COMPREHENSIVE INCOME TAXATION: A RESPONSE

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In an earlier article, Professor Bittker argued that the Haig-Simons economic definition of income would not be a useful basis for income tax reform because it yields no help in dealing with many of the most vexing problems, because its "no preference" approach would lead to sweeping changes which would be unacceptable even to its advocates, and because it gives no assistance in determining the merits of suggested "preferences" or "exceptions" to its sweeping inclusions. Professor Musgrave and Dr. Pechman in the November issue, and Dean Galvin in this issue, defended the concept as a useful basis for tax reform, rejecting Professor Bittker's ad hoc approach. This is Professor Bittker's answer to their challenges.

IN "A 'Comprehensive Tax Base' as a Goal of Income Tax Reform," published last year in this *Review*,¹ I examined the major substantive areas of income tax law to see what changes would be required if the overriding aim of tax reform were a "comprehensive tax base" (CTB) without "preferences," "exceptions," or "special provisions." My exploration was stimulated by the fact that the major organizing principle in most serious discussions of tax reform since World War II has been the CTB concept, whose exponents have been increasingly arguing that a ruthless suppression of all "preferences," no matter how seductive their appeals, is the only feasible road to a simplified and improved income tax structure. I summarized my conclusions as follows:²

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

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¹ 80 HARV. L. REV. 925 (1967) [hereinafter cited as Bittker].

² Bittker 934.

with the Haig-Simons definition as their elimination would be. Finally, those who continue, in defiance of all experience, to hope for a simplified tax structure in a complex society are doubly deluded, in my view, if they believe that a CTB will make a significant contribution to simplification. Most of our troublesome complexities concern issues that are either independent of the definitional criteria or unavoidable once we accept the departures that even the most committed believers in a CTB accept as desirable or necessary.

My views evoked responses by Professor Musgrave and Dr. Pechman in the November 1967 issue of this *Review*, and by Dean Galvin in the present issue.³ I should like to comment briefly on their responses, while simultaneously expressing the hope that interested readers will go back to the original article rather than confine themselves to this truncated summary.

Despite Musgrave's intimations, I do not reject the Haig-Simons definition as "an analytical tool." To the contrary, this is precisely the purpose to which I put the definition in exploring its implications throughout a wide range of specific issues. Having done so, I concluded that a systematically defined CTB would require many more drastic changes than have been acknowledged, and that many of these changes would be unpalatable to many professed advocates of the Haig-Simons definition. I cannot ascertain whether Musgrave disagrees with either (or both) of these conclusions, since he discloses his view on only a few of the items discussed in my article. He agrees that the Haig-Simons definition requires inclusion of noncash benefits from public services, gifts, bequests, unrealized appreciation, and imputed income from assets, accrual accounting for all income, and repeal of the separate corporate income tax; and he evidently would favor these changes to the extent "administratively feasible."⁴ By sedulously qualifying almost every conclusion with

³ Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44 (1967) [hereinafter cited as Musgrave]; Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63 (1967) [hereinafter cited as Pechman]; Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR*, 81 HARV. L. REV. 1016 (1968) [hereinafter cited as Galvin].

⁴ As to transfer payments, Musgrave says that "feasibility" suggests taxing only cash grants. Musgrave 55. He would evidently recognize unrealized appreciation (and depreciation?) on marketable securities, but doubts the feasibility of reaching other assets; he favors taxing imputed rent, but not imputed income from other assets; and I am not sure of his view on the feasibility of accrual accounting for all income.

For Musgrave's position on the corporate tax see note 17 *infra*.

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

Thus, the encouragement of "general capital formation and economic growth" is the purpose and justification for the investment credit, a tax provision that is "very different," we are told, from percentage depletion.⁵ Does the difference lie in the adjective "general" as applied to the investment credit's contribution to investment? Well, not exactly: it "may be desirable" to use tax concessions to encourage investment in "particular industries or types of assets." (One can hardly approve of the investment credit of existing law unless one is prepared to accept such distinctions, since it distinguishes among taxpayers and takes account of the type, life, location, physical character, industrial use, and other features of the property.⁶) But don't natural resources qualify as "particular industries"? Well, "even if there were a case for special aid, such aid is not granted effectively as a tax subsidy to gross income." Why not? Perhaps it is because percentage depletion confers benefits "which Congress would not be willing to give in explicit form" so that "faith in the democratic process suggests that the subsidy approach [that is, direct cash grants] is superior." But this objection (explicitly employed by Musgrave in his criticism of the deduction for charitable contributions⁷) seems equally applicable to the investment credit. Is it seriously contended that Congress would have

⁵ Musgrave 57-58.

