STANLEY SURREY AND TAXING UNREALIZED APPRECIATION

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I

INTRODUCTION

In a review of the recently published memoirs of Stanley S. Surrey[1] and the accompanying introductory essay by Ajay Mehrotra and myself,[2] Michael Simkovic criticizes Surrey for not having advocated the taxation of unrealized appreciation, or at least the inclusion of the nontaxation of unrealized appreciation in the tax expenditure budget. He also criticizes us for not having discussed Surrey's view on unrealized appreciation in our essay.[3] Simkovic asks: "What were Surrey's views on this issue? What role did Surrey play in the continuation of the realization requirement in tax law?"[4] These are excellent questions, which I attempt to answer here.

II

INCLUSION IN THE TAX EXPENDITURE BUDGET, AND SUBSTANTIVE REFORM

The 1972 edition of Surrey's coauthored casebook, *Federal Income Taxation,* included fourteen pages on "The Policy Aspects of Taxing Accrued Gains."[5] In an introductory paragraph, Surrey and his coauthors explained that "[t]he decision in the United States tax system not to include accrued gains in income on an annual basis is a policy decision which has a substantial revenue effect. Billions of dollars of annual gains go untaxed on a current basis because of the realization requirement in United States tax law."[6] The remainder of the fourteen

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1. *See generally* STANLEY S. SURREY, A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY (Lawrence A. Zelenak & Ajay K. Mehrotra eds., 2022).

2. LAWRENCE ZELENAK & AJAY K. MEHROTRA, *Editors' Introduction* to STANLEY S. SURREY, A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY xi–li (Lawrence A. Zelenak & Ajay K. Mehrotra eds., 2022).

3. Michael Simkovic, *Did New Deal Liberalism Steer too Far to the Right?*, 174 TAX NOTES FED. 681 (2022).

4. *Id.* at 682.

5. 1 STANLEY S. SURREY, WILLIAM C. WARREN, PAUL R. MCDANIEL & HUGH J. AULT, FEDERAL INCOME TAXATION: CASES AND MATERIALS 923–36 (1972).

6. *Id.* at 923.

pages featured excerpts "indicat[ing] the manner in which economists, business advisors, and accountants deal with the treatment of unrealized gain."[7]

A year later, in his 1973 monograph on the tax expenditure concept, *Pathways to Tax Reform*, Surrey offered a paragraph explaining his view that the exemption of unrealized appreciation should not be included in the tax expenditure budget. Despite its length, it is worth setting forth here in its entirety:

> The development of the boundaries of an income tax structure will at many points be an evolutionary matter, as we gain insight and experience. In this evolution we usually pass through several stages. The first stage is where most people would simply not accept a proposed change, suggested on the basis of the economists' concept or definition above stated [the classic Haig-Simons definition[8]], in the existing treatment of an item as being necessary to the determination of a proper income tax base. In other words, the application of the economists' concept is still too novel an approach in the particular area. The second stage is where the economists' approach is accepted and the existing treatment comes to be regarded as at variance with that approach so that a change is proper in terms of the income tax base, but the existing treatment is then defended for the economic or social advantages it is said to provide. Or the other way around, at this stage the existing treatment is defended to prevent the disadvantages that a change in the status of the item, now admittedly a tax preference, is said to entail. When this second stage is reached we certainly have a 'tax expenditure.' The exemption from the income tax of unrealized appreciation on assets transferred at death may be an illustration of this process, for I believe that for this item we are now at the second stage. But current taxation of unrealized appreciation as it accrues during lifetime is probably still somewhere between the first and second stage, probably closer to the first stage. We could, if we used the economists' definitions fully, always have a tax expenditure at the first stage. But too rigid an adherence to those definitions is likely, as the Treasury material [on tax expenditures] states, to 'becloud the utility of this special analysis of tax expenditures.'[9]

In *Tax Expenditures*, Surrey's second book on the topic, coauthored with Paul R. McDaniel and published in 1985 (the year after Surrey's death), he and McDaniel expanded on Surrey's earlier discussion and suggested it might be time to reevaluate the omission of the nontaxation of unrealized appreciation from the tax expenditure budget. Again, the discussion merits quoting at length:

> The U.S. tax expenditure list has also been criticized because it does not treat as a tax expenditure the exclusion from income of annual unrealized appreciation from assets. Under the [Schanz-Haig-Simons] definition, annual gains in property constitute income, whether those gains are realized or not. The decision not to include the nontaxation of unrealized gains in the U.S. tax expenditure list was based on two factors. First, the concept of realization has played a large part in the legal definition of income since the inception of the U.S. income tax. Second, it is likely that most legislators and members of the general public do not view gains from property as income until some step has been taken to realize on that gain, such as by a sale or by an exchange of the property. To these factors may also be added the administration difficulties involved in imposing

7. *Id.*

8. Under the Haig-Simons definition of economic income, a person's income for a period of time is "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in value of the store of property rights between the beginning and end of the period in question." HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938).

