

# ‘MORALIST’ VERSUS ‘SCIENTIST’: STANLEY SURREY AND THE PUBLIC INTELLECTUAL PRACTICE OF TAX POLICY

DANIEL SHAVIRO\*

## I

### INTRODUCTION

Tax scholars have long felt the dual call between functioning primarily as “scientists” who seek to advance expert understanding or as “moralists” who seek to improve the world. I borrow these terms from William F. Buckley, who, in a 1974 *Firing Line* TV dialogue with the renowned Harvard Law School tax professor, Stanley Surrey, said to him: “On the one hand you are a moralist, a tax moralist, and on the other hand you feign . . . scientific detachment . . . . [Y]ou insist that your observations are scientific in nature whereas in fact I think that they are based on a highly articulated set of personal value principles.”<sup>1</sup>

From the 1950s through the early 1980s, Surrey was tax law’s prevailing moralist, “single-minded[ly]” pursuing his “crusade” for what he deemed a “fair, progressive tax system.”<sup>2</sup> This approach could put him into sharp conflict with such rivals in the field as Boris Bittker, “the tax law’s great ‘fox’ who saw many things, and scourge of all the ‘hedgehogs’ who saw one big thing.”<sup>3</sup> As “hedgehogs” go, however, Surrey was one with a fox’s grasp of the legal system’s many intricate details, and—as discussed below—with a wide range of particular policy aims that he viewed as advancing fairness and progressivity.

To this day, the scientist versus moralist dichotomy continues to be prominent in the field. We all can think of tax scholars whom we view as primarily engaged in either the one enterprise or the other. Moreover, those of us with a foot in each camp are often quite self-aware about the distinction between projects that aim

---

Copyright © 2023 by Daniel Shaviro.

This Article is also available online at <http://lcp.law.duke.edu/>.

\* Wayne Perry Professor of Taxation, NYU Law School. I am grateful to the Gerald A. Wallace Matching Gift Fund for financial support. I am grateful to Ajay Mehrotra and Lawrence Zelenak for helpful comments on an earlier draft.

1. STANLEY S. SURREY, A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY xlii (Lawrence Zelenak & Ajay Mehrotra eds., 2022) [hereinafter *Surrey Memoirs*].

2. William D. Andrews, *A Source of Inspiration*, 98 HARV. L. REV. 332, 332 (1984).

3. Daniel Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 203 (2004) (citing Boris J. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244, 245 (1969)).

at neutral analysis and those that engage in deliberate advocacy with the hope of improving the world.<sup>4</sup>

To the scientist, the moralist risks the intellectual sins of over-selling, over-simplifying, and perhaps even improperly tilting the analysis or conclusions for ideological or salesmanship reasons. To the moralist, the scientist risks aesthetic self-indulgence, and perhaps even the self-centered pursuit of academic reputation, at the expense of actually trying to make a positive difference in the world.

Surrey experienced both sides of the reputational impact of being so avowed a moralist. When he died nearly forty years ago,<sup>5</sup> he was regarded as, “[b]y common consent . . . the greatest tax scholar of his generation.”<sup>6</sup> One of the era’s leading tax lawyers even “compared his stature as a thinker and shaper of tax policy to that of Shakespeare in drama and Aristotle in philosophy.”<sup>7</sup> To this day, he is widely regarded not just as “the most important U.S. tax academic . . . of the twentieth century,”<sup>8</sup> but also as one whose views continue to exert a “far reaching” influence on both domestic and international tax policy debate.<sup>9</sup>

Yet his centrality to tax policy debate was not that of an unquestioned consensus builder—say, the modern tax equivalent of a “Wigmore on Evidence” or a “Williston on Contracts.”<sup>10</sup> He inspired too much pushback, of both a “No” and a “Yes, but” character,<sup>11</sup> for any such hope to have been fulfilled. His greatest success lay in setting the terms of debate, rather than in establishing—even just in the academic realm—the firm consensus about good real-world tax policy that he sought.

To this day, not just Surrey’s moralist approach in general, but his principal conclusions about good tax policy remain both salient and hotly contested. His five main legacies are the following:

---

4. I recall attending a tax conference at which a leading European tax economist mused as to why almost every leading American tax scholar seemed to have his or her own tax reform plan. He has since joined those Americans in being the proponent of a particular plan (and indeed of several).

5. Stanley S. Surrey, 74, *Taxation Law Expert*, N.Y. TIMES, Aug. 28, 1984, at 7, <https://www.nytimes.com/1984/08/28/obituaries/stanley-s-surrey-74-taxation-law-expert.html> [<https://perma.cc/W46R-6K9S>].

6. Erwin N. Griswold, *A True Public Servant*, 98 HARV. L. REV. 329, 331 (1984).

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

8. Reuven Avi-Yonah & Nir Fishbien, *Stanley Surrey, the Code, and the Regime*, 25 FLA. TAX REV. 119, 119 (2021).

9. *Id.* at 121.

10. Boris Bittker’s income tax treatise-writing made him more directly like a Wigmore or a Williston than Surrey ever was (or wanted to be). See Part II, *infra*. Within tax policy debate, however, Bittker was more a gadfly or contrarian than one who was setting the terms of debate. *Id.*

11. See Shaviro, *supra* note 3, at 203 (“Bittker’s article is more of a ‘yes, but’ than a ‘no,’ because he agreed at the end that ‘a more limited accounting’ could be useful, ‘provid[ing] information that would be helpful in applying our political, economic, and ethical criteria in making policy judgments about the income tax system.’”).