⁶ INT. REV. CODE OF 1954, § 48. The investment credit as granted by recent treaties for American industry abroad also makes some nice distinctions, industry-by-industry and country-by-country. Thus, a credit is allowed for building a hotel in Israel but not for one in Thailand, for a gas and electric plant in Thailand but not for one in Brazil, and for a mineral smelting and refining facility in Brazil but not (to complete the circle) for one in Israel. Moreover, none of these installations would qualify for an investment credit if built in the United States, so far as their buildings and structural components (other than elevators and escalators) are concerned. Finally, no investment credit is to be allowed for investment in the Philippines, although its state of development is comparable to that of some of the countries that do qualify for the credit.

⁷ Musgrave 57.

been willing to appropriate 1.3 billion dollars in 1964 as direct cash grants to the 330,000 corporations⁸ making the investments specified by section 48 of the Code?

Another illustration: Musgrave favors deductions "for disaster expenses, be they medical costs, disaster losses, or what not" to allow for "situations where taxpayers with equal incomes and family size have strikingly different needs."⁹ Fidelity to the Haig-Simons definition would lead to the conclusion, it seems to me, that damage to one's personal automobile by collision, fire, or theft is a form of consumption, like depreciation through use; and that a taxpayer who prefers to assume these risks himself rather than procure insurance against them should not expect the tax system to bail him out if his choice backfires. Moreover, one might also expect the application to medical expenses and casualty losses of the other criteria that Musgrave offers for testing the propriety of tax allowances: (1) the irrationality (as he sees it, in discussing the deduction of charitable contributions) of an allowance whose value increases with the taxpayer's income; (2) the likelihood that Congress would have been willing to grant a direct subsidy; and (3) the availability of alternative devices (like insurance, public or private). Judged by these standards, a tax allowance for "disaster expenses" does not rate very high.

The same paradox — an insistence that the Haig-Simons definition will keep us from getting lost in a miasma of ad hoc judgments, coupled with departures from that definition for "reasons" that are no more than vague, and sometimes inconsistent, intuitions — appears in Musgrave's support for adjustments to take account of "differences in the ability to pay of taxable units of unequal size," his tolerant view of tax postponement, and his

⁸ Only about 25% of the 1.4 million active corporations claimed the credit. U.S. TREASURY DEP'T, PUB. NO. 159, STATISTICS OF INCOME — 1964 (CORPORATION INCOME TAX RETURNS, PRELIMINARY), Table C.

As originally proposed by the Treasury, the investment credit was geared to the taxpayer's depreciation deductions (15% of investment in excess of depreciation and 6% of investment between 50 and 100% of depreciation) in order to focus "on investment which would not have been undertaken without this inducement, and which will be most responsive to the stimulus which it provides." Statement by Secretary Douglas Dillon in *Hearings on the President's 1961 Tax Message Before the House Comm. on Ways and Means*, 87th Cong., 1st Sess. 26 (1961). Although the theory is superficially plausible, I am by no means sure that sensitivity to an incentive for *future* investment is closely related to the taxpayer's deductions for *past* investments. Whether the Treasury's 1961 theory was correct or not, however, the investment credit as enacted is not very efficient.

⁹ Musgrave 56.

comments on other specific points. Musgrave's submission, therefore, seems to me to support, rather than undermine, my earlier conclusion that¹⁰

[the reasons offered by CTB advocates] for departing from the Haig-Simons definition are, in my opinion, no different from the reasons that are offered in support of all of the "preferences" of existing law: the necessity or desirability of avoiding difficulties in valuation or enforcement, of stimulating economic growth, of encouraging behavior thought to be socially useful, of alleviating economic hardship, of retaining the freedom of choice that results from use of tax concessions rather than some other governmental mechanism, or of pursuing other social policies.