9. STANLEY S. SURREY, PATHWAYS TO TAX REFORM 18–19 (1973) (footnotes omitted).

> a tax on annual accrued gains, especially in the case of property such as real estate and closely held businesses.
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> But as the public and legislators become more knowledgeable about the effects of the policy decision to defer taxation on gains until realized, the initial Treasury decision to exclude this item from the tax expenditure budget should be reexamined. The nontaxation of accrued gains in effect constitutes an interest-free loan to the holder of appreciating property, and this fact is becoming more widely recognized, both in and out of Congress. This issue involves no real conceptual dispute between preparers of the U.S. tax expenditure list and those who have criticized the noninclusion of unrealized gains in the list. *The appropriate response to the growing public awareness of the role played by the realization rule would be to include in future tax expenditure lists, as an informational item, the revenue cost of the nontaxation of annual accrued gains*.[10]

This strongly suggests that, were it not for his untimely death in 1984, in the mid-1980s Surrey would have campaigned for the inclusion of the nontaxation of unrealized appreciation in the official list of tax expenditures. It even more strongly suggests that, were Surrey miraculously alive in 2023, he would vigorously support not only the suggested revision of the tax expenditure budget, but also something along the lines of the mark-to-market income taxation of billionaires proposed by Senate Finance Committee Chair Ron Wyden,[11] or the proposal of President Biden's Treasury Department for mark-to-market taxation of billionaires under a new minimum tax.[12] To be sure, one can support inclusion of a tax preference in the tax expenditure budget without also supporting legislation to eliminate the preference, but in many cases Surrey envisioned the identification of a tax expenditure as the first step toward its repeal. He urged that each identified tax expenditure be examined to determine whether it could "simply be dropped without substituting another form of Government financial assistance, because on review it is seen that Government policies and priorities do not require the expenditure of federal funds for the purposes involved."[13] Given the implausibility that Surrey would have considered advisable a federal subsidy—tax or nontax—for ownership of appreciating assets,[14] he almost certainly would have favored mark-to-market taxation of billionaires were he confident that public and legislative opinion had evolved to his second stage.

If public opinion was well on the way to stage two, even in the mid-1980s, by now it has arrived at the destination. Although the nation may not have reached

10. STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 198–99 (1985) (footnote omitted) (emphasis added).

11. Press Release, U.S. Senate Comm. on Fin., Wyden Unveils Billionaires Income Tax (Oct. 27, 2021), https://www.finance.senate.gov/chairmans-news/wyden-unveils-billionaires-income-tax [https://perma.cc/QD5C-U65X] (including links to the proposed legislative text and a section-by-section summary of the bill).

12. DEP'T OF THE TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION'S FISCAL YEAR 2023 REVENUE PROPOSALS 34–37 (Mar. 2022), https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf [https://perma.cc/BVB7-NVZW].

13. Surrey, *supra* note 9, at 180.

14. *But see generally* David M. Schizer, *Realization as Subsidy*, 73 N.Y.U. L. REV. 1549 (1998) (arguing the deferral of tax on unrealized gains should be understood as a subsidy for savings).

the second stage with respect to all unrealized appreciation of all taxpayers, it certainly seems to have reached it with respect to publicly-traded stock owned by billionaires. Two recent public opinion surveys—to be sure, conducted by organizations in favor of mark-to-market taxation of billionaires—have found widespread support for the mark-to-market taxation of billionaires.[15] In October 2021, Americans for Tax Fairness reported the results of a poll of thirty-seven swing congressional districts with elections decided by five percentage points or less in 2020. When the poll described the Build Back Better bill as including an annual tax on billionaires' untaxed investment gains above $1 billion, at the same rate as wages and salaries, support for the bill rose from net +14% (56% in favor, 42% opposed) to net +43% (69% in favor, 26% opposed).[16] If the limited geographical scope of the survey and its somewhat fuzzy description of the billionaires tax left something to be desired, an impressively sophisticated opinion survey reported by Data for Progress in November 2021 featured a similar bottom line.[17] The Data for Progress survey described the Wyden proposal accurately and in some detail to respondents.[18] It found support of net +39% (64% in favor, 25% opposed) for the billionaires tax among all likely voters, and narrow support of net +4% (47% in favor, 43% opposed) even among Republican likely voters.[19] Data for Progress also took the important—but unusual—additional step of presenting initial supporters of the tax with the major arguments against it, and initial opponents with the major arguments in favor, and then repolling. Support for the tax remained strong among all likely voters