(1) Tax expenditure analysis, under which income tax benefits—such as deductions, exclusions, and credits—that depart from the aim of measuring income are listed and classified as indirect government spending.<sup>12</sup>

(2) Support for the policy of broadening the income tax base by comprehensively repealing tax expenditures, and using the revenue therefrom to fund the lowering of income tax rates.<sup>13</sup>

(3) Support for income taxation itself as the “fairest possible” tax system,<sup>14</sup> and as clearly superior to consumption taxation.<sup>15</sup>

(4) In the international realm, support for combating tax havens and ensuring that all corporate income is taxed globally exactly once—whether on a residence or source basis.<sup>16</sup>

(5) Opposition to integrating, either wholly or partially, the corporate and individual income taxes.<sup>17</sup>

Surrey’s distinctive and important place in tax policy debate makes a signal event of the 2022 publication<sup>18</sup> of a lengthy, roughly eighty-five percent complete, first draft of his memoirs of his tax career.<sup>19</sup> Characteristically, he did not write these memoirs as an exercise in personal introspection. While he allows that they are “necessarily autobiographical,” his aim was to examine not his own psychology or motivations, but rather what broader lessons about taxation one might learn from his fifty years of engagement with it.<sup>20</sup> For example: “Does an intense relationship with the tax system confine the horizon of a lifetime to a narrow focus?”<sup>21</sup> And, what lessons about academia, tax politics, and tax practice

12. See generally STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* (1973).

13. Stanley S. Surrey, *Do Income Tax Exemptions Make Sense?*, *COLLIERS*, Mar. 30, 1956, at 26.

14. *Id.*

15. E.g., Stanley S. Surrey, *Our Troubled Tax Policy: False Routes and Proper Paths to Change*, 73 NAT’L TAX ASS’N PROC. 1, 2 (1980).

16. Stanley S. Surrey, *The United States Taxation of Foreign Source Income*, 1 J. LAW & ECON. 72 (1958).

17. E.g., Stanley S. Surrey, *Reflections on “Integration” of Corporation and Individual Income Taxes*, 28 NAT’L TAX J. 335, 340 (1975).

18. Even before such publication, however, the Memoirs were being discussed. Avi-Yonah & Fishbien, *supra* note 8, at 122.

19. *Surrey Memoirs*, *supra* note 1, at xxxii. Harvard tax law professor Daniel Halperin had found the Surrey manuscript in his office while cleaning it out in 2019, in connection with his own retirement. *Id.* No other portions of the manuscript have since been found. I call it an eighty-five percent complete draft because it consists of ten chapters, but (a) one of them (chapter 6) appears to be incomplete and (b) a planned chapter 11 apparently was never written.

20. *Id.* at lv.

21. *Id.* Surrey is confident that the answer to this question will turn out to be No. In other respects, however, he views the question of what other conclusions will emerge from reviewing his fifty-year tax career as “a mystery whose clues or insights will only be revealed as the writing moves along. I am interested in finding out what will eventuate.” *Id.*

might be gleaned from his experiences during his first stint as a law professor from 1947 through 1961?<sup>22</sup>

In light of these aims, it should come as no surprise that Surrey's memoirs—unlike those, say, of a Saint Augustine or a Jean-Jacques Rousseau—decline to make us “privy to the memoirist's introspection and self-doubts . . . [H]e rarely second-guesses himself even on matters of tactics and strategy, and never on his fundamental tax policy commitments.”<sup>23</sup> Given his “single-mindedness,” which assured that, “whatever he was doing, he was bound to be continuing the crusade” for what he deemed a “fair, progressive tax system,”<sup>24</sup> doing so no doubt would have seemed frivolous to him.

Yet writing can be self-revelatory even when that is not its conscious purpose. From this standpoint, Surrey's memoirs provide a valuable opportunity to interrogate both a prominent instance of the moralist approach to legal academic work and the grounds for his main tax policy stances—all of which remain rightly prominent, albeit reasonably contested—along with the question of what made him so sure that he was right. I aim here both to explore his own underlying moral premises, and to assess what his work both gained and lost intellectually by reason of his hewing so strongly to a set of career-long, deeply held beliefs.

To this end, Part II discusses what we learn from the memoirs and elsewhere regarding Surrey's core underlying beliefs. Part III examines how his tax moralism affected tax expenditure analysis. Part IV offers a brief conclusion.

## II

### THE MAKING OF A TAX MORALIST

#### A. Using Memoirs to Illuminate a Writer's Ideas

There is a scene near the end of Kurt Vonnegut's science fiction novel, *Player Piano*, in which Dr. Paul Proteus, the leader of a rebellion against a technological dystopia in America's near future, stands exposed by a futurist lie detector as having been motivated by hatred of his famous father, who had helped to create this world. Vonnegut comments: “A moment before [Paul] had been a glib mouthpiece for a powerful, clever organization. Now, suddenly, he was all alone, dealing with a problem singularly his own.”<sup>25</sup> Proteus turns things around, however, by arguing that it makes no difference how sordid his own underlying psychological motivations might be, if his beliefs are independently valid.

As applied to memoirs, no less than lie detector tests, Proteus is rightly noting the limits of *ad hominem* inquiry. The correctness and value of one's ideas do not depend on one's autobiographical reasons either for holding them, or for

---

22. *Id.* at 81.

23. *Surrey Memoirs*, *supra* note 1, at xlvii.

24. Andrews, *supra* note 2, at 332.

25. Kurt Vonnegut, Jr., *PLAYER PIANO* 293 (1952).

“want[ing] to *do* something about [them],”<sup>26</sup> such as by challenging perceived injustice. Yet the autobiographical aspect can enrich our understanding in at least two dimensions. First, we can better understand an important thinker, such as Surrey, by placing his or her expressed beliefs in a broader context. Second, as to the underlying ideas more generally, one gets an anecdotal sense of what sorts of beliefs and experiences can, at least in one case, contribute to their appeal.

## B. An Aversion to Boredom

Memoirists often begin by describing their family backgrounds, births, or upbringing.<sup>27</sup> Not Stanley Surrey, however. In keeping with his memoir’s central topic—“my relationship to the Internal Revenue Code”—he begins in 1929, when he was a nineteen-year-old first-year Columbia law student, sitting in a “dull and uninspiring” Civil Procedure class.<sup>28</sup> The occasion is noteworthy because he impresses the professor, Roswell Magill, a tax specialist who soon takes Surrey under his wing.

