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DEFINING INCOME

by

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More than half a century ago in *Commissioner v. Glenshaw Glass*, the Supreme Court defined "income," as used in section 61 of the Internal Revenue Code, as "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[1] The Code narrows the scope of income by providing for specific exclusions but, outside of those exclusions, the Code's own, self-referential definition—"gross income means income from whatever source derived"[2] — seems to confirm the broad scope of the definition.[3]

The breadth of the *Glenshaw Glass* definition appears to be nearly co-extensive with the Haig–Simons definition of income, which is widely accepted as providing the theoretical foundation for the income tax.[4] Accordingly, many tax professionals interpret the language in section 61 and *Glenshaw Glass* solely in light of the economic principles reflected in the Haig–Simons definition.[5] The analytical structure for determining what is

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1. Comm'r v. Glenshaw Glass, 348 U.S. 426, 431 (1955). Professor Joseph Dodge has observed that the Court in *Glenshaw Glass* "does not purport to 'define' the term 'income.' It only 'translates' the *facts* of *Glenshaw-Goldman* into the legally relevant form of 'realized economic gain of the taxpayer.'" Joseph M. Dodge, *The Story of Glenshaw Glass: Towards a Modern Concept of Gross Income*, *in* TAX STORIES 18 (Paul L. Caron ed., 2d ed. 2009) [hereinafter *Glenshaw Glass* Story]. Although Professor Dodge is correct that the Court in *Glenshaw Glass* does not adopt a formulation that says "we define income as . . . ," courts and scholars following *Glenshaw Glass* have uniformly taken the formulation announced in *Glenshaw Glass* to be the definition of income and we do likewise here. The title of Professor Dodge's chapter in TAX STORIES, and indeed, its placement as the first chapter in that book, suggests that we are not alone.

2. Section 61 provides: "Except as otherwise provided in this subtitle, gross income means income from whatever source derived, including (but not limited to) the following items . . . ." I.R.C. § 61. The list of specific inclusions contains principally receipts that are fairly obviously income, such as compensation for services. This formulation is not tautological if gross income is viewed as "merely a phrase indicating a step in the mathematical computation" for which the term "statutory base" could well be substituted. Stanley S. Surrey & William C. Warren, *The Income Tax Project of the American Law Institute: Gross Income, Deductions, Accounting, Gains and Losses, Cancellation of Indebtedness*, 66 HARV. L. REV. 761, 771 (1953).

3. The regulations shed a bit of light by including additional specific items, such as some fringe benefits and treasure trove, Treas. Reg. § 1.61-14, but despite the tremendous and increasing girth of the Code, the *Glenshaw Glass* formulation remains the starting point for defining income.

4. HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938). The *Glenshaw Glass* definition differs from Haig–Simons because *Glenshaw Glass* requires realization, but its inclusion of all accessions makes it otherwise just as broad as Haig–Simons. *See infra* notes 45–46 and accompanying text.

5. In addition, as Zoë and John Prebble have noted, "[t]here is a strong tradition of construing tax statutes literally," Zoë Prebble & John Prebble, *The*

income appears clear and is generally treated as immutable. The analysis begins with the broad mandate of section 61 and *Glenshaw Glass*. As long as there is a realized accession in the economic sense within the taxpayer's dominion, *Glenshaw Glass* would seem to provide that there is income unless, pursuant to the very first words of section 61, there is an exclusion in the statute. From the time they are introduced to the tax law, students are taught this analytical structure, and by the time they become practitioners and then judges or scholars, it is second nature.[6]

The apparent breadth of the *Glenshaw Glass* formulation seems to give the Internal Revenue Service (IRS) wide authority to tax accessions to wealth. Nevertheless, the IRS has sometimes taken the position that a particular accession is income, only to be rebuffed by a trial or appellate court and then abandon its position.[7] Other times the IRS has chosen not to take the position that a particular accession is income at all.[8] For example, courts and the IRS have concluded that "imputed" income is not income even though nothing in the *Glenshaw Glass* definition specifically excludes it.[9] Similarly, courts have held that neither meals and lodging provided by an

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Morality of Tax Avoidance, 20 CREIGHTON L. REV. 101, 123 (2010), and in this context there would seem to be scant reason to do otherwise because the statutory language seems to further the policies that underlie the tax law. For an important dissenting view, which will be discussed at greater length below, *see* Lawrence A. Zelenak & Martin J. McMahon, Jr., *Taxing Baseballs and Other Found Property*, 84 TAX NOTES 1299 (1999).

6. Even the suggestion of a different approach to defining income is so anathema to tax scholars that it was described as an "untenable position" that would result in "Bittker's Quagmire" during the late 1960s when a (CTB) was offered as the foundation for tax reform. Boris I. Bittker, *Comprehensive Income Taxation: A Response*, 81 HARV. L. REV. 1032, 1041 (1968) [hereinafter *Bittker's CTB Response*]; *see infra* Part II. More recently it has been labeled "incoherent." Joseph M. Dodge, *Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the "Claim of Right Doctrine" to Found Objects, Including Record-Setting Baseballs*, 5 FLA. TAX REV. 685, 691 (2000) [hereinafter Dodge, *Claim of Right*]. Indeed, Professors Zelenak and McMahon, whose suggestion that the analysis of what is income should begin with cash, bringing in property in kind only as necessary to prevent avoidance, prompted the charge of incoherence, acknowledge their own late-coming to that position. Zelenak & McMahon, *supra* note 5, at 1301 n.13.

7. *See* Benaglia v. Comm'r, 36 B.T.A. 838 (1937); Gotcher v. United States, 401 F.2d 118 (5th Cir. 1968).

8. For example, the IRS has not tried to tax support, the value of an expensive lunch provided by a lawyer to a client, or the value of record breaking baseballs caught by fans. *See infra* notes 48, 52, 90–94 and accompanying text.

9. Even Professor Dodge, who asserts the incoherence of the Zelenak and McMahon approach, acknowledges that psychic benefits and what he refers to as "hypothetical" or imputed income are not income. *See* Dodge, *Claim of Right*, *supra*

employer on the employer's business premises for the convenience of the employer[10] nor an expense-paid trip to Germany to inspect VW facilities provided to a VW dealer to induce him to make an additional investment in the dealership[11] were income, and the IRS acknowledges that cash welfare payments are not income either.[12] Sometimes, as in the case of "swag bags" given to nominees and presenters at the Academy Awards, the IRS has taken a position consistent with the apparent breadth of *Glenshaw Glass*,[13] but other times, as in the case of less valuable free samples received by ordinary people, child support, government transfer payments, government-funded benefits (such as public education and medical care), or even record-breaking baseballs caught by baseball fans, it has not.[14]

While such instances reflect the IRS's and the courts' reluctance to attempt to implement the full apparent breadth of the *Glenshaw Glass* definition of income, neither the courts, nor tax scholars, nor the IRS have articulated a comprehensive theory that explains all of these specific outcomes.[15] Perhaps in reaching these conclusions the courts and the IRS are being lawless, deliberately ignoring the apparent mandate of *Glenshaw Glass*. Or maybe they simply do not understand the breadth of the *Glenshaw Glass* definition and are therefore incompetently failing to effectuate it.

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note 6, at 692–93. Professors Zelenak and McMahon agree and indeed make the non-inclusion of imputed income the centerpiece of their claim for non-inclusion of found property. Zelenak & McMahon, *supra* note 5, at 1304–05. Every major tax casebook and treatise acknowledges that imputed income is not income for tax purposes. *See, e.g.*, DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE AND POLICY 226, 228–31 (3d ed. 2004); MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION, PRINCIPLES AND POLICIES 130–33 (6th ed. 2009); KLEIN ET AL., FEDERAL INCOME TAXATION 63–69 (14th ed. 2006); PAUL R. MCDANIEL ET AL., FEDERAL INCOME TAXATION 83–86 (6th ed. 2008); RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 121–27 (2d ed. 2007). For an analysis of one possible exception to this—income from interest free loans—*see infra* notes 73–77.

10. *Benaglia*, 36 B.T.A. 838.

11. *Gotcher*, 401 F.2d 118.

12. Notice 99-3, 1999-1 C.B. 271 (TANF payments are not gross income); Rev. Rul. 71-425, 1971-2 C.B. 76 (state welfare payments are not gross income). *See infra* note 50 and accompanying text.

13. *See infra* note 82 and accompanying text.

14. *See infra* notes 48, 50, 90–94 and accompanying text.

15. Professors Zelenak and McMahon come close to articulating such a theory when they propose that the analysis of what is income should "start with the observation that basically what the income tax is about is the inclusion of the receipt of cash in gross income, and then describe the ways in which section 61 extends beyond cash receipts." Zelenak & McMahon, *supra* note 5, at 1304 (footnotes omitted).

We believe that neither lawlessness nor incompetence explains the apparent inconsistency between the breadth of the *Glenshaw Glass* definition and the narrower interpretation adopted by the courts and the IRS. We subscribe, rather, to a third explanation: that the rulings of the courts and the IRS reflect a widespread uncertainty and disagreement about what counts as the kind of "accession to wealth" that should be taxed—that is, widespread uncertainty and disagreement about what the language in the Internal Revenue Code and *Glenshaw Glass* means.

Our thesis is that what explains the inconsistency and the uncertainty and disagreement is that economics—at least Haig–Simons economics—is not everything. Although the *Glenshaw Glass* definition of income is largely consistent with the Haig–Simons definition,[16] and thus with economics, it fails to take into account other values that count for the people who are subject to the tax and must buy into it, at least to some degree, for the tax to be administrable.[17]

The IRS, the agency charged with administering the tax law, sometimes understands this. While the IRS rarely acknowledges these noneconomic values explicitly—perhaps for fear of unmooring tax from economics and being left rudderless on a turbulent sea—it does give itself some slack, taking into account competing, non-economic values, and finding no income when *Glenshaw Glass* could be read to suggest otherwise. And in those instances when the IRS misunderstands the competing values, courts or Congress provide the slack, rebuffing the IRS without explicitly recognizing the departure from strict economic values and thereby retaining an anchor to prevent excessive drift.

The task before us in this Article, therefore, is to demonstrate that we can make theoretical sense of what is actually treated as income by taking into account both economic and noneconomic values.

We begin in Part I by exploring the difficulty of articulating a definition of income that describes with precision the universe of accessions which are actually subject to tax. We trace the expansion of the positive definition of income, culminating in *Glenshaw Glass*, and then show the difference between the apparent breadth of that definition and what the IRS and sometimes Congress and the courts are actually willing to tax.

In Part II we consider possible explanations for this incongruity, focusing on the idea of "aptness." The aptness of a legal definition describes the extent to which it reflects the values that are important in the relevant field, which in turn minimizes the number of controversial applications of the definition.

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16. *See supra* note 4 and accompanying text.

17. For discussion of the importance of congruence between the values of those subject to laws and the values reflected in those laws, *see, e.g.*, John H. Robinson & Paul M. Darley, *The Utility of Desert*, 91 NW. U. REV. 453, 456 (1997).

Armed with this concept, we return in Part III to the *Glenshaw Glass* definition and ask whether it is apt. Since an apt definition should reflect the values that define a field, we attempt to identify the important values in tax and determine whether those values converge in the *Glenshaw Glass* definition. Here we encounter a difficulty because outside of a few categories of accessions, such as the receipt of cash salary, there is little society-wide consensus about what ought to be subject to tax, reflecting, in turn, a lack of consensus about what values ought to determine what is taxed. Hence, the *Glenshaw Glass* definition proves not to be apt in the expected sense, for it fails to reflect tax values directly. Nonetheless, this apparent defect in the definition is its virtue. Its very breadth makes it possible for a variety of values—including noneconomic values—to compete. And the IRS, with its vast authority to administer the tax law, is left free to explore what values are relevant, as well as their relative importance, on a case-by-case basis. In the absence of legislative action, the IRS substitutes its view for the non-existent consensus and then awaits the judicial, congressional, or popular response. The IRS serves as the taste tester for society's views.[18]

Accordingly, we conclude that the *Glenshaw Glass* definition of income is apt after all, but in a highly unusual way. Instead of reflecting by its own terms tax law's defining values, it gives the IRS the flexibility to navigate the shoals of social opinion regarding income taxation, thereby both providing stability in the administration of the income tax and permitting the evolution of a concept of income that serves the important values in taxation. The candidates for these values, as we will show, include economic values, but also include a variety of noneconomic values. And if the IRS (with occasional assistance from the courts and Congress) does its job well—if its ongoing determination of what is income meets with general political and social approval—then *Glenshaw Glass* turns out to be apt, after all.

I. DEFINING INCOME THAT IS TAXED

In this Part we explore the dramatic expansion of the definition of income in 1955's *Glenshaw Glass* decision, in contrast to the narrow approach taken by the Court in *Eisner v. Macomber* over 30 years earlier. But in the more than half century since *Glenshaw Glass*, the IRS has treated many accessions to wealth, clearly realized and under the taxpayer's dominion, as nontaxable. We describe this contraction of the *Glenshaw Glass* definition to show that the definition of income as administered by the IRS is neither as broad nor as straightforward as *Glenshaw Glass* appeared to promise.

18. Of course, if the IRS gets it wrong, it is subject to correction by the courts or the legislature.

A. The Definition Expands

That the *Glenshaw Glass* definition of income seems so broad is not surprising. Its apparent breadth likely reflects its source (a Supreme Court opinion interpreting a vacuously worded text), its place in the history of the income tax (after the income tax evolved from a class tax to a mass tax during World War II), and perhaps even the scholarly acceptance of what is now commonly referred to as the Haig–Simons definition of income following the publication of Henry Simons' book in 1938.[19]

The *Glenshaw Glass* definition stands in marked contrast to the much narrower definition the Court had announced in *Eisner v. Macomber.*[20] In *Macomber* the Court had to decide whether a pro-rata stock dividend was income. In holding that it was not, the Court defined income as "the gain derived from capital, from labor, or from both combined," and emphasized that the gain be "derived," or severed, from the property.[21] By requiring severance the Court gave birth to the realization requirement, which remains part of the definition of income today.[22]

Despite the longevity of the realization requirement, the first part of the *Macomber* definition, which limited income to the "product of labor or capital or both combined" was destined for a different fate. More than three decades after it decided *Macomber* the Court in *Glenshaw Glass* had to decide whether punitive damages were income. Unlike compensatory damages, punitive damages bear no relationship to the labor or capital of the plaintiff but are paid solely to punish the defendant. Hence, as to the plaintiff, they are a windfall. Because windfalls do not proceed from the recipient's labor or capital or both combined, the punitive damages received by Glenshaw Glass could not be income under the *Macomber* definition, and the lower courts had consistently so held.[23] To treat them as income the Court needed to redefine the term.

The Court's decision in *Glenshaw Glass* must have come as quite a surprise to the lower federal courts, whose opinions betrayed little doubt that they were reaching the correct result in concluding that windfalls generally,

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19. *See supra* text accompanying note 4.

20. Eisner v. Macomber, 252 U.S. 189 (1920).

21. *Id.* at 193. (citing earlier cases for its definition).

22. *See infra* Part III.B.