Pechman makes two major criticisms of my views, one concerning the scope of the Haig-Simons definition and the second concerning the criteria for departing from it.¹¹ His first point is:¹²

Since income is a flow of receipts per unit of time, the term income alone has two dimensions. A third dimension of the tax computation is the taxable unit, and a fourth the personal deductions. While there are problems in identifying the receipts to be included in income, the income concept is neutral regarding (1) the time interval over which income should be measured, (2) the proper unit of taxation, and (3) the personal deductions that might be allowed for income tax purposes. Most of Professor Bittker's discourse is concerned with these three dimensions, which are not supplied by any definition of income, comprehensive or otherwise.

¹⁰ Bittker 981.

¹¹ Pechman also takes exception to two comments in my preliminary remarks: he asserts that no one has used the NID concept of personal income as a "normative model" for a CTB, and that my reference to certain provisions of the Code as a way of putting the Haig-Simons definition into statutory language "can only be regarded as an attempt to confuse the issue." As to the NID's conceptual framework, I cited examples (Bittker 933 n.17) of what I described as "an incipient tendency" to use it "with some modifications" as a normative model. (One was a statement by Galvin, who does not repudiate my characterization in his response.) Perhaps Pechman and I can agree on this medieval formula: if there be any abroad in the land who favor the normative heresy, either in thought or in expression, let them be anathema. Turning to what Pechman describes as an "attempt to confuse the issue" by suggesting that §§ 61(a), 162, 166, 167 and 212 of the Code could be used to define a taxable base corresponding to the Haig-Simons definition, I am unrepentant. They could be so used.

¹² Pechman 65-66. Although the Haig-Simons definition may have more relevance to the issues mentioned by Pechman than he is prepared to concede, it does, in my opinion, shed less light on many issues than CTB advocates seem to claim. The dimmer its light, the less it will aid us in improving the tax structure.

In response, I submit that if I belabored the obvious, it was because the advocates of a CTB — Pechman included — have in the past argued that the “income concept” is *not* neutral as to these issues, and I doubt very much that Pechman’s latter-day revisionism will be generally accepted. As to personal deductions (medical expenses, casualty losses, interest, taxes, charitable contributions, nonbusiness bad debts, etc.), it has been a central tenet of CTB philosophy, stemming from Henry Simons himself, that no account should be taken, in defining income, of the way the taxpayer spends his resources. If evidence for this elementary point is required, one need go no farther afield than Pechman’s 1959 estimate of the yield of a comprehensive individual income tax “[i]f all the eroding features of the tax law had been eliminated.”¹³ Of 18 proposed changes, 6 concern the personal deductions, accounting for almost half of the estimated increase in the base and yield.

Turning to “the proper unit of taxation,” another “dimension” that Pechman says is not “supplied by any definition of income, comprehensive or otherwise,” there is a bit more room for debate. Pechman evidently agrees with me that the Haig-Simons definition tells us nothing about whether the individual, the married couple, the family, or the household should be the taxable unit. Musgrave is more cautious: he agrees that “the problem of formulating the taxable unit is not solved by the income concept,” but he intimates that there is some relationship between the two issues.¹⁴ As explained by Galvin, however, the Haig-Simons definition takes the individual as the proper taxable unit.¹⁵ The Canadian Royal Commission Report, on the other hand, argues that income should be computed on a “family unit” basis.¹⁶ When the advocates of a CTB exhibit this much diversity about the relationship between the Haig-Simons definition and the proper taxable unit, I am puzzled by Pechman’s allegation that I have misunderstood “what the Haig-Simons definition of income does and does not imply.”

¹³ Pechman, *What Would a Comprehensive Individual Income Tax Yield?*, in 1 HOUSE COMM. ON WAYS AND MEANS, 86TH CONG., 1ST SESS., TAX REVISION COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE 251, 279 (Comm. Print 1959).

¹⁴ Musgrave 60-61.