The only personal note in this opening involves a snapshot of Surrey’s attitude towards having to take Civil Procedure. To Surrey, it has been a mere waste of time—“days to be spent in a [dull] subject prescribed by the curriculum.”<sup>29</sup> Worse still, he has been required, through random assignment, to write a short paper on a “most dismal case . . . [offering] no intriguing point of jurisprudence, no subtle reconciliation of precedents.”<sup>30</sup> But the paper “caught Magill’s eye,”<sup>31</sup> establishing a relationship between them. Surrey especially welcomed this as he could “perceive an intelligence within [Magill’s] dryness and habitualness, and even flashes of wit.”<sup>32</sup> Evidently Magill found Civil Procedure as boring as Surrey did, and he proved far more engaging when teaching Taxation.<sup>33</sup>

The theme of boredom recurs frequently in the early stages of Surrey’s memoirs, until he becomes senior enough to choose his own work assignments. His time at Columbia Law School becomes “interesting, rewarding, and enjoyable” once he can pick the niche classes that he likes, not caring if they are “impractical from a bar examination standpoint.”<sup>34</sup> Meanwhile, he carefully avoids classes where “the subject matter or teachers [a]re dull.”<sup>35</sup>

Post-graduation, he swiftly rejects law firm life as a junior associate, leaving after just two months for a federal government job because he finds the work so

---

26. *Id.*

27. Thus, consider the classic opening line of Richard Nixon’s memoirs: “I was born in the house my father built.” RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 1 (1978).

28. *Surrey Memoirs*, *supra* note 1, at 3.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 4.

34. *Id.* at 5–6.

35. *Id.* at 4–5.

“deadly dull.”<sup>36</sup> Likewise, when briefly in the Navy near the end of World War II, he manages to get his placement changed upon finding it “exceedingly dull.”<sup>37</sup>

Surrey’s quest for stimulation does not, however, involve looking for theatrics. As a Columbia law student, he avoids, not just the “dull” professors, but also the “flashy types, such as Professor [Karl] Llewellyn whom I often thought shouted complex nonsense to frighten or hypnotize the first-year Contracts class.”<sup>38</sup> Rather than theatrics, he craves deeper intellectual meaning and consequence. He first finds this when, as Magill’s tax research assistant right after graduating, he participates in a study that Magill is conducting with the economists Robert Haig, the co-originator of “Haig-Simons income,” and Carl Shoup. This study involves joint inquiry by Haig and Shoup into the “economic concepts” of income, and by Magill—with Surrey’s help—into the “legal concepts.”<sup>39</sup> While performing this work—not yet directly in touch with Haig or Shoup, but, one suspects, with some sense of the spirit behind the shared enterprise—Surrey has his Saul-on-the-road-to-Damascus moment:

I was forced to find the theoretical strands that held the structure [of the income tax] together. As a result I had the rare opportunity early on to obtain a sense of that structure as a whole and to understand that the structure could be analyzed and dealt with in logical terms. A rational framework could be devised for the structure and in turn structural errors could be perceived. I saw the income tax not as a random body of rules and edicts but as an internally consistent framework. All of my later work has been dominated by that approach.<sup>40</sup>

One point of interest here is the evidence of Surrey’s precocious intellectual formation. Given the stated continuity, along with the project’s broader background, it seems likely that his view is already “rooted in the Schanz-Haig-Simons concept of accretion,” albeit “allow[ing] for feasibility in administration and for considerations such as the ‘generally accepted structure of the income tax.’”<sup>41</sup> Full-blown tax expenditure analysis—pertaining to the structural errors—is only a stone’s throw, if that, away.

Also of note, however, is how Surrey comes to find income taxation so interesting. In performing his research task for Magill, he evidently craves “theoretical strands” and a “rational framework,” in lieu of just a “random body of rules and edicts.”<sup>42</sup> The system must have an identifiable general logic and purpose, even if it is also, unfortunately, littered with “structural errors.”<sup>43</sup> As we will see, he soon starts developing substantive rationales for favoring those errors’ elimination. Even at the start, however, there is an underlying quest for

---

36. *Id.* at 10.

37. *Id.* at 69.

38. *Id.* at 4.

39. *Id.* at 7.

40. *Id.*

41. Richard A. Musgrave, *Pathway to Tax Reform*, 98 HARV. L. REV. 335, 335 (1984).

42. *Surrey Memoirs*, *supra* note 1, at xvii.

43. *Id.*

meaning and purpose, to be found by discerning the higher-level unities behind what would otherwise just be a welter of boring and trivial details.

For a sharp contrast in intellectual style—likewise apparently reflecting an underlying aesthetic sensibility—consider Surrey's future rival, Boris Bittker. When wearing his treatise-writing hat, Bittker evidently reveled in mastering all the rules and edicts, whether they be random or not. When writing as a policy analyst, Bittker often delighted in finding contradictions, paradoxes, and the impossibility of discerning right answers or higher-level unifying themes.

Thus, consider Bittker's finding an irresolvable "trilemma" in the income tax treatment of marriage, such that "there can be no peace in this area, only an uneasy truce."<sup>44</sup> When responding to Surrey's tax expenditure work, he frivolously appeared to "suggest[] that the inability to produce a perfect [tax expenditure budget, supplying the answer in *all* cases], was reason enough to abandon the enterprise."<sup>45</sup> To this end, he wrote a "Yes, but . . ." article that read like a "No"<sup>46</sup>—accomplished by his burying, on the article's next to last page, his agreement that "a more limited accounting" could be useful, "provid[ing] information that would be helpful in applying our political, economic, and ethical criteria in making policy judgments about the income tax system."<sup>47</sup> He thereby misled readers as to the actual level of disagreement regarding the proper classification of many of the items that Surrey called tax expenditures.

In a similar vein, consider Bittker's noting—in a classic 1979 article that also was clearly aimed at Surrey—that one might object to tax preferences on either of two grounds: (a) because they violate horizontal equity if after-tax prices do *not* adjust to reflect their value; or (b) on efficiency grounds if, due to the requisite price changes, the "apparent horizontal inequities . . . shake out in competitive resource allocation and translate into misuse of resources."<sup>48</sup> Here Bittker is scrupulous enough to acknowledge the obvious riposte: "If both groups damn what they see and agree on the remedy (for example, a tax law based on the Haig-Simons definition of income), why be concerned if they prefer to reach their common destination by different roads?"<sup>49</sup> But he then offers spurious grounds for rejecting it.<sup>50</sup> This allows him to draw the cynical conclusion that only

44. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1443 (1975).

45. *Surrey Memoirs*, *supra* note 1, at xli.

46. Shaviro, *supra* note 3.

47. Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 260–61 (1969).