23. The taxpayer had won not only in the Third Circuit, which decided both *Glenshaw Glass* and *William Goldman Theatres* together, Comm'r v. Glenshaw Glass Co., 211 F.2d 928 (3d Cir. 1954), *rev'd*, 348 U.S. 426, (1955) but in the Tax Court as well. *See* Glenshaw Glass Co. v. Comm'r, 18 T.C. 860 (1952), *aff'd*, 211 F.2d 928; William Goldman Theatres, Inc. v. Comm'r, 19 T.C. 637 (1953).

and punitive damages specifically, were not income.[24] The Third Circuit reasoned that the Court had "never expressly departed from the definition of income of *Eisner v. Macomber*," had "reiterated it fairly recently" and had even "expressly declined to overrule" it.[25] Indeed, the Third Circuit seemed shocked that the "government in substance asserts that any money or property coming into the hands of any person is taxable as income unless specifically exempted."[26] Despite the court's apparent attraction to the symmetry that taxing punitive damages would produce (it would remove the difference in the taxation of compensatory and punitive damages), it was unwilling to depart from existing case law. It concluded that "if such a result is to be achieved after nearly two decades it should be effected by the Supreme Court and not by this tribunal."[27]

In holding for the taxpayer the Third Circuit did as the Court had done in *Macomber* and supported its reading of existing case law by considering the ordinary meaning of the term. As it explained,

> We concede that no definition is too helpful, and that the decisions relating to income tax law contain charts rather than definitions . . . . But it should be borne in mind that in *Eisner v. Macomber*, albeit where severability was the primary issue, the Supreme Court said, that "only a clear definition of the term 'income,' as used in common speech" was required. We do believe that a "windfall"—and the payments at bar were "windfalls"—would not be regarded as "income" within the terms of common speech. Certainly the payments to the taxpayers cannot fairly be regarded as products of capital or labor. We believe that the ordinary man regards income as something which comes to him from what he has done, not from something which is done to him. This is perhaps an over-simplification but we are of the opinion that the ordinary man using terms of common speech would not regard punitive damages as "income."[28]

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24. Professor Dodge, who has thoroughly studied the Court's *Glenshaw Glass* decision, notes that the Court's opinion in *Glenshaw Glass* does not seem to have been perceived as seismic at the time. DODGE ET AL., *supra* note 9, at 31–32.

25. *Glenshaw Glass*, 211 F.2d at 933.

26. *Id.* at 932.

27. *Id.* at 934.

28. *Id.* at 933.

The Third Circuit thus followed *Macomber* not only by applying its definition of income but also by hewing to its methodology: reference to common understanding of what should be taxed.[29]

The Tax Court, which had also held for the taxpayer in both *Glenshaw Glass* and its companion case, had seemed even more certain of its conclusion.[30] Nevertheless, not only did the Court reverse the judgments of the Tax Court and the Third Circuit, but it adopted a definition of income that went far beyond that which courts had applied in the three decades following *Macomber.*

With the benefit of hindsight, it is not surprising that the Court in *Glenshaw Glass* defined income as it did. The *Glenshaw Glass* definition preserves the realization requirement but is broad enough to encompass windfall gains of the sort at issue in that case. That it may have been excessively broad might not have concerned the Court because the statutory formulation it was construing was also very broad. Indeed, in quoting the statutory formulation the Court emphasized that income included "*gains or profits and income from any source whatever*" by italicizing that specific language,[31] and explaining that "the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted."[32]

That the *Glenshaw Glass* Court took its cue from the breadth of the statutory definition of income seems reasonable in light of the evolution of the tax law from the time of *Macomber* in 1920 to *Glenshaw Glass* in 1955. At the time of *Macomber*, the constitutional income tax was barely seven years old and tax laws were contained in yearly enactments. Although there was a brief period of growth in the income tax occasioned by the need to fund World War I, the income tax that the *Macomber* Court faced was still a class tax of relatively narrow application.[33] By the time the Court decided *Glenshaw Glass* in 1955, Congress had not only enacted the 1939 Code, but in the time during and after World War II the income tax had grown so much that a second codification project was necessary, culminating in the 1954

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29. The *Macomber* definition of income came from dictionaries. Eisner v. Macomber, 252 U.S. 189, 207 (1920).

30. *See* Glenshaw Glass Co. v. Comm'r, 18 T.C. 860, 868 (1952), *aff'd*, 211 F.2d 928 (3d Cir 1954), *rev'd*, 348 U.S. 426 (1955); *see also* William Goldman Theatres, Inc. v. Comm'r, 19 T.C. 637 (1953) (with identical case history).

31. Comm'r v. Glenshaw Glass Co., *supra* note 1, at 429 (1955).

32. *Id.* at 430.

33. *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 (1988) (describing the growth in the income tax from a levy that affected only those at the very top of the income distribution at its inception to a levy of general application as a result of the need to fund World War II).

Code, the structure and organization of which persist to this day.[34] During the 1940s marginal tax rates skyrocketed, wage withholding was instituted, and the income tax grew from a levy on the few (a class tax) to a substantial exaction on the many (a mass tax). In that context, expanding the definition of income to correspond with the expanding importance of income taxation was sensible. There was only one dissent from the Court's decision: Justice Douglas, dissenting without opinion.[35]

The definition adopted by the Court in *Glenshaw Glass* would also have seemed reasonable to tax scholars. Tax theory derives from public finance economics, so a definition of income grounded in economics would seem natural. By the early 1950s, when *Glenshaw Glass* was making its way through the courts, the Haig–Simons definition of income had become the centerpiece of the scholarly lexicon, following Henry Simons's 1938 publication of the famous book in which he refined Robert Haig's definition of income.[36] Simons wrote that "[p]ersonal 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."[37] This is an exceedingly broad definition, bringing within its grasp all accessions, whether consumed or saved. Its breadth allows it to serve the goal of raising maximum revenue while also being maximally equitable and efficient and therefore serving two important tax policy objectives. If all accessions are subject to tax then taxpayers who are similarly situated economically will be taxed similarly and the level of taxation can be adjusted to correspond to relative positions. This serves both horizontal and vertical equity. In addition, because such a definition does not distinguish between sources of income, it does not privilege income from certain activities, which is efficient.

34. Although the current Code is the Internal Revenue Code of 1986, the change in appellation marks the importance of the Tax Reform Act of 1986 rather than the creation of a new codification.

35. *See*, BERNARD WOLFMAN ET. AL., DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES, 41–42 (1975); DODGE ET AL., *supra* note 9, at 31 n.43.

36. SIMONS, *supra* note 4. Simons's work is generally acknowledged to be refinement and elaboration of "the basic concept advanced in Robert M Haig, *The Concept of Income – Economic and Legal Aspects, in* THE FEDERAL INCOME TAX (Robert M. Haig ed. 1921)" and previously advanced by the German theorist Georg von Schanz. Dodge, *Glenshaw Glass* Story, *supra* note 1, at 36 n.65. The Haig–Simons definition was discussed in a number of scholarly pieces published in the early 1950s, including Comment, *Taxation of Found Property and Other Windfalls*, 20 U. CHI. L. REV. 748, 753 n.23 (1953); Surrey & Warren, *supra* note 2, at 770.

37. SIMONS, *supra* note 4, at 50.

Even Simons understood that his definition could not describe a workable tax base.[38] One significant limitation on it comes from the absence of a realization requirement. Absent a realization requirement a taxpayer's property would have to be valued periodically and the difference between the beginning and ending values would have to be computed in order to determine the amount of a taxpayer's income. Even if the valuation were easy, as in the case of public traded securities, treating a positive difference as income would create persistent liquidity problems in the absence of cash. The realization requirement solves these problems.[39]

The *Glenshaw Glass* definition, which is the Haig–Simons definition limited by realization, is faithful to all three major tax policy objectives: equity, efficiency, and administrability.[40] It is neither too broad, as Haig–Simons alone would be, nor too narrow, as the *Macomber* definition was. By retaining realization while moving to embrace Haig–Simons, the Court may have gotten it just right. This probably did not happen by accident.

Unlike the *Macomber* Court, whose 1920 opinion predated even the publication of Haig's work, the *Glenshaw Glass* Court had reason to know of the Haig–Simons definition and of its importance as the theoretical underpinning of the modern income tax. Although the Court did not cite Simons or refer to the Haig–Simons definition in its opinion, there is strong

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38. *Id.* at 103–07.

39. *See* Helvering v. Horst, 311 U.S. 112, 116 (1940); Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 565 (1991); GRAETZ & SCHENK, *supra* note 9, at 154; MCDANIEL ET AL., *supra* note 9, at 70–71; Fred B. Brown, *Proposal to Reform the Like Kind and Involuntary Conversion Rule in Light of Fundamental Tax Policies: A Simpler, More Rational, and More Unified Approach*, 67 MO. L. REV. 705, 713 (2002); Edward A. Zelinsky, *For Realization: Income Taxation, Sectoral Accretionism, and the Virtue of Attainable Virtues*, 19 CARDOZO L. REV. 861, 863, 961 (1997); Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 20 (1992); *but see* David M. Schizer, *Realization as Subsidy*, 73 N.Y.U. L. Rev. 1549, 1551 (1998) (suggesting that the realization requirement provides an important subsidy to savings); Deborah H. Schenk, *A Positive Account of the Realization Rule*, 57 TAX L. REV. 355, 355–56 (2004) (noting "[t]here is a strong consensus in the literature that a normative income tax would tax changes in wealth as they accrue rather than as realized, but a realization requirement is nevertheless necessary due to the liquidity and valuation constraints of accrual taxation" but that the realization requirement is necessary not because of liquidity and valuation concerns, but because it is politically impossible to repeal since it aligns with a taxpayer belief that "paper gains" should not be taxed); *see generally* Marjorie E. Kornhauser, *The Story of Macomber: The Continuing Legacy of Realization*, *in* TAX STORIES 93, 115 (Paul L. Caron ed., 2d ed. 2009).

40. *See supra* note 4. Even Professor Dodge admits the closeness of the two definitions, as do other scholars. *See, e.g.*, BANKMAN ET AL., FEDERAL INCOME TAX: EXAMPLES AND EXPLANATIONS 40 (4th ed. 2005).

reason to believe that Simons's work and the central place of the Haig–Simons definition in economic theory were known to it. Significantly, the Government's brief in *Glenshaw Glass* cited two pieces of scholarship that make explicit reference to Simons's work and to the Haig–Simons definition of income.[41] One is a student note in the Chicago Law Review that begins by quoting Justice Douglas, proclaiming in dissent that "*Eisner v. Macomber* dies a slow death," and goes on to advocate a broad definition of income, citing Simons's work.[42] The other is more significant. It is the report of the ALI Income Tax Project, for which Stanley Surrey and William Warren served as reporters and which was published in an issue of the Harvard Law Review in 1953.[43] Given the pedigree of the contributors to that project,[44] not to mention the scholarly stature of the reporters,[45] it is inconceivable that the Justices and law clerks who read the Government's brief would not have read the documents the Government was citing in support of its position.[46]

The ALI Report criticized the *Macomber* definition, classifying it as a "generalization rather than a definition," and then looked to the economists' definitions—specifically, to Haig–Simons—for assistance. We think that the similarity between the *Glenshaw Glass* definition and the Haig–Simons formulation is not coincidental and that similarity accounts for the continuing appeal of *Glenshaw Glass*. By being rooted in Haig–Simons the *Glenshaw Glass* definition ensures promotion of the important tax policy objectives of equity and efficiency, while the constraint of realization makes

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41. Brief for the Petitioner at v, 14, 23, 25., Comm'r v. Glenshaw Glass Co., 348 U.S. 426, No. 199 (Dec, 27, 1954).

42. Comment, *supra* note 36, at 753.

43. Surrey & Warren, *supra* note 2.

44. The project was under the direction of the Tax Policy Committee of the ALI; that committee was composed of seven members, including two renowned tax scholars: Dean Erwin Griswold of the Harvard Law School, and Randolph E. Paul of Washington, D.C. *See id.* at 766.

45. Stanley Surrey, the Chief Reporter, was then a Professor at the Harvard Law School and William Warren, the Associate Reporter, was then Acting Dean and Professor of Law at Columbia Law School. *Id.* at 761.

46. Professor Dodge acknowledges that "'accession to wealth' sounds very much like 'increase in net wealth,' and to that extent, the statement from *Glenshaw-Goldman* is congruent with the Haig–Simons Concept of income." Dodge, *Glenshaw Glass* Story, *supra* note 1, at 36. Nevertheless he asserts that "there is no evidence from the record that the Court and counsel were particularly aware of the Haig–Simons concept." *Id.* The Government's citation of scholarly pieces that refer to the concept in its brief, and in the case of the ALI Project, discuss in detail its relationship to a legal definition of income, lead us to a different conclusion. Given that both lower courts in *Glenshaw Glass* held for the taxpayer, it stands to reason that the Court was aware of the scholarship that supported the Government's position and that was cited to it, including the scholarship that advocated a broad concept of income consistent with emerging economic theory.

it administrable. In developing the *Glenshaw Glass* definition the Court played Goldilocks, trying the narrow definition (*Macomber*), almost certainly considering the broader one (Haig–Simons), but developing a formulation that retained the best of both. The problem is that the definition cannot apply as written.

B. The Definition Contracts

As the Third Circuit had observed in its opinion in *Glenshaw Glass*, the breadth of the Government's position, which prevailed in the Supreme Court, was such that any receipt could be income unless excluded.[47] Because Congress did not act to increase the specific exclusions in the Code after *Glenshaw Glass*, it was possible for an amount that would not have been treated as income before *Glenshaw Glass* and that would not generally be thought to constitute the type of receipt that should be taxed to be treated as income and to remain in the tax base because no exclusion would rescue it from that fate. Child support provides an example of such a receipt.

A check for support wrung by a court from a recalcitrant father is an accession to the child's, or her mother's, wealth, and is clearly realized and within their dominion. Hence, although it would not have been income under the *Macomber* definition because it does not proceed from either the mother's or child's labor or capital, it fits the *Glenshaw Glass* definition.[48] Nothing in the statute excludes it. If it were true that the statutory pattern is that gross income is income, as defined by *Glenshaw Glass*, unless an exclusion applies, support would be income.

Yet, support other than alimony is not taxed.[49] Millions of dollars constituting support doubtless change hands every day and the IRS has never

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47. Comm'r v. Glenshaw Glass Co., 211 F.2d 928, 932 (3d Cir. 1954), *rev'd*, 348 U.S. 426 (1955).

48. In Gould v. Gould, 245 U.S. 151 (1917), the Court held that alimony was neither deductible to the ex-husband paying it nor includible in the income of the ex-wife receiving it. Unlike the definition contained in the statute at the time of *Glenshaw Glass*, the definition of income at issue in *Gould* was closer to the *Macomber* definition in listing the kinds of items that were income. With respect to alimony § 71 now provides for a specific inclusion, but the very existence of the specific inclusion when the payor gets a deduction proves that the general rule would be exclusion.

49. Section 71(c) provides that § 71(a), which includes alimony in the recipient's income, will not apply to child support, but that does not exclude child support from income—it only provides that it will not be included *as alimony*. Nothing in § 71(c) precludes the inclusion of child support in income under § 61 in the absence of a specific exclusion. While some child and other support, such as spousal support, could be excluded from income as a gift, that rationale would not apply to support which is provided as a result of a legal obligation, not detached and

asserted that such amounts are income. Apparently, the IRS does not interpret income as broadly as *Glenshaw Glass* seems to permit.

The gap between the apparent breadth of the *Glenshaw Glass* definition of income and what is taxed grows if we consider other items. Consider government transfer payments, such as those provided by the Temporary Aid to Needy Families (TANF) program, medical services, including hospitalization, provided by Medicaid and Medicare, and public education. Such benefits, particularly those for medical care, could reach substantial amounts and, like support, appear to come within the *Glenshaw Glass* definition of income. In this case, as in the case of support, the statute is silent, but unlike the case of support the IRS has provided some guidance by developing a so-called general welfare exclusion pursuant to which payments from the government that meet certain criteria are not treated as income.[50] Although the exclusion is sensible, it is inconsistent with the apparent breadth of *Glenshaw Glass*.