15. *But see* Zachary Liscow & Edward Fox, *The Psychology of Taxing Capital Income: Evidence from a Survey Experiment on the Realization Rule*, 213 J. PUB. ECON., Sept. 2022, at 6 (scholarly study finding that respondents favored taxation of gains only at sale over mark-to-market taxation of gains by 75% to 25%, on the assumption that the same realization rules would apply to taxpayers at all income and wealth levels). Unfortunately, Liscow and Fox did not ask respondents about mark-to-market taxation limited to taxpayers with a net worth of at least $1 billion (Wyden proposal) or of at least $100 million (Biden Treasury proposal). The only wealth-limited proposal in their study would have applied to all taxpayers with net worths above a mere $10 million. *Id.* at 11. Under that limitation, support for mark-to-market taxation increased from 25% to 34%. This suggests that Liscow and Fox might well have found majority support for mark-to-market taxation of billionaires, had they included such a question in their study.

16. AMS. FOR TAX FAIRNESS, SUPERMAJORITY AND BIPARTISAN SUPPORT FOR THE BILLIONAIRES INCOME TAX 3–4 (Oct. 2021), https://americansfortaxfairness.org/wp-content/uploads/ATF-Polling-Compilation-on-Billionaires-Income-Tax-Oct-2021-1.pdf [https://perma.cc/D3F7-9SAQ].

17. Jason Katz-Brown, *Taxing Billionaires is Enormously Popular*, DATA FOR PROGRESS (Nov. 23, 2021), https://www.dataforprogress.org/blog/2021/11/23/taxing-billionaires-is-enormously-popular [https://perma.cc/VU2H-GS2J].

18. "Some lawmakers in Congress are proposing that people with $1 billion in assets, or people who have made $100 million or more in income for three consecutive years, pay capital-gains taxes on their investments every year, even if those assets are not sold. This would affect only 700 American taxpayers." *Id.* at 4.

19. *Id.* Support from Democrats was net +72% (81%, 9%), and support from Independents was net +35% (61%, 26%).

at net +37% (61% in favor, 24% opposed), and actually increased among Republicans to net +15% (51% in favor, 36% opposed).[20]

As for opinions among members of Congress, it is true that the billionaires tax was not included in the House-passed version of Build Back Better, and that Speaker Nancy Pelosi reportedly described the tax as a publicity stunt.[21] Nevertheless, it seems quite possible that Congress would have enacted some version of mark-to-market taxation of billionaires in late 2021 but for the opposition of a single member of Congress, Senator Joe Manchin (D-WV), who criticized Wyden's proposal as "divisive."[22]

Decades ago, Surrey presciently anticipated this sort of evolution in the views of the public and of members of Congress toward the taxation of unrealized appreciation. Presented with today's attitudes, he surely would have supported inclusion of nontaxation of unrealized appreciation in the tax expenditure budget, and very likely would have supported the Wyden and Treasury billionaires tax proposals as well. As Surrey noted in the above-quoted excerpt from *Pathways*, he *could* have pushed in 1973 for inclusion of the nontaxation of unrealized appreciation in the tax expenditure budget. But if he was right—as I suspect he was—that public and legislative opinion on the topic was then still mired in stage one, it is hard to see what that would have accomplished. And although Surrey sometimes took on battles he did not win—as discussed below, with respect to the tax-free step-up in basis at death—he was never interested in fighting battles he *knew* he could not win. It is probably ahistorical to think Surrey should have done anything more than he did with respect to the realization-based character of the income tax.[23]

In addition to the evolution of public and legislative opinion on unrealized gains as income over the decades, there has also been a change in the urgency of taxing unrealized appreciation as a matter of distributional justice. As *ProPublica* dramatically revealed in 2021, in recent years the richest billionaires' unrealized gains in publicly-traded stock has constituted the vast majority of their economic income, dwarfing their taxable income from compensation for services, dividends, and realized capital gains.[24] Many of today's ultrarich receive little or

20. *Id.* at 5. After messaging and repolling, support from Democrats was net +67% (76%, 9%), and support from Independents was net +28% (55%, 27%).

21. Jeff Stein, *Democrats' Lofty Tax Agenda Imperiled by Resistance from Within*, WASH. POST (Nov. 11, 2021), https://www.washingtonpost.com/us-policy/2021/11/11/billionaire-tax-democrats-wyden/ [https://perma.cc/C4ML-CJCQ].

