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The Definitions of Income

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I. INTRODUCTION

What is income? Perhaps you know it when you see it, but defining income in a comprehensive, rigorous, and coherent way is very difficult, if not impossible. Economists, tax scholars, policymakers, and others have struggled with the income concept for well over a hundred years, with no solution in sight. Instead, we have many different definitions of income for different purposes—income definitions for taxes, transfers, measurement of national production, measurement of household resources, measurement of individual wellbeing, health care subsidies, student financial aid grants and loans, and more.[1] Even within the Code, there are several different measures of income for different purposes.[2] Each concept serves a specific goal, but none is truly comprehensive, nor can any be.

In this Article, I explore in depth the conceptual difficulties presented by the income concept. Because a truly complete and rigorous definition of income is impossible or unworkable, we must make decisions about what the practical simplifications will be. This means that any operative definition of income is essentially a political choice, even when we claim to be using a pure definition, and any definition thus inherently incorporates normative views about, for example, justice, social policy, and economics. Ultimately, "income" is whatever society wants it to be in order to achieve a result that the democracy believes to be appropriate and just. Including some items of income in "income" but not others means that those items become the focus of normative comparisons between individuals, while others are ignored.

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[1] See Part II.

[2] See, e.g., IRC § 61 (gross income), § 62 (adjusted gross income), § 63 (taxable income), § 55(b)(2) (alternative minimum taxable income). There are several different definitions for "modified adjusted gross income." See, e.g., §§ 24(b)(1), 36B(d)(2)(b), 86(b)(2), 135(c)(4), 221(b)(2)(C).

Income is thus a constructed idea, inherently driven by policy objectives and pragmatic concerns. From the standpoint of taxation, that in and of itself is not necessarily a problem, nor is it surprising. It is of course well understood that most legal concepts and rules are constructed ideas that embody policy choices.[3] The particular danger here, however, is that the increasing hegemony of the tax concept of income has second-order effects, because the choice of a tax base can also end up being a choice about a broader "index of equality."[4] Because we can only study what we measure, income—and, as I show, largely a tax-driven construction of income—has become the yardstick by which we make normative comparisons between individuals, and by which we measure the effects of a broad range of policies and institutional forces. But because the definitions of income themselves incorporate policy decisions, we can inadvertently ignore or even entrench the effects of those decisions when we use those income definitions for other purposes, especially in areas where they do not belong.

To see the problem with defining income, consider the following puzzles, familiar to most students of basic taxation: Homeowners earn a return from their own homes, which ought to be considered income. The home produces a return just like any other asset—but the return is in the form of housing. If I live in a home that I own, I avoid having to pay rent elsewhere, and that savings is a benefit to me—a net accretion to my wealth. But that return goes untaxed—even though the value of that housing benefit would be taxed if instead I rented the home to a third party.

The failure to tax imputed rental income is considered a big hole in the tax base. Treasury treats the exclusion of net imputed rent from owner-occupied housing as the second-biggest tax expenditure, costing about $100 billion a year in lost revenue.[5]

A similar problem in income taxation is the imputed income from self-provided services, especially child care and housework. Providing child care oneself generates imputed income, since the parent thereby avoids paying cash to a third party. As with owner-occupied rent, if the parent paid a child care provider to watch his children while working himself as a child care provider outside the home, both payments would be taxable, and the result should not be different just because the parent provides the care to his own children, rather than someone else's.

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[3] See, e.g., Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935).

[4] See Part VI.

[5] Treasury Dep't, Tax Expenditures 9-10, 33 (Nov. 11, 2015), https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2017.pdf.

Like the nontaxation of imputed rent, the nontaxation of imputed services is a pervasive and important problem. It likely accounts for at least some of the relatively low labor force participation by women, for example, since it is often cheaper after taxes for a mother to provide child care herself than to pay someone else to enable her to work outside the home.[6] Empirical studies have shown that secondary earners in a household are particularly responsive to marginal tax rates, so this effect could be quite large.[7]

But what is often left out of these commonplace discussions is how far the imputed income logic can go. If I am earning imputed rent from my home, what about from my car? My furniture? My computer? My dishwasher? My *dishes*? And if a stay-at-home parent is earning imputed income from self-provided child care, what about lawn-mowing? Cooking? Shaving? Or even providing parental advice? Each of these things is a valuable good or service that has or could have a market price, and the logic behind imputed rent and child care services applies equally to these other goods and services. And these are the simple problems—as I discuss below, problems of psychic and capital income compound the issue significantly. Once these forms of income are included, it is not even clear what income is any more.

This conceptual difficulty of defining income comprehensively is an old problem. The puzzles above are versions of Kleinwächter's Conundrums, posed by the German fiscal theorist Friedrich von Kleinwächter in 1898 to attack the very idea of income taxation.[8] Henry Simons is usually read as effectively rebutting Kleinwächter, but as I show here, Simons did not resolve the most difficult issues.[9] Moreover, one of Simons' lesser-known purposes was to reject definitional arguments in the first place.[10] Arguments over what is and is not "income" elevate accounting operations, he wrote, and can make us lose sight of the fact that an income tax is ultimately a tax on *individuals* according to their economic wellbeing.[11]

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[6] See, e.g., Grace Blumberg, Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers, 21 Buff. L. Rev. 49, 69-71 (1971).

[7] See, e.g., Nada Eissa, Taxation and Labor Supply of Married Women: The Tax Reform Act of 1986 as a Natural Experiment 9-13 (Nat'l Bureau Econ. Research, Working Paper No. 5023, 1995), http://www.nber.org/papers/w5023.pdf; Emmanuel Saez, Joel Slemrod & Seth H. Giertz, The Elasticity of Taxable Income with Respect to Marginal Tax Rates: A Critical Review, 50 J. Econ. Lit. 3, 3-4 (2012).

[8] Friedrich Ludwig von Kleinwächter, Das Einkommen und Seine Verteilung (Income and Its Distribution) (1898) (unpublished trans. Hannelore T. McDowell, on file with the Wake Forest University Law School Library); see Part II.

[9] See Part II.

[10] Henry C. Simons, Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy 59-80 (1938).

[11] Id. at 76-85.

Early courts also struggled with defining income, and it was not until 1955 that the Supreme Court held that the Sixteenth Amendment authorized taxing a broad and expansive concept of income from "whatever source derived."[12] One of the first early debates in the courts was over the treatment of stock dividends in *Eisner v. Macomber*,[13] a question that appeared to divide Simons and another early–twentieth century economist, Edwin R.A. Seligman.[14] Simons viciously attacks Seligman's argument that stock dividends cannot be income under the Constitution, but ultimately reaches the same conclusion on pragmatic grounds.[15] In a sense, Simons ignores his own advice and is seduced by the definitional argument, while dismissing its usefulness at the same time.

This same issue—disguising policy choices as something more normative or theoretical—pervades two other prominent debates in the literature: the roles of a "comprehensive tax base"[16] and of tax expenditures.[17] Boris Bittker appears in both debates, making strong arguments against reliance on some "pure" definition of income,[18] but the errors he points out still linger, as evidenced by the Joint Committee on Taxation's failed 2008 project to reform tax expenditures analysis.[19] These debates underscore further that income is a constructed concept, as are the purported normative baselines to which we compare our actual tax base.

Income definition issues also arise in interpreting optimal tax theory, because economists working in the Mirrlees framework have adopted a particular, and narrow, definition of income different from that used by other economists and legal scholars for other purposes.[20] In the Mirrlees framework, the social planner is often described as wanting to tax *ability* to earn income, rather than income itself, since that would avoid the distortion from taxpayers substituting leisure for labor.[21] But because the social planner can only observe and tax actual income, information asymmetries arise that can lead to labor/leisure distortions and deadweight loss. Optimal income tax theory asks

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12 Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 432 n.11 (1955).

13 252 U.S. 189 (1920).

14 Simons, note 10, at 85-89.

15 Id. at 203-04.

16 See Part III.

17 See Part IV.

18 Boris I. Bittker, A "Comprehensive Tax Base" As a Goal of Income Tax Reform, 80 Harv. L. Rev. 925, 985 (1967); see Part III for additional commentary.

19 Staff of the Joint Comm. on Tax'n, JCX-37-08, A Reconsideration of Tax Expenditure Analysis (May 12, 2008), http://www.jct.gov/x-37-08.pdf; see Part IV.

20 See James A. Mirrlees, An Exploration in the Theory of Optimum Income Taxation, 38 Rev. Econ. Studies 175 (1971).

21 Mirrlees, note 20, at 175.

how to maximize social welfare given these forces, and the models suggest how to "optimally" tax income—most famously, the Atkinson-Stiglitz result, which is sometimes interpreted to mean that the social planner should not tax capital income at all.[22]

But optimal income tax theory is not free from the same definitional ambiguities that bedeviled early legal scholarship. The definition of income in optimal tax theory—generally labor earnings that are a function of ability and effort[23]—is quite different from both the Haig-Simons definition used by other theorists and the actual definition in the Code.[24] And that choice of definition is driven by the particular policy concerns of the researchers—namely minimizing labor/leisure distortions and the need for a mathematically tractable way to model the social planner's information problems.[25] The results that flow from the models depend in large part on these *prior* decisions about how to define income. Different definitions could produce different results, however. Thus a measure of caution is needed in interpreting the results of the theory.

To underscore the point that there is no single definition of income, and that even practical definitions can differ greatly, I also analyze and compare a dozen different income concepts used by government agencies for various purposes, such as economic analysis or distribution of transfers.[26] The depth and breadth of this comparison is, to my knowledge, unique in the literature, and it reveals a surprising amount of variation, as well as a surprising amount of uncertainty—the definitions of income are relatively opaque, especially in the details. Despite this variation, however, the definitions also show a core connection to adjusted gross income (AGI), the tax measure of income. Several of the income definitions are just modifications to AGI; others are surveys that refer respondents to tax returns, and others rely in part on tax administrative data in constructing their measures. The tax system's choices of how to measure income thus reverberate into nontax areas, meaning that tax policy choices can inadvertently affect nontax policies.

I conclude by examining some of the leading economic studies of income inequality, especially by Thomas Piketty and Emmanuel Saez. Piketty and Saez rely on tax administrative data to measure income inequality, in order to measure top income shares where survey data is

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[22] A.B. Atkinson & J.E. Stiglitz, The Design of Tax Structure: Direct Versus Indirect Taxation, 6 J. Pub. Econ. 55 (1976); see note 126.

[23] Louis Kaplow, The Theory of Taxation and Public Economics 54 (2008).

[24] See generally Part II; IRC § 61.

[25] See, e.g., Kaplow, note 23, at 54-56.

[26] See Part VI.

lacking.[27] But I show that this choice raises significant questions about the way they measure both levels of income and income shares. These issues are implicitly acknowledged by a paper by Piketty, Saez, and Gabriel Zucman, which leans more heavily on survey data, especially from the Census Bureau, to get a fuller picture of income distribution.[28] The need to rely on multiple sets of data is further reinforced by a competing line of income inequality literature.[29]

This Article makes several contributions. First, it provides a critical examination of the intellectual history of the income concept, spanning from 1898 to the present day, and incorporating materials from the legal, economic, and policy literatures. While necessarily incomplete, it is still the most comprehensive overview in the literature to date, and yields several important insights. Second, this Article provides a close reading of the optimal tax theory literature to challenge some of the overly simplistic ways in which it is sometimes interpreted, especially in the legal literature. Third, it provides a uniquely broad and deep examination of twelve different income concepts used by the federal government, and the pros and cons of each. This is material that is necessary for any analysis of income data, yet has not appeared in the literature prior to date. Finally, the Article shows the growing hegemony of the tax concept of income—AGI—and describes the risks (and some rewards) of applying that concept outside of tax.

This Article proceeds as follows. In Part II, I critically review some of the early intellectual history of the income concept, especially the role of Simons and his famous statement defining income. Part III examines and recasts the prominent mid-century debate over the comprehensive tax base. In Part IV, I do the same for the tax expenditure debate, highlighting especially the failure of the Joint Committee's 2008 reform project. Part V turns to optimal income tax theory, to explain how policy choices embedded in the optimal tax models influence the interpretation of the models. Part VI expands beyond income taxation to examine other income definitions and concepts, but also shows the long reach of the tax definition of income. This Part

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[27] Thomas Piketty & Emmanuel Saez, Income Inequality in the United States, 1913-1998, 118 Q.J. Econ. 1 (2003).

[28] Thomas Piketty, Emmanuel Saez & Gabriel Zucman, Distributional National Accounts: Methods and Estimates for the United States, 133 Q.J. Econ. 553 (2018).

[29] See especially Richard V. Burkhauser, Jeff Larrimore & Kosali I. Simon, A "Second Opinion" on the Economic Health of the American Middle Class, 65 Nat'l Tax J. 7 (2012) [hereinafter Second Opinion]; Jeff Larrimore, Richard V. Burkhauser, Gerald Auten & Philip Armour, Recent Trends in U.S. Top Income Shares in Tax Record Data Using More Comprehensive Measures of Income Including Accrued Capital Gains (Nat'l Bureau Econ. Research, Working Paper No. 23007, 2016) http://www.nber.org/papers/w23007.pdf [hereinafter Recent Trends]

also reviews the work of Piketty, Saez, and others. Part VII concludes.

II. The Difficulty of Defining Income

The problems with defining income are as old as—if not older than—the income tax itself. In this Part, I review some of the early intellectual history of the income concept, focusing on the work of Kleinwächter, Seligman, and Simons. Simons is sometimes portrayed as resolving important definitional questions, but, as I show here, all he does is either dismiss them or rephrase them. The same questions remain with us today.

A. Kleinwächter's Conundrums and the Problem of Imputed Income

The challenge that imputed and psychic income pose to a rigorous conception of income has been known since at least the nineteenth century. The mid-to-late-nineteenth century was the beginning of the widespread shift from property taxes and customs duties to income taxes as the biggest source of government revenue, and early fiscal theorists, especially in Germany, struggled to come up with a clear definition of this new tax base.[30] A particular example of the difficulty that has played an important role in English-language tax theory are what sometimes are called "Kleinwächter's Conundrums," discussed by Simons.[31] Because Kleinwächter's criticisms continue to be trenchant over 100 years later, and because the Haig-Simons income definition is a direct response to them, I review them here in detail.

Kleinwächter presents the straightforward logic for why "income" must include items of imputed or psychic income. He starts by saying that income clearly cannot be just cash income, since one could also be enriched by commodities and other noncash property and benefits, such as room and board for a household servant.[32] And, if that is so, then "income" must also include intangible items, like property or contract rights. And if these commodities and rights received exter-

[30] See Simons, note 10, at 59-80 (reviewing earlier attempts).

[31] Id. at 52-53.

[32] Kleinwächter, note 8, at 3 ("Actually, as far as the concept of income is concerned, it is of no importance whether the individual receives cash in hand with which he will buy the necessary food items, the clothing and other things which are needed in life; or if all these items in question are delivered to his house in kind, because in both cases some kind of goods came into his household from the outside.") (All Kleinwächter page references are to the McDowell translation.)

nally can be income, so must commodities and rights produced within a household, like a farmer growing his own food.[33]

At this point, once income includes tangible and intangible goods, and goods produced both outside and within a household, Kleinwächter declares, "one has reached a point where the concept of income has become so watery and ethereal that absolutely nothing can be done with it in practical life."[34] He then proceeds with his famous *Flügeladjutant* example.