¹⁵ Galvin 1017. If the proper tax unit is the individual, taken in isolation, the Haig-Simons definition would include the value of support furnished to the taxpayer by parents, spouse, etc. See Bittker 946-47.

¹⁶ 3 REPORT OF THE ROYAL COMM’N ON TAXATION (Canada) 117-49 (1966).

Moreover, my discussion of "taxable unit" was not confined to family relationships, but included comments on the proper treatment of partnerships, corporations, and trusts. Pechman may believe that the Haig-Simons definition is "neutral" as to this "dimension" of income, but I think that most CTB advocates would agree with Musgrave and the Canadian Royal Commission that the definition requires these legal entities to be treated as intermediaries, and their income to be imputed currently to their shareholders, partners, or beneficiaries.¹⁷

As to timing, another "dimension" that Pechman says I have belabored needlessly because the Haig-Simons definition is neutral on the point, I described at length in the original article the ambivalent response of CTB advocates to problems in this area. For example: they often derive from the Haig-Simons definition the conclusion that an employer's contribution to pension and profit-sharing plans should be taxed currently to the employee rather than when the cash benefits are received, but simultaneously favor taxing social security benefits on receipt rather than when the benefits accrue. Assuming for the moment that cash basis accounting can be reconciled with what Musgrave properly calls "the accretion concept," shifting back and forth between accruals and cash receipts as the measure of income seems to require some justification.

Like Musgrave, Pechman evidently thinks that proponents of the CTB approach can depart from the Haig-Simons definition without bogging down in the quagmire of ad hoc judgments that they see as the outcome of my skepticism. They can attain this happy state of objectivity because¹⁸

¹⁷ 4 *id.* at 3-44; Musgrave 61. I argued (Bittker 978) that the CTB approach would require unrealized appreciation or depreciation in the value of stock to be reported currently or, if this is rejected as not feasible, it would suggest that retained earnings should be imputed to the shareholder. Musgrave favors doing *both*, a proposal I do not understand. If retained earnings are reflected in an increase in the value of the stock, they would be taken into account as part of the shareholder's net accretion for the taxable year; if, on the other hand, the retained earnings are for some reason not reflected in an increase in the value of the stock, how can an imputation of the earnings to the shareholders be squared with a net accretion concept of income? Of course, by treating Musgrave's double-barreled proposal as circular, one can reconcile it with the accretion concept. Thus, assume that A buys stock on Jan. 1 for \$100, the corporation earns and retains \$30, and the stock is worth \$125 on Dec. 31. A is taxed on \$30 of retained earnings, but is allowed to deduct \$5 of unrealized depreciation (*i.e.*, adjusted basis of \$130 less Dec. 31 value of \$125). Net result: \$25 of income. The same result would be reached more directly, however, by merely taking account of the appreciation in value, and not bothering to impute the retained earnings.

¹⁸ Pechman 66.

departures from comprehensiveness are permitted by the proponents [of the CTB, who] . . . have even stipulated the conditions under which departures would be tolerated. These conditions are, first, that the departure must promote a major national objective and that the tax mechanism is the most efficient method of achieving it; or, second, it is impractical to tax the particular item.

Could the investment credit — which makes no effort to separate taxpayers who will invest only if they get an incentive from those who will invest anyway¹⁹ — meet these conditions? One can certainly say of the investment credit that it proved to be a politically successful method of achieving its result, and some may well believe that the “waste” is outweighed by the gain. If it is “the most efficient method” of expanding private investment, however, “efficiency” is a sufficiently expansive criterion to embrace percentage depletion, the exemption of municipal bond interest, the deduction of intangible drilling and development expenses, the charitable contribution deduction, and many other provisions of existing law that are distasteful to CTB advocates. If, on the other hand, Pechman’s conditions are intended as strict guardians of the commonweal, they spell the doom of accelerated depreciation, the 1962 shorter-than-real-life depreciation guidelines, the write-off or rapid amortization of research and experimental costs, tax-free exchanges, and many other provisions.

It would clarify the debate immeasurably if Pechman had applied his conditions to the numerous issues discussed in my article so that the interested spectator could judge for himself just how strictly we are asked to apply the criteria of “major national objectives” and “most efficient method of achieving them.” Does Pechman believe that the scores of provisions omitted from his 1959 list of “all the eroding features” of the tax structure²⁰ either (a) are the “most efficient method” of achieving a “major national objective,” or (b) are required in the interest of administrative practicality?