48. Boris I. Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?*, 16 SAN DIEGO L. REV. 735, 737 n.3 [hereinafter *Equity and Efficiency*]. Of the two above options, the one I have labeled (a) was Surrey's well-known stance.

49. *Id.* at 746.

50. Bittker argues that this reconciliation is unavailing because the people on each side of the divide would reject the other side's normative conclusion if they accepted its empirical claims. *Id.* at 746. At the time when he wrote, this appears to have been unambiguously false. On the one side, Surrey objected to the allocative inefficiency that can result from tax preferences, not just to horizontal inequity. See Lubick, *supra* note 7, at 339; Bernard Wolfman, *Statesman, Scholar, Mentor*, 98 HARV. L. REV. 343, 344 (1984).

“intuition and political preferences [can supply] the basis for analysis because scholars, alas, can legitimately claim little more authority than the average citizen.”<sup>51</sup>

The battle between Surrey’s moralist–hedgehog stance on the one hand, and Bittker’s scientist–fox stance on the other, was more about temperament than ideology.<sup>52</sup> Each approach has its virtues and vices. Again, with respect to tax expenditures, Bittker was willing to throw out the baby with the bathwater, just because he disliked overclaiming and could point to some unclear or borderline cases. By delivering an overstated rebuke of tax expenditure analysis—given his actual partial agreement with it—he made his critique more memorable and dramatic, albeit at the cost of setting back informed public discussion.<sup>53</sup>

On the other hand, the very urgency of Surrey’s quest to improve the world through his claims about tax expenditure analysis could leave even strong supporters feeling intellectually queasy. They could find him too “rigid and dogmatic,”<sup>54</sup> compromising his persuasiveness. He was prone to “carr[ying] his tax expenditure thesis a bit too far, too obsessively - almost theologically.”<sup>55</sup> He thus risked flouting the general principle that “scholarship and politics are a poor mix.”<sup>56</sup>

From the standpoint of improving the world, these might seem mere quibbles. Yet the scientist mantle is so central to academics’ claims to be speaking authoritatively that one places one’s whole intellectual standing at risk—and arguably betrays core professional responsibilities—if, without due disclosure one, in Buckley’s words to Surrey, “insist[s] that [one’s] observations are scientific in nature whereas in fact . . . they are based on . . . personal value principles.”<sup>57</sup>

---

On the other side, Martin Feldstein, the leading contemporary proponent of the rival view emphasizing tax capitalization, strongly objected to horizontal inequity. Martin Feldstein, *On the Theory of Tax Reform*, 6 J. PUB. ECON. 77 (1976). The difference was simply that he attributed it to unanticipated tax law changes, to which markets cannot adjust, rather than to tax preferences around which a market equilibrium forms. *Id.* Thus, he did not consider tax-caused allocative inefficiency the only relevant ill. *Id.*

51. *Equity and Efficiency*, *supra* note 48, at 748.

52. Surrey’s true ideological (as opposed to temperamental) foes, discussed at length and sometimes caustically in his memoirs, were pro-business conservatives who supported tax policies that they argued would promote capital formation. *See, e.g., Surrey Memoirs*, *supra* note 1, at 150. Bittker was not in that camp any more than he was in Surrey’s. *See generally* Boris I. Bittker, *A “Comprehensive Tax Base” As a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967).

53. *See* Shaviro, *supra* note 3.

54. Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 HARV. L. REV. 491, 495 (1985) (reviewing STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985)).

55. Wolfman, *supra* note 50.

56. *Id.* In the context of writing a memorial tribute right after Surrey’s death, Wolfman calls him a “clear and happy exception” to the general principle that “scholarship and politics are a poor mix.” *Id.* Yet his concern that Surrey undermined the persuasiveness of his own claims by pushing them “too far” shows that general principle at work. *Id.*

57. *Surrey Memoirs*, *supra* note 1, at xlii.



Returning to Surrey, it was not *just* the quest to find meaning instead of boredom that motivated his discernment of a deep theoretical structure that both explained the existing income tax—apart from its structural errors—and supplied an agenda for its reform. He relied as well on his underlying moral views. These in turn may have had autobiographical roots, as I discuss next.

### C. Broadening The Autobiography

Stanley Surrey was born into a Russian–Jewish immigrant family at a time when American anti-Semitism was pervasive, yet sectorally variable in its dominance. The Great Depression struck just when he had finished college, and the New Deal started right after he finished law school. These facts arguably have explanatory power regarding the moral sentiments that later guided Surrey’s tax policy views.

#### 1. Russian–Jewish Immigrant Family

The word “Jewish” never appears in Surrey’s memoirs, and as a cultural matter he appears to have been fairly assimilated.<sup>58</sup> Indeed, Surrey’s son Scott has reported not knowing that his father was Jewish until, at the age of thirteen, he heard about it from his uncle Walter, Surrey’s brother.<sup>59</sup>

Presumably to help with assimilation, Surrey’s father changed the family name from Serhey to the English-sounding Surrey when Stanley was in his teens.<sup>60</sup> Yet surely he was frequently reminded of his being at least ethnically Jewish in a predominantly Christian society. He notes in the memoirs, without comment, an instance in which a law school classmate similarly changed his family name so that it would sound English rather than Jewish.<sup>61</sup> In addition, as I further discuss below, the fact that Surrey’s brief law firm experience immediately post-graduation was at “one of the ‘traditional’ New York City Jewish law firms, with a practice area catering mainly to the personal, family, and real estate matters of prominent Jewish families”<sup>62</sup> seems unlikely to have been wholly coincidental.

As to recent immigrant status, Surrey’s father came to America as a child, while his mother was born in New York to immigrant parents.<sup>63</sup> While the Surreys appear to have been fairly affluent<sup>64</sup> by the time he was born, there are grounds

---

58. *Id.* at xix n.47.

59. E-mail from Calvin Johnson to Daniel Shaviro (Nov. 4, 2022, 09:10 CST) (on file with the author).

60. *Surrey Memoirs*, *supra* note 1, at xiv.

61. This classmate changed his last name from Aronson to Allison. *Id.* at 8. On the name Allison’s English or Scottish roots, see *Allison (surname)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Allison\\_\(surname\)](https://en.wikipedia.org/wiki/Allison_(surname)) [<https://perma.cc/GFL6-9ZKE>] (last accessed Feb. 2, 2023).