Suppose, he says, that there is a soldier who serves as the prince's *Flügeladjutant*, or aide-de-camp:

> The aide-de-camp occupies an apartment in the princely residence which obviously is free of charge; heating and lighting, understandably, are also free; one or two servants are assigned to the aide-de-camp from the princely household; he takes his meals daily at the princely table; every evening he sits in the box at the theater with his sovereign; he rides in the carriage and rides on the horses of his master; he accompanies the ruler on all excursions and trips and takes part in all festivities at court. In short, he leads a life as if he himself were a prince, at the cost of the princely bureaucracy.[35]

Clearly, says Kleinwächter, this soldier has income to the extent of these benefits, much more so than if he were just assigned a normal post where he would receive little more than his wages. While this is an extreme example, he goes on, the same logic would apply to any job that includes payment or benefits in kind, such as a servant's room and board or a private teacher's standing invitation to lunch (this being 1898).[36]

Treating in kind transfers as income raises difficult issues of identifying and valuing the various benefits a person might receive, but Kleinwächter goes further. First, he asks: What if the aide-de-camp actually *hates* all of these things? How should we consider these benefits "if the continuing visits to the theater, concerts, balls, evening parties (and so on) are a great bore; in short, if all of this is an

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[33] Id. at 5 ("[I]f, for example, a landowner rented his land for monetary rent and lived on this rent in a city far away from his estate there could be no doubt, even by the limited conception [of monetary income], that that man had a regular income. Now, compare this landowner with a second one, who does not rent his properties, but rather cultivates them himself and perhaps consumes the major part of the harvest of his estate directly. One is forced to conclude, that this second property owner also, as well as the first one, has an actual 'income.'").

[34] Id.

[35] Id. at 6.

[36] Id. at 7-8.

exceedingly burdensome official duty to him?"[37] How do we value perquisites that are not benefits but rather burdens of the job, particularly when such benefits and burdens are subjective?

Second, he asks, if all the goods and services that come into a household are income, what about a meal at a friend's house, or even "an offered cigar"?[38] Would not these too be accretions to wealth, or a flow of benefits? Finally—anticipating the "sharing economy" that will appear over a century later—Kleinwächter wonders about underused consumer durables and personal time. If one who stays in his home instead of renting it out has imputed rental income, what about someone who chooses to lie on his own "bed or divan and perhaps read the most dreadful dime novels"?[39] Or a mother who chooses to wash and comb "her little wild rascals" rather than earn cash by washing and combing another's?[40] And so on.

Kleinwächter underscores the absurdity of going to these extremes by illustrating the distributional consequences. A poor family would suddenly seem rich, because of all the services they provide to themselves, unable to afford alternatives:

> [I]f then in addition, the heavens are as merciful as to send a few long and hard illnesses into their home, during which time the children are being nursed by the mother with self-sacrifice of her own health, and if—which is the main point—the people do not forget to register painstakingly all of those services in their ledger as receipts because every service could have been performed for strangers for money or, the reverse, would have had to be bought for money from strangers—thus, the ledger will easily show a sum of "receipts" of several tens of thousands at the end of the year.[41]

In summary, Kleinwächter makes three essential arguments against the income concept. First, it is impossible to identify all the "inflow[s] of satisfactions" (in Seligman's later phrase[42]) that a person accrues. Second, even if we could identify these flows of satisfactions, the measurement of such income is not feasible, since the satisfactions are subjective and heterogeneous. Third, if we actually solved the first and second problems, income would not serve well as an "index of

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[37] Id. at 8.

[38] Id. at 9.

[39] Id. at 9-10.

[40] Id. at 10.

[41] Id. at 10-11.

[42] Edwin R.A. Seligman, Are Stock Dividends Income?, 9 Am. Econ. Rev. 517, 517 (1919).

equality" (in Richard Musgrave's later phrase[43]) for making comparisons between households.

Ultimately, Kleinwächter concludes, income tax supporters have "let themselves be deceived by the transactions of the businessman."[44] Business income, he says, is an accounting shorthand to measure profit and loss, but cannot be pressed into the broader measurement of all individuals' inflows and outflows, particularly of intangible or self-created goods, much less the psychic benefits of each. As Simons, writing forty years later, says, "[t]he problem is clearly hopeless."[45]

B. Simons' (Partial) Solution

Despite his pronouncement of the problem as hopeless, Simons takes up the challenge of defining income, or at least appears to. His phrasing of the definition has become canonical among tax theorists, lawyers, and economists, but his treatment of the problem is more nuanced and, at times, contradictory.[46] Simons defines income as follows:

> Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question. In other words, it is merely the result obtained by adding consumption during the period to "wealth" at the end of the period and then subtracting "wealth" at the beginning.[47]

He goes on to say that the "*sine qua non* of income is *gain*."[48] Here, Simons' main task is rebutting those who would define income as merely an accounting measure of the differences between inflows and outflows.[49] Simons rightly deserves credit for putting to rest that idea, and especially for acknowledging that increases in wealth are just as

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[43] Richard A. Musgrave, The Theory of Public Finance 161 (1959).

[44] Kleinwächter, note 8, at 19.

[45] Simons, note 10, at 53.

[46] Victor Thuronyi also reads Simons as being contradictory and somewhat ambiguous, though in a different way than I find here. See Victor Thuronyi, The Concept of Income, 46 Tax L. Rev. 45, 48-49 (1990).

[47] Simons, note 10, at 50. This is typically called "Haig-Simons" income, because of the similar formulation of Robert Haig. See Robert Murray Haig, The Concept of Income—Economic and Legal Aspects, in The Federal Income Tax 1, 7 (Robert Murray Haig ed., 1921) (emphasis omitted) ("Income is the money value of the net accretion to one's economic power between two points of time.").

[48] Simons, note 10, at 50.

[49] See id. at 51 ("This position, if tenable, must suggest the folly of describing income as a flow and, more emphatically, of regarding it as a quantity of goods, services, receipts, fruits, etc.").

much income as wages or the profit from sales. But, as he himself acknowledges, his phrasing does not answer "the unanswerable question as to where or how a line may be drawn between what is and what is not economic activity."[50]

He then turns to some of the objections raised by Kleinwächter. As to imputed income, including self-provided services like caring for sick children, Simons largely assumes away the problem. First, he notes (correctly) that "leisure is itself a major item of consumption,"[51] and that therefore we do not need to be concerned with identifying nonmarket services. Whether one provides a service within the household or just sits around, one would be consuming the same amount, in terms of an hourly wage forgone.[52] Second, he assumes that "these elements of income vary with considerable regularity, from one income class to the next, along the income scale."[53] Because, Simons says, income is fundamentally a *relative* concept,[54] we can assume away those things that would not alter the relative ranking of individuals.

But this move raises more questions than it answers. His argument essentially is (1) that leisure and imputed income can be valued at the same hourly rate as one's paid employment, and (2) that individuals' hours worked either increase as one goes up the income scale, or at least decrease slower than the hourly wage increases. As a result, we can remove the hours spent in leisure or providing services in the household without changing the ranking of income groups.

As to the first point, the inclusion of all hours, regardless of whether spent at work, leisure, or otherwise, is another way of saying that we should be assigning burdens based on someone's hourly wage rate,[55] not their overall level of income—work effort and other factors that go into determining total wages are not relevant (or at least not rele-

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[50] Id.

[51] Id. at 52.

[52] That is, if we value a person's time by his or her market wage, the imputed income from providing household services or from leisure (as an item of consumption) is the same—simply the hourly wage multiplied by the time spent at the activity.

[53] Simons, note 10, at 53.

[54] See id. at 49 ("[Personal income's] measurement implies estimating merely the *relative* results of individual economic activity during a period of time."); see also id. at 200 (noting that the income tax "is a tax upon persons according to their respective incomes which, strictly, are merely estimates of their relative 'prosperity'").

[55] In addition to my objections below, it is also not clear that this would be the right way to value these services or psychic benefits. Researchers use many different methods to try to value unpaid domestic services, and using the opportunity cost of the person providing the services is only one such way. Other ways include measuring the market value of the output itself (for example, child care) and valuing the labor based on the wages paid for similar work. See, e.g., U.N. Econ. Comm. for Eur., Canberra Group Handbook on Household Income Statistics 40-41 (2d. ed. 2011) [hereinafter Canberra Group Handbook].

vant in making comparisons). This presages the move by optimal tax theory to focus on "ability" to earn income, rather than actual income.[56] As I discuss in Part V, this is a normatively flawed basis for taxation. But it also undermines the whole income concept if the logic ultimately leads one to throw out "income" altogether and just look at ability or the value of one's time. Simons is not saying that Kleinwächter is *wrong* to consider imputed and psychic income—indeed, he essentially concedes the point, but just decides it does not matter. But by doing so he implicitly redefines income itself.

As to second point, even if the general statement seems broadly true with respect to income groups—with relatively few hours in a day, it seems unlikely that the inclusion of a few more hours of imputed income and leisure would overwhelm differences in wages—it ignores several important margins of comparison, especially within income groups. What about an unemployed or underemployed person who does not actually value their leisure time? What about the well-known distortions resulting from the exclusion of imputed child care services?[57] What about just the simple comparison between two individuals with the same wages but who work very different hours? Should an income concept necessarily assume away the differences in those two individuals?

Moreover, ignoring nonmarket activities of households may give a false impression of the income dynamics of a given household. For example, if a household member shifts from providing nonmarket services to providing market services, the household might appear to have increased its income, when there has been no real change in economic power. In part for this reason, the Stiglitz-Sen-Fitoussi Commission on the Measurement of Economic Performance and Social Progress recommended expanding government income measures to include nonmarket activity.[58]

With respect to the unhappy *Flügeladjutant* and the problem of psychic income, Simons makes a similar move as for imputed income: "[A]gain, these elements of unmeasurable psychic income may be presumed to vary in a somewhat continuous manner along the income scale."[59] But that move comes only after first underscoring Kleinwächter's point. The *Flügeladjutant* parable provides a stark example of the need to value perquisites of employment, but the problem is not limited to members of a prince's court. Why not also the

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[56] N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan, Optimal Taxation in Theory and Practice, 23 J. Econ. Persp., Fall 2009, at 161-64.

[57] See notes 6-7 and accompanying text.

[58] Joseph E. Stiglitz, Amartya Sen & Jean-Paul Fitoussi, Report by the Commission on the Measurement of Economic Performance and Social Progress 14 (2009).

[59] Simons, note 10, at 53

"prestige and social distinction of a (German) university professor[?]" asks Simons.[60] Attempting to measure the subjective value of different forms of compensation, Simons says, "would be the negation of measurement."[61] Simons is again agreeing with the point—both that these psychic benefits are income and that they are impossible to measure—but argues again that they can be ignored because they will not affect the relative comparisons between individuals.

Again, this assumption is not at all obvious, especially with respect to horizontal comparisons. A prison guard and a public interest lawyer might earn similar wages, but surely earn very different psychic benefits. Political candidates fight tooth and nail over relatively low-paying jobs, implying that the power and prestige of the position is quite valuable. And certain well-paying "pink collar" jobs continue to have trouble attracting men likely due to a perceived lack of status.[62] There is enough heterogeneity of psychic benefits across jobs and individuals to make universal assumptions unreasonable.

To be clear, I am not saying Simons is definitely wrong, and that we must include these items of income. Rather, the point is that Simons does not fully address Kleinwächter's argument that a true comprehensive measure of income is unknowable or unworkable. The point that I make throughout this Article is that any income definition necessarily includes choices of what to include and what not, and Simons' no less. His choice to ignore much imputed income, leisure, psychic benefits, and the like may be entirely reasonable—but it is still a *choice*. Simons' construction of his purportedly comprehensive income definition hides many of those choices.

The irony is that, while Simons and his book are remembered largely for his project of providing this purported comprehensive definition of income, the book has another, less well-known goal as well—to advocate for less slavish resort to definitional arguments in the first place. He says, for example, that when lawyers and economists put too much stock in definitional arguments:

> The numerical results of accounting operations are immediately reified; the discussion proceeds in terms of the income tax as a tax upon income—like a tax on potatoes or mousetraps—and loses sight of the obvious fact that it is a tax upon persons according to their respective incomes which, strictly, are merely estimates of their relative 'prosperity.'[63]

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[60] Id.

[61] Id.

[62] See, e.g., Claire Cain Miller, Why Men Don't Want Jobs Done Mostly by Women, N.Y. Times, Jan. 5, 2017, at A3.

[63] Simons, note 10, at 200.

The income tax is ultimately a tax on *individuals*, and "income" is just a rough heuristic for what a given individual ought to pay. An income tax is different from, for example, a direct sales tax or custom duty, which is just a levy based on the market value of a transaction. The goal with an income tax, as conceived by Simons and other early theorists, was not just for the government to get a cut of market transactions, but to attempt as best as possible to measure an individual's ability to pay, and thus to determine how much of the overall tax burden to assign to that individual. Rather than get caught up in trying to define "income" in some pure Platonic sense, we should keep in mind the underlying goal of the tax when constructing the definition of the tax base—to, as Simons says, levy taxes on individuals relative to their prosperity.[64]

The implication of this view is that an operative definition of income is a policy choice driven by the underlying purposes of the tax, not some exogenous idea of what "income" is. In the end, the best rebuttal to Kleinwächter is that we do not need a pure definition of income to make policy choices. But even as Simons makes that point, he is still purporting to provide a technical-sounding comprehensive definition of income involving "algebraic sum[s]" and "store[s] of property rights."[65]

As Simons acknowledges, all his definition does is change the question. Instead of "What is income, and how do we measure it?" Simons asks "What is consumption and accumulation, and how do we measure them?"[66] But these problems are just as hopeless.

C. Stock Dividends and Eisner v. Macomber

The central tension of Simons is his robust defense of his own income definition and attack on others' definitions, even while telling us not to rely on definitional arguments in the first place. This tension can be seen in his discussion of stock dividends and *Eisner v. Macomber*.[67] The argument over that case also demonstrates another of the points of this Article: that definitional arguments about income are frequently arguments about something else, such as practical feasibility, fairness, distribution, or economic efficiency, and that the definitions themselves generally follow from policy or political goals rather than being prior to them.

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[64] Cf. Thuronyi, note 46, at 49 ("A careful reading of Simons suggests, however, that he did intend his definition to flow, at least in part, from judgments about tax equity.").

[65] See Simons, note 10, at 50.

[66] See id.

[67] See id. at 197–204.

Simons devotes a large part of his book to a full-frontal attack on Seligman and his treatment of stock dividends.[68] Seligman was a U.S. economist and fiscal theorist in the late nineteenth and early twentieth centuries, and was an important intellectual figure behind the adoption of a federal income tax in 1913.[69] In 1919, the Supreme Court heard the case of *Eisner v. Macomber* on the issue of whether stock dividends could be considered "income" for tax purposes.[70] Congress made stock dividends taxable in the 1916 Act,[71] and the case challenged whether stock dividends could be considered income under the Sixteenth Amendment.[72] The case was argued before the Supreme Court twice, and between the arguments Seligman published an article in the *American Economic Review* arguing that stock dividends are not income by definition.[73]

The article likely influenced the Court, which adopted some of Seligman's arguments in holding that stock dividends were not income.[74] While excluding stock dividends was a reasonable result on its own, the case had ramifications beyond that limited issue, since it purported to give a definition of income under the Constitution that was quite narrow: "the gain derived from capital, from labor, or from both combined." The case is famous in large part for this error; the Court relatively quickly began backing away from such a constitutional limitation,[75] before refuting it entirely in *Glenshaw Glass*.[76]

Seligman's argument is clearly flawed, as Simons makes clear. Seligman starts off appearing to use comprehensive income definitions similar to Simons and Kleinwächter. He says that income is "all wealth that comes in"[77] and "any inflow of satisfactions which can be parted with for money. It may not be money income, but it must be capable of being transmuted into money income."[78] As Kleinwächter pointed out, that is hardly a useful touchstone, since it would include

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[68] A stock dividend is just what it sounds like—a distribution by a corporation to shareholders of stock in itself. If done pro rata, this has no net effect on shareholders, since the new stock would not change their relative ownership of the corporation, nor would any of the corporation's assets have left corporate solution. The only real effect is to move some amounts from retained earnings to paid-in capital on the corporation's balance sheet.