The IRS's failure to tax child support and its administrative exclusion of government benefits complicate the articulation of a definition of income that reflects what is actually subject to tax. In light of the administratively defined general welfare exclusion such a definition would go something like this: "Gross income is all accessions to wealth, clearly realized, over which the taxpayer has dominion unless excluded by statute, or by the IRS's never having attempted to tax them, or by the IRS's having announced an administratively created exclusion pursuant to no specific authority whatsoever." Such a definition might not merit being labeled lawless but it does reveal the existence of an apparent incongruence[51]

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disinterested generosity, which is required for classification as a gift. Duberstein v. Comm'r, 363 U.S. 278 (1960). Indeed, if support were income, there would be no need for § 71(a).

50. For a comprehensive history and description of the general welfare exclusion, *see* Robert W. Wood & Richard C. Morris, *The General Welfare Exception to Gross Income*, 109 TAX NOTES 203 (2005); Robert W. Wood, *Updating General Welfare Exception Authorities*, 123 TAX NOTES 1443 (2009). For a recent application *see* Notice 2011-14, 2011-14 I.R.B. 544.

51. In THE MORALITY OF LAW Professor Lon Fuller discusses "the most complex of all the desiderata that make up the internal morality of law: congruence between official action and law." LON FULLER, THE MORALITY OF LAW 81 (rev. ed. 1969). Insofar as the actual practices of the IRS reflect an interpretation of the term "income" that seems inconsistent with § 61 as interpreted by *Glenshaw Glass*, its administration of income tax law appears to lack this "congruence." As Professor Fuller explains:

> The most subtle element in the task of maintaining congruence between law and official action lies, of course, in the problem of interpretation. Legality requires that judges and other officials apply statutory law, not according to their fancy or with crabbed

between what the positive law (statute and regulations) says and what the IRS actually attempts to tax. That apparent incongruence is an unexplained contraction of the positive law.

The apparent incongruence between the positive law definition of income and what the IRS actually attempts to tax, which we refer to as the administered definition of income, is not limited to accessions that take place in non-commercial transactions. The wheels of commerce are often oiled by the transfer of valuable property or services and such transfers undoubtedly enhance the wealth of those who receive, realize, and have dominion over them. Lawyers take clients to lunch or dinner and invite them to sporting events every day. Some businesses provide unsolicited samples of their wares at no charge in hopes of inducing additional purchases thereof. Still others court potential investors or candidates for employment by covering the cost of travel designed to induce the investor or candidate to invest or accept an offer of employment. All such transactions would appear to fit within the *Glenshaw Glass* definition of income. Yet, the IRS does not currently treat them as generating income. In these cases the existence of the apparent incongruence is especially troublesome because of the near absence of any administrative pronouncement.[52] The only authority that supports the proposition that such realized accessions are not income is one Fifth Circuit opinion which the IRS only partially lost and in which it has not announced its acquiescense.[53]

In *United States v. Gotcher*,[54] the taxpayer, who had an interest in a VW dealership, and his wife went on a trip to Germany arranged and paid for by VW. It was a group trip, in which 60 of the participants were VW dealers

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> literalness, but in accordance with principles of interpretation that are appropriate to their position in the whole legal order.

Id. at 83. However, as we will develop in Part III, in interpreting the word "accession" in *Glenshaw Glass* more narrowly than its apparent breadth would seem to allow, the IRS is neither acting according to its fancy nor with crabbed literalness. Rather, it is choosing among competing values, which, in the absence of a wide consensus, is what it should do.

52. Rev. Proc. 2000-30, 2000-2 C.B. 13 provides that de minimis in-kind payments (the proverbial toaster offered by a bank to new depositors) will not be treated as original issue discount, or income, but such pronouncements are rare in light of the multiplicity of situations that raise similar issues.

53. Gotcher v. United States, 401 F.2d 118 (5th Cir. 1968). By acquiescence we do not necessarily mean formal acquiescence, but the IRS can indicate its agreement with a decision that it lost by other means. It hasn't chosen to do that in this case.

54. *Id.*

and their wives, and the other participants were VW employees.[55] As the Court of Appeals explained:

> The trip was made in 1959 when VW was attempting to expand its local dealerships in the United States. The "Buy American" campaign and the fact that the VW people felt they had a "very ugly product" prompted them to offer these tours of Germany to prospective dealers. . . . It was believed that once the dealer saw the manufacturing facilities and the stability of the "new Germany" he would be convinced that VW was for him.[56]

The Government took the position that the cost of the trip was income to Mr. and Mrs. Gotcher. That position followed from a straightforward application of positive law, based on section 61 and the *Glenshaw Glass* definition. Nevertheless, the District Court agreed with the taxpayers, holding that the trip was neither compensation for services rendered nor a prize or reward for past services, thus distinguishing other cases but arguably disregarding the expansive language of section 61 and *Glenshaw Glass*, neither of which confine income to compensation or prizes. The Government appealed, but the Fifth Circuit also agreed with the taxpayers, at least with respect to Mr. Gotcher's trip. Its rationale, like that of the District Court, was that taxation to the recipient should be determined by the motive of the payor. It found an analogy in the judicially created "convenience of the employer" doctrine because the trip served a purpose of the payor and was not intended to compensate or reward the payee, and concluded that there was no income to Mr. Gotcher.[57] Although the District Court had found that Mrs. Gotcher's attendance had also furthered VW's purpose because of the communal nature of investment in a significant business venture such as a VW dealership, the Appellate Court panel, over the objection of the Chief Judge, reversed, finding that for Mrs. Gotcher the trip was a vacation.

Gotcher may reach the correct result with respect to Mr. Gotcher for reasons we develop in Part IV, but it seems puzzling in light of the language of the positive law. The only possibly applicable exclusion, section 119 (which codified the judicially-created convenience of the employer doctrine) was clearly inapplicable because VW was not Mr. Gotcher's employer. Indeed, the very codification of that doctrine in a statutory provision by its terms applicable only to employees (and even then only to meals and lodging

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55. Gotcher v. United States, 259 F. Supp. 340, 343 (E.D. Tex. 1966); *aff'd in part and rev'd in part*, 401 F.2d 118 (5th Cir. 1968).

56. *Gotcher*, 401 F.2d at 121.

57. Beraglia v. Comm'r, 36 B.T.A. 838 (1937).

provided on the employer's business premises) should have allowed the IRS to prevail. That it didn't was certainly good news for Mr. Gotcher, but the case nevertheless had the potential for creating substantial uncertainty.

The uncertainty would have come from the IRS's having taken the position that the trip was income at all, not losing completely, and not announcing its agreement with the Fifth Circuit majority. Taxpayers might have drawn comfort from a tightly reasoned opinion, but not only does the *Gotcher* court apply a judicial doctrine that has been codified to a situation clearly not covered by the codification, but the doctrine itself does not withstand rigorous analysis. The court's rationale, which focuses on the motives of the payor, proves too much. To say that an amount is paid because it furthers an important objective of the payor is to describe salary, which is clearly income. The desire to induce specific behavior on the part of the payee does not distinguish from salary the payment of amounts such as VW's payment of Mr. Gotcher's trip to Germany, not only because salary is also paid to induce particular behavior (work) but also because if VW thought that it could get the potential dealers to go to Germany without the inducement of covered expenses, it would have done so, just as an employer who can get desired services without the payment of compensation, or with the payment of less compensation, would do so. In both cases the payor is paying because paying serves an important interest of the payor.

The Fifth Circuit's decision in *Gotcher* also provides scant comfort to taxpayers because it is internally inconsistent. Surely VW's motivation for paying Mr. Gotcher's expenses was the same as its motivation for paying Mrs. Gotcher's expenses: it wanted to induce the investment in the dealership. The district court recognized this and found no income with respect to either taxpayer. Two of the three judges on the Fifth Circuit panel, however, distinguished between Mr. and Mrs. Gotcher; Mrs. Gotcher's purpose was personal but Mr. Gotcher's was business. Putting aside the implicit sexism in this view, it underscores the internal inconsistency of the court's stated rationale. If it is the *payor's* purpose that is determinative, then the payee's purpose ought not matter.

What the internal inconsistencies of the *Gotcher* opinion reveal is the tension between the *Glenshaw Glass* definition and the apparent legal structure of which it is a part (in which all realized accessions are income unless specifically excluded), and the difficulties of administering a tax system consistent with that structure. The tension is evident in the IRS's litigation of *Gotcher* even though in 1963 it had issued a ruling in which it reached a conclusion apparently at odds with its litigating position in *Gotcher*. The ruling held that amounts paid by a potential employer in one state to reimburse individuals who incurred expenses in travelling from another state to undergo interviews for potential employment were neither

wages nor income.[58] The conclusion that the amounts are not wages is obvious, but the conclusion that they are not income is not. Perhaps the IRS didn't think there was an element of enjoyment (personal consumption) in the situation in the ruling but suspected the existence of such an element in *Gotcher*, but we do not know because the ruling limits itself to describing the situation and providing a conclusion. No rationale is given. To us, the ruling and the litigation of *Gotcher* within the same time frame reveal an agency trying to find its way.[59] The IRS apparently resolved the tension by deciding to make the *Gotcher* argument only in very public situations involving relatively large amounts.[60]

After *Gotcher* the administered definition of income would seem to be something like: "Gross income is all accessions to wealth, clearly realized, over which the taxpayer has dominion, unless excluded by statute, or by the IRS's not ever having attempted to tax it, or by the IRS's having announced an administratively created exclusion pursuant to no specific authority whatsoever or by the IRS's having taken the position that it is income but having a court, albeit not the Supreme Court, disagree in part, on grounds that cannot withstand rigorous analysis, which therefore allows the IRS to take a contrary position in a case in which the amounts are larger."

C. The Definition Fragments

Another way of attacking the *Gotcher* problem of non-taxable consumption is to deny a business expense deduction to the payor in any situation that contains a significant element of consumption.[61] This technique assumes that the statutory limitation will restrict the deduction to the cases that have the smallest possibility of representing consumption to the recipient and that, in the absence of a deduction, payors would only incur the expenses when the benefits to them exceeded any consumption element to the payee, thus creating an equilibrium and relative ease of administration provided by the visibility of the deduction.

In the employment context, Congress attempted to provide certainty on the definition of income by codifying specific rules after the IRS

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58. Rev. Rul. 63-77, 1963-1 C.B. 177.

59. The year at issue in *Gotcher* was 1960. The District Court decided *Gotcher* in 1966, and the Court of Appeals in 1968.

60. There are no cases after *Gotcher*, and the IRS has raised the income issue only in situations that draw significant public attention, as will be discussed later. The absence of additional cases is surely not due to the absence of situations that present *Gotcher* issues.

61. Section 274 provides the clearest example of this approach. For example, § 274 limits the deduction for many meals or entertainment that would otherwise be deductible business expenses to 50 percent of the amount spent. I.R.C. § 274(n).

suggested that fringe benefits common in many workplaces were actually income, prompting howls of protest from business and industry groups.[62] A similarly vitriolic public reaction led the IRS to abandon the possibility of taking the position that frequent flyer miles accumulated while on business travel paid for by an employer (and properly excluded from income under section 132 as a working condition fringe) produced income to employees when used to obtain free personal travel.[63]

The difficulty of reconciling the positive law definition of income—the statutory structure in which the apparently broad *Glenshaw Glass* definition is followed by specific exclusions—with the need to administer the tax law, is nicely illustrated by the quandary into which an elementary school principal put the IRS in the late 1960s. In 1967 and 1968, the elementary school principal, Mr. Haverly, received unsolicited textbooks from publishers, as all of us in academia still do.[64] In 1968 Mr. Haverly not only gave the books to his school's library but also took a charitable contribution deduction therefor. Apparently flummoxed by this action the IRS in 1970 issued a revenue ruling in which it took the position that unsolicited books received by a book reviewer were income to the reviewer, reasoning that they were an accession to the reviewer's wealth not excluded by any statutory provision.[65] Later that same year, it superseded that ruling with another one which held that receiving such unsolicited books and then donating them to charity resulted in income.[66] The IRS challenged Mr. Haverly's deduction, but in 1974 the district court handed the taxpayer a complete victory.[67]

The IRS was clearly bothered by the apparent double benefit of receiving property free of tax and then being allowed a deduction for giving

62. Testimony before the Senate Finance Committee by Treasury Assistant Secretary for Tax Policy John E. Chapoton in 1983 succinctly summarizes the IRS action and public and Congressional reaction. *Treasury, Joint Tax Committee Discuss Taxation of Fringe Benefits*, 19 TAX NOTES 1191 (1983). In 1984 Congress enacted § 132. *See* Kenneth J. Kies, *Analysis of the New Rules on the Taxation of Fringe Benefits*, 24 TAX NOTES 981 (1984).

63. Announcement 2002-18, 2002-1 C.B. 621; IRS Tech. Adv. Mem 9547001 (July 11, 1995), *see also IRS Wrestles with Frequent Flyer Miles; Clinton and Hill Fight over Budget*, 69 TAX NOTES 1157 (1995); Sheryl Stratton & Ryan J. Donmoyer, *Don't Ask, Don't Tell: The IRS's Frequent Flier Policy*, 69 TAX NOTES 1159 (1995).

64. Haverly v. United States, 513 F.2d 224 (7th Cir. 1975), *cert. denied*, 423 U.S. 912 (1975).

65. Rev. Rul. 70-330, 1970-1 C.B. 14.

66. Rev. Rul. 70-498, 1970-2 C.B. 6. By superseding the previously issued ruling the IRS seemed fairly clearly to be saying that it would not treat mere receipt of the books as income. The books would be income only if received and donated.

67. Haverly v. United States, 374 F. Supp. 1041 (N.D. Ill. 1974), *rev'd*, 513 F.2d 224 (7th Cir. 1975).

it away. But the amount of the charitable contribution deduction is determined by the value of the property donated and does not depend on that value having been taxed.[68] Because there was no question of the taxpayer's entitlement to the deduction, the IRS had to litigate the issue from the income side. As to the income issue, the district court was unable to distinguish the receipt of books which were later donated to charity by a taxpayer who took a charitable contribution deduction therefor from the receipt of books donated to charity by a taxpayer who took no such deduction, or from the many situations in which taxpayers receive unsolicited samples which they use, exercising dominion in ways more private than the taking of a tax deduction but exercising dominion nonetheless.[69] It reasoned that all such situations were the same with respect to the exercise of dominion and that "a distinction based on the value of the sample, or on the particular way in which a recipient converts it to his or her own use, is not acceptable as a matter of law based on any applicable tax provision, precedent or logic."[70]

The Second Circuit reversed. Although that court acknowledged the unassailable logic of the District Court's analysis, it concluded, in archetypical common law fashion, that only Mr. Harverly's case was before it, and Mr. Haverly, having realized an accession to wealth over which he exercised dominion by making the donation and taking the ensuing deduction, had income. Any resulting lack of symmetry was acceptable because

> [t]he Internal Revenue Service has apparently made an administrative decision to be concerned with the taxation of unsolicited samples only when failure to tax those samples would provide taxpayers with double tax benefits. It is not for the courts to quarrel with an agency's rational allocation of its administrative resources.[71]

The opinions in *Haverly* illustrate the difficulty of defining income in a coherent, administrable way not only by their inability to do so but because the existence of the case itself confirms the inadequacy bordering on irrelevance of the "intent of the payor" or "convenience of the employer" talismans. There can be no doubt that the publisher of the books sent to Mr.

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68. I.R.C. § 170.

69. *Haverly*, 374 F. Supp. at 1045.

70. *Id.*

71. *Haverly*, 513 F.2d at 227. The charitable contribution provisions clearly allow a deduction for the fair market value of property, not its basis, so denial of the deduction could not reasonably be pursued. Inclusion in income was the only way of preventing a double benefit.