22. Jonathan Weisman, *Manchin Denounces the Democrats' Plan to Tax Billionaires as Divisive*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/10/27/us/politics/manchin-billionaires-tax.html [https://perma.cc/UZ2V-JAUL].

23. *See* Joseph J. Thorndike, *Soaking the Forgotten Man: Why New Dealers Taxed the Middle Class*, 175 TAX NOTES FED. 1172, 1173 (2022) ("Regarding the realization requirement, I suspect that Surrey was reading the tea leaves correctly. I have never seen any historical evidence to suggest that there was a snowball's chance in Miami of eliminating it, or even limiting its scope. At least not in Surrey's day.").

24. Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021),

nothing as compensation for services, and own highly appreciated stock in corporations that seldom or never pay dividends.[25]

In a recent article providing some historical perspective on the *ProPublica* revelations, I described the publication of the income tax liabilities of the richest Americans for two years during the mid-1920s, and the fact that those earlier revelations, unlike *ProPublica*'s, did not inspire calls for mark-to-market income taxation of the stockholdings of the ultrarich.[26] As that article explains, in the 1920s the ultrarich generally had taxable income which may have been much less than their economic income, but the two at least had some meaningful correlation. The most profitable corporations paid substantial dividends, taxable as ordinary income, and paid substantial salaries to their executives who were also major stockholders.[27] In short, persons at the top of the economic income distribution in the 1920s also tended to be at the top of the taxable income and tax liability distributions. Under those conditions, application of high rates of tax to taxable income could serve as a proxy—highly imperfect, but perhaps not unacceptably so—for the application of lower rates to a tax base which included unrealized appreciation.

As *ProPublica* demonstrated in 2021, that is no longer true.[28] Because realization-based taxation was not nearly as distributionally unsatisfactory in the 1920s as it is today, the tax liability disclosures of the 1920s did not make mark-to-market taxation of billionaires the urgent issue it is for many today. I have not attempted a similar analysis for the 1970s and early 1980s—the years during which Surrey expounded his views on tax expenditures—but at first glance, those years bear more resemblance to the 1920s than to today.[29] For investors in publicly traded stock, historical annual dividend yields—the percentage of a stock's value received each year as taxable dividends—provide insight into whether taxation of dividends might have served as an acceptable proxy for taxation of unrealized gains during different periods. For 1920 through 1929, the

https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax [https://perma.cc/3FNE-SFLX].

25. *Id.*

26. Lawrence Zelenak, *1924, 2021: Taxes of the Ultrarich, and Mark-to-Market Reforms*, 172 TAX NOTES 583 (2021).

27. *Id.* at 587–89 (contrasting dividend policies then and now).

28. *See also* Jenny Bourne et al., *More than They Realize: The Income of the Wealthy*, 71 NAT'L TAX J. 335, 336 (2018) (in a study linking estate tax returns filed in 2007 with income tax returns from 2002 through 2006, the authors found that realized returns to capital for most wealthy individuals were less than 2%, far lower than long-run stock market real returns of 7% to 8%).

29. In this connection, the following statement included in Surrey's 1972 casebook is instructive: "Many corporations, therefore, have adopted the practice of retaining 50% or more of their annual earnings. In some extreme cases they pay out nothing [as dividends]." SURREY, WARREN, MCDANIEL & AULT, *supra* note 5, at 934 (excerpting WILLIAM LUCIUS CARY & CRAIG B. BRIGHT, THE LAW AND LORE OF ENDOWMENT FUNDS (1969)). Zero dividend payouts by highly profitable corporations are, of course, no longer extreme cases.

average annual dividend yield on the S&P 500 was 5.37%.[30] For the eleven years most relevant to Surrey's efforts—from 1973 to 1983 (the year of publication of *Pathways to Tax Reform* and the last full year of Surrey's life, respectively)—the average annual dividend yield was only a bit lower at 4.70%.[31] In sharp contrast, for 2012 through 2021 the average annual dividend yield was only 1.88%.[32] When the effect of decreased dividend yields is combined with the change from taxing dividends at ordinary income rates to taxation at long-term capital gains rates,[33] dividend taxation today is a much less satisfactory proxy for taxing unrealized stock appreciation than it was in Surrey's time.

