax Institute*, 64 MAJOR TAX PLANNING (forthcoming 2013) (for a description see <http://weblaw.usc.edu/why/academics/cle/tax/assets/docs/TIbrochure.pdf>); Symposium, *The Federal Income Tax: Has It Run Its Course?*, 138 TAX NOTES (forthcoming 2013) (information available at www.taxanalysts.com/www/conferences.nsf/KeyLookup/SCAO-94GPVK); Symposium, *100 Years Under the Income Tax*, 108 N.W. U. L. Rev. (forthcoming 2013) (information available at www.law.northwestern.edu/journals/lawreview/symposia.html).

8. Graetz, *supra* note 6, at 631.

9. *Id.* at 631–32.

10. See, e.g., Martin Feldstein, *The Tax Reform Evidence From 1986*, WALL ST. J., Oct. 24, 2011, <http://online.wsj.com/article/SB10001424052970204002304576629481571778262.html>.

11. See Michael J. Graetz, *Tax Reform 1986: A Silver Anniversary, Not a Jubilee*, 133 TAX NOTES 313 (2011); see also Daniel N. Shaviro, *1986-Style Tax Reform: A Good Idea Whose Time Has Passed*, 131 TAX NOTES 817 (2011).

12. Graetz, *supra* note 6, at 632.

13. *Id.* at 632–33.

14. *Id.* at 633.

15. *Id.* at 634.

achieve a fair distribution of the tax burden and promote our nation's economic growth."¹⁶ He argues that "[w]e need to reunite 'virtue' and 'justice' by moving back toward the mix of consumption and income taxes adopted in 1913."¹⁷ Attempts to lower income tax rates by eliminating "loopholes" are doomed to fail since the vast majority of the \$1 trillion of yearly tax expenditures consists of politically untouchable tax breaks for health insurance, retirement savings, home mortgage interest, state and local taxes, charitable deductions, and capital gains.¹⁸ As he has written elsewhere,¹⁹ Graetz instead advocates refocusing the income tax on higher-income people supplemented by a broad-based sales tax on goods and services:

A dramatic reform that uses a goods and services tax to reduce our nation's reliance on income taxation is the only path forward that will, once again, embrace both virtue and justice and enhance economic growth without abandoning tax equity. We now need a major overhaul of our nation's tax system, not just another oil change and lubrication.²⁰

David Brunori²¹ moderated the first panel on *The Buffett Rule, the 1%, and the Fairness/Growth Divide*. The three papers focus on different groups of taxpayers. In *The 535 Report: A Pathway to Fundamental Tax Reform*, Dorothy A. Brown²² argues that the current tax code disadvantages taxpayers of color while favoring the select few—especially members of Congress.²³ She presents data showing how taxpayers of color receive disproportionately fewer benefits from popular tax breaks such as those for pensions, capital gains, and home mortgage interest.²⁴ Like Graetz, Brown is skeptical of the political will to eliminate such popular tax expenditures.²⁵ But she argues

16. *Id.*

17. *Id.* at 635.

18. STAFF OF JOINT COMM. ON TAXATION, 113TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017 (Comm. Print 2013).

19. MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR, AND COMPETITIVE TAX PLAN FOR THE UNITED STATES (2008).

20. Graetz, *supra* note 6, at 635.

21. Executive Vice President of Editorial Operations, Tax Analysts.

22. Professor of Law, Emory University School of Law.

23. Dorothy A. Brown, *The 535 Report: A Pathway to Fundamental Tax Reform*, 40 PEPP. L. REV. 1155 (2013).

24. *Id.* at 1161–62.