Haverly wanted Mr. Haverly to adopt them in his school, which would lead to substantial sales. Its motives were no more compensatory than those of VW in paying for the Gotchers' trips to Germany. The existence of a significant non-compensatory purpose by the payor sufficed to save Mr. Gotcher from having income but failed to provide a similar fate for Mr. Haverly (and Mrs. Gotcher).[72]

The post-*Gotcher* legacy renders any attempt at a definition of administered income nearly incoherent. It would seem to go something like this: "Gross income is all accessions to wealth, clearly realized, over which the taxpayer has dominion unless excluded by statute, or by the IRS's not ever having attempted to tax it, or by the IRS's having announced an administratively created exclusion pursuant to no specific authority whatsoever or by the IRS's having taken the position that it is income but having a court, albeit not the Supreme Court, disagree in part, on grounds that cannot withstand rigorous analysis, which therefore allows the IRS to take a contrary position in a case in which the amounts are larger, or adopting without explanation a position driven by administrative convenience, of uncertain application beyond the specific facts provided, or otherwise having indicated that it doesn't know whether it can or should tax it but for the moment it won't."

To add to the uncertainty, the IRS can, and sometimes does, change its position. Even though the IRS had never taken the position that imputed income is income and had issued a revenue ruling stating that interest-free loans did not result in income to the recipient as a result of the forgone interest,[73] it subsequently took the position that an interest-free loan from a corporation to a shareholder resulted in the receipt of interest by the shareholder.[74] There followed nearly two decades of litigation in which the courts stubbornly refused to agree, until one court finally adopted the IRS's analysis in the gift tax context.[75] The resulting split in the circuits landed the

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72. As the District Court in *Haverly* pointed out, and as the Court of Appeals seemed to acknowledge, the contribution of the items received is logically distinct from their inclusion in income. The two events can be tied in the service of administrative convenience, as the Court of Appeals acknowledged, but it is one thing to say the receipt of the property is income which the IRS is going to choose not to tax for reasons of administrability, and another to say that the receipt is just not income at all.

73. Rev. Rul. 55-173, 1955-2 C.B. 23.

74. Dean v. Comm'r, 35 T.C. 1083 (1961), *non-acq*, 1973-2 C.B. 4. For another example of the IRS's change in position on interest free loans *see Favorable Ruling on Interest-Free Loans is Revoked*, 22 TAX NOTES 285 (1984).

75. For a detailed explanation of the judicial and administrative events that preceded the enactment of § 7872, *see* Staff of the Joint Comm. on Tax'n, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, JCS 41-

gift tax issue before the Supreme Court, which agreed with the IRS.[76] Chaos then threatened to ensue because of the virtual impossibility of administering such a conclusion uniformly.[77] The IRS tried to calm the waters by issuing guidance, and Congress stepped in by enacting section 7872, which treats as income (or gift) the forgone interest in below market loans under some, though not all, circumstances.

Despite such arguably happy endings, the difficulties persist. Members of Oprah's studio audience in September 2004 were probably delighted to hear that they would all receive Pontiac G6 automobiles, until someone pointed out that the cars, whether solicited or not, were realized accessions to wealth within the audience members' dominion and hence income.[78] Of course, in many ways, the audience members were like Mr. Haverly or even Mr. Gotcher—beneficiaries of a seller's desire to hawk its wares—but their situation was too public, the value of what they received—a car—too clear, and they looked too much like prize winners.[79] They did not ask for the cars, may not have wanted them, and it seems to us that they received the cars only because it was in Pontiac's and Oprah's interest that they do so,[80] but that was not the only possible characterization. Perhaps the

84, at 524–26 (1984). For thoughtful commentary on § 7872, *see* Nancy J. Knauer, *Legal Fictions and Juristic Truths*, 23 ST. THOMAS L. REV. 70, 113–14 (2010).

76. Dickman v. Comm'r, 456 U.S. 330 (1984).

77. The IRS was keenly aware of these problems and promptly after winning *Dickman* issued published guidance to resolve them both retroactively and prospectively and in the income and gift tax contexts. *See IRS Explains Valuation of Pre-1984 Interest-Free Demand Loans*, 23 TAX NOTES 851 (1984).

78. *Surprise! Oprah Gives Entire Audience New Cars*, TODAY TELEVISION, Sept. 13, 2004, http://today.msnbc.msn.com/id/5989964/ns/today-entertainment/.

79. Some news accounts underscored the prize aspects. *See, e.g.*, *Oprah Car Winners Hit with Hefty Tax*, CNNMONEY.COM, Sept. 22, 2004, http://money.cnn.com/2004/09/22/news/newsmakers/oprah_car_tax/, but others praised the marketing aspects, Tara Burghart, *Oprah's Car Giveaway Hailed as Marketing Coup, Pontiac Confident in its Multimillion Investment*, CINCINNATI.COM, Sept. 15, 2004, http://www.enquirer.com/editions/2004/09/15/biz_biz1yoprha.html.

80. The move indeed added to Oprah's luster; not only did she repeat the event, most recently with VW Beetles and trips to Australia, but the 2004 original stunt was recently voted "TV's Greatest Surprise." Michael Langston, *Oprah's Free Car Giveaway Voted No.1 as "TV's Greatest Surprise,"* EXAMINER.COM, June 6, 2010, www.examiner.com/african-american-entertainment-in-national/oprah-s-free-car-giveaway-voted-no-1-as-tv-s-greatest-surprise. For descriptions of the Beetle and Australia trip giveaways, on which Oprah agreed to pay the resulting tax liability for her audience members, *see Tax Consequences of Oprah's Latest Car Giveaway*, TAXPROF BLOG, Nov. 29, 2010, http://taxprof.typepad.com/taxprof_blog/1910/11/tax-consequences.html; Michael Cohn, *Oprah to Pay Taxes for Audience's Australia Trip*, ACCOUNTING TODAY.COM, Sept. 24, 2010, http//www.accountingtoday.com/debits_credits/Oprah-Pay-Taxes-Audience-Australia-Trip-55711-1.html.

cars were a prize for being in the audience that day, like the person who receives money for being the millionth customer of an establishment. That quickly became the prevailing public view.[81]

Like Oprah's audience, for years award show presenters and nominees enjoyed the samples of luxury items contained in the "swag bags" they received. Such items were provided for the same reasons VW paid for the Gotchers' trip to Germany and the publishers of textbooks sent the books to Mr. Haverly: sellers wanted to increase sales of their products by generating publicity for them. Their motives were as non-compensatory as those of VW or the textbook publishers; Oscar presenters do not need swag bags to be induced to serve as presenters (many would almost certainly pay for the opportunity if they could), and no behavior whatsoever was required from the nominees who also received the bags. As with other free samples, it would be nearly impossible to determine whether the taxpayer exercised dominion by using the product. Nevertheless, as the value of the bags and the resulting publicity surrounding them grew, the IRS felt compelled to act, and in 2006 it took the position that the value of the swag in the bags was income to the recipient.[82] While that position clearly follows from the *Glenshaw Glass* definition of income, and those of us who champion progressive taxation might not quarrel with its effect, it is completely inconsistent with the IRS's published position on unsolicited samples, as well as with the intent of the payor and convenience of the employer talismans approved by the courts in *Gotcher* and other cases. All of the arguments made by the District Court in *Haverly* would apply to the swag bags, and in the absence

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81. There were even some reports that Oprah had agreed to cover the resulting tax liability, *see, e.g.*, Zachariah Boren, *Great Tax Lesson of Oprah's "Free" Cars*, SZONE.COM, Sept. 22, 2004, http://www.szone.us/f65/great-tax-lesson-oprahs-free-cars-7034/ (referring to a CNN story reporting that Oprah would pay), although most reports suggest that she did not do so in that instance. Chuck Sudo, *"And Then The IRS Asked For Their Cut, And The Screaming Stopped."* CHICAGOIST.COM, Nov. 22, 2010, http://chicagoist.com/2010/11/22/and_then_the_irs_asked_for_their_cu.php (noting that Oprah's studio had said the recipients of the cars would have to pay). In subsequent giveaways Oprah has agreed to cover the resulting tax liability. *See* Cohn, *supra* note 80; *see also* Anosheh Azarmsa, Note, *Award Shows, Gifts, and Taxes: A Criticism of the Tax Treatment of Celebrity Gift Bags*, 28 LOY. L.A. ENT. L. REV. 27, 43 (2007/2008); Brian Hirsch, *The Extreme Home Renovation Giveaway: Constructive Justification for Tax-Free Home Improvements on ABC's Extreme Makeover: Home Edition*, 73 U. CINN. L. REV. 1665, 1669 (2005).

82. The IRS did this not by issuing a ruling or similar document, but by having then-Commissioner Everson issue a press release. I.R. 2006-128, 2006 TNT 160-6 (Aug. 17, 2006); *see* Robert J. Wells, *There are no Free Goody Bags*, 112 TAX NOTES 621 (2006); Allen Kenney, *IRS Reaches Out to Celebrities to Soothe Anxiety Over Tax on Swag*, 112 TAX NOTES 636 (2006); Azarmsa, *supra* note 81, at 43.

of a deduction taken by the recipients, the distinction which the Second Circuit found determinative in that case would not apply.[83] The distinction, if any, has to be one of degree and not of kind unless the bags are regarded as prizes, which is unlikely.[84]

Nevertheless, we may never know how a court would rule. In response to the IRS's asserted position, the Academy reached an agreement with the IRS for past years, agreed to issue information returns to recipients in 2006, and thereafter discontinued the practice.[85] Still, the practice of bestowing swag on celebrities has not so much died as evolved. At the 2010 Academy Awards (Oscars) public relations companies organized "gifting suites" filled with expensive items free to celebrities, as well as consolation gift bags to be given to losing nominees.[86] In the confusion, the beat goes on. Whatever comfort the average taxpayer may take from the taxpayer victory in *Gotcher* and the IRS's apparent decision not to tax free samples unless the taxpayer takes a charitable contribution deduction,[87] its position on Oscar swag bags shows that it does not in fact believe that free samples are categorically not income. It knows *Glenshaw Glass*. What it appears to be doing is applying an unarticulated *de minimis* rule, seeking to make the *Glenshaw Glass* definition of income coextensive with the administered definition only when it can do so because the public nature of the receipts, the limited number of recipients and the size of the amounts involved make them identifiable and worth taxing. Although, as the Second Circuit observed in *Haverly*, the IRS is probably making a perfectly rational decision on how to deploy its administrative resources, nothing in *Glenshaw Glass* or in section 61 defines income as "accessions to wealth, clearly realized, over which the taxpayer has dominion, and which are big enough and public

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83. Commissioner Everson acknowledged that the motivation for the bags was the same as for other free samples: "This has become big business for companies promoting their products. These things aren't given without pride and prejudice." I.R. 2006-128, 2006 TNT 160-6.

84. The prize characterization is most fitting in the case of the bags delivered to the nominees who do not win the Oscar, as they are sometimes referred to as "consolation prizes," but to say that Angelina Jolie receives a swag bag because she has won the role of presenter seems fanciful given that the bag is not paid for by the Academy but rather by the manufacturers of the products in it. In any event, if the IRS uniformly applied the *Gotcher* rationale and looked to the motive of the payor, the bags would not be income because the motives of the swag bag providers are indistinguishable from those of VW—increased sales.

85. Kenney, *supra* note 82.

86. *See* Cheryl Wischhover, *Oscars Swag 2010: It Gets Weird*, FASHIONISTA.COM, http://fashionista.com/2010/03/oscar-swag-2010-it-gets-weird/. *But see*, I.R. 2006-128, 2006 TNT 160-6 (items taken from gifting suites are income).

87. *See* Rev. Rul. 70-498, *supra* note 66 and accompanying text.

enough for the IRS to find." In any event, it is clear that the IRS attempts to tax some accessions (swag bags) but not others (free books to book reviewers), and no theory for distinguishing one situation from the other exists.

Two final examples suffice to show the array of situations in which the administrative application of the positive definition of income seems confused. The first involves the iconic American game of baseball. When contemporary players began to threaten long established home run records, it was clear that any ball that broke such a record would become a collector's item worth substantial amounts of money. When the records began to be broken and a fan caught the record-breaking ball, the tax controversy erupted. Practitioners, academics, and former IRS Commissioners all agreed that catching the ball, like finding old currency in a used piano, which was held to be income in a case known to virtually every student of taxation,[88] resulted in the realization of income.[89] But the public and Congressional outcry at such a prospect was fierce.[90] How could the joy of catching the record breaking-ball be marred by the prospect of the rapacious IRS pursuing the fan for a cut of the good fortune? Legislation to ensure non-taxation was introduced.[91] One IRS Commissioner, not a lawyer, dissembled.[92] Years later, the Chief Counsel of the IRS, not only a lawyer but a tax lawyer, reportedly covered his head with his hands and captured the difficult position the agency was in when he responded to the question whether the fan who caught and kept the ball had income by saying, "Please don't ask me that."[93] Scholarly articles were written and the question was debated,[94] but the IRS's position remains unknown.

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88. Cesarini v. United States, 296 F. Supp. 3 (N.D. Ohio 1969), *aff'd*, 428 F 2d 812 (6th Cir. 1970).

89. *See* Zelenak & McMahon, *supra* note 5, at 1300 (1999) (reporting former IRS Commissioner Donald Alexander's opinion that a record-breaking baseball is income when caught by a fan, documenting that Alexander's opinion was "universally shared among tax experts," and attributing the "unanimity of expert opinion" to its reliance on the literal language of Treas. Reg. §1.61-14.). *See also* Claim of Right, *supra* note 6, at 688 (2000).

90. *See* Zelenak & McMahon, *supra* note 5, at 1299.

91. *Id.*

92. *Id.*; CHARLES O. ROSSOTTI, MANY UNHAPPY RETURNS 95 (2005). This was possible because the Commissioner responded to a hypothetical question involving a fan who caught the ball and then gave it to the player, which could be analogized to a disclaimer. I.R. 98-56, 98 TNT 174-14.

93. Tom Herman, *The Big Catch Could Have a Big Catch*, WALL ST. J., July 25, 2007, at D1.

94. Zelenak & McMahon, *supra* note 5; Dodge, *Claim of Right*, *supra* note 6; Andrew D. Appleby, *Ball Busters: How The IRS Should Tax Recordsetting Baseballs And Other Found Property under The Treasure Trove Regulation*, 33 VT. L. REV. 43 (2008).

The second example involves fish. Found money and found property are income under the regulations, but how about caught fish? The expenses incurred by the recreational fish catcher may exceed the value of the fish caught,[95] but in most cases expenses incurred by commercial fishing operations will not. Catching fish produces a realized accession to the taxpayer's wealth, within the taxpayer's dominion. Yet the IRS has taken the position that caught fish are not income until sold.[96] Despite opportunities to do so and arguable provocation, the IRS has also declined to assert that the value of big game trophies is income to the hunters, or that minerals are income when removed from the ground.[97] These discrepancies between the positive law, including the dictates of the Treasury's own regulation, and the IRS's administration thereof may be sound from the standpoint of tax administration, but they have caused at least two prominent tax scholars to call for the withdrawal of the regulation and the adoption of a position generally treating only cash as income, except when equity strongly demands otherwise to prevent abuse.[98] That position has been resisted[99] and the IRS has shown no inclination to adopt it, but our objective here is not to debate the merits of the competing positions. We use the controversy to illustrate the difficulty of articulating an accurate and clear definition of the income that is actually subject to tax. The IRS has not done it yet.

We have tried to demonstrate that although the *Glenshaw Glass* definition of income appears clear and straightforward, its application has not always been likewise. Some realized accessions over which the taxpayer has dominion are income, others are not taxed despite the absence of a statutory or even administratively stated exclusion, and still others are not taxed based on administrative practice or pronouncement. Most significantly, we have tried to demonstrate that a theory that satisfactorily explains the various results has yet to be articulated. We now proceed to explore the source of the difficulty.