62. *Surrey Memoirs*, *supra* note 1, at xix. The firm in question was Proskauer, Rose, and Paskus. *Id.*

63. *Id.* at xiv.

64. *Id.*

for inferring a classic American immigrant family's faith in education and upward mobility.<sup>65</sup> It seems unlikely that a child would graduate from college at age nineteen—indeed, *magna cum laude* and Phi Beta Kappa,<sup>66</sup> and with the apparent presumption that this must immediately be followed by either graduate or professional school<sup>67</sup>—without not only talent and internal motivation, but also strong parental modeling and encouragement.<sup>68</sup> Moreover, a strongly inculcated family credo of upward professional aspiration is suggested *ex post*, not just by Surrey's own subsequent career arc, but also by that of his younger brother Walter, who became a leading international business lawyer.<sup>69</sup>

In sum, one might reasonably infer that Surrey grew up with substantial exposure to what we now call the American Dream.<sup>70</sup> By early adulthood, he could see its promise being richly fulfilled, both in his own life and that of family members and peers. This positive experience may have strongly influenced his views about the economy and tax policy. Yet his moral outlook may also have been shaped by the fact that contemporary American anti-Semitism was so pervasive, albeit not all-powerful.

## 2. American Anti-Semitism

For his college degree, Surrey went to the City College of New York (CCNY). At the time, America's Ivy League and comparable undergraduate institutions "catered mainly to the children of the native Protestant elite"<sup>71</sup>—admitting few Jews or even Catholics, and even fewer, if any, non-Whites.<sup>72</sup> While Surrey may therefore have suffered no ill effect from the era's educational apartheid, he surely was well-aware of it.

Jewish people were apparently less unwelcome at Ivy League graduate and law schools than they were at the undergraduate level. Thus, Surrey was able to gain admission to both Columbia's and Harvard's law schools, along with Columbia's graduate program in history. Yet the era's legal profession was not so tolerant. Wall Street law firms were still sufficiently anti-Semitic that, even as the second-ranked student in Columbia's graduating 1932 law school class—and

---

65. See, e.g., JIM CULLEN, *THE AMERICAN DREAM: THE SHORT HISTORY OF AN IDEA* 5 (2003) (suggesting that what came, in the 1930s, to be known as the American Dream was long before that embodied in millions of American immigrants' expectations when they came to America).

66. *Surrey Memoirs*, *supra* note 1, at xv.

67. Immediately after his college graduation, Surrey initially enrolled in Columbia University's graduate history program, but decided not to go. Not being one to take what we now call a "gap year," however, he also applied successfully to Harvard Law School before enrolling at Columbia Law School. *Id.* at xiv.

68. Surrey's father worked for the Continental Oil Company for most of his life, rather than in academics or education, but his mother was a schoolteacher and high school official. *Id.* at xiv.

69. *Id.*

70. While the term "American Dream" appears not to have been invented until 1931, in substance it was centuries-old before that. Cullen, *supra* note 65, at 5.

71. *Surrey Memoirs*, *supra* note 1, at xv.

72. *Id.* at xvii.

with several prominent supporters on the faculty—“Surrey likely faced significant challenges in securing a position with a prestigious law firm.”<sup>73</sup>

To be sure, the era’s Jewish law firms—arising precisely because of Wall Street’s anti-Semitism—gave Surrey an alternative career path, which could presumably have served him well but for the tenor of his intellectual interests. Yet one should not underestimate just how ugly and deep-rooted anti-Semitism was in the legal profession at this time. For example, Harlan Fiske Stone, who had been named to the Supreme Court in 1925 and then served as Chief Justice from 1941 until his death in 1946, described Jews as having “racial tendencies toward study by memorization” and “mind[s] almost Oriental in [their] fidelity to the minutiae of the subject without regard to any controlling rule or reason.”<sup>74</sup> Henry S. Drinker, the Chairman of the American Bar Association’s Ethics Committee for many years, and the author of a leading mid-century treatise on legal ethics, applied this expertise to condemn “Russian Jew boys who came up out of the gutter [and] were merely following the methods their fathers had been using in selling shoe strings and other merchandise.”<sup>75</sup>

There also was broader anti-Semitism in American society and culture, of a far more overt kind than would be fashionable for many decades afterwards. In the 1930s, for example, while Hitler raged in Germany, the era’s leading Fox News precursor, Father Charles Coughlin, was spreading anti-Jewish vitriol on American radio waves. In the run-up to World War II, Charles Lindbergh blamed the “Jewish race” for “agitating for war” against Germany “for reasons which are not American,” and warned that, if they should succeed, they would not only stimulate a decline in American tolerance for such alien interlopers, but be “among the first to feel its consequences.”<sup>76</sup>

One need not posit that Surrey was deeply scarred by anti-Semitism—which, after all, did not stop him from achieving great personal success—to suspect that encountering it may have influenced him intellectually. I will discuss below how his broader tax policy views may have reflected his seeing how biases such as anti-Semitism could lead to injustice.

### 3. The Great Depression And The New Deal

Surrey entered law school just as the Great Depression was starting. When he graduated, as he notes, “[t]he economic depression was still deep, and downtown law firm jobs hard to find. Still, a Law Review editor at least could

---

73. *Id.*

74. Quoted in Alan Dershowitz, *Unequal Justice*, N.Y. TIMES (Jan. 25, 1976), <https://www.nytimes.com/1976/01/25/archives/unequal-justice-counselor-counsel-thyself.html> [<https://perma.cc/4ULJ-856H>].

75. *Id.*

76. Charles Lindbergh, Address in Des Moines, Iowa (Sept. 11, 1941), <https://www.jewishvirtuallibrary.org/lindbergh-accuses-jews-of-pushing-u-s-to-war> [<https://perma.cc/UB42-9U92>].

secure an offer”<sup>77</sup> as he indeed did a year later—albeit at a Jewish rather than a traditional Wall Street firm—after working for Magill as a research assistant. With the start of the Roosevelt Administration, however, his employment opportunities expanded. He promptly “went to Washington and entered the legal life of President Roosevelt’s New Deal,” working not in tax but for the National Recovery Administration (NRA).<sup>78</sup>

Here he found himself amid a “mixed lot—young, mostly liberal leaning, lawyers scarcely out of eastern law schools attracted by the excitement of the New Deal, and older, mostly conservative leaning, southern attorneys needing jobs and finding them via the Congressional patronage route.”<sup>79</sup> He belonged, obviously, to the first of these two groups, whose members presumably were hired based on merit, not influence. So merit turns out, in his experience, to be positively correlated with political liberalism—and both also, perhaps, with Jewish ethnicity.<sup>80</sup>

Surrey’s NRA work came to an end in 1935 when the Supreme Court declared that its operations were unconstitutional, but he moved to the National Labor Relations Board (NLRB) for two years and then began a ten-year stint at the U.S. Treasury.<sup>81</sup> This was clearly a crucial formative experience for him—underlying, for example, his career-long conviction that the U.S. Treasury, more than any other institution or person, speaks for tax equity, and hence “should play the dominant role in the legislative process.”<sup>82</sup>

In this way, Surrey internalized a New Deal model of the government expert, hired based on merit and shielded from interest group politics, who wisely judges and acts in the public interest. This is mixed with a readiness to be skeptical of members of the elite bar when they are acting under the undue influence of narrow client interests.<sup>83</sup> As we will see, however, in other respects Surrey

---

77. *Surrey Memoirs*, *supra* note 1, at 6.

78. *Id.* at 11.

79. *Id.* at 14.

80. *Id.* Though Surrey does not address either group’s ethnicity, it seems likely that only his group included many Jewish lawyers. *See id.* at xix (noting that “the New Deal became a professional sanctuary for many talented Jewish lawyers during the Depression.”). Zelenak and Mehrotra add that “[Surrey] was likely part of an entire generation of accomplished Jewish lawyers who during the Great Depression gravitated to the professional and social appeal of the New Deal,” and that, in the words of a leading legal historian on this topic, “[t]he Depression generation of talented Jewish law students were saved from professional extinction, insofar as it was saved at all, only by the New Deal alphabet agencies.” *Id.* at xix–xx, n.47 (quoting JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 185 (1977)).

81. *See id.* at 14–20 (describing Surrey’s job history).

82. George K. Yin, “*Who Speaks for Tax Equity and Tax Fairness?*”: *Stanley Surrey and the Tax Legislative Process*, 39 VA. TAX REV. 39, 109 (2019).

83. An amusing illustration of Surrey’s readiness to be skeptical of members of the elite bar arises, while he is still at the National Labor Relations Board, when he meets with the dazzlingly well-dressed, but otherwise apparently unimpressive, Dean Acheson, who (in between Roosevelt Administration stints) is representing the Colt Firearms Company in a labor relations case. *See Surrey Memoirs*, *supra* note 1, at 13.

appears *not* to have fully adopted his age cohort's frequent skepticism about free market capitalism, based on the perception that the "disastrous, seemingly unending Great Depression" showed "market failure" to be "pervasive."<sup>84</sup> To the contrary, his support of a broad base and low rates implied generally limiting Congress's political interventions in the economy through the tax system—especially given his grounds, discussed below, for skepticism about the political process.

#### D. Further Attitudinal Evidence From The Surrey Memoirs

The Surrey memoirs, despite their limited outside autobiographical detail, do indeed enrich the picture that one would get purely by reading his academic books and articles. A key example involves their extensive focus on people's intellectual ability and political views.

##### 1. Intelligence, Elitism, And Meritocracy

One of the most striking features of Surrey's memoirs is how frequently he comments on particular individuals' intelligence. Newly introduced characters often get a baseline assessment that is usually, but not always, favorable. Those who mattered more often get fuller assessments. Examples of both types of comments include the following:

— His deepening acquaintance with Roswell Magill allowed him to confirm that "[a]s I had suspected there was a deep intelligence in this person."<sup>85</sup>

— Frank Pollak was "a hard taskmaster but intelligent . . . ."<sup>86</sup>

— Roger Traynor and Jack Maguire were "intelligent and careful, methodical thinkers . . . ."<sup>87</sup>

— Roy Blough was a "well-grounded, steady person, not brilliant but with sound judgment."<sup>88</sup>

— Lucien Shaw had "some tax experience [and] a good mind . . . ."<sup>89</sup>

— Robert Eichholz had a "fine mind [and] perceptive sharp insights," but was "plagued by too large inherited wealth, so he was not forced fully to use his remarkable talents."<sup>90</sup>

— Marion Herron had "[j]ust an average intelligence and no particular quality of judgment. The realization that such a person . . . could become a Board

---

84. Daniel Shaviro, *Bittker's Pendulum and the Taxation of Multinationals*, 104 TAX NOTES INT'L 535, 539 (2021).

85. *Surrey Memoirs*, *supra* note 1, at 4.

86. *Id.* at 13.

87. *Id.* at 25.

88. *Id.* at 36.

89. *Id.*

90. *Id.* at 37.

Member [at the IRS's institutional predecessor] . . . shocked my sense of how Government should operate."<sup>91</sup>

— Senator Walter George was not only “gracious” but a man of “high intelligence” who “fully recognized” a senior staffer’s “pluses and minuses and used him adroitly . . . .”<sup>92</sup>

— Appellate judge—and future Supreme Court Chief Justice—Fred Vinson “did not really have a sharp intellectual mind but was politically astute.”<sup>93</sup>

— Randolph Paul “was often an ambiguous figure, given to somewhat inarticulate, rather cryptic words spoken in a low voice that at times made it difficult to decide what point he was making. In a deceptive way he had a keen mind . . . .”<sup>94</sup>

— Sumio Hara and Keiichiro Hirata were “both highly intelligent . . . .”<sup>95</sup>

— Jonathan Moore had a “fast-moving creative mind and a wide range of knowledge of the political world . . . .”<sup>96</sup>

— David Tillinghast was “highly intelligent [and] articulate . . . .”<sup>97</sup>

— Harry Gutman was “intelligent [and] fast thinking . . . .”<sup>98</sup>

— Joseph Kartiganer had “an imaginative, creative mind that could look far beyond current rules . . . .”<sup>99</sup>

— F.O.N. Dornelles was a “forceful, intelligent advocate of his positions . . . .”<sup>100</sup>

— M.H. Collins was a “hard, intelligent worker . . . .”<sup>101</sup>

— Adnan Mardini was a “delightful and intelligent companion . . . .”<sup>102</sup>

— W. Michael Blumenthal was an “intelligent person . . . .”<sup>103</sup>

Colin Stam, the long-serving Joint Committee on Taxation Chief of Staff, whose affinity for lobbyists, and—at least in Surrey’s view—for dishonestly manipulating the Congressional tax committees, made the two “deadly enem[ies],”<sup>104</sup> draws a fuller portrait than any of these:

91. *Id.* at 47.