In addition to the taxation of dividends serving as a proxy for taxing unrealized gains—more or less adequately so in different eras—the corporate income tax itself can be viewed as playing a similar role. Although the economic incidence of the corporate income tax is a fiercely debated question, a typical expert estimate is that 60% of the burden of the corporate income tax falls on shareholders, 20% on owners of capital generally, and 20% on labor.[34] Thus, to the extent the ultrarich own stock in corporations paying the corporate income tax, much of the tax paid by the corporations can plausibly be viewed as falling on those wealthy shareholders. Emmanuel Saez and Gabriel Zucman have forcefully advocated this view: "In effect, the corporate tax serves as a minimum tax on the affluent. . . . [I]t's through the corporate income tax—more than through the individual income tax—that the very rich contributed to the public coffers in the middle of the twentieth century."[35] The problem today, however, as Saez and Zucman explain in detail, is that corporate income tax revenue as a percentage of national income has decreased dramatically, from hovering around 2.5% throughout the 1970s, to 1.0%, 1.1%, 1.0%, and 1.7% for 2018 through 2021, respectively.[36] The decrease is explained partly by the decline of the top corporate tax rate from 48% through most of the 1970s to 21% today,[37] and partly

30. Author's calculations based on table at S&P 500 DIVIDEND YIELD BY YEAR, multpl.com/s-p-500-dividend-yield/table/by-year (last accessed Jan. 27, 2023).

31. *Id.*

32. *Id.*

33. *See* I.R.C. § 1(h)(11) (2022) (taxing most dividends at the same low rates applicable to long-term capital gains).

34. *See Brief Description of the Tax Model*, TAX POL'Y CTR., https://www.taxpolicycenter.org/resources/brief-description-tax-model [https://perma.cc/3FNE-SFLX] (updated Mar. 9, 2022) (setting forth the 60–20–20 estimate, and noting that the Congressional Budget Office, the Treasury Department, and the Joint Committee on Taxation have all adopted similar estimates for their purposes).

35. EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY 42–43 (2019).

36. *Id.* at 70 tbl.4; *Historical Tables on Federal Government Finances*, THE WHITE HOUSE, https://www.whitehouse.gov/omb/budget/historical-tables/ [https://perma.cc/SKQ8-8F4D] (last visited January 30, 2022) (Table 2.3—Receipts by Source as Federal Percentages of GDP: 1934–2027).

37. *Historical Corporate Top Tax Rate and Bracket, Tax Years 1909–2022*, TAX POL'Y CTR. (Feb. 14, 2022), https://www.taxpolicycenter.org/statistics/corporate-top-tax-rate-and-bracket [https://perma.cc/48G6-AFPN].

by the increasing ability of U.S. multinational corporations to shift income to low-tax foreign countries in an increasingly globalized economy.

In short, mark-to-market taxation of the stockholdings of the ultrarich was not so urgent an issue in Surrey's time as it is today. In Surrey's era, dividend taxation and the corporate income tax combined to impose significant burdens on the ultrawealthy, and served as plausible proxies for mark-to-market taxation. One suspects that a twenty-first-century Stanley Surrey, faced with the withering of both dividend taxation and the corporate income tax, would be in the forefront of the movement for mark-to-market taxation of billionaires.

III

SURREY AND THE CONSTITUTIONAL ISSUE

Proponents of mark-to-market income taxation must overcome two hurdles. In addition to persuading Congress to enact a mark-to-market tax regime, they must convince the Supreme Court that the resulting tax is constitutional. To pass constitutional muster, it must be either (1) a tax on income within the meaning of the Sixteenth Amendment, so that the apportionment requirement imposed on federal direct taxes by the original Constitution does not apply;[38] or (2) an indirect tax, so that the apportionment requirement would not apply even in the absence of the Sixteenth Amendment. As is well known to every student of the federal income tax, the first route to constitutionality is blocked by the Supreme Court's 1920 decision in *Eisner v. Macomber,*[39] in which the Court declared that unrealized appreciation is not income for purpose of the Sixteenth Amendment.[40] Of course, that route is blocked only if *Macomber* is still good constitutional law. Although the Supreme Court has never formally abandoned *Macomber*, it has never again—in over a century—struck down an income tax provision on the authority of the case. And more than once it has described the realization requirement as based on "administrative convenience"—seemingly quite a demotion from a constitutional requirement.[41] Moreover, at least once the Court has passed up an opportunity to apply *Macomber* to legislation chipping away at the edges of the realization requirement.[42]

38. U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4.

39. 252 U.S. 189 (1920).

40. *Id.* at 219.

41. Helvering v. Horst, 311 U.S. 112, 116 (1940); Cottage Savings Ass'n v. Comm'r, 499 U.S. 554, 559 (1991). To be sure, it is conceivable that a constitutional requirement could itself be based on administrative convenience, so the administrative convenience description does not compel the conclusion that the realization-based character of the income tax is based on something less lofty than the Constitution. Nevertheless, it seems fair to say that the U.S. Constitution does not generally concern itself with matters as mundane as the administrative convenience of different tax regimes.