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95. This could still result in residual income because the expenses, even if they could offset any income in theory under § 183(b), would be miscellaneous itemized deductions not fully deductible in most cases.

96. Tax Highlights for Commercial Fishermen, IRS Pub. 595, 9 (1998). Like Professors Zelenak and McMahon, *supra* note 5, to whom we are thankful for the example, we do not question the wisdom of this position as a sensible recognition of the likelihood that in all but the most unusual cases the catching and the selling will take place during the same taxable year, and accounting for fish caught but unsold would be administratively burdensome. Like them, however, we recognize that such a position would not follow from a technically accurate application of the Treasury's regulation.

97. Zelenak & McMahon, *supra* note 5, at 1302.

98. *Id.* at 1304–08.

99. Dodge, *Claim of Right*, *supra* note 6, at 688.

II. DEFINITIONS: A JURISPRUDENTIAL DETOUR

Why is it so difficult to define what income is actually subject to tax? We now explore this question and offer as an answer the concept of aptness. In Part III we will apply the idea of aptness to the problem of defining income.

A. The Quest for Scientific Precision

From the time the Court decided *Glenshaw Glass*, scholars have struggled with the definition of income. This struggle is arguably an iteration of the more general struggle between those who see law as science and those comfortable with a less definitive account. The struggle was manifest in the debate over the search for a "comprehensive tax base" (a tax system free of loopholes and base erosions), which raged during the late 1960s and continues to this day with the claim that tax law suffers from a dislocation from real world events, dubbed an ectopia, that dooms it to doctrinal incoherence.

The first salvo in the battle over the search for a comprehensive tax base ("CTB") was fired by no less an iconic tax scholar than Professor Boris Bittker, who asserted that a "neutral, scientific definition of . . . income is a mirage,"[100] and that efforts to use the Haig–Simons definition of income as the point of departure for the development of a CTB that would serve as the touchstone for developing a pristine tax system were doomed to failure.[101] Prominent public finance economists and legal tax scholars promptly attacked Professor Bittker's apparent heresy, accusing him of misunderstanding Haig–Simons, adopting an "untenable position" and even doing no more than "suggesting ad hoc settlements."[102] In response, Professor Bittker remained undaunted, sardonically expressing the hope that the search for a CTB, which he derided as "an encompassing verity" would not lead its proponents into that "dank, miasmic, myxomycetous sump" that his detractors would probably like to call "Bittker's Quagmire."[103]

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100. Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Tax Reform*, 80 HARV. L. REV. 925 (1967) (hereinafter Bittker, *CTB as Goal*).

101. *Id.* at 925.

102. *See* Joseph A. Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63 (1967) (accusing Professor Bittker of misunderstanding Haig–Simons); R.A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44 (1967) (accusing Professor Bittker of adopting an "untenable position"); and Charles O. Galvin, *More on Boris Bittker's Comprehensive Tax Base: The Practicalities of Reform, the ABA's CSTR*, 81 HARV. L. REV. 1018, 1019 (1968) (accusing Professor Bittker of doing no more than suggesting "ad hoc settlements").

103. *Bittker's CTB Response*, *supra* note 6, at 1041.

Although the current income tax system is far from the CTB, the desire for scientific precision continues. Recently, it has taken the form of Professor John Prebble's claim that tax law suffers from ectopia, which he describes as a regime of legal doctrines that have no relationship to real world events and which are therefore doomed to doctrinal incoherence. The oddity of income tax law, in Professor Prebble's view, is that, unlike other fields of law, tax law necessarily relies on artificial concepts and definitions that do not answer to an underlying economic reality, and the pervasive indeterminacy that results from this ectopia is, therefore, ineradicable from the law of taxation. At the heart of this problem is the concept of income, which Professor Prebble believes "is not something that ultimately can be defined by law because it is not something that exists either as a physical fact or as an abstract thought."[104]

We offer a critique of ectopia because we see it as an iteration, albeit an extreme one, of the yearning for scientific precision in tax law, which we, like Professor Bittker, believe is doomed to failure, like obtaining hydration from a mirage. Our critique, and our development of the concept of aptness, shows that abandoning the search for scientific precision need not lead to a "dank, miasmic, myxomycetous sump," but can instead provide space for articulation of a multiplicity of values. These values include but are not limited to economic values. In this way, tax is no different from other areas of law, where multiple values inform the development of doctrine.[105]

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104. John Prebble, *Ectopia, Tax Law and International Taxation*, 1997 BRITISH TAX REV. 301, 310 (2002).

105. Many judges, lawyers, and tax scholars view tax as a self-contained body of law that differs from other areas of law and believe that tax lawyers are somehow different from other "normal" lawyers. Furthermore, the complexity of tax statutes has led some to advocate approaching statutory construction differently in the context of tax statutes. *See* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 519-32 (1994) (discussing the "myth" that tax law and tax lawyers are different); Leo P. Martinez, *The Summons Power and the Limits of Theory: A Reply to Professor Hyman*, 71 TUL. L. REV. 1705, 1714-16 (1997) (suggesting that courts afford tax legislation a greater than normal level of deference due to the special importance of tax laws for the functioning of the government). *But see* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference,* 90 MINN. L. REV. 1537 (2006) (urging that tax regulations deserve the same level of judicial deference as any other regulations). David A. Hyman, *Procedural Intersection and Special Pleading: Is Tax Different?*, 71 TUL. L. REV. 1729, 1744 (1997) (criticizing the view the tax laws are different and advocating a less self-contained approach to tax); JOSHUA D. ROSENBERG & DOMINIC L. DAHER, THE LAW OF FEDERAL INCOME TAXATION, § 1.02, at 4–5 (2008) (stating that "tax laws are not so different from any other laws," despite the fact that tax laws are judged primarily based on their economic impact, which differs from the manner in which many other laws are evaluated, and that equity standards applied to tax and nontax laws tend to be different). In deciding that

The Prebble position echoes one offered by Professor John Miller in 1993, when he argued that the Internal Revenue Code comprises a set of "creational" rules. His idea was that "the income tax has no counterpart in reality antedating its enactment in the same sense that a murder statute may be antedated by the act of killing someone and the societal disapproval that act may engender."[106] Professor Miller analogized tax law to a game, of which "the rules are an inseparable and definitional part."[107] If tax law is a game, created by the legislature, it has the possibility of being pristine because it can be created that way. If the definition of income tracks Haig–Simons (except when it has to depart to accommodate the administrative necessity for realization),[108] then it can be precise, because economic accessions can be counted in dollars and added up with mathematical accuracy. But we do not believe that such precision is attainable.

Professors Miller and Prebble invoke a pre-law world—an "underlying reality"[109]—that, much like classical economics, appears to have an identifiable nature independent of human interpretation and thus independent of any constitutive effects produced by rules devised by humans. For example, in Professor Prebble's view, the rules of criminal law or torts (to take two of his examples) map reasonably well onto this antecedent "natural world."[110] By contrast, although there is a "natural world" of economic transactions that income tax law regulates, Professor Prebble argues that tax law does so with definitions that do not reflect that world, which leads to a legal regime full of incongruities, indeterminacies, and consequent instability.

Is this contrast between criminal law and tort law, on the one hand, and income tax law, on the other hand, correct? For example, does a

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tax regulations are entitled to the same level of deference as other regulations, the Supreme Court has recently cast its lot with the non-exceptional view. Mayo Foundation v. United States, 131 S. Ct. 704 (2011).

106. John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 68 (1993).

107. *Id.* at 62. Professor Miller explicitly connects this idea to John Rawls's concept of a "practice." *Id.* at 62 n.288, 68 n.319. Rawls defines a practice as "any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure. As examples one may think of games and rituals, trials and parliaments." John Rawls, *Two Concepts of Rules*, 64 THE PHILOSOPHICAL REVIEW 3, 3 n.1 (1955).

108. *See* SIMONS, *supra* note 4.

109. John Prebble, *Fictions of Income Tax* 13 (Victoria University of Wellington Centre for Accounting, Governance, and Taxation Research, Working Paper Series, Paper No. 7 2002), Centre for Accounting, Governance, and Taxation Research, at http://www.victoria.ac.nz/sacl/cagtr/working-papers/WP07.pdf.

110. John Prebble, *Income Taxation: a Structure Built on Sand*, 24 SYDNEY L. REV. 301, 310 (2002).

homicide statute, as Professor Miller suggests, map onto an antecedent reality: the killing of a human being? Clearly not. There are substantial categories of killings that are not homicides, such as killings by state executioners, and killings by the insane, killings in self-defense and in defense of others. Conversely, there are homicides such as felony murder and various accomplice and conspiracy-based homicides that do not involve the killing of a human being by the accused. Nothing in the "natural world" accounts for these distinctions. The willful, deliberate, and premeditated killing of a convicted murderer by the state executioner differs from the willful, deliberate, and premeditated killing of an organized-crime rival only by social and legal convention and the values that inform them. Without denying any "natural occurring phenomena," we could treat both the same, just as English law used to treat killing in self-defense as a criminal homicide,[111] without running afoul of the "physical facts."

The reason that no underlying scientific reality answers to legal claims about homicide or income becomes apparent when we examine Professor Prebble's proffered example of a claim that straightforwardly maps onto things that "exist in the natural world,"[112] namely, the claim that "Kilimanjaro is in Tanzania."[113]

Let us begin with Tanzania. As Professor Prebble acknowledges, national entities are "defined by the actions and agreements of people, not by nature."[114] Nonetheless, he insists that "the definitions that we employ are definitions (borders) that themselves are defined by reference to natural, physical features of the landscape." Accordingly, there is a "required logical connection between a country and a mountain or a river in that country."[115] But, of course, there is no *logical* connection between a country's borders and topographic features. That relationship is entirely contingent, and the world is full of counter-examples. (Consider the border between the Koreas or between Canada and the United States.) Thus, whether Kilimanjaro is in Tanzania (as opposed to some other country) is entirely dependent on "actions and agreements of people." It is not just science.

What about Kilimanjaro? Is it logically connected to a physical, scientific reality? Not at all. Do foothills count as part of a mountain? If the answer is no, then Kilimanjaro is currently in Tanzania; if the answer is yes, then part of Kilimanjaro is in Kenya. The answer to the status of the foothills cannot be determined by reference to an underlying physical reality. The decision whether to include the foothills in the definition of "mountain" is, again, conventional, not scientific: it depends on the "actions and agreements

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111. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 344, 352 (1978).

112. *Id.* at 310.

113. Prebble, *supra* note 104, at 388.

114. *Id.*

115. *Id.*

of people." And these actions and agreements are informed by the values of those who enter into them.

The point, of course, is that there is no antecedent reality that is presented to us without being "always, already" conceptualized. This bears emphasizing: It is not that there is no real world independent of human thought, but that that real world is never present to us free of conceptualization—conceptualization that represents the world with a particular form and order. And those concepts, and the form and order they engender, are necessarily conventional and, therefore, contingent and provisional. This is true of "Tanzania," of "Kilimanjaro," and of "income." An individual can receive a $100 bill that is hers to keep, or she may show great happiness when seeing a loved one, but whether either of those observable events are income requires more than observing them. It requires defining income, and reference to scientific, observable phenomena is not enough.

As with Tanzania or Kilimanjaro, the success of the definition of income is a function of its "aptness." It is to this notion of aptness that we now turn.

B. Aptness

We develop the idea of aptness by focusing on the relationship between the definition and the goals and values it is meant to serve. In this view, legal definitions are instruments that are designed to promote particular ends. The aptness of a definition, then, is a measure of its success in realizing those ends.[116]

Those ends or purposes, of course, are contingent. As society changes over time, the ends that a given legal definition furthers can

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116. For earlier views that goals and values are fundamental to understanding law, *see, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Proces, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW xci-xcii (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994) (legal process movement); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 52 (1936) ("[L]egal rules can be understood only with reference to the purposes they serve."); Thomas C. Gray, *Freestanding Pragmatism*, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 256 (Morris Dickstein ed. 1998) ("pragmatist jurisprudence" understands "legal thought" to be both "contextual" and "instrumental"); Kenneth Heinar Himma, *Natural Law*, *in* INTERNET ENCYCLOPEDIA OF PHILOSOPHY (James Fieser & Bradley Dowden eds., 2005), http://www.iep.utm.edu/natlaw/. ("According to natural law theory of law, there is no clean division between the notion of law and the notion of morality.").

change.[117] Moreover, in a complex society, the ends are multiple. Thus, for instance, tort law and the concepts that constitute it are shaped by a collection of goals and values that include compensation of innocent victims, imposition of liability on individuals whose conduct is blameworthy, and imposition of liability on individuals who cause harm to others.[118] To take another example, criminal law is defined by goals and values that include retribution, utility, and autonomy.

A quick examination of these two examples shows that the goals and values that define a legal field are not only multiple, but heterogeneous. Compensation, fault, and causation cannot be reduced to one another, nor can they be subsumed under a single, broader rubric. The same is true of retribution, utility, and autonomy. Being heterogeneous, these goals and values are potentially in tension and even conflict. Indeed, at the risk of anthropomorphism, we can think of the multiple, heterogeneous goals and values that constitute a field of law as competing with one another for attention through the formulation of the various concepts that give legal content to the field.[119]

In this Part we use these characteristics of multiplicity, heterogeneity, tension, conflict, and competition to develop a number of ideas that will be important for addressing the problem of defining income. We first seek to explain why some applications of the law are easy while others are controversial, and that distinction will help clarify what determines the aptness of a legal definition. An apt definition, we will argue, tends to generate a preponderance of easy applications. We will then examine the important difference between a rule and a standard and discuss how each can be apt. Finally, we will focus on a particular goal/value that plays a dominant role in determining the aptness of definitions in public law fields, including

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117. Even more fundamentally, the very existence of a coherent set of ends furthered by a given legal definition is generally contingent on the existence of a high degree of social consensus. The significance of this dependency for the definition of income will become apparent later in Part III.

118. The division in tort law between blameworthiness (fault) and causation is illustrated by *Sindell v. Abbott Laboratories*, which adopted the theory of market share liability. *See infra* notes 120–24 and accompanying text. In *Sindell* each defendant could be shown to have behaved in a blameworthy manner (as described by the court), but could not be shown to have caused harm to anyone in particular. Conversely, a person can cause harm to someone without acting in a blameworthy manner (a careful driver who kills a child who dashes out from between two parked cars, for example).

119. *E.g.*, Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980) (market share liability in torts); Mapp v. Ohio, 367 U.S. 643, 659–60 (1961) (discussing tension among goals and values of law enforcement, judicial integrity, and individual liberties).

income taxation: administrability. Finally, we will see how administrability pushes public law definitions to prefer rules over standards.

1. *Controversial vs. Easy Applications of the Law*

If we imagine the various goals and values comprised by a particular field of law as having directional vectors, we can think of an easy case as one in which those vectors point in roughly the same direction: toward the same outcome. Conversely, in a controversial case the vectors point in significantly different directions and, therefore, toward different outcomes. Consider, for instance, the market share liability rule developed in *Sindell v. Abbott Laboratories*.[120]

This litigation concerned cancer suffered by daughters of mothers who had ingested diethylstilbestrol (DES) during their pregnancies. The defendants in the suit were various companies that had manufactured and marketed DES as an anti-miscarriage drug.

Although the culpability of the companies was established,[121] not one of the injured parties could prove which company had manufactured the specific drug that her mother had taken during pregnancy. Thus each of these victims was asking the court to hold various drug companies liable for her injuries although she could not establish a causal connection between her injuries and the conduct of any particular company. Indeed, since the defendants accounted for ninety percent of the DES that was placed on the market, there was a ten percent chance that none of the defendants had caused any particular injury.