25. *See id.* at 1170.

that such reform could be triggered through a “focusing event” that galvanizes the American public to demand change.²⁶ She proposes *The 535 Report* as such a focusing event: an annual IRS “study of the 100 senators and 435 members of the House of Representatives” that would report “the percent[age] of members of Congress who take advantage of the largest tax expenditures” and how that compares to the average taxpayer.²⁷ Her “hunch is that *The 535 Report* would show the harm to the average American in the form of higher tax rates that was inflicted by Congress for tax breaks that most members of Congress receive but that most Americans do not.”²⁸

In *Access to Tax Justice* Francine J. Lipman²⁹ contends that the 46 million Americans living in poverty belie the nation’s promise of liberty and justice for all.³⁰ She argues that alleviation of poverty is a fundamental precondition for social justice, and that the earned income tax credit (EITC) is our most successful antipoverty program for working lower-income Americans.³¹ Yet running such an ambitious anti-poverty program through the tax code creates serious access issues for low-income workers.³² Because the IRS is fundamentally a collection agency, its orientation and expertise are in collecting revenue rather than in distributing resources.³³ As a result, Lipman endorses the National Taxpayer Advocate’s recommendation that the IRS appoint a deputy commissioner with primary responsibility over all tax-system based social benefit initiatives like the EITC.³⁴ Such a Social Benefits Deputy Commissioner would join “an impressive team of social justice advocates across America, inside and outside of the government, to better provide access to tax justice for all Americans, including through the income tax system, to the most vulnerable and voiceless among us.”³⁵

Kirk J. Stark³⁶ and Eric M. Zolt³⁷ shift the focus to *Tax Reform and the American Middle Class*.³⁸ They present data showing two distinct trends over the past quarter century: (1) the middle class is in real and significant

26. *Id.* at 1170.

27. *Id.* at 1171.

28. *Id.* at 1172.

29. William S. Boyd Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law.

30. Francine J. Lipman, *Access to Tax Justice*, 40 PEPP. L. REV. 1173 (2013).

31. *Id.* at 1181–85.

32. *Id.* at 1185–98.

33. *Id.*

34. *Id.* at 1200–1203.

35. *Id.* at 1208.

36. Vice Dean and Professor of Law, UCLA School of Law.

37. Michael H. Schill Distinguished Professor of Law, UCLA School of Law.

38. Kirk J. Stark & Eric M. Zolt, *Tax Reform and the American Middle Class*, 40 PEPP. L. REV. 1209 (2013).

economic decline, with reduced median income and wealth, while (2) politicians from both parties have showered ever more tax relief on the middle class. “[T]he middle class is indeed struggling, but neither the root causes of America’s ‘middle class decline’ nor the policy solutions to address it are likely to be found within the confines of the Internal Revenue Code.”³⁹ Although the tax zeitgeist currently requires Democrats and Republicans to pledge fealty to “middle class tax relief,” Stark and Zolt ask whether this approach “has outlived its usefulness.”⁴⁰ They instead propose “fortification of key expenditure programs designed to alleviate economic insecurity, even if it means a less progressive tax system.”⁴¹ Such apostasy may better serve average Americans than mindless adherence to middle class tax dogma.⁴²

Bruce Bartlett⁴³ and David S. Miller⁴⁴ provided commentary on the papers. Bartlett agrees with *The 535 Report* proposal, but would go even further by requiring every member of Congress to publicly release his or her tax return.⁴⁵ He notes the disingenuousness of Republicans who now bemoan the fact that only 47% of Americans pay federal income taxes when it was Gerald Ford who created the EITC, Ronald Reagan who expanded it, and Newt Gingrich who made it refundable.⁴⁶ Bartlett congratulates Stark and Zolt “for treading where very few are willing to go, of stating that the middle class is under-taxed. I agree with this completely. But I also agree that we need to soak the rich a lot more.”⁴⁷

Miller notes that all three papers “share a very common thread. Stated broadly, the wealthy are jumping ahead; the poor and middle class are falling behind; and tax policy has rolled away.”⁴⁸ He shares the desire to

39. *Id.* at 1211.

40. *Id.* at 1212.

41. *Id.*

42. *See id.* at 1232–34.

43. Columnist, *Tax Notes* and *The Fiscal Times*; Contributor, *The Financial Times* and *The New York Times*; former Deputy Assistant Secretary of the Treasury for Economic Policy in the George H. W. Bush Administration.