42. Estate of Whitlock v. Comm'r, 59 T.C. 490 (T.C. 1972), *aff'd in relevant part*, 494 F.2d 1297 (10th Cir. 1974), *cert. denied*, 419 U.S. 839 (1974). The litigation involved an unsuccessful taxpayer challenge, based on the realization requirement and *Eisner v. Macomber*, to Subpart F of the Internal Revenue Code, taxing shareholders of controlled foreign corporations on the undistributed income of their corporations.

The bottom line is that nobody knows the current status of *Eisner v. Macomber*. A very plausible argument can be made that the Supreme Court has silently abandoned the constitutional foundations of the case. On the other hand, the 1920 opinion remains on the books, and it is also plausible to argue that every subsequent legislative whittling away at the realization requirement—whether the mark-to-market treatment of securities dealers under Sec. 475, the treatment of certain futures contracts under Sec. 1256, the constructive sale rules of Sec. 1259, or the expatriation tax of Sec. 788A—is constitutionally distinguishable from a tax on pure unrealized appreciation. If so, then it would not necessarily follow from the apparent constitutionality of those whittlings (as indicated expressly by lower court decisions, and implicitly by Supreme Court inaction) that the billionaires tax frontal assault on the realization requirement would be constitutional.[43] In short, this is one of those issues—so common in constitutional law—where a plausible opinion can be written on either side, and the right answer is simply whatever five Supreme Court justices declare it to be.

But the point here is neither to predict how the current Supreme Court would view the billionaires tax, nor to add to the arguments about how it should view the tax. Rather, the focus here remains on Stanley Surrey. To my knowledge, Surrey was the first commentator to declare the death of *Eisner v. Macomber*, way back in 1941, just over two decades after the case was decided, and more than eighty years ago today. Writing in the *Illinois Law Review*—the predecessor of the *Northwestern University Law Review*[44]—Surrey considered the implications of the Supreme Court's then-recent decision in *Helvering v. Bruun*.[45] The taxpayer in *Bruun* was a landlord; upon lease termination, a building erected on the taxpayer's land by the tenant became the property of the taxpayer. The Supreme Court upheld the taxation of the landlord on the fair market value of the building at lease termination, even though there had been no severance of the income (the building) from the taxpayer's capital (the land), which *Macomber* had declared a constitutional requirement. While *Bruun* could be read narrowly, as continuing to insist on a realization event (here, the termination of the lease) and as abandoning only the severance aspect of *Macomber*, Surrey argued it constituted "a complete denial of the realization doctrine that is the heart of *Eisner v. Macomber*," and that it "mark[ed] the end of one era in our tax history."[46] According to Surrey, "When an event occurs which legislators . . . feel is sufficient to end the postponement [of tax on an increase in value of property],

43. *See* Philip Balzafiore, Mike Gaffney & Dylan Lionberger, *The Constitutional Uncertainty of a Broad Market-to-Market Rule for Derivatives*, 172 TAX NOTES FED. 2101 (2021) (arguing that broadly applicable mark-to-market rules for derivatives contracts would be unconstitutional; the analysis would apply equally to the proposed billionaires tax).

44. Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 ILL. L. REV. 779 (1941).

45. 309 U.S. 461 (1940).

46. Surrey, *supra* note 44, at 783.

a realization of income has occurred in the legal sense."[47] Surrey did not mention the mere turning over of the calendar from one year to the next as a permissible realization event in the case of publicly traded stock, but that is a fair implication of his position. In his 1941 article, Surrey immediately followed his discussion of *Bruun* with a detailed analysis of *Helvering v. Horst*,[48] another then-recent Supreme Court income tax decision.[49] In *Horst*, the Court upheld against constitutional challenge the taxation of a father on interest income on a bond owned by the father,[50] even though the father had detached the interest coupon from the bond and given it to his son, who presented the interest coupon to the debtor for payment.[51] Quoting with approval the Court's statement in *Horst* that the realization doctrine is founded on administrative convenience,[52] Surrey read *Bruun* and *Horst*, taken together, to mean that the realization requirement was a matter of "the revenue laws and not . . . the Constitution."[53] Surrey concluded, "The twenty years of income tax sophistication that followed the statements in *Eisner v. Macomber* have thus led to the sound conclusion that the formalistic doctrine of realization proclaimed by that decision is not a constitutional mandate."[54]