The California Supreme Court resolved the case by requiring each drug company to pay a share of the plaintiffs' injuries equal to the company's share of the DES market. A company could avoid this liability only by showing that it could not have caused the injuries. Thus, the California court allowed the injured parties to recover damages from the defendants without having to establish a causal connection between the injuries and the conduct of any particular defendant.

The court was clearly aware of the tension in this case among the goals and values of compensation, culpability, and causation, and of its denigration of causation in favor of the other two. Although the three dissenting justices were unwilling to jettison the requirement of causation,[122] the majority emphasized the innocence of the plaintiff and the culpability of the defendants, who were the only parties in a position to have prevented the harm caused by their product.[123]

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120. *Snidell*, 607 P.2d at 924.
121. *Id.* at 925–926.
122. *Id.* at 938.
123. *Id.* at 936.

When goals and values collide, as they did in *Sindell*, the court could have resolved the matter if it had been able to identify some applicable metaprinciple. But no such legal metaprinciple exists. The precedents that inform the law of torts express doctrines that permit imposition of liability in the absence of culpability (e.g., a manufacturer's strict liability for injuries caused by a defective product), in the absence of causation (e.g., an employer's liability under the doctrine of respondeat superior for torts committed by employees), and in the absence of injury (e.g., the imposition of so-called "nominal" damages for the mere invasion of a legal right). Thus, none of the principles under consideration expresses a necessary condition for liability as a general matter, nor do the precedents indicate a fixed hierarchical or lexicographical relationship among the principles.

Faced with a controversial case in which important goals and values clashed, in the absence of guiding metaprinciples the *Sindell* court was required to choose which goals or values to vindicate and which to sacrifice. The majority chose to vindicate compensation and culpability and to sacrifice causation. The dissent would have subordinated compensation and, to some extent,[124] culpability, to causation.

By contrast, in an easy tort case (such as a two-car automobile accident caused by the careless inattention of one of the drivers), the compensation, culpability, and causation principles all point toward the same conclusion. Accordingly, no matter how the court prioritizes the various goals and values that comprise the field, the outcome of the easy case remains the same.

It is important to keep in mind that the ends served by a field of law are contingent and can change over time. That means not only that the goals and values themselves can change, but also that the way in which they are understood can change. That, in turn, means that what is an easy or controversial case at one point in time can become its opposite at another point. For example, when the United States Supreme Court held that the Constitution permitted racially segregated railroad cars in *Plessy v. Ferguson*,[125] it bolstered its conclusion with the apparently uncontroversial example of "the establishment of separate schools for white and colored children."[126] Accordingly, in 1896 the Supreme Court would have regarded the constitutionality of racially segregated public schools as an easy case. However, a series of Supreme Court decisions and an altered social climate

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124. The implication of the dissent is to clearly subordinate culpability to causation. However, the dissenters conflate causation and culpability, in that they appear to believe that the drug companies are not really culpable since they can't be shown to have caused harm. For this reason we use the hedging language "to some extent."

125. Plessy v. Ferguson, 163 U.S. 537 (1896).

126. *Id.* at 544.

transformed that easy case into a hard case, culminating in *Brown v. Board of Education*,[127] which held segregated public schools unconstitutional.[128]

2. *The Aptness of a Legal Definition*

We can now define the aptness of the definition of a legal concept like income as its tendency to further the goals or values that constitute a field of law. By so doing, an apt definition will generate a preponderance of easy applications, in which the goals and values served by the definition point toward the same conclusion. It bears emphasizing that "preponderance" is, as the word suggests, a relative measure. Some apt definitions will generate more controversial applications than others, as the discussion of rules and standards in the next section will illustrate. However, when a definition is apt easy applications preponderate.

As an example of an apt definition, consider "cause" in criminal law. The Model Penal Code provides that "[c]onduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred."[129] This definition is notoriously under- and over-inclusive. Nonetheless, the but-for definition of cause works terrifically well in reliably identifying causal behavior that we wish to punish as criminal, and it works well because it is apt. It succeeds in both of the senses identified above: first, the definition can be demonstrated to serve effectively all of the core values of criminal law: retribution, utility, and autonomy. Second, because it furthers the core values of criminal law so well, those values all point toward the same conclusion regarding causation in the great run of situations, while holding controversial applications (where the core values point toward different conclusions regarding causation) to an acceptable level.

We can contrast the aptness of but-for causation by comparing it to a famously inapt definition: the specification of the crime of "vagrancy" in a Jacksonville, Florida ordinance struck down as unconstitutionally vague in the 1972 case *Papachristou v. City of Jacksonville*.[130] The language of the ordinance was so vague that it failed "to give notice of conduct to be avoided"[131] and thereby placed "unfettered discretion . . . in the hands of the . . . police,"[132] transmuting all sorts of ordinary conduct into potential violations of the law, depending on whether the police wished to respect the autonomy of the individual or saw the individual as a threat to the social

127. Brown v. Board of Education, 347 U.S. 483 (1954).

128. *See generally* RICHARD KLUGER. SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

129. MODEL PENAL CODE § 2.03(1)(a) (Proposed Official Draft 1961).

130. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

131. *Id.* at 166.

132. *Id.* at 168.

order. Consequently, there were virtually no easy applications. And the reason for the defect is found in a single paragraph early in the Court's opinion, where it notes that the statute was "derived from early English law" designed to address "labor shortages" caused by the "breakup of feudal estates," and subsequently "became criminal aspects of the poor laws."[133] Thus, however apt the language might have been given the historical goals and values promoted by the English vagrancy statutes, those specific goals and values no longer obtained in late twentieth-century Florida.

3. *Rules and Standards*

Our claim that an apt legal definition generates predominantly easy applications requires some further clarification. Specifically, we need to attend to two types of formulations: rules and standards. A rule can be likened to an on-off light switch: it is formal, and in the great majority of circumstances the rule either clearly applies or clearly does not. A statute of limitations is a familiar example. By contrast, a standard acts like a dimmer switch for a light: it allows for infinite gradation between on and off. Application of a standard tends to be contextual and fact-sensitive. Examples include negligence (lack of reasonable care) in tort law.

If a field of law is constituted by a particular set of goals and values, then we can understand the difference between rules and standards from that perspective. Insofar as a definition within the field promotes fewer than all the goals and values or rests on a particular priority among the values, it will seem rule-like. This is because only those facts necessary to determine whether the favored goal or value is satisfied need be determined and because other goals and values are not in play to point the analysis in different directions.

Conversely, insofar as the definition promotes many or all of the goals and values simultaneously and without preference, it will seem standard-like. The increased number of values in play will push the analysis in different directions and will require many more facts to be determined. The analysis will therefore be much more contextual and complex.[134]

Because the goals and values that constitute a field are heterogeneous—because they cannot be reduced to one another or collectively subsumed under another goal or value—they will, as suggested earlier, compete for attention in the formulation of a legal definition. Accordingly, we can understand Professor Carol Rose's analysis of the rule-

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133. *Id.* at 161–62 (citations omitted).

134. *See, e.g.*, Popov v. Hayashi, No. 400545 (San Francisco Super. Ct. Dec. 18, 2002) ("using a contextual" analysis to resolve dispute over "possession" of Barry Bonds's seventy-third home run baseball).

standard dialectic[135] as follows. At any given moment in the development of the field, certain goals and values will gain ascendency and generate definitions that use rule-like formulations to promote them over the other goals and values. However, the demoted goals and values may continue to compete for attention and over time generate changes in the definition that muddy it up and move it more in the direction of a standard. But the competition doesn't stop, and we can expect at some point in time that once again certain goals and values will contingently gain ascendency and generate more rule-like definitions. And the cycle continues.

Both rules and standards can be apt. Because a rule generally reflects a prioritization of the core values of the field, promoting certain values and sacrificing others, there should be very few instances in which values point in different directions when the rule is applied, and the ratio of easy to controversial applications should, consequently, be very high. For instance, we would expect a very small proportion of statute of limitations issues to be controversial.[136]

In contrast to rules, standards generally require for their application that virtually all the core values be considered in the context of the particular case. And for this very reason standards can generate many controversies. Nonetheless, a standard can be apt as long as the ratio of easy applications (where all the relevant values point toward the same conclusion) to controversial applications (where the values point to different conclusions) is high. Negligence illustrates this. While this dimmer-switch-like standard, with its focus on nuance and context, generates many more disputes than does an on-off rule like a statute of limitations, the easy applications still predominate. If we consider the countless everyday physical encounters (pedestrian bumps, fender-benders, etc.) that are quickly resolved by means of an apology or informal compensation, we quickly realize that as a practical matter the question whether behavior constitutes reasonable care is easily resolved in the vast majority of situations.[137]

How does that happen? How is it that the all-things-considered judgments required by a standard can generate predominately easy applications? The answer appears to lie in a contingent social fact: If there is

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135. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

136. However, for a rule to be apt, two conditions must usually be met. The first is that the rule must reflect values that define the field. The second condition is that the prioritization of core values reflected in a rule must be politically and socially acceptable. A failure to meet either or both of these conditions would generate noncompliance or legal challenges.

137. Of course, an additional reason for a lack of formal controversy is that the injury is too trivial to litigate. The significance of this factor will become apparent in the consideration of the distinction between public and private law. *Infra* notes 138–40 and accompanying text.

a widely shared understanding of the goals and values that underlie the field, then a standard that reflects those values will be apt. The significance of social consensus becomes clearer as we consider the distinction between private and public law and the important public law value of administrability.

Two particular features distinguish public from private law. The first of these is institutional. Governmental institutions monopolize the enforcement of public law, while enforcement of private law is primarily in the hands of individuals, with the government serving as enforcer of last resort. Again, the vast majority of issues involving questions of negligence—a private law question—are resolved privately. Easy applications routinely stay in the hands of private individuals (people do not litigate accidental bumps in a crowd), and many controversial applications are similarly resolved privately without litigation (by negotiating compensation or ignoring the matter). Indeed, individuals are free to invent the standards governing their relationships, as long as such standards do not violate legally enforced social policies.[138] The government, largely through the judiciary, is invoked only when these private negotiations fail and the stakes are sufficiently high.

By contrast, individuals cannot decide for themselves whether a particular accession to wealth is taxable or whether particular behavior is criminal.[139] Income tax law and criminal law, two paradigmatic examples of public law, are binding on all and are principally interpreted, applied, and enforced by agencies of the government.

A second feature that distinguishes public from private law is, in some ways, the flip side of the first. Because public law is enforced by the government and potentially applicable to everyone, administrability should be a centrally important value. A legal definition is administrable to the extent that it can be applied easily and without excessive controversy by the governmental agency charged with its enforcement. In the competition

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138. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES pt. I (1991) (describing how cattle ranchers in Shasta County, California resolve disputes using informal norms rather than law); *see generally id.* pt. II (setting out a "theory of how people manage to interact to mutual advantage without the help of a state or other hierarchical coordinator"); and Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 1 (1960) (study of use of informal norms rather than contract law to structure business relationships).

139. The problem of triviality is more complicated. Minor accessions to wealth or instances of criminal behavior may be overlooked because private individuals fail to bring them to the attention of the government. However, while private law permits private individuals to resolve such issues among themselves; public law does not. Law enforcement officials may decide that a particular offense is not worth the expenditure of resources to prosecute; however, the law does not delegate that kind of determination to private persons.

among the congeries of values that constitute a given field of public law, the importance of administrability will tend to push definitions in that field toward rule-like formulations for two reasons. First, the central importance of administrability will cause it to dominate in the competition among goals and values, and definitions that reflect the domination of a single goal or value will tend to be rule-like. Second, administrability itself suggests rule-like definitions since the on-off nature of rules tends to support many of the qualities associated with administrability: clarity, simplicity, dependence on discoverable information, and predictability— and, not coincidentally, few controversial applications.[140] The dimmer-switch quality of standards, on the other hand, tends to defeat administrability with its insistence on highly nuanced, contextual application of multiple, heterogeneous values. That is, because of the all-things-considered requirement of a standard, its application is less efficient and simple than the more limited considerations required by a rule.

Of course, administrability is a value in all fields of law because some governmental institution will have the responsibility for policing (i.e., administering) the law's implementation. But in private law this responsibility falls to the courts, which are called upon only as a last resort; following the law is largely in the hands of private individuals. Accordingly, administrability isn't a powerfully important value, and in the ongoing competition it will not consistently dominate the formulation of definitions. Hence, private law makes frequent and successful use of standards (e.g., the negligence standard in torts). But tax is public law, and administrability is crucially important, so we would expect the definition of a key concept like income to be a rule or be inapt. We will now show that it is neither.

III. APTNESS IN THE TAX LAW

Individuals have tax responsibilities even if they do not do anything wrong and do not want to pay taxes, and these responsibilities are triggered by the receipt of gross income.[141] The definition of income is therefore of central and foundational importance. Yet, as we demonstrated in Part I, a definition that accurately describes what is subject to tax does not exist. Although *Glenshaw Glass* purports to provide a definition of income in the

140. The qualities that constitute administrability have an affinity with the qualities identified by Lon Fuller as constituting the "internal morality of law"— qualities he regarded as necessary to fulfill law's function as "the enterprise of subjecting human conduct to the governance of rules." *See* FULLER, *supra* note 51, ch. 2.

141. Not all gross income will become taxable income because of the existence of deductions, and even the existence of taxable income may not result in positive tax liability because of the existence of credits, but the receipt of gross income raises the possibility of the existence of ultimate tax liability.

tax law, there is an apparent incongruence between the arguable reach of that definition and the income that is actually subject to tax. In our discussion of aptness in Part II we saw that a definition that generates many contestable cases may be inapt. Accordingly, we now turn to determining whether the *Glenshaw Glass* definition of income is inapt for this reason.

A. *Values in the Tax Law*

The first step in determining aptness is an identification of the goals and values in the tax law. Identifying the principal goal of the income tax system is easy: the tax system exists to raise revenue. Redistribution of wealth and shaping behavior are secondary objectives, and whether they are proper objectives at all is debatable, but there can be little disagreement that the primary goal of the income tax system is to raise revenue.[142] Important policies determine how the revenue is raised. Those policies are usually described as a trinity: equity,[143] efficiency,[144] and simplicity,[145] but that listing is misleading for two reasons.

First, it does not capture the degree to which each of the items is valued. In most discussions of tax policy, equity and efficiency take center stage.[146] Not only is simplicity always third, but it is a very distant third. Often it is not discussed at all, and when it is, it appears in the role of an intruder crashing the theoretical party. Although simplicity is often touted as

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142. Our analysis is deliberately confined to the income tax. Other taxes, such as wealth transfer taxes (estate, gift, and generation skipping) have other principal objectives.

143. Equity takes two forms. Horizontal equity refers to the taxation of similarly situated taxpayers similarly. Vertical equity refers to taxing in proportion to ability to pay so that tax burdens rise as ability to pay raises. Both forms are contested, as it is often difficult to determine the way in which the similarity of situations should be determined and the proposition that tax the rate of tax should rise as ability to pay rises is hotly debated. Although scholars, policy makers, and the public differ on how they define equity, there is general agreement that equity is an important goal of the tax system.

144. Efficiency is generally defined in economic terms, in which an efficient system is one that does not interfere with the actions of participants in the marketplace. The more a system interferes with economic activity, such as by providing more favorable tax consequences for one activity than another, the more inefficient it is. Sometimes the inefficiency is deliberate, as in the case of tax expenditures.

145. *See, e.g.*, GRAETZ & SCHENK, *supra* note 9, at 28.