[69] See Ajay K. Mehrotra, Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877-1929 (2013); Edwin R.A. Seligman, Progressive Taxation in Theory and Practice (1908).

[70] 252 U.S. 189 (1920); see Seligman, note 42, at 517.

[71] Revenue Act of 1916, Pub. L. No. 64-271, § 2(a), 39 Stat. 756, 757.

[72] *Eisner*, 252 U.S. at 199.

[73] Seligman, note 42, at 536.

[74] *Eisner*, 20 U.S. at 208.

[75] See, e.g., Helvering v. Bruun, 309 U.S. 461, 468-69 (1940) (rejecting the constitutional argument).

[76] Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430-31 (1955).

[77] Seligman, note 42, at 517.

[78] Id. at 518.

things like strawberries picked while on a walk or parental advice to a child.[79]

Recognizing that these definitions are "too vague,"[80] Seligman goes further. Because the question concerned stock dividends, the distinction between capital and the income from capital is central. Seligman sets out to differentiate the two based on the idea of realization and separation. If the income from the capital cannot be realized and separated from the underlying capital, he writes, it is at best "inchoate" and more likely not income at all.[81] He compares the lack of separation to, for example, a plumber choosing not to sell his services, or a mare not yet pregnant with a foal.[82] Realization and separation are therefore "necessary attribute[s] of income"[83]—that is, part of the definition of income. Because a stock dividend does not involve any value leaving corporate solution, there is no realization and separation, and therefore no income, by definition.

With this, Simons cannot abide. For several pages of his book, he ruthlessly takes down Seligman's analysis.[84] He describes it as, for example, a "parade of dogmatic assertions—put forward as necessities of logic,"[85] and states that "[i]n [his] emphasis upon the necessity of realization, Professor Seligman has outdone even the accountants."[86] Simons also writes, "Certainly the phrase 'inchoate income' deserves prominent place among the curiosities of economic terminology."[87]

While the tone is harsh, the points are fair. As Simons points out, Seligman is inconsistent and imprecise, and several of his moves are more assertions than arguments. (Seligman also has a particularly weird section involving forests and trees.[88]) And he is right to be frustrated by an argument for excluding stock dividends on *definitional* grounds—as we know, it led to almost forty years of confusion about how broad or narrow the definition of income was for tax purposes.[89]

One would think, therefore, that Simons took the contrary position to Seligman—that stock dividends *should* be taxable as income. But Simons later states in his book that the decision to exclude stock divi-

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79 Kleinwächter, note 32, at 17.

80 Seligman, note 42, at 517.

81 Id. at 525.

82 Id. at 519-20.

83 Id. at 520.

84 For more on this debate, see Daniel Shaviro, The Forgotten Henry Simons, 41 Fla. St. Univ. L. Rev. 1, 30 & nn. 169-71 (2013).

85 Simons, note 10, at 87.

86 Id. at 85.

87 Id. at 87.

88 See Seligman, note 42, at 524–25.

89 See text at notes 74-76.

dends from income was "eminently sound."[90] "[T]here is here no proper issue as to the meaning of income," he writes, "only a question as to what constitutes a reasonable, consistent, and convenient application of the realization criterion," a criterion which he thinks is likely *required* for administrability reasons.[91] He thus reaches the same conclusion as Seligman and the Supreme Court's opinion in *Eisner v. Macomber*, but he incorporates a realization requirement on pragmatic, rather than definitional, grounds. In other words, after trashing Seligman and others who put forward narrow definitions of income, he ultimately comes out in the same place, even if by a different path.

Moreover, one can read Seligman more charitably as struggling with how to make sense of the distinction between income and capital, which is a necessity in a realization-based tax system, and for what events should constitute realization. Seligman and the Court in *Eisner v. Macomber* make the mistake of reading realization into the Constitution, but that does not change the fact that our system is based on realization, and any functional definition of income needs to fit within that. On this and the resulting treatment of stock dividends, Simons and Seligman agree, but a reader could miss that in the heat of Simons' attack. Seligman's mistake is to frame that issue as a question of what income is and is not, but the analysis he follows is actually not so different than Simons'. As long as we have a realization-based system, we have to distinguish capital income from the capital itself, and "separation" is as good a basis as any. Seligman dresses his argument up as being about the definition of income, but it is ultimately driven by practical considerations about administering a realization-based system, just as it is for Simons.

Finally, the question of whether "gain" must be separated from capital to be income is not entirely a settled question today. As I discuss in Part IV, many major income concepts do not include accrued (or even realized) capital gains and losses, as distinguished from dividends and interest, thus implicitly requiring "separation" for the income to be included, just as Seligman argued. Moreover, the Canberra Group, an important international commission addressing income measurement issues, explicitly excludes both realized and unrealized gains and losses from even its broadest, most conceptual measure of income (a measure that includes nonmarket household production and imputed rent).[92] Echoing Seligman's analysis, they write that "[asset] gains and losses are excluded from income, whether they are realized . . . or remain unrealized. Instead, they are treated as changes in net

[90] Simons, note 10, at 198.

[91] Id. at 199.

[92] See Canberra Group Handbook, note 55, at 14–16.

worth."[93] Simons would say that any gain is income, Seligman would say there is only income when that gain is separated from the capital, but the Canberra Group seems to say no gain is income. With several defensible definitions of income available, arguments should no longer be about fidelity to a "true" definition of income, but rather about which better serves underlying objectives.

III. The Comprehensive Tax Base

Definitional arguments were also a key part of the battle between Bittker of Yale Law School and several other tax scholars in the late 1960's and early 1970's over the proposals to move toward a "comprehensive tax base" (CTB). Following Simons and *Glenshaw Glass*, tax scholars no longer had any doubt that income is a broad and expansive concept, and commentators and policymakers began advocating for corresponding reforms to broaden the tax base. The CTB project also had a goal of eliminating preferences and other kinds of differential treatment of different items of income, with the hope that broadening the tax base could lead to lower, less distortionary tax rates.

In the midst of this seemingly reasonable project, Bittker wrote an article in the *Harvard Law Review* essentially attacking the idea that a CTB could be a reliable guide to tax reform:

> I have concluded that a systematic and rigorous application of the "no preference" or CTB approach would require many more sweeping changes in the existing tax structure than have been acknowledged. I also believe that many of these changes would be quite unacceptable, despite their conformity to the Haig-Simons definition, to many of those who are attracted, in the abstract, by the idea of a CTB. At the same time, there are in my view many more ambiguities in the concept than have been acknowledged, and at these points it sheds less light than some of its supporters seem to claim.[94]

Bittker then proceeds systematically through a number of different areas, arguing that a CTB, or Haig-Simons, approach would require inclusion of items that no reformer advocates including, and that the reasons for deviating from a CTB are ultimately practical and political, and not based on anything fundamental to the income concept.

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[93] Id. at 16. Because of the difficulties of translating the stock of net worth into the flow of income, the Canberra Group instead treats net worth as an additional measure of economic wellbeing alongside income and consumption. Id. at 3-4.

[94] Bittker, note 18, at 934.

Examples of items that a CTB approach would treat as "income" would include government benefits, like transfer programs and Social Security, life insurance payments, gifts and bequests, support and dower, imputed income, and even vicarious enjoyment.[95] He also shows that a CTB approach provides little, if any, guidance to fundamental questions like the personal/business border, methods of accounting, the taxable unit, timing, and accounting periods.[96]

Bittker's point was not that these items should be included or not based on a more consistent use of a CTB definition, but rather that the definition cannot answer questions that are ultimately about other things, like administration, fairness, social policy, difficulties of valuation and enforcement, promoting economic growth, and so on:

> This means not that all provisions of existing law are equally good, but rather that we cannot avoid an examination of each one on its merits in a discouragingly inconclusive process that can derive no significant assistance from a no preference presumption that would at best be applied only on a wholly selective basis. Put another way, there are preferences and preferences; some are objectionable, some are tolerable, some are unavoidable, and some are indispensable. A truly "comprehensive" base, in short, would be a disaster.[97]

Bittker's article provoked (in tax scholarship terms) a furious response, with strongly-worded articles from important figures of tax and fiscal theory of the time: Richard Musgrave,[98] Joseph Pechman,[99] and Charles Galvin.[100] Bittker responded to these critics,[101] who responded yet further.[102] Musgrave's response is the most trenchant, and so I review it here briefly.

Musgrave argued that we cannot even talk about income taxation without some income concept or definition to look to. With that definition in mind, we can then make decisions about when to follow the

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95 Id. at 934-49.

96 Id. at 952-80.

97 Id. at 982.

98 R.A. Musgrave, In Defense of an Income Concept, 81 Harv. L. Rev. 44 (1967).

99 Joseph A. Pechman, Comprehensive Income Taxation: A Comment, 81 Harv. L. Rev. 63 (1967).

100 Charles O. Galvin, More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR, 81 Harv. L. Rev. 1016 (1968).

101 Boris I. Bittker, Comprehensive Income Taxation: A Response, 81 Harv. L. Rev. 1032 (1968).

102 The remaining volleys in the debate are compiled in Boris I. Bittker, Charles O. Galvin, R.A. Musgrave & Joseph A. Pechman, A Comprehensive Income Tax Base? (1968).

definition and when to deviate from it based on issues like feasibility and equity—we should only deviate from the definition when the gains from taking a more feasible approach outweigh the equity costs of not following a purer definition:

> In concluding, I believe that Professor Bittker's message is wrong in both principle and application. His principle—that matters of income definition should be decided on an ad hoc basis—is mistaken. A generalized income concept is needed as an analytical tool if an equitable income tax base is to be defined. In application, his position—that the income concept is useless because it does not solve all problems and must be moderated by administrative feasibility—is also in error. In most situations, the concept points to the equitable solution, and administratively feasible measures can usually be found which approximate the proper result to a fair degree.[103]

In Bittker's response, he essentially accuses Musgrave of engaging in exactly the sort of ad hoc judgments that Bittker advocates, and which Musgrave condemns:

> By sedulously qualifying almost every conclusion with such phrases as ideally, conceptually, and in principle, however, Musgrave leaves the door open for a quick escape in practice; and this, coupled with his silence on so many other specific issues, makes it hard to know how faithfully he would follow his Platonic, or Hegelian, ideal. One can infer from Musgrave's scanty affirmative commitments, however, that he—like other CTB enthusiasts—has a capacious knapsack of arguments to support a wide range of departures from the Haig-Simons definition.[104]

He goes on to describe Musgrave's approach as "an insistence that the Haig-Simons definition will keep us from getting lost in a miasma of ad hoc judgments, coupled with departures from that definition for 'reasons' that are no more than vague, and sometimes inconsistent, intuitions."[105]

In a later response, Galvin attempts to mediate the debate—though perhaps ends up conceding Bittker's point—by analogizing to the debates between Lon Fuller and H.L.A. Hart over legal positivism, say-

[103] Musgrave, note 98, at 62.
[104] Bittker, note 101, at 1033-34.
[105] Id. at 1035.

ing that the CTB position is analogous to a "natural law" approach to jurisprudence, as opposed to Bittker's more positivist approach.[106] Bittker, in the concluding piece in the debate, responds that a natural law-like command to "[f]ollow the Haig-Simons definition unless it produces adverse results" provides as little guidance as Aquinas's "[d]o good and avoid evil."[107]

For the most part, the debate was not so much about whether there is a single definition of income—in Bittker's response to Musgrave, he says, "I do not reject the Haig-Simons definition as 'an analytical tool'"[108]—but rather whether it should be a policy goal. All parties seem to agree that there is such a thing as Haig-Simons income, and furthermore that strictly following that definition would be a mistake—they just disagree on how they would characterize its usefulness. Bittker argues that a pure Haig-Simons income tax base would deviate so far from reasonable policy judgments that we should not even treat it as a guidepost, and instead just make—admittedly contested—judgments case-by-case and item-by-item.[109]

In the conclusion of his first piece, however, Bittker seems to go further and make an argument closer to the argument of this Article, that part of the problem lies in the fact that there is no single clear definition of "income" in the first place:

> There are many problem areas in which the search for "preferences" is doomed to fail because we cannot confidently say which provisions are "rules" and which are "exceptions". . . . The central source of difficulty is the fact that the income tax structure cannot be discovered, but must be constructed; it is the final result of a multitude of debatable judgments. . . . [W]e do not begin with a consensus on the meaning of income, but with a myriad of arguments about what should be taxed, when, and to whom.[110]

Here, Bittker's point dovetails with mine. Ultimately, a "constructed" definition of income, rather than the "pure" Haig-Simons definition, is the only possible definition that can both achieve the goals of the tax system—to assign burdens fairly—and be practically workable. Furthermore, a constructed definition of income may be

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106 Charles O. Galvin, Epilogue to the Dialogue, in A Comprehensive Income Tax Base, note 102, at 119.

107 Boris I. Bittker, A Last Word, in A Comprehensive Income Tax Base, note 102, at 126-27.

108 Bittker, note 101, at 1033.

109 See id. at 1041.

110 Bittker, note 18, at 985.

the only theoretically sound definition, since a pure definition—or at least one that does not collapse in on itself as Kleinwächter showed—remains elusive. Thus, arguments resorting to the Haig-Simons or any other definition of income do not answer the question, they only rephrase it. As Bittker points out, even the CTB proponents support making practical judgments about particular items based on the typical policy judgments of equity, efficiency, and administrability. Cloaking these judgments in definitional terms only serves to cut off debate in areas where it is most necessary.

IV. Tax Expenditures

Where definitional arguments in tax law are perhaps most pronounced are in the area of tax expenditures, which are defined in law as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."[111] Their leading proponent, Stanley Surrey, described tax expenditures as "special provisions . . . not part of the structure required for the income tax itself, but . . . instead Government expenditures made through the tax system."[112] As Assistant Secretary of the Treasury, Surrey pushed for the government to provide an accounting of tax expenditures—a tax expenditure budget—in order to shine a light on this form of disguised spending, and, he hoped, to thereby reign it in. Congress has been required to produce a tax expenditure budget since 1974.[113]

The problem with tax expenditures, as Surrey acknowledged, is that "[t]he use of the phrase 'special provisions' clearly involves a major definitional question: which tax rules are special provisions and therefore tax expenditures, and which tax rules are just tax rules; simply part of the warp and woof of a tax structure?"[114] This question continues to go unanswered definitively.

A. Early Debates

Bittker, of course, had problems with Surrey's tax expenditure methodology, since it requires us to "first construct an ideal or correct income tax structure, departures from which will be reflected as 'tax

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[111] Congressional Budget and Impoundment Control Act of 1974, § 3(3), 2 U.S.C. § 622(3).

[112] Stanley S. Surrey, Pathways to Tax Reform: The Concept of Tax Expenditures, at vii (1973).

[113] See 2 U.S.C. § 662(3).