My point is not that Surrey was right or wrong about the demise of *Macomber.* Certainly history has not yet proven him wrong, but we will have a definitive answer only if Congress enacts a billionaires mark-to-market tax, and the Supreme Court considers the inevitable constitutional challenge. My point, rather, is that it is difficult to criticize Surrey as being too willing to accept the nontaxation of unrealized appreciation, when he was among the first—as far as I know, the very first—to declare and celebrate the death of realization as a constitutional requirement.[55]

47. *Id.* at 784.
48. Helvering v. Horst, 311 U.S. 112 (1940).
49. Surrey, *supra* note 44, at 784.
50. *Helvering*, 311 U.S. at 119–20.
51. *Id.* at 114.
52. *Id.* at 116.
53. Surrey, *supra* note 44, at 791.
54. *Id.*
55. Perhaps inspired in part by Surrey's 1941 article, in a 1943 case involving the taxability of a pro rata stock dividend (the same basic situation as in *Macomber*), the government urged the Court expressly to overrule *Macomber*'s interpretation of the Constitution. Interpreting the statute not to impose a tax on pro rata stock dividends, a six-justice majority decided for the taxpayer on statutory grounds, thus avoiding the constitutional question. Helvering v. Griffiths, 318 U.S. 371 (1943). Three dissenting justices, in an opinion by Justice Douglas, would have abandoned *Macomber*. According to the dissenters, the effect of the majority opinion was not the survival of *Macomber*, but only that the case "dies a slow death" instead of a speedy one. *Id.* at 404.

IV

SURREY AND REALIZATION OF GAINS AT DEATH

In a 1984 tribute to Surrey in the *Harvard Law Review*, economist Richard A. Musgrave emphasized Surrey's focus on politically attainable goals.[56] Thus, wrote Musgrave, "Surrey, ever the pragmatist, stopped short of going the whole way" of defining as tax expenditures all deviations from the Haig-Simons definition of income.[57] Given his ultimate goal of the removal of most tax expenditures from the Internal Revenue Code, Surrey the pragmatist reasonably concluded that there was no point to including the nontaxation of unrealized appreciation in the list of tax expenditures because there was no realistic possibility that inclusion in the list would lead to mark-to-market taxation.[58] Although Surrey was more than willing to fight battles where victory was far from certain—and endured any number of defeats as a result—he had no interest in fighting battles where he thought victory impossible. Unrealized appreciation furnishes perhaps the best example of Surrey's choice of battles based on prospects for success.

Thinking general mark-to-market taxation politically unattainable, Surrey did not pursue it as a legislative goal. But thinking taxation of gains at death politically possible, and far better than the permanent nontaxation of gain under the tax-free step-up in basis at death,[59] Surrey was a long-standing and prominent advocate of that reform. In fact, there is a case to be made that no one, in the history of the federal income tax, campaigned more strenuously and more effectively—albeit not effectively enough—than Surrey for taxing gains at death. The first serious executive branch proposal for the taxation of gains at death came from the Kennedy administration in 1963, during Surrey's time as Assistant Secretary of the Treasury for Tax Policy. In his 1963 tax message to Congress, President Kennedy urged legislators to "[i]mpose a tax at capital gains rates on all net gains accrued on capital assets at the time of transfer at death or by gift," and described the tax as "an essential element of my program for the taxation of capital gains."[60] The Treasury Department, under Surrey's tax policy direction, followed this up with thirteen pages of detailed technical explanations of how the proposal would operate, including a number of exceptions and examples applying the exceptions.[61]

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56. Richard A. Musgrave, *Pathways to Tax Reform*, 98 HARV. L. REV. 335, 335–36 (1984).

57. *Id.* at 335.

58. See the discussion, *supra* part II.

59. I.R.C. § 1014.

60. JOHN F. KENNEDY, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS RELATIVE TO A REVISION OF OUR TAX STRUCTURE, H.R. DOC. NO. 88-43, at 5, 24 (1963).

61. *President's 1963 Tax Message: Hearings Before the Comm. on Ways & Means on the Tax Recommendations of the President Contained in his Message Transmitted to the Congress: Part 1*, 88th Cong. 128–40 (1963). Two decades earlier, in 1942, the Roosevelt Treasury Department had half-heartedly suggested replacement of the tax-free step-up in basis at death with a carryover basis regime, but the Roosevelt Treasury devoted precisely one sentence to the suggested revision, and it attracted no

Unfortunately, Surrey did not describe his years in the Kennedy and Johnson administrations in his *Memoirs*, so we do not have from Surrey a blow-by-blow account of the proposal's defeat. Although the proposal died quickly in 1963—when the Ways and Means Committee voted it down following severe criticism from, among others, Surrey's old mentor Roswell Magill[62]—it was undeniably a serious attempt at reform, and it bore the unmistakable imprint of Stanley Surrey. In his memorial tribute, Donald Lubick described Surrey as "completely resilient in responding to defeat," viewing all legislative setbacks to his tax reform proposals as temporary.[63] There is no better example of this than Surrey's response to the defeat of the 1963 proposal. Late in 1968, with Surrey's departure from the Treasury imminent as a result of the election of Richard Nixon, the Johnson (and Surrey) Treasury Department tried again. This time Treasury sent Congress an even more detailed twenty-one page proposal for taxing gains at death.[64] Details of the proposal, all indicative of serious hopes for enactment rather than mere grandstanding, included: a small estate exemption (in the form of a $60,000 minimum basis allowance); exemptions for personal and household effects, and for marital and charitable bequests; provisions for basis allocation in the case of marital and charitable bequests; and liquidity relief provisions.[65] As if this were not enough, Surrey followed up with an article in *Columbia Law Review*,[66] calling the tax-free step-up in basis at death "the most serious defect in our federal tax structure,"[67] urging enactment of Treasury's proposed reforms, and describing and rejecting the arguments against the reforms.[68] As with its 1963 proposal, the later Treasury proposal went nowhere in Congress, but it certainly was not for lack of effort on Surrey's part.

There is a coda to the story. In 1976, with Surrey back at Harvard Law School and on the legislative sidelines during the Gerald Ford presidency, Congress—to

interest from Congress. *Revenue Revision of 1942: Hearings Before the H. Comm. on Ways & Means*, 77th Cong. 90 (1942) (statement of Randolph Paul, Tax Adviser to the Sec'y of the Treasury).

62. *President's 1963 Tax Message: Hearings Before the Comm. on Ways & Means on the Tax Recommendations of the President Contained in his Message Transmitted to the Congress: Part 2*, 88th Cong. 1379–80 (statement of Roswell Magill, Esq., Cravath, Swaine & Moore); *New Levy on Heirs is Dropped from Tax Bill by House Group*, N.Y. TIMES, Aug. 27, 1963, at 17 (describing the committee's vote against the proposal as a surprise move). For more detail on these events, see LAWRENCE ZELENAK, FIGURING OUT THE TAX: CONGRESS, TREASURY, AND THE DESIGN OF THE EARLY MODERN INCOME TAX 110–12 (2018).

63. Donald C. Lubick, *A View from Washington*, 98 HARV. L. REV. 338, 339 (1984).

64. U.S. DEP'T OF THE TREASURY, TAX REFORM STUDIES AND PROPOSALS 331–51 (Comm. Print 1969). Surrey and his Treasury colleagues had been working on the realization at death proposal and the other proposals included in the reform package for more than two years. *Id.* at 3 (statement of Henry H. Fowler, Sec'y of the Treasury).

65. *Id.* at 331–51.

66. *See generally* Stanley S. Surrey & Jerome Kurtz, *Reform of Death and Gift Taxes: 1969 Treasury Proposals, Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1365 (1970).

67. *Id.* at 1381.

68. *Id.* at 1368. ("Most of the objections to the proposal [made in the 1969 Ways and Means hearings on the Treasury proposals] are either specious or are directed at debating points that are minor indeed.").

the surprise of many observers—replaced the tax-free step-up in basis at death with a version of carryover basis rather than with Surrey's realization at death system.[69] The new regime proved politically unstable, in part because of technical deficiencies in its design, and Congress repealed it with retroactive effect in 1980.[70] Was Surrey's advocacy of taxing gains at death a but-for cause of the 1976 reform? If Surrey had been at the Treasury in 1976, would Congress have enacted a technically superior reform—probably realization at death, or perhaps a better-designed version of carryover basis—that could have survived repeal efforts, no matter how vigorous? One can only speculate.

V

CONCLUSION

My purpose in recounting, in the preceding section, the history of Surrey's efforts to tax gains at death, is to demonstrate again, from yet another angle, how hard Surrey worked toward reform of the income tax treatment of unrealized appreciation. With a historical perspective on the art of the possible, and realizing that reforms that may be viable today were not viable during Surrey's lifetime, it is difficult to conclude that Surrey should have taken a harder line on the tax treatment of unrealized appreciation. If medals were to be awarded for heroic service in the ongoing war against tax deferral for unrealized appreciation, Surrey would deserve a place near the front of the line.

69. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2005(a), 90 Stat. 1520, 1872–87 (1976) (codified at former I.R.C. § 1023).

70. Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 401, 94 Stat. 229, 299 (1980); *see also* ZELENAK, *supra* note 62, at 110–25 (examining in detail the short and unhappy life of the 1976 carryover basis reform).