92. *Id.* at 50. The senior staffer was Colin Stam, further discussed below.

93. *Id.* at 71.

94. *Id.* at 112.

95. *Id.* at 146.

96. *Id.* at 232.

97. *Id.* at 267.

98. *Id.* at 271.

99. *Id.*

100. *Id.* at 289.

101. *Id.* at 292.

102. *Id.* at 295.

103. *Id.* at 313.

104. Yin, *supra* note 82, at 78 (quoting a New York Post reporter during the 1961 Senate Finance Committee’s hearings regarding Surrey’s nomination to be the Treasury’s Deputy Assistant Secretary for Tax Policy). According to another contemporary observer, Stam’s “strong hatred” of Surrey had induced him to play this role. *Id.*

Stam's mind was rather ordinary and he did not have a really detailed knowledge of tax law. His talent instead was shrewd and wily perception of where the influential Committee Members — and the influential lobbyists — desired to move . . . . He also had a skill in explaining proposals in outrageously simple terms, which covered up major problems and led as a result to committee acceptance without any understanding of the issues. But he had no patience or talent for deep analysis or the subtleties of drafting.<sup>105</sup>

In the entirety of the memoirs, only one other person draws nearly such negative attention. Pierre Benoit, a fiscal department head at the United Nations when it was developing model tax treaties, became “in effect a personal enemy” because he “correct[ly]” saw Surrey’s offers of assistance as “reflecting adversely . . . on his own competence.”<sup>106</sup>

What should we make of Surrey’s focusing so intently on people’s intelligence? There is nothing surprising or wrong about it. Obviously, himself extremely intelligent—as well as reliant on his intelligence for his own success—Surrey naturally would value this trait in others. In addition, others’ intelligence, or lack thereof, could greatly affect the ease and productivity of his working with them. Yet his hyper-focus on it is more broadly intellectually revealing. It shows a strand of elitism, along with faith in meritocracy—meant here as purely descriptive terms, not criticism—that may help to explain his tax policy views.

Surrey’s elitism and belief in meritocracy are strongly tied to his sense of public service. He celebrates intellect as a tool for improving public policy analysis and design, rather than for getting rich. Moreover, while he may view capitalist success stories as tending to be deserved, success also implies social responsibility. For example, members of the elite tax bar ought to use their talents and knowledge constructively. He scorns those among them who constantly seek “devices to reduce the taxes of their wealthy clients . . . [while] constantly berat[ing] the Treasury and never aid[ing] in efforts to improve the tax system.”<sup>107</sup>

## 2. Liberals Versus Conservatives

In addition to commenting frequently on people’s intelligence, Surrey focused intensively on their political views. They are frequently described as either liberal or conservative, with either term potentially being modified (for example, *very* liberal, and *out-and-out* versus *somewhat* conservative).

---

105. Surrey, *supra* note 1, at 42–43. See also *id.* at 44. Surrey also, most uncharacteristically in memoirs that are usually quite generous towards others, seems to relish Stam’s occasional setbacks and humiliations. For example, at certain drafting sessions “Stam was often abruptly told . . . to shut up.” *Id.* at 39. Told once again to “shut up and not offer comments,” he decides to stop attending the sessions. *Id.* at 43. On another occasion, embarrassed by the tax committee chairs’ incredulous response to a “silly” proposal that lobbyists had asked him to make, Stam “sheepishly withdrew the proposal.” *Id.* at 62. “But I am sure if the Committee had accepted the proposal, Stam would not in the least have been troubled by such a ridiculous change in the Code’s technical provisions, for the performance was a typical Stam suggestion.” *Id.*

106. *Id.* at 290. While competence is not identical to intelligence, they are sufficiently closely linked to further evidence Surrey’s inclination to judge people based on their intellectual ability.

107. *Id.* at 50–51.

He had clear pragmatic reasons for caring about these assessments. Himself a professed liberal and “good Democrat,”<sup>108</sup> he frequently was seeking broader institutional support for a given proposal—for example, from Washington policymakers, or from the participants in an American Law Institute (ALI) study. His ideological name checks also, however, illuminate both how he defined liberalism and conservatism, and what broader inclinations he thought might underlie each stance.

Liberals had “a strong preference for a progressive income tax, and a strong regard for . . . treating people with equal incomes equally in the tax laws. This stress on tax equity led naturally to a distaste for tax preferences and ‘loopholes.’”<sup>109</sup> Surrey’s support for broadening the base and lowering the rates was therefore a liberal position, even if it was done in such a way as to be distributionally neutral. Liberal and tax reformer are close to synonymous in the memoirs.

A “thorough” and sincere proponent would have “liberal instincts at the very core of his being rather than merely worn conspicuously on his sleeve.”<sup>110</sup> There also, however, were fake liberals. For example, without “local accountability . . . a Senator regarded back home as a ‘liberal’ could vote against a tax reform without their knowing back in his state.”<sup>111</sup>

Conservatives are defined more as opponents of tax reform than either of progressivity, or of what we might today call “big government.” They may emphasize incentives for capital formation,<sup>112</sup> and “view[] the taxation of capital gains as almost immoral,”<sup>113</sup> but more generally are “sympathetic to the general views of the business community,”<sup>114</sup> or “see[] only the business point of view.”<sup>115</sup>

Liberal tax lawyers who had been pro-reform while they were in government or academia were prone to becoming more conservative under the “influence of a Wall Street practice.”<sup>116</sup> To be liberal while practicing tax law required sufficient “objectivity” to see beyond the clients’ point of view, and to recognize the importance of “balanc[ing] as well as one can the interest of taxpayers and government.”<sup>117</sup> However, only the best conservatives could “listen well and . . . be persuaded to see the other side,”<sup>118</sup> or were capable of being offended—despite their pro-taxpayer instincts—by aggressive tax planning “shenanigans.”<sup>119</sup>

---

108. *Id.* at 213.