146. *See* Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 652–53 (2003); David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1649 (1999); Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. REV. 151, 157 (1997).

desiratum, it seems to have little actual traction since the tax laws get more complicated every year and the trend shows no sign of abating. Simplicity is lauded as an objective, but in the end it usually gets left on the cutting room floor.[147]

Second, simplicity is not the whole story. Simplicity can be important in producing an equitable and efficient system, but it does not necessarily do so,[148] and we believe it is more appropriately thought of as a part of what makes the tax law administrable. As we argued in Part II, administrability is a centrally important value in any field of public law, and having an administrable tax law is what makes it possible for the system to raise the revenue which is its *raison d'etre*. An unadministrable system will almost certainly be inequitable and inefficient because it will affect taxpayers arbitrarily, resulting in inequity and inefficiency. Simplicity enhances administrability and administrability is necessary so that the system can raise revenue in an equitable and efficient way. Administrability requires simplicity, but it requires other things as well.

Administrability includes transparency, as well as the procedures and practices necessary for the collection of revenue, such as designing and printing forms and instructions and providing mechanisms for audit, assessment, and enforcement.[149] Because the concept of administrability captures the reason for including simplicity as a tax policy value but is more comprehensive, we believe that it is more descriptively appropriate and we adopt it in our analysis. We consider administrability to consist of the interaction between simplicity, transparency, and the operational mechanics that makes a system work to achieve its objective of collection of revenue in an equitable and efficient manner.

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147. GRAETZ & SCHENK, *supra* note 9, at 31, *see* Steven A. Dean, *Attractive Complexity: Tax Deregulation, The Check-The-Box Election, and the Future of Tax Simplification*, 34 HOFSTRA L. REV. 405 (2005); Steve R. Johnson, *The E.L. Wiegand Lecture: Administrability-Based Tax Simplification*, 4 NEV. L.J. 573, 583 (2004); Donaldson, *supra* note 146, at 647.

148. For example, a head, or per capita tax, is simple, but very inequitable, and a tax on wages, but nothing else, is also simple, but it is not only inequitable but also very inefficient as taxpayers have every incentive to receive compensation in non-wage forms.

149. GRAETZ & SCHENK, *supra* note 9, at 71–74, 78–80; GAO, UNDERSTANDING THE TAX REFORM DEBATE: BACKGROUND, CRITERIA, & QUESTIONS 45–52 (2005); MCDANIEL ET AL., *supra* note 9, at 27–32; *see* Anthony C. Infanti, *Tax Equity*, 55 BUFFALO L. REV. 1191, 1202 (2008) ("[A]n 'administrable' tax is one that minimizes the burdens on taxpayers in complying with it and reduces the costs to the government of enforcing it."); *see* Johnson, *supra* note 147, at 580; William G. Gale & Janet Holtzblatt, *The Role of Administrative Issues in Tax Reform: Simplicity, Compliance, and Administration*, *in* GEORGE R. ZODROW & PETER MIESZKOWSKI, UNITED STATES TAX REFORM IN THE TWENTY-FIRST CENTURY 9–13 (Cambridge Univ. Press 2000).

Conceptualizing simplicity as part of the larger concept of administrability does not rescue it from the back of the policy pack, however. In most tax policy discussions, when issues of administrability are discussed at all, they are portrayed as near-afterthoughts, as considerations that must be tolerated, but not embraced. Administrability is the housework of tax policy.[150]

B. The Importance of Rules

Not coincidentally, the realization requirement, so crucial to the administrability of the income tax system, is a rule. Realization requires an event that changes a taxpayer's legal relationship to property. In *Helvering v. Bruun* the Court held that a landlord whose tenant built a building upon leased land and then abandoned the lease had income in the amount of the value of the new building.[151] The landlord's legal relationship to the building changed upon the tenant's abandonment of the lease because as a result of

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150. Administrability played a role in the debate over the proper treatment of caught record breaking baseballs, but its role was controversial and illustrates its uncertain status as a policy value. Professors Zelenak and McMahon asserted that one reason to embrace their view that "income is cash except when it can't be to prevent avoidance" is that it has the "attainable virtues" of ease of valuation and of liquidity, Zelenak & McMahon, *supra* note 5, at 1304, but Professor Dodge was unpersuaded, opining instead as follows.

> [T]he income tax base has been, and perhaps should be, modified to take into account practical concerns such as difficulty or impossibility of valuation and nonliquidity is commonplace. But practical concerns do not automatically trump other norms. Nevertheless, insofar as Zelenak and McMahon are arguing that practical concerns should be taken seriously, I would not only concur but advance the point a step further: accommodation to practical considerations should not be viewed as a 'retreat' from 'principle,' but rather as a 'shift' to a *different kind* of principle, namely, a 'legal' (as opposed to 'economic' or 'fairness') principle. Legal issues that are relevant to the present discussion include: (1) whether or not rules that can rarely be enforced, or which are enforced at the whim of officials, are 'rules' worth having, and (2) whether various distinctions among tax categories are coherent and intelligible. Admitting legal norms into tax policy debates should not be a cause for embarrassment.

Dodge, *Claim of Right*, *supra* note 6, at 693 (footnotes omitted). Professor Dodge's characterization of administrability as proceeding from a "different" principle consigns it to second class status.

151. Helvering v. Bruun, 309 U.S. 461 (1940).

the abandonment the landlord acquired rights, such as the right to take possession of or re-lease the building, which it did not have before.[152] In *Bruun* the Court found realization despite the absence of the severance which it had considered determinative in *Macomber*, looking to the more subtle change in legal relationship rather than the more crass severance. Similarly, in *Cottage Savings v. Commissioner* the Court found that a taxpayer who exchanged a pool of mortgages with a fair market value of $4.5 million for another pool with the identical fair market value had a realization event despite the equivalence of the market values because the underlying mortgages in each pool were different.[153] In the Court's view the difference in the identity of the properties and obligors in the underlying mortgages sufficed to create realization.[154]

Realization has all of the hallmarks of an apt concept. It provides a rule in an area of public law and it is an on/off switch which tracks an identifiable event. The rule is easy to apply in most situations, and those in which it is not tend to be relatively few. In realization the vectors of important tax values point in the same direction. The vector of equity, treating similarly situated taxpayers similarly, is satisfied because all taxpayers who experience a change in their legal relationships with property will have realization events. The vector of efficiency, having the tax system interfere as little as possible with what taxpayers feel it is economically favorable to do, is satisfied because tax consequences are determined by reference to the change in legal relationships, which has economic significance in most cases. The vector of administrability points to realization because the occurrence of an event makes the definition administrable insofar as the event can be identified.

The wrinkle in this analysis is that the change in legal relationships is not the only occurrence that has economic significance. The increase or decrease in value has economic significance as well, and that is one reason *Cottage Savings* has been controversial.[155] Arguably, a system in which

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152. Although the enactment of § 109 changes the specific result reached in *Bruun*, it does not affect the validity of the holding on the realization question or its effect on other fact patterns not covered by § 109.

153. Cottage Savings v. Comm'r, 499 U.S. 554 (1991).

154. As the Court explained, "[b]ecause the participation interests exchanged by Cottage Savings and the other S & L's derived from loans that were made to different obligors and secured by different homes, the exchanged interests did embody legally distinct entitlements. Consequently, we conclude that Cottage Savings realized its losses at the point of the exchange." *Id.* at 566.

155. The absence of a change in economic position has led many to regard *Cottage Savings* as a tax shelter case. *See, e.g.*, David Weisbach, *Business Purpose, Economic Substance, and Corporate Tax Shelters: The Failure of Disclosure as an Approach to Shelters*, 54 SMU L. REV. 73, 75 (2001); Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5 (2000). Indeed, taxpayers often

taxation followed fluctuations in market values would be more equitable and efficient than one which requires realization, as all taxpayers with equivalent changes in their wealth would be treated alike.[156] An accrual (non-realization based) system would also be less susceptible to manipulation through the creation of events with legal but little economic significance and would therefore be more efficient than a realization based system.[157] But, as we have seen, it would also be nearly impossible to administer. Factoring in the change in values makes the equity and efficiency vectors favor accrual rather than realization but causes significant administrability problems in many cases. The administrability vector therefore points in favor of realization (rather than accrual) and in this case its strength is determinative because an unadministrable tax system is no tax system at all. The strength of administrability therefore suffices to overcome the strength of the values of equity and efficiency.

Over seventy years earlier the Court grappled with these clashing values when it embraced the concept of realization by failing to find that it existed. In *Macomber* a majority of the Court, over the vigorous dissent of Justice Brandeis (as well as a less vigorous dissent by Justice Holmes), held that a pro-rata stock dividend was not income because any increase in the value of the taxpayer's capital (the underlying stock) represented by the issuance of the stock dividend had not be severed from the capital. In requiring severance before being willing to find that receiving the additional shares of stock created income, the Court allowed administrability to moderate the pull of equity and efficiency, for equity and efficiency are precisely what the taxpayer, and Justice Brandeis in dissent, championed.[158]

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cite *Cottage Savings* in support of their position in corporate tax shelter cases. *See, e.g.*, ACM Pship v. Comm'r, 157 F.3d 231, 251 (3d Cir. 1998).

156. Jeffrey Kwall, *When Should Asset Appreciation Be Taxed?; The Case for a Disposition Standard of Realization*, 86 INDIANA L. REV. 77 (2011); Clarissa Potter, *Mark-To-Market Taxation as The Way to Save The Income Tax—A Former Administrator's View*, 33 VAL. U. L. REV. 897 (1999); David A. Weisbach, *A Partial Mark-to-Market Tax System*, 53 TAX L. REV. 95, 103–05 (1999); Daniel Halperin, *Saving the Income Tax: An Agenda for Research*, 77 TAX NOTES 967 (1997); Fred B. Brown, *"Complete" Accrual Taxation*, 33 SAN DIEGO L. REV. 1559 (1996); Reed Shuldiner, *A General Approach to the Taxation of Financial Instruments*, 71 TEX. L. REV. 243 (1992); Jeff Strnad, *Periodicity and Accretion Taxation: Norms and Implementation*, 99 YALE L.J. 1817, 1879 (1990); David Shakow, *Taxation without Realization: A Proposal for Accrual Taxation*, 134 U. PA. L. REV. 1111 (1986).

157. The Code requires mark-to-market (accrual) taxation in a few situation in which it is feasible, such as in the case of certain financial instruments, as described in § 1256. *See generally* Henry Ordower, *Revisiting Realization: Accretion Taxation, The Constitution, Macomber, and Mark to Market*, 13 VA. TAX. REV. 1 (1993).

158. The two values converge in this case, as they do in many cases. Treating economically similarly situated taxpayers similarly is equitable, and making

Although the government lost both *Macomber* and *Cottage Savings*, the allure of grounding decisions on changes in economic relationships—economic substance—has remained strong.[159] We think that the *Glenshaw Glass* definition of income has endured because it is grounded in economics; it is nearly coextensive with the Haig–Simons definition. The question we must now answer is whether the *Glenshaw Glass* definition of income is apt.

C. *Aptness and* Glenshaw Glass

Preliminary analysis would suggest that the answer to that question is yes. The definition of income in the tax law is a part of public law, and a public law of intended application to the entire population. In such cases definitions ought generally to be promulgated as rules to maximize administrability, and the *Glenshaw Glass* definition looks like a rule. It has the on/off quality of rules. Applying the *Glenshaw Glass* definition, a taxpayer either has a clearly realized accession under her dominion or she does not. Defining income should be like turning on a light—the light is either on or off. But that binary paradigm is illusory. The *Glenshaw Glass* definition of income has the appearance of a rule but is actually a standard.

As interpreted and administered by the IRS, the definition of income is a standard because it does not operate like an on-off switch. As we demonstrated in Part I, there are numerous items that fit the *Glenshaw Glass* definition of income and are not excluded by statute but which are nevertheless not income that is taxed. The reason for this is not that the IRS is lawlessly refusing to follow the dictates of *Glenshaw Glass*; the reason is that *Glenshaw Glass* does not indicate what metrics ought to be applied in making the determination of what is and what is not within the definition. That is, *Glenshaw Glass* fails to specify what counts as an "accession to wealth." Does psychic wealth count? On the one hand, much of the market value of Mark McGwire's seventieth home run ball derives from the psychic benefits its ownership can provide; on the other hand, a foul ball hit by a taxpayer's favorite baseball player might hold as much or more psychic value for her as the more famous record-breaking ball. Is that taxpayer's increase in psychic wealth income when she catches her favorite player's foul ball? The answer is no, but not because *Glenshaw Glass* explicitly says that an accession is not to be determined by a psychic metric. We do, in

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economic position, rather than form, determinative makes it futile for taxpayers to engage in transactions purely for formalistic reasons, which is efficient.

159. Most recently Congress codified the economic substance doctrine, to the dismay of much of the tax bar. *See generally* Martin J. McMahon, Jr., *Living with the Codified Economic Substance Doctrine*, 128 TAX NOTES 731 (2010).

effect, tax psychic value when it can be translated into market value.[160] When the goals and values of income taxation are all taken into account, the reasonable conclusion is that the kind of wealth we are concerned with in taxation excludes psychic wealth, unless it enhances market value, just as it excludes imputed income from services, the material support that parents give to children, or, sensibly, welfare payments or education provided by the government. These exclusions, resulting from an all-things-considered understanding of the meaning of "accessions to wealth," are typical of how standards operate.[161]

Recall that an apt definition reflects the goals and values of the field and thereby generates predominately easy applications. Rules accomplish this by privileging certain values over others. Standards, by contrast, typically achieve aptness despite their all-things-considered approach through widely shared consensus. An example is the standard of "reasonable care" in the law of torts.

By contrast, we expect a standard lacking widely shared consensus as to its applications to generate a large "borderland"—a predominance of controversial cases. So is the *Glenshaw Glass* definition of income an apt standard like reasonable care in torts? We conclude that the *Glenshaw Glass* standard is apt, but for a surprising reason. Although there is probably wide agreement with respect to whether some items, such as salary, are income, there is wide disagreement generally as to many other items. The disagreement is deep, ranging from fundamental issues, such as whether capital gains should be income, to the more peripheral, such as the treatment of caught record breaking baseballs. While positive law resolves the disagreement in some cases, in part by providing a compromise, such as the reduced rate of tax applicable to realized capital gains in the United States, deep divisions remain. As Professor Bittker observed more than four decades ago, "[w]hen we turn to the field of income taxation, however, we 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."[162] The arguments have not abated in the intervening years—if anything they are now more intense.

The clash of values in taxation is so deep that it encompasses not only what ought to be taxed but whether there ought to be a tax system at all or, if so, how extensive it should be. Taxation not only played a pivotal (if

160. *See* William A. Klein, *Timing in Personal Taxation*, 6 J. LEGAL STUD. 461, 479 (1977).

161. The transformation of the *Glenshaw Glass* rule-like definition into the standard-like administered definition of income is neatly explained by Professor Carol Rose's analysis of the rule-standard dialectic. *Supra* notes 135–37 and accompanying text.

162. *Bittker, CTB as Goal, supra* note100, at 985.

symbolic) role in the founding of the United States, but debate about its role and extent continues today and exposes deep divisions regarding values. Issues of the reach of the tort law or some aspects of the criminal law are debated in the context of the political debates that are part of the democratic process, but it is difficult to say that any other area of law is as visible a part of political debate at the highest levels as the tax system. Presidential candidates are rarely asked about their positions on matters of torts, contracts, or property, and with respect to criminal law they may be asked about the death penalty. But a Presidential candidate without a position on taxes is unimaginable. The candidates are almost certain to differ, and differ substantially. That those differences constitute a central part of their platforms illustrates the deep societal divisions on taxation. If there is little agreement on whether we should be taxed and the extent to which we should be taxed, it is hardly surprising that there will be little agreement on what the tax base should be.