Finally, Pechman finds in the report of the Canadian Royal Commission on Taxation a rebuttal to my criticisms of the CTB movement. I would argue, to the contrary, that this massive effort to apply the CTB principle throughout an income tax structure supports my conclusion that “a systematic and rigorous application of the ‘no preference’ or CTB approach would require many more sweeping changes in the existing tax structure than

¹⁹ See note 8 *supra*.

²⁰ See Pechman, *supra* note 13, at 279.

have been acknowledged." Among the numerous changes that are thought by the Canadian Report to follow from the Haig-Simons definition are: integration of the corporate tax into the individual tax, aggregation of family income, taxation of capital gains at regular rates, and the inclusion in income of gifts, bequests, mortality gains on life insurance, patronage refunds, mutual insurance dividends, and recoveries in personal injury cases. Some of these proposals are either omitted or barely hinted at by the extensive CTB literature, and capital gain reform is the only one included in Pechman's estimate of a comprehensive tax base's potential yield.²¹

As to lawyers, the group I know best, I think that the Canadian Report also bears out another conclusion I expressed in the article, that is, that "many of these changes [to achieve a CTB] would be quite unacceptable, despite their conformity to the Haig-Simons definition, to many of those who are attracted, in the abstract, by the idea of a CTB." Although this is not the place for even a cursory examination of the Canadian report, it should be noted that its strides toward a CTB (which are unquestionably bold) are partly countered by several major anti-CTB recommendations (for example, liberal write-offs of business costs, including some capital outlays; the device of the income adjustment account; concessions for college tuition; lenient acceptance of business accounting practices; tax postponement through retirement income plans; and the election to take account of unrealized appreciation or depreciation on certain assets).²²

In his comments in this issue of the *Review*, Galvin argues that my "suggestion of ad hoc settlements will get us nowhere" and that "[w]e have had a surfeit of patchwork and piecemeal efforts; a normative concept must be sought" I certainly sympathize with Galvin's exasperation, and I hope that his search

²¹ *Id.* Pechman's list includes full taxation of capital gains; as to life insurance, he includes the interest component of insurance savings, but not mortality gains. For the difference see Bittker 943-44.

Integration of the corporate tax would be extremely costly; but this is another way of saying that it ought to be at the top of the reform list because it departs so dramatically from the CTB ideal.

It may be, of course, that some CTB advocates believe that these items are the most efficient methods of achieving major national objectives and hence meet Pechman's conditions for a departure from a CTB.

²² See Bittker, *The Comprehensive Income Tax Base and the Report of the Royal Commission on Taxation* (Address delivered to the Annual Conference of the Canadian Tax Foundation, Montreal, Nov. 27-29, 1967).

for an encompassing verity does not lead him into that "dank, miasmic, myxomycetous sump" that Musgrave, Pechman, and he would probably like to call "Bittker's Quagmire." If Galvin plans to avoid it by following the CTB route wherever it may lead, however, I think he will have to confront the troublesome issues discussed in my article; and if he consistently prescribes the remedies that the Haig-Simons definition requires, I doubt if it will be possible to muster a corporal's guard in the ABA Tax Section to parade at the unveiling of the proposals. Perhaps, on the other hand, the proposed new tax structure will allow a roll-over of investments, an immediate write-off of the cost of business plant and equipment, and other departures from the Haig-Simons definition for such reasons as "the necessity or desirability of avoiding difficulties in valuation or enforcement, of stimulating economic growth, of encouraging behavior thought to be socially useful, of alleviating economic hardship, of retaining the freedom of choice that results from use of tax concessions rather than some other governmental mechanism, or of pursuing other social policies."²³ If Galvin takes this route, he will, I think, soon find himself — as though drawn by an *ignis fatuus* — in the swamp he hopes to avoid. In short, if we want a program for tax reform, rather than a classroom construct, I can see no escape from "an examination of each [issue] on its merits in a discouragingly inconclusive process that can derive no significant assistance from a 'no preference' presumption that would at best be applied only on a wholly selective basis."²⁴

Galvin has high hopes for the computer-aided ABA study described in his article, which (if it gets the financing that will be necessary) unquestionably could make an important contribution to our knowledge of this area. If the study confines itself to the raw data that are most readily available, however, it will produce disappointingly limited results — which are likely to be "tilted," as Galvin points out, against employees and other persons whose income is derived from the performance of services.²⁵

²³ Bittker 981.