[114] Stanley S. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705, 706 (1970).

expenditures' in the National Budget."[115] He goes on to recite many of the same problems he had with the CTB approach—that using Haig-Simons income as a normative baseline for measuring "special provisions" means including many more things than anyone might intend, but also provides no guidance on a host of other things that could be considered tax expenditures depending on the choice of definition.[116]

As a result, any tax expenditure budget must make choices about what to include and what not to include, and those things not included may become *even more* hidden due to their noninclusion in a supposedly neutral accounting of "special provisions."[117] The tax expenditure budget is thus an inherently political document that would receive the mantle of neutral accounting. As Bittker noted,

> For such issues, every man can create his own set of "tax expenditures," but it will be no more than his collection of disparities between the income tax law as it is, and as he thinks it ought to be. Such compilations would be interesting, but I do not know how we can select one of them for inclusion in the National Budget.[118]

Ultimately, Bittker still thinks a version of a tax expenditure budget is a useful thing, and that measuring those expenditures against a Haig-Simons definition is appropriate. But he resists giving such a budget any greater normative weight. Calling the tax expenditure budget a "full accounting" of such deviations would not only be wrong, but could mean a greater stigmatizing of those items that are included compared to those items that are not, even if items not included have a greater normative effect. For example, a rate reduction for a high-bracket taxpayer is not categorized as a tax expenditure, because we have no baseline for judging what is the normatively "correct" amount of tax for such a person to pay.[119] A tax expenditure budget risks treating, for example, the Earned Income Tax Credit as less normatively defensible than such a rate cut.[120]

At this point William Andrews enters the debate to suggest, if not a resolution to the definitional question, at least a change in the question tax expenditure analysis should ask. He first reframes the defini-

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115 Boris I. Bittker, Accounting for Federal "Tax Subsidies" in the National Budget, 22 Nat'l Tax J. 244, 248 (1969).

116 Id. at 257-58.

117 Id. at 259.

118 Id. at 260.

119 Id. at 251.

120 Id. at 261.

tional point, by saying that the issue is not what is and is not income, but rather by what standard should we apportion the burdens of taxation. Thus, he argues, "an ideal personal income tax is one in which tax burdens are accurately apportioned to a taxpayer's aggregate personal consumption and accumulation of real goods and services and claims thereto."[121] He thus treats the Haig-Simons definition not as a sort of accounting identity—which it is—but rather as an independent normative basis for taxation. The ideal tax, to Andrews, is one that is based on personal consumption and accumulation, and "income" is a handy proxy for that.[122]

As Andrews acknowledges, this move resolves little. All we have done is change the question from what is "income" to what is "consumption" and "accumulation." Simons did not claim those would be easy questions, however. The main purpose of Simons' definition was not to resolve for all time what is and is not income, but rather to demonstrate that issues of source should be irrelevant and that accretions to wealth must be considered. But the shift to "consumption" and "accumulation" nonetheless still has some use to Andrews:

> In relation to these problems the concept of consumption is not one that enters into Simons' definition of personal income with a simple, fixed, or predetermined meaning. It is rather a concept calling for creative elaboration to effectuate the practical implementation of the purposes of the tax. . . . But Simons' definition indicates the direction in which meaning should be elaborated and where the real problems of tax policy are to be found.[123]

With the focus now on "consumption," Andrews turns to the issue of personal deductions in the income tax, and whether some deductions are inherent to the structure of his ideal income tax, or whether they are departures that could be considered tax expenditures. He focuses in particular on medical expenses and charitable contributions, and argues that in many cases those expenditures should not be considered "consumption."[124] And if not consumption, then the

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121 William D. Andrews, Personal Deductions in an Ideal Income Tax, 86 Harv. L. Rev. 309, 313 (1972).

122 Id. at 328 ("The personal income tax is thus an indirectly measured tax on aggregate personal consumption and accumulation. Income transactions provide the practical basis for computing and collecting the tax, but aggregate personal consumption and accumulation are its real objects.").

123 Id. at 324.

124 Id. at 313-16.

amounts spent on them should not be "income," that is, a deduction is an appropriate part of an income tax, not a "special provision."[125]

A medical purchase is not a form of personal gratification, he argues, but is rather a reflection of differences in endowments for health.[126] Two people may have the same salary, but if one also has a chronic illness, that will affect his ability to consume other goods and services or to accumulate wealth. Thus, the sick person is not "consuming" health care—he is simply trying to maintain a baseline of normal health.

In the case of charitable contributions, if we assume that the donor derives no benefit, then charitable contributions are just passing consumption through the donor to the donee, and therefore it should be taxed at the donee's rate, which is likely to be lower than the donor's, if not zero.[127] Disallowing the deduction, Andrews argues, would be equivalent to taxing the donee at the donor's marginal tax rate.[128] And even if the donor does derive some personal benefit, there are a number of reasons, Andrews argues, for still excluding charitable contributions from income.[129]

The focus on "consumption" does not resolve all the issues, however, and Andrews is clear that these are still judgment calls on which reasonable people can differ. Simons, for example, argued that charitable contributions should *not* be deductible precisely because they *should* be considered "consumption" by the donor, the opposite conclusion from Andrews.[130] Bittker, in a later article, underscores the problems with the "consumption" baseline, while still appreciating Andrews' clarification of the problem.[131]

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125 See id. at 384-85.

126 Id. at 331-37.

127 Id. at 346.

128 This is assuming that the donor passes through the entire tax benefit. But the degree to which that is true depends on the price elasticity of charitable contributions, which is an unsettled issue.

129 In particular, Andrews argues that we do not tax other nontaxable redistributive actions, such as a businessman paying above-market wages, Andrews, note 121, at 347; we do not tax the value of services provided to charities, id. (acknowledging that this relates to overall nontaxation of imputed income, but that taxation of gifts nonetheless would advantage providers of services over providers of cash); and contributions to charities other than for services to the poor should be considered "common goods" whose benefits are so spread that taxation based on benefit is practically impossible, id. at 357 et seq.

130 See Simons, note 10, at 57-58 ("If it is not more pleasant to give than to receive, one may still hesitate to assert that giving is not a form of consumption for the giver. The proposition that everyone tries to allocate his consumption expenditure among different goods in such manner as to equalize the utility of dollars-worths may not be highly illuminating; but there is no apparent reason for treating gifts as an exception.").

131 See Boris I. Bittker, Income Tax Deductions, Credits, and Subsidies for Personal Expenditures, 16 J.L. & Econ. 193, 195-96 & n.7 (1973).

Andrews is careful not to overstate the work that his definition does, but by nonetheless couching his arguments for medical expense and charitable contribution deductions in definitional terms, he cloaks a policy debate in normative language, about whether such deductions are "proper" or not. Andrews is still arguing from definitions, just replacing a definition of "income" with one for "consumption." Perhaps that is somewhat firmer ground for an argument, but it does not resolve Kleinwächter's Conundrums, nor does it point us to the best policy.

That said, Andrews' choice of a definition is still helpful in reminding us that the key question should be whether a tax provision serves broader normative goals, and not whether it fits into a particular definition or not. By treating "income" as merely a proxy for overall well-being, and not as a normative baseline in its own right, we are freer to inquire whether a particular deduction or inclusion helps to measure wellbeing, and not just whether it is "special" or not.

B. The Joint Committee's 2008 Reform Project

In the years since that first burst of tax expenditure literature, other commentators have worked to try to come up with a more coherent theory of tax expenditures, but all with only limited success. Victor Thuronyi, for example, has argued that instead of tax expenditures, policymakers should look at "substitutable tax provisions," which are those "whose purposes a non-tax-based federal program can achieve at least as effectively."[132] This would focus the analysis in particular on those tax provisions that could achieve the same goals outside of the Code. The goal would be de-cluttering the Code of things extraneous to it, without resort to definitional arguments about what is inherently part of an income tax and what is not.

Daniel Shaviro has argued that tax expenditure analysis should not hinge on Surrey's distinction between which taxes are "taxes" and which are actually "spending."[133] He argues instead that tax rules should be analyzed under Musgrave's distinction between allocative and distributional tax rules.[134] Shaviro does not present his version of tax expenditure analysis with a purpose of removing a particular set of rules from the Code; instead, he sees it as a key tool for dispassionately analyzing tax rules on their own merits. "There is no necessary implication that tax expenditures must be eliminated," he writes, "only that we should think about them differently than the usual 'tax'

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132 Victor Thuronyi, Tax Expenditures: A Reassessment, 1988 Duke L.J. 1155, 1156.

133 Daniel N. Shaviro, Rethinking Tax Expenditures and Fiscal Language, 57 Tax L. Rev. 187, 188 (2004).

134 Id.

and 'spending' categories imply."[135] He then goes on to propose changes to the tax expenditure budget that would place it on firmer ground while minimizing contestable political judgments.[136]

David Weisbach and Jacob Nussim take a similar approach of trying to separate policy judgments from tax expenditure analysis.[137] Instead of looking at the tax expenditure question from the perspective of tax policy, they argue, we should be looking at it from the perspective of institutional design. That is, the question should just be how best for the government to implement a particular policy and which agency is best equipped to do so. They compare having the IRS run national defense and implement the Earned Income Tax Credit: While the first task may not be appropriate for reasons of institutional expertise and specialization, the second may well be, even though the IRS is primarily a taxing agency not a welfare agency, because of its expertise in tasks such as income measurement.[138] Like Shaviro, they argue that the heated definitional battles and implicit condemnation of tax expenditures that arise from Surrey's approach do harm to the analytical usefulness that a "nonevaluative" tax expenditure budget could provide.[139]

While these reframings are worthwhile and would help to place tax expenditure analysis on more solid theoretical ground, they are fundamentally different projects than one that seeks to determine what factors ought normatively to be the basis of taxation. Tax expenditure analysis, as Surrey conceived of it, is partly an act of tax gatekeeping—keep what is tax within the Code and keeping what is not, out—but it also fundamentally normative and distributional, in the sense that tax expenditures go above and beyond the justifications for tax qua tax, and in many cases actively undermine them. None of these other approaches would tell us whether such spending is a good idea or not; they would only tell us something about the choice to do it through the tax system or not.

Thus, there continues to be a theoretical vacuum around tax expenditures just as Bittker first diagnosed in 1969 and which Andrews attempted, with mixed success, to fill in 1972. We still have little other

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135 Id. at 221.

136 Id. at 228-31.

137 David A. Weisbach & Jacob Nussim, The Integration of Tax and Spending Programs, 113 Yale L.J. 955 (2004).

138 Id. at 958-59. Nussim & Weisbach say that from an institutional design perspective, the definition of income is irrelevant to which agency does the work. Id. at 975. This neglects the fact highlighted by this Article that different agencies measure income in different ways. See notes 185-210 and accompanying text. Of course, nothing prevents one agency from using another's definition, but there appears to be great temptation to turn income measurement tasks over to the IRS and its definition.

139 Weisbach & Nussim, note 137, at 976-77.

than contested political judgments to determine what items should, or should not, be included in income, and what deductions should, or should not, be allowed.

In 2008, the Joint Committee on Taxation (JCT) attempted to fill that vacuum. As one of the bodies charged with tax expenditure analysis, the JCT annually produces a tax expenditure budget, along with front matter explaining the approach and what it has decided to treat as tax expenditures.[140] In *Reconsidering Tax Expenditure Analysis*, the JCT acknowledged that tax expenditure analysis had largely failed in its project of eliminating the use of tax expenditures by Congress, and it placed some of that blame on "insufficiently rigorous foundations" of the analysis.[141]

Tax expenditure methodology requires the JCT to specify a "normal" tax baseline, and then to treat as a tax expenditure any provision that deviates from that baseline. But, as discussed at length above, there is no pure "normal" tax. As the JCT staff wrote,

> [T]he "normal" tax is largely a commonsense extension (and cleansing) of current tax policies, not a rigorous tax framework developed from first principles. As a result, the "normal" tax cannot be defended from criticism as a series of ultimately idiosyncratic or pragmatic choices. If tax expenditure analysis is to enjoy broad support, it must be seen as *neutral* and *principled*; unfortunately, the "normal" tax satisfies these requirements only in the eyes of those who already believe that the "normal" tax accurately captures their personal ideal of a tax system.[142]

To try to place tax expenditure analysis on firmer footing, the JCT introduced a new methodology that, it claimed, would not rely on contested normative judgments about what the "normal" tax baseline should be. It thus defined two categories of tax expenditures, "Tax Subsidies" and "Tax-Induced Structural Distortions."[143] It defined Tax Subsidies as "a specific tax provision that is deliberately inconsistent with an identifiable general rule of the present tax law (not a hypothetical 'normal' tax), and that collects less revenue than does the general rule."[144] Tax-Induced Structural Distortions were "structural elements of the Internal Revenue Code (not deviations from any

[140] See, e.g., Staff of Joint Comm. on Tax'n, Estimates of Federal Tax Expenditures for Fiscal Years 2016-2020 (2017), https://www.jct.gov/publications.html?func=select&id=5.

[141] Joint Comm. on Tax'n, note 19, at 7.

[142] Id. at 36.

[143] Id. at 39.

[144] Id.

clearly identifiable general tax rule and thus not Tax Subsidies in our classification) that materially affect economic decisions in a manner that imposes substantial efficiency costs."[145]

That second category was needed, JCT decided, because some of what were commonly considered tax expenditures did not neatly fit into the newly-defined Tax Subsidy category. Provisions such as the ability to defer U.S. taxation on the active income of controlled foreign corporations, for example, or the different tax treatment of debt and equity, could not be judged against some "clearly identifiable rule," because there is no clear consensus on what the general rule of law is or should be.[146] Traditional tax expenditure analysis would just say, for example, that a "normal" tax would include taxation of worldwide income, and thus deferral of foreign earnings would be a "special provision," a deviation from true worldwide taxation.[147] The new JCT methodology did not say that the provision was "special" in the sense of deviating from the pure tax baseline, but rather that its existence generated a lot of tax-motivated structuring and planning, and thus should be eliminated in the name of evening the playing field and reducing tax gaming.[148]

The ostensible goal of JCT's new methodology was to switch from the supposedly "normative" Haig-Simons baseline to a nonnormative, more practical and real-world baseline, with a hope to sidestep the Bittker-like criticism about the rigor of tax expenditure analysis. That new baseline has been described as more like a current law reference baseline, similar to what the Congressional Budget Office (CBO) uses in making fiscal projections or to what Treasury uses in its alternative tax expenditure budgets.[149]

Some commentators criticized this move as simply incorporating a normatively worse baseline—entrenching current law rather than striving for a more ideal law.[150] But if we accept my argument that all income definitions are a set of choices, the new methodology is problematic not because it accepts a second-best income definition, but rather because it purported to be free from definitional problems altogether.

The stated goal of the new methodology was to provide "neutral and principled" standards by which to measure tax expenditures, with-

145 Id. at 41.

146 Id. at 41-42.

147 Id. at 10.

148 Id. at 41-42.

149 J. Clifton Fleming & Robert J. Peroni, Can Tax Expenditure Analysis Be Divorced from a Normative Tax Base?: A Critique of the "New Paradigm" and Its Denouement, 30 Va. Tax. Rev. 135, 155 (2010).

150 Id.

out the fraught debates around what is "income." But those debates are inescapable as long as some baseline is used. The choice of baseline affects the number and magnitude of the tax expenditures, and since "tax expenditure" was intended to be a pejorative term,[151] the degree of approbation is directly related to the choice of baseline. JCT might have declared that the baseline was not intended to be a normative objective, but the tax expenditure budget still puts a *cost*—a value-laden measure—on the degree of deviation from that baseline.