Even individuals who agree on the essential need for taxation will differ on what ought to be subject to tax, and those differences are not only deep but are often unexplored. Tax may be different from other areas of the law in at least two ways. First, self interest can affect tax values in ways that are less evident in other areas of law. *Ex ante*, an individual might not know what kind of contract or tort rules she might favor because she would not know whether she would be likely to be a breaching promissor or a disappointed promisee, or the driver of the vehicle or the pedestrian who was hit. In tax, however, self interest will almost always move an individual toward a conclusion of no income. Sides are more easily taken, even in the abstract.

Second, putting self-interest to one side, while socialization produces in most individuals a shared morality and sense of right and wrong, socialization does not typically produce in individuals a sense of what ought, or ought not, be taxed. Those who teach tax know that until students take the introductory income tax course, few have given much thought to the subject. They may know that there is an obligation to pay tax, as do most people, but like most people, they expect the tax law to consist of a set of mechanical rules unmoored from values. Students expect that the subject will be artificial, unlike, for example, constitutional law, which they know will involve the clash of deeply felt values.

That perceived artificiality complicates the clash of values. People who have not thought much about the values of equity and efficiency in taxation but care about baseball may well think that a caught record breaking baseball ought to bring nothing but joy to its catcher. There is almost certainly a greater national consensus about baseball than about what ought to be taxed and it is likely that most baseball fans would agree with former

IRS Commissioner Rossotti that the lucky fan who catches the record breaking ball deserves "a round of applause, not a tax bill."[163]

Commissioner Rossotti's account of his reaction to the caught baseball tax controversy, which we discussed briefly in Part I.C, is worth detailing because it illustrates perfectly the clash of values we have identified. Commissioner Rossotti was the first Commissioner in a very long time who was not a tax professional.[164] He had founded and run a large information technology corporation and was brought in to head the IRS at a time when the agency was in great turmoil and the approach of Y2K raised the specter of the possible collapse of its computer systems.[165] That he was not a lawyer, much less a tax lawyer, is important because it means he brought to the position of Commissioner the reactions and sensibilities of a member of the public, not of someone whose professional training began at the knee of section 61 and *Glenshaw Glass*. In his reflections on his time as Commissioner he recounted the events that began the baseball tax controversy: a New York Times reporter asked "a hypothetical question about gift tax due from a fan who might catch [Mark McGwire's] record breaking baseball and give it back to McGwire."[166] When an IRS spokesperson answered the question by saying that tax would be due, a firestorm of controversy erupted. As Rossotti explains,

> More than innocent-spouse cases, more than small-business owners losing their businesses, more than ITS modernization failures, the prospect of the IRS taxing this hypothetical good-hearted fan unleashed the fury of the American people, not to mention their representatives in Congress. This was what people thought of when they talked about a faceless bureaucracy.[167]

The firestorm of controversy erupted because even if most people had not thought much about what ought to be taxed, it seemed obvious to them that a ball caught at a park should not be. In the words of White House spokesman Mike McCurry, taxing the baseball was "about the dumbest thing I've ever heard in my life."[168]

It is telling that tax professionals, those who had been inculcated with the structure that begins with section 61 and proceeds to *Glenshaw*

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163. IR 98-56, 98 TNT 174-14. *See* ROSSOTTI, *supra* note 92, at 223.

164. Ryan J. Donmoyer, *Next IRS Commissioner Should be Outsider, Grassley Says*, 74 TAX NOTES 993 (1997); *see*, *Unofficial Transcript of Finance Hearing on IRS Commissioner-Nominee Rossotti*, 77 TAX NOTES 583 (1997).

165. ROSSOTTI, *supra* note 92, at 1–25.

166. *Id.* at 94.

167. *Id.* at 95.

168. *Id.*

Glass, were unanimous in their view that catching the baseball and keeping it produces income.[169] Commissioner Rossotti was fortunate in not having to answer that question. The IRS Chief Counsel was able to respond to the catch-and-return hypothetical by analogy to disclaimers and thus conclude that there would be no tax.[170] A subsequent IRS Chief Counsel, himself a baseball fan, had no such easy out. When asked the income question directly, he covered his head with his hands and declined to respond.[171]

Commissioner Rossotti is justifiably proud of his handling of the situation, reporting that

> The press grudgingly gave us credit for not being so pinheaded after all. I was told one of the television commentators read my quote "Sometimes pieces of the tax code can be as hard to understand as the infield fly rule. All I know is that the fan who gives back the home run ball deserves a round of applause, not a big tax bill" to the national audience at the beginning of the game in which McGwire hit his sixty-second homer. By the skin of our teeth, we had turned a potential public relations disaster into something that made it seem as if real people worked at the IRS, even people who knew what the infield fly rule was.[172]

Commissioner Rossotti's account of the IRS response to the controversy captures the importance of the IRS's role in resolving clashes of values in defining income. It is significant that, in Commissioner Rossotti's words, "real people work at the IRS."

Commissioner Rossotti's reaction to the baseball controversy illustrates another way in which values clash over what should be taxed—the clash between tax professionals and the tax laity. There was unanimity of opinion on the part of tax professionals, for whom it was clear that the baseball was income when caught, but members of the general public, including members of Congress and the IRS Commissioner himself (who as a non-tax professional had not been privy to the inculcation of values that begins when a student takes her first tax course), considered such a result preposterous. As the casebooks and other student materials show, the study of tax begins with what is income, and that in turn begins with Haig–Simons and leads directly to section 61 and *Glenshaw Glass*.[173] Tax students are

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169. Zelenak & McMahon, *supra* note 5, at 1300.

170. ROSSOTTI, *supra* note 92, at 95; IR 98-56, *supra* note 163.

171. Herman, *supra* note 93, at D1.

172. ROSSOTTI, *supra* note 92, at 95.

173. *See supra* notes 5–6 and accompanying text; *see also* casebooks cited *supra* note 9.

taught that the definition of income is rooted in Haig–Simons and that tax should follow economics, in large part because doing so will effectuate the core values of equity and efficiency. The approach does not admit other, non-economic values, and that sets up an inevitable clash between the views of the professionals, who have absorbed this training, and the laity, which has not.

Practicing tax lawyers may not consciously experience the full force of the clash because their duty to represent their client's interest will usually cause them to want to find no income and they will attribute any IRS desire to find income to rapaciousness born of the duty to collect revenue. Law trains us to think in adversarial terms. But tax lawyers who work for the IRS, particularly those in its Office of Chief Counsel, have a more difficult task. Those tax lawyers would probably agree that equity and efficiency point toward taxing the value of the baseball (because it is an accession to wealth clearly realized within the taxpayer's dominion if she keeps it), and the Chief Counsel who covered his head with his hands and pleaded not be asked the question probably reflects that.[174] But as lawyers working for the IRS they understand the difficulty of administering such a conclusion, not only because of the difficulty of valuation but also because it necessarily implies taxing all caught baseballs, including those of relatively little value. Such a result, while equitable and efficient,[175] is unadministrable, not only because people would rebel but also because it would be impossible for the IRS to enforce it. Administrability encompasses non-economic values, which affect the IRS's ability to enforce the law, as well. Equity, efficiency, and administrability thus clash in this case as they do in those involving free samples, because the free sample of shampoo mailed to an individual's house is logically indistinguishable from the one included in the Oscar swag bag. A rule based on administrability could be an invitation to circumvention[176] and would lack the flexibility to address similar but unforeseen iterations of the same issue by weighing non-economic values that affect public perception and enforceability. In the case of income, a standard is therefore most apt.[177]

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174. *See supra* note 93 and accompanying text.

175. It is efficient because it doesn't privilege one type of accession over another and hence does not induce taxpayers to engage in a particular type of behavior over another.

176. Rules can invite behavior that might be regarded as circumvention because they create bright lines that allow taxpayers to choose whether to go to, but not over, the line, or to cross the line. *See, e.g.*, Granite Trust Co. v. United States, 238 F.2d 670 (1st Cir. 1956); Rev. Rul. 78-285, 1978-2 C.B. 287. This is not a new problem, and it is one that may be informed by the concept of aptness that we have tried to develop here, but further discussion of it is beyond the scope of this first attempt.

177. Treasury has used rules effectively when its overriding objective has been to promote administrability. Two prominent examples are implementing the

But if we cannot rely on a shared consensus regarding tax values to render the *Glenshaw Glass* standard apt, what is the substitute? The answer is *ad hoc* intervention by the IRS. The IRS has specified on a case-by-case basis what counts as an accession to wealth for purposes of income taxation, and it has generally done so in a manner that respects the values of equity and efficiency, along with the equally important value of administrability. The *Glenshaw Glass* standard will produce the right result in those cases where the values align, so salary will be income because treating it as such promotes both equity and efficiency and is highly administrable. But in cases where the values point in different directions, such as the case of the client who is taken to lunch by her lawyer, the IRS can weigh equity and efficiency, both of which would point to income, but allow administrability to outweigh them, leaving itself open to argue income when it senses abuse, either because the value of the lunch is excessive or because it suspects some non-business motivation on the part of the lawyer. Moreover, with a standard the IRS can take into account non-economic values that are not central to tax law but emerge as important in specific situations—like reverence for the game of baseball.[178]

The use of a standard, as exists in the administered definition of income, respects equity and efficiency. At the same time, the standard allows for the crucial value of administrability by giving the agency charged with administering the tax law, the IRS, the ability to weigh the relative values, including non-economic values, and make decisions that reflect current circumstances. The very cloudiness of the definition thus becomes its strength. It was Justice Benjamin Cardozo, writing for a unanimous Court trying to define "ordinary and necessary" in *Welch v. Helvering*,[179] who perhaps captured the wisdom of the structure: "The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."[180]

Supreme Court's decision in INDOPCO, Inc. v. Comm'r, 503 U.S. 79 (1991), by issuing regulations that contained numerous safe harbors and de minimis rules, Treas. Reg. § 1.263(a), and making entity classification elective in many cases through the promulgation of the check-the-box regulations, Treas. Reg. § 301.7701-3.

178. In his 1992 H.L.A. Hart lecture at Oxford University, Professor Tony Honoré offered a political justification for substituting the will of officials for social consensus in defining our legal obligations. Tony Honoré, *The Dependence of Morality on Law*, 13 OXFORD J. LEGAL STUD. 1 (1993).

179. Welch v. Helvering, 290 U.S. 111 (1933).

180. *Id.* at 115. The deep irony of our conclusion does not escape us. Not only do we know that the *Welch* opinion is not generally regarded with admiration by tax lawyers and scholars, but for decades at least one of us shared the deep derision in which it is held. *See, e.g.*, Joel S. Newman, *The Story of Welch: The Use (and Misuse) of the "Ordinary and Necessary" Test for Deducting Business*

What we propose, that the definition of income be acknowledged to be a standard that should be interpreted in light of the values—including noneconomic values—that animate the field of income taxation, may sound heretical or even incoherent to the contemporary scholarly ear, but it is not revolutionary when viewed in historical context. It has a long and distinguished pedigree that dates to the period shortly before the Court's decision in *Glenshaw Glass* and that was contained in scholarship that was cited by the Government to the Court in that case.[181]

Professors Surrey and Warren understood that even the *Macomber* formulation was "a generalization rather than a definition"[182] that failed to answer questions such as whether the "act of picking up found money [was] 'labor'"[183] which would be captured by the *Macomber* formulation of income as "gain derived from capital, from labor, or from both combined."[184] They acknowledged that the Haig–Simons definition was too broad to be administrable and concluded instead that

> the concept of income is a flexible one, with the result in a particular case being determined by the interplay of common usage, accounting concepts, administrative goals, and finally judicial reaction to these forces. Each force and judicial reaction in turn reflects an underlying judgment as to what types of receipts should be subject to a tax imposed on "income."[185]

They advocated "a simple reference to 'all gains, profits, and income,'"[186] because they "believed that this combination of wide

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Expenses, *in* TAX STORIES 197, 205 (2d ed. 2009) (characterizing what Justice Cardozo was doing as "whining"). Although we agree with Professor Newman that the opinion "long ago should have been consigned to the judicial scrap heap" for its extreme obfuscation of the capitalization doctrine, which should have served as the sole basis for deciding the case, *id.* at 223, we are constrained to conclude that despite the "archaic, verbose style," *id.* (*quoting* Brady Coleman, *Lord Denning & Justice Cardozo: The Judge as Poet-Philosopher*, 32 RUTGERS L.J. 485 (2001)), and the charge that Justice Cardozo "sometimes substitutes rhetorical flourish for analysis," William Powers, Jr., *Thaumatrope*, 77 TEX. L. REV. 1319 (1999) (quoted in Newman, *supra*, at 223), Justice Cardozo nevertheless captured the tension and the clash of values it has taken us an entire article to untangle. That deserves some credit.

181. *See supra* notes 36–46 and accompanying text.

182. Surrey & Warren, *supra* note 2, at 770.

183. *Id.*

184. Eisner v. Macomber, 252 U.S. 189, 207 (1920).

185. Surrey & Warren, *supra* note 2, at 771.

186. *Id.*

inclusiveness and elasticity" offered "reasonable certainty for almost all of the area and a workable standard for the application of judicial and administrative common sense in dealing with the infrequent but intriguing problems at the periphery."[187] After reviewing some of what were then novel questions, such as whether the recovery of damages for insider trading under section 16(b) of the Securities Exchange Act were income, they explained that

> [t]he question is thus whether it is more sensible to have these unforeseen borderline questions depend upon the construction of the phrase "gains, profits, and income" or upon a judicial dissection of various subsidiary items of income. It is likely that the former would produce a more satisfactory and coherent result, since the court's attention would be focused directly on the basic issue of the desirability of including these borderline items within a statute taxing "income."
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> . . .
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> In the income tax, as in other complex legislation, the need is for a standard which will project our present aims into the future and serve as the vehicle for solving the unforeseen cases as they arise. The legislative function is not denied or thwarted when other branches of the Government are relied upon by Congress to perform substantial tasks in the application of statutes. Administration and judicial interpretation are necessary parts of the overall process of legislation. The income tax is no exception.[188]

We couldn't agree more.

Because the Surrey and Warren article was cited in the Government's brief in *Glenshaw Glass* and because its discussion of the definition of income implicated precisely the issue facing the Court—expansion of the *Macomber* definition—and was prominent, having been placed at the very beginning of the piece, we believe that it is likely that the Court considered it, and took it to heart in the formulation it adopted in that case.[189] We think that history has proven Professors Surrey and Warren, and later Bittker, right. While a definition of income that is acknowledged to be a standard does not fit the desire for technical precision that seems to be the hallmark of so much tax legislation, it is not for that reason inapt.

187. *Id.* at 772.

188. *Id.* at 773–75.

189. *See supra* text accompanying notes 43–46.

Acknowledging that the *Glenshaw Glass* formulation is not a rule but a standard will not land the tax system in a quagmire but will instead, like Professor Bittker's rejection of the CTB as a goal of tax reform, allow a deliberate examination of whether a particular item ought to be included in the tax base.

IV. CONCLUSION

In law, as in baseball, there are rules and there are standards. The infield fly rule is a rule, but the strike zone is a standard. In law, apparently crystalline rules can turn into muddy standards as they are applied to situations in which competing values clash. The *Glenshaw Glass* definition of income may seem to provide a rule, but it is actually a standard, and the IRS is its umpire. Unlike the umpire, the IRS generally does not have the last word. However, the IRS does call the balls and strikes within the zone. In doing so it weighs numbers of factors and tries to reach the right result: a tax system that is equitable, efficient, and administrable. By exploring the IRS's role in defining income and by dissecting the factors that make it so difficult to articulate a clear, precise, and accurate definition of the income that is taxed, we have tried to illuminate the penumbral area where income becomes no-income. In that area, economics are important, but non-economic values also count. Economics is not everything.