109. *Id.* at 44.

110. *Id.* at 25–26.

111. *Id.* at 335.

112. *See, e.g., id.* at 150–51.

113. *Id.* at 123.

114. *Id.*

115. *Id.* at 41.

116. *Id.*

117. *Id.* at 241–42.

118. *Id.* at 111.

119. *Id.* at 123.



A typical lens on the choice between liberalism and conservatism might attribute it to whether one happens to care more about equity on the one hand, or efficiency and economic growth on the other hand. Surrey shows signs of accepting this account, as when he notes liberals' greater concern with tax equity and conservatives' with capital formation. Yet he viewed conservatives as ignoring the points—both clear to him—that tax reform would increase efficiency as well as equity, and that the empirical case for increasing capital formation through tax incentives was extremely weak. Moreover, in tolerating special income tax preferences, they were ignoring the “rational framework” and basic “theoretical strands”<sup>120</sup> from which he had—seemingly non-ideologically—initially derived his views. So there is a touch of incredulity in his view of conservatives. From his perspective, their stance seems almost to require that one be closed-minded, unmoved by basic rationality and fairness—seen mainly in horizontal, rather than vertical, terms)—or biased in favor of business interests or those of one's clients, or both.

#### E. A View of Surrey's Underlying Moral Landscape

Surrey's memoirs, no less than his career and the avowals of his closest professional colleagues, attest strongly to the predominant influence on him of underlying moral commitments. Tax equity is his *summum bonum*, and, while a strong believer in due progressivity, he thinks about equity mainly in horizontal terms. Thus, consider an account of his meeting then-President Elect John F. Kennedy, in the run-up to his being nominated as the top tax policy official in Kennedy's Treasury Department:

Kennedy . . . seemed to have trouble in pinning down the significance of tax equity and tax fairness. I responded by . . . pointing out that persons with the same income pay vastly different income taxes . . . [For example, a person with \$100,000 of municipal bond interest income has a rate of zero], a person with \$100,000 of capital gains has a rate of 25%, a married person with \$100,000 of oil income has a rate of 32%, a married person with \$100,000 of dividend income has a rate of 47%; a married person with a salary or professional income has a rate of 66%. Kennedy liked this illustration of tax unfairness and thought it a useful way to present the picture.<sup>121</sup>

To put it in simplified numbers with fewer zeroes, Surrey is complaining that an individual with \$100 of pretax income might end up with either \$100, \$75, \$68, \$53, or \$34 after-tax, depending on the vagaries of how the \$100 happens to have been earned.

---

120. *Id.* at 7.

121. *Id.* at 189. Surrey says “(add tax exempt)” in lieu of the bracketed language above, but Zelenak and Mehrotra plausibly suggest that this is what he must have had in mind. *See id.* at 189 n.21.

While evidently comfortable with the example's intuitive force to a lay audience,<sup>122</sup> Surrey appears to have seen no need to go one turtle deeper<sup>123</sup> in explaining *why* it is so objectionable—either in the memoirs or his scholarly writings. Yet some clues can be discerned from each of its two key elements. The first is its using market pretax economic returns as a normative baseline for applying horizontal equity. The second is its focusing, as Surrey generally did in his writing on the topic, not just on disparities in after-tax income, but specifically on deliberate decisions by the “United States Congress . . . [to] creat[e] ways for certain people to escape the very taxes it imposes.”<sup>124</sup> That is, he cares about the underlying legislative intention, not just about the ex post result.

### 1. Justice And Market Outcomes

Today, a standard academic critique of Surrey's example might start by arguing that it presumes market pretax economic returns are inherently just, thus making relative dispersion from them objectionable.<sup>125</sup> Surrey would not have thought that his stance required endorsing this proposition about market returns, for two main reasons. First, the amount of economic power—or material wellbeing—that people had depended on their earnings, whether earned justly or not. So a tax premised on the distribution of burdens based on such power or wellbeing would depend on pretax income, whether or not it had been earned justly. Second, his focus on legislators' intent, that is, on “why some taxpayers receive favors from Washington,”<sup>126</sup> often due to the “game of lobbying,”<sup>127</sup> created grounds for objection even if pretax wages were not inherently just.

Nonetheless, while surely no adherent of strongly moralizing market outcomes—and thus of viewing, say, a successful corporate raider as thousands of times more deserving than an outstanding kindergarten teacher—Surrey was indeed “committed to letting the free market allocate economic resources.”<sup>128</sup> He valued the capacity of a broad-based, low-rate tax system to “interfere least with

---

122. In an article written for a mass audience four years before he met with Kennedy, Surrey had used almost exactly the same example. See Surrey, *supra* note 13, at 26.

123. I refer to the old story of the woman who claimed that the earth rests on the back of a turtle and, when asked what the turtle rests on, answered that it was “turtles all the way down.” See Daniel Shaviro, *Beyond the Consumption Tax Consensus*, 60 STAN. L. REV. 745, 752 n.24 (2007).

124. Surrey, *supra* note 13, at 26.

125. See generally LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002). A second critique—Bittker's point about “apparent horizontal inequities . . . shak[ing] out in competitive resource allocation” through their effects on after-tax returns—Surrey rejected, for example in his *Firing Line* debate with Buckley, by arguing that marginal tax rate differences prevented this from happening in the highest rate brackets. Broader challenges to horizontal equity as a normative concept, as in Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989), had not yet been made, and Surrey thus could confidently note that economists, or at least those with “liberal-leaning fiscal views,” had a “strong regard” for it. *Surrey Memoirs*, *supra* note 1, at 44.

126. Surrey, *supra* note 13, at 26.

127. *Id.*

128. Lubick, *supra* note 7, at 339.

the efficiency of our market system”<sup>129</sup>—at least apart from his support for alleviating poverty. Only in the absence of high tax rates, applying unevenly due to pervasive tax preferences, would “management and investors be free to make decisions on the basis of business factors and not of tax lures.”<sup>130</sup>

In this respect, Surrey brings to mind