Furthermore, the new methodology may not have provided any clarity. In the tax expenditure budget that applied the new methodology, little changed from the pre-2008 tax expenditure analysis. All of the pre-2008 tax expenditures were still considered tax expenditures in the 2008 tax expenditure budget.[152] They just were slotted into new categories. Indeed, while no provisions left the tax expenditure budget entirely, only five were moved into the new Tax-Induced Structural Distortions category; the vast majority retained the more quasi-normative label of "Tax Subsidy."[153]

In the end, the new approach did not take. After using the new methodology for one tax expenditure budget, in 2008, the Joint Committee Staff returned to its prior methodology in 2010. The JCT staff said that the similarity between the new and old approach, the fact that the old approach was somewhat more expansive, and historical continuity convinced it to return to the pre-2008 approach, which it has maintained through the current period.[154]

The 2008-era JCT staff deserves credit for at least openly acknowledging the theoretical limits of tax expenditure analysis. Their work was correctly premised on the idea that there is no such thing as an exogenous, pure, yet measurable, Haig-Simons income tax—that even a baseline has to be constructed through practical and political choices. However, the project ultimately failed because it attempted to sidestep those issues, to be a mere passive and neutral observer. But the issues are unavoidable. The tax expenditure budget is premised on the idea that some tax provisions have a "cost" to the fisc and others do not, and that cost is due to a deviation from some preferred baseline. Because there is no truly "pure" income baseline, the

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151 See, e.g., Bruce Bartlett, The End of Tax Expenditures as We Know Them?, 92 Tax Notes 413, 414 (July 16, 2001); Shaviro, note 133, at 201 (the tax expenditure budget was intended as a "hit list").

152 Staff Joint Comm. on Tax'n, note 19, at 47.

153 Cf. Staff Joint Comm. on Tax'n, Estimates of Federal Tax Expenditure for Fiscal Years 2008-2012, at 69 (2008), https://www.jct.gov/publications.html?func=select&id=5.

154 Staff Joint Comm. on Tax'n, Estimates of Federal Tax Expenditures for Fiscal Years 2009-2013 (2010), https://www.jct.gov/publications.html?func=select&id=5.

baseline is no less constructed than the tax base itself. The construction of that base is a fundamentally political question, one that analysts and scholars must lean into instead of avoiding.

V. Optimal Income Tax Theory

The discussion thus far briefly lays out some of the classic debates in the legal literature over the definition of income, and how the unresolvable nature of the question leads some commentators into theoretical dead ends. But the claim of this Article is not just that the question cannot be answered rigorously, but also that in our attempts to construct a practical definition of income, we necessarily incorporate policy and normative judgments into the definition. This is unavoidable, but the danger is that those judgments get swallowed up and hidden when we simply say that such-and-such is, or is not, "income." By naming the thing "income," and giving it the special normative weight that "income" gets, we hide the myriad decisions that go into constructing "income." This is particularly a problem when two people both talk about "income," but are referring to different things. As an example, I consider here the role of optimal income tax theory in tax policy, and in tax theory more generally.

Optimal income tax theory is a branch of public finance economics that unlike many branches of economics is explicitly normative.[155] The basic question is, what tax system will maximize social welfare, where social welfare is represented by some function that often incorporates normative objectives, such as minimizing income inequality, or insuring a minimum level of resources for the lowest income groups.[156]

This is, obviously, a difficult question to get traction on. The insight of a principal founder of optimal income tax theory, James Mirrlees, was to treat the problem essentially as one of asymmetric information—how should the government pick a tax schedule to maximize social welfare without knowing a priori each person's propensity to earn income and how taxation might affect it?[157] The original Mirrlees paper is dense and mathematically formal. It uses a control-theoretic construct whereby individuals with identical utility functions but different ability types choose income and consumption bundles,

[155] See, e.g., Robin Boadway, From Optimal Tax Theory to Tax Policy: Retrospective and Prospective Views 1-2 (2012) (optimal tax scholars "formulate models of optimal tax-transfer systems based on normative principles that reflect efficiency and equity considerations").

[156] Though often the social welfare function is strictly utilitarian, that is, just a summation of individual utilities.

[157] Mirrlees, note 20, at 175.

given their abilities and some tax schedule.[158] By application of the revelation principle, the social planner can pick the tax schedule that induces everyone to reveal their type—that is, to earn actual income in the same rank order as their abilities to earn income.[159]

In the Mirrlees set-up, as interpreted and simplified by others, ability is represented by a personal wage rate, *w*,[160] while income is represented by the person's wage rate times effort, or *wl*. In the simple case, we could think of that as an hourly wage rate times hours worked. All the social planner can see is *wl*, not *w* alone. The social planner wants to find the right mix of revenue raised—which is then redistributed to meet its normative goals without causing high-ability taxpayers to mimic low-ability taxpayers in order to lower their tax burden. They could do this by, for example, substituting from labor toward leisure, taking a lower-paying job, or simply hiding income. Too much of that behavior means less taxable income, which means less revenue, which means *less* redistribution and therefore lower social welfare. The social planner picks a rate schedule to maximize social welfare giving these two competing forces, and specifically one that induces the individuals to reveal their type through their choice of income and consumption bundles.

The original Mirrlees paper (and those that followed) contained some surprising results, most notably that the optimal marginal rate schedule might follow an inverted U-shape and actually *decline* at high income levels,[161] perhaps becoming 0% for the highest earner under some assumptions.[162] The logic of that result, in the model, is that a government can collect more revenue, and thus redistribute more, if it makes mimicking a low-ability individual less attractive to high-ability individuals; it ought to encourage them to move up a tax bracket, rather than down, essentially.

The original Mirrlees paper is very stylized, and uses a "parsimonious"[163] model that, assumes, among other things, that the only differences between individuals are their abilities and that individuals have

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158 Formally, Mirrlees describes this as the government choosing a consumption bundle for the individual, since the degree of taxation determines how much income is available for consumption. Id. at 177; see also Boadway, note 155, at 12 n.6; Kaplow, note 23, at 65.

159 See Kaplow, note 23, at 65-66, 66 n.20; Mankiw et al., note 56, at 150.

160 See, e.g., Boadway, note 155, at 60; Kaplow, note 23, at 54 ("In standard formulations of the optimal income tax problem, individuals' abilities are indicated by their given wage rate, taken to be exogenous.").

161 See Boadway, note 155, at 13; Mankiw et al., note 56, at 151-55; Mirrlees, note 20, at 202-04.

162 See Mankiw et al., note 56, at 151-52; Mirrlees, note 20, at 195; J.K. Seade, On the Shape of Optimal Tax Schedules, 7 J. Pub. Econ. 203 (1977).

163 Boadway, note 155, at 13. Mirrlees clearly spells out some of his many assumptions at the outset. Mirrlees, note 20, at 175-76. He also urges caution in interpreting his results. Id. at 207-08.

identical utility functions that depend just on consumption and leisure. The paper is over forty years old, and the optimal tax literature since then is vast and complex. It is not my intent here to recite the nuances and results of later, more developed work, of which there are many. Rather, I want to discuss how the literature defines "income" in a particular way that does not line up with the definitions discussed earlier in this paper, and how that definition derives from both the particular policy concerns and methodological constraints of economics. As a result, commentators and policymakers need to be careful about importing the results of the optimal income tax literature, since the "income" tax that it purports to study may be quite different from the "income" tax under discussion.

First, and most importantly, the basic definition of income that just about any optimal tax paper starts with is the definition above—*wl*, an individual's wage rate times effort.[164] At its most basic, that is simply a measure of cash labor earnings, though it would presumably also encompass fringe benefits and other noncash earnings. Note how far that is from the idea of gain or accessions to wealth that is at the heart of the Haig-Simons definition, however. It does not include any capital income, for example, much less the imputed income from housing and other consumer durables.

There are several reasons for using this particular definition of income, rather than something broader like Haig-Simons. First, the definition follows from the set-up and objective of the Mirrlees model—namely, that the social planner wants to redistribute but does not want to create excessive disincentives to earn labor income—the classic labor-leisure distortion—such that a person's income no longer reflects their ability. Because minimizing the effect of the labor-leisure margin is the particular concern and task for the social planner, labor income and labor effort are the objects of study. The income definition is thus directly related to the particular policy objective.

Second, the social planner's objectives in the model are driven as much or more by mathematical tractability as true social policy. The social planner's goal in optimal income tax theory is sometimes described as an independent desire to tax ability. Importantly, Mirrlees did not make a tax on ability an independent objective; his goal was maximizing social welfare. But in the literature, this objective is

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[164] See, e.g., Boadway, note 155, at 52, 60; Kaplow, note 23, at 53-54; Atkinson & Stiglitz, note 22, at 57; James A. Mirrlees, The Theory of Optimal Taxation, in 3 Handbook of Mathematical Economics 1197, 1202 (Kenneth J. Arrow & Michael D. Intriligator eds., 1986); Nicholas Stern, Optimum Taxation with Errors in Administration, 17 J. Pub. Econ. 181, 185 (1982); Joseph E. Stiglitz, Self-Selection and Pareto Efficient Taxation, 17 J. Pub. Econ. 213, 2146 (1982).

sometimes collapsed down into a first-order desire to tax ability.[165] Beginning especially with a paper by George Aklerlof[166] this led to a literature on "tagging," that is, searching for nonincome-based indicators of a person's type.[167] If a tax included tags for ability, it would lower the incentives for a high-ability person to mimic a low-ability person by earning less income—the tags would reveal this mimicry, and the social planner could still tax accordingly.

But let's be clear—while taxing "ability" may be nondistortive, it is normatively deeply flawed.[168] No government would truly have that as a first-best policy. It implies, for example, that high-ability Ivy League graduates should all be taxed as if they are law partners, hedge fund managers, TV show-runners, or tech entrepreneurs (or at least average ones, if we include luck as a factor), even if they start nonprofits, teach public school, or become monks.[169] And presumably vice versa, though I have not seen this point in the literature—a lucky, low-ability individual who wins the lottery would pay no more in tax than he would have if he had lost.[170]

The set-up is thus driven not by a true social or normative objective, but rather by a need to create a simplified, mathematically tractable, version of the information problems faced by a government using a distortive tax instrument. The ability/income divide is in effect a simplified metaphor for the information and distortion problems of income taxes. This is not to say that the insights of the literature are not useful—they are extremely valuable, especially for isolating the theoretical effects of particular tax instruments, and for underscoring some

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[165] See, e.g., Atkinson & Stiglitz, note 22, at 56; Mankiw et al., note 56, at 150; Stiglitz, note 164, at 214 ("The government would like to differentiate between low ability and high ability individuals. If it could identify them costlessly, it would impose differential lump-sum taxes. It can, however, only observe differences in earned income.").

[166] George A. Akerlof, The Economics of "Tagging" as Applied to the Optimal Income Tax, Welfare Programs, and Manpower Planning, 68 Am. Econ. Rev. 8 (1978).

[167] See, e.g., Boadway, note 155, at 169-74 (discussing literature); Kaplow, note 23, at 96-103 (discussing literature); Mankiw et al., note 56, at 161-66.

[168] A full articulation of the liberty and other objections is beyond the scope of this article. For more discussion see, e.g., David Hasen, Liberalism and Ability Taxation, 85 Tex. L. Rev. 1057 (2006); Daniel Shaviro, Endowment and Inequality, in Tax Justice: The Ongoing Debate 123 (Joseph J. Thorndike & Dennis J. Ventry Jr. eds., 2002); Kirk J. Stark, Enslaving the Beachcomber: Some Thoughts on the Liberty Objections to Endowment Taxation, 18 Can. J.L. & Juris. 47 (2005); Linda Sugin, A Philosophical Objection to the Optimal Tax Model, 64 Tax L. Rev. 229, 237 (2011); Lawrence Zelenak, Taxing Endowment, 55 Duke L.J. 1145 (2006).

[169] This is sometimes described as the "high-ability beachcomber" problem. See, e.g., Stark, note 168.

[170] An easy extension of an optimal tax model would be to allow lump-sum taxation of windfalls such as this, since that would be nondistortive. But that is a different policy than taxing ability—that would be a policy of using lots of nondistortive tax instruments, which just underscores that the point is distortion and social welfare, not that taxing ability is the normative objective.

key questions and assumptions that should guide tax design. But ultimately, optimal tax theory provides little guidance about what an income tax actually is or should be.

This stylized set-up and relatively narrow definition of income can lead commentators to misinterpret some of the results of the literature, especially when imported to our more real-world income tax. Here, I highlight two possible ways that the literature can be misinterpreted.

First, while the income definition used in the optimal tax literature can be described as labor earnings, a seemingly unambiguous measure, it is not free from the sort of definitional ambiguity that arose in the CTB and tax expenditure debates. To see this, consider the way that the literature models utility.

In the typical optimal tax set-up, the social welfare function is some weighted combination of individual utility functions, and individual utility is usually some function of consumption and leisure.[171] Consumption is done out of after-tax income, while leisure is just leisure. Potential distortions arise because consumption is taxed while leisure is not, making leisure somewhat more attractive than it would be in the absence of taxation. But, as noted in the earlier discussion,[172] leisure is a form of consumption as well, and encompasses more than just sitting around. "Leisure" here is just a catch-all category for any form of untaxed consumption.

Similarly, in considering the labor/leisure margin and applying the Haig-Simons identity, leisure could be thought of as any form of untaxed economic income, including capital income, black-market income, psychic income, imputed services, as so on. In other words, the labor/leisure choice is not really between working and not working, but rather between taxed forms of consumption and income and untaxed forms of consumption and income.

Therefore, what is "labor" and what is "leisure" is entirely a function of the tax itself, and in particular the choice about how to define the tax base. "Labor" and "leisure" do not exist *prior to* policy choices about what to tax but actually *follow from* those choices. As a result, using a seemingly more clearly specified and limited definition of income still does not free optimal tax theory from the definitional problems discussed herein. Choices still need to be made, and many of those will be choices about how to build the model ex ante, not in interpreting its results ex post. If "income" in the optimal tax models included more of the items now considered "leisure"—like imputed

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171 See, e.g., Kaplow, note 23, at 55; Atkinson & Stiglitz, note 22, at 59; Mirrlees, note 20, at 177.

172 See notes 51-52 and accompanying text.

services—presumably we would see fewer, or at least different, distortions.

Second, the focus on utility from consumption, and the definition of income as labor earnings, also leads to one of the more famous and controversial results of the literature, the Atkinson-Stiglitz result. Atkinson & Stiglitz show, under certain strong assumptions, that when a government has available a nonlinear income tax, it is best for any commodity taxes to be uniform—to have the same, rather than different, tax rates on all goods.[173] One not very controversial implication of this result is that governments ought to use a single-rate VAT or sales tax, rather than, for example, a low or zero rate for food and a high rate for luxuries. It is better instead to handle any distributional issues using the income tax.[174]

A more controversial interpretation, however, is that governments should not impose capital income taxes.[175] In other words, one could interpret the optimal tax literature as not just *passively* choosing to tax only labor income because of the structure of the basic model, but *affirmatively* instructing governments to only tax labor income.[176] Atkinson-Stiglitz is interpreted in this way because a tax on capital is, in some ways, an extra tax on future consumption relative to current consumption. Invested capital is generally after-labor-income-tax capital, and so a person is deciding between consuming that after-tax income today or investing it to earn a return to fund future consumption. If the person expects to earn a normal risk-adjusted market return, but is taxed *again* on that return in the form of a capital income tax, then her future purchasing power will be less than her current purchasing power in present value. In Atkinson-Stiglitz terms, this functions as differential taxation of two commodities—current commodity X and future commodity X—which their model implies is a bad idea.

