

A Tax Crit Identity Crisis? Or Tax
Expenditure Analysis, Deconstruction, and the
Rethinking of a Collective Identity

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Anthony C. Infanti

Abstract

Critical tax theory, much like its non-tax critical counterparts, has been consistently marginalized by mainstream tax academics. To date, tax crits have accepted and acquiesced in this marginalization. In this article, I question the idea that tax crits are outsiders as well as the notion that critical tax theory is a marginal form of tax policy literature. My primary purpose in questioning this conventional wisdom is to get tax crits to think critically about the collective identity of the critical tax movement.

I question the outsider status of critical tax theory by essentially turning the mainstream into the marginal (or the marginal into the mainstream, depending upon your perspective). I accomplish this by reconceptualizing a quite mainstream tax concept - tax expenditure analysis - as an application of critical (and, more particularly, deconstructionist) techniques to the Internal Revenue Code. Once the mainstream (i.e., tax expenditure analysis) has been recast as the marginal (i.e., deconstructionist analysis), the distinction between the two essentially deconstructs itself, calling into question the justification for attaching significant weight to the distinction between the mainstream and the marginal. This opens the way for tax crits to think critically about their marginality and what role it should play in the collective identity of the critical tax movement.

A TAX CRIT IDENTITY CRISIS? OR TAX EXPENDITURE ANALYSIS, DECONSTRUCTION, AND THE RETHINKING OF A COLLECTIVE IDENTITY

*Anthony C. Infanti*¹

“There is nothing unusual about the appearance of deconstructive arguments
in the texts of non-deconstructionists”

– J. M. Balkin²

I. INTRODUCTION

A. Once upon a Time . . .

How to begin? A story to set the tone seems to work well, but my usual story line simply won't do the job this time. You see, I've recently begun my articles by tracing the thought process that led me to the topic on which I am writing.³ Normally, I arrive at a topic after reading something that gets me thinking in a new or different direction.⁴ This time, however, the initial idea just came to me, rendering my customary introduction impossible. So, I will have to set the tone here with a different type of story—a story about my sister's commitment ceremony.

But, in the interest of full disclosure, I'd like to make a few things clear before I share this story with you. First, for those of you who don't know me and haven't read my previous work, I'm an openly-gay man. Second, I've never been a big proponent of same-sex marriage, mostly because I've been skeptical about the wisdom of gays and lesbians imitating heterosexual marriage. In my 35 years, I've been lucky enough to have fallen in love twice. My first relationship lasted some nine

1. Assistant Professor of Law, University of Pittsburgh School of Law. I would like to thank the University of Pittsburgh School of Law for providing financial support for the writing of this article. I would like to thank my faculty colleagues who participated in an internal works-in-progress session for their helpful comments on an early draft of this article. I would also like to thank Dorothy Brown, Vivian Curran, Jeffrey Kahn, and Leandra Lederman for their helpful comments on previous drafts of this article. Most importantly, I would like to thank Hien Ma for his love and support while I was writing this article.

2. J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 767 (1987) [hereinafter Balkin, *Deconstructive Practice*]; see, e.g., JACQUES DERRIDA, OF GRAMMATOLOGY 189, 212, 215 (Gayatri Chakravorty Spivak trans., 1997) [hereinafter DERRIDA, GRAMMATOLOGY] (reading Rousseau as deconstructionist).

3. Anthony C. Infanti, *The Ethics of Tax Cloning*, 6 FLA. TAX REV. 251, 253–54 (2003) [hereinafter Infanti, *Tax Cloning*]; Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 763–69 (2004) [hereinafter Infanti, *Sodomy Statute*].

4. Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677, 677 n.* (2001); Infanti, *Tax Cloning*, *supra* note 3, at 253–54; Infanti, *Sodomy Statute*, *supra* note 3, at 763–69.

years, and the second has lasted two years and counting (I will speak more about my current partner⁵ later). Neither my former partner, Michael, nor I had any interest in having a public commitment ceremony.⁶ Nonetheless, we openly held ourselves out as a couple, and were generally accepted as such by our friends and families. After a few years, we began to wear rings as a symbol of our relationship. We always joked that we did have a commitment ceremony; it was just a small one—comprised of the two of us and the woman at Tiffany who sold us our wedding rings (the rings were, in fact, two identical men’s wedding rings).

Needless to say, I was a bit skeptical when my sister Elyse decided to have a commitment ceremony about two years ago (although I never told her this, because I didn’t want to dampen her excitement and enthusiasm).⁷ She had met her partner, Cindy, a few years before (and had been exclusively in heterosexual relationships prior to meeting Cindy). They had already purchased a house together and had been living in it for a while when Cindy proposed to Elyse in a rather romantic setting. Cindy even gave Elyse an engagement ring.

The two planned what would have been a rather traditional wedding, had it occurred between a man and a woman. The ceremony was held outdoors at a hotel near where my sister and I had grown up, which also happened to be located not too far from where Cindy’s family lives. The ceremony took place at the end of an outdoor pier that extended over the river that ran behind the hotel. The river, boats, and luxury homes on the opposite shore formed a rather nice backdrop for the ceremony. A minister officiated at the ceremony, and two of Cindy’s nieces served as bridesmaids. Cindy’s sister stood up for her, and I stood up for my sister. I also escorted my sister, who was wearing a rather elegant wedding dress, down the aisle because my father had passed away before the ceremony took place (my mother had passed away before my sister had even met Cindy). Cindy and Elyse exchanged vows, lighted a unity candle, and released doves into the air at the end of the ceremony. It was all quite moving. The ceremony was followed by a wedding reception at the hotel that was not unlike the many heterosexual wedding receptions that I have attended.

As I said, I was a bit skeptical at the outset because it seemed that Elyse and Cindy were imitating heterosexual marriage in every particular—from the engagement ring to picking the place for the ceremony and reception to choosing the invitations to registering at department stores to buying a wedding dress to choosing just the right people to do hair and make-up and, finally, to honeymooning in Hawaii.⁸ But, as is so often the case, looks can be deceiving.

After the ceremony, the wedding party exited first and went back to the hotel lobby. The guests remained outside for a cocktail hour on the pier. While we were waiting to go out to the cocktail hour, Cindy’s sister and I sat down in the hotel lobby and were chatting when two elderly women came up to ask us about the wedding. By our attire, they could tell that we were in the

5. For a discussion of the desexualized euphemisms used in referring to the members of a same-sex couple, see Infanti, *Sodomy Statute*, at 776–77, 783–84 & n.44. As was the case in that article, I will use the term “partner” here because, in my experience, it the most commonly-used term in everyday speech.

6. Marriage was not a possibility in the United States or Canada during our relationship.

7. Right now you must be thinking, “what are the odds of *both* children being gay?” But you don’t know the half of it—my sister and I were both adopted and have different biological parents. While she was alive, my mother played the lottery every week, but never won big. I guess she won a lottery of a different sort.

8. I even accompanied them to the initial session with the hair and make-up people where they did a “dry run” so that Cindy and Elyse could get an idea of how they would look on the day of the ceremony.

wedding party. They had been a bit confused when the first two people they saw come back from the ceremony were two women. They had been watching the ceremony, which you could observe from inside the hotel; however, because the ceremony took place out on the edge of the pier, several hundred feet behind the hotel, it had been difficult for these two elderly women clearly to see who was participating in the ceremony.

After exchanging pleasantries, the two elderly women asked why two women had come back from the ceremony first, when a bride and groom would normally have left first. Cindy's sister answered that two women had gotten married. "How nice," they replied, "are they sisters?" Cindy's sister and I gave each other a knowing glance. "No," Cindy's sister said, "two *women* got married." "Oh, are they friends?" "No, *two women* got married." Finally, it began to sink in. "Ohhhhh," they said simultaneously with a tone of manifest disapproval and a complete lack of understanding or empathy. They then unceremoniously turned and walked away.

Cindy and Elyse had done everything possible to mirror a heterosexual wedding, but the one thing that they could not do was change the fact that they are two women. This one detail, which I had thought had been buried in the overwhelming heterosexuality of the affair, wasn't really buried at all. It clearly wasn't lost on these two elderly women, because it was the first and only thing that struck them about the ceremony. Seeing the ceremony from their perspective led me to rethink the value and desirability of same-sex marriage. This experience drove home for me how same-sex marriage, no matter how much it's disparaged by some in the gay community as a drowning of our differences from the heterosexual majority, is really a radical act that simultaneously demonstrates our similarity to the mainstream and our differences from it.

B. *The Tale and the Title*

After you read the title of this article, I'll bet that you didn't expect to be reading about my sister's lesbian commitment ceremony or about my epiphany on the question whether the gay rights movement should actively pursue the right to marry. It's more likely that some of you (if you've gotten this far) were probably thinking that it's bad enough that you have to put up with all of the whining that tax crits do,⁹ why should you now have to put up with their angst too?¹⁰

9. Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1729 (1998) ("The foregoing critiques tend to validate Professor Zelenak's thesis that critical tax scholarship betrays a 'whiner' mentality: (1) critical tax scholarship obsesses over tax provisions it does not like while ignoring the larger context, and (2) it is weak on plausible solutions.").

Realizing that some of you may be unfamiliar with the work that tax crits do, I would offer as a general description the following passage from Karen Brown and Mary Louise Fellows, which explains how critical tax theory can be thought of as filling a gap in the traditional tax discourse:

What is missing from both the political and academic debate about taxes is a serious consideration of how the tax system exacerbates marketplace discrimination against traditionally subordinated groups. With dramatic and far-reaching tax reform always a possibility, the purpose of this anthology[, which forms part of the "Critical America" series,] is to change the tax discourse to include issues of disability discrimination, economic exploitation, heterosexism, sexism, and racism.

Karen B. Brown & Mary Louise Fellows, *Introduction to TAXING AMERICA* at 1–2 (Karen B. Brown & Mary Louise

For many of the rest of you, however, I suspect that your initial reaction may have been along the lines of “what, *already?*” The follow-up to this pithy reaction would probably be: “Why is a movement¹¹ talking about an identity *crisis* when it’s still in its infancy—so new that it’s still early in

Fellows eds., 1996) [hereinafter Brown & Fellows, *Introduction*].

10. If you fall into this category, I hope that you will stick it out because you will find very little angst, and you may just benefit from a new way of looking at a relatively old idea.

11. Tax crits, their critics, and bystanders have all referred to critical tax theory as a “movement,” even though all tax crits may not share all of the views that are associated with critical tax theory. *E.g.*, Michael A. Livingston, *Putting “Critical Tax Scholarship” in Perspective*, 76 N.C. L. REV. 1791, 1813 (1998) [hereinafter Livingston, *Perspective*]; Edward J. McCaffery, *The Missing Links in Tax Reform*, 2 CHAP. L. REV. 233, 243 n.50 (1999); Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837, 1878 (1998); Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1566, 1578, 1580 (1998); Elisabeth S. Clemens, *Good Reasons to Stop Avoiding Taxes*, 24 LAW & SOC. INQUIRY 517, 518–19 (1999) (reviewing CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* (1997), and EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997)); *see also* Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 626 n.15 (1984) (indicating that “Llewellyn described Realism as a movement though he would not say that any single participant shared all the views whose ‘sum [wa]s Realism.’” (quoting Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1234–35 (1931))) [hereinafter Tushnet, *Essay in Deconstruction*]; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516 (1991) [hereinafter Tushnet, *Political History*] (recounting the awkwardness that he feels when referring to critical legal studies as a “movement” or a “school” because of his disagreement with the statements of others who are also identified with critical legal studies).

The sociologist Alberto Melucci, some of whose work is briefly discussed below in Part IV, has despaired the use of “the term social movement . . . in a naïvely descriptive manner to refer to a supposedly unified ‘subject’, such as the ‘youth movement’, the ‘women’s movement’ or the ‘ecological movement.’” ALBERTO MELUCCI, *NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY* 29 (1989); *see also id.* at 24 (“Contemporary American authors seem to call every form of non-institutional political action a social movement, to the extent that the word ‘movement’ is in danger of becoming synonymous with everything in motion in society.”). Melucci instead essays a more precise definition of the term “social movement”:

In my view, this concept designates a specific class of collective phenomena which contains three dimensions. First, a social movement is a form of collective action which involves *solidarity*, that is, actors’ mutual recognition that they are part of a single social unit. A second characteristic of a social movement is its engagement in *conflict*, and thus in opposition to an adversary who lays claim to the same goods or values. Conflict is analytically distinct from the idea of contradiction as used, for instance, within the Marxist tradition. Conflict presupposes adversaries who struggle for something which they recognize as lying between them. Third, a social movement *breaks the limits of compatibility of a system*. Its actions violate the boundaries or tolerance limits of a system, thereby pushing the system beyond the range of variations that it can tolerate without altering its structure.

Id. It is worth noting that Melucci does not view social movements as a homogeneous phenomenon; rather, he sees social movements as “a composite and heterogeneous phenomenon . . . that involve various levels of the social structure. They entail different points of view. They belong to different historical periods. We must seek to understand, therefore, this multiplicity of synchronic and diachronic elements. Then we can explain how they combine into the concrete unit of a collective actor.” Alberto Melucci, *A Strange Kind of Newness: What’s “New” in New Social Movements?*, in *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* 101, 105-06 (Enrique Laraña et al. eds., 1994) [hereinafter *IDEOLOGY TO IDENTITY*]; *see also* Carol Mueller, *Conflict Networks and the Origins of Women’s Liberation*, in *IDEOLOGY TO IDENTITY*, *supra*, at 234, 235-36.

the process of exploring and forming its identity?” Such a reaction would be quite understandable given that tax crits *and* their critics often refer to the youth or newness of the critical tax movement¹² as well as to the movement’s failure to break into the mainstream of tax thought.¹³ If the one thing that everyone seems to agree on is the youth and outsider status of the critical tax movement, isn’t talk of an identity crisis a bit premature?

Or is it? In this article, I question the widely-held belief that critical analysis is new to the tax policy literature as well as the correlative notion that critical work constitutes some form of marginal literature. I hope to displace this conventional wisdom by demonstrating that critical analysis surreptitiously entered the tax mainstream decades ago¹⁴ and that it has been firmly ensconced there

Please bear in mind, however, that Melucci’s is only one among many definitions of the term “social movement” that sociologists have proposed. See Benita Roth, *Select Definitions of Social Movements*, at <http://womhist.binghamton.edu/socm/definitions.htm> (last visited June 3, 2004) (published on the women and social movements website, which is a project of the Center for the Historical Study of Women and Gender at the State University of New York at Binghamton). Whether critical tax theory qualifies as a “movement” in one or more of these sociological senses need not be considered here. For purposes of this article, I will simply accede to the use of this ostensibly agreed-upon label and, from time to time, refer to critical tax theorists collectively as the “critical tax movement.”

12. See Karen B. Brown & Mary Louise Fellows, *Preface to TAXING AMERICA*, *supra* note 9, at vii–ix [hereinafter Brown & Fellows, *Preface*] (describing the formation in the early- to mid-1990s of a “group of tax scholars in which each of us who previously had felt isolated by the traditional tax analysis that dominated the legal literature and the tax conferences now had found intellectual kinship”); Marjorie E. Kornhauser, *Through the Looking Glass with Alice and Larry: The Nature of Scholarship*, 76 N.C. L. REV. 1609, 1610 (1998) (“[c]ritical scholarship is relatively new to the tax field”); Shurtz, *supra* note 11, at 1841, 1878 (“critical tax scholarship may be said to still be in an embryonic state of development”; “the critical tax movement is young”); Zelenak, *supra* note 11, at 1521–23 (describing the recent growth of feminist tax policy analysis, critical race theory tax analysis, and articles discussing the taxation of same-sex couples); *Introduction to Symposium, Internal Revenue Code*, 76 N.C. L. REV. 1519, 1519 (1998) (“In recent years, the Internal Revenue Code increasingly has become the focus of feminist and critical race theorists.”).

A notable exception is Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971).

13. See Kornhauser, *supra* note 12, at 1610 (likening the reception of critical tax theory to the reception of critical scholarship more generally, which has been characterized by a trivialization of feminist scholarship and a failure to integrate critical scholars into academic debate); *id.* at 1623 (“A primary virtue of critical tax theory is that it, like any outsider theory, reveals the assumptions hidden behind established thought and institutions.” (see *id.* at 1611 n.12 for a definition of the term “outsider” as used by Kornhauser in this article)); Livingston, *Perspective*, *supra* note 11, at 1806 (“If critical tax scholars are sometimes too eager to identify bias in the tax system, traditional scholars have an equal or greater tendency to downplay such evidence and to marginalize scholarship that crosses traditional boundaries or refuses to play by traditional rules. Traditional scholars tend to favor economic over non-economic arguments and incremental solutions over radical reevaluations, often labeling those on the wrong side of these dichotomies as unrealistic or incoherent.”); Shurtz, *supra* note 11, at 1845–50 (also likening the reception of critical tax theory to that of critical scholarship generally, but further asserting that Zelenak’s piece “may be seen as a sign of progress” because critical tax theory is no longer being completely ignored—it is now being addressed by mainstream scholars, albeit in an effort to discredit or dismiss it); *id.* at 1878 (“Though the critical tax movement is young, a cursory glance at the pieces examined in this Article reveals a breadth of subject matter that points to the future expansion of this endeavor to the frontiers of other outsider scholarship.”); Zelenak, *supra* note 11, at 1579–80 (“Those outside the [critical tax] movement have simply ignored it, while those within have mostly chosen support at the expense of discussion and debate. This is understandable, given the small size and outsider status of the movement.”).

14. See generally Livingston, *Perspective*, *supra* note 11, at 1791 (“Tax scholars have long been both ahead

since that time. From this perspective, the recent spate of articles examining how the Internal Revenue Code (Code) impacts “traditionally subordinated groups”¹⁵ (e.g., women, minorities, and gays and lesbians)¹⁶ can be seen not as some attempt at a radical shift in the terms of the tax policy debate, but instead as part of the natural progression of that debate.

My purpose in questioning the conventional wisdom is to do for tax crits and their critics what the two elderly women at my sister’s commitment ceremony did for me: I want to make them reconsider their preconceptions by helping them to see things from a new perspective. For tax crits, I hope that this shift in perspective will trigger the identity crisis referenced in the title of this article and spur them to think more deliberately about the collective identity of the critical tax movement and how “marginality” fits in with that identity (if at all). At the same time, I hope to undercut the ability of mainstream academics to ignore or trivialize critical contributions to the tax literature by blurring the distinction between mainstream and marginal contributions to that literature and by calling into question the validity of judging the worth of contributions on the basis of this categorization.

The remainder of this article is divided into four parts. I explore the notion that the marginal is really the mainstream in Parts II and III of the article. To provide necessary background, Part II contains an extended description of the tax expenditure concept, which is an idea that entered the mainstream of tax policy thought by the early- to mid-1970s and has been the subject of academic and non-academic debate ever since. Part III then considers how this mainstream tax policy concept, which pre-dates the emergence of contemporary critical theory, can actually be viewed as an application of critical—and, more particularly, deconstructionist—techniques to the Code. By reconceptualizing the tax expenditure concept as a form of deconstructionist analysis, Part III implicitly challenges the distinction between the new and the old, the mainstream and the marginal, and underscores the constructedness of these distinctions.¹⁷ For how can one label critical tax thinking either “new” or “marginal” when deconstructionist analysis—a mode of analysis that is

of and behind their peers in non-tax subjects. Rhetorically they have always recognized the political character of taxation and the difficulty of separating one’s views on tax matters from more general opinions about human nature or the character of a just society. In this respect, tax scholars were ‘critical’ before the rest of the legal academy.” (footnote omitted)).

15. Brown & Fellows, *Introduction*, *supra* note 9, at 2.

16. *See, e.g.*, TAXING AMERICA, *supra* note 9; Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751; Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

17. As sometimes proves to be the case, this article “is as much an effort to do [critical thinking] as it is to write about [it].” Tushnet, *Essay in Deconstruction*, *supra* note 11, at 623 n.*.

closely associated with contemporary critical theory¹⁸—has been an accepted part of the mainstream of tax policy thought for decades?

Which, in Parts IV and V, brings us back to the title of this article and the question that it poses. If the marginality of tax crits is not “real” but constructed, then it becomes necessary to consider why tax crits accept their marginality and incorporate it so readily and unquestioningly in their collective identity. Why do tax crits, who devote much of their scholarly energies to ferreting out latent biases in the Code, acquiesce in branding themselves as “marginal” when that is tantamount to inviting “mainstream” scholars to ignore or trivialize their contributions to the tax policy literature and, therefore, to make them an academically subordinated group?¹⁹ In response to this question, I

18. See, e.g., GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 116–22, 142–44, 179–80 (1995); J. M. Balkin, *Deconstruction's Legal Career* (1998), at www.yale.edu/lawweb/balkin/articles/deconstructionslegalcareer1.pdf (last visited June 3, 2004) [hereinafter Balkin, *Legal Career*] (“Critical scholars in the feminist and critical legal studies movements made the most frequent and familiar use of deconstruction in law.”); J. M. Balkin, *Nested Oppositions*, 99 *YALE L.J.* 1669, 1669 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989)) [hereinafter Balkin, *Nested Oppositions*] (“Deconstruction has become a prominent force in legal theory in the last few years, especially through its use by feminist scholars and members of the Critical Legal Studies movement.”); Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 *U. CIN. L. REV.* 1439, 1483 (1994) (describing deconstruction as being at the “core” of the critical legal studies attack on conventional legal scholarship); Deborah A. Geier, *Textualism and Tax Cases*, 66 *TEMPLE L. REV.* 445, 446 n.3 (1993) [hereinafter Geier, *Textualism*] (“The abstruse movement in legal academia known as ‘Critical Legal Studies’ is the legal branch of literary deconstruction.”); Livingston, *Perspective*, *supra* note 11, at 1792 (“Critical, and especially feminist, scholars likewise embrace a goal of consciousness-raising and ‘deconstruction’ of laws and institutions that is altogether alien to tax scholarship.”); Shurtz, *supra* note 11, at 1880 (“Deconstruction can, therefore, be a useful tool in the service of feminists, critical race theorists, queer legal scholars, and other schools of outsider inquiry.”); Jean Stefancic, *The Law Review Symposium: A Hard Party to Crash for Crits, Feminists, and Other Outsiders*, 71 *CHI.-KENT L. REV.* 989, 989 (1996) (“Over the past ten years or so, outsider scholarship has been proliferating. Members of critical legal studies . . . have been exploring legal indeterminacy, the structure of western capitalism, and deconstruction.”).

19. E.g., James D. Bryce, *A Critical Evaluation of the Tax Crits*, 76 *N.C.L. REV.* 1687, 1687 (1998) (“Recent years have seen the spread of legal academia’s favorite obsession—sex and race as the origin of all of society’s ills—to the tax law. In my view, this is not a helpful development. This Article will focus on just a few of the recent writings to illustrate how little useful analysis there is in this body of writing.” (footnote omitted)); Dodge, *supra* note 9, at 1729 (“The foregoing critiques tend to validate Professor Zelenak’s thesis that critical tax scholarship betrays a ‘whiner’ mentality: (1) critical tax scholarship obsesses over tax provisions it does not like while ignoring the larger context, and (2) it is weak on plausible solutions.”). That traditional tax scholars would react negatively to the advent of critical tax thinking is to be expected—challenges to the established paradigm normally provoke a response from the mainstream. In fact, this is exactly what occurred when contemporary critical theory entered onto the scene. MINDA, *supra* note 18, at 208–23; Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 *U. PA. L. REV.* 1349, 1351 (1992) (“My conclusion is that mainstream figures who control the terms of discourse marginalize outsider writing as long as possible. . . . The continued marginalization of outsider scholars, while perhaps distressing for the cause of social reform, should not come as a surprise. It is what we might expect from our studies of narrative theory paradigm shifting Reform tends to be slow and incremental; new knowledge strikes us as extreme, coercive, ‘political,’ or strange.”); see Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561 (1984) (describing the exclusion of minority scholars from central areas of civil rights scholarship); Richard Delgado, *Rodrigo’s Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond*, 86 *GEO. L.J.* 1051 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)) (responding to a number of critics of critical race theory and setting out an etiquette for conducting discussions

suggest that tax crits undertake a deliberate and purposeful re-examination of this aspect of their collective identity. Along with this suggestion, I offer some food for thought based on my personal experience in thinking through both my own individual identity as a gay man and my small part in the collective identity of the gay rights movement. More specifically, I analogize the several options that tax crits face in addressing their marginality to my personal experience of living life in the “closet” as well as to my thinking through the debate over gay marriage, which, in the end, brings us back to the story with which this article began.

II. TAX EXPENDITURE ANALYSIS

During his lifetime, Stanley Surrey was the most vocal proponent of the tax expenditure concept in the United States. He began publicly to consider and speak about the concept—and even “coined the term ‘tax expenditure’”²⁰—while he was serving as Assistant Secretary of the Treasury for Tax Policy during the 1960s.²¹ Over an approximately fifteen-year period, Surrey produced a voluminous amount of writing on the subject of tax expenditures, both alone and with co-authors.²²

about race).

20. Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 HARV. L. REV. 491, 494 (1985) (reviewing STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985)); *see also* STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES*, at vii (1973) [hereinafter SURREY, *PATHWAYS*]; Allaire Urban Karzon, *Tax Expenditures and Tax Reform*, 38 VAND. L. REV. 1397, 1399 (1985) (reviewing STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985)).

21. SURREY, *PATHWAYS*, *supra* note 20, at 1–6; Wolfman, *supra* note 20, at 491; *see also* Marjorie E. Kornhauser, *A Legislator Named Sue: Re-Imagining the Income Tax*, 5 J. GENDER RACE & JUST. 289, 313 n.54 (2002) (describing Surrey as the father of the tax expenditure concept); Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 978 (1986) [hereinafter Zelinsky, *Efficiency*] (indicating that the tax expenditure concept was “originally propounded” by Surrey); DANIEL N. SHAVIRO, *RETHINKING TAX EXPENDITURES AND FISCAL LANGUAGE 1* (N.Y. Univ. Law Sch. Pub. Law & Legal Theory Research Paper No. 72, 2003), available at <http://ssrn.com/abstract=444281> (describing Surrey as the original American proponent of the tax expenditure concept).

Tax expenditure analysis was not, however, a new concept. Others had earlier spoken in similar terms—including Surrey himself. *See* Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244, 244–45 (1969); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 343 n.3 (1989); Wolfman, *supra* note 20, at 493–94; SHAVIRO, *supra*, at 25–26. Furthermore, Germany had been preparing “a type of tax expenditure budget” even before Surrey’s seminal speech on this topic. *Compare* SURREY, *PATHWAYS*, *supra* note 20, at 3, with STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* 180 (1985) [hereinafter SURREY & MCDANIEL, *TAX EXPENDITURES*], and Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 679, 679 n.3, 692 n.38 (1976) [hereinafter Surrey & McDaniel, *Budget Reform Act*]; *see also* SHAVIRO, *supra*, at 23.

22. *E.g.*, SURREY, *PATHWAYS*, *supra* note 20; SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21; Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970) [hereinafter Surrey, *Federal Income Tax Reform*]; Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) [hereinafter Surrey, *Tax Incentives*]; Stanley S. Surrey & William F. Hellmuth, *The Tax Expenditure Budget—A Response to Professor Bittker*, 22 NAT’L TAX J. 528 (1969) [hereinafter Surrey & Hellmuth, *Response to Professor Bittker*]; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21; Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging*

In addition to being a rather prolific writer on the subject, Surrey proved to be quite persuasive in pressing the case for adopting tax expenditure analysis. In 1974, Congress mandated the use of tax expenditure analysis in the annual budget process.²³ Tax expenditure analysis has also become a staple in the textbooks used in basic federal income tax courses in law school, ensuring that each new crop of tax lawyers will be exposed to, and become familiar with, the concept.²⁴ In a review of Surrey's last published work on the subject, Bernard Wolfman described the general acceptance of tax expenditure analysis in the following terms:

Writers have not generally used quotation marks around the term "tax expenditure" since 1974, when Congress, spurred by Surrey, adopted the first tax expenditure budget. A rather broad spectrum of people now understand that the income tax system is used extensively to confer monetary benefits as real and as preferential as those conferred by direct expenditure, and that tax expenditures may be less open to debate, to scrutiny, and to review because they are tucked away in the 3,000-page tax code.²⁵

A. The Basic Notion

As articulated by Surrey and his main collaborator, Paul McDaniel, the tax expenditure concept bifurcates tax provisions into two categories: (i) structural provisions and (ii) tax preferences

Issues, 20 B.C. L. REV. 225 (1979) [hereinafter Surrey & McDaniel, *Emerging Issues*]; Stanley S. Surrey & Paul R. McDaniel, *Tax Expenditures: How to Identify Them; How to Control Them*, 15 TAX NOTES 595 (1982) [hereinafter Surrey & McDaniel, *Identify and Control*].

For a more complete listing of the works of Stanley Surrey, see Bernard Wolfman, *Statesman, Scholar, Mentor*, 98 HARV. L. REV. 343 app. (1984).

23. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 3, 202, 301, 308, 88 Stat. 297, 299, 304, 306, 313 (codified at 2 U.S.C. §§ 602, 622, 632, 639) (1974); see also Surrey & McDaniel, *Budget Reform Act*, *supra* note 21 (discussing the Act).

A number of states also publish tax expenditure reports. For a list of states that compile tax expenditure reports along with an indication whether those reports are available on the Internet, see John L. Mikesell, *Tax Expenditure Budgets, Budget Policy, and Tax Policy: Confusion in the States*, 22 PUB. BUDGETING & FIN. 34, 38-40, tbl. 1 (2002), available at <http://urban.csuohio.edu/budget/taxexpend.pdf> (last visited June 3, 2004).

24. E.g., WILLIAM D. ANDREWS, BASIC FEDERAL INCOME TAXATION 401-12 (5th ed. 1999); JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 27-29 (2d ed. 1999); JAMES J. FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION 32, 477-78 (12th ed. 2002); MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 39-53 (rev. 4th ed. 2002); WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 9-10 (13th ed. 2003); JOEL S. NEWMAN, FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 135-36 (2d ed. 2002); see Griffith, *supra* note 21, at 350; Wolfman, *supra* note 20, at 494; Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1165 (1993) [hereinafter Zelinsky, *Public Choice*].

25. Wolfman, *supra* note 20, at 497; see also Brown & Fellows, *Introduction*, *supra* note 9, at 8 ("[T]he tax expenditure budget has become the primary arbiter of which tax provisions are considered structural and free from scrutiny and which provisions are considered tax subsidies and subject to continuing reexamination for modification or repeal."); Griffith, *supra* note 21, at 349-52 (describing the ways in which "[t]he tax expenditure model has had a significant impact on the formulation of tax policy").

or tax penalties.²⁶ Although the tax expenditure concept can be applied to any broad-based tax,²⁷ the income tax is most often used as an example by Surrey and McDaniel (as well as other commentators). In keeping with this practice, the income tax will be employed as the prime example of the operation of the tax expenditure concept in the discussion below.

1. *The Normative Tax Base and Departures from It*—The structural provisions of a tax “compose the revenue-raising aspects of the tax.”²⁸ For example, the structural provisions of an income tax would include both the normative provisions of an income tax (i. e., items that would “be treated in much the same way by any group of tax experts building the structure of an income tax”²⁹) and the provisions that, even though not normative, are necessary to build an income tax.³⁰ Tax preferences and penalties constitute “departures from [this] normal tax structure.”³¹

For Surrey and McDaniel, the Schanz-Haig-Simons definition of income, which posits that income is equal to “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 the end of the period in question,”³² served as the starting point for determining which provisions in the income tax are structural in nature and which are tax preferences or penalties.³³ This economic definition of income was, however, “tempered . . . by also referring to ‘the generally accepted structure of an income tax.’”³⁴ In making this modification, Surrey and McDaniel’s purpose was to “exclude from classification as tax expenditures certain items of income that . . . historically had not been viewed as income in the United States.”³⁵ For example, this modification excluded from tax expenditure classification “unrealized appreciation (during a person’s lifetime) in asset values and imputed income from homes or other durable consumer assets.”³⁶

26. SURREY, *PATHWAYS*, *supra* note 20, at 6–7; SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 3; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 680; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 227–28.