²⁴ Bittker 982.

²⁵ Galvin 1026. Though the "tilt" hardly needs documentation, mention might be made of Gurley's recent estimate that capital gains during the period 1955-1965 amounted to \$60 billion annually, of which only \$10 billion was realized and reported. Gurley, *Federal Tax Policy*, 20 NAT'L TAX J. 319, 320 (1967). See also Slawson, *Taxing as Ordinary Income the Appreciation of Publicly Held Stock*, 76 YALE L.J. 623, 631-32 (1967), estimating that inclusion of appreciation on publicly held stock as ordinary income would have increased the individual income tax yield in 1965 by at least \$15 to \$26 billion (from \$49 billion). If

One hopes, therefore, that the initial output of this pilot project will be distinctly labeled as experimental, and that it will be followed by an effort to correct the "tilt" by seeing what kind of a tax burden would result from a more systematic pursuit of the CTB ideal. If the difficult items (annual increases in net worth, gifts and bequests, imputed income from personal assets, accrual accounting, depreciation tied to losses in market value, etc.) are taken into account at the best estimates available, we will for the first time have an econometric model based on the Haig-Simons definition. It will then be possible to measure the effects (horizontally and vertically) of specific departures from that definition.

I suggested in my original article that we might discover, once we had such a macroeconomic model, that a system of countervailing "preferences" might produce a distribution of the tax burden conforming more closely to the professed ideal of the CTB advocates than an indiscriminating elimination of those "pref-

these estimates are even roughly correct, the "tilt" might be characterized more accurately as abject obeisance; and with the tax structure in this posture, I would not rank the exclusion of unemployment compensation, strike benefits, employee death benefits, or social security payments very high on the list of "preferences" to be eliminated in order to achieve what will in any event be a noncomprehensive CTB.

Constructive realization at death—which may be many years after a gain has accrued—would make only an insignificant contribution toward correcting the bias just described. *See* Bittker 970-71. Musgrave concedes this shortcoming in constructive realization and would remedy it by "applying an interest charge when the tax becomes due." Musgrave 60. If stock purchased by the taxpayer for \$10,000 in 1950 is worth \$100,000 on his death in 1970, I do not know whether Musgrave would compute the proposed interest charge (1) by calculating each intervening year's unrealized gain (or loss) and carrying forward an annual interest charge (or credit) on each year's hypothetical tax, to be applied against the tax on the \$90,000 of gain constructively realized at death; (2) by assuming that the \$90,000 of gain accrued in equal annual installments over the taxpayer's holding period (or that it accrued all at once at the mid-point), and adding to the tax in the year of death an interest charge related to this hypothetical postponement; or (3) by employing some other assumptions. The first method presupposes an ability to compute the annual unrealized appreciation or depreciation on the asset in question—although it has been a tenet of the CTB movement that this is so impractical that taxpayers cannot be put on an annual accrual method. The second method, however, would not really be a fee for postponement: the entire \$90,000 of gain might have arisen in the year of the taxpayer's death. Both methods, it should be noted, may result in a tax burden exceeding the gain, or even the value of the asset, at the time the tax is imposed. One suspects that it will be some time before Musgrave's improvement on constructive realization is enacted; that may be the proper time to correct the erosion of the tax base caused by the exclusion of unemployment compensation and strike benefits.

erences" that happen to be vulnerable at a particular time.²⁶ Although I cannot prove that this judgment is correct, it seems to me more plausible than the contrary assumption that the elimination of *any* preference, even if it is enjoyed only by a generally disfavored group, will be an improvement. In any event, I should think that all would welcome a test of these competing hypotheses.

²⁶ Bittker 983-84.