The Atkinson-Stiglitz result has had an enormous effect on tax scholarship and policy, and many commentators take it as at least a

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[173] See Atkinson & Stiglitz, note 22, at 68.

[174] This is sometimes referred to as a "double-distortion" issue. An income tax creates a distortion by taxing labor. A differential commodity tax also has that distortion (since work is somewhat less valuable if you are able to consume less from an hour of work), but also introduces a distortion between commodities. Even if you wanted individuals who buy luxury items to pay more taxes, you could accomplish that with less distortion using an income tax.

[175] See, e.g., Boadway, note 155, at 96-101 (discussing this interpretation of Atkinson-Stiglitz); Kaplow, note 23, at 221-23 (same); Joseph Bankman & David A Weisbach, The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax, 58 Stan. L. Rev. 1413 (2005).

[176] See Boadway, note 155, at 96-97; Kaplow, note 23, at 222-24; Atkinson & Stiglitz, note 22, at 69.

starting point in any discussion of capital income taxes. It has led even some scholars who support significant redistribution to at times also support a consumption tax over an income tax (since the taxation of capital is the essential difference between the two).[177]

The obvious criticism of the Atkinson-Stiglitz result is that it is built on a highly stylized model, with many heroic assumptions about individuals, utility, social welfare, and the rest. (And much of the work since 1976 involves relaxing these assumptions, with different results.) But even taken on its own terms, we should be careful about interpreting the result too broadly. First, the question is not whether capital income is income or not. Indeed, unlike in the Mirrlees set-up, we are now at least acknowledging that there is more to income than labor earnings. Rather, the question is whether and under what circumstances capital income can be taxed without a net loss to social welfare. The Atkinson-Stiglitz result is thus best thought of not as a final answer, but rather as "an organizing device for highlighting deviations from [the result]."[178]

Moreover, because it grows out of the Mirrlees framework, the Atkinson-Stiglitz result is driven by the same underlying policy concerns—maximizing social welfare that is a function of individuals' consumption and leisure. If all that really matters to utility is consumption, and if individuals are indifferent between present and discounted future consumption, then it is not that surprising that the resulting welfare-maximizing tax system would treat present and future consumption the same. But, again, that means we have a definition of income that grows out of the framing of the policy goal, namely to maximize utility from consumption. Again, the definition of income *reflects* underlying policy choices rather than *determines* them.

We could imagine a very different set of policy concerns. For example, maybe accumulation of assets provides utility separate from its ability to fund future consumption; or excessive concentration of wealth impedes social welfare for a whole set of reasons difficult to model; or we have a glut of savings and actually want to encourage current consumption over future consumption; or capital income, in a low-interest-rate environment, actually reflects not time-value returns but a combination of luck, market power, and disguised labor income, all of which Atkinson-Stiglitz would happily tax. Ultimately, the policy choices embedded in the model are what end up determining the tax base, rather than vice versa.

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[177] See, e.g., Bankman & Weisbach, note 175; Edward J. McCaffery & James R. Hines Jr, The Last Best Hope for Progressivity in Tax, 83 S. Cal. L. Rev. 1031 (2010); Daniel N. Shaviro, Replacing the Income Tax with a Progressive Consumption Tax, 103 Tax Notes 91 (Apr. 5, 2004).

[178] See Boadway, note 155, at 59.

To summarize, this discussion is not intended as an indictment of the optimal tax literature, which I think is important and valuable. Rather, the point is that scholars, commentators, and policymakers should understand that when the optimal tax literature speaks about "income" and "income taxes," it may be talking about something very different from what the reader imagines. Moreover, those particular definitions of income embody and reflect policy choices that may also be different from those of the reader. We must remember that income—even in economics—is not a pure concept, but is rather a constructed idea based on political and practical objectives.

VI. Income Beyond Taxation

The discussion thus far has focused on definitions of income for tax purposes, and the theoretical issues they raise. In this Part, I expand the discussion beyond just tax by considering the role that "income" plays as a broader metric of comparison between individuals—for both tax and nontax purposes. I begin by laying out the issues that can arise when tax-driven measures of income are imported to nontax areas. I then turn to a detailed analysis and breakdown of the many definitions of income that are used by different agencies for different purposes.

A. The Index of Equality

Problems with the income concept have effects beyond just tax law and scholarship. As Musgrave argued in 1959, the choice of a tax base is not simply an administrative choice, but also establishes that base as an "index of equality,"[179] a metric for making comparisons between individuals. That normative index is particularly important for taxation, since at its core a system of taxation has to make normative decisions about the relative demands it puts on individuals to fund public and collective goods. But that normative index can then seep out into other areas of law and policy.[180]

Income has thus become generalized as the way to make normative comparisons. We talk about high- and low-income individuals, income inequality, income disparities between men and women, between whites and minorities, and so on. Many studies of course also look at other metrics for comparison, like wealth, health, educational outcomes, and the like, but income is the dominant comparison—de-

[179] Musgrave, note 43, at 161-73.

[180] See Thuronyi, note 46, at 45 (noting that concepts of income and income distribution, as measured for the purposes of tax policy, also impact other areas of public policy as well as the social sciences).

spite the fact that one hundred years ago theorists and courts were not even sure what income was, and as I have argued here any pure definition remains elusive.

The corollary to using income as the index for making normative comparisons is that only those items included in the income definition are used for such comparisons, whereas items not included are not. The nonincluded items might still reflect important margins of inequality, however. But if they are not in the index, those margins might be ignored.

For example, consider the example that began this Article—net imputed income for owner-occupied housing. That is a significant form of income, in a Haig-Simons sense—for many people, it could amount to thousands or tens of thousands of dollars a year. That is enough to affect a horizontal equity comparison between individuals. Two people with the same salary, but one owning a home and the other paying rent (and holding all else equal), should not be thought of as having equal economic wellbeing. Understanding this, many means-tested programs include assets, not just income, in their formulas. But the vast majority of other definitions of income—tax and otherwise—do not.

As another example, consider capital gains. As Simons taught us, accretions to wealth ought to be considered when comparing individuals. But the tax system does not measure increases or decreases in wealth. All that it measures are realized capital gains or business profits—under our realization-based tax system, increases in the value of property do not become taxable until they are "realized" through a sale or exchange. Thus, an individual who simply buys and holds could see her wealth grow year after year, without ever having that growth appear as "income."[181] Furthermore, many of the other definitions of income discussed in the next Section do not include even *realized* gain.

The failure to measure unrealized gains in AGI means that the tax data likely understates the income of the highest-income cohort, since we observe only realized, but not unrealized, gains.[182] This absence might be even worse in studies that use income definitions that do not include realized gains either, like the Bureau of Economic Analysis's

[181] Indeed, if the person holds the property until death, none of the growth will ever be income to anyone, since § 1014 steps up the basis of property transferred by bequest or inheritance, thus wiping out any built-in gain in the property.

[182] This is exacerbated by the fact that well-advised taxpayers will annually realize most or all of their portfolio losses.

Personal Income measure.[183] Trying to accurately measure the income from capital is thus a major methodological problem for tax and other researchers. In many studies about income inequality, capital gains are simply left out altogether.[184] Much of the work that Thomas Piketty does in *Capital in the Twenty-First Century* (and in earlier work with co-authors) is an attempt to construct some measures of capital and the income from capital from the relatively thin sources available, relying especially on tax data for the wealthiest cohort.[185] His work is probably the most comprehensive ever done in that respect, but has still faced some strong and fair criticisms. He has also said that his desire to have a global wealth tax is driven as much, if not more, by a desire for *data* than about any normative benefits.[186]

To be clear, I am not saying that any definition has necessarily failed by not taxing these two items of Haig-Simons income—imputed income from housing and unrealized capital gains. It should be clear by now that I am skeptical of definitional arguments. My point is rather that if they are not included in the definition of income, they are not used as a basis for comparisons between individuals, for tax and non-tax purposes. If income is our normative index of equality, then only those things that are "income" are used as a basis for comparison.

A possible response is that what a tax system cares about, ultimately, is cash. Cash is what the government needs to pay its obligations, and thus we should tax people on their ability to pay that cash.[187] (Other income definitions, like the Census Bureau's Money Income concept, explicitly make the choice to focus on cash.[188]) That

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183 Mark Ledbetter, Bureau of Econ. Analysis, Comparison of BEA Estimates of Personal Income and IRS Estimates of Adjusted Gross Income (2007), https://www.bea.gov/scb/pdf/2007/11%20November/1107_pi_agi.pdf.

184 See, e.g., notes 226, 235, and accompanying text.

185 Thomas Piketty, Capital in the Twenty-First Century 11, 17-19 (Arthur Goldhammer trans., 2014). This is partly because other measures do not include capital gain, and partly because other data sources are top-coded for high-income people, meaning that tax returns might be the only source of good data.

186 See, e.g., Matthew Yglesias, Thomas Piketty Doesn't Hate Capitalism, He Just Wants to Fix It: Interview, Vox (Apr. 24, 2014), http://www.vox.com/2014/4/24/5643780/who-is-thomas-piketty#interview ("To me, one of the main purposes of the wealth tax is that it should produce more information on wealth. I think even a wealth tax with a minimal tax rate would be a way toward more financial transparency. A minimal registration tax on assets, a minimum wealth tax is a way that we can produce more information on wealth, and then we'll see what happens in terms of tax rate.").

187 See e.g., Joseph M. Dodge, Deconstructing the Haig-Simons Income Tax and Reconstructing It as Objective Ability-to-Pay "Cash Income" (Fla St. Pub. Law, Research Paper No. 633, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245818. Dodge's "cash income" concept is much more nuanced than can be given justice here, though he proposes changes that move the income concept more toward cash, such as repealing accrual accounting and depreciation, and embedding the realization principle. Id. at 1-2.

188 Arnold J. Katz, Explaining Long-Term Differences Between Census and BEA Measures of Household Income 2 n.1 (Jan. 10, 2012) (unpublished manuscript) (available at

could do away with the problems of imputed income and unrealized gains, for example. A senior on a fixed income living in a house he owns may not be liquid enough to pay a higher tax, nor would a small business owner whose capital is all tied up in the business.

These are, essentially, the practical judgments we have already made with respect to imputed rent and unrealized gains. But we should remember that the tax system makes many huge deviations from a notion of cash income already. To list just a few: accrual accounting, cost recovery, pass-through taxation for partnerships and S corporations, constructive sales rules, the tax treatment of borrowing, original issue discount, constructive receipt of deferred compensation, passive loss limitations, casualty loss limitations, § 475 mark-to-market treatment, subpart F, and so on. In these and other areas, Congress has decided that a taxpayer should pay taxes based on a broader idea of economic income than simply available cash.

If taxable income were just cash income, we might be less inclined to give greater normative weight to AGI—it would be more obviously just an accounting category. But because the tax system purports to measure "all income from whatever source derived," AGI takes on the appearance of comprehensiveness, which in turn makes it appear appropriate for nontax comparisons as well.

As discussed in the next Section, the tax definition of income is not the only one out there. Other agencies use surveys or other administrative data to come up with their own measures of income. While these definitions do not necessarily replicate the choices of the tax system, they make their own choices for their own particular policy or other reasons. I discuss these more below. But the tax definition of income is still the central concept. The other measures all rely on tax administrative data to some extent, and several of them are explicitly keyed off of AGI.[189] These measures start with income as reported on tax returns, and then make adjustments to better capture whatever the particular agency decides should be included. AGI thus has a long reach. As a result, legislative changes to the Code for tax reasons can have repercussions beyond just tax, affecting income measures used for transfers or for other policy analysis. For example, moving an itemized deduction, such as for charitable contributions, "above the line" (that is, used in calculating AGI) could affect an individual's eligibility for subsidized health insurance or student loan forgiveness.

Musgrave's prediction has thus come true, in two ways. First, income has become the dominant metric by which to make comparisons

https://www.bea.gov/papers/pdf/arnold_katz_fcsm_paper.pdf). See also notes 202-03 and accompanying text.

[189] See notes 220-21 and accompanying text.

among individuals—it is the primary "index of equality." One cannot prove the counterfactual, of course, but if the tax system had chosen a different measure of ability to pay—consumption or wealth, for example—we might have a different normative language today.

Second, although income does not have a single definition, and can in fact be defined in a nearly infinite number of ways, the tax system's definition of income—a definition driven almost entirely by tax policy—extends into nontax areas, and especially into other normative spaces, like eligibility for transfers and a broader measurement of inequality. As argued above, any definition of income is a policy choice, but the tax system's dominance in income measurement means that some tax policy choices are imported into other areas where they may not belong.

B. The Many Definitions of Income

The IRS is not the only agency that attempts to measure income. Many other agencies have their own reasons for caring about income, either in order to distribute transfers or to judge the effects of other policies. And because each agency has slightly different goals, the income concepts that they use are constructed in different ways, and none match up precisely. Here, I consider twelve other income concepts beyond Haig-Simons and AGI. I discuss each of them briefly below, and the differences between them are summarized in Table 1. But some broader points are worth emphasizing:

First, I am not aware of another study or paper that performs this complete of a comparison across income concepts. While several analysts and academics have made bilateral comparisons, and some cover more than two concepts,[190] this broad and nearly all-encompassing review has thus far not appeared in the literature. That alone is surprising.

Second, compiling this information involved digging rather deep into some agencies' documentation (including, in the case of the Fed's

[190] See, e.g., Dennis Fixler & David S. Johnson, Accounting for the Distribution of Income in the US National Accounts, in Measuring Economic Sustainability and Progress 214 (Dale W. Jorgenson, J. Steven Landefeld & Paul Schreyer eds., 2014); Eric L. Henry & Charles D. Day, A Comparison of Income Concepts: IRS Statistics of Income, Census Current Population Survey, and BLS Consumer Expenditure Survey, in Special Studies in Federal Tax Statistics 149 (James Dalton & Beth Kilss eds., 2005); Mark Ledbetter, Comparison of BEA Estimates of Personal Income and IRS Estimates of Adjusted Gross Income, 87 Surv. Current Bus. 35 (2007); Barry W. Johnson & Kevin Moore, Differences in Income Estimates Derived from Survey and Tax Data, Am. Statistical Ass'n (2008), http://users.nber.org/~taxsim/to-taxsim/scf/Johnson_Moore_ASA2008.pdf; John Ruser, Adrienne Pilot & Charles Nelson, Alternative Measures of Income: BEA Personal Income, CPS Money Income, and Beyond (Nov. 2007) (unpublished manuscript) (available at https://www.bea.gov/about/pdf/AlternativemeasuresHHincomeFESAC121404.pdf).

Survey of Consumer Finances, the ASCII-text guide for how data analysts should code answers to some survey follow-up questions).[191] Much of the easily accessible information is incomplete or only in summary form, and it seems likely that few beyond those most intimate with the data fully understand what is actually included in particular definitions. These first two points underscore one of the arguments of this Article, that the word "income" is used to describe many things, but that speakers are often not aware of how much one person's or agency's definition differs from another's. As this Section and the table shows, the differences can be stark.

Third, the particular choices about what to include in "income" and what to exclude are generally driven by either the policy goals or the object of study of the agency in question. The decisions are (mostly) not arbitrary. What an agency names as "income" are those items that it cares about in meeting its policy or analytical goals. But there are nonetheless some idiosyncratic choices, especially when a definition relies on the tax definition as a starting point, as several do.