27. SURREY, *PATHWAYS*, *supra* note 20, at 26–29, 155; SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 233–39; Surrey & Hellmuth, *Response to Professor Bittker*, *supra* note 22, at 534–35; Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 610.

28. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 3; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 680; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228; *see also* SURREY, *PATHWAYS*, *supra* note 20, at 6.

29. SURREY, *PATHWAYS*, *supra* note 20, at 17.

30. *Id.*; *see also* SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 186–94.

31. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 3.

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

33. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 187–88; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228–30.

34. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 188; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228.

35. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 188; *see also* Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228.

36. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 188; *see also* Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228.

Using this modified version of the Schanz-Haig-Simons definition of income, Surrey and McDaniel identified the following as examples of the structural provisions of an income tax: “the definition of net income, the specification of accounting rules, the determination of the entities subject to tax, the determination of the rate schedule and exemption levels, and the application of the tax to international transactions.”³⁷ Together, these structural provisions compose what Surrey and McDaniel referred to as the “normal” or “normative” income tax.³⁸

In contrast, tax preferences and penalties constitute a residual category and include all provisions that are not considered to be structural in nature.³⁹ Because tax preferences and penalties depart from the normative tax structure, they have the effect of either (i) providing governmental assistance to taxpayers by reducing their normative tax burden or (ii) exacting a penalty from taxpayers by increasing their normative tax burden. Proponents of the tax expenditure concept reach this conclusion by separating tax preferences and penalties into their component parts.

Under tax expenditure analysis, each taxpayer can be viewed as paying to the government the tax due under the normative income tax.⁴⁰ Then, taxpayers who are entitled to tax preferences can be viewed as having received a payment from the government equal to the amount of the preference, and taxpayers who are subject to tax penalties can be viewed as having been required to make an additional payment to the government equal to the amount of the penalty.⁴¹ In the case of tax preferences, these two payments are, in practice, simply netted out for the sake of expediency (i.e., the tax payment from the taxpayer is simply reduced by the amount that the government owes the taxpayer).⁴² Thus, under tax expenditure analysis, tax preferences and penalties are the equivalent of direct expenditure programs and penalties, respectively.⁴³

2. *An Example*—To take a concrete example, consider the deduction for extraordinary medical expenses.⁴⁴ Surrey argued that this deduction is not part of the normative income tax because it is not “theoretically necessary” for the calculation of an individual’s net income; rather, it represents no more than one of the ways in which that income can be consumed.⁴⁵ Surrey asserted that “most

37. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 3; *see also* Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 680; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228.

38. *E.g.*, SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 2-6; Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 597.

39. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 3; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 680; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228; *see also* SURREY, PATHWAYS, *supra* note 20, at 6. Tax preferences are discussed in more detail below. *See infra* Part II.B. A brief discussion of tax penalties is provided *infra* note 60.

40. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 25; *see also* SURREY, PATHWAYS, *supra* note 20, at 6-7.

41. *See* SURREY, PATHWAYS, *supra* note 20, at 7; SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 25.

42. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 25.

43. *Id.* at 99; SURREY, PATHWAYS, *supra* note 20, at 129; Surrey, *Federal Income Tax Reform*, *supra* note 22, at 354; Surrey, *Tax Incentives*, *supra* note 22, at 713-14.

44. I.R.C. § 213 (2004).

45. SURREY, PATHWAYS, *supra* note 20, at 21-23.

economists would classify these items as tax expenditures.”⁴⁶ Accordingly, Surrey viewed the deduction for medical expenses as no more than a government health insurance program⁴⁷—a stop-gap measure to fill the void created by the “absence of comprehensive medical care programs,”⁴⁸ albeit a rather “perverse”⁴⁹ choice of stop-gap measure.

To pursue this example further, if all tax preferences (including the deduction for medical expenses) were eliminated from the Code, each taxpayer would pay the tax due under the normative income tax. For individuals who had previously availed themselves of the medical expense deduction (or any other tax preference in the Code), this would result in an increased income tax payment to the government. If the government still wished to provide financial assistance to individuals with extraordinary medical expenses as a means of relieving hardship, the government could simply use the additional revenue raised by eliminating the medical expense deduction to fund a spending program that would provide direct grants to reimburse extraordinary medical expenses. When viewed in this light, the medical expense deduction can be seen as the equivalent of a direct government health insurance program.

Nonetheless, Surrey observed, it would be rather unlikely for Congress to adopt a direct spending program with the same distribution as the medical expense deduction.⁵⁰ Because the extant tax expenditure health insurance program is cast in the form of a deduction, the amount of government financial assistance varies according to the taxpayer’s marginal tax rate.⁵¹ Consequently, under an equivalent direct expenditure health insurance program, wealthier individuals would receive greater financial assistance than poorer ones. For the same \$100 in medical expenses, an individual in the 35% tax bracket would receive a government reimbursement of \$35 (35% x \$100), an individual in the 10% tax bracket would only receive a government reimbursement of \$10 (10% x \$100), and an individual who is too poor to pay income tax would receive no government financial assistance to mitigate her hardship (0% x \$100). This is what Surrey referred to as the “upside-down”⁵² effect of many tax expenditures—in other words, when cast as an exclusion or a deduction, tax preferences provide greater assistance to the wealthy than they do to the poor. As we will explore in more detail below,⁵³ this inequity is one of the reasons why Surrey and McDaniel at times advocated the repeal of nearly all tax preferences and their replacement (if deemed appropriate as a policy matter) with appropriately-designed direct expenditure programs.

3. *Making the Distinction*—Surrey and McDaniel contended that, in most cases, it will not be difficult to differentiate between structural provisions and tax preferences or penalties.⁵⁴ Normally,

46. *Id.*

47. See Surrey, *Federal Income Tax Reform*, *supra* note 22, at 369; Surrey, *Tax Incentives*, *supra* note 22, at 722. For a discussion of contrary viewpoints, see *infra* notes 282–301.

48. Surrey, *Federal Income Tax Reform*, *supra* note 22, at 369; see also SURREY, *PATHWAYS*, *supra* note 20, at 202.

49. William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 333 (1972).

50. SURREY, *PATHWAYS*, *supra* note 20, at 22.

51. *Id.*; see also ANDREWS, *supra* note 24, at 23 (“a deduction only reduces taxes by the amount of the allowable deduction multiplied by the taxpayer’s marginal tax rate”).

52. See *infra* note 81 and accompanying text.

53. See *infra* Part II.C.2.

54. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 197, 225; Surrey, *Federal Income Tax*

the arguments made in support of a provision will identify it either as structural in nature or as a tax preference or penalty.⁵⁵ Classification based on these arguments will not, however, be conclusive. Surrey and McDaniel contemplated that the lists of structural provisions and of tax preferences and penalties would not be etched in stone. They anticipated an evolutionary process that entails continual analysis and refinement of the list of tax preferences and penalties:

The tax expenditure concept requires a dynamic and continuing analysis of the provisions in a tax system. As the tax expenditure concept compels closer consideration of the role of a specific tax provision (or nonprovision) in the overall tax system, new studies are undertaken, new data are developed, and continual rethinking of positions is required.⁵⁶

Countering their critics,⁵⁷ Surrey & McDaniel argued that this need for continual analysis and refinement is, in actuality, a strength of the tax expenditure concept because “the debates and analyses are themselves important contributions to the continuing improvement of a country’s tax and spending structures.”⁵⁸ In any event, they downplayed the magnitude of these borderline issues and their impact on the utility of the tax expenditure concept.⁵⁹

B. Tax Preferences

In their writings, Surrey and McDaniel focused primarily on identifying and analyzing tax preferences, and did not engage in an extended discussion of tax penalties.⁶⁰ Tax preferences “are

Reform, *supra* note 22, at 355; Surrey & Hellmuth, *Response to Professor Bittker*, *supra* note 22, at 533; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 236–38.

55. SURREY, *PATHWAYS*, *supra* note 20, at 28, 49; Surrey, *Tax Incentives*, *supra* note 22, at 707; Surrey & Hellmuth, *Response to Professor Bittker*, *supra* note 22, at 537; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 685; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228; *see also* Charles Davenport, *Tax Expenditure Analysis as a Tool for Policymakers*, 11 *TAX NOTES* 1051, 1052 (1980).

56. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 196–97; *see also* SURREY, *PATHWAYS*, *supra* note 20, at 18–19; Surrey & Hellmuth, *Response to Professor Bittker*, *supra* note 22, at 531–32. For a discussion of some of the borderline issues, *see* SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 197–222.

57. *See infra* Part II.D.

58. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 197.

59. *Id.*; SURREY, *PATHWAYS*, *supra* note 20, at 13–14, 19–20; *see also* Davenport, *supra* note 55, at 1052 (“[T]here has been a broad consensus about the items that are appropriately on the tax expenditure budget. There have been mild disagreements over five or six items in a listing of 85 or more. . . . The only people who think there is a serious definitional problem are academics.”); Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 609 (“[A]ny classification system has its borderlines. The entire Congressional budget process depends in part on the allocation of all government outlays among a limited number of budget functions. Obviously, this process entails many borderline judgments, yet the process operates.”).

60. For the sake of completeness, a short discussion of tax penalties will be included in this footnote for those interested in more information. Tax penalties are the converse of tax preferences. Rather than departing from the normative income tax in order to provide government assistance to a taxpayer by lowering her tax burden, a tax penalty departs from the normative income tax “by requiring a greater tax payment than would occur under the normative net income base,” thereby increasing the taxpayer’s tax burden. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note

designed to favor a particular industry, activity, or class of persons.”⁶¹ They can “take many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax, or special rates.”⁶² As described above, under tax expenditure analysis, tax preferences are the equivalent of “government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms of government assistance.”⁶³

Some tax preferences were expressly enacted with the idea of “induc[ing] action which the Congress considered in the national interest,” while others have “cloudy” origins but are now “defended on incentive grounds.”⁶⁴ The deductions for accelerated depreciation⁶⁵ and charitable contributions⁶⁶ are examples of income tax provisions in the former category, and the deductions for

21, at 29; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 242; *see also* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 222. The purpose of this increase in the tax burden is to render “more expensive either the continuance of present conduct where the conduct is contrary to a desired policy goal or a change to conduct inconsistent with the policy goal.” SURREY, PATHWAYS, *supra* note 20, at 155; *see also* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 29. Accordingly, just as tax preferences can be viewed as government spending programs for selected taxpayers, tax penalties can be viewed as “the functional equivalents of direct government regulatory or financial penalty rules.” SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 222; *see also id.* at 29; SURREY, PATHWAYS, *supra* note 20, at 155–56; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 243.

Examples of tax penalties in the income tax include “the various ‘public policy’ provisions that deny deductions for certain business expenses involving lobbying, bribes, or fines.” SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 29; *see also id.* at 223–24; SURREY, PATHWAYS, *supra* note 20, at 155–56; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 242. In addition, the denial of deductions with respect to, and excise tax imposed on, golden parachute payments constitutes a tax penalty. I.R.C. §§ 280G, 4999 (2004). There are a number of other excise taxes in the Code that also serve regulatory purposes. *See, e.g., id.* §§ 4001, 4064, 4401 (concerning luxury passenger automobiles, gas guzzling automobiles, and wagering, respectively); *see also* SURREY, PATHWAYS, *supra* note 20, at 155–56; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 246–52. Given the equivalence of these tax penalties to direct government regulatory or penalty provisions, Surrey and McDaniel urged policymakers to make an educated decision when choosing the means for implementing government regulation. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 223. They advocated an analysis in both cases of the regulation’s “necessity, effectiveness, and correspondence to other direct penalty programs.” *Id.* Although they did not develop their discussion of tax penalties to the same extent as their discussion of tax preferences, Surrey and McDaniel did speculate that tax penalties share some of the negative aspects of tax preferences, *see infra* pp. 15–16; for example, tax penalties also have an upside-down effect (i.e., the amount of the penalty increases with income), and they entail the same problems with regard to tax administration and the legislative process as tax preferences. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 223; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 251–52. Building on Surrey and McDaniel’s work, Eric Zolt has further analyzed tax penalties and has attributed to them many of the same negative aspects that Surrey and McDaniel attributed to tax preferences. Eric M. Zolt, *Deterrence via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 374–76 (1989).

61. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 3; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 680; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228.

62. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 3; *see also* SURREY, PATHWAYS, *supra* note 20, at 93–100; Surrey, *Federal Income Tax Reform*, *supra* note 22, at 353–54; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 680; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228.

63. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 3; *see also* Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 680; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228.

64. SURREY, PATHWAYS, *supra* note 20, at 126–27; *see also* Surrey, *Tax Incentives*, *supra* note 22, at 711.

65. I.R.C. §§ 167, 168 (2004).

66. *Id.* § 170. For an argument that the deduction for charitable contributions in many cases is no more than

home mortgage interest⁶⁷ and state and local taxes⁶⁸ are examples of income tax provisions in the latter category.⁶⁹ Yet other preferences were not enacted to “induce[] certain activities or behavior in response to the monetary benefit available,” but were generally intended to relieve hardships.⁷⁰ These hardships could be either personal (e.g., extraordinary medical expenses⁷¹ or blindness⁷²) or administrative (e.g., complex tax computations⁷³) in nature.⁷⁴

Because any tax preference can be drafted as either a tax expenditure or a direct expenditure program,⁷⁵ Surrey and McDaniel urged policymakers to make an educated decision when choosing the means for implementing government expenditure programs.⁷⁶ They devoted nearly an entire chapter of their 1985 book *Tax Expenditures*, which was published several months after Surrey’s passing,⁷⁷ to explaining that “most perceived differences between tax and direct expenditure programs are not inherent in the two approaches. Instead, they generally reflect differences in program design.”⁷⁸ Surrey and McDaniel contended that some of the justifications for choosing tax over direct expenditure programs do not hold up under scrutiny, and that some of the disadvantages of tax expenditure programs are also shared by direct expenditure programs.⁷⁹

Nevertheless, Surrey and McDaniel did identify a number of differences—both positive and negative—between tax and direct expenditure programs. They included in the negative column:⁸⁰

- *Upside-down Effect of Exclusions and Deductions.* The benefit provided by exclusions and deductions is proportional to each taxpayer’s marginal tax rate, with the highest rate taxpayers receiving the most benefit.⁸¹

a refinement of an ideal income tax base and not a departure from it, see Andrews, *supra* note 49, at 344–75. For a response to this argument, see SURREY, PATHWAYS, *supra* note 20, at 19–23, and SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 205 n.32.

67. I.R.C. § 163(h) (2004).

68. *Id.* § 164.

69. SURREY, PATHWAYS, *supra* note 20, at 127.

70. SURREY, PATHWAYS, *supra* note 20, at 126–28; *see also* Surrey, *Tax Incentives*, *supra* note 22, at 711–12. In some situations, these provisions may also have incentive effects (e.g., the deduction for extraordinary medical expenses may induce the purchase of health insurance). SURREY, PATHWAYS, *supra* note 20, at 126–28.

71. I.R.C. § 213 (2004).

72. *Id.* § 63(f)(2).

73. *E.g.*, *id.* §§ 174 (research and experimental expenditures), 613 (percentage depletion); *see* SURREY, PATHWAYS, *supra* note 20, at 127; Surrey, *Tax Incentives*, *supra* note 22, at 712.

74. SURREY, PATHWAYS, *supra* note 20, at 126–28; Surrey, *Tax Incentives*, *supra* note 22, at 712–13.

75. *See supra* note 43.

76. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 99, 114–15; *see also* SURREY, PATHWAYS, *supra* note 20, at 129–30; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 287–88.

77. Wolfman, *supra* note 20, at 491.

78. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 114.

79. *Id.* at 100–03; *see also* SURREY, PATHWAYS, *supra* note 20, at 130–34, 138–39; Surrey, *Tax Incentives*, *supra* note 22, at 715–20, 725–26.

80. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 103–07; *see also* SURREY, PATHWAYS, *supra* note 20, at 134–38, 141–46; Surrey, *Tax Incentives*, *supra* note 22, at 720–25, 727–32.

81. Surrey and McDaniel suggest, however, that the upside-down effect may be mitigated by employing refundable and taxable credits in place of exclusions or deductions. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 108–11.

- *Exclusion of Non-taxpayers.* Non-taxpayers are automatically excluded from any program effectuated through the Code. Persons may be non-taxpayers for a number of reasons: because they are low-income, in a loss situation, or exempt from tax.
- *Dependence on the Tax Rate Structure.* If a program is effectuated through the Code, then a change in the tax rates will result in a concomitant change in the benefits provided by the program.
- *Lower Visibility of Tax Expenditures.* Tax expenditure programs are less visible than their direct expenditure counterparts, which results in a lesser level of scrutiny for tax expenditure programs.
- *Inability to Ensure that Tax Expenditures Will Be Used for Their Intended Purpose.* For example, in the individual tax shelters of the 1970s and 1980s, the intended recipients of the tax benefits afforded by tax expenditure programs repackaged and sold those benefits to high-income persons who were *not* the intended recipients of the benefits, but who wanted to shelter income unrelated to the purpose of the tax expenditure program.⁸²
- *Administrative Concerns.* Tax expenditure programs increase the complexity of the tax laws for non-tax reasons, and also require the Internal Revenue Service to devote administrative resources to non-tax programs.
- *Responsibility for the Program.* A tax expenditure program is under the jurisdiction of the Department of the Treasury, which generally does not have any particular expertise in the substantive areas implicated by the program. In contrast, an equivalent direct expenditure program would be under the jurisdiction of the executive branch agency that (i) has expertise in the substantive area implicated by the program and (ii) would be more likely to monitor the effectiveness of the program. A similar critique was made concerning the allocation of jurisdiction among congressional committees (i.e., tax expenditure programs are controlled by the tax committees, while direct expenditure programs would be controlled by the committee with jurisdiction over the substantive area implicated by the program).⁸³
- *Perception of Unfairness.* Because tax preferences single out certain taxpayers for a reduction in their tax burdens, they create the perception that the tax system is unfair in the allocation of the overall tax burden.

82. For an in-depth discussion of tax shelters involving tax preferences, see SURREY, PATHWAYS, *supra* note 20, at 100–19.

83. Surrey and McDaniel suggest ways in which a tax expenditure program might be structured in order to allow the Internal Revenue Service (or the congressional tax committees) to take advantage of the expertise of the executive branch agency (or congressional committee) with jurisdiction over the substantive area implicated by the program. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 111–12.

Surrey and McDaniel included the following differences in the positive column: (i) the fact that tax expenditures are more palatable to taxpayers because they do not view them as government subsidies and (ii) the ability to take advantage of an existing and effective administrative framework (i.e., the Internal Revenue Service).⁸⁴

C. The Import of Tax Expenditure Classification

1. *Introspective Version*—Surrey and McDaniel gave conflicting signals—even within the same piece—about the import of classifying a provision as a tax preference or a tax penalty. At times, they seemed to describe the tax expenditure concept in a neutral fashion, as no more than an informational tool for policymakers.⁸⁵ Under this view, the tax expenditure concept was intended to highlight, and then fill, a previously unrecognized information gap in the formulation of budgetary and tax policy. Tax expenditure analysis first makes clear the equivalency of tax preferences and penalties on the one hand and their direct spending and direct penalty counterparts on the other; then, it attempts to clarify the relevant factors that policymakers should consider when choosing between these two means to the same end.⁸⁶ In later years, Surrey and McDaniel also discussed the importance of the tax expenditure concept as a tool for policymakers to identify *all* forms of government spending when tough economic times motivate them to try to control government spending.⁸⁷ The ultimate goal of the introspective version of the tax expenditure concept appears, therefore, to be the fostering of educated decisionmaking by policymakers.⁸⁸

In 1976, Surrey and McDaniel articulated this introspective version of the tax expenditure concept in a footnote responding to their critics:

There appears in some quarters to be misconception regarding the significance to be attached to the presence of an item in the tax expenditure list. Some assume that this listing is an automatic statement that the tax expenditure is bad per se and a “loophole” in the popular usage. The listing, however, is not pejorative, but only descriptive of the included items as “spending” and not “taxing” provisions. The spending programs embodied in the listing may be helpful or harmful, necessary or unnecessary. The answers to these queries, however, lie not in the listing but in a

84. *Id.* at 107–08; see also SURREY, PATHWAYS, *supra* note 20, at 147–48.

85. *E.g.*, SURREY, PATHWAYS, *supra* note 20, at 30–40 (setting forth this version of the tax expenditure concept, but peppering it with statements that reflect the absolutist version of the concept described in the text below); Surrey, *Federal Income Tax Reform*, *supra* note 22, at 360–62 (same); Surrey & Hellmuth, *Response to Professor Bittker*, *supra* note 22, at 530 (articulating the introspective version of the tax expenditure concept); Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 684–85, 692–93 (setting forth the introspective version of the tax expenditure concept, but peppering it with statements that reflect the absolutist version of the concept described in the text below); see Karzon, *supra* note 21, at 1413 (“In his original work, Surrey adopted a dual stance, that of a tax technician and a tax moralist, and condemned most tax expenditure items. . . . His value judgments on the wisdom of eliminating certain tax expenditures that he found objectionable sometimes obscured the value of the technique he had devised.”).

86. *See, e.g.*, SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 99–117.

87. Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 606–09.

88. *See supra* note 76 and accompanying text.

careful analysis of the programs represented in the items listed. This is of course equally the situation for each item listed in the direct budget.⁸⁹

Later, Surrey and McDaniel went so far as to incorporate the introspective version of the tax expenditure concept into their general description of the concept in the first chapter of *Tax Expenditures*:

The classification of an item as a tax expenditure does not in itself make that item either a desirable or an undesirable provision; nor does it indicate whether the inclusion of the item in the tax system is good or bad fiscal policy. The classification of an item as a tax expenditure is purely informative, just as the presence of an item in the direct budget of a government is informative; it is simply a way of announcing that the item is not part of the normative tax structure. This being so, it is appropriate to ask whether the presence of those items in the tax system is desirable or undesirable, given the existing budget policy, tax policy, and other relevant criteria.⁹⁰

2. *Absolutist Version*—At other times, however, Surrey and McDaniel seemed to view tax expenditure analysis as a nearly pointless endeavor because it will almost invariably lead to the same conclusion; namely, that almost all tax preferences should be eliminated from the Code and, under appropriate circumstances, should be replaced with direct expenditure programs.⁹¹ Surrey contended that a comparison of tax and direct expenditure programs would “favor[] resort to the direct programs in nearly all cases as the method of providing the encouragement of governmental financial assistance.”⁹² Direct expenditure programs would be favored because “many tax incentives will be seen as either inequitable, often to the point of being so grossly unfair as to be ludicrous, or ineffective.”⁹³ Thus, this absolutist version of the tax expenditure concept was based on a determination that inequity and inefficiency are endemic to tax expenditures.⁹⁴

89. Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 685 n.22.

90. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 5–6. Karzon contends that this statement “reflects that the tax expenditure concept has matured,” and “evidences a separation of political value judgments from professional tax craftsmanship.” Karzon, *supra* note 21, at 1413. Nevertheless, a careful review of *Tax Expenditures* uncovers a number of these “political value judgments” (or what I refer to in the text below as the “absolutist” version of the tax expenditure concept) in later portions of that book. See *infra* text accompanying notes 114–116.

91. SURREY, *PATHWAYS*, *supra* note 20, at 208; Surrey, *Tax Incentives*, *supra* note 22, at 726–27. See SURREY, *PATHWAYS*, *supra* note 20, at 175–208, for a review of all of the items in the 1972 tax expenditure budget, and see *id.* at 8–11 to determine which could simply be jettisoned, which could be removed from the Code and replaced with direct expenditure programs, and which should be retained in the Code. It is worth noting that, of all of the items in the 1972 tax expenditure budget, Surrey only identified one (the investment credit for machinery and equipment) as a potential candidate to remain in the Code. *Id.* at 206–07. In a similar review of the 1969 tax expenditure budget, Surrey did not identify a single item as a potential candidate to remain in the Code. See Surrey, *Federal Income Tax Reform*, *supra* note 22, at 361–62, 364–71.

92. SURREY, *PATHWAYS*, *supra* note 20, at 155; see also *id.* at 148; Surrey, *Tax Incentives*, *supra* note 22, at 734.

93. SURREY, *PATHWAYS*, *supra* note 20, at 179; see also *id.* at 179–80, 198; Surrey, *Federal Income Tax Reform*, *supra* note 22, at 360; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 697–98.

94. See generally Davenport, *supra* note 55, at 1052.

Tax preferences are considered to be inequitable because they are distributed in an upside-down fashion (i.e., taxpayers in the upper tax brackets receive the most benefits while those in the lowest tax brackets receive the least benefits).⁹⁵ In addition, tax preferences that are fashioned as deductions, exclusions, or exemptions automatically exclude nontaxpayers from receiving any benefits whatsoever.⁹⁶ This adversely impacts the vertical equity (i.e., progressivity) of the tax system.⁹⁷ In addition, tax preferences adversely impact the horizontal equity of the tax system by treating taxpayers with the same level of income differently based on the uses to which they put their income.⁹⁸

Tax preferences may be considered inefficient⁹⁹ for a number of reasons. Some tax preferences are inefficient because they do no more than “pay [taxpayers] for continuing to engage in their activities.”¹⁰⁰ Other tax preferences “are inefficient because the tax savings (subsidies) greatly exceed the value of the activity induced.”¹⁰¹ Yet other tax preferences “are inefficient because they provide tax savings to middlemen who deliver the government assistance to the targeted beneficiaries.”¹⁰²

Under the absolutist version of the tax expenditure concept, simplification would be a collateral benefit of eliminating these inequitable and inefficient provisions from the Code because “tax preferences are a major source of complexity.”¹⁰³ As it is, the normative income tax must track the complexity of the myriad of economic arrangements that taxpayers create.¹⁰⁴ Tax preferences—when viewed as disguised spending programs—unnecessarily add to the required level of complexity in the normative income tax, because they import into the Code “the complexities of spending programs”¹⁰⁵ and often later entail the addition of another layer of complexity “as tax

95. SURREY, *PATHWAYS*, *supra* note 20, at 68–72; SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 71–72; Surrey, *Tax Incentives*, *supra* note 22, at 720–25; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 693–95; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 254–56. For a discussion of the horizontal and vertical equity implications of individual tax preferences, see SURREY, *PATHWAYS*, *supra* note 20, at 60–68, and SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 72, 77–80.

96. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 72; Surrey, *Tax Incentives*, *supra* note 22, at 720; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 693.

97. SURREY, *PATHWAYS*, *supra* note 20, at 68–69; Surrey, *Tax Incentives*, *supra* note 22, at 723.

98. SURREY, *PATHWAYS*, *supra* note 20, at 69.

99. For an exploration of the definition of efficiency for this purpose as well as a defense of tax preferences as potentially efficient under some circumstances, see Zelinsky, *Efficiency*, *supra* note 21.

100. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 82.

101. *Id.* at 83.

102. *Id.* at 83–87; *see also* SURREY, *PATHWAYS*, *supra* note 20, at 106–07, 211, 238–44; Surrey, *Federal Income Tax Reform*, *supra* note 22, at 372–73; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 704–05; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 256; Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 622.

103. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 91; *see also* Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 707; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 275.

104. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 91–92; *see also* Surrey, *Tax Incentives*, *supra* note 22, at 731; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 707; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 276.

105. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 92; *see also* Surrey, *Tax Incentives*, *supra* note 22, at 731–32; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 707; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 277.

reformers seek to limit the adverse effects of the tax expenditure on tax equity. The net result is a tax system of ever-increasing complexity and financial assistance programs that are often irrational and sometimes counterproductive.”¹⁰⁶ Consequently, Surrey and McDaniel concluded that “[i]t is clear that enormous tax simplification could be achieved by repeal of all tax expenditures in the income tax.”¹⁰⁷

Surrey’s articulation of this absolutist version of the tax expenditure concept was at times brusque.¹⁰⁸ For example, in discussing the inability of nontaxpayers to reap the benefits of tax preferences, he stated in *Pathways to Tax Reform* that, “[o]f course, this problem is really an illustration of the lack of wisdom in ever turning to the tax expenditure route in the first place to grant assistance rather than to a direct subsidy.”¹⁰⁹ In another passage, Surrey stated that

[m]ost of the tax expenditure programs should either be scrapped because the federal financial assistance they provide is not warranted by the nation’s priorities or be replaced by direct assistance measures that can readily be devised.¹¹⁰

In a later article, Surrey and McDaniel warned that these replacement direct expenditure programs would probably not look anything like their tax expenditure counterparts:

If faced with direct outlay programs having the same benefits as the tax expenditure items, it is a fairly easy conclusion that Congress would not replace them as is. The programs would be expensive as outlay items; they would lack any cost-benefit justification; they would, through the grossing-up, be clearly seen as upside-down programs because the gross-up must, under progressive rates, produce higher outlays for the well-off as compared to those below the income levels of the upper brackets.¹¹¹

106. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 93.

107. Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 276.

108. *See* Karzon, *supra* note 21, at 1413 (indicating that Surrey’s “value judgments . . . sometimes obscured the value of the technique he had devised”); Wolfman, *supra* note 22, at 344 (stating that Surrey “may have carried his tax expenditure thesis a bit too far, too obsessively—almost theologically”).

109. SURREY, *PATHWAYS*, *supra* note 20, at 250; *see also id.* at 247 (“For the most part these courses are indirect approaches in the sense that they assume the continuance of some tax expenditures but seek to modify the tax benefits produced by the expenditures and thus reduce the tax abuses and inequities generated by those expenditures.”); Surrey, *Federal Income Tax Reform*, *supra* note 22, at 359 (“I have discussed elsewhere the comparison of these tax expenditures, or tax incentives, with direct expenditures as devices for implementing government policies, and concluded that the case is very strong against the use of the tax device.”); Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 625 (“many a tax expenditure has been approved that would never have survived for a moment if structured as a direct spending program”).

110. SURREY, *PATHWAYS*, *supra* note 20, at 209. Surrey did admit, however, that a few programs (e.g., the exclusion of interest on state and local bonds and the deductibility of non-business state and local taxes, the deduction for charitable contributions, and assistance for owner-occupied homes and rental housing) would “require further analysis”; namely, a tailoring of the alternative direct expenditure program to incorporate special requirements that exist in the tax expenditure program. *Id.*

111. Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 600.

In explaining the impact of tax preferences on horizontal and vertical equity, Surrey asserted that

[i]t is thus clear that most tax incentives have decidedly adverse effects on equity as between taxpayers on the same income level, and also, with respect to the individual income tax, between taxpayers on different income levels. As a consequence of these inequitable effects, many tax incentives look, and are, highly irrational when phrased as direct expenditure programs structured the same way. Indeed it is doubtful that most of our existing tax incentives would ever have been introduced, let alone accepted, if so structured, and many would be laughed out of Congress.¹¹²

After setting forth a few examples to illustrate his point, Surrey then continued his withering criticism of tax preferences:

This criticism—that tax incentives produce inequitable effects and upside-down benefits—is valid as to the general run of tax incentives. It demonstrates why tax incentives make high-income individuals still better off and result in the paradox that we achieve our social goals by increasing the number of tax millionaires. The marketplace does not work this way—for the individual who earns his profits, even high profits, by meeting a need or desire of society, finds his rewards subject to the progressive income tax. The economic system is thus functioning as it is intended it should, and the tax system, which acts as a control, is also functioning as intended. But when rewards are in the form of tax incentives, the latter control is eliminated, and tax millionaires are produced.¹¹³

Although the rhetoric did soften somewhat by the time Surrey and McDaniel co-authored *Tax Expenditures*, even that work is peppered with statements that evince the absolutist version of the tax expenditure concept. For example, in discussing the inequity of tax preferences, Surrey and McDaniel stated that

the overwhelming majority of tax expenditure programs disproportionately benefit the upper-income groups. Not only are the tax expenditure provisions the primary cause of perceived tax inequity, but it also seems safe to say that they fail to achieve what most Americans would perceive to be a fair distribution of funds, measured by criteria applied to direct spending programs.¹¹⁴

112. Surrey, *Tax Incentives*, *supra* note 22, at 721–22; *see also* SURREY, PATHWAYS, *supra* note 20, at 136.

113. Surrey, *Tax Incentives*, *supra* note 22, at 722–23 (footnote omitted).

114. SURREY & MCDANIEL, *TAX EXPENDITURES*, *supra* note 21, at 72; *see also* Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 255–56 (containing a similar statement).

When later discussing the inefficiency of tax preferences, they stated that

[t]he conclusion to be drawn from all this evidence is that many tax expenditure incentives or corresponding direct programs may have little justification. Certainly most existing studies on the efficiency of tax expenditure incentives indicate a low response in relation to the funds involved.¹¹⁵

They also remarked that “[t]ax simplification will be impossible if these tax expenditures persist.”¹¹⁶

D. Criticism of the Tax Expenditure Concept

Since being popularized by Stanley Surrey in the late 1960s and early 1970s, the tax expenditure concept has been sharply criticized both within and without academic circles. These critiques of the tax expenditure concept—and, more particularly, its application to the U.S. federal income tax—have taken a variety of forms. I will first summarize the academic critiques and then summarize the critiques made by non-academics (usually, politicians).

1. *Critiques Made by Academics*—Many of the academic critiques revolve around the distinction drawn by Surrey and McDaniel between (i) the structural provisions of a tax and (ii) tax preferences and penalties. Some commentators doubt the possibility of dividing tax provisions into these two categories because they question the existence of “an ideal or correct income tax structure, departures from which will be reflected as ‘tax expenditures’ in the National Budget.”¹¹⁷ Others

115. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 87.

116. *Id.* at 26.

117. Bittker, *supra* note 21, at 248; *see, e.g., id.* at 251 (“the Treasury’s ‘full accounting’ [of tax expenditures] will have to select one ‘correct’ model against which to measure existing law. Because I see no way to select such an ‘official’ model for these structural provisions, I am not sanguine about the prospects for a ‘full accounting.’”); Boris I. Bittker, *The Tax Expenditure Budget—A Reply to Professors Surrey & Hellmuth*, 22 NAT’L TAX J. 538, 541 (1969) (“At bottom, however, every tax structure, whether on the books or projected, is an assemblage of value judgments on scores of issues that could plausibly have been decided differently. To bestow the label ‘correct’ on any of these human creations is to misuse the term.”); Douglas A. Kahn & Jeffrey S. Lehman, 54 TAX NOTES 1661, 1663 (1992) (“The tax expenditure budget baseline . . . is ‘normative’ in the sense that it advances a particular moral or political claim. It reflects a particular balance among the ideals of efficiency, equity, neutrality, administrability, privacy, charity, and pragmatism. But, each of the six perspectives enumerated in the prior section is ‘normative’ in precisely the same way.”); Michael J. McIntyre, *A Solution to the Problem of Defining a Tax Expenditure*, 14 U.C. DAVIS L. REV. 79 *passim* (1980) (acknowledging the critics’ forceful argument that the list of tax expenditures arrived at using the idea of a “normative” or “ideal” income tax “has no serious claim of legitimacy,” and proposing an alternative means of identifying tax expenditures that avoids the need to create a consensus list of structural provisions); Walter J. Blum, *Book Review*, 1 J. CORP. TAX’N 486, 488 (1975) (reviewing SURREY, PATHWAYS TO TAX REFORM, *supra* note 20) (indicating that tax expenditure analysis is “a very useful analytical tool,” but arguing that, by moving past those items that are universally considered to be tax expenditures and relying on the concept of a normative income tax, Surrey has pushed the tax expenditure concept “beyond its defensible boundaries and assign[ed] it far too great a role”); SHAVIRO, *supra* note 21, at 41–42 (“In sum, tax expenditure analysis can be rescued from the vacuity of the distinction between taxes and spending if we reinterpret it to identify provisions in the tax laws that Musgrave’s distributional branch would be unlikely to employ when acting on the basis of broad equitable considerations. . . . [This approach]

accept or assume the existence of an ideal income tax base, but disagree about its composition.¹¹⁸ One commentator has agreed with the idea behind tax expenditure analysis, but feels that Surrey's articulation of "a normative income tax [is] so inherently subjective that it deprives the tax expenditure concept of its persuasive force."¹¹⁹ Another commentator has faulted Surrey for failing to justify and explain his choice of net income as the ideal tax base in terms of "an attractive principle of distributive justice."¹²⁰

Yet other commentators criticize or reject the pejorative connotation given the tax expenditure label by the absolutist version of the concept.¹²¹ Some of these commentators argue that tax expenditures may, in fact, be a useful policy tool under some circumstances.¹²² Two of them

helps to show, moreover that Bittker's critique of tax expenditure analysis was overstated, unless one confines the critique (as Bittker perhaps intended) to rebutting overstated claims that one particular rendering of the 'true' distribution system is canonical. Although we lack an agreed conceptual model of exactly what the distribution branch should do, we do not lack widely shared approaches to how we should think about what it is trying to do."); *see also* Davenport, *supra* note 55, at 1051; Zelinsky, *Efficiency*, *supra* note 21, at 978.

In a recent article, a commentator pointed out that this baseline issue is not unique to the tax expenditure budget (and the tax expenditure concept on which it is based), but also exists in the "regular" federal budget that it is meant to supplement. Julie Roin, *Truth in Government: Beyond the Tax Expenditure Budget*, 54 HASTINGS L.J. 603, 615–17 (2003).

118. *See, e.g.*, Andrews, *supra* note 49, at 313–15 (contending that the ideal tax base should consist of personal consumption and accumulation of goods and services, and arguing that, using this tax base, the deductions for charitable contributions and medical expenses should not be classified as tax expenditures because they are refinements of, rather than departures from, this ideal tax base); Jeffrey H. Kahn, *Personal Deductions—A Tax "Ideal" or Just Another "Deal"?*, 2002 L. REV. MICH. ST. U.—DETROIT C.L. 1, 6–9 (2002) (assuming the existence of an ideal tax base and arguing that the deductions for medical expenses, charitable contributions, personal casualty losses, and home mortgage interest should not be classified as tax expenditures); *see also* Bruce Bartlett, *The End of Tax Expenditures as We Know Them?*, 92 TAX NOTES 413, 416–17 nn.26–37 (2001) (citing a number of articles arguing that certain provisions should not be considered departures from the normative tax structure).

119. Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1155–56 (proposing the identification and listing of "substitutable tax provisions"—which are "tax law provision[s] whose purposes a non-tax-based federal program can achieve at least as effectively"—as a more "workable" alternative to the tax expenditure budget); *see also* SHAVIRO, *supra* note 21, at 2–3 (claiming that "taxes" and "spending" are not coherent categories, but arguing that tax expenditure analysis may serve a useful purpose if recast "in terms of Richard Musgrave's famous distinction between the allocative and distributional branches of the fiscal system").

120. Griffith, *supra* note 21, at 364; *see also* Gwen Thayer Handelman, *Acknowledging Workers in Definitions of Consumption and Investment*, in TAXING AMERICA, *supra* note 9, at 119, 121, 122–24 (criticizing Surrey for ignoring the perspective of workers "in accommodating theory to practice" in tax expenditure analysis).

121. *See* Bartlett, *supra* note 118, at 414 ("Surrey clearly intended the term 'tax expenditure' to be pejorative, undermining political support for tax preferences."); Roin, *supra* note 117, at 612 ("The implicit assumption that all tax expenditures are bad can also be distracting." (footnote omitted)); Gene Steuerle, *Some Thoughts on the Status of Tax Expenditures*, 68 TAX NOTES 485, 486 (1995) ("I have always been convinced that the tax expenditure budget is a useful concept for examining different programs within the income tax, but I do not adhere to the view that a 'tax expenditure' is bad per se, any more than a direct expenditure is bad per se."); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 958, 972–82 (2004) (describing the tax expenditure concept and indicating that Surrey "generally condemn[ed] tax expenditures").

122. *See, e.g.*, Kahn & Lehman, *supra* note 117, at 1663–64 (making the argument that "the special deductions for the blind and the elderly . . . can be seen as rough adjustments to the standardized hypothetical utility curve—a crude recognition that those who are blind or aged must spend more to meet their basic needs than young, sighted taxpayers must spend"); Zelinsky, *Efficiency*, *supra* note 21, *passim* (challenging the notion that tax

criticize Surrey for focusing too narrowly on tax policy; they argue that he should instead have taken a more holistic view of the institutional design of the government when considering how best to implement government programs (i.e., through a tax expenditure or a direct spending program).¹²³ For example, they contend that, even if a program may render the tax system more complicated, it should still be implemented through the tax system if, on an overall basis, that program would better achieve the stated objectives than a direct spending program.¹²⁴ Another commentator questions the assertion that “tax deductions and exclusions undermine the progressivity of the tax system because they are worth a greater dollar amount to the rich than to the poor,” and argues instead that “deductions and exclusions can reduce the relative tax burden of the poor and make the relative after-tax distribution of income more equal.”¹²⁵

2. *Critiques Made by Non-Academics*—The tax expenditure concept has also come under fire from non-academics. Some non-academics reiterate or expand upon the arguments summarized in the previous section.¹²⁶ Others assert that the tax expenditure concept “implicitly assumes that all income belongs to the government.”¹²⁷ This objection was rejected by Surrey (and even by certain

expenditures are inefficient); Zelinsky, *Public Choice*, *supra* note 24, *passim* (challenging the notion that the Congressional committees and administrative agencies with jurisdiction over the substantive areas affected by tax expenditures are superior vehicles for designing government programs than are the tax-writing committees and the Treasury Department and Internal Revenue Service); *see also* Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 687–90 (2002) (advocating the application of tax expenditure analysis to payroll taxes, but acknowledging the utility of tax preferences and penalties and arguing that Congress should “restore some coherence to tax policy by restricting the use of tax subsidies to encourage activities with positive externalities and the use of tax penalties to reflect the negative external costs associated with those activities”).

123. Weisbach & Nussim, *supra* note 121, at 957–58, 980–82.

124. If the underlying policy is held constant, there are no effects of putting a program into or taking a program out of the tax system even if doing so hurts or enhances traditional notions of tax policy. Welfare is the same regardless of whether the program is formally part of the tax system or is located somewhere else in the government. If we mistakenly look only at the tax system instead of overall government policy, we will draw the wrong conclusions. Putting a program into the tax system makes the tax system look more complicated, but there is unseen simplification elsewhere. The tax system will seem less efficient, but the efficiency of government policy is unchanged.

Id. at 958.

125. Griffith, *supra* note 21, at 366.

126. *See, e.g.*, C. David Anderson, *Conventional Tax Theory and “Tax Expenditures”: A Critical Analysis of the Life Insurance Example*, 57 TAX NOTES 1417 (1992); Bartlett, *supra* note 118, at 419–20.

127. Zelinsky, *Efficiency*, *supra* note 21, at 979; *see also* Heidi Glenn, *Bush Administration Questions Value of Tax Expenditures List*, 91 TAX NOTES 535, 535 (2001) (in explaining the Bush administration’s questioning of the utility of the tax expenditure concept, indicating that “[s]everal economists suggested that a long-standing ideological debate over the term tax expenditure is really what’s at issue here. ‘It could be that their concern is that the rhetoric [of the list] suggests it’s the government’s money and not the people’s money.’”); Thuronyi, *supra* note 119, at 1178 (“Politicians commonly attack the tax expenditure concept for assuming that our money belongs to the government and that the government is doing us a favor by not taxing it.”).

For examples of this argument, see OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE BUDGET OF THE UNITED STATES GOVERNMENT, 1983: SPECIAL ANALYSIS G: TAX EXPENDITURES 3 (1982)

of his academic critics) as misinformed.¹²⁸ As described above,¹²⁹ the tax expenditure concept does not contemplate that “the government has a preeminent claim on the society’s resources.”¹³⁰ Rather, the tax expenditure concept contemplates only that all taxpayers pay a normative tax (at rates determined by Congress—whether high, low, or moderate), and that the government then returns a portion of that tax payment to taxpayers who benefit from tax preferences or demands a further payment from taxpayers on whom tax penalties are imposed.

The tax expenditure concept has also been attacked by two Republican presidential administrations. First, in 1982, the Reagan administration essentially rejected Surrey’s tax expenditure model.¹³¹ The administration criticized the term “tax expenditure” as “misleading in several respects.”¹³² It also contended that “there are formidable difficulties in trying to define the underlying concept”:¹³³ “The standard of an ‘ideal’ income tax has often been suggested for delineating tax subsidies. However, there is no common agreement on the details of such a normative standard and many would regard such a standard as an impractical tax base.”¹³⁴ In place of the Surrey model, the administration set forth its own “reference law” approach, under which a provision would be classified as a “tax subsidy” if it is (i) “special” (i.e., “it applies to a narrow class of transactions or taxpayers”¹³⁵ such as “to permit the specification of a program objective that could be assigned to an existing agency other than the IRS and be administered with appropriated funds”¹³⁶) and (ii) a clear

[hereinafter 1983 SPECIAL ANALYSIS G], Editorial, *The \$91 Billion Loophole*, WALL ST. J., Mar. 20, 1975, at 22, and *Notable & Quotable*, WALL ST. J., Apr. 18, 1985, at 30 (publishing remarks made by Senator Daniel P. Moynihan in an address to the National League of Cities), as well as the sources cited in Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 231 n.13.

128. See Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 687; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 231–32; Thuronyi, *supra* note 119, at 1178; Zelinsky, *Efficiency*, *supra* note 21, at 979–80.

129. See *supra* notes 40–42 and accompanying text.

130. Zelinsky, *Efficiency*, *supra* note 21, at 980.

131. See Griffith, *supra* note 21, at 351 (“The reference law approach, then, is more appropriately viewed as a rejection of the Surrey tax expenditure model than a refinement of it.”); Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 595–97 (explaining how the reference law approach fails to comply with the requirements of the Congressional Budget and Impoundment Control Act of 1974, *supra* note 23); see also Paul F. Harstad, *Treasury and OMB Clash on Tax Expenditure Concept*, 13 TAX NOTES 1407 (1981) (describing the unexpected cancellation of Treasury Under Secretary for Tax and Economic Affairs Norman B. Ture’s appearance before the Senate Budget Committee because “OMB officials could not accept Ture’s proposed testimony because they viewed it as both too critical of the tax expenditure concept and politically risky”).

The Reagan administration’s rejection of the Surrey model has been described as politically motivated. See Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 595 (“These . . . strong criticisms . . . are also intended to convey a note of sadness in finding what should be a document prepared with technical competence distorted into a political tract that lacks both competence and reliability.”); Thuronyi, *supra* note 119, at 1184 (“The inclusion of ACRS in the tax expenditure budget embarrassed the administration, which had supported this substantial liberalization of depreciation allowances in the Economic Recovery Tax Act of 1981”).

132. 1983 SPECIAL ANALYSIS G, *supra* note 127, at 3.

133. *Id.*

134. *Id.* at 4.

135. *Id.* at 5.

136. BUDGET OF THE UNITED STATES GOVERNMENT, FY 1985: SPECIAL ANALYSIS G: TAX EXPENDITURES, at G-5 (1984) [hereinafter 1985 SPECIAL ANALYSIS G].

exception to some “general” provision in the tax code.¹³⁷ Just two years later, however, the Reagan administration partially reversed course and began to publish a tax expenditure budget that included both tax expenditures determined under the Surrey model and tax expenditures determined under the reference law approach.¹³⁸ The reason given for this change was that neither the Congressional Budget Office nor the Joint Committee on Taxation (who also compile tax expenditure budgets) had adopted the reference law approach, and the failure of the three tax expenditure budgets to correspond fully with each other created “a condition some . . . found confusing.”¹³⁹

More recently, the tax expenditure concept has become a target of the Bush administration in its war against the income, estate, and gift taxes.¹⁴⁰ The Bush administration surprised observers¹⁴¹ when it included the following statement in the budget analysis for fiscal year 2002:

So-called tax expenditures may be defined as provisions of the Federal tax laws with exclusions, exemptions, deductions, credits deferrals [sic], or special tax rates. Underlying the “tax expenditure” concept is the notion that the Federal Government would otherwise collect additional revenues but for these provisions. It assumes an arbitrary tax base is available to the Government in its entirety as a resource to be spent. Because of the breadth of this arbitrary tax base, the Administration believes that the concept of “tax expenditure” is of questionable analytic value. The discussion

137. 1983 SPECIAL ANALYSIS G, *supra* note 127, at 5. For critiques of the “reference law” approach, see TAX EXPENDITURES, *supra* note 21, at 94–122; Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 597–99, 601–06; and Thuronyi, *supra* note 119, at 1185–86.

138. 1985 SPECIAL ANALYSIS G, *supra* note 136, at G-1; *see also* Bartlett, *supra* note 118, at 413 (“The Reagan administration made a similar effort in 1982, only to backtrack in the face of criticism and continue with the status quo henceforth.”).

139. 1985 SPECIAL ANALYSIS G, *supra* note 136, at G-5.

140. *See* Leonard E. Burman, *Is the Tax Expenditure Concept Still Relevant?*, 56 NAT’L TAX J. 613, 626 (2003) (“One suspects, though, that the [Bush] Administration’s preference to shift the focus of analysis from an income tax baseline to a consumption tax baseline is part of a larger strategy to sneak a consumption tax in through the back door.”); Grover Norquist, *Step-by-Step Tax Reform*, WASH. POST, June 9, 2003, at A21 (laying out the Bush Administration’s long-term plan to effect fundamental tax reform through annual tax cuts, which will eventually replace our extant progressive income tax with a form of consumption tax (even though it is nominally referred to as a flat-rate income tax)); Sheldon D. Pollack, *Republican Antitax Policy*, 91 TAX NOTES 289 (2001) (tracing the historical roots of Republican animus toward the taxation of income and wealth, and exploring its more fanatical iteration during the 1990s); *see also* David S. Broder, *Tipping the Republicans’ Hand?*, WASH. POST, June 18, 2003, at A25 (indicating that Norquist’s article, *supra*, was written in response to an invitation from the Washington Post’s editorial page “to explain the Bush tax strategy”).

141. *See* Bartlett, *supra* note 118, at 413 (“In its 2002 budget, the Bush administration launched a stealth attack on the concept of ‘tax expenditures.’”); Glenn, *supra* note 127, at 535 (“The new language seems to have caught Washington economists by surprise.”); Patti Mohr, *Economists Seek Clarification of Tax Expenditure Concept*, 93 TAX NOTES 42, 42 (2001) (“The Bush administration surprised some economists last April when it released its fiscal 2002 budget that questioned the analytical value of the [tax expenditure] reports.”); Roin, *supra* note 117, at 603 (“President Bush sparked a minor firestorm within the Beltway by including these words in his fiscal 2002 budget analysis.”); Martin A. Sullivan, *Administration Reignites Old Battle over Tax Expenditures*, 91 TAX NOTES 701 (2001) (“Usually dull as doornails, the text of the Bush budget jolted tax policy aficionados to attention. . . .”).

below is based on materials and formats developed and included in previous budgets. The Administration intends to reconsider this presentation in the future.¹⁴²

This language was interpreted as “the opening salvo in a battle to overturn the Congressional requirement that . . . a [tax expenditure] budget be constructed and published as part of the annual budget.”¹⁴³

Nevertheless, the administration’s rhetoric softened considerably in its budget analysis for fiscal year 2003. In that analysis, the administration dropped the reference to “so-called” tax expenditures, and affirmatively stated that “[t]hough imperfect, the tax expenditure budget has expanded our understanding of policy programs operating through the Federal income tax and, more generally, the workings of the Federal income tax.”¹⁴⁴ The administration further stated its belief that “the ‘tax expenditure’ presentation can be improved by consideration of alternative or additional tax bases.”¹⁴⁵ The contemplated changes included (i) defining tax expenditures by reference to a comprehensive income tax base (as opposed to the modified version of such a base used in the Surrey model and the reference law approach) as well as a consumption tax base and (ii) compiling a list of tax penalties.¹⁴⁶ In its budget analysis for fiscal year 2004, the administration included an appendix containing an “initial presentation” of these changes.¹⁴⁷

III. DECONSTRUCTION

A. Tax Expenditure Analysis and Critical Thinking

As a chronological matter, Stanley Surrey began to press the case for adopting tax expenditure analysis—and achieved significant mainstream acceptance of the concept—before the emergence of the academic movements that have been grouped together under the rubric “contemporary critical theory.”¹⁴⁸ Surrey began to speak about the tax expenditure concept in the 1960s while he was serving as Assistant Secretary of the Treasury for Tax Policy,¹⁴⁹ and, by the early

142. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2002: ANALYTICAL PERSPECTIVES 61 (2001).

143. Roin, *supra* note 117, at 603–04.

144. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003: ANALYTICAL PERSPECTIVES 95 (2002).

145. *Id.*

146. *Id.* at 96–97.

147. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004: ANALYTICAL PERSPECTIVES 130–40 (2003) [herein after FY 2004 ANALYTICAL PERSPECTIVES]. For a description of how these changes further the Bush administration’s long-term tax reform agenda (as described by Norquist, *supra* note 140), see Bartlett, *supra* note 118, at 421–22; Mohr, *supra* note 141, at 42–43; and Sullivan, *supra* note 141, at 701.

148. See Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century’s End*, 49 AM. U. L. REV. 1, 48 (1999) (“Finally, we come to a legal perspective, or a set of legal perspectives, that I shall call ‘contemporary critical theory.’”).

149. See *supra* note 21 and accompanying text.

1970s, had already written a book and a spate of articles on the tax expenditure concept.¹⁵⁰ Congress clearly marked the concept's entry into the mainstream of tax policy thought when it incorporated tax expenditure analysis into the federal budget process in 1974.¹⁵¹ The lively, on-going debate over the propriety, contours, and use of tax expenditure analysis—a debate that rages among academics and non-academics alike—provides evidence of the continued acceptance of the concept as part of the mainstream of tax policy thought.¹⁵²

Contemporary critical theory did not, however, emerge until the mid- to late-1970s or 1980s¹⁵³—after the tax expenditure concept had already achieved mainstream acceptance. The community of contemporary critical theorists is comprised of scholars engaging in work in the areas of critical legal studies, feminist legal theory, critical race theory,¹⁵⁴ and gay and lesbian legal studies.¹⁵⁵ While it is difficult to generalize about such a diverse group of scholars,¹⁵⁶ their body of work has been described as “seek[ing] to demonstrate the constructedness and the contingency of our

150. See, e.g., SURREY, *PATHWAYS*, *supra* note 20; Surrey, *Federal Income Tax Reform*, *supra* note 22; Surrey, *Tax Incentives*, *supra* note 22; Surrey & Hellmuth, *Response to Professor Bittker*, *supra* note 22.

151. See *supra* note 25 and accompanying text.

152. See *supra* Part II.D.

153. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 35–36, 39 (2d ed. 2003); MINDA, *supra* note 18, at 106, 128, 167, 196; Tushnet, *Political History*, *supra* note 11, at 1523.

154. Since the 1990s, critical race scholarship has . . . been marked by attention to diversity among racial minority groups. Breaking out of a white/black discourse, Latino, Asian-American, and Native American scholars have begun to articulate how the effect of white supremacy differs with respect to particular ethnic groups and to observe the lack of visibility of minority groups other than African-Americans.

CHAMALLAS, *supra* note 153, at 137.

155. See *id.* at 135–72 (describing post-essentialist feminism, critical race theory (which embraces LatCrit theory), and gay and lesbian legal studies as “allied intellectual movements”); J. M. Balkin, *Ideology as Constraint*, 43 *STAN. L. REV.* 43, 43–44 (1991) (reviewing ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)) [hereinafter Balkin, *Ideology as Constraint*] (describing the failure of the book to discuss feminist legal theory and critical race theory as a weakness because they “have thoroughly transformed CLS in the past decade”); Wøtlauffer, *supra* note 148, at 48 (“Contemporary critical theory includes critical legal studies, feminist legal theory, and critical race theory.”). For a description of the early relationship between critical legal studies on the one hand and feminist legal theory and critical race theory on the other, see Harlon L. Dalton, *The Clouded Prism*, 22 *HARV. C.R.-C.L. L. REV.* 435 (1987), and Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 *J. LEGAL EDUC.* 61 (1988).

156. See MINDA, *supra* note 18, at 107 (“Commentators have suggested that the intellectual component of CLS is difficult to characterize because Crits share only antipathy toward traditional views of law and do not advocate a common method or approach to legal scholarship.”).

settled understandings, including our understandings about the law.”¹⁵⁷ Critical theorists go about demonstrating the constructedness of our understanding of law in a number of ways:

Sometimes this is done by showing that “the belief structures that rule our lives are not found in nature but are historically contingent.” Sometimes it is done through demonstrations of law’s indeterminacy. And so sometimes it is expressly disruptive and oppositional, taking the form of arguments variously known as critique, debunking, unmasking, unfreezing, trashing and—a term that has both a technical and a colloquial meaning—deconstruction.

In all of these ways, proponents of contemporary critical theory seek to demonstrate the constructedness and the contingency of those settled understandings that hold in place, or perhaps that simply *are*, the existing order. In all these ways they seek to unmask the operation of power and politics within legal discourse and to expose the existence and operation of illegitimate structures of domination.¹⁵⁸

Additionally, many critical theorists “seek to expose . . . illegitimate structures of domination” through consciousness-raising and narrative jurisprudence.¹⁵⁹

B. Tax Expenditure Analysis as Deconstructionist Analysis

Tax expenditure analysis has a decidedly critical—and, more particularly, a deconstructionist—flavor to it. As indicated in the passage quoted above, the term “deconstruction” has multiple meanings in the legal academic literature.¹⁶⁰ In its colloquial sense, deconstruction

157. Wetlaufer, *supra* note 148, at 54; see also CHAMALLAS, *supra* note 153, at 135 (“Most of the contemporary scholars in these fields are social constructionists. Their writings start from the premise that race, gender, and sexual orientation are shaped by historical, cultural, and ideological forces.”).

158. Wetlaufer, *supra* note 148, at 54–55 (footnotes omitted); see also MINDA, *supra* note 18, at 111–12, 116–27; see, e.g., Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) (trashing); Tushnet, *Essay in Deconstruction*, *supra* note 11 (deconstruction); Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981) (reviewing DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980)) (unmasking).

159. Wetlaufer, *supra* note 148, at 57; see also CHAMALLAS, *supra* note 153, at 2–3, 4–5, 136, 165–67; MINDA, *supra* note 18, at 130–33, 160–61, 172–73; see, e.g., Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 683–89, 696–700 (2000) (using third person narratives); Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 38 (1991) (proposing that feminist legal scholars explain women’s experiences to those who are “stranger[s] to those experiences”); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (on the general value of stories told by outgroups); Infanti, *Sodomy Statute*, *supra* note 3 (using first person narrative); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994) (on the particular value of stories told by gays and lesbians).

160. See also J. M. Balkin, *Deconstruction* (1996), at www.yale.edu/lawweb/jbalkin/articles/deconessay.pdf (last visited June 3, 2004) [hereinafter Balkin, *Deconstruction*] (“Deconstruction has a broader, more popular, and a narrower, more technical sense. The latter refers to a series of techniques for reading texts developed by Jacques Derrida, Paul de Man, and others; these techniques in turn are connected to a set of philosophical claims about language and meaning. However, as a result of the popularity of these techniques and theories, the verb ‘deconstruct’ is now often used more broadly as a synonym for criticizing or demonstrating the incoherence of a position.”).

signifies “stinging criticism” and is used as “another expression for ‘trashing,’ that is, showing why legal doctrines are self-contradictory, ideologically biased, or indeterminate.”¹⁶¹ In its technical sense, deconstruction refers to “a methodology, an interpretive tool”¹⁶² that “is the brainchild of Jacques Derrida,”¹⁶³ a French philosopher.¹⁶⁴ As will be borne out by the discussion below, Surrey and McDaniel’s exposition of the tax expenditure concept bears the hallmarks of deconstruction in both its colloquial and technical senses.¹⁶⁵

1. *Deconstructionist in the Colloquial Sense*—To see how tax expenditure analysis can be characterized as deconstructionist in the colloquial sense, one need only re-read the description of the absolutist version of the tax expenditure concept found in Part II.C.2 above. When Surrey and McDaniel turn from articulating the tax expenditure concept in the detached intellectual voice used in the introspective version of the concept,¹⁶⁶ they argue in a shriller political voice for the elimination of nearly all tax preferences as inherently and invariably inimical to one or more of the triad of concerns (i.e., efficiency, equity, and simplicity) that drive tax policy debate.¹⁶⁷ One can aptly

161. Balkin, *Deconstructive Practice*, *supra* note 2, at 743–44; *see also* Balkin, *Ideology as Constraint*, *supra* note 155, at 1136 n.19 (“Altman’s use of ‘deconstruction’ corresponds roughly to a popular conception of deconstruction as linguistic nihilism coupled with assertions of complete individual freedom in the reading of texts.”); Shurtz, *supra* note 11, at 1880 (“use of the term [‘deconstruction’] in its dimension of criticizing legal doctrine should not be identified as a process of destruction”).

162. Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 4 (1994); *see also* Balkin, *Deconstruction*, *supra* note 160 (“Despite Derrida’s insistence that deconstruction is not a method, but an activity of reading, deconstruction has tended to employ discernable techniques.”); Balkin, *Legal Career*, *supra* note 18 (“Derrida and his followers have always insisted that deconstruction is not a method, and that it cannot be reduced to a set of techniques. But this assertion is undermined by their actual practices of reading and argument.”); Balkin, *Deconstructive Practice*, *supra* note 2, at 745–46 (“Because Derrida and his followers insist that deconstruction is not a philosophical position but rather a practice, it is neither possible nor desirable to state a deconstructionist creed.”) (footnote omitted); *id.* at 786 (“Deconstruction by its very nature is an analytic tool and not a synthetic one. It can displace a hierarchy momentarily, it can shed light on otherwise hidden dependences of concepts, but it cannot propose new hierarchies of thought or substitute new foundations.”).

Whether deconstruction is a philosophical perspective or a methodology “is hotly contested by deconstruction’s critics in the legal field (as well as by some of its antifoundationalist proponents in the legal field).” Curran, *supra*, at 19 n.43; *see also* Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, 11 CARDOZO L. REV. 1211, 1212 (1990) (“Any attempt at defining deconstruction is hazardous at best as there is disagreement over whether deconstruction is a method, a technique or a process based on a particular ontological and ethical vision.”). For the contrary viewpoint, *see*, for example, Pierre Schlag, “*Le Hors de Texte, C’est Moi*” *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990) (arguing that deconstruction is neither a technique, a theory, a method, nor a tool).

163. Curran, *supra* note 162, at 6.

164. Balkin, *Deconstructive Practice*, *supra* note 2, at 743; Curran, *supra* note 162, at 6 n.5.

165. Derrida’s description of his own analysis of one of Pascal’s *pensées* captures the flavor of the analysis of the tax expenditure concept in the ensuing text: “my analysis (or rather . . . my active and anything but non-violent interpretation).” Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 11 (Mary Quaintance trans., Drucilla Cornell et al. eds., 1992) [hereinafter Derrida, *Force of Law*].

166. *See supra* Part II.C.1.

167. *See* Anthony C. Infanti, *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime*, 35 VAND. J. TRANSNAT’L L. 1105, 1113 (2002) (“The ensuing debate

describe the absolutist passages from Surrey and McDaniel's works (some of which are reproduced at the end of Part II.C.2 above) as "stinging criticism" or "trashing" of the tax preferences found in the Code.

2. *Deconstructionist in the Technical Sense*—In the United States, deconstruction in the technical sense first surfaced in the field of literary criticism, and only later made its way into legal academic thinking.¹⁶⁸ Despite this late arrival, Derrida himself has asserted that deconstruction is probably more appropriately applied to law than to literature:

If, hypothetically, it had a proper place, which is precisely what cannot be the case, such a deconstructive "questioning" or meta-questioning would be more at home in law schools, perhaps also—this sometimes happens—in theology or architecture departments, than in philosophy departments and much more than in the literature departments where it has often been thought to belong.¹⁶⁹

In his article *Deconstructive Practice and Legal Theory*, J. M. Balkin translated Derrida's ideas for consumption by legal academics.¹⁷⁰ In that article, Balkin focused on two deconstructive

over how to reform the ailing U.S. international tax regime has largely been shaped by the traditional concerns of efficiency, fairness, and simplicity."); SHAVIRO, *supra* note 21, at 4 ("Unfortunately, Surrey, in promoting his version of tax expenditure analysis, undermined this clarifying function by also enlisting the analysis as a weapon in battles concerning what the government's distribution policy should look like—in particular, his support for progressivity and comprehensive income taxation. Even those who share his distributional views ought to recognize by now that tax expenditure analysis cannot be politically effective—even leaving aside the intellectual defensibility of the enterprise—when it is fighting so many battles at once."); *see supra* text accompanying notes 94–107 for a discussion of the potential inefficiencies and inequities of, and the complexity created by, tax preferences.

168. Balkin, *Deconstruction*, *supra* note 160; Balkin, *Legal Career*, *supra* note 18; *see also* Balkin, *Deconstructive Practice*, *supra* note 2, at 744. For an historical perspective of deconstruction and its evolution, *see* Curran, *supra* note 162, at 5–24.

169. Derrida, *Force of Law*, *supra* note 165, at 8; *see also* Balkin, *Nested Oppositions*, *supra* note 18, at 1671 ("Properly understood and properly used, deconstruction offers theorists a set of techniques and arguments involving the concepts of similarity and difference. Because the logic of law is to a large degree the logic of similarity and difference, these issues are of obvious concern to lawyers.").

170. Balkin, *Deconstructive Practice*, *supra* note 2. For an explanation of why Balkin refers to his discussion of Derrida's ideas as a work of "translation," *see id.* at 745–46. *See also* Balkin, *Legal Career*, *supra* note 18 ("To be adapted to the needs and concerns of the legal academy, deconstruction had to be translated and altered in significant ways, making it more flexible, practical, and attentive to questions of justice and injustice."); Balkin, *Nested Oppositions*, *supra* note 18, at 1671 ("[T]he form of deconstructive analysis that I advocate . . . is the type most suitable for use by legal and political theorists. It is also . . . the interpretation that is most charitable to Derrida's often obscure texts and that makes the most sense of the type of arguments found within them."); J. M. Balkin, *Transcendental Deconstruction*, *Transcendent Justice*, 92 MICH. L. REV. 1131, 1131 (1994) [hereinafter Balkin, *Transcendental Deconstruction*] ("When I first began to write about deconstruction and law, I faced the task of translating deconstructive arguments in philosophy and literature to the concerns of law and justice. In the process, I proposed an understanding of deconstruction that enabled it to be employed in a critical theory of law. I fully recognized then that, in translating the insights of deconstructionists to the study of law, I was also working a transformation—for to translate is to iterate, and iterability alters.").

Some argue that, "[a]lthough superficially faithful to the letter of deconstruction, Balkin's accounts entirely

miss the spirit of Derrida's work." Katherine C. Sheehan, *Caring for Deconstruction*, 12 YALE J.L. & FEMINISM 85, 91 (2000); see also Schlag, *supra* note 162, at 1642–43 (describing Balkin's view of deconstruction "as an excellent and sophisticated account of the dominant paradigm of deconstruction practiced within critical legal studies," but then stating that this view "turns deconstruction on its head . . . [m]ore precisely, it sends deconstruction reeling back to the eighteenth-century metaphysics of the individual and his reason as the origin of truth, morals, etc."); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1695 (1991) (after again citing Balkin's view when describing the "typical" depiction of deconstruction in critical legal thought, indicating that "[n]ow, of course, this is not Derrida, and it is not deconstruction"). What I find most interesting about these critiques of Balkin is that they themselves seem to betray deconstruction and, more particularly, the idea of the free "play" of the text, which is discussed *infra* Part III.A.2.c.

As Vivian Curran has explained, "[t]he deconstructionist enterprise differs from the structuralist's in that deconstruction allows for more than one valid textual interpretation." Curran, *supra* note 162, at 16. She goes on to explain that

[w]here structuralism devalorizes the non-textual, deconstruction valorizes the reader's contribution *qua* interpreter in creating the interpretation from the point of departure of the multitude of relations of signification engendered by the text. Both structuralism and deconstruction eschew authorial intention; but, where structuralism views relevant context as finite, deconstruction views it as boundless. Where structuralists believe that their methodology yields the truth of the text, deconstructionists believe that their analysis yields a meaning which is interpretive in nature. Where structuralism puts the self outside of the text, deconstruction places the self within it.

Id. (footnotes omitted); see also Derrida, *Force of Law*, *supra* note 165, at 56 ("If I do not answer questions that take this form, it is only because I am not sure that such a thing as 'Deconstruction,' in the singular, exists or is possible. It is also because I think that deconstructive discourses as they present themselves in their irreducible plurality participate in an impure, contaminating, negotiated way in all these filiations . . . of decision and the undecidable."). Given the notorious opacity of Derrida's writing, Curran, *supra* note 162, at 18 (which you will experience first-hand in the liberal sprinkling of quotations in the text and notes below), and even acknowledging the fact that deconstruction does not "valorize[] all interpretations," *id.* at 22, it seems that Sheehan and Schlag are the ones who have "turn[ed] deconstruction on its head," Schlag, *supra* note 162, at 1643, by claiming that Balkin has misunderstood Derrida and that their views on deconstruction are the true or faithful interpretations of Derrida's work. See *id.* at 1647–73 (describing deconstruction as "maddening to the uninitiated"—a group in which Schlag apparently does not include himself—and then purporting to explain "the ways in which the deconstructive enterprise might be conducted" in law); Sheehan, *supra*, at 92 ("To a surprising extent, the theoretical weaknesses of West's feminist essentialism resemble misunderstandings of Derrida's work at large among 'deconstructionists' in the United States. Part IV of this Article will attempt to correct some of these misunderstandings, in particular identifying features of J.M. Balkin's explanatory work on deconstruction that have obscured its value for feminists . . ."); *id.* at 101 n.76 (accusing Balkin of oversimplifying Derrida's notion of "iterability"); *id.* at 120–27 (describing in detail a number of other ways in which Sheehan believes that Balkin has misunderstood Derrida). If iterability truly alters, see Balkin, *Deconstructive Practice*, *supra* note 2, at 780, and texts are pregnant with meaning, Balkin, *Deconstruction*, *supra* note 160, then neither the author nor any subsequent interpreter of a text can claim to be its master, or, put another way, can claim to have mastered or to have a monopoly on understanding its true spirit or meaning. As Derrida explains:

[T]he writer writes *in* a language and *in* a logic whose proper system, laws, and life his discourse by definition cannot dominate absolutely. He uses them only by letting himself, after a fashion and up to a point, be governed by the system. And the reading must always aim at a certain relationship, unperceived by the writer, between what he commands and what he does not command of the patterns of the languages that he uses. This relationship is not a certain quantitative distribution of shadow and light, of weakness or of force, but a signifying structure that critical reading should

practices: (i) “the inversion of hierarchies” and (ii) “the liberation of the text from the author.”¹⁷¹ Balkin singled out these techniques because he believed that they “have the most relevance to what legal thinkers do when they analyze legal texts. They also have the most relevance to the study of ideology and the social and political theories underlying our legal system.”¹⁷²

Each of these deconstructive techniques will be discussed separately below. First, by way of background, the inversion of hierarchies will be described more fully. Following the description of the inversion of hierarchies, Surrey and McDaniel’s (witting or unwitting) use of this technique will be considered. Second, and again by way of background, the liberation of the text from the author will be described more fully. Following the description of the notion of the liberation of the text from the author, Surrey and McDaniel’s (witting or unwitting) use of this technique will be considered.

produce.

DERRIDA, GRAMMATOLOGY, *supra* note 2, at 158. Later in the same work, he states:

And Rousseau’s text must constantly be considered as a complex and many-leveled structure; in it, certain propositions may be read as interpretations of other propositions that we are, up to a certain point and with certain precautions, free to read otherwise. Rousseau says A, then for reasons that we must determine, he interprets A into B. A, which was already an interpretation, is reinterpreted into B. After taking cognizance of it, we may, without leaving Rousseau’s text, isolate A from its interpretation into B, and discover possibilities and resources there that indeed belong to Rousseau’s text, but were not produced or exploited by him, which, for equally legible motives, he *preferred to cut short* by a gesture neither witting nor unwitting.

Id. at 307.

In any event, for purposes of this article, whether Balkin, Schlag, or Sheehan is more faithful to Derrida is irrelevant—what is relevant is that, as indicated by the quotes from Schlag above, Balkin’s view of deconstruction has been the dominant one in critical legal studies. *See also* Sheehan, *supra*, at 91 (referring to Balkin as “[o]ne of Derrida and deconstruction’s most prolific self-appointed spokesmen in law”). Thus, if Surrey and McDaniel have employed the deconstructive techniques described by Balkin, then they will have been employing techniques closely associated with the critical legal studies movement and contemporary critical theory more generally.

171. Balkin, *Deconstructive Practice*, *supra* note 2, at 746; *see also* Balkin, *Legal Career*, *supra* note 18; Chibundu, *supra* note 18, at 1485; Curran, *supra* note 162, at 16–17, 22, 24. Balkin illustrates the application of an additional deconstructive practice—etymological analysis—in J. M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1613, 1626–27 (1990) [hereinafter Balkin, *Tradition*]. In that article, Balkin deconstructs Justice Scalia’s and Justice Brennan’s opinions in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), by exploring the etymological link between the words tradition (which Justice Scalia cites and relies upon in his opinion) and betrayal (which is what Justice Brennan essentially accuses Justice Scalia of doing to prior precedents). Balkin, *Tradition*, *supra*, at 1619–25. For an example of an application of this technique in Derrida’s work, see JACQUES DERRIDA, *ARCHIVE FEVER: A FREUDIAN IMPRESSION* (Eric Prenowitz trans., 1995) [hereinafter DERRIDA, *ARCHIVE FEVER*], in which Derrida engages in a deconstructive analysis of the concept of archiving through an exploration of the etymology of the word “archive.”

172. Balkin, *Deconstructive Practice*, *supra* note 2, at 746; *see also* Derrida, *Force of Law*, *supra* note 165, at 21 (“Deconstruction is generally practiced in two ways or styles, although it most often grafts one on to the other. One takes on the demonstrative and apparently ahistorical allure of logico-formal paradoxes. The other, more historical or more anamnestic, seems to proceed through readings of texts, meticulous interpretations and genealogies.”).

a. *Inversion of Hierarchies: Background*—Hierarchical oppositions—the privileging of one idea over another—are found all around us. As Balkin explains:

For Derrida, hierarchies of thought are everywhere. They can be found in the following assertions: *A* is the rule and *B* is the exception; *A* is the general case and *B* is the special case; *A* is simple and *B* is complex; *A* is normal and *B* is abnormal; *A* is self-supporting and *B* is parasitic upon it; *A* is present and *B* is absent; *A* is immediately perceived and *B* is inferred; *A* is central and *B* is peripheral; *A* is true and *B* is false; *A* is natural and *B* is artificial. Indeed, my labelling of these ideas as *A* and *B* involves a hierarchical move because the letter *A* precedes *B* in the alphabet.¹⁷³

Deconstruction reverses these hierarchical oppositions and shows that what is true of *A* is also true of *B*—that “*A* depends upon *B* as much as *B* depends upon *A*.”¹⁷⁴ This reversal can be accomplished

in a number of ways. Normally the privileging of *A* over *B* is justified by reasons, either explicit or implicit. So the deconstructor can ask whether the reasons why *A* is privileged over *B* actually apply to *B* as well, or the reasons why *B* is thought subordinate to *A* are actually also true of *A*. Alternatively, one can try to show that *A* is a special case of *B*, or that *A*'s existence or conceptual coherence depends on the thing it excludes or subordinates, namely, *B*.¹⁷⁵

By temporarily reversing the hierarchy of *A* and *B*, deconstruction reveals “*A*'s privileged status as an illusion” and enables us “to see things about both *A* and *B* that we had never noticed before.”¹⁷⁶ Deconstruction allows us “to rethink the relationship between conceptual opposites and observe similarities and conceptual dependencies that were previously hidden or submerged.”¹⁷⁷ Moreover, the inversion of hierarchies reminds us that “neither term of the opposition can be originary and fundamental because both are related to each other in a system of mutual dependences and differences. Each is continually calling upon the other for its foundation, even as it is constantly differentiating itself from the other.”¹⁷⁸

The purpose of inverting a hierarchical opposition is neither to equate one term in the opposition with the other nor completely to efface the distinction between the two terms in the opposition.¹⁷⁹ Rather, the purpose is to move us to question why the first term in the opposition is

173. Balkin, *Deconstructive Practice*, *supra* note 2, at 747 (emphasis of the letters *A* and *B* added); *see also* Balkin, *Deconstruction*, *supra* note 160.

174. Balkin, *Deconstructive Practice*, *supra* note 2, at 747 (emphasis of letters *A* and *B* added); *see also* Balkin, *Deconstruction*, *supra* note 160.

175. Balkin, *Legal Career*, *supra* note 18.

176. Balkin, *Deconstructive Practice*, *supra* note 2, at 747 (emphasis of letters *A* and *B* added).

177. Balkin, *Legal Career*, *supra* note 18.

178. Balkin, *Deconstructive Practice*, *supra* note 2, at 751; *see also* Balkin, *Deconstruction*, *supra* note 160.

179. *See infra* notes 302–307 and accompanying text.

privileged over the second and then to consider whether that privileging is justified or justifiable.¹⁸⁰ As Balkin has explained:

Deconstructive reversals show that the reasons given for privileging one side of an opposition over the other often turn out to be reasons for privileging the other side. The virtues of the first term are seen to be the virtues of the second; the vices of the second are revealed to be true of the first as well. This undoing of justifications for privileging is part of the deconstructionist aim of “ungrounding” preferred conceptions by showing that they cannot act as self-sufficient or self-explanatory grounds or foundations.¹⁸¹

Because this idea of inverting hierarchical oppositions is likely unfamiliar territory for most tax academics, I will describe a few examples from Balkin and Derrida to illustrate the technique:

(i). *Example: Identity/Difference*—Balkin illustrates the inversion of hierarchies¹⁸² more concretely using, among other examples, the hierarchical opposition between identity and difference.¹⁸³ In Western philosophy, identity is considered to be the basic term in this pair, and difference is considered to be “a derivative concept based upon identity: Two things are different if they are not identical.”¹⁸⁴ However, Balkin asserts that, likewise, two things cannot be identical unless they can be shown to “be different from something else.”¹⁸⁵ Consequently, just as difference can only be understood by reference to identity, identity can only be understood by reference to difference.¹⁸⁶ By inverting the hierarchy between these two concepts, one can show that the basic

180. For there are two heterogenous ways of erasing the difference between the signifier and the signified: one, the classic way, consists in reducing or deriving the signifier, that is to say, ultimately in *submitting* the sign to thought; the other, the one that we are using here against the first one, consists in putting into question the system in which the preceding reduction functioned: first and foremost, the opposition between the sensible and the intelligible. For the *paradox* is that the metaphysical reduction of the sign needed the opposition it was reducing. The opposition is systematic with the reduction. And what we are saying here about the sign can be extended to all the concepts and all the sentences of metaphysics, in particular to the discourse on “structure.”

JACQUES DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 278, 281 (Alan Bass trans., 1978) [hereinafter DERRIDA, *Structure*].

181. Balkin, *Deconstructive Practice*, *supra* note 2, at 755.

182. In a later article, Balkin re-cast the deconstructive practice of inverting hierarchies in terms of reinterpreting conceptual oppositions as “nested oppositions”—that is, oppositions which also involve a relation of dependence, similarity, or containment between the opposed concepts.” See Balkin, *Nested Oppositions*, *supra* note 18, at 1671–78.

183. Balkin, *Deconstructive Practice*, *supra* note 2, at 748.

184. *Id.*

185. *Id.*

186. *Id.*

term is actually dependent upon the derivative term.¹⁸⁷ “In doing so, we show that what was thought to be foundational (identity) is itself dependent upon the concept it was privileged over (difference).”¹⁸⁸

Derrida employs the term “*différance*” to capture this notion that a relationship of mutual dependence and difference exists between the terms in a hierarchical opposition. Balkin explains the term as follows:

Différance is a pun based upon the French word *différer*, which means both to differ and to defer. Derrida replaces an “e” with “a” in *différence* to make it *différance*; the two words sound exactly the same in French. *Différance* simultaneously indicates that (1) the terms of an oppositional hierarchy are differentiated from each other (which is what determines them); (2) each term in the hierarchy defers the other (in the sense of making the other term wait for the first term); and (3) each term in the hierarchy defers *to* the other (in the sense of being fundamentally dependent upon the other).¹⁸⁹

Closely associated with the idea of *différance* is “the idea of ‘trace.’”¹⁹⁰ As part of their mutual differentiation and deferral, “the terms in a hierarchical opposition rely for their coherence on the differentiation between them”;¹⁹¹ it is thus said that each of the terms bears a “trace” of the other.¹⁹²

187. *Id.*

188. Balkin, *Deconstructive Practice*, *supra* note 2, at 748.

189. *Id.* at 752 (footnote omitted); *see also Implications: Interview with Henri Ronse*, in JACQUES DERRIDA, POSITIONS 1, 8 (Alan Bass trans., 1981) [hereinafter POSITIONS] (containing a similar description).

190. Balkin, *Deconstructive Practice*, *supra* note 2, at 752.

191. *Id.*; *see also* DERRIDA, GRAMMATOLOGY, *supra* note 2, at 46–47.

192. Balkin, *Deconstructive Practice*, *supra* note 2, at 752.

[B]eyond and behind what one believes can be circumscribed as Rousseau’s text, there has never been anything but writing; there have never been anything but supplements, substitutive significations which could only come forth in a chain of differential references, the “real” supervening and being added only while taking on meaning from a trace and from an invocation of the supplement, etc. And thus to infinity

DERRIDA, GRAMMATOLOGY, *supra* note 2, at 159.

But what disposes of it in this way, we now know, is not the origin, but that which takes its place; which is not, moreover, the opposite of an origin. It is not absence instead of presence, but a trace which replaces a presence which has never been present, an origin by means of which nothing has begun.

JACQUES DERRIDA, *Ellipsis*, in WRITING AND DIFFERENCE, *supra* note 180, at 294, 295.

The presence of an element is always a signifying and substitutive reference inscribed in a system of differences and the movement of a chain. . . .

Turned towards the lost or impossible presence of the absent origin, this structuralist thematic of broken immediacy is therefore the saddened, nostalgic, guilty, Rousseauistic

For example, when one considers the idea of identity, one normally thinks of identity (and identity alone) as being present in one's mind.¹⁹³ But, because of the relationship of *différance* between identity and difference, one does not just have the idea of identity present in one's mind; instead, one has in mind both identity *and* difference—in other words, one has in mind identity *as opposed to* difference.¹⁹⁴ The idea of identity continues to bear the trace of the idea of difference,¹⁹⁵ and it is “[t]he trace [that] makes deconstruction possible; by identifying the traces of the concepts in each other, we identify their mutual conceptual dependence.”¹⁹⁶

(ii). *Example: Speech/Writing*—To further illustrate how one inverts hierarchical oppositions, let us consider what is probably Derrida's most famous examination of privileging—the privileging of speech over writing. In *Of Grammatology*,¹⁹⁷ Derrida discusses how philosophers have historically privileged speech over writing:

The privilege of the *phonè* does not depend upon a choice that could have been avoided. It responds to a moment of *economy* (let us say of the “life” of “history” or of “being as self-relationship”). The system of “hearing (understanding)-oneself-speak” through the phonic substance—which *presents itself* as the nonexterior, nonmundane, therefore, nonempirical or noncontingent signifier—has necessarily dominated the history of the world during an entire epoch, and has even produced the idea of the world, the idea of world-origin, that arises from the difference between the worldly and the non-worldly, the outside and the inside, ideality and nonideality, universal and nonuniversal, transcendental and empirical, etc.¹⁹⁸

side of the thinking of play whose other side would be the Nietzschean *affirmation*, that is the joyous affirmation of the play of the world and of the innocence of becoming, the affirmation of a world of signs without fault, without truth, and without origin which is offered to an active interpretation. *This affirmation then determines the noncenter otherwise than as the loss of the center.* And it plays without security. For there is a *sure* play: that which is limited to the *substitution* of *given* and *existing, present, pieces.* In absolute chance, affirmation also surrenders itself to *genetic* indetermination, to the *seminal* adventure of the trace.

DERRIDA, *Structure*, *supra* note 180, at 292.

193. Balkin, *Deconstructive Practice*, *supra* note 2, at 753.

194. *Id.*; see also *Semiology and Grammatology: Interview with Julia Kristeva*, in *POSITIONS*, *supra* note 189, 15, 26 [hereinafter *Semiology and Grammatology*] (“Nothing, neither among the elements nor within the system, is anywhere ever simply present or absent. There are only, everywhere differences and traces of traces.”).

195. Balkin, *Deconstructive Practice*, *supra* note 2, at 753.

196. *Id.* at 752.

197. DERRIDA, *GRAMMATOLOGY*, *supra* note 2. “Grammatology” is “the science of writing.” *Id.* at 4.

198. *Id.* at 7–8; see *id.* at 6–26 (containing a discussion of how a number of philosophers have privileged speech over writing); *id.* at 101–40 (exploring the privileging of speech over writing in CLAUDE LÉVI-STRAUSS, *TRISTES TROPQUES* (1955), in which writing is associated with violence and exploitation while speech is associated with innocence, non-violence, and freedom); *id.* at 141–57 (writing as the “dangerous supplement” for Rousseau).

As this passage hints, this privileging, or hierarchical opposition, stems from the view that speech is primary (or closer to the signified)¹⁹⁹ and writing is secondary (or farther removed from the signified):

As has been more or less implicitly determined, the essence of the *phonè* would be immediately proximate to that which within “thought” as logos relates to “meaning,” produces it, receives it, speaks it, “composes” it. If, for Aristotle, for example, “spoken words (ta en tē phonē) are the symbols of mental experiences (pathēmata tes psychēs) and written words are the symbols of spoken words” . . . it is because the voice, producer of *the first symbols*, has a relationship of essential and immediate proximity with the mind.

. . . In every case, the voice is closest to the signified, whether it is determined strictly as sense (thought or lived) or more loosely as thing. All signifiers, and first and foremost the written signifier, are derivative with regard to what would wed the voice indissolubly to the mind or to the thought of the signified sense, indeed to the thing itself The written signifier is always technical and representative. It has

199. In other words, speech is “present.” Derrida later explains his project in the following terms:

To make enigmatic what one thinks one understands by the words “proximity,” “immediacy,” “presence” (the proximate [*proche*], the own [*propre*], and the pre- of presence), is my final intention in this book. This deconstruction of presence accomplishes itself through the deconstruction of consciousness, and therefore through the irreducible notion of the trace (*Spur*), as it appears in both Nietzschean and Freudian discourse.

Id. at 70. Also consider in this regard the following excerpt from *Structure, Sign and Play in the Discourse of the Human Sciences*:

This is why one perhaps could say that the movement of any archaeology, like that of any eschatology, is an accomplice of this reduction of the structurality of structure and always attempts to conceive of structure on the basis of a full presence which is beyond play.

If this is so, the entire history of the concept of structure, before the rupture of which we are speaking, must be thought of as a series of substitutions of center for center, as a linked chain of determinations of the center. Successively, and in a regulated fashion, the center receives different forms or names. The history of metaphysics, like the history of the West, is the history of these metaphors and metonymies. Its matrix—if you will pardon me for demonstrating so little and for being so elliptical in order to come more quickly to my principal theme—is the determination of Being as *presence* in all sense of this word. . . .

. . . Henceforth, it was necessary to begin thinking that there was no center, that the center could not be thought in the form of a present-being, that the center had no natural site, that it was not a fixed locus but a function, a sort of nonlocus in which an infinite number of sign-substitutions came into play. This was the moment when language invaded the universal problematic, the moment when, in the absence of a center or origin, everything became discourse—provided we can agree on this word—that is to say, a system in which the central signified, the original or transcendental signified, is never absolutely present outside a system of differences. The absence of the transcendental signified extends the domain and the play of signification infinitely.

DERRIDA, *Structure*, *supra* note 180, at 279–80.

no constitutive meaning. This derivation is the very origin of the notion of the “signifier.”²⁰⁰

Derrida also detects this privileging in the work of the linguist Ferdinand de Saussure.²⁰¹ Using Saussure’s *Cours de linguistique générale*, Derrida proceeds to deconstruct the speech/writing hierarchical opposition.²⁰² Derrida deconstructs this privileging by showing that what is true of speech is also true of writing; he argues that “[t]he thesis of the *arbitrariness* of the sign . . . must forbid a radical distinction between the linguistic and the graphic sign.”²⁰³

For Derrida, both speech and writing are forms of signification or “arche-writing”²⁰⁴ that share this quality of arbitrariness. According to Saussure, “[w]ithin the ‘natural’ relationship between phonic signifiers and their signifieds *in general*, the relationship between each determined signifier

200. DERRIDA, GRAMMATOLOGY, *supra* note 2, at 11; *see also, e.g., id.* at 14 (“Thus, within this epoch, reading and writing, the production or interpretation of signs, the text in general as fabric of signs, allow themselves to be confined with secondariness. They are preceded by a truth, or a meaning already constituted by and within the element of the logos.”); *id.* at 20 (“There has to be a transcendental signified for the difference between signifier and signified to be somewhere absolute and irreducible. It is not by chance that the thought of being, as the thought of this transcendental signified, is manifested above all in the voice: in a language of words [*mots*]. The voice *is heard* (understood)—that undoubtedly is what is called conscience—closest to the self as the absolute effacement of the signifier: pure auto-affectation that necessarily has the form of time and which does not borrow from outside of itself, in the world or in ‘reality,’ any accessory signifier, any substance of expression foreign to its own spontaneity. It is the unique experience of the signified producing itself spontaneously, from within the self, and nevertheless, as signified concept, in the element of ideality or universality.”).

201. *See id.* at 30–44 (containing a detailed description of the ways in which Saussure privileged speech over writing). For example, Derrida states:

On the one hand, true to the Western tradition that controls not only in theory but in practice (*in the principle of its practice*) the relationships between speech and writing, Saussure does not recognize in the latter more than a *narrow* and *derivative* function. Narrow because it is nothing but one modality among others, a modality of the events which can befall a language whose essence, as the facts seem to show, can remain forever uncontaminated by writing. “Language does have an . . . oral tradition that is independent of writing” Derivative because *representative*: signifier of the first signifier, representation of the self-present voice, of the immediate, natural, and direct signification of the meaning (of the signified, of the concept, of the ideal object or what have you).

Id. at 30.

202. Derrida’s deconstruction, while ostensibly targeting Saussure’s work, was not aimed only at Saussure: “When I say this, my quarry is not primarily Ferdinand de Saussure’s intention or motivation, but rather the entire uncritical tradition which he inherits.” *Id.* at 45–46.

203. *Id.* at 44.

204. *Id.* at 56–57; *see also id.* at 70 (“If the trace, arche-phenomenon of ‘memory,’ which must be thought before the opposition of nature and culture, animality and humanity, etc., belongs to the very movement of signification, then signification is a priori written, whether inscribed or not, in one form or another, in a ‘sensible’ and ‘spatial’ element that is called ‘exterior.’ Arche-writing, at first the possibility of the spoken word, then of the ‘graphie’ in the narrow sense, the birthplace of ‘usurpation,’ denounced from Plato to Saussure, this trace is the opening of the first exteriority in general, the enigmatic relationship of the living to its other and of an inside to an outside: spacing.”).

and its determined signified would be ‘arbitrary.’”²⁰⁵ Thus, for example, there is no necessary connection between the word “tree” and the thing that it signifies.²⁰⁶ Derrida contends that Saussure is wrong in characterizing writing as an “image” of spoken language, because the relationship between spoken language and written language is similarly characterized by arbitrariness:

The thesis of the arbitrariness of the sign thus indirectly but irrevocably contests Saussure’s declared proposition when he chases writing to the outer darkness of language. This thesis successfully accounts for a conventional relationship between the phoneme and the grapheme (in phonetic writing, between the phoneme, signifier-signified, and the grapheme, pure signifier), but by the same token it forbids the latter be an “image” of the former.²⁰⁷

Thus, Derrida concludes that “we must think that writing is at the same time more exterior to speech, not being its ‘image’ or its ‘symbol,’ and more interior to speech, which is already in itself a writing.”²⁰⁸

Derrida further demonstrates that speech and writing are characterized by *différance*.²⁰⁹ Drawing from Saussure, Derrida notes that “[f]rom the moment that there is meaning there are nothing but signs. *We think only in signs.*”²¹⁰ Both speech and writing are thus systems of signs, and like writing, speech “implies an originary writing”;²¹¹ in other words, speech, like writing, is secondary.²¹²

Saussure breaks speech down into two parts: “the ‘sound-image’ and the objective sound,”²¹³ a distinction which Derrida describes as follows:

The sound-image is the structure of the appearing of the sound [*l’apparaître du son*] which is anything but the sound appearing [*le son apparaissant*]. It is the sound-image that he [Saussure] calls *signifier*, reserving the name *signified* not for the thing, to be sure (it is reduced by the act and the very ideality of language), but for the “concept,” undoubtedly an unhappy notion here; let us say for the ideality of the sense. . . . The sound-image is what is *heard*; not the *sound* heard but the being heard

205. *Id.* at 44.

206. See DERRIDA, GRAMMATOLOGY, *supra* note 2, at 52 n.17 (“The signs used in writing are arbitrary; there is no connection, for example, between the letter *t* and the sound that it designates.”) (quoting FERDINAND DE SAUSSURE, COURS DE LINGUISTIQUE GÉNÉRALE 165–66 (1916)).

207. *Id.* at 45; see *supra* note 206 for an example of this arbitrariness.

208. DERRIDA, GRAMMATOLOGY, *supra* note 2, at 46.

209. See *id.* at 52 (“Henceforth, it is not to the thesis of the arbitrariness of the sign that I shall appeal directly, but to what Saussure associates with it as an indispensable correlative and which would seem to me rather to lay the foundations for it: the thesis of *différance* as the source of linguistic value.”); *id.* at 65 (“And as it [the trace] is *a fortiori* anterior to the distinction between regions of sensibility, anterior to sound as much as to light, is there a sense in establishing a ‘natural’ hierarchy between the sound-imprint, for example, and the visual (graphic) imprint?”).

210. *Id.* at 50.

211. *Id.* at 52.

212. *Id.* at 52–53.

213. *Id.* at 63.

of the sound. Being-heard is structurally phenomenal and belongs to an order radically dissimilar to that of the real sound in the world.²¹⁴

Building on Saussure's notion of difference (which posits that what gives each word meaning is not sound, but the fact that the word can be differentiated from all other words),²¹⁵ Derrida states that

[t]he unheard difference between the appearing and the appearance [*l'apparaître et l'apparaissant*] (between the "world" and "lived experience") is the condition of all other differences, of all other traces, and *it is already a trace*. This last concept is thus absolutely and by rights "anterior" to all *physiological* problematics concerning the nature of the *engramme* [the unit of engraving], or *metaphysical* problematics concerning the meaning of absolute presence whose trace is thus opened to deciphering.²¹⁶

In this way, speech and writing share the trait of "receiv[ing] meaning only in sequences of differences."²¹⁷ As signs, speech and writing can be understood only by reference to the way that they differ from, and defer to, other signs:

The outside, "spatial" and "objective" exteriority which we believe we know as the most familiar thing in the world, as familiarity itself, would not appear without the *grammè*, without difference as temporalization, without the nonpresence of the other inscribed within the sense of the present, without the relationship with death as the concrete structures of the living present. . . . The subordination of the trace to the full presence summed up in the *logos*, the humbling of writing beneath speech dreaming its plenitude, such are the gestures required by an onto-theology determining the archeological and eschatological meaning of being as presence, as *parousia*, as life without difference: another name for death, historical metonymy where God's name holds death in check.²¹⁸

Accordingly, neither speech nor writing can be seen as primary, fundamental, or more present than the other.²¹⁹ Derrida thus undermines the privileging of speech over writing by showing that both are signs, forms of arche-writing, that always, already derive their meaning from the ways in which they differ from other signs.²²⁰

214. DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 63.

215. *Id.* at 52–53 & n.16.

216. *Id.* at 65.

217. *Id.* at 70.

218. *Id.* at 70–71.

219. *Id.* at 53 ("By definition, difference is never in itself a sensible plenitude. Therefore, its necessity contradicts the allegation of a naturally phonic essence of language. It contests by the same token the professed natural dependence of the graphic signifier.")

220. DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 69 ("This signification is formed only within the hollow of difference: of discontinuity and of discreteness, of the diversion and the reserve of what does not appear. This hinge

(iii). *Example: Justified/Unjustified Force*—Closer to home, in *Force of Law: The Mystical Foundation of Authority*,²²¹ Derrida inverts the hierarchical opposition in law between justified and unjustified force. His deconstruction of this hierarchical opposition begins with an expression of a fondness for the English idiomatic expression “to enforce the law.” The French equivalent of this expression is “*appliquer la loi*,” which, literally translated, means “to apply the law.”²²¹ As Derrida correctly notes, the French expression lacks a “direct, literal allusion to . . . force,”²²² whereas the English expression “remind[s] us that law is always a justified force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable.”²²³ The expression “to enforce the law” further reminds us that law and force are inextricably linked: “Applicability, ‘enforceability,’ is not an exterior or secondary possibility that may or may not be added as a supplement to law. It is the force essentially implied in the very concept of *justice as law (droit)*, of justice as it becomes *droit*, of the law as ‘*droit*.’”²²⁴ What puzzles Derrida, however, is how one can distinguish between the justified force that is privileged in law and unjustified force—“the violence that one always deems unjust”:²²⁵

[h]ow are we to distinguish between the force of law of a legitimate power and the supposedly ordinary violence that must have established this authority and that could not itself have been authorized by any anterior legitimacy, so that, in this initial moment, it is neither legal nor illegal—or, others would quickly say, neither just nor unjust?²²⁶

Later in this essay, Derrida revisits the relationship between justified and unjustified force in the context of Pascal’s *pensées* and a related phrase used by Montaigne:²²⁷ “*fondement mystique de l’autorité*” (“mystical foundation of authority”). Derrida finds in these *pensées* and in this phrase “the basis for a modern critical philosophy, indeed for a critique of juridical ideology” that goes beyond viewing law as a mere instrument of the “dominant power.”²²⁸ Derrida posits “a more internal, more complex relation” between law and force:²²⁹

Justice—in the sense of *droit* (right or law)—would not simply be put in the service of a social force or power, for example, an economic, political, ideological power that

[*brisure*] of language as writing, this discontinuity, could have, at a given moment within linguistics, run up against a rather precious *continuist* prejudice. Renouncing it, phonology must indeed renounce all distinctions between writing and the spoken word, and thus renounce not itself, phonology, but rather phonologism.”)

221. See Derrida, *Force of Law*, *supra* note 165, at 5 (translation by the author).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 6.

226. Derrida, *Force of Law*, *supra* note 165, at 6.

227. Derrida also borrowed this phrase for use in the title of his essay, which was his keynote address and contribution to a symposium on *Deconstruction and the Possibility of Justice*. Symposium, *Deconstruction and the Possibility of Justice*, 11 CARDOZO L. REV. 919 (1989).

228. Derrida, *Force of Law*, *supra* note 165, at 13.

229. *Id.*

would exist outside or before it and which it would have to accommodate or bend to when useful. Its very moment of foundation or institution (which in any case is never a moment inscribed in the homogeneous tissue of a history, since it is ripped apart with one decision), the operation that amounts to founding, inaugurating, justifying law (*droit*), making law, would consist of a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate.²³⁰

This is how Derrida interprets what Pascal and Montaigne refer to as the “mystical foundation of authority.” This mystical foundation lies in “a silence . . . walled up in the violent structure of the founding act. Walled up, walled in because silence is not exterior to language.”²³¹ Derrida continues:

Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of “illegal.” They are neither legal nor illegal in their founding moment. They exceed the opposition between founded and unfounded, or between any foundationalism or anti-foundationalism. Even if the success of performatives that found law or right (for example, and this is more than an example, of a state as guarantor of a right) presupposes earlier conditions and conventions (for example in the national or international arena), the same “mystical” limit will reappear at the supposed origin of said conditions, rules or conventions, and at the origin of their dominant interpretation.²³²

Thus, Derrida inverts the hierarchical opposition in the law between justified and unjustified force by demonstrating through his interpretation of Pascal and Montaigne that justified force is actually founded on a force that, at the moment of its occurrence, is neither justified nor justifiable:

The structure I am describing here is a structure in which law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable and transformable textual strata (and that is the history of law [*droit*], its possible and necessary transformation, sometimes its amelioration), or because its ultimate foundation is by definition unfounded.²³³

Having undermined this privileging by showing that justified force depends upon an unjustifiable force for its very existence, Derrida then pursues these thoughts about justified/unjustified force in the

230. *Id.*

231. *Id.* at 14.

232. *Id.*

233. *Id.*



second half of the essay, where he undertakes a reading of a text by Walter Benjamin entitled *Zur Kritik der Gewalt* [*Critique of Violence*].²³⁴

b. Inversion of Hierarchies: In Tax Expenditure Analysis—Through tax expenditure analysis, Surrey and McDaniel have inverted a hierarchical opposition in much the same way that Balkin and Derrida did in the examples discussed above. The only difference is the choice of hierarchical opposition; rather than focusing on identity/difference, speech/writing, or justified/unjustified force, Surrey and McDaniel focus their attention on perhaps the most basic division of government activity: taxing and spending. Under this dichotomy, all government activity is characterized either as related to (i) the collection of revenue or (ii) the disbursement of the revenue that has been collected. In common parlance, these two categories of government activity are viewed as an inextricably linked “either/or”: *either* the government is raising revenue through taxes *or* it is spending that revenue as directed by our representatives in Congress. Nevertheless, as we will see, Surrey and McDaniel help us to realize through their deconstruction of this dichotomy that taxing and spending are not necessarily an “either/or”—they can also be a “both/and.”²³⁵

This categorization of government activity as either taxing or spending is so pervasive and so commonly-accepted that it has even come to be used as a metaphor for government itself. It is quite common to hear Republicans deride Democrats for being “tax-and-spend” liberals.²³⁶ This epithet is meant to convey the idea that Democrats strive for bigger government—a government with an insatiable appetite for taxing that is used to fuel spending on an ever-increasing array of social programs. President Clinton attempted to distance himself from this image by declaring in his 1996

234. Derrida, *Force of Law*, *supra* note 165, at 29–57.

235. See Balkin, *Nested Oppositions*, *supra* note 18, at 1672–74 (asserting that “deconstructive claims of ‘neither/nor and both/and’ do not necessarily involve any abandonment of rationality”); Derrida, *Force of Law*, *supra* note 165, at 4 (“That is the choice, the ‘either/or,’ ‘yes or no’ that I detect in this title. To this extent, the title is rather violent, polemical, inquisitorial. We may fear that it contains some instrument of torture—that is, a manner of interrogation that is not the most just. Needless to say, from this point on I can offer no response, at least no reassuring response, to any questions put in this way (‘either/or,’ ‘yes or no’), to either party or to either party’s expectations formalized in this way.”).

236. See, e.g., Ralph Z. Hallow, *GOP Hopes to Paint Dean as the New McGovern*, WASH. TIMES, Dec. 11, 2003, at A3 (“But Republican strategists say the Bush campaign will seek to portray Mr. Dean as a tax-and-spend liberal who cannot be trusted on national-security issues.”); Michael Janofsky, *The 2004 Campaign: Political Points*, N.Y. TIMES, Aug. 31, 2003, at 26 (“Consider how the Republican National Committee, on its Web site, describes the would-be presidents: . . . Bob Graham: ‘A tax-and-spend liberal in moderate’s clothing.’”); Michael Powell, *Dean a Tax-and-Spend Liberal? Hardly; Candidate Stressed Fiscal Discipline in Vermont*, WASH. POST, Aug. 3, 2003, at A1 (the title says it all).

State of the Union message—not once, but twice—that the “era of big government is over.”²³⁷ And this metaphor is used not only to tarnish Democrats; recently, it has also been used to explain the Bush Administration’s overarching fiscal strategy. As Paul Krugman explains,

many analysts now acknowledge that the [Bush] administration never had any intention of pursuing a conventionally responsible fiscal policy. Rather, its tax cuts were always intended as a way of implementing the radical strategy known as ‘starve the beast,’ which views budget deficits as a good thing, a way to squeeze government spending.²³⁸

The metaphor is seen more directly in the following, rather colorful passage from a longer piece by Krugman on the recent spate of tax cuts enacted by the federal government:

The other camp in the tax-cut crusade actually welcomes the revenue losses from tax cuts. Its most visible spokesman today is Grover Norquist, president of Americans for Tax Reform, who once told National Public Radio: “I don’t want to abolish government. I simply want to reduce it to the size where I can drag it into the bathroom and drown it in the bathtub.” And the way to get it down to that size is to starve it of revenue. “The goal is reducing the size and scope of government by draining its lifeblood,” Norquist told U.S. News & World Report.²³⁹

(i). *The Privileging of Taxing over Spending in the Code*—As a text, the Code is a primary constituent part of this dichotomous metaphor because it purports to set forth the rules for imposing, calculating, and collecting the taxes that provide the revenue upon which the government (or beast, depending upon your perspective) counts for its survival. References to taxing thus quite naturally abound in the Code; in fact, a search for the word “tax” and its derivatives (e.g., taxing,

237. Alison Mitchell, *State of the Union: The Overview*, N.Y. TIMES, Jan. 24, 1996, at A1 (“In an election-year State of the Union Message intended far more for voters than for the Republican-controlled Congress, Mr. Clinton separated himself from Democratic orthodoxy, twice pronouncing that the ‘era of big government is over.’”).

238. Paul Krugman, *Support the Troops*, N.Y. TIMES, Nov. 11, 2003, at A21; see also ROBERT D. ATKINSON, PROGRESSIVE POLICY INST., *THE INNOVATION ECONOMY: A NEW VISION FOR ECONOMIC GROWTH IN THE 21ST CENTURY* 6 (2003) (“Finally, even if the Bush administration were to concede that their permanent tax cuts spur neither work nor investment, they would still stay the course because of their simplistic view that public sector spending is a drag on growth. Tax cuts that ‘starve the beast,’ they believe, transfer money to the more productive private sector. To be sure, there is waste in government that should be cut, yet some of the most egregious examples of it are the corporate subsidies that this administration has so vigorously defended.”); ED KILGORE, *STARVING THE BEAST*, 2003 BLUEPRINT NO. 3, available at <http://www.ndol.org/blueprint/archive.html> (last visited June 3, 2004) (“But one of the leading strategists behind Bush’s secret war on government is more than happy to tell the world all about it. His name is Grover Norquist, and he is the nation’s leading advocate of ‘kill the taxes and you kill the government.’”).

239. Paul Krugman, *The Tax-Cut Con*, N.Y. TIMES, Sept. 14, 2003, § 6, at 54; see also Jay A. Soled, *Refinancing America: The Republican Antitax Agenda*, 101 TAX NOTES 1235 (2003) (reviewing SHELDON D. POLLACK, *REFINANCING AMERICA: THE REPUBLICAN ANTITAX AGENDA* (2003)) (“However, behind closed doors, some Republicans acknowledge that the party’s intent is to starve the beast—the federal government—ultimately fostering a reduction of its size.”).

taxable, and taxpayer) in title 26 of the U.S. Code returned over 44,000 occurrences.²⁴⁰ But, like so many other deconstructionists, Surrey and McDaniel have found most interesting not what is *present* in the Code, but what is *absent* from it.²⁴¹ In contrast to the ubiquitous references to taxing, references to spending—the other half of the dichotomy—are nearly non-existent in the Code. A search for the word “spend” and its derivatives (e.g., spendable, spending, and spent) in title 26 returned only a scant 63 occurrences.²⁴²

Through their work on tax expenditure analysis, Surrey and McDaniel have identified and deconstructed the hierarchical opposition between this textual presence (i.e., taxing) and textual absence (i.e., spending). In the Code, the first term of this hierarchical opposition is privileged over the second.²⁴³ Indeed, this privileging is immediately apparent in the unabbreviated title of the Code:

240. I searched for occurrences of some form of the word “tax” by first downloading title 26 of the U.S. Code in its entirety from the website of the Office of Law Revision Counsel of the U.S. House of Representatives. OFFICE OF LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, DOWNLOAD THE UNITED STATES CODE, at <http://uscode.house.gov/download.htm> (last visited June 3, 2004). I then unzipped and opened the downloaded file in WordPerfect. I selected “Find and Replace” from the drop-down menus, and had WordPerfect search for and replace all occurrences of “tax,” whether occurring as a whole word or as part of a word. Upon completion of this task, WordPerfect indicated that it had replaced 44,399 occurrences of “tax.”

241. Curran, *supra* note 162, at 16 (“The deconstructionist technique is similar. It involves intense scrutiny of all textual elements, including a study of textual presences by the evocation of textual absences. It also involves the derivation of meaning through the opposition of textual components to non-textual equivalents which the actual text displaced and whose presence is evoked through their differentiation from the signs selected by the author for textual presence.” (footnote omitted)); see also Balkin, *Deconstruction*, *supra* note 160 (“Deconstructive analyses look for what is deemphasized, overlooked, or suppressed in a particular way of thinking or in a particular set of legal doctrines. Sometimes they explore how suppressed or marginalized principles return in new guises.”); Balkin, *Transcendental Deconstruction*, *supra* note 170, at 1134 (“Of course, from a deconstructionist’s standpoint, what might be most interesting about this list are the articles that Derrida did not choose to mention.”).

As Derrida has explained:

This design seems to us to be represented in the handling of the concept of the supplement. Rousseau cannot utilize it at the same time in all the virtualities of its meaning. The way in which he determines the concept and, in so doing, lets himself be determined by that very thing that he excludes from it, the direction in which he bends it, here as addition, there as substitute, now as the positivity and exteriority of evil, now as a happy auxiliary, all this conveys neither a passivity nor an activity, neither an unconsciousness nor a lucidity on the part of the author. Reading should not only abandon these categories—which are also, let us recall in passing, the founding categories of metaphysics—but should produce the law of this relationship to the concept of the supplement. It it [sic] certainly a production, because I do not simply duplicate what Rousseau thought of this relationship. The concept of the supplement is a sort of blind spot in Rousseau’s text, the not-seen that opens and limits visibility. . . . And what we call production is necessarily a text, the system of a writing and of a reading which we know is ordered around its own blind spot. We know this a priori, but only now and with a knowledge that is not a knowledge at all.

DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 163–64.

242. For a description of the procedure that I used to identify all of the occurrences of the word “spend” and its derivatives, see *supra* note 240.

243. See SHAVIRO, *supra* note 21, at 3 (“One key reason for the value of tax expenditure analysis as an exercise . . . is that it addresses the confusion in public policy debate that may occur when proponents of placing particular allocative rules in the tax system exploit the common tendency to define ‘taxes’ and ‘spending’ entirely

“The Internal Revenue Code.”²⁴⁴ The roots of this privileging can be detected in the Constitution. In a single clause (and a single thought), the Constitution confers upon the Congress the “Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”²⁴⁵ In this clause, mention of the power to tax precedes mention of the power to spend—likely because the power to spend is generally perceived to be derivative of the power to tax.

Moreover, despite linking the power to tax and the power to spend when granting them to Congress, the Constitution elsewhere singles out exercises of the power to tax and imposes a unique procedural requirement on them: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”²⁴⁶ Congress is therefore required to treat bills for raising revenue differently from all other bills, including, of course, spending bills. In practice, and much to the consternation of Surrey and McDaniel,²⁴⁷ revenue-raising and spending measures are considered by separate congressional committees. In the House of Representatives, primary jurisdiction over revenue-raising bills is delegated to the Committee on Ways and Means,²⁴⁸ and, since 1865,²⁴⁹ primary jurisdiction over spending bills has been delegated to the Committee on Appropriations.²⁵⁰ In the Senate, primary jurisdiction over revenue-raising bills is delegated to the Committee on Finance,²⁵¹ and, since 1867,²⁵² primary jurisdiction over spending bills has been delegated to the Committee on Appropriations.²⁵³

(ii). *Inverting the Taxing/Spending Hierarchical Opposition*—Surrey and McDaniel have quite adeptly inverted this hierarchy, which is embedded both in the text of the Code and in the process of creating that text. They explore how provisions couched in tax terminology—that purport to do no more than adjust a taxpayer’s tax liability—are really not tax provisions at all. These “tax

formally, and yet to treat the categories as genuinely meaningful.”).

244. Tax Reform Act of 1986, Pub. L. No. 99-514, § 2(a), 100 Stat. 2085, 2095 (1986) (“The Internal Revenue Title enacted August 16, 1954, as heretofore, hereby, or hereafter amended, may be cited as the ‘Internal Revenue Code of 1986.’”).

245. U.S. CONST., art. I, § 8, cl. 1.

246. *Id.* art. I, § 7, cl. 1.

247. *See, e.g.*, SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 65–68; Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 711–13; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 335–36; Surrey & McDaniel, *Identify and Control*, *supra* note 22, at 616.

248. RULES OF THE HOUSE OF REPRESENTATIVES, 108th CONG., R. X(1)(s) (2003), available at <http://www.house.gov/rules/108rules.pdf> (last visited June 3, 2004).

249. COMM. ON APPROPRIATIONS, U.S. HOUSE OF REPRESENTATIVES, ABOUT THE COMMITTEE: GENERAL INFORMATION, at <http://appropriations.house.gov/> (last visited June 3, 2004).

250. RULES OF THE HOUSE OF REPRESENTATIVES, 108th CONG., R. X(1)(b) (2003), available at <http://www.house.gov/rules/108rules.pdf> (last visited June 3, 2004).

251. STANDING RULES OF THE SENATE, R. XXV(1)(i) (2000), available at <http://rules.senate.gov/senaterules/standingrules.txt> (last visited June 3, 2004).

252. COMM. ON APPROPRIATIONS, U.S. SENATE, COMMITTEE HISTORY: CREATION OF THE SENATE COMMITTEE ON APPROPRIATIONS, at <http://appropriations.senate.gov/commhistory/commhistory.htm> (last visited June 3, 2004).

253. STANDING RULES OF THE SENATE, R. XXV(1)(b) (2000), available at <http://rules.senate.gov/senaterules/standingrules.txt> (last visited June 3, 2004).

preferences” are, in reality, no more than disguised spending provisions. Under tax expenditure analysis, tax preferences do not determine how much revenue is to be raised from each taxpayer. Instead, tax preferences are no more than a shortcut—a netting of the revenue that otherwise would have been raised from certain taxpayers against the amount that the government otherwise would have spent on transfers back to them.

Thus, through tax expenditure analysis, Surrey and McDaniel demonstrate that the Code, which privileges taxing over spending, actually contains a number of provisions that are the equivalent of “government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms of government assistance.”²⁵⁴ In other words, they show that what is true of spending provisions is also true of this significant (and growing) group²⁵⁵ of nominally taxing provisions. Surrey and McDaniel “reveal similarities where before we saw only differences,” and allow us “to observe *simultaneously* the similarity and difference, the dependence and differentiation, involved in [the] relation between [the] concepts” of taxing and spending.²⁵⁶

By inverting this hierarchy through tax expenditure analysis, Surrey and McDaniel have revealed the constructedness of the distinction between taxing and spending. They demonstrate the arbitrariness of drawing the line between taxing and spending at the borders of title 26 of the U.S. Code.²⁵⁷ Surrey and McDaniel engage in this deconstructive exercise because they feel that the line

254. SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 21, at 3; *see also* Surrey & McDaniel, *Budget Reform Act*, *supra* note 21, at 680; Surrey & McDaniel, *Emerging Issues*, *supra* note 22, at 228.

255. FY 2004 ANALYTICAL PERSPECTIVES, *supra* note 147, at 103–05, tbl. 6-1 (listing more than 130 tax expenditures and their revenue effects); Heidi Glenn, *JCT Tax Expenditure List Gets Longer*, 102 TAX NOTES 21, 21 (2004) (indicating that Congress added “a number of new tax expenditures” in 2003, listing the five biggest tax expenditures reported by the Joint Committee on Taxation, and noting that, from 2004 through 2008, the revenue loss from the latter five tax expenditures ranged from \$202.6 billion for the exclusion of capital gains at death to \$602.7 billion for the exclusion of employer contributions for health care, health insurance premiums, and long-term care insurance premiums).

256. Balkin, *Nested Oppositions*, *supra* note 18, at 1676.

257. The following is a passage from Derrida on the deconstructibility of such lines that nicely illustrates the point:

This right imposes or supposes a bundle of limits which have a history, a deconstructable history, and to the deconstruction of which psychoanalysis has not been foreign, to say the least. This deconstruction in progress concerns, as always, the institution of limits *declared* to be insurmountable, whether they involve family or state law, the relations between the secret and the nonsecret, or, and this is not the same thing, between the private and the public, whether they involve property or access rights, publication or reproduction rights, whether they involve classification and putting *into order*. What comes under theory or under private correspondence, for example? What comes under system? under biography or autobiography? under personal or intellectual anamnesis? In works said to be *theoretical*, what is worthy of this name and what is not? Should one rely on what Freud says about this to classify his works? Should one for example take him at his word when he presents his *Moses* as a “historical novel”? In each of these cases, the limits, the borders, and the distinctions have been shaken by an earthquake from which no classificational concept and no implementation of the archive can be sheltered. Order is no longer assured.

DERRIDA, ARCHIVE FEVER, *supra* note 171, at 4–5 (footnote omitted).

between taxing and spending is more fruitfully drawn within the Code—at the point where the normative income tax ends and tax preferences and penalties begin.²⁵⁸ Their purpose in this endeavor is to ensure that policymakers reach educated decisions about how to implement government expenditure programs.²⁵⁹ They argue that policymakers should consider both the positive differences

258. As Curran and Balkin have both explained, the application of deconstructive techniques to a text is not a random occurrence. Curran states that

Derrida has made clear that deconstruction is applied in response to textual components: “[Deconstruction is an] incision, precisely [because] it can be made only according to lines of force and forces of rupture that are localizable in the discourse to be deconstructed.” Moreover, in his keynote speech at the 1990 “Deconstruction and the Possibility of Justice” colloquium at Cardozo Law School, Derrida again made clear that the deconstructionist exploration of meaning through hierarchy reversal is not imposed randomly, but, rather, on those word combinations whose juxtapositions draw the attention of the deconstructionist to the likelihood of rich interpretive possibilities.

Curran, *supra* note 162, at 21 (quoting *Positions: Interview with Jean-Louis Houdebine and Guy Scarpetta*, in *POSITIONS*, *supra* note 189, at 37, 41) (citation omitted). Balkin agrees that “[w]e deconstruct a particular text because we think that the text has a particular form of richness that speaks to us, either for good or for ill,” and, in considering why one deconstructs Plato or Saussure but not a laundry list or the back of a cereal box, he further asserts that “in each case, one deconstructs because one has a particular ax to grind, whether it be a philosophical, ideological, moral, or political ax.” Balkin, *Tradition*, *supra* note 171, at 1626–27; *see also* J. M. Balkin, *Being Just with Deconstruction*, 3 *SOC. & LEGAL STUD.* 393, 399 (1994) [hereinafter Balkin, *Being Just*] (“So the target of deconstruction, and the way that the particular deconstructive argument is wielded, may vary with the moral and political commitments of the deconstructor.”); Balkin, *Transcendental Deconstruction*, *supra* note 170, at 1138 (“I shall argue that Derrida’s encounter with justice really shows that deconstructive argument is a species of rhetoric, which can be used for different purposes depending upon the moral and political commitments of the deconstructor.”); J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 *YALE L.J.* 105, 124–27 & n.34 (1993) (“One could engage in deconstruction of a legal text without the desire to offer a normative alternative, or without a belief that the difficulties one found in the text were due to failures of substantive rationality However, the deconstruction practiced by legal critics is almost always rational deconstruction, because it seeks to criticize law on the basis of some proposed normative alternative.” (citation omitted)).

Derrida has spoken to this issue as well: “*Taking a position in philosophy*: nothing ‘shocks’ me less, of course. Why engage in a work of deconstruction, rather than leave things the way they are, etc.? Nothing here, without a ‘show of force’ somewhere. Deconstruction, I have insisted is not *neutral*. It *intervenes*.” *Positions: Interview with Jean-Louis Houdebine and Guy Scarpetta*, in *POSITIONS*, *supra* note 189, at 37, 93 [hereinafter *Positions*]; *see also* DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 161–64 (explaining his “exorbitant” choice of certain of Rousseau’s texts for deconstruction). Thus, it should not come as a surprise that Surrey was motivated to employ deconstructionist techniques “as a weapon of political combat” in an effort to realize a “broadening [of] the base of the income tax so that high-income taxpayers would pay more, [which] had long been a personal cause of his.” SHAVIRO, *supra* note 21, at 26; *see also id.* at 4 (“Surrey, in promoting his version of tax expenditure analysis, undermined this clarifying function by also enlisting the analysis as a weapon in battles concerning what the government’s distribution policy should look like—in particular, his support for progressivity and comprehensive income taxation.”); *see also* JULIAN E. ZELIZER, *TAXING AMERICA: WILBUR D. MILLS, CONGRESS, AND THE STATE, 1945–1975*, at 309 (1998) (“Ultimately, policymakers such as Mills and Surrey argued that tax reform was designed to maintain a modified progressive tax structure that contained some economically efficient and politically necessary deductions, exemptions, and exceptions.”).

259. *See supra* note 76.

(e.g., the palatability of tax expenditures and the ability to take advantage of an existing administrative framework) and the negative differences (e.g., the upside-down distribution of deductions and exclusions, the exclusion of non-taxpayers, and the involvement of the Department of the Treasury in areas outside of its substantive expertise) between tax expenditures and direct expenditures before settling on a means for implementing a given program.²⁶⁰ Furthermore, in tough economic times, Surrey and McDaniel wish to ensure that policymakers interested in controlling government spending take into account both direct spending and spending that is indirectly accomplished through the Code when considering where cuts should be made.²⁶¹

The constructedness of the taxing/spending hierarchical opposition is only underscored by its historical origins. As mentioned earlier, the privileging of taxing over spending is found not only in the Code, but also in the process prescribed by the Constitution for its enactment. At the 1787 Constitutional Convention, the origination clause, which requires all revenue raising bills—and *only* revenue raising bills²⁶²—to originate in the House of Representatives, played an important role in shaping the allocation of power between the House of Representatives and the Senate.²⁶³ The American colonies had borrowed this practice of originating revenue raising and appropriation bills in the popular house of the legislature from England, where the practice dates back to the fourteenth century.²⁶⁴ Accordingly, prior to the Constitutional Convention, “the origination of money bills in the popular house had [already] become firmly entrenched both in [American] custom and in written law as the proper enactment procedure.”²⁶⁵

During the Constitutional Convention, the power to originate revenue raising and appropriation measures was first granted to the House of Representatives in exchange for equal representation in the Senate as part of the Great Compromise on representation.²⁶⁶ At this stage of the debate, the origination clause did not permit the Senate to alter or amend revenue raising or

260. See *supra* Part II.B, –C.1.

261. See *supra* Part II.C.1.

262. Noel Sargent, *Bills for Raising Revenue Under the Federal and State Constitutions*, 4 MINN. L. REV. 330, 345–49 (1920); Thomas L. Jipping, Comment, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633, 663, 665 (1986). The House of Representatives nonetheless claims the right to originate general appropriations bills. CHARLES W. JOHNSON, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 108-93, at 3 (2003). The Senate has, however, expressed its disagreement with this claim. 3 LEWIS DESCHLER, DESCHLER’S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, at ch. 13, § 20.1 (1977) (describing Senate Resolution 414, passed in 1962, which asserts the Senate’s power to originate appropriations bills); FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 153–54 (1992) (indicating the Senate’s contrary viewpoint, and citing an 1881 House of Representatives report acknowledging the ability of the Senate to originate appropriations measures).

263. John L. Hoffer, Jr., *The Origination Clause and Tax Legislation*, 2 B.U. J. TAX L. 1, 2–11 (1984); J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 TULSA L.J. 165, 170–72 (1987); Sargent, *supra* note 262, at 331–34; Jipping, *supra* note 262, at 648–62; Jonathan Rosenberg, Comment, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 NW. U. L. REV. 419, 421–31 (1983).

264. Rosenberg, *supra* note 263, at 421; see also Sargent, *supra* note 262, at 334–36.

265. Rosenberg, *supra* note 263, at 422.

266. *Id.* at 425; Hoffer, *supra* note 263, at 7–8, 16; Medina, *supra* note 263, at 170; Sargent, *supra* note 262, at 331; Jipping, *supra* note 262, at 648, 654–55.

appropriation bills.²⁶⁷ The final version of the origination clause was, however, restricted to revenue raising bills and permitted Senate amendment of those bills, these changes having “served as a trade-off for the exclusive powers granted to the Senate: the treaty and appointment confirmation powers.”²⁶⁸

The purpose of the origination clause appears to have been to repose the power to set the legislative agenda in the branch of the legislature that would be most accountable to the people.²⁶⁹ Yet, “even during the period of the Constitution’s drafting and ratification, the value of the origination clause was subject to question.”²⁷⁰ Some viewed the concession of the power of amendment to the Senate as rendering the origination clause “virtually meaningless,” because the power to amend is, in essence, the power to originate (i.e., the Senate could simply strike out every word of a bill except “whereas” and substitute its own bill as an amendment).²⁷¹

Two centuries of experience have proved these skeptics to be correct. The origination clause has been narrowly construed.²⁷² In addition, contemporary commentators have described it as “an historical anachronism,”²⁷³ “a constitutional backwater,”²⁷⁴ and “wholly without practical consequences.”²⁷⁵ Thus, by identifying and deconstructing the Code’s privileging of taxing over spending, Surrey and McDaniel have drawn our attention to the historical origins of this hierarchical opposition and have helped to unmask its rather vacuous ideological underpinnings.²⁷⁶

267. Rosenberg, *supra* note 263, at 425 & n.37.

268. Medina, *supra* note 263, at 171; *see also* Hoffer, *supra* note 263, at 9–11, 16; Jipping, *supra* note 262, at 648–49; Rosenberg, *supra* note 263, at 428, 429.

269. Rosenberg, *supra* note 263, at 423, 426–27; *see also* Hoffer, *supra* note 263, at 21; Sargent, *supra* note 262, at 336; Jipping, *supra* note 262, at 649, 655, 661. The House of Representatives was thought to be more accountable to the people because, at the time of the Constitutional Convention, it was the only branch of Congress directly elected by the people, it had a larger number of members, and its members had shorter terms. Rosenberg, *supra* note 263, at 423 n.27.

270. Medina, *supra* note 263, at 171.

271. *Id.* at 172 & n.28; Hoffer, *supra* note 263, at 11; Sargent, *supra* note 262, at 349; Rosenberg, *supra* note 263, at 429–30.

272. Medina, *supra* note 263, at 167 (tracing narrow construction of the origination clause back to Justice Story’s *Commentaries on the Constitution of the United States*, published in 1833); *id.* at 225 (remarking how “the United States and its constituent states are unique [among countries that derive their constitutional foundations from Great Britain] in their restrictive and grudging construction of the revenue (supply) power embodied in the origination clause”).

273. *Id.* at 167; *see also* *United States v. Munoz-Flores*, 863 F.2d 654, 657 (9th Cir. 1988), *rev’d*, 495 U.S. 385 (1990) (indicating that “diminished concern about the Senate’s lack of accountability has largely undermined the clause’s rationale”); Sargent, *supra* note 262, at 352.

274. Medina, *supra* note 263, at 170.

275. Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3, 6 (1987); *see also* 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS ¶ 1.2.2 at 1-14 n.5 (3rd ed. 1999) (“The Senate, however, appears not to be meaningfully restrained by this limitation [i.e., the origination clause].”).

276. Now what can the “efficacy” of all this work, all this deconstructive practice, be on the “contemporary ideological scene”? . . . [W]hat is perhaps in the process of being reconsidered, is the form of closure that was called “ideology” (doubtless a concept to be analyzed in its function, its history, its origins, its transformations), the form of the relationships between a transformed concept of “infrastructure,”

(iii). *Serial Deconstruction: Enter the Critics*—The only quarrel that I have with Surrey and McDaniel’s deconstruction of this hierarchical opposition is that it does not go nearly far enough. As mentioned above, Surrey and McDaniel deconstructed the privileging of taxing over spending because they believed that the operation of the government could be improved by recognizing the general equivalence of tax expenditure and direct expenditure programs.²⁷⁷ But, despite their good intentions, all that Surrey and McDaniel have done is to replace the current line between taxing and spending (i.e., the boundaries of title 26 of the U.S. Code) with another line (i.e., the boundaries of the normative income tax) that they considered to be foundational in nature.²⁷⁸ In developing tax expenditure analysis, Surrey and McDaniel lost sight of the lesson from Balkin’s inversion of the identity/difference hierarchical opposition described above:²⁷⁹ neither of the terms in a hierarchical opposition can be considered originary or foundational in nature “because both are related to each other in a system of mutual dependences and differences. Each is continually calling upon the other for its foundation, even as it is constantly differentiating itself from the other.”²⁸⁰ As

if you will—an “infrastructure” of which the *general text* would no longer be an effect or a reflection—and the transformed concept of “ideology.” If what is in question in this work is a new definition of the relationship of a *determined text* or signifying chain to its exterior, to its referential effects, etc. . . ., to “reality” (history, class struggle, relationships of production, etc.), then we can no longer restrict ourselves to prior delimitations, nor even to the prior concept of a regional delimitation. What is produced in the current trembling is a reevaluation of the relationship between the general text and what was believed to be, in the form of reality (history, politics, economics, sexuality, etc.), the simple, referable exterior of language or writing, the belief that this exterior could operate from the simple position of cause or accident. What are apparently simply “regional” effects of this trembling, therefore, at the same time have a nonregional opening, destroying their own limits and tending to articulate themselves with the general scene, but in new modes, without any pretention to mastery.

Positions, *supra* note 258, at 90–91; *see also* Balkin, *Deconstructive Practice*, *supra* note 2, at 744, 761–64 (discussing how “deconstructive techniques can show how doctrinal arguments are informed by and disguise ideological thinking”).

277. Balkin, *Transcendental Deconstruction*, *supra* note 170, at 1141 (“Transcendental deconstruction has a goal; its goal is not destruction but rectification. The deconstructor critiques for the purpose of betterment; she seeks out unjust or inappropriate conceptual hierarchies in order to assert a better ordering. Hence, her argument is always premised on the possibility of an alternative to existing norms that is not simply different, but also more just, even if the results of this deconstruction are imperfect and subject to further deconstruction.”); *see also id.* at 1174 (asserting that the purpose of deconstruction is reconstruction—otherwise “there is no point in deconstructing in the first place”); Balkin, *Being Just*, *supra* note 258, at 393 (“I claim that deconstructive analyses can be of no use to the pursuit of justice unless deconstructive arguments assume the existence of an alternative which is more just than the one being deconstructed, even if this alternative is subject to further deconstruction.”).

278. I would note that Surrey and McDaniel do, however, contemplate that where a given provision falls with respect to this line may change over time, thereby necessitating the continual reassessment of the role that each provision plays in the tax system. *See supra* note 56 and accompanying text.

279. *See supra* Part III.B.2.a.(i).

280. Balkin, *Deconstructive Practice*, *supra* note 2, at 751; *see also* Balkin, *Deconstruction*, *supra* note 160.

a result, all that Surrey and McDaniel have accomplished is to replace the old hierarchy with a new hierarchy that can likewise be deconstructed.²⁸¹

In fact, certain of Surrey and McDaniel's critics seem to have recognized this, as they have picked up where Surrey and McDaniel left off and have essentially deconstructed this new hierarchy. For example, William Andrews and Jeffrey Kahn have both argued that items that fall on the spending side of Surrey and McDaniel's line are more akin to, and more appropriately classified as, items that fall on the taxing side of the line.²⁸² Andrews has argued that the deductions for charitable contributions and medical expenses are "refinement[s] in our notion of an ideal personal income tax, rather than . . . departure[s] from it."²⁸³ He concludes that "there are substantial arguments in favor of both these personal deduction provisions that are intrinsic arguments of tax policy germane to the

281. See Balkin, *Deconstructive Practice*, *supra* note 2, at 1179 ("A deconstruction of an opposition, however, cannot by itself establish a new hierarchy in place of an old one, because the new hierarchy also could be deconstructed."); Balkin, *Transcendental Deconstruction*, *supra* note 170, at 1178–79 ("Yet the decision to stop and assess the conclusions of one's argument, to state them as conclusions . . . leaves unspoken the many further steps that could be taken. These additional steps could lead to a partial or even a complete transformation of the conclusions just arrived at. Thus, from another perspective, the conclusion of a deconstructive argument is a conclusion in neither sense of the word: for it does not end the possible lines of deconstructive argument, nor does it lead to a fixed and determinate result."); Derrida, *Force of Law*, *supra* note 165, at 14 ("One can always turn what I am doing or saying here back onto—or against—the very thing that I am saying is happening thus at the origin of every institution.").

As Derrida has explained:

What interested me then, that I am attempting to pursue along other lines now, was, at the same time as a "general economy," a kind of *general strategy of deconstruction*. The latter is to avoid both simply *neutralizing* the binary oppositions of metaphysics and simply *residing* within the closed field of these oppositions, thereby confirming it.

Therefore we must proceed using a double gesture, according to a unity that is both systematic and in and of itself divided, a double writing, that is a writing that is in and of itself multiple, what I called, in "*La double séance*," a *double science*. On the one hand, we must traverse a phase of *overturning*. To do justice to this necessity is to recognize that in a classical philosophical opposition we are not dealing with the peaceful coexistence of a *vis-à-vis*, but rather with a violent hierarchy. One of the two terms governs the other (axiologically, logically, etc.), or has the upper hand. To deconstruct the opposition, first of all, is to overturn the hierarchy at a given moment. To overlook this phase of overturning is to forget the conflictual and subordinating structure of opposition. Therefore one might proceed too quickly to a *neutralization* that *in practice* would leave the previous field untouched, leaving one no hold on the previous opposition, thereby preventing any means of *intervening* in the field effectively. We know what always have been the *practical* (particularly *political*) effects of *immediately jumping beyond* oppositions, and of protests in the simple form of *neither this nor that*. When I say that this phase is necessary, the word *phase* is perhaps not the most rigorous one. It is not a question of a chronological phase, a given moment, or a page that one day simply will be turned, in order to go on to other things. The necessity of this phase is structural; it is the necessity of an interminable analysis: the hierarchy of dual oppositions always reestablishes itself. Unlike those authors whose death does not wait their demise, the time for overturning is never a dead letter.

Positions, *supra* note 258, at 41–42 (footnotes omitted).

282. For other examples, see the works cited by Bartlett, *supra* note 118, at 416–17 nn.26–37.

283. Andrews, *supra* note 49, at 312; *see also id.* at 314–15.

basic question of how to achieve a fair distribution of personal tax burdens.”²⁸⁴ Kahn has gone further and has argued (on grounds independent from those offered by Andrews) that the deductions for charitable contributions, medical expenses, theft and casualty losses, and home mortgage interest all “conform to progressive income tax principles and therefore cannot properly by [sic] characterized as governmental expenditures.”²⁸⁵

To be more specific, consider the deduction for extraordinary medical expenses, which has been discussed by all three of Surrey, Andrews, and Kahn. Surrey contends that this deduction is appropriately classified as a tax preference because most economists would agree that it is not part of the “generally accepted definition of income”²⁸⁶ on the ground that it represents no more than one of the ways in which income can be consumed.²⁸⁷ In Surrey’s view, burdensome medical expenses are not a problem because they adversely impact an individual’s ability to pay income tax; they are a problem because they adversely affect an individual’s ability to pay for medical care that she needs.²⁸⁸ Phrased in this way, Surrey saw the problem as one that should be addressed by an appropriately-designed government health insurance program,²⁸⁹ and Surrey considered the medical expense deduction to be no more than a poor substitute for such a program.²⁹⁰

Andrews, however, disagrees with Surrey’s classification of the medical expense deduction as a tax preference. Andrews articulates two distinct reasons to justify his assertion that medical expenses are appropriately taken into account when calculating income. Andrews first maintains that, because “treatment only puts the taxpayer back where others are who have suffered no injury,” the taxpayer has “no taxable gain when he suffers an injury and receives treatment.”²⁹¹ In support of this assertion, Andrews points out that this theory explains why the government has not classified the § 104 exclusion for medical expenses reimbursed by a tortfeasor as a tax expenditure.²⁹² Andrews then argues that

[i]f we are willing to say that one has had no taxable gain when he suffers an injury and then receives treatment, we should say it in every case, whatever the source of payment for the treatment—whether or not the tortfeasor pays, whether or not there is a tortfeasor, indeed whether the taxpayer’s malady is a traumatic injury or an organic disease.²⁹³

Andrews’ second justification for taking medical expenses into account when calculating income is premised on the idea that the tax base is intended “to provide an index of relative material

284. *Id.* at 315.

285. Kahn, *supra* note 118, at 2.

286. SURREY, PATHWAYS, *supra* note 20, at 21.

287. *Id.* at 21–23.

288. *Id.* at 22–23.

289. *Id.*

290. *See supra* Part II.A.

291. Andrews, *supra* note 49, at 334.

292. *Id.*

293. *Id.*

well-being on the basis of which to distribute tax burdens.”²⁹⁴ Andrews contends that “differences in health affect relative material well-being.”²⁹⁵ Andrews admits that

[i]t would be impractical to try to include robust good health directly as an element of personal consumption for those who have it, but the difference between good and poor health can be partially reflected—or the failure to include the difference directly can be partially offset—by also excluding or allowing a deduction for the medical services that those in poorer health will generally need more of.²⁹⁶

Kahn, on the other hand, maintains that the medical expense deduction can be viewed as implementing the principles of progressivity that are an integral part of our income tax system.²⁹⁷ Kahn views the rate structure as (i) exempting from tax the income necessary for an individual to subsist and then (ii) employing “a standardized utility curve as a reference for the tax rate schedule[, which] results in applying graduated rates to income above the insulated amount, thereby reflecting the declining utility of added amounts of income.”²⁹⁸ Kahn argues that the deduction for extraordinary medical expenses can be conceptualized as “a rough adjustment to the rate schedule to reflect the greater utility that the dollars so expended have for a taxpayer in that condition.”²⁹⁹ In other words, this deduction adjusts the standardized utility curve in a situation where it is generally believed that application of that curve would be “grossly inappropriate.”³⁰⁰

Through their arguments, Andrews and Kahn have effectively inverted the new taxing/spending hierarchical opposition devised by Surrey and McDaniel. They have demonstrated that items that fall outside of Surrey and McDaniel’s normative income tax actually have the attributes of items that are included within their normative income tax. By inverting this new hierarchical opposition, Andrews and Kahn help to demonstrate the instability of the boundary between taxing and spending.³⁰¹

I would emphasize that the point here is not that the distinction between taxing and spending is completely indeterminate and incoherent; by inverting this hierarchical opposition, Surrey and McDaniel have neither equated taxing with spending nor have they completely effaced the distinction between these two concepts.³⁰² Rather, they (along with Andrews and Kahn) have shown that the line

294. *Id.* at 335.

295. *Id.*

296. Andrews, *supra* note 49, at 335.

297. Kahn, *supra* note 118, at 27.

298. *Id.* at 28.

299. *Id.*

300. *Id.* at 29.

301. “The ‘sufferance’ of deconstruction, what makes it suffer and what makes those it torments suffer, is perhaps the absence of rules, of norms, and definitive criteria that would allow one to distinguish unequivocally between *droit* and justice.” Derrida, *Force of Law*, *supra* note 165, at 4.

302. *See, e.g.*, DERRIDA, GRAMMATOLOGY, *supra* note 2, at 88–89 (“The distinction between phonetic and nonphonetic writing, although completely indispensable and legitimate, remains very derivative with regard to what may be called a synergy and a fundamental synesthesia. . . . ‘Phonetic’ and ‘nonphonetic’ are therefore never pure qualities of certain systems of writing, they are the abstract characteristics of typical elements, more or less numerous and dominant within all systems of signification in general.”); *id.* at 120 (“the colloquial difference between language and writing, the rigorous exteriority of one with respect to the other, is admitted”); DERRIDA, *Structure*, *supra* note

between taxing and spending is not a fixed and immovable boundary that we can demarcate if only we think with sufficient logic and clarity.³⁰³ Taxing and spending are not absolute, but constructed categories.³⁰⁴ They stand in a relationship of both similarity *and* difference—they simultaneously depend upon and differentiate themselves from each other. In some contexts, the similarity between them becomes salient (e.g., Surrey’s discussion of the deduction for extraordinary medical expenses), while, in other contexts, the differences between them become salient (e.g., Andrews’ and Kahn’s discussion of the deduction for extraordinary medical expenses).³⁰⁵ This serial deconstruction engaged in by Surrey and McDaniel, Andrews, and Kahn un.masks “the common tendency to define ‘taxes’ and

180, at 280–81 (“There is no sense in doing without the concepts of metaphysics in order to shake metaphysics. We have no language—no syntax and no lexicon—which is foreign to this history; we can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest.”); Derrida, *Force of Law*, *supra* note 165, at 19 (“what is currently called deconstruction would not correspond (though certain people have an interest in spreading this confusion) to a quasi-nihilistic abdication before the ethico-politico-judicial question of justice and before the opposition between just and unjust”); *Semiology and Grammatology*, *supra* note 194, at 20 (“... nor is it a question of confusing at every level, and in all simplicity, the signifier and the signified. That this opposition or difference cannot be radical or absolute does not prevent it from functioning, and even from being indispensable within certain limits—very wide limits.”). *Contra* SHAVIRO, *supra* note 21, at 2 (“The basic claim of tax expenditure analysis, that certain tax rules are ‘really’ spending, is not quite correct, because ‘taxes’ and ‘spending’ are not coherent categories to begin with.”).

If, as Shaviro contends, these categories are truly incoherent, why did he need to revert to them in clarifying his purportedly more “substantive” suggested replacement? *Id.* at 35–36 (“We presumably would not reclassify the [weapons supply tax credit] as being part of the tax system after all, even though its motivation would then be distributional. After all, so reclassifying it would imply that, when interest groups strongly influence the enactment of a preferential tax rule, the case for treating the rule as a tax expenditure is weakened. Yet this presumably is the opposite of what advocates of tax expenditure analysis have in mind, and no one would suggest reclassifying spending as ‘really’ taxation when interest groups use it to line their pockets.”). In fact, Shaviro’s entire discussion of the weapons supply tax credit example in his paper makes clear that there are certain items that are indubitably spending (or, conversely, indubitably taxes), and reveals his claim of incoherence as an overstatement. Moreover, when this discussion is considered in the context of the other examples that Shaviro explores, it becomes clear that his perspective is actually much closer to that expressed in the ensuing text above; in other words, his discussion demonstrates that while certain items can easily be classified as either taxing or spending provisions, the classification of many others will be more fluid and depend greatly on context. *See id.* at 34–42.

303. *See* DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 90 (stating, in the context of discussing the distinction between phonetic and nonphonetic writing, that “[t]he problem of the picture-puzzle (*rébus à transfert*) brings together all the difficulties. As pictogram, a representation of the thing may find itself endowed with a phonetic value. This does not efface the ‘pictographic’ reference which, moreover, has never been simply ‘realistic.’ The signifier is broken or constellated into a system: it refers at once, and at least, to a thing and to a sound.”).

304. *See* Curran, *supra* note 162, at 18–19 (“I believe that deconstruction is a methodology and that its ideological or philosophical implications appropriately extend to a debunking of absolutism, and, equally appropriately, apply to nonscientific fields, but that deconstruction does not deny the existence of truths or the value of logocentrism, which, moreover, it adopts in its own discourse.”).

305. *See* Balkin, *Transcendental Deconstruction*, *supra* note 170, at 1153 (“To deconstruct a conceptual opposition is to show that the conceptual opposition is a nested opposition—in other words, that the two concepts bear relations of mutual dependence as well as mutual differentiation. For example, we might discover that they have elements in common, which become salient in some contexts, but that in other contexts we note very important differences between them, so that they are not the same in all respects.” (footnote omitted)).

‘spending’ entirely formally,³⁰⁶ and displaces it with the notion that the distinction between taxing and spending is fluid and will often depend on context.³⁰⁷

c. Liberation of the Text from the Author: Background—The liberation of the text from the author is the other deconstructive practice singled out by Balkin. Once described, this practice should hopefully seem familiar to many readers, as it is broadly consistent with the dynamic approach to statutory interpretation described by William Eskridge.³⁰⁸ Because the idea of the liberation of the text from the author should be more familiar terrain for most tax academics, I will not

306. SHAVIRO, *supra* note 21, at 3.

307. Balkin, *Being Just*, *supra* note 258, at 398 (“The goal of deconstruction is to reveal the contextual nature of practical and theoretical judgment, and to critique acontextual or categorical judgments for their lack of sensitivity to context.”); *id.* (“Our goal is not to efface the distinction between them, but rather to discover appropriate ways of thinking about their similarities and differences.”); Balkin, *Legal Career*, *supra* note 18 (“[T]he point of deconstructing conceptual oppositions is not to show that concepts have no boundaries, but rather than [sic] their boundaries are fluid and appear differently as the opposition is placed into new interpretive contexts. Deconstruction is not a mechanical demonstration of total indeterminacy. Deriving interesting results from deconstructive techniques is a skill that requires sensitivity to changes in interpretive context. Moreover, deconstructing a legal distinction does not necessarily show that it is incoherent. That is a pragmatic judgement to be made by the interpreter.”); *id.* (“Deconstructionists attacked the structuralist contention that there were universal and fixed structures of meaning that shaped all human thought. They argued that the structures of social meaning are always unstable, indeterminate, impermanent and historically situated, constantly changing over time and accumulating new connotations.”).

This notion of contextuality can be seen in the following passage from *Of Grammatology*:

Gesture is here an adjunct of speech, but this *adjunct* is not a supplementing by artifice, it is a recourse to a more natural, more expressive, more immediate sign. It is the more universal the less it depends on conventions. But if gesture supposes a distance and a spacing, a milieu of visibility, it ceases being effective when the excess of distance or mediation interrupts visibility: then speech supplements gesture. Everything in language is substitute, and this concept of substitute precedes the opposition of nature and culture: the supplement can equally well be natural (gesture) as artificial (speech).

DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 235 (footnote omitted). And in this passage, Derrida generally describes what follows the inversion of hierarchies:

By means of this double, and precisely stratified, dislodged and dislodging, writing, we must also mark the interval between inversion, which brings low what was high, and the irruptive emergence of a new “concept,” a concept that can no longer be, and never could be, included in the previous regime. If this interval, this biface or biphase, can be inscribed only in a bifurcated writing (and this holds first of all for a new concept of writing, that *simultaneously* provokes the overturning of the hierarchy speech/writing, and the entire system attached to it, *and* releases the dissonance of a writing within speech, thereby disorganizing the entire inherited order and invading the entire field), then it can only be marked in what I would call a *grouped* textual field: in the last analysis it is impossible to *point* it out, for a unilinear text, or a punctual *position*, an operation signed by a single author, are all by definition incapable of practicing this interval.

Positions, *supra* note 258, at 42 (footnote omitted).

308. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1498, 1506–11 (1987).

elaborate on this practice to the same extent that I elaborated on the inversion of hierarchies in the previous sections of this Part.

To keep the idea of the liberation of the text from the author on familiar ground, I will describe it in terms of the debate over the appropriate method(s) for engaging in statutory interpretation. The “modern consensus”³⁰⁹ is that the basic objective of statutory construction, including construction of the Code,³¹⁰ “is interpretation consistent with the intent of the enacting legislature.”³¹¹ There are, of course, a number of different methods for ascertaining this intent. Some (particularly Supreme Court Justice Antonin Scalia) advocate a literal or textualist approach that looks to the plain language of the statute as the most accurate expression of legislative purpose.³¹² Others take an originalist approach that looks to the intent of the enacting legislature.³¹³ Yet others advocate a purposive approach that looks to the purpose or structure of the statute as a whole when interpreting individual provisions within the statutory framework.³¹⁴

Despite differences of method, these approaches to statutory construction do share at least one trait in common: each of them implies that some readings of the Code will be correct (i.e., they will reflect the intent of the legislature) while others will be incorrect (i.e., they will not reflect the intent of the legislature).³¹⁵ The ostensible goal of statutory construction, therefore, is “to separate the correct readings from the incorrect readings.”³¹⁶ But like any other hierarchical opposition, this

309. Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 845 (1991) [hereinafter Livingston, *Legislative History*].

310. 1 BITTKER & LOKKEN, *supra* note 275, ¶ 4.2.1 at 4-17 (“Since all statutes are sisters under the skin, the courts employ the usual tools of statutory construction to interpret the Code.”).

311. Livingston, *Legislative History*, *supra* note 309, at 845; *see also* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:05 (6th ed. 2000); Balkin, *Deconstructive Practice*, *supra* note 2, at 773 n.87; Eskridge, *supra* note 308, at 1479–80.

312. *See, e.g.*, Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., No. 02-1343, 2004 U.S. LEXIS 3232, at *11 (U.S. Apr. 28, 2004) (Scalia, J., delivering the opinion of the court) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” (quoting *Park ’N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985))); *see also* Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492, 494–95 (1995) [hereinafter Geier, *Purpose*] (discussing textualism); Geier, *Textualism*, *supra* note 18, *passim* (considering the potential impact of Justice Scalia’s brand of textualism on interpretation of the Code); Mary L. Heen, *Plain Meaning, the Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771 *passim* (1997) (discussing the potential adverse impact of employing a textualist approach when interpreting the Code); Richard Lavoie, *Subverting the Rule of Law: The Judiciary’s Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115 *passim* (2004) (arguing that Justice Scalia’s textualism fosters unethical behavior and, contrary to its ostensible purpose, undermines the rule of law in society).

313. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817–22 (1983); *see also* Geier, *Textualism*, *supra* note 18, at 450–54 (discussing Justice Scalia’s thoughts on originalism in statutory interpretation); Livingston, *Legislative History*, *supra* note 309, at 822 (mentioning originalism).

314. *See, e.g.*, Geier, *Purpose*, *supra* note 312, *passim*; *see also* Michael Livingston, *Practical Reason, “Purposivism,” and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 *passim* (1996) [hereinafter Livingston, *Purposivism*] (discussing Geier’s purposivism, but rejecting it in favor of a dynamic or practical reason approach to statutory interpretation).

315. Balkin, *Deconstructive Practice*, *supra* note 2, at 773–74.

316. *Id.* at 774.

understanding/misunderstanding privileging in the reading of statutes can be deconstructed to show that understanding is merely a special case of misunderstanding.³¹⁷

In discussing the deconstruction of this hierarchical opposition, Balkin quotes at length from Jonathan Culler's treatment of this subject and, because I am in no better position than Balkin to summarize Culler's discussion, I will do the same:

“When one attempts to formulate the distinction between reading and misreading, one inevitably relies on some notion of identity and difference. Reading and understanding preserve or reproduce a content or meaning, maintain its identity, while misunderstanding and misreading distort it; they produce or introduce a difference. But one can argue that in fact the transformation or modification of meaning that characterizes misunderstanding is also at work in what we call understanding. If a text can be understood, it can in principle be understood repeatedly, by different readers in different circumstances. These acts of reading or understanding are not, of course, identical. They involve modifications and differences, but differences which are deemed not to matter. We can thus say, in a formulation more valid than its converse, that understanding is a special case of misunderstanding, a particular deviation or determination of misunderstanding. It is misunderstanding whose misses do not matter. The interpretive operations at work in a generalized misunderstanding or misreading give rise both to what we call understanding and to what we call misunderstanding.

“The claim that all readings are misreadings can also be justified by the most familiar aspects of critical and interpretive practice. Given the complexities of texts, the reversibility of tropes, the extendability of context, and the necessity for a reading to select and organize, every reading can be shown to be partial. Interpreters are able to discover features and implications of a text that previous interpreters neglected or distorted. They can use the text to show that previous readings are in fact misreadings, but their own readings will be found wanting by later interpreters, who may astutely identify the dubious presuppositions or particular forms of blindness to which they testify. The history of readings is a history of misreadings, though under certain circumstances these misreadings can be and may have been accepted as readings.”³¹⁸

This deconstruction of the understanding/misunderstanding hierarchical opposition does not render all readings of a text (including a statute such as the Code) “equally legitimate, but rather . . . call[s] into question the ways in which we decide that a given interpretation . . . is illegitimate.”³¹⁹

For these reasons, deconstruction “eschew[s] authorial intention”³²⁰ and the attempt to unearth the one true meaning of a text.³²¹ While this disregard for authorial intention may run counter to the

317. *Id.* at 774–75.

318. *Id.* (quoting JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 176 (1982)).

319. *Id.* at 776.

320. Curran, *supra* note 162, at 17.

321. *Id.* (“Deconstruction does not take a position as to whether truth exists. It is, rather, a dialectical

conventional approach to statutory interpretation (whether taking the form of textualism, originalism, or purposivism), it has far greater descriptive power than the conventional approach because it comports more closely with experience and reality. When interpreting statutes (and especially something so arcane as a tax statute), how can one really speak of “authorial intent” when the author is a body of 535 people who clearly could not all have understood the text to mean exactly the same thing—if they understood it at all (or had even bothered to read it)?³²²

In my Federal Income Tax course, I make this point in the context of discussing the elusive search for an all-encompassing definition of “income.” To do this, I choose several students to read the different parts in the following excerpt from a discussion about the computation of gain from the sale of a horse, which occurred in the Senate in the course of debate over the Revenue Act of 1913:

Mr. Cummins. [S]uppose ten years ago I had bought a horse for \$900, and this year I had sold him for \$1,000, what would I do in the way of making a [tax] return?...

Mr. Williams. That thousand dollars is a part of the Senator’s receipts for this year, and being a part of his receipts, that much will go in as part of his receipts, and from it would be deducted his disbursements and his exemptions and various other things.

Mr. Cummins. Would the price I paid for the horse originally be deducted?

Mr. Williams. No, because it was not a part of the transactions in that year; but if the Senator turned around and bought another horse that year, it would be deducted . . .

movement.”).

322. Livingston, *Legislative History*, *supra* note 309, at 832–38 (describing the tax legislative process); *id.* at 842–44 (in light of the complexity of the Code, questioning whether Congress can “‘intend’ anything about a statute that it understands incompletely or not at all”). An oft-quoted exchange between Senators Dole and Armstrong during the consideration of the Tax Equity and Fiscal Responsibility Act of 1982 nicely illustrates the point:

Mr. Armstrong. Mr. President, will the Senator tell me whether or not he wrote the committee report?

Mr. Dole. Did I write the committee report?

Mr. Armstrong. Yes.

Mr. Dole. No; the Senator from Kansas did not write the committee report . . .

Mr. Armstrong. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

Mr. Dole. I am working on it. It is not a bestseller, but I am working on it.

128 CONG. REC. 16,918 (1982).

Mr. Bristow. Mr. President, I desire to ask a question, and see if I have this matter clear in my mind. As I understood the question of the Senator from Iowa, it was, if he bought a horse ten years ago for \$100—

Mr. Cummins. Nine hundred dollars.

Mr. Bristow. And sold it this year for a thousand dollars, whether or not that thousand dollars would be counted as a part of his income for this year, regardless of what he paid for the horse ten years ago. Is that correct?

Mr. Williams. No; I did not say that. It would be a part of his gross receipts for the year, of course, but it may not necessarily be a part of his net receipts, and therefore not a part of his income that is taxable.

Mr. Cummins. But I asked the Senator from Mississippi specifically whether, in the case I put, the price that was originally paid for the horse could be deducted from the price received.

Mr. Williams. The price paid ten years ago? No; of course not. How could it? When a man puts in his return for his income of the previous year in order to be taxed he puts down everything he has received and everything he has paid out, subject to the exemptions and limitations otherwise provided in the bill. Necessarily that is so. To answer the Senator, I want to read the precise language of the provision.³²³

Needless to say, this exchange elicits quite a few chuckles from my students, especially because, by that time, we have already discussed how gain and loss are computed under the Code.³²⁴ Professors Bittker and Lokken, to whom I am indebted for drawing my attention to this exchange,³²⁵ nicely sum up the point for me when they state that “[a] deliberative assembly so confused about the treatment of a sale of a horse could hardly be expected to devote much attention to the more arcane aspects of the term ‘income.’”³²⁶

In lieu of searching for an elusive (and, in all likelihood in the case of the Code, nonexistent) authorial intention, deconstructionists embrace an idea that Derrida refers to as the “free ‘play’ of text.”³²⁷ This idea is based on the notion that “a sign can only signify to the extent that it can signify repeatedly, in a number of different contexts. The essential property of the sign is its iterability.”³²⁸

323. 50 CONG. REC. 3775–76 (1913).

324. See I.R.C. §§ 61(a)(3), 1001 (2004) (today, the original cost of the horse (\$900) would unquestionably be deducted from the amount realized on the sale of the horse).

325. 1 BITTKER & LOKKEN, *supra* note 275, ¶ 5.1.

326. *Id.*

327. Balkin, *Deconstructive Practice*, *supra* note 2, at 777.

328. *Id.* at 779; see also DERRIDA, GRAMMATOLOGY, *supra* note 2, at 91 (“Is it not evident that no signifier, whatever its substance and form, has a ‘unique and singular reality?’ A signifier is from the very beginning the possibility of its own repetition, of its own image or resemblance. It is the condition of its ideality, what identifies it

Put differently, a word can only be used as a means of communication if that word is “public”—if it can be used by others in different contexts regardless of the meaning that is attached to it when it is uttered (or written).³²⁹ Accordingly, as Balkin explains,

[t]he structural precondition of the sign is its ability to break free from the author, and to mean other than what the author meant. The very act of “meaning” something creates a chasm between the sign and the producer’s intention. This detachability makes iterability, and thus intersubjective meaning, possible. The repetition of the sign in the new context is simultaneously a relation of identity and difference; the repeated sign is syntactically identical, yet semantically different. The result is that the text, as it is repeatedly understood, takes on a life of its own in a relation of *différance* with the person who meant it³³⁰

In this way, at the moment that a text is created, it is liberated from its author to take on new meanings in new contexts; this is the free “play” of the text.³³¹ Derrida spends much of his time exploring this “gap between what the author commands by her language and what the language performs—the uncontrollable incongruity in human language and thought”³³²—searching for unintended connections between words, unexpected difficulties, and contradictions in the text.³³³

Because meaning is determined by context, a single text is susceptible of a multiplicity of meanings.³³⁴ As Vivian Curran has noted, “deconstruction valorizes the reader’s contribution *qua* interpreter in creating the interpretation from the point of departure of the multitude of relations of signification engendered by the text.”³³⁵ And, as Balkin points out, this notion that meaning changes with context should not be foreign to lawyers. We often encounter situations where “[t]he words in a statute or in a case used as precedent take on new meanings in new factual contexts, and cannot be

as signifier, and makes it function as such, relating to a signified which, for the same reasons, could never be a ‘unique and singular reality.’”)

329. Balkin, *Deconstructive Practice*, *supra* note 2, at 779.

330. *Id.* at 780.

331. *Id.*

332. *Id.* at 779; *see also* DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 195 (“The architecture must find its justification in the deep intention of the *Essay*. It is for that reason that it interests us. Yet we must not confound the meaning of the architecture with the declared intention of the work.”).

333. Balkin, *Deconstructive Practice*, *supra* note 2, at 778.

334. *Id.* at 781; Curran, *supra* note 162, at 17.

Following the appearances of the word “supplement” and of the corresponding concept or concepts, we traverse a certain path within Rousseau’s text. To be sure, this particular path will assure us the economy of a synopsis. But are other paths not possible? And as long as the totality of paths is not effectively exhausted, how shall we justify this one?

DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 161.

335. Curran, *supra* note 162, at 17; *see also* DERRIDA, *GRAMMATOLOGY*, *supra* note 2, at 158 (“*There is nothing outside of the text* [there is no outside-text; *il n’y a pas de hors-texte*.”); *id.* at 160–61 (describing the reader as within her history and culture and that history and culture as within the reader).

confined to a limited number of meanings.³³⁶ For most tax academics, the failed attempts at fashioning an all-encompassing definition of the word “income”³³⁷—along with their later abandonment in favor of a more ad hoc, fluid approach to defining income—readily come to mind as an example of this phenomenon.³³⁸ In this vein, the contrast between the 1913 exchange on how to compute the gain on the sale of a horse (quoted at length above)³³⁹ and the modern view on the same question³⁴⁰ provides a concrete illustration of this point.

Moreover, texts often take on new meanings over time as the surrounding circumstances change and evolve.³⁴¹ Consider in this regard how the notion of what constitutes a “charitable organization,” as embodied in §§ 170 and 501(c)(3), has responded to changing times. Its evolution can be seen both in (i) the decision in the late 1970s to grant tax-exempt status to a gay and lesbian organization³⁴² and (ii) the introduction of the public policy limitation in the early 1970s³⁴³ (later sanctioned by the Supreme Court in *Bob Jones University v. United States*³⁴⁴), which resulted in the revocation of the tax-exempt status of an educational institution with a racially discriminatory admissions policy. This view of meaning as changing and evolving over time is consistent with a dynamic or practical reason approach to statutory interpretation, such as that advocated by William Eskridge.³⁴⁵

Even though a single text is susceptible of a multiplicity of interpretations, I would underscore that this does *not* mean that deconstruction validates *all* interpretations.³⁴⁶ Derrida himself has noted

336. Balkin, *Deconstructive Practice*, *supra* note 2, at 781.

337. I.R.C. § 61 (2004).

338. See 1 BITTKER & LOKKEN, *supra* note 275, ¶ 5.1 (tracing the evolution in approach to defining “income”); Livingston, *Purposivism*, *supra* note 314, at 701 (“The very definition of income, § 61, is almost entirely a matter of judicial precedent, the statute providing only that ‘gross income means all income from whatever source derived’ and the legislative history being worthless or at least ignored. Decisions in such areas regularly ascribe intents or purposes to Congress that have little or no historical sanction and that may differ radically from the purposes that earlier courts ascribed to the very same provisions. ‘Purpose’ is here a dynamic concept, to be derived from post-enactment judicial and administrative decisions and then applied to the decisions in new cases.”).

339. See *supra* text accompanying note 323.

340. See *supra* note 324.

341. Balkin, *Deconstructive Practice*, *supra* note 2, at 778–79 (pointing out how readings of the equal protection clause have changed over time—although its authors may not have intended the clause to require equality between men and women when it was written, constitutional law scholars and judges interpret it in this way today).

342. Rev. Rul. 78-305, 1978-2 C.B. 172; Gen. Couns. Mem. 37,173 (June 21, 1977).

343. Rev. Rul. 71-447, 1971-2 C.B. 230.

344. 461 U.S. 574 (1983).

345. *Bob Jones University* is often cited as an example of the dynamic statutory interpretation described by William Eskridge; this approach takes into account “present societal, political, and legal context” when interpreting a statute. Eskridge, *supra* note 308, at 1479; see *id.* at 1482–97 (sketching the model for dynamic statutory interpretation); see also Geier, *Textualism*, *supra* note 18, at 484 (indicating that *Bob Jones University* is “the tax case most often cited in the literature as demonstrating dynamic statutory interpretation” (footnote omitted)); Livingston, *Purposivism*, *supra* note 314, at 690, 699–701, 704 (describing *Bob Jones University* as an example of dynamic statutory interpretation). In the tax literature, Michael Livingston has advocated the adoption of Eskridge’s dynamic approach to statutory interpretation (which Livingston refers to as a “practical reason” approach). Livingston, *Purposivism*, *supra* note 314, at 720–24.

346. Curran, *supra* note 162, at 22 (“Equally fallacious is the accusation that deconstruction valorizes all interpretations.”).

that although “[r]eading is transformational[,] . . . this transformation cannot be executed however one wishes. It requires protocols of reading.”³⁴⁷ As a result, deconstruction “engenders only a certain (or perhaps, rather, uncertain) number of valid interpretations”³⁴⁸ because “our reading must be intrinsic and remain within the text.”³⁴⁹

d. Liberation of the Text from the Author: In Tax Expenditure Analysis—As told by Surrey, the story of the genesis of the tax expenditure concept is a tale of a text liberated from its author. Surrey recounts how, in the fall of 1967, President Johnson had proposed a 10% surcharge on individual and corporate income taxes to reduce a budget deficit that was increasing as a result of “[t]he combination of expanded domestic spending under the President’s Great Society programs and of increased Vietnam war expenditures.”³⁵⁰ The House of Representatives’ Ways and Means Committee thought that “the inflationary potential could better be controlled through a reduction in Government expenditures, or that at least a tax increase must be matched by a decrease in those expenditures.”³⁵¹ The Committee met with the Director of the Budget to consider ways to reduce spending.³⁵² But, during this meeting, the Committee and the Budget Director only considered ways to reduce the direct spending that was detailed in the federal budget.³⁵³ As Surrey explains, “[n]ever once in its examination of the direct expenditures listed in the budget did the committee pause to consider the dollars involved in the tax incentives and tax subsidies contained in the Internal Revenue Code.”³⁵⁴

Although the members of the Ways and Means Committee were well aware of a number of tax provisions that provide financial assistance to taxpayers, they “kept the financial assistance furnished by these special tax provisions completely separate and isolated in [their] mind[s] from the task at hand. Indeed, the connection with that task simply did not occur to the members.”³⁵⁵ In other words, the members of the Ways and Means Committee were thinking of taxing and spending as rigid, formal categories.³⁵⁶ Because they were considering ways of reducing “spending,” it only occurred to them to look to the direct expenditures in the federal budget as a source of savings.³⁵⁷ They did not even

To recognize and respect all its classical exigencies is not easy and requires all the instruments of traditional criticism. Without this recognition and this respect, critical production would risk developing in any direction at all and authorize itself to say almost anything. But this indispensable guardrail has always only *protected*, it has never *opened*, a reading.

DERRIDA, GRAMMATOLOGY, *supra* note 2, at 158.

347. *Positions*, *supra* note 258, at 63; *see also* Curran, *supra* note 162, at 22.

348. Curran, *supra* note 162, at 22.

349. DERRIDA, GRAMMATOLOGY, *supra* note 2, at 159.

350. SURREY, PATHWAYS, *supra* note 20, at 1.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. SURREY, PATHWAYS, *supra* note 20, at 2.

356. *Id.*

357. *Id.*

think to consider tax expenditures as a source of savings because those provisions are addressed in tax bills, not in budget bills.³⁵⁸

During this meeting, Surrey, who was then Assistant Secretary of the Treasury for Tax Policy, had an “illumination”:

The scene in the House Ways and Means Committee suddenly illuminated many questions: Just what would a list of the special tax provisions that are comparable to expenditure programs look like? What would be the categories covered and the groups benefited? How many dollars would be involved and how would the amounts compare with direct budget spending in those categories for those groups? Given the existence of such a list, other questions follow: How do you go about comparing the substantive results under the tax benefits with those under budget expenditures? Once it is determined to provide Government financial assistance to a particular group, how does Government decide—and how should it decide—whether to use the tax route or the direct budget route?³⁵⁹

Whether or not Surrey actually experienced a revelation during that meeting,³⁶⁰ it is clear that he had detected a contradiction in the text of the Code (i.e., a number of taxing provisions that operated as spending provisions) that had not been recognized by its authors.³⁶¹ All of these congressmen on the House Ways and Means Committee—the elected representatives assigned the task of drafting and revising the Code (and, moreover, given the power under the Constitution to originate these additions and changes)—had apparently *not* contemplated the existence of this contradiction when drafting and re-drafting provisions in the Code.

In explicating tax expenditure analysis in his early articles and books, Surrey was not in the least concerned with ascertaining the intent of Congress when it enacted the tax preferences in the Code. Instead, Surrey, in Derridean fashion, was preoccupied with exploring the gap between what Congress intended to say when it enacted the tax preferences and how those tax preferences actually operated after their creation (i.e., once the Code, as text, had been liberated from its author, Congress). Surrey’s aim was to inform Congress—the institutional author of the text being examined—about this contradiction in the text that it had written so that Congress could take the contradiction into account when re-writing and re-working the text (i.e., when considering how to design future spending programs).

3. *Summary*—Thus, Surrey and McDaniel’s tax expenditure analysis bears the hallmarks of deconstruction in both its colloquial and technical senses. As evidenced by Surrey and McDaniel’s

358. *Id.*

359. *Id.* at 3.

360. SHAVIRO, *supra* note 21, at 23–26 (describing this story as a “creation myth,” and offering evidence that Surrey had thought of the tax expenditure concept well before his alleged “illumination”).

361. *See Positions*, *supra* note 258, at 82 (“The *incision* of deconstruction, which is not a voluntary decision or an absolute beginning, does not take place just anywhere, or in an absolute elsewhere. An incision, precisely, it can be made only according to lines of force and forces of rupture that are localizable in the discourse to be deconstructed.”).

numerous works, tax expenditure analysis not only reads as a stinging criticism of the status quo, but also employs the methods of Derridean (or, more accurately, Balkinian) deconstructive practice. In essence, Surrey and McDaniel employ tax expenditure analysis to bring to light and then to reverse the privileging of taxing over spending in the Code. Their approach to reading the Code is also consistent with the Derridean idea of the free play of the text. As originally conceived, tax expenditure analysis in no way depended upon divining the intent of Congress in enacting the tax preferences in the Code; rather, Surrey explored the actual operation of these tax preferences and, in doing so, identified a contradiction that had not been recognized by the authors of the Code.

IV. THE RETHINKING OF A COLLECTIVE IDENTITY

A. *Deconstructing the Mainstream/Marginal Hierarchical Opposition*

Having established that tax expenditure analysis can be reconceptualized as a form of deconstructionist analysis, we can now explore—and, yes, deconstruct—a privileging that this reconceptualization implicitly calls into question; namely, the privileging of “mainstream” over “marginal” contributions to the tax policy discourse.

A quick story from my own personal experience will help to illustrate the privileging of “mainstream” contributions to the tax policy discourse over “marginal” ones. In addition to my interest in critical tax theory, I have an interest in international tax and comparative legal theory. A few years ago, I wrote an article on the advisability of adopting a comparative approach to reforming the U.S. international tax regime.³⁶² Despite the potential cross-border aspects of nearly every provision in the Code, international tax articles tend to focus on only a small subset of the universe of potential issues, which creates a privileging of certain (mainstream) subjects over the remaining (marginal) subjects. This privileging manifested itself in the comments that I received about this article while I was in the process of writing it.

One of the people who was kind enough to read and comment on my article indicated that the example that I had chosen to demonstrate how this comparative approach would work in practice (viz., the rules governing the deductibility of cross-border charitable contributions)³⁶³ would not be of interest to academics who write and/or teach in the area of international tax (with the sole possible exception of Harvey Dale). To remedy this problem, the reader made two alternative suggestions: either I could turn this single article into two separate articles (one that would appeal to international tax folks and another that would appeal to exempt organization folks) or I could choose an example that would appeal to those who write or teach in the area of international tax (in particular, he suggested the corporate reorganization rules as a possible substitute).

While I fully understood the point (and actually expected this reaction), I did not follow the reader’s advice because I had chosen my example precisely because it was *not* a topic about which academics studying international tax normally write. Part of my purpose was to try to move the

362. Infanti, *supra* note 167.

363. Although one might not think of exempt organizations as a marginal topic, the discussion in the text below should amply demonstrate that the distinction between the marginal and the mainstream is not fixed and rigid but constructed and contextual. What may be mainstream in one circumstance may become marginal in another.

international tax discourse beyond the usual subjects. Whether I succeeded (and whether anyone has actually read the article), I do not know. In any event, this story helps to demonstrate how mainstream contributions to the tax policy literature are privileged over marginal ones.

As mentioned at the outset of this article, critical tax theory has been classified as “marginal” by tax crits and their critics alike.³⁶⁴ When this classification is considered in light of the mainstream/marginal hierarchical opposition in the tax policy discourse, it is no wonder that mainstream tax academics at first ignored critical contributions to the tax policy discourse and, more recently, have attempted to discredit them.³⁶⁵ Indeed, the “marginal” label—a label that members of the mainstream branded upon tax crits without any demonstrable resistance from them—virtually dictated this reaction to critical tax theory.

But by reconceptualizing tax expenditure analysis as deconstructionist analysis, this rhetorical move deconstructs itself by showing that what is true of the marginal is also true of the mainstream. Tax expenditure analysis has been in the mainstream of tax policy thought for decades.³⁶⁶ As described above, Stanley Surrey achieved congressional acceptance of tax expenditure analysis in the mid-1970s,³⁶⁷ and descriptions of tax expenditure analysis can be found in many basic income tax casebooks³⁶⁸ as well as in treatises on the subject.³⁶⁹ Although tax expenditure analysis has never achieved universal acceptance, the fact that it has generated a lively, on-going debate in both academic and political circles³⁷⁰ is evidence of the fact that it took its place in the mainstream of the tax policy discourse long ago—a place that it continues to occupy today. If, as discussed above,³⁷¹ tax expenditure analysis is no more than an application of deconstructionist techniques to the Code, then deconstruction itself has been in the mainstream of the tax policy discourse for decades. And deconstructionist analysis, which is closely associated with contemporary critical thinking (particularly with the critical legal studies movement and feminist legal theory),³⁷² is undisputably a “marginal” analytical technique in the legal academic literature. What this means is that, for decades, a “marginal” form of analysis has really been in the “mainstream” of tax policy discourse.

Furthermore, just as was the case with the understanding/misunderstanding hierarchical opposition,³⁷³ the mainstream can be understood as no more than a special case of the marginal. Both marginal and mainstream contributions to the tax policy discourse are no more than ideas with or without a following. The only difference between the two is the size of the following (i.e., how many adherents an idea has at any particular moment). A greater number of adherents can make a particular

364. See *supra* note 13.

365. See *supra* notes 13, 19.

366. See Edward A. Zelinsky, *Qualified Plans and Identifying Tax Expenditures: A Rejoinder to Professor Stein*, 9 AM. J. TAX POL'Y 257, 261 (1991) (“Tax expenditure analysis is now firmly ensconced in the tax policy literature, in the law school curriculum and, via the Congressional Budget Act, in federal law.” (footnotes omitted)).

367. See *supra* note 23 and accompanying text.

368. See *supra* note 24 and accompanying text.

369. 1 BITTKER & LOKKEN, *supra* note 275, ¶ 3.6.

370. See *supra* Part II.D.

371. See *supra* Part III.A.

372. See *supra* note 18; see also Balkin, *Deconstruction*, *supra* note 160 (“Hence, deconstructive arguments and techniques often overlap with and may even be in service of other approaches, such as pragmatism, feminism or critical race theory.”).

373. See *supra* note 318 and accompanying text.

idea mainstream, while fewer can make the same idea marginal. By definition, every idea begins its existence in marginality because it has a following of one: the person who originated the idea. It is only through dissemination and the passage of time that an idea draws further adherents. At some point, an idea that began its existence in marginality may become mainstream; however, there is no clear line between what is marginal and what is mainstream—in other words, there is no magic number at which the marginal suddenly transforms into the mainstream. There is likewise no fence preventing an idea from migrating from one classification to join the other or from later returning to its original classification. As a result, over time, an idea that started out in marginality and that later became mainstream may return to marginality once again. There is an ebb and a flow that depends on the currency of ideas in any given context.

The notion that the mainstream is merely a special case of the marginal comports with general experience. Consider, for example, the ebb and flow during the course of the twentieth century of the different theoretical perspectives that have influenced thinking about the law—from legal formalism to legal realism to the legal process school to law and economics and on to critical thinking.³⁷⁴ To take another example with particular relevance to tax academics, consider how the limit on the foreign tax credit has come full circle over time:³⁷⁵

As originally enacted in 1918,³⁷⁶ the foreign tax credit was unlimited, meaning that “foreign income taxes could be credited against U.S. tax liabilities even when the foreign tax rate exceeded the effective U.S. rate.”³⁷⁷ When the income tax rates fell at the end of World War I, it became apparent that “an American with substantial investments abroad, particularly if made in a high-tax nation (or nations), might eliminate his entire tax bill to the United States.”³⁷⁸ To prevent the possibility of abuse, Congress enacted a limitation on the amount of foreign tax credits that a taxpayer could claim.³⁷⁹

Beginning in 1921, taxpayers were able to claim foreign tax credits only against the U.S. tax on their foreign source income (i.e., foreign tax credits would not reduce the U.S. tax on income from U.S. sources).³⁸⁰ From 1921 until 1932, Congress allowed taxpayers to compute this limitation on an “overall” basis, meaning that they could take into account all foreign source income and losses when

374. See Wetlaufer, *supra* note 148, at 8–59.

375. See 1 JOEL D. KUNTZ & ROBERT J. PERONI, U.S. INTERNATIONAL TAXATION ¶ B4.16[1] (2002); Michael J. Graetz & Michael M. O’Hear, *The “Original” Intent of U.S. International Taxation*, 46 DUKE L.J. 1021, 1056 n.141 (1997).

376. Revenue Act of 1918, Pub. L. No. 65-254, ch. 18, §§ 222(a)(1), 238, 40 Stat. 1057, 1073, 1080–81 (1919); Harvey P. Dale, *The Reformed Foreign Tax Credit: A Path Through the Maze*, 33 TAX L. REV. 175, 179 n.22 (1978); Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 261 (2001); Karen V. Kole, *The Status of United States International Taxation: Another Fine Mess We’ve Gotten Ourselves into*, 9 NW. J. INT’L L. & BUS. 49, 55 (1988). See Graetz & O’Hear, *supra* note 375, at 1043–54, for the historical background of, as well as the impetus for, the enactment of the foreign tax credit.

377. Dale, *supra* note 376, at 179; see also Graetz & O’Hear, *supra* note 375, at 1054; Kole, *supra* note 376, at 55.

378. Graetz & O’Hear, *supra* note 375, at 1054.

379. *Id.* at 1055.

380. Revenue Act of 1921, Pub. L. No. 67-98, ch. 136, §§ 222(a)(5), 238(a), 42 Stat. 227, 249, 258 (1921).

computing the limitation.³⁸¹ This overall limitation allowed taxpayers to average the different tax rates applied by different countries or to different types of income.³⁸²

With the advent of the Depression, Congress considered the complete repeal of the foreign tax credit, but, in a political compromise, adopted a per country limitation instead.³⁸³ From 1932 until 1954, taxpayers computed the foreign tax credit limitation using the overall limitation or a per-country limitation, whichever was less.³⁸⁴ The per-country limitation prevented the averaging of the different tax rates applied by different countries,³⁸⁵ with the result that the total of the country limitations was “often lower than the overall limitation.”³⁸⁶

In 1954, Congress eliminated the overall limitation and required taxpayers to use only the per-country limitation.³⁸⁷ The reason for the repeal was

that the overall limitation discouraged a company operating profitably in one foreign country from going into another country where it might have expected to operate at a loss for several years. For example, if a company operated in two countries, and one operation generated foreign source income but the other a loss, the loss could effectively wipe out any utilizable foreign tax credit in the profitable operation because the numerator of the limitation could be reduced to zero. Basically, the overall limitation was repealed in order to encourage foreign investment.³⁸⁸

Beginning in 1960, Congress allowed taxpayers to elect either a per-country or an overall limitation.³⁸⁹ When making this change, “Congress reasoned that the overall limitation would encourage investment, and was more consistent with the way United States companies viewed their operations. In most cases, United States firms operating abroad think of their foreign businesses as a single operation and set up their organizations on this basis.”³⁹⁰

In 1976, Congress eliminated the per-country limitation.³⁹¹ “Again, the reason given for the change was that most United States companies viewed their foreign operations on an overall basis, not on a country by country basis.”³⁹²

In 1986, Congress reaffirmed its adherence to the overall limitation, indicating that the overall limitation is “consistent with the integrated nature of U.S. multinational operations,”³⁹³ but enacted

381. Dale, *supra* note 376, at 180; Graetz & O’Hear, *supra* note 375, at 1055; Kole, *supra* note 376, at 55–56.

382. 1 KUNTZ & PERONI, *supra* note 375, ¶ B4.16[1] at B4-186.

383. Kole, *supra* note 376, at 56.

384. Revenue Act of 1932, Pub. L. No. 72-154, ch. 209, § 131(b), 47 Stat. 169, 211 (1932); Dale, *supra* note 376, at 180; Graetz, *supra* note 376, at 263; Kole, *supra* note 376, at 56.

385. 1 KUNTZ & PERONI, *supra* note 375, ¶ B4.16[1] at B4-186.

386. Kole, *supra* note 376, at 56.

387. Internal Revenue Code of 1954, Pub. L. No. 83-591, ch. 736, § 904, 68A Stat. 287–88 (1954); Dale, *supra* note 376, at 180, Graetz, *supra* note 376, at 263; Kole, *supra* note 376, at 56.

388. Kole, *supra* note 376, at 56–57.

389. Act of Sept. 14, 1960, Pub. L. No. 86-780, § 1(a), 74 Stat. 1010, 1010 (1960).

390. Kole, *supra* note 376, at 57.

391. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1031(a), 90 Stat. 1520, 1620–21 (1976).

392. Kole, *supra* note 376, at 57.

393. 1 KUNTZ & PERONI, *supra* note 375, ¶ B4.16[1] at B4-187.

a basket system³⁹⁴ that prevents the averaging of taxes on different types of income where it felt that averaging would distort the foreign tax credit limitation.³⁹⁵

In this series of enactments, there is an ebb and flow of ideas as context changes: what is prevailing policy is replaced by a new policy (i.e., the mainstream becomes marginal); then the old, jettisoned policy resurfaces to become the prevailing policy once again (i.e., the marginal returns to the mainstream).

The reconceptualization of tax expenditure analysis as a form of deconstructionist analysis thus leads us to the inversion of the mainstream/marginal hierarchical opposition. As was the case with the taxing/spending hierarchical opposition, this inversion reveals the constructed, unstable, and context-driven nature of the boundary between mainstream and marginal contributions to the tax policy literature. It concomitantly demonstrates that mainstream and marginal contributions to the tax policy literature stand in a relationship of both similarity *and* difference—they simultaneously depend upon and differentiate themselves from each other. When considered from this perspective, the advent of a literature exploring feminist, critical race theory, and gay and lesbian perspectives on the Code can be seen not as some radical shift in the tax policy discourse,³⁹⁶ but rather as part of its natural progression. Surrey and McDaniel's tax expenditure analysis simply prepared the way for these later critical contributions by surreptitiously introducing "mainstream" tax academia to critical thinking long before its ostensible attempt at infiltrating the tax policy discourse.

B. *Reconsidering Our Collective Identity*

This deconstruction built upon a reconstruction raises an interesting question: if the distinction between mainstream and marginal contributions to the tax policy discourse is constructed, unstable, and context-driven, why do tax crits so readily accept the "marginal" label that virtually guarantees their contributions will be ignored or trivialized by "mainstream" tax academics?

At first glance, it's not at all surprising that tax crits rally around their "marginality." Because the critical tax movement is comprised of quite a diverse group of scholars—working in such areas as feminist legal theory, critical race theory, and gay and lesbian legal studies—marginality or outsider status is probably the least common denominator of both their work and their personal identities.³⁹⁷

394. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1201, 100 Stat. 2085, 2520–28 (1986).

395. 1 KUNTZ & PERONI, *supra* note 375, ¶ B4.16[1] at B4-187.

396. Livingston, *Perspective*, *supra* note 11, at 1792 ("Within the tax field, critical scholarship is likely to appear radical, even a bit outrageous, in nature and may receive less attention than it would otherwise deserve.")

397. The sociologists Verta Taylor and Nancy Whittier have observed that out-groups often accept their marginality as part of the process of constructing a collective identity:

Boundaries mark the social territories of group relations by highlighting differences between activists and the web of others in the contested social world. Of course, it is usually the dominant group that erects social, political, economic, and cultural boundaries to accentuate the differences between itself and minority populations. Paradoxically, however, for groups organizing to pursue collective ends, the process of asserting "who we are" often involves a kind of reverse affirmation of the characteristics attributed to it by the larger society. Boundary markers are, therefore, central to the formation of collective identity because they promote a heightened awareness of a group's commonalities and frame interaction between members of the in-group and the out-group.

But, once you get past this superficial commonality, it's actually quite surprising that tax crits actively and unthinkingly accept their "marginality."

Tax crits focus their scholarly energies on attempting "to strip the tax law of its claim to objectivity and hold it accountable for its social and economic impact on traditionally subordinated groups."³⁹⁸ Yet, ironically,³⁹⁹ a group that dedicates itself to uncovering latent discrimination in the Code has overlooked the fact that the mainstream/marginal hierarchical opposition—a hierarchical opposition that the traditionally dominant group embedded in the tax policy discourse (after all, they framed the discourse) and that tax crits accepted—is just another latent means of subordination that can be used to control the flow and impact of ideas that are contrary to the interests of the mainstream.

Since some tax crits appear to view themselves as part of a movement (as do some of their critics as well as some bystanders),⁴⁰⁰ I propose that tax crits remedy this oversight by taking a cue from new social movement theory⁴⁰¹ in the area of sociology. New social movement theorists such

Verta Taylor & Nancy E. Whittier, *Collective Identity in Social Movement Communities*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 104, 111 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) [hereinafter *FRONTIERS*]; see Nancy Whittier, *Meaning and Structure in Social Movements*, in *SOCIAL MOVEMENTS: IDENTITY, CULTURE, AND THE STATE* 289, 303 (David S. Meyer et al. eds., 2002) [hereinafter *SOCIAL MOVEMENTS*] (among other examples, stating that, "[a]s those who write about lesbian/gay or queer organizing point out, mobilizing a constituency around an identity that the dominant system has made salient can shore up the distinctions the movement is trying to undermine." (citations omitted)). On this point, see also Mary Bernstein, *The Contradictions of Gay Ethnicity: Forging Identity in Vermont*, in *SOCIAL MOVEMENTS*, *supra*, at 85, 85 (citations omitted):

Many queer theorists, poststructuralists, and feminists argue that to gain recognition for a constituency, activists narrowly and naively rely on fixed or essentialist notions of identity. By advocating for rights based on an identity such as "woman" or "gay," identity movements reinforce the identity on which the movement is based and, as a result, fail to recognize diversity, homogenize and ignore differences within the identity category, and inhibit the creation of a "politics of commonality" among diverse groups. Engaging in politics based on identity categories shores up the category itself and sets up invidious distinctions, reinforcing a normal-deviant dichotomy. Cultural transformation is sacrificed for narrow political gains.

(N.B. In her piece, Bernstein recounts the formation of the lesbian and gay rights movement in Vermont, and argues that the politics pursued by this movement was not based on a fixed notion of identity but on one that was shaped by "complex interactions with the state, the opposition, and with other social movements." *Id.* at 86.)

398. Brown & Fellows, *Preface*, *supra* note 12, at vii; see also Shurtz, *supra* note 11, at 1837–41 ("However, largely absent from these efforts has been examination of the role played by the taxation system in undergirding this hierarchy [i.e., the white male power elite], chiefly through its subsidization of wealth acquisition and concentration (and its adjunct, social and political power), while concurrently exacerbating the subordinate status and relative impoverishment of the remaining sectors of society. Now change is afoot. This void in the catalog of taxation literature is rapidly being filled with fresh studies and commentaries on the relationships between the taxation system and the social, economic, and political standing of 'traditionally subordinated groups.'" (footnote omitted)).

399. See *supra* note 397.

400. See *supra* note 11.

401. Alberto Melucci was one of the founders of new social movement theory, which originated in European scholarship. Enrique Laraña, *Continuity and Unity in New Forms of Collective Action: A Comparative Analysis of Student Movements*, in *IDEOLOGY TO IDENTITY*, *supra* note 11, at 209, 210; see also ELIZABETH A. ARMSTRONG, *FORGING GAY IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950–1994*, at 7 (2002) (describing new social movement theorists as "predominantly European"); Mueller, *supra* note 11, at 234 (referring to new social

as Alberto Melucci⁴⁰² do not view social movements as “a unified ‘subject,’”⁴⁰³ but rather as a social construction⁴⁰⁴—“a composite action system, in which widely differing means, ends and forms of

movement theory as European). Melucci also “was among the first writers to introduce the term ‘new social movements’ into English.” MELUCCI, *supra* note 11, at 204; Melucci, *supra* note 11, at 105. He describes use of this term as follows:

I am not opposed to the continued use of the term [i.e., “new social movements”], but—as *Nomads of the Present* tries to explain—I have become dissatisfied with its reification and convinced of the need to clarify and specify its meaning. The term is often used loosely in a chronological sense to refer to the growth, since the early 1960s, of forms of action which diverged from the then dominant types of collective action. But this sense of the term wrongly assumes that the “new” movements are unified entities. My main theoretical objection to the literature on “new social movements” is that it fails to recognize their *composite* character. It therefore neglects a vital question: given the differentiated nature of contemporary social movements—the fact that they contain a plurality of levels, including very traditional forms of action—do they nevertheless display novel types of action which cannot be explained by the traditional analyses of class conflict or political struggle?

MELUCCI, *supra* note 11, at 204–05.

It is worth noting, however, that new social movement theory is just one paradigm for explaining and understanding social movement organizations. Whittier, *supra* note 397, at 289–90; *see also* ARMSTRONG, *supra*, at 5–13 (developing a hybrid cultural-institutional approach to examining social movements). Theorists have begun to integrate these different paradigms to create more complex understandings of social movement organizations. Whittier, *supra* note 397, at 289–90 (“For some time now, in fact, the conventional theoretical distinctions in the field—between political process, resource mobilization, and new social movements theories—have been breaking down. Textbooks and literature reviews still invoke these approaches in their theoretical taxonomies, but far more often than scholars actually employ them in distinguishable form.”).

402. Melucci also coined the term “collective identity,” Bert Klandermans, *Transient Identities? Membership Patterns in the Dutch Peace Movement*, in *IDEOLOGY TO IDENTITY*, *supra* note 11, at 168, 168, and has been described as “the best exemplar of those writing in this tradition” (i.e., “European writers who emphasize the centrality of identity issues in . . . ‘new’ social movements”). William A. Gamson, *The Social Psychology of Collective Action*, in *FRONTIERS*, *supra* note 397, at 53, 56; *see also* Taylor & Whittier, *supra* note 397, at 104, 104–05 (stating that “European analyses of recent social movements, loosely grouped under the rubric ‘new social movement theory,’ suggest that a key concept that allows us to understand this process is collective identity,” and citing as examples the works of Melucci, Alessandro Pizzorno, Carl Boggs, Jean L. Cohen, Alain Touraine, and Barbara Epstein).

403. MELUCCI, *supra* note 11, at 28; *see also id.* at 25 (“Social movements cannot be represented as characters, as subjects endowed with being and purpose, as acting within a scenario whose finale is predetermined. Such misconceptions can be rectified only by rejecting the assumption of collective action as a unified datum. Only then can we discover the plurality of perspectives, meanings and relationships which crystallize in any given collective action.”).

404. *Id.* at 25–26 (“Collective action is . . . the product of purposeful orientations developed within a field of opportunities and constraints. Individuals acting collectively *construct* their action by defining in cognitive terms these possibilities and limits, while at the same time interacting with others in order to ‘organize’ (i.e., to make sense of) their common behavior.”); *see also* ARMSTRONG, *supra* note 398, at 7 (“These cultural approaches all treat interests and identities as politically constructed”); Bert Klandermans, *The Social Construction of Protest and Multiorganizational Fields*, in *FRONTIERS*, *supra* note 397, at 77, 80 (“In Melucci’s eyes, social movements are themselves social constructions.”); Taylor & Whittier, *supra* note 397, at 109 (“Sometimes labeled postmodernist, new social movement perspectives are social constructionist paradigms From this standpoint, collective political actors do not exist *de facto* by virtue of individuals sharing a common structural location; they are created in the course of social movement activity.”).

solidarity and organization converge in a more or less stable manner.”⁴⁰⁵ These theorists focus on the manner in which the collective identity⁴⁰⁶ of a social movement is formed⁴⁰⁷ and continuously refined⁴⁰⁸ by its members, because “[t]he process of constructing, maintaining and altering a collective identity provides the basis for actors to shape their expectations and calculate the costs and benefits of their action.”⁴⁰⁹ Indeed, the process of constructing a collective identity has been characterized as “the most central task of ‘new’ social movements”⁴¹⁰—a task that is not only “instrumental to the success of collective action but [also] a goal in its own right.”⁴¹¹ In keeping with this view of collective identity,

405. MELUCCI, *supra* note 11, at 28; *see also* Laraña, *supra* note 401, at 218–19 (“Another problem in the study of social movements comes from taking for granted that social movements have an internal unity, which is manifested in the homogeneity of beliefs and values of actors, their consensus on demands, and the role of organizations where strategic decisions are made. . . . More recent research does not share the assumption of unity and stresses the relevance of internal conflict as an important factor in the emergence of, or a crisis in, a movement’s collective identity.” (citing Melucci, among others, in support of the latter statement)).

406. Melucci defines “collective identity” as “an interactive and shared definition produced by several interacting individuals who are concerned with the orientations of their action as well as the field of opportunities and constraints in which their action takes place.” MELUCCI, *supra* note 11, at 34. Taylor and Whittier, who have themselves been described as “[t]wo of the most cited scholars on this topic,” Ryken Grattet & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference,”* 91 J. CRIM. L. & CRIMINOLOGY 653, 682 (2001), have offered a slightly different definition of “collective identity”: “the shared definition of a group that derives from members’ common interests, experiences, and solidarity.” Taylor & Whittier, *supra* note 397, at 105; *see also* Klandermans, *supra* note 402, at 168 (“Verta Taylor and Nancy Whittier suggest a slightly different definition [from Melucci’s] that stresses ‘we’-feeling.”); Whittier, *supra* note 397, at 302 (“Collective identity, thus, is an *interpretation* of a group’s collective experience: who members of the group are, what their attributes are, what they have in common, how they are different from other groups, and what the political significance of all this is.”).

407. *E.g.*, MELUCCI, *supra* note 11, at 30–36; Mueller, *supra* note 11, at 236–37.

408. MELUCCI, *supra* note 11, at 34 (“Collective identity formation is a delicate process and requires continual investments.”); *id.* at 218 (“Collective actors invest an enormous quantity of resources in the on-going game of solidarity. They spend a great deal of time and energy discussing who they are, what they should become and which people have the right to decide that. This on-going process of construction of a sense of “we” can succeed for various reasons . . . [b]ut it can also fail, in which case collective action disintegrates.”); Hank Johnston et al., *Identities, Grievances, and New Social Movements, in* IDEOLOGY TO IDENTITY, *supra* note 11, at 3, 15–16 (“This social constructionist definition has three dimensions that make collective identity an especially difficult concept to pin down empirically. First, it is predicated on a continual interpenetration of—and mutual influence between—the individual identity of the participant and the collective identity of the group. Second, by the very nature of the phenomena we study, the collective identity of social movements is a ‘moving target,’ with different definitions predominating at different points in a movement career. Third, distinct processes in identity creation and maintenance are operative in different phases of the movement.”); Belinda Robnett, *External Political Change, Collective Identities, and Participation in Social Movement Organizations, in* SOCIAL MOVEMENTS, *supra* note 397, at 266, 271 (indicating that “participants in social movements constantly negotiate collective identities”); Taylor & Whittier, *supra* note 397, at 114 (“We see the development of consciousness as an ongoing process in which groups reevaluate themselves, their subjective experiences, their opportunities, and their shared interests.”).

409. MELUCCI, *supra* note 11, at 34.

410. Gamson, *supra* note 402, at 56; *see also* Johnston et al., *supra* note 408, at 10 (“The new social movement perspective holds that the collective search for identity is a central aspect of movement formation.”).

411. Gamson, *supra* note 402, at 57; *see also* MELUCCI, *supra* note 11, at 73–74 (“This means that the energies and resources that actors invest in the construction of their collective identity are an essential part of the action, and not simply an accessory or ‘expressive’ dimension. The weakness of an exclusively political view centred

tax crits should consider in a deliberate and purposeful fashion⁴¹² how to deal with their “marginality”:⁴¹³ whether to (i) accept it with resignation, (ii) wholeheartedly embrace it and use it to accentuate their differences from the mainstream, (iii) reject it on the ground that they are actually no different than the mainstream, or (iv) reject it as an artificial construct that masks the complex web of similarities and differences that characterize the relationship between tax crits and mainstream tax academics.

The task of rethinking (and possibly reshaping) this aspect of the collective identity of the critical tax movement will naturally require collective action—in the form of a give and take among critical tax scholars.⁴¹⁴ For this reason, you will not find a definitive description of what the movement’s collective identity should or must look like in this article. Rather, what I would offer by way of closing comments is some food for thought.

on the ‘instrumental’ dimension of action is that it considers as ‘expressive’ or residual the self-reflective investments of the movements. But these investments in self-reflection are crucial for understanding the effects of movements on the political system. If what movements do to construct a sense of ‘we’ is not considered accessory or residual then our understanding of concepts such as efficacy and success is correspondingly modified.”); Robnett, *supra* note 408, at 279 (describing how collective identity transformation “became a central goal of the [Student Nonviolent Coordinating Committee], since transcending racism through upward mobility was impossible for most blacks, particularly the uneducated”); *cf.* Whittier, *supra* note 397, at 290 (indicating that while some groups “want to construct new collective identities that challenge subservient definitions of the group, . . . others . . . construct new identities as a means of promoting mobilization rather than as a goal in themselves”).

412. Until now, the only reflections that I have seen by tax crits on the critical tax movement have been written in reaction to criticism of that movement. The 1998 symposium on critical tax theory in the *North Carolina Law Review* consisted of an article by Lawrence Zelenak critiquing a number of applications of critical tax theory in recent scholarship (and praising a few others), followed by responses from those who had been criticized and reactions from a number of other tax scholars. Symposium, *Critical Tax Theory: Criticism and Response*, 76 N.C.L. REV. 1519 (1998). What I am proposing here is an active, rather than a reactive, shaping of the collective identity of the critical tax movement.

413. See MELUCCI, *supra* note 11, at 64–70 (describing a research project in which the groups being studied “consciously activated their own internal relationships and concentrated on the process of constructing their sense of ‘we’—which serves as the basis of collective action. Self-reflection rendered this process visible and contributed new insights into the groups’ understanding of their action. In the course of this self-reflection, the complex interaction of internal and external relationships, which are characteristic of collective action, also surfaced.”); Taylor & Whittier, *supra* note 397, at 118 (“[W]e suggest two types of negotiation central to the construction of politicized collective identities. First, groups negotiate new ways of thinking and acting in *private* settings with other members of the collectivity, as well as in *public* settings before a larger audience. Second, identity negotiations can be *explicit*, involving open and direct attempts to free the group from dominant representations, or *implicit*, consisting of what Margolis terms a ‘condensed symbol or display’ that undermines the status quo.” (citation omitted) (quoting Diane Rothbard Margolis, *Redefining the Situation: Negotiations on the Meaning of Woman*, 32 SOC. PROBS. 332, 340 (1985)).

414. Scott A. Hunt et al., *Identity Fields: Framing Processes and the Social Construction of Movement Identities*, in IDEOLOGY TO IDENTITY, *supra* note 11, at 185, 189 (“Melucci . . . also stresses the interactional accomplishment of identity, arguing that ‘collective identity is an interactive and shared definition.’” (quoting MELUCCI, *supra* note 11, at 34); Klandermans, *supra* note 404, at 81 (“To form a collective identity, a group must define itself as a group, and its members must develop shared views of the social environment, shared goals, and shared opinions about the possibilities and limits of collective action.”); Robnett, *supra* note 408, at 284 (“The extent to which a social movement organization allows for self-labeling and re-labeling is crucial to recruitment and to sustaining commitment. Redefined movement collective identities must resonate with participants’ own identities.”).

In making these comments, I will draw upon my experience as a gay man in thinking through both my own individual identity as well as my small part of the collective identity of the overall gay and lesbian movement.⁴¹⁵ I turn to these personal experiences because of the general relevance of gay and lesbian experience to issues of identity formation:

The coming-out process of identity formation is clearly situational and relational; that is, it occurs at a specific time or times, and in relation to specific people. In this respect, “coming out” is a decidedly postmodern phenomenon, where we can see personal identity being constructed as part of an ongoing process. . . . As postmodern scholars work more at the intersections of different kinds of oppression, the coming-out process experienced by gay men and lesbians could become the model for describing the process of identity formation generally.⁴¹⁶

Through my comments, I hope to provide other tax crits with a perspective that may help them to decide how their “marginality” fits (if at all) in the collective identity of the critical tax movement. I also hope to show that the contextuality of the mainstream/marginal categories can serve as an advantage or a disadvantage (or both an advantage and a disadvantage), but more importantly, and precisely because of this malleability, I hope to show tax crits that they have the choice to make of their marginality what they will.⁴¹⁷

415. For a recent sociological perspective on the formation and evolution of the gay and lesbian movement in San Francisco from 1950 through the mid-1990s, see ARMSTRONG, *supra* note 398.

416. CHAMALLAS, *supra* note 153, at 168–69. The first sentence of the second paragraph of this article, where I come out to you, the reader, evidences the truth of this statement. Each time I encounter someone—whether in person or through my writing—I have to decide whether, when, and how much to share about my sexual orientation.

Drawing on these experiences seems even more appropriate once you realize that homosexuality was formerly referred to as “sexual inversion” (i.e., the inversion of the normal sexual instinct). 2 SUPPLEMENT TO THE OXFORD ENGLISH DICTIONARY 355 (1976). (My thanks to Leandra Lederman for drawing this to my attention.) This term highlights another of the hierarchical oppositions that surround us; namely, the privileging of heterosexuality over homosexuality in our society.

See also DERRIDA, GRAMMATOLOGY, *supra* note 2, at 221, where he discusses another perversion/inversion in Rousseau’s *Essay on the Origin of Languages*.

The first two must be satisfied for the last to appear, Rousseau notes, but we have observed that *the second or secondary need* [i.e., needs “that deal with ‘well-being’”] *supplants each time, by force or urgency, the first need* [i.e., needs “that ‘deal with subsistence’ and ‘with preservation’”]. *There is already a perversion of needs, an inversion of their natural order.* And we have just seen included among needs what is elsewhere named passion. Need is thus permanently present within passion.

417. And if they do not make of it what they will, others will surely do the job for them. See Debra Friedman & Doug McAdam, *Collective Identity and Activism: Networks, Choices, and the Life of a Social Movement*, in FRONTIERS, *supra* note 397, at 156, 166 (“And more important, the SMO [social movement organization] is likely to find itself confronting a variety of other groups willing to construct the organization’s image. It isn’t just the SMO that has a stake in defining the group’s collective identity. So too do movement opponents, rival SMOs, law enforcement officials, and the media.”); see also Hunt et al., *supra* note 414, at 192–203 (maintaining that the construction of the identities of a movement’s antagonists as well as its audience (i.e., neutral observers) is just as important as the construction of the identity of the movement’s protagonists); Johnston et al., *supra* note 408, at 18 (“Both individual identity and collective identity are affected by interaction with nonmembers and by definitions

1. *Going into the Closet*— The first of the options in addressing their “marginality,” that of resigned acceptance, would represent a step backward for tax crits. This option reminds me of terrain with which I am all too familiar: the closet (and *not* the one that you hang clothes in). I lived in the closet until I was in my early twenties,⁴¹⁸ and, take it from me, it was not a pleasant experience. The closet can be an extremely isolating place. It cuts you off from others, accentuates in your eyes the ways in which you are different from the remainder of society, and creates a sense of despondency at your plight that sets in motion a yearning for normality (as defined, of course, by those who have marginalized you). If tax crits resignedly accept their marginality, they will essentially consign themselves to the closet by acquiescing in their marginalization and, almost ineluctably, internalizing that marginality.

When you acquiesce in your own marginalization, you give the mainstream (here, straight society or mainstream tax academia, as the case may be) permission to ignore you, your needs, and your desires. For gays and lesbians, the closet renders you invisible. Because there is no tell-tale sign for identifying someone who is gay or lesbian, you can go into the closet and try to “pass” for straight—either actively or by default (because in our heterosexist society, people are normally presumed to be straight). You continue to be gay and often to engage in homosexual behavior; however, to the greatest extent possible, this activity takes place apart and away from straight society so that it simply doesn’t register on the straight radar screen (or, if it does, can be dismissed as an anomaly).

For tax crits, resigned acceptance of their marginality would produce similar results. Some tax crits may stop (or never begin) writing in this area and instead retreat to more “mainstream” tax topics. Or they may simply abandon writing in tax at all because it is inhospitable to critical work.⁴¹⁹ In either case, critical work would be banished from the mainstream radar screen. And the few brave souls who continued to make critical contributions to the tax literature would find that their work would have little or no impact on the mainstream tax policy literature or on the way that mainstream

imposed on movements by state agencies, counter-movements, and, especially in the contemporary movement environment, the media.”); Laraña, *supra* note 401, at 220 (describing the student mobilizations against *Selectividad* (the college entrance exams) in Spain and stating that “[t]his is one of the defining characteristics of this movement: its public image was produced by a politicized group of university students that had a different status than the movement’s constituency, that did not adequately express the movement’s motives or its demands, that did not use the same language, and that had a different ideology”); Mueller, *supra* note 11, at 256 (“Through these devices, a collective identity becomes public that has a potential for political influence. It is then subject to attempts at distortion and marginalization of state, media, and countermovements.”); Robnett, *supra* note 408, *passim* (indicating that the collective identity of a social movement organization is shaped by both internal *and* external factors, and describing how internal and external factors changed the collective identity of the Student Nonviolent Coordinating Committee); Whittier, *supra* note 397, at 293–94, 301–06 (also indicating that the collective identity of a social movement organization is shaped by both internal *and* external factors, but stating that “how activists define their group is by no means dictated by the dominant society. Movements transform hegemonic collective identities and discourses when they organize, and they continue to debate and redefine those group meanings as time passes”).

418. For a description of my experience of the closet, see Infanti, *Sodomy Statute*, *supra* note 3, at 771–73.

419. See Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 384 (1998) (“There has been a smattering of critical tax scholarship—Kelman’s work arguably qualifies—but critical scholars have generally shied away from the field, perhaps sensing its mainstream bias. Many of those who started out in the area (including Kelman himself) have left it.” (footnotes omitted)).

tax academics think about tax policy issues, because, for the mainstream, it simply would not exist. In fact, mainstream tax academics initially treated critical contributions to the tax policy debate in just this way—they acted as if those contributions were invisible.⁴²⁰

The purpose for going into the closet is usually to avoid the treatment visited upon you by the mainstream should your separate existence come to be publicly acknowledged. For gays and lesbians, this treatment ranges from discrimination (in housing, employment, etc.) to verbal denigration or degradation to physical violence and intimidation.⁴²¹ As expected, once the critical tax movement “garnered new adherents and became impossible to ignore, mainstream scholars employed new and varied strategies to devalue the content of critical commentary.”⁴²² Tax crits who are out in the open have experienced the academic version of gay bashing: their work has been dismissed, devalued, and/or discredited.⁴²³

But a far worse prospect is the possibility that, by going into the closet, you may become an accomplice to your own subordination and suffering. When I went into the closet, I was trying to avoid being attacked by society because of my homosexuality. I eventually came out of the closet because I realized that the closet was really no escape at all. As I have explained elsewhere:

Interestingly, denial became both a means of defending myself from attack and a proxy for those attacks. Through denial, I was able to try to fend off attacks from others, but at the same time began to attack myself—questioning what was wrong with me, why I was different, why I couldn’t change and be normal like everyone else. By high school, society had so successfully ingrained in me its hostility toward gays and lesbians that, even when defending myself from its attacks, I was still being attacked. I had simply traded one oppressor (society at large) for another (myself). To cope with the anguish created by this self-loathing, I redirected my energy and attention toward studying [because] [s]chool work helped to lessen the constant pain and anguish⁴²⁴

Earlier, tax crits appear to have experienced a similar sense of isolation⁴²⁵ as well as a (conscious or unconscious) yearning to be “normal.”⁴²⁶ More recently, however, tax crits appear to have emerged

420. See *supra* note 13.

421. See, e.g., Infanti, *Sodomy Statute*, *supra* note 3, at 769–79.

422. Shurtz, *supra* note 11, at 1846.

423. See *supra* note 19.

424. Infanti, *Sodomy Statute*, *supra* note 3, at 771–72.

425. See Brown & Fellows, *Preface*, *supra* note 12, at vii–viii (describing how, through a series of conferences, “a group of tax scholars in which each of us who previously had felt isolated by the traditional tax analysis that dominated the legal literature and tax conferences now had found intellectual kinship,” and expressing their hope that TAXING AMERICA, *supra* note 9, would “provide[] evidence that connection and interchange within a community of scholars are essential”).

426. See, e.g., Kornhauser, *supra* note 12, at 1615–16 (describing ways in which critical tax theory and tax crits are just like mainstream tax theory and mainstream tax academics); Nancy C. Staudt, *Tax Theory and Mere “Critique”: A Reply to Professor Zelenak*, 76 N.C. L. REV. 1581, 1582–85 (1998) (explaining how critical theory actually fits the mainstream paradigm espoused by Professor Zelenak in his lead article in a symposium on critical tax theory, and further explaining how Professor Staudt’s approach in a piece that she wrote, and which Professor Zelenak

from this isolation to form “a remarkable community of scholars.”⁴²⁷ This community is evidenced by *Taxing America*, a book of essays by tax crits, and by periodic critical tax theory conferences.⁴²⁸

Because tax crits seem to be taking the first steps out of the closet, weathering the negative treatment of the mainstream, and standing together and asking to be recognized and respected, the first option—resigned acceptance of their marginality—would be a step backward for the critical tax movement.

2. *Learning from the Same-Sex Marriage Debate*—The other three options facing tax crits lend themselves to discussion as a group. Recall that these options are: (i) wholeheartedly embracing their marginality and using it to accentuate their differences from the mainstream, (ii) rejecting their marginality on the ground that they are actually no different than the mainstream, and (iii) rejecting their marginality as an artificial construct that masks the complex web of similarities and differences that characterize the relationship between tax crits and mainstream tax academics. Together, these three options remind me of the options that faced the gay and lesbian community in the wake of the Hawaii Supreme Court’s 1993 decision in *Baehr v. Lewin*.⁴²⁹ The *Baehr* case represented “the first victory for gay rights activists seeking to secure the legal right of marriage.”⁴³⁰ In the vigorous debate over same-sex marriage that followed the *Baehr* decision, proponents of same-sex marriage and gay and lesbian opponents⁴³¹ of same-sex marriage took positions that, in substance, are strikingly similar to the three options that face tax crits in dealing with their marginality.⁴³²

In making their case (before and) after *Baehr*, proponents of same-sex marriage argued for extending the right to marry on equality grounds, maintaining that gay and lesbian couples should be afforded the right to marry because they are no different from straight couples.⁴³³ Gay and lesbian opponents of same-sex marriage countered that “marriage will not liberate us as lesbians and gay men.

criticized, “is not pragmatism as Zelenak suggests (although it has practical feminist implications), but a theoretical argument that easily fits within the traditional tax policy debates concerning the proper scope of the tax base”).

427. Brown & Fellows, *Preface, supra* note 12, at vii.

428. The most recent conference was held at Rutgers University Law School—Newark in April 2004. Many thanks to Neil Buchanan for organizing the conference, to Rutgers University Law School for hosting the conference, and to Tax Analysts for its financial support of the conference.

429. 852 P.2d 44 (Haw. 1993).

430. Anthony C. Infanti, *Baehr v. Lewin: A Step in the Right Direction for Gay Rights?*, 4 LAW & SEXUALITY 1, 2 (1994) [hereinafter Infanti, *Baehr v. Lewin*].

431. Even with the advent of gay marriage in Canada and Massachusetts, there is still ambivalence among many gay and lesbian couples on the question whether to marry. See Pam Belluck, *Gays Respond: “I Do,” “I Might” and “I Won’t,”* N.Y. TIMES, Nov. 26, 2003, at A1.

432. These groups represent two of the corners in the triangular debate over same-sex marriage. The remaining corner of the triangle was (and continues to be) occupied by heterosexual opponents of same-sex marriage. Infanti, *Baehr v. Lewin, supra* note 430, at 4.

433. See, e.g., Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, in LESBIANS, GAY MEN, AND THE LAW 398, 400-01 (William B. Rubenstein ed., 1993); Andrew Sullivan, *Virtually Normal*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 126, 126-31 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) [hereinafter MORAL AND LEGAL DEBATE]; see also Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 11 (1991) (“Proponents of a campaign for marriage rights have framed their arguments largely in terms of equality for lesbians and gay men Opponents have relied on two primary arguments. . . . Second, these activists have drawn on the politics of validating difference. . . .”).

In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation.”⁴³⁴ Underlying this counter-argument is “the notion that gay relationships are fundamentally different from heterosexual relationships and that, in reality, an entire spectrum of possible relationships exists. To ape heterosexual marriage, simply to gain the benefits that accompany it, is to sell ourselves [i.e., gays and lesbians] short.”⁴³⁵

The idea that fundamental differences separate gay and lesbian couples from straight couples permeates the following statement by Paula Ettelbrick:

Justice for gay men and lesbians will be achieved only when we are accepted and supported in this society despite our differences from the dominant culture and the choices we make regarding our relationships. Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so. It is an identity, a culture with many variations. It is a way of dealing with the world by diminishing the constraints of gender roles that have for so long kept women and gay people oppressed and invisible. Being queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of our society.⁴³⁶

I must admit that, for me, Ettelbrick’s assertions did have a certain persuasiveness to them.

Until recently, I was not a proponent of same-sex marriage because of my shared skepticism about the wisdom of imitating heterosexual marriage.⁴³⁷ But what changed my view was the experience of seeing my sister’s commitment ceremony through the eyes of the two elderly women who had been watching from the hotel lobby.⁴³⁸ They drove home for me how same-sex marriage, no matter how much it is disparaged as a drowning of our differences from the heterosexual majority, is really a radical act that simultaneously demonstrates our similarity to the mainstream and our differences from it.

434. Paula L. Ettelbrick, *Since when Is Marriage a Path to Liberation?*, in MORAL AND LEGAL DEBATE, *supra* note 433, at 164, 165. Nancy Polikoff has espoused a similar view, Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1536 (1993) (“I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.”), as have others, *see* John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1123 n.21 (1999) (discussing the gay and lesbian opposition to same-sex marriage), and *Infanti, Baehr v. Lewin*, *supra* note 430, at 6–7 (same).

435. *Infanti, Baehr v. Lewin*, *supra* note 430, at 7.

436. Ettelbrick, *supra* note 434, at 165; *see also* Polikoff, *supra* note 434, at 1549–50 (“Advocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all. It will also require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people. I fear that the very process of employing that rhetorical strategy for the years it will take to achieve its objective will lead our movement’s public representatives, and the countless lesbians and gay men who hear us, to believe exactly what we say.”).

437. *See supra* Part I.A.

438. *See supra* Part I.A.

To put it in deconstructionist terms, those (including Ettelbrick) who argue against same-sex marriage on assimilationist grounds are setting up a hierarchical opposition by privileging difference over identity. In reaction to those who argue for the right to marry on the ground that gay and lesbian couples are just like heterosexual couples (an argument that implicitly privileges identity over difference), these opponents argue that we should not highlight our similarities to heterosexuals, but should instead highlight our differences from them:

The moment we argue, as some among us insist on doing, that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices. As a lesbian, I am fundamentally different from nonlesbian women. That's the point. Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice.⁴³⁹

In making this argument, opponents of same-sex marriage have traded one privileging for another, and, in the process, have embraced the hierarchical opposition set up by the heterosexual majority to confer a marginalized, outsider status upon them. But whether embraced by heterosexuals or homosexuals, this hierarchical opposition can be deconstructed in much the same way that J. M. Balkin deconstructed the converse identity/difference hierarchical opposition that Ettelbrick and others have rejected as unsatisfying.⁴⁴⁰

Following my sister's commitment ceremony, I came to agree with the proponents of same-sex marriage who argue that extending the right to marry to gay and lesbian couples has the potential to "transform it into something new."⁴⁴¹ There is still something quite radical about two men or two women getting married. After all, President Bush only announced his support for a constitutional ban on same-sex marriage after the Massachusetts Supreme Judicial Court issued a decision legalizing same-sex marriage and the City of San Francisco began to issue marriage licenses to a deluge of same-sex couples.⁴⁴² In the wake of that announcement of support, a number of municipalities reacted by issuing marriage licenses to same-sex couples,⁴⁴³ ministers in New York solemnized same-sex

439. Ettelbrick, *supra* note 434, at 165–66.

440. *See supra* notes 182–188, 192, 193 and accompanying text.

441. Stoddard, *supra* note 433, at 401; *see also* Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, in MORAL AND LEGAL DEBATE, *supra* note 433, at 27, 27–29; Hunter, *supra* note 433, at 13–19.

442. Elisabeth Bumiller, *Same-Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1. The proposed constitutional amendment failed to garner the support of even a majority of the Senate. Carl Hulse, *Senate Blocks Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, at A1.

The City of San Francisco issued more than 4100 marriage licenses to same-sex couples before the California Supreme Court ordered it to cease issuing such licenses, and an additional 2600 couples had made appointments for a license before the order was issued. Dean E. Murphy, *San Francisco Forced to Halt Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at A1.

443. Thomas Crampton, *Issuing Licenses, Quietly, to Couples in Asbury Park*, N.Y. TIMES, Mar. 10, 2004, at B5 (Asbury Park, New Jersey); Matthew Preusch, *Oregon County, with Portland, Offers Same-Sex Marriages*, N.Y. TIMES, Mar. 4, 2004, at A26 (Multnomah County, Oregon); Marc Santora & Thomas Crampton, *Same-Sex Weddings*

marriages in the face of criminal charges for doing so,⁴⁴⁴ and one municipality even stopped issuing marriage licenses at all (i.e., both to opposite-sex and same-sex couples) until its state supreme court issued a decision resolving the question whether same-sex couples are permitted to marry.⁴⁴⁵ Indeed, although my current partner, Hien, and I had discussed the idea of getting married before all of this occurred, the recent course of events has stiffened my resolve to do so.

I view same-sex marriage as allowing me to acknowledge both the ways in which I am like my heterosexual counterparts and the ways in which I am different from them. It is not a matter of arguing that we are *either* the same *or* we are different, because we can be *both* the same *and* different. This is not only a vaguely deconstructionist perspective of same-sex marriage, it is also an entirely realistic one. My sister's commitment ceremony was, in many ways, quite the same as a heterosexual wedding. But, at the same time, it was quite different from a heterosexual wedding because the two people committing themselves to each other for life were of the same sex. Paula Ettelbrick is not wrong when she says that gays and lesbians are fundamentally different from heterosexuals. What she and others who ascribe to her viewpoint miss, however, is that, in many ways, we are also much alike. And what deconstruction tells us about her viewpoint is that ignoring our similarities to accentuate our differences is really no better than ignoring our differences to accentuate our similarities.

3. *Returning to the Collective Identity of the Critical Tax Movement*—By now, I'm sure that you are asking yourself what all of this same-sex marriage talk has to do with tax crits and their collective identity. So, let's return now to the remaining options from which tax crits can choose in rethinking how their marginality fits in with their collective identity: (i) wholeheartedly embracing it and using it to accentuate their differences from the mainstream, (ii) rejecting it on the ground that they are actually no different than the mainstream, or (iii) rejecting it as an artificial construct that masks the complex web of similarities and differences that characterize the relationship between tax crits and mainstream tax academics.

Tax crits might choose the first of these three options, wholeheartedly embrace their marginality, and use it to accentuate their differences from the mainstream. In doing so, they would essentially be choosing the path taken by Ettelbrick and other gay and lesbian opponents of same-sex marriage. Tax crits would be reifying the mainstream/marginal hierarchical opposition and acting as if their differences from the mainstream were both real and their defining characteristics. Like the gay and lesbian opponents of same-sex marriage, tax crits would be embracing an easily deconstructible hierarchical opposition and ignoring the reality that they are in many ways similar to mainstream tax academics. For example, Marjorie Kornhauser has pointed out that we are all interested in unraveling the story behind tax provisions; we just go about it in different ways.⁴⁴⁶ Likewise, Nancy Staudt has explained the importance of critical analysis to the formulation of workable legal reform, which is also often a shared goal.⁴⁴⁷

in Upstate Village Test New York Law, N.Y. TIMES, Feb. 28, 2004, at A1 (New Paltz, New York).

444. Thomas Crampton, *Two Ministers Are Charged in Gay Nuptials*, N.Y. TIMES, Mar. 16, 2004, at B1.

445. Kate Zernike, *Gay? No Marriage License Here. Straight? Ditto.*, N.Y. TIMES, Mar. 27, 2004, at A8.

446. Kornhauser, *supra* note 12, at 1615.

447. Staudt, *supra* note 426, at 1582–83.

Or tax crits might choose the second of these three options and argue that they should be admitted to the mainstream because they are actually no different from mainstream tax academics. This option suffers from nearly the same flaws as the previous option; it privileges the ways in which tax crits are similar to mainstream tax academics over the ways in which they are different. For example, tax crits often use different methods (e.g., narrative, feminist, and minority perspectives) than those employed by mainstream tax academics.⁴⁴⁸ Accordingly, were tax crits to choose this option, they would again be embracing a hierarchical opposition that is easily deconstructible and that fails to comport with reality.

Alternatively, tax crits might choose the last of these three options and reject their marginality as an artificial construct that masks the complex web of similarities and differences that characterize the relationship between tax crits and mainstream tax academics.⁴⁴⁹ I find this option to be more appealing because it would open the possibility of breaking down the artificial barrier between marginal and mainstream contributions to the tax policy literature while not suppressing tax crits' distinct voice or dissolving the community that they have developed around the ways in which they differ from the mainstream.⁴⁵⁰

Once the mainstream/marginal hierarchical opposition is seen for what it truly is—not a reified status but a constructed, unstable, context-driven boundary—there is no reason to attach quite so much significance to it. In fact, why attach any significance to it at all? The existence of different groups of scholars can surely be acknowledged without privileging one group over the other. There is, without doubt, room in the tax policy literature for all contributions, just as there is room in the institution of marriage for all couples—neither inhabits a finite space. Moreover, once critical contributions to the tax policy literature are confronted on their merits and on appropriate terms (rather than being ignored or trivialized because of their “marginality”), critical tax theory, much like same-sex marriage, has the potential to transform the tax policy discourse for the better.

448. See Kornhauser, *supra* note 12, at 1615 (“An important goal of tax scholarship, then, is to unravel the story about that particular truth—to show that it is only a story and to reveal its origins and its effects, which may be unintended. This unraveling can be done in a number of ways, for example by philosophic or historical examinations. Critical tax theory also does this by using non-traditional views and theories to examine provisions frequently enacted in far different times by people with world views not representative of all taxpayers back then (let alone now).” (footnote omitted)).

449. See DERRIDA, GRAMMATOLOGY, *supra* note 2, at 89 (“And, indeed, one cannot say that each graphic signifier belongs to such and such a class, the cuneiform code playing alternately on two registers. In fact, each graphic form may have a *double value*—ideographic and phonetic. And its phonetic value can be simple or complex. The same signifier may have one or various phonic values, it may be *homophonic* or *polyphonic*. To this general complexity of the system is added yet another subtle recourse to categorical determinatives, to phonetic complements useless in reading, to a very irregular punctuation.”).

450. See Taylor & Whittier, *supra* note 397, at 111 (“For any subordinate group, the construction of positive identity requires both a withdrawal from the values and structures of the dominant, oppressive society and the creation of new self-affirming values and structures.”)

V. CONCLUSION?

With this food for thought, we have come to the formal end of this article. But this end is really not an end at all:

[T]he decision to stop and assess the conclusions of one's argument, to state them as conclusions . . . leaves unspoken the many further steps that could be taken. These additional steps could lead to a partial or even a complete transformation of the conclusions just arrived at. Thus, from another perspective, the conclusion of a deconstructive argument is a conclusion in neither sense of the word: for it does not end the possible lines of deconstructive argument, nor does it lead to a fixed and determinate result.⁴⁵¹

In this case, the further steps to be taken need not be left unspoken. With the floor finally open, the give and take among tax crits about the shape of the critical tax movement's collective identity and how "marginality" fits into it can now begin . . .