44. Tax Partner, Cadwalader, Wickersham & Taft LLP, New York, NY.

45. Bruce Bartlett, Commentary at the Pepperdine Law Review Symposium: Tax Advice for the Second Obama Administration (Jan. 18, 2013) (transcript on file with the *Pepperdine Law Review*; video recording available at <http://new.livestream.com/pepperdinesol/lawreviewsymposium>).

46. *Id.*

47. *Id.*

48. Davis S. Miller, Commentary at the Pepperdine Law Review Symposium: Tax Advice for the Second Obama Administration (Jan. 18, 2013) (transcript on file with the *Pepperdine Law Review*; video recording available at <http://new.livestream.com/pepperdinesol/lawreviewsymposium>).

make the tax system more progressive, but thinks too much attention is given to income inequality and not enough to wealth inequality.⁴⁹ Miller continues to support a progressive mark-to-market tax system, at least with respect to publicly-traded stock.⁵⁰

I moderated the second panel on *Estate and Gift Taxation*. In *Distracted from Distraction by Distraction: Reimagining Estate Tax Reform*, Edward J. McCaffery⁵¹ offers very simple advice about what to do about the estate tax: “forget about it.”⁵² He argues that the “estate tax has long since ceased” to serve a significant policy objective such as “raising revenue, instilling progressivity into the tax system, ‘backing up’ the income tax, or breaking up large concentrations of wealth.”⁵³ McCaffery contends that through devices such as the dynasty trust, the estate tax can be so easily avoided with a modicum of planning that we should no longer be distracted by it.⁵⁴ Indeed, the failure of the tax system to tax unrealized appreciation enables the wealthy to engage in Tax Planning 101 (buy, borrow, die) to escape taxes altogether.⁵⁵ Instead, we should focus reform efforts elsewhere to serve the estate tax’s goals by adopting a progressive consumption tax, taxing unrealized appreciation, or replacing stepped-up basis at death with either carryover basis or capital gains/realization at death.⁵⁶

In contrast, James R. Repetti⁵⁷ and I are not ready to give up on the estate tax. In *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, we present data showing that income and wealth inequality has increased dramatically over the past thirty years.⁵⁸ This increased inequality causes a variety of adverse social consequences and slows economic growth.⁵⁹ We argue that federal tax policy can play an important role in reducing inequality and that the estate tax is a particularly apt reform vehicle.⁶⁰ Although we concede that dynasty trusts and other loopholes permit significant leakage in the estate tax, we present tax return

49. *Id.*

50. David S. Miller, *A Progressive System of Mark-to-Market Taxation*, 121 TAX NOTES 213 (2008); David S. Miller, *The Zuckerberg Tax*, N.Y. TIMES, Feb. 7, 2012, at A27.

51. Robert C. Packard Trustee Chair in Law, Economics and Political Science, USC Gould School of Law; Visiting Professor of Law and Economics, California Institute of Technology.

52. Edward J. McCaffery, *Distracted from Distraction by Distraction: Reimagining Estate Tax Reform*, 40 PEPP. L. REV. 1235, 1236 (2013).

53. *Id.*

54. *Id.* at 1241–44.

55. *Id.* at 1250–51.

56. *Id.* at 1251–54.

57. William J. Kenealy, S.J. Professor of Law, Boston College Law School.

58. Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255 (2013).

59. *Id.* at 1257–74.

60. *Id.* at 1274–80.

data showing that the estate tax plays an important role in moderating the amount of wealth that is passed from generation to generation.⁶¹ We propose a modest reform: that Congress restore the estate tax exemption level (\$3.5 million) and top rate (45%), as in effect in 2009 and as proposed by President Obama in his 2014 federal budget:

Our take on the political environment in Washington, D.C.—now and for the foreseeable future—is that attempts to “go big” and pursue dramatic reform have little chance for success. . . . Instead, we believe a “go small” approach has the greatest chance for political success and would win a small but significant battle in the long war against inequality in America. . . . Tax policy perfection must not be the enemy of the tax reform good that is politically achievable.⁶²