Fourth, there are some notable patterns. Among the items that appear in every one of the income concepts are wages, business income, income from property (other than realized gains), and taxable interest and dividends. The core of each definition thus contains the major items of labor and production that lead to cash in the hands of individuals. These are the items that would make up anyone's intuitive definition of income. More interesting is the general absence of some other items. Realized gain, for example, appears in relatively few of the concepts, and even fewer of the concepts that do not use AGI as a starting point. The logic seems to be that transforming an asset into cash does not create income, rather just changes the form of a resource. But none of the concepts (other than Haig-Simons income) includes *unrealized* gain. Which means that appreciation in asset values often goes unmeasured entirely. Analysts and policymakers using these concepts should be aware that they may be inadvertently embedding these choices and problems in their studies and policies.

Finally, as noted in the previous Section, several of these measures are at least partly based on AGI, the measure of income for tax purposes. The Census Bureau and Bureau of Labor Statistics (BLS) measures of income rely on independent surveys and other data, with some supplementary information from tax and administrative sources.[192]

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[191] Fed. Reserve Bd., Summary Listing of Questions Asked in the 2013 SCF, https://www.federalreserve.gov/econres/files/scfoutline.2013.pdf (last visited Apr. 16, 2018).

[192] See notes 202-11 and accompanying text.

TABLE 1
INCOME DEFINITIONS

ITEM OF INCOME	*Haig-Simons/ CTB*	*AGI*	*BEA Personal Income*	*CPS Money Income*	*CPS Alternative 15*	*BLS CE Survey*	*CBO Before-Tax Income*	*Fed SCF "Bulletin" Income*	*SNAP Gross Income*	*SSI Countable Income*	*FAFSA "Total Income"*	*ACA MAGI*
Labor Income												
Wages	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Fringe benefits (other than health care)	Yes	Some	Yes	Yes	Yes	No	Yes	Taxable only	No	No	Some	Some
Employer health care contributions	Yes	No	Yes	No	Yes	No	Yes	No	No	No	No	No
Employer retirement contributions	Yes	No	Yes	No	No	No	Yes	No	No	No	Some	No
Employer contributions to SS	Yes	No	No (added, then deducted)	No	No	No	Yes	No	No	No	No	No
Household production/imputed services	Yes	No	Some (farm)	No	No	No	No	No	No	No	No	No
Capital Income												
Rent & royalties from property	Yes	Yes	Yes	Yes	Yes	Yes	Yes (incl. share of corp. taxes)	Yes	Yes	Yes	Yes	Yes
Taxable interest and dividends	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Tax-exempt interest	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Net business income	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Imputed investment income (e.g., on pension funds, insurance funds, bank deposits)	Yes	No	Yes	No	No	No	No	No	No	No	No	No
Realized gain	Yes	Yes	No	No	Yes	No	Yes	Yes	Yes	No	Yes	Yes
Unrealized gain	Yes	No	No	No	No	No	No	No	No	No	No	No
Net imputed rent	Yes	No	Yes	No	Yes	No	No	No	No	No	No	No

ITEM OF INCOME	*Haig-Simons/ CTB*	*AGI*	*BEA Personal Income*	*CPS Money Income*	*CPS Alternative 15*	*BLS CE Survey*	*CBO Before-Tax Income*	*Fed SCF "Bulletin" Income*	*SNAP Gross Income*	*SSI Countable Income*	*FAFSA "Total Income"*	*ACA MAGI*
Retirement income												
Retirement & pension income	Yes	Some	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Some
Social Security payments	Yes	Some	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Some	Yes
Income Security												
Workers' compensation	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Unemployment ins. payments	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
SSI	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A	No	No
Disability & survivor payments (non-SSI)	Yes	Some	No	Yes	Yes	No	Unknown	Yes	Yes	Yes	Yes	Some
Veterans' payments (other than educational)	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	No
Transfers												
Private cash transfers/gifts/ transfers from non-profits	Yes	No	No	Yes	Yes	Regular, not lump-sum	*	Yes	If exceed $1200	Yes	Yes	No
Alimony	Yes	Yes	No	Yes	Yes	Yes	*	Yes	Yes	Yes	Yes	Yes
Child support	Yes	No	No	Yes	Yes	Yes	*	Yes	Yes	Yes	Yes	No
Cash government transfers (other than EITC) (incl. SNAP and other income maintenance programs)	Yes	Some	Yes	Yes	Yes	Yes	Yes	Yes	Other than SNAP	Some	No	Some
EITC	Yes	No	Yes	No	Yes	No	No	No	No	No	No	No
In-kind government transfers	Yes	No	Yes	No	Yes	No	Yes	Housing	No	Food and shelter	No	No
Educational assistance (other than as compensation)	Yes	No	Yes	Yes	Yes	Some	*	Some grants	No	No	No	No

ITEM OF INCOME	*Haig-Simons/ CTB*	*AGI*	*BEA Personal Income*	*CPS Money Income*	*CPS Alternative 15*	*BLS CE Survey*	*CBO Before-Tax Income*	*Fed SCF "Bulletin" Income*	*SNAP Gross Income*	*SSI Countable Income*	*FAFSA "Total Income"*	*ACA MAGI*
Items of Expense/Deduction (i.e., is income lowered by these amounts?)												
Employee contributions to SS	Yes	No	Yes	Yes	No	No	No	No	No	No	No	No
Negative income (net loss)	Yes	No	Yes	*	*	*	*	Yes	Some (farming losses)	*	No	No
Tax payments	No	No	No	No	Yes	No	No	No	No	No	No	No
Employee retirement contributions	No	Some	No	No	No	No	No	No	Unknown	No	No	Some

* Unable to determine based on publicly available sources

Sources:

AGI	Internal Revenue Code
CPS	CPS P60-200, Appendix A
BEA	NIPA Table 2.1, NIPA Handbook & appendix
BLS	Table 1203; Glossary; Handbook of Methods
CBO	Trends, 2011
SCF	Questionnaire Summary; Bricker et al.; Codebook, especially variable x5724 ("other")
SNAP	7 U.S.C. § 2014
SSI	20 C.F.R. § 416.1102 et seq.
FAFSA	20 U.S.C. § 1087vv; keyed off of AGI
ACA MAGI	25 U.S.C. § 36B(d); keyed off of AGI

But the CBO uses a combination of tax and Census Bureau data, and the Bureau of Economic Analysis (BEA) uses primarily administrative data, such as tax data, unemployment filings, and Social Security data, as well as reliance on the Census and other surveys.[193] The Fed's Survey of Consumer Finances explicitly tells respondents to look at their tax returns to answer survey questions.[194] And the Free Application for Federal Student Aid (FAFSA) and Affordable Care Act (ACA) definitions start with AGI and then make some adjustments. The centrality of income measurement to tax administration, and the enormous amounts of data collected by the IRS, make reliance on tax measures of income extremely tempting.

1. NIPA Personal Income

BEA, through its National Income and Product Accounts (NIPA), attempts to measure the production of the entire household sector (in addition to other sectors).[195] The BEA's primary task is calculating GDP, and thus the income concept is particularly focused on production, whether or not that production translates into cash on hand.[196] Thus NIPA Personal Income includes items such as employer contributions to health care and retirement insurance, as well as all in kind and cash government transfers, but does not include most interpersonal transfers, such as alimony and child support.[197]

Importantly, NIPA Personal Income is the only agency definition (other than the Census's alternative Definition 15) that includes imputed rent on owner-occupied housing and the only one that includes imputed investment income, such as bank depositor services and the interest and dividend income on insurance and pension accounts.[198] The assets in owner-occupied housing, insurance companies, retirement funds, and bank deposits make up an enormous amount of personal wealth, so it follows that the income produced from those assets should be taken account of—though no other measure does. And not

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193 See Bureau of Econ. Analysis, State Personal Income and Employment: Concepts, Data Sources, and Statistical Methods I-9--I-10 (2016).

194 See note 215 and accompanying text.

195 See Bureau of Econ. Analysis, Concepts and Methods of the U.S. National Income and Product Accounts 1-1--1-2 (2017) [hereinafter NIPA Handbook].

196 See id. at 1-2; Bureau of Econ. Analysis, note 193, at 1-8.

197 See NIPA Handbook, note 195, at 2-6--2-13; Bureau of Econ. Analysis, Table 2.1: Personal Income and Its Disposition, https://www.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=3&isuri=1&1921=survey&1903=58 (last visited Apr. 3, 2018).

198 See NIPA Handbook, note 195, at 2-5; U.S. Census Bureau, Money Income in the United States: 1997, at A-4 (1998), https://www.census.gov/prod/3/98pubs/p60-200.pdf.

even NIPA Personal Income measures imputed household services, like parent-provided child care.[199]

The NIPA Personal Income concept also does not include capital gain income.[200] This is not unreasonable, given that this income concept is based on the idea of national production. Production at the corporate level is counted separately, so including increases in the prices of corporate equity as "national production" would be partly double-counting. However, the Personal Income concept is not synonymous with full national production—it is only the measure of production done by individuals, and does not impute corporate earnings to individuals.[201] Thus, capital income due to increases in the value of capital assets goes almost completely uncounted in the Personal Income measure.

2. *Census Bureau Money Income*

The Census Bureau, through the Current Population Survey, measures families' "money income," which, as the name implies, is intended as a measure of the resources that a family has available for consumption.[202] It is a more bottom-up "micro" approach, compared to the "macro" approach of the BEA.[203] It is also a significantly narrower definition, since it measures mostly cash and cash equivalents, and thus leaves out things that the BEA includes, such as employer contributions to health care, retirement insurance, and Social Security, in kind government transfers, and imputed rent.[204] (Though, unlike NIPA Personal Income, it includes private transfers, like gifts, alimony, and child support.)

The gap between Census Bureau Money Income and BEA Personal Income is wide and growing. One study found the gap between Census Money Income and BEA Personal Income to be over $2 trillion in 2001.[205] That gap had grown to around $5.4 trillion in 2016.[206]

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199 See NIPA Handbook, note 195, at 2-5 (discussing how NIPA imputes nonmarket transactions).

200 See id. at 2-7.

201 See id. at 2-13.

202 See Katz, note 188, at 9-10.

203 Id.

204 See Bernadette D. Proctor, Jessica L. Semega & Melissa A. Kollar, U.S. Census Bureau, Income and Poverty in the United States: 2015, at 21 (2016). For a more thorough discussion, see U.S. Census Bureau, note 198, at A-1 to A-4.

205 Ruser et al., note 190, at 2 (BEA estimate of $8.678 trillion vs. CPS estimate of $6.446 trillion).

206 Bureau of Econ. Analysis, note 195 ($16 trillion). U.S. Census Bureau, Historical Income Tables: People, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-people.html (follow "All Races" hyperlink underneath Table P-1: Total CPS Population and Per Capita Income) ($10.6 trillion).

Recognizing the relative meagerness of the Money Income definition, the Census Bureau also uses fifteen other "alternative" definitions of income for various purposes (underscoring how many definitions are possible).[207] Definition 15 is the broadest, including in kind government transfers and realized gain, as well as the employer's contribution to retirement and the employee's share of payroll taxes (presumably under the view that they are also income contributed to retirement savings).[208] On the Census Bureau's website, researchers can also construct their own definition of income out of forty-two separately compiled components of income.[209]

3. *Bureau of Labor Statistics Consumer Expenditure Survey Income*

The Consumer Expenditure Survey (CE) is conducted by the BLS primarily for revisions to the CPI index of inflation,[210] and it is thus especially focused on expenditures (as opposed to the BEA's focus on production and the Census's focus on money). The concept lines up closely to the Census's Money Income definition, however (the Census Bureau performs both surveys). Differences include the inclusion of employer-provided noncash fringe benefits in the Census definition but not the BLS definition. The BLS also only includes transfers from others if they are regular, as opposed to lump sum, and does not deduct the employee's share of payroll taxes.[211] Presumably these differences are driven by a desire to get the most accurate picture of the income that flows into an individual's purchases of consumer goods.

4. *Congressional Budget Office Before-Tax Income*

CBO is especially interested in measuring or estimating the distributional effects of tax and other legislative changes. For this purpose, they use three income measures: market income, market income after transfers but before taxes (what I call "Before-Tax Income"), and

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207 See U.S. Census Bureau, note 204, at A-4.

208 See id.; U.S. Census Bureau, Alternative Measures of Income, https://www.census.gov/topics/income-poverty/income/about/glossary/alternative-measures.html (last updated May 11, 2016).

209 U.S. Census Bureau, Current Population Survey (CPS), http://www.census.gov/cps/data/incdef.html.

210 See Bureau of Labor Statistics, Consumer Expenditure Survey, http://www.bls.gov/cex.

211 See Bureau of Labor Statistics, Consumer Expenditure Survey Glossary (2015), http://www.bls.gov/cex/csxgloss.htm (providing the definition for "Income"); Bureau of Labor Statistics, Consumer Expenditure Survey, Table 1203: Income Before Taxes (2015), http://www.bls.gov/cex/2015/combined/income.pdf.

market income after taxes and transfers.[212] I chose Before-Tax Income because it is the broadest measure. It essentially takes AGI and corrects for certain tax expenditures, such as the exclusion of interest on state and local bonds and the partial exclusion of some retirement and Social Security income.[213] It also adds in cash and in kind government transfers, like SNAP and Medicaid, but does not include transfers through the tax system, such as the Earned Income Tax Credit. It also aims to get a fuller picture of income by including the employer's portion of the payroll tax and the proportionate share of corporate taxes borne by capital and labor.[214] Both would be offset in the after-tax income measure, but including them in the pretax measure allows CBO to better understand the distributive consequences.

5. *Federal Reserve Bulletin Income*

The Federal Reserve publishes what it calls "Bulletin Income," derived from its Survey of Consumer Finances. The Fed is particularly concerned with household balance sheets—stocks, rather than flows—and its income measure reflects that. For example, it includes a relatively broad definition of capital income, including capital gains (unlike the BEA, Census, and BLS measure).[215] It also includes the value of private cash transfers, like alimony and child support, government cash transfers, and in kind government transfers with respect to housing.[216] (I suspect that including transfers for housing but not health care reflects the Fed's focus on assets and liabilities.) However, because the Survey of Consumer Finances (SCF) survey refers individuals to their tax returns to answer some of the questions about income, Bulletin Income also mirrors AGI in some odd ways, such as not including employer contributions for health care and retirement in labor income, including only taxable fringe benefits, and not including veterans' payments.[217] Finally, and uniquely among the income measures here, the SCF seems to allow for respondents to declare negative income, due to excessive losses. This is consistent with the Haig-Simons concept, and also with the Fed's focus on household balance

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212 See, e.g., Cong. Budget Office, Trends in the Distribution of Household Income Between 1979 and 2007, at 33-34 (2011), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/10-25-householdincome0.pdf.

213 See id. at 33.

214 Id.

215 Fed. Reserve Bd., note 191, at 21 (indicating that income includes "[g]ains or losses on stocks, bonds, mutual funds").

216 Id. at 21-22; Fed. Reserve Bd., Codebook for 2013 Survey of Consumer Finances, https://www.federalreserve.gov/econres/files/codebk2013.txt (describing these sources of income, particularly in the questions under Code x5725).

217 Id.

sheets, but "negative income" is a concept that most other agencies do not consider.

6. *SNAP, SSI, FAFSA, ACA*

Finally, I consider the income measures used to determine eligibility for various government transfers. These measures, along with the CBO's, are distinct from the others in measuring income largely for social policy reasons, rather than national accounting. The choices of what to include and exclude somewhat reflect that difference.

SNAP, often referred to as "food stamps," provides cash assistance for low-income individuals in the purchase of food. Supplemental Security Income (SSI) provides additional support under Social Security for disabled individuals. FAFSA determines students' eligibility for Pell Grants, subsidized federal loans, and other educational transfers. And the Modified Adjusted Gross Income measure determines the size of the premium support tax credits used to subsidize individuals' purchase of health insurance through the ACA exchanges.

Each measure differs, in sometimes idiosyncratic ways. For example, the measure of income for purposes of SNAP appears to allow net losses from farming activity but not net losses from other activities.[218] SSI Countable Income does not appear to count capital gains, because that is just a shift in the character of a resource, not an increase in resources.[219] Because SSI (along with SNAP and FAFSA) looks not only at income but also resources, counting capital gains would presumably be a form of double-counting (though SNAP and FAFSA both include capital gains in income). SSI also explicitly focuses on the income and resources needed to procure food and shelter, and therefore counts in kind transfers of food and shelter as income (since they offset the demands on cash for food and shelter).[220]

A final, particularly important feature of these measures is FAFSA's and the ACA's reliance on AGI as the baseline measure. Both start with AGI and make certain adjustments. In the case of FAFSA, tax-expenditure-type items, such as tax-exempt interest, workers' compensation, and veterans' benefits are added back in.[221] Modified Adjusted Gross Income for the ACA is only AGI plus un-

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[218] See 7 U.S.C. § 2014(d)(9) (2012). My instinct is that this is somehow valued by the farm lobby, but I am at a loss to explain why their focus is only on making farmers more eligible for SNAP rather than everyone. Anything that lowers income and increases overall eligibility for SNAP ought to be valued by agricultural interests.

[219] See 20 C.F.R. § 416.1103(c) (2017).

[220] See id. at § 416.1130(b).

[221] See 20 U.S.C. § 1087vv.

taxed foreign income, tax-exempt interest, and excluded Social Security benefits.[222]

While this sample is too small to allow for firm conclusions, it is telling that two of the newer government transfer programs do not set out to create an income measure from scratch, but instead start with an existing measure (AGI) and make adjustments. That reliance is not entirely unwarranted—after all, these programs and the tax system share some overall goals regarding distributive justice, and it would be expected that the income measure used to assign tax burdens is similar to the one used to determine transfers. That said, the more established SNAP and SSI programs are not nearly as reliant on AGI, perhaps because of an understanding that many other issues are at play in measuring AGI, not just a concern with fairness.

If so, then Congress' recent use of AGI in transfer programs raises some concern. If future government programs key benefits to need rather than being universal—as seems likely[223]—then the tax measure of income may become even more prominent. More use of AGI could serve to further entrench the particular policy choices embedded within that definition.

C. Income Studies

To illustrate the importance of considering the different definitions of income and how they are used, I now look briefly at the trajectory of perhaps the most important work in income inequality in the last two decades, the work of Piketty, Saez, and co-authors, as well as a competing line of literature from Jeff Larimore, Richard Burkhauser, and co-authors. My purpose here is not to provide a definitive overview of their work or to take sides, but rather to show how research and conclusions can change significantly depending on income definitions, and also that researchers are beginning to grapple with the limits of tax-driven definitions of income. An important irony illustrated by this is that researchers are moving beyond tax-driven definitions of income at the same time that policymakers are doubling down, especially through the ACA and FAFSA income concepts.

In work that culminated in a 2003 paper (which continues to be updated online with more recent data),[224] Piketty and Saez tackled the issue of income inequality, and especially the growth in the very

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[222] See IRC § 36B(d)(2)(B).

[223] See John R. Brooks, Quasi-Public Spending, 104 Geo. L.J. 1057, 1072-78 (2016) (discussing budget constraints that drive governments to limit nominal expenditures to subsidies and distributional adjustments rather than full provision).

[224] Piketty & Saez, note 27; Update at https//eml.berkeley.edu/saez/ (under Income and Wealth Inequality) (last updated June 2016).

top shares of income. Their challenge was that survey data could not give them an answer, because of top-coding and a lack of over-sampling. Their solution was to use tax data instead, following the method of Simon Kuznets.[225] Using tax data from 1913 to 1998, they show that the share of income earned by the top income groups followed a U-shape over that period, with very high shares early and late in the period, but somewhat lower during World War II and the post-war period.[226] Their finding that top income shares have been growing in recent decades has had a major effect on policy discussion around income inequality.

While tax data can provide more reliable data on top income share groups, it is—as we well know by this point in the Article—an imperfect measure of income. It does not include several important categories of income, including employer-provided health care and other excluded fringe benefits, many government transfers (both cash and in kind), and not all Social Security, all of which are important categories of income for lower- and middle-income taxpayers. Piketty and Saez also explicitly exclude capital gain income and tax-exempt interest, both of which are important categories of income for high-income taxpayers.[227]

A more subtle methodological issue arises from the fact that Piketty and Saez are trying to compute *shares* of income, not just levels of income. To do that, they need a denominator that reflects total national income. Ideally, they would use total income as reported on tax returns, to be consistent with their numerators, but this is not possible since prior to 1945 only higher-income individuals paid the income tax and reported their incomes.[228] Thus, the tax data does not have a measure (even an imperfect one) of total income prior to 1945.[229] Instead, they use NIPA Personal Income, as Kuznets did.[230]

However, the two concepts—the tax and NIPA measures—include different items, as discussed above and shown in Table 1. To address this mismatch, Kuznets made a number of adjustments to national income in order to bring it closer to the tax measure of income.[231] It is

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225 Id. at 1-2; Simon Kuznets, Shares of Upper Income Groups in Income and Savings (1953).

226 Piketty & Saez, note 27, at 11.

227 See Thomas Piketty & Emmanuel Saez, Income and Wage Inequality in the United States, 1913-2002, in Top Incomes Over the 20th Century: A Contrast Between Continental European and English-Speaking Countries 198 n.70 (Anthony B. Atkinson & Thomas Piketty eds., 2007).

228 See Carolyn C. Jones, Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II, 37 Buff. L. Rev. 685, 685 (1989).

229 See Piketty & Saez, note 27, at 4 (discussing the problem).

230 Id. at 6 n.9; see Kuznets, note 225; Subsection V.B.1.

231 See Kuznets, note 225, at 5.

not clear whether Piketty and Saez make the same adjustments, however. These adjustments should affect income shares, since the items included or excluded from one or the other measure affect individuals differently. For example, imputed rent from owner-occupied housing likely accrues more to higher-income individuals. If imputed rent is in the denominator (since it is included in the NIPA measure) but not the numerator, this would bias the top income shares downward. Other items, like disability and workers' compensation payments probably cut the other way.

If the differences between the tax and NIPA income measures were consistent over time, this might be less of a concern, at least for showing trends. However, the differences between the tax and NIPA measures of income is not static, but may be growing in recent years, with increasing amounts of income not in the tax base.[232] Thus, some of the movement in income shares may reflect just these relative changes in the two income measures, rather than changes in actual income inequality.

This is not to challenge the overall thrust of the work, and it is unlikely that these issues would affect the direction of the trend that they show. But they could have a material effect on the levels and the rate of change. For example, Burkhauser, Larrimore, and Simon show that using different measures of income can increase the growth rate in middle class incomes.[233] Specifically, they include the value of post-tax transfers (cash and some in kind), and also adjust for household size. They also use the same income concept for both the numerator and the denominator—CPS Money Income—avoiding the problem Piketty and Saez faced. But this reintroduces other problems, like the top-coding of top incomes and the absence of some important items of income from the CPS concept.[234] The CPS also does not include data on tax credits, tax liabilities, or the value of in kind benefits, which Burkhauser, Larrimore & Simon instead impute using tax data.[235]

Based on a recent paper, Piketty and Saez seem to consider the income definition question to be of first order importance. Piketty, Saez, & Zucman point out that previous studies like their own do not capture the full picture of "national income," since they look only at tax data, fail to take account of taxes, transfers, and spending on public goods, and, by looking at tax units rather than individuals, do not

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[232] See Jesse Bricker, Alice M. Henriques, Jake A. Krimmel & John E. Sabelhaus, Measuring Income and Wealth at the Top Using Administrative and Survey Data, 1 Brookings Papers on Economic Activity 261, 305 (2016), https://www.brookings.edu/wp-content/uploads/2016/03/brickertextspring16bpea.pdf; Thomas Piketty, Saez et al., note 28, at 563.

[233] Burkhauser, et al., Second Opinion, note 29.

[234] See text accompanying notes 224-25.

[235] Burkhauser et al., Second Opinion, note 29, at 11.

capture the profound changes in female labor force participation over time.[236] In the new paper, they instead look at the distribution of national income—that is, total production—with some adjustments, such as imputing corporate retained earnings to individuals in proportion to their observed dividend and realized capital gain income.[237] They also make some substantial (and disputable) assumptions about the incidence of both taxes and public goods expenditures.[238]

They find a similar U-shaped trend in the top income shares as the 2003 Piketty & Saez paper but with somewhat less concentration of pretax income at the top 10%, though still high and sharply rising in recent years.[239] Expanding the definition of income appears to have had a more significant effect on top-10% incomes in years before 1986, increasing the share of income earned by the top 10% by more than ten percentage points in some years.[240] They attribute this to high levels of undistributed corporate retained earnings in earlier periods, and also to the growth in capital income earned by pension funds in later periods.[241] Moreover, the share of the bottom 90% is increasingly made up of tax-exempt income, such as fringe benefits. They find that tax-exempt labor income made up 13% of bottom-90% income in 1962, but 23% of bottom-90% income today.[242]

At the same time that Piketty and Saez have addressed weaknesses in the tax definition of income by using survey data, a paper by Larrimore, Burkhauser, Gerald Auten, and Philip Armour addresses weaknesses in survey definitions of income by adding tax data (in contrast to the 2012 paper that uses only CPS data).[243] They also go beyond the approach of Piketty, Saez, and Zucman to consider accrued capital gains from both housing and corporate stock.[244] With this and other differences, they also find that the top 1% share of income has increased in recent years, though less dramatically than shown in the 2003 Piketty & Saez study. In the end, however, the two papers end

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236 Piketty et al., note 28, at 554.

237 Id. at 568.

238 See id. at 569-73.

239 Thomas Piketty, Emmanuel Saez & Gabriel Zucman, Distributional National Accounts: Methods and Estimates for the United States 30-31, 53 fig.12 (Nat'l Bureau Econ. Research, Working Paper No. 22945, 2016), http://www.nber.org/papers/w22945.pdf

240 Piketty et al., note 28, at 588-89.

241 The income earned by pension funds is distributed more equally than corporate retained earnings, and so it does not increase inequality as much. See id. at 589 n.2.

242 Id. at 580-81.

243 See Larrimore et al, Recent Trends, note 29, at 1-2.

244 Piketty et al., note 28, calculate capital gain by attributing current-year corporate earnings to individuals in proportion to their realized dividend and capital gain income. Id. at 568. As Larrimore et al., Recent Trends, note 29, points out, this fails to capture increase in stock prices based on investor perceptions of future corporate earnings. Id. at 6-7.

up in a similar spot, though swapping places. Piketty, Saez, and Zucman find that the top-1% share of post-tax national income (their broadest measure that includes the effects of taxes and transfers) in 2014 is 15%, with Larrimore, Burkhauser, Auten, and Armour finding that the top-1% share of "comprehensive income" in 2013 is 16.5%.[245] While both are slightly lower than the estimates in the earlier Piketty and Saez paper, they are still substantial and growing.

What we can take from these papers (in addition to their actual conclusions), is that a tax definition of income, and the data on income collected by the IRS, is hugely valuable to researchers and sometimes can provide a decent, though imperfect, snapshot of relative economic positions and trends. But the tax data can only go so far, and the forms of income that it misses—especially unrealized capital gains, fringe benefits, and imputed income from owner-occupied housing—are significant and have material effects on both levels of income and degrees of inequality. Researchers are increasingly aware of the first order importance of these differences, and one hopes that Congress and other policymakers will follow suit.

VII. Conclusion

This Article has argued that income is not capable of a single, pure, and rigorous definition, and that any income definition instead must be constructed based on the underlying goals or purposes of the relevant policy or study. Different parties will include or exclude different items based on particular policy goals or issues under study, and with good reason. This understanding can help us to better contextualize some debates in the literature, such as the role of tax expenditure analysis and optimal income tax theory. The mutability of income can also be demonstrated by the multitude of definitions that different government agencies use for different purposes.

This matters for a couple of reasons. First, the concept of "income" carries great weight. It is our index of equality, and the basis that we use for taxes, transfers, distributive analysis, and broader normative comparisons. But we can only study what we measure, so the choice of what is "income" and what is not has important effects on those same dimensions.

But, second, knowing that income is a constructed concept allows us to better answer the question "What is income?" Ultimately, income is simply the name that we use to describe the set of things that we measure for purposes of making normative comparisons. This is not to say that it can be literally anything at all, only that whether an item

[245] Piketty et al., note 28, at 575 tbl.1; Larrimore et al., Recent Trends, note 29, at 28.

is or is not in the Haig-Simons or some other comprehensive definition is beside the point. Maybe we care that the *Flügeladjutant* gets free carriage rides, maybe we do not, but in no way is a tax, or other, agency obligated to include those rides in his income just because some particular definition might demand that. What a tax agency, and Congress, is obligated to do is ensure that the items included in the income definition for tax purposes are those items that it believes are appropriate in assigning relative tax burdens.[246]

Pushing against this view, however, is the importance of the tax definition of income in nontax policy areas. The ubiquity of taxation, the detail of the Code, the centrality of income measurement to the IRS mission, and the enormous amount of data the IRS collects makes reliance on tax definitions of income tempting to policymakers and researchers. But if AGI is just one possible measure of income, and one inherently imbued with tax policy choices (some reasonable, some not), then policymakers and researchers must be very careful and deliberate in using it. In the story this Article tells, researchers are coming to grips with these issues just as policymakers may be relying even more heavily on AGI.

The enormous simplification and administrative benefits that come from using AGI mean that Congress and other agencies will likely continue to rely on AGI to some degree. If so, they should also be sensitive to nontax issues when considering changes to the tax base, despite the claim above that the government may assign tax burdens however it wishes. This is not because they ought to follow some particular definition of income—indeed, because income definitions follow in part from policy goals, it is rather because there are now multiple policies, and therefore multiple definitions of income, in play, and AGI is asked to fill them all. It may be asking too much of Congress for it to consider the effects of AGI changes on, for example, Pell Grant eligibility or the Fed's Survey of Consumer Finances, but AGI affects those and more. Our definitions of income overlap and intertwine in important, often unseen ways, and it is incumbent on all of us to understand that income is not a single thing, a single idea, but rather a vast range of different concepts, definitions, norms, and policies.

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[246] This is somewhat similar to Victor Thuronyi's argument that income can be defined only by reference to equity, that is, that something is income if it is fair to determine tax burdens based on it. See Thuronyi, note 46, at 53-55. Where I differ with Thuronyi is that I do not believe even fairness is required. Policymakers are welcome to incorporate their fairness views in the income definition, but the definition may also incorporate other norms or policies, and it would be equally valid. The point only is that the definition follows from whatever the goals are.