Grayson M.P. McCouch⁶³ discusses the evolution of dynasty trusts in *Who Killed the Rule Against Perpetuities?*⁶⁴ Although the conventional view is that the \$1 million (now \$5.25 million) generation-skipping transfer (GST) tax exemption led to the explosion of dynasty trusts, McCouch takes a more nuanced view of the relationship between the federal wealth transfer taxes and the rule against perpetuities.⁶⁵ He notes that marketing material for perpetual trusts stresses not only their transfer tax avoidance potential but also “their ability to conserve and manage accumulated wealth for future generations and protect beneficiaries against improvidence and misfortune”⁶⁶ But in the end, the drive for perpetual trust legislation owes more to the efforts of bankers and lawyers to drum up business than to lobbying by wealthy clients motivated by tax and non-tax concerns.⁶⁷

Joseph J. Thorndike⁶⁸ provided commentary on the *Estate and Gift Tax* panel papers.⁶⁹ He agrees that McCaffery makes a compelling case for the

61. *Id.* at 1280–89.

62. *Id.* at 1288.

63. Professor of Law, University of San Diego School of Law; Visiting Professor of Law, University of Florida Levin College of Law.

64. Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291 (2013).

65. *Id.* at 1299–1302.

66. *Id.* at 1299–1300.

67. *Id.* at 1302–06.

68. Director of the Tax History Project and Contributing Editor, Tax Analysts.

69. Joseph J. Thorndike, Commentary at the Pepperdine Law Review Symposium: Tax Advice for the Second Obama Administration (Jan. 18, 2013) (transcript on file with the *Pepperdine Law*

irrelevance of the estate tax in revenue, progressivity, and fairness terms, but not in political terms.⁷⁰ Thorndike wonders whether we are experiencing a rebirth of progressive tax ideas and, if so, how Caron and Repetti's pro-growth estate tax revival might fit into that rebirth.⁷¹ As a historian, Thorndike likes McCouch's tale of who killed the rule against perpetuities—there is a great story to be told about the marketing of tax policy.⁷²

Thomas G. Bost⁷³ moderated the third panel on *Business and International Taxation (I)*. The first two papers discuss missing elements in business tax reform. In *The Globalization of Corporate Tax Reform*, Steven A. Bank⁷⁴ notes that the international tax reforms proposed by President Obama and Congress neglect to take into account the global corporate tax reform movement.⁷⁵ Although the United States has tools to unilaterally target abusive transactions like the Double Irish/Dutch Sandwich, the OECD, European Commission, and others have called for collaborative global tax reform to address multinational tax evasion.⁷⁶ Bank does not take a position in favor of either international tax reform cooperation or unilateral corporate tax reform.⁷⁷ But he concludes that “to be successful, any attempt at domestic corporate tax reform must be informed by and in some respects reflect international standards and developments in the global corporate tax reform movement.”⁷⁸

Karen C. Burke⁷⁹ explains in *Passthrough Entities: The Missing Element in Business Tax Reform* that passthroughs have “become the vehicle of choice for nonpublicly-traded businesses.”⁸⁰ As a result, business tax reform plans that decrease corporate tax rates while increasing individual tax rates must prevent the use of corporations as tax shelters that would erode the personal income tax base.⁸¹ Burke supports an entity-level tax on large

Review; video recording available at <http://new.livestream.com/pepperdinesol/lawreviewsymp osium>).

70. *Id.*

71. *Id.*

72. *Id.*

73. Professor of Law, Pepperdine University School of Law.

74. Vice Dean and Professor of Law, UCLA School of Law.

75. Stephen A. Bank, *The Globalization of Corporate Tax Reform*, 40 PEPP. L. REV. 1307 (2013).

76. *Id.* 1311–20.

77. *Id.* at 1326.

78. *Id.* at 1326–27.

79. Warren Distinguished Professor of Law, University of San Diego School of Law; Visiting Professor of Law, University of Florida Levin College of Law.

80. Karen C. Burke, *Passthrough Entities: The Missing Element in Business Tax Reform*, 40 PEPP. L. REV. 1329, 1331 (2013).

81. *Id.* at 1335–40.

publicly-traded partnerships and securities partnerships to stem the long-term decline in corporate tax revenues.⁸²

In *A Proposal for the Tax Treatment of Interest in a Territorial System*, Martin A. Sullivan⁸³ responds to House Ways and Means Committee Chair Dave Camp's call for the "adoption of a territorial tax system in which most active foreign profits of multinational corporations would be exempt from U.S. tax," along with a reduction in the corporate tax rate from 35% to 25%.⁸⁴ Sullivan argues that in such a case, the United States should adopt interest allocations rules, either with other countries (with assets as the allocation factor) or unilaterally (with gross profits as the allocation factor).⁸⁵

Michael L. Schler⁸⁶ provided commentary on the *Business and International Tax (1)* panel papers.⁸⁷ He is skeptical about the effectiveness of global cooperation to prevent the shifting of income to tax havens.⁸⁸ Schler agrees that the passthrough tax system is a complete mess, and that lower corporate tax rates will turn closely-held corporations into the new tax shelter.⁸⁹ Although he likes the idea of using gross profits as the interest allocation rule, he fears the revenue gains may prove illusory.⁹⁰

Khrista McCarden⁹¹ moderated the fourth panel on *Business and International Taxation (2)*. In *Corporate and International Tax Reform: Proposals for the Second Obama Administration (and Beyond)*, Reuven S. Avi-Yonah⁹² offers a series of corporate and international reform proposals, grouped in long-term, medium-term, and short-term time horizons.⁹³ On the long-term front, he joins in Michael Graetz's call for a value-added tax,⁹⁴ but

82. *Id.* at 1340–43.

83. Chief Economist, Tax Analysts.

84. Martin A. Sullivan, *A Proposal for the Tax Treatment of Interest in a Territorial System*, 40 PEPP. L. REV. 1345, 1345, 1350 (2013).

85. *Id.* at 1350–61.

86. Tax Partner, Cravath Swaine & Moore LLP, New York, NY.

87. Michael L. Schler, Commentary at the Pepperdine Law Review Symposium: Tax Advice for the Second Obama Administration (Jan. 18, 2013) (transcript on file with the *Pepperdine Law Review*; video recording available at <http://new.livestream.com/pepperdinesol/lawreviewsymposium>).

88. *Id.*

89. *Id.*

90. *Id.*

91. Associate Professor of Law, Pepperdine University School of Law.

92. Irwin I. Cohn Professor of Law and Director, International Tax LLM, University of Michigan Law School.

93. Reuven S. Avi-Yonah, *Corporate and International Tax Reform: Proposals for the Second Obama Administration (and Beyond)*, 40 PEPP. L. REV. 1365 (2013).

94. GRAETZ, *supra* note 19, at 61–83.

would not eliminate the corporate tax.⁹⁵ In the medium-term, Avi-Yonah advocates shifting to a territorial corporate tax system with transfer pricing reform.⁹⁶ In the short-term, he embraces the Obama Administration's proposal for a minimum tax on foreign source income of U.S.-based multinational corporations.⁹⁷

Allison Christians⁹⁸ discusses two pieces of legislation passed in the first Obama administration in *Putting the Reign Back in Sovereign: Advice for the Second Obama Administration*: (1) the Foreign Account Tax Compliance Act (FATCA); and (2) the Extractive Industries Transparency Initiative (EITI) addendum to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).⁹⁹ She applauds the reinvigoration of the role of the nation-state in regulating people and resources, but argues that both statutes fall short for two reasons.¹⁰⁰ First, neither adequately deals with the thorny issues of global disclosure and compliance.¹⁰¹ Second, each is too narrow: FATCA should be fully reciprocal, and EITI should expand beyond extractive industries.¹⁰² Christians outlines how the second Obama administration could cure these defects.¹⁰³

In *The Transfer Pricing Regs Need a Good Edit*, Susan C. Morse¹⁰⁴ seeks to constrain the ability of U.S. corporations "to allocate taxable income away from U.S. affiliates and income tax deductions toward U.S. affiliates."¹⁰⁵ She argues that the IRS already possesses the regulatory authority to incrementally add formulaic elements tethered to high-friction non-tax reference points "without adopting any formulary global transfer pricing standard."¹⁰⁶ Because the transfer pricing regulations are "more like standards and less like rules," the IRS should have a wide berth in implementing Morse's suggestions.¹⁰⁷ Particular incremental formulary changes to the U.S. transfer pricing regulations also might be accepted by U.S. tax treaty partners.¹⁰⁸

95. Avi-Yonah, *supra* note 93, at 1366–67.

96. *Id.* at 1368–69.

97. *Id.* at 1368–72.

98. H. Heward Stikeman Chair in Taxation, McGill University Faculty of Law.

99. Allison Christians, *Putting the Reign Back in Sovereign: Advice for the Second Obama Administration*, 40 PEPP. L. REV. 1373 (2013).

100. *Id.* at 1375–1402.

101. *Id.* at 1403–13.

102. *Id.*

103. *Id.*

104. Associate Professor of Law, University of California, Hastings College of the Law.

105. Susan C. Morse, *The Transfer Pricing Regs Need a Good Edit*, 40 PEPP. L. REV. 1415, 1416 (2013).

106. *Id.* at 1417–26.

107. *Id.* at 1427.

108. *Id.* at 1433–38.

Robert Goulder¹⁰⁹ provided commentary on the *Business and International Tax (2)* panel papers.¹¹⁰ He notes that international tax is where the action is—it is where the money is, and where the worst abuses are.¹¹¹ Goulder agrees with Avi-Yonah’s specific reforms and his observation that the plans proposed by President Obama and House Ways and Means Committee Chair Camp are not far apart.¹¹² Goulder considers Christians’ EITI discussion “the revelation of the conference. Few tax professionals are even aware of the regime’s existence. Bravo to Professor Christians for highlighting the issue and framing the issue in such an insightful manner.”¹¹³ He concurs with Morse that “transfer pricing is really the big problem. What did they say about World War II fighter pilots that were getting shot at? If you’re getting flack, you know you’re over the target. You know you’re getting flack because transfer pricing is right over the target.”¹¹⁴ Like the late Walter Brooke’s advice to a young Dustin Hoffman in *The Graduate*¹¹⁵ (“plastics”), Goulder closed with advice for the audience: “[T]ransfer pricing and FATCA, that’s your future.”¹¹⁶

David Cay Johnston¹¹⁷ delivered the luncheon address¹¹⁸ and closed the symposium in a *Morning Joe*¹¹⁹-inspired segment on *What Have We Learned Today?*¹²⁰ He compared the current tax system to a *New Yorker* cartoon: “[O]ne brontosaur[u]s [is] talking to the other and saying, ‘You know, warm weather, lots of food, we can go on like this forever.’”¹²¹

109. Editor-in-Chief of Tax Analysts’ international tax publications (*Tax Notes International*, *Worldwide Tax Daily*, and *Worldwide Tax Treaties*).

110. Robert Goulder, Commentary at the Pepperdine Law Review Symposium: Tax Advice for the Second Obama Administration (Jan. 18, 2013) (transcript on file with the *Pepperdine Law Review*; video recording available at <http://new.livestream.com/pepperdinesol/lawreviewsymposium>).

111. *Id.*

112. *Id.*

113. Goulder, *The Pepperdine Papers*, *supra* note 2.

114. Goulder, *Commentary*, *supra* note 110.

115. *THE GRADUATE* (Embassy Pictures 1967).

116. Goulder, *Commentary*, *supra* note 110.

117. Distinguished Visiting Lecturer, Syracuse University College of Law. Recipient of the 2001 Pulitzer Prize for his tax reporting for *The New York Times*.

118. David Cay Johnston, Luncheon Address at the Pepperdine Law Review Symposium: Tax Advice for the Second Obama Administration (Jan. 18, 2013).

119. A morning talk show on MSNBC.

120. David Cay Johnston, Closing Remarks at the Pepperdine Law Review Symposium: Tax Advice for the Second Obama Administration (Jan. 18, 2013) (transcript on file with the *Pepperdine Law Review*; video recording available at <http://new.livestream.com/pepperdinesol/lawreviewsymposium>).

121. *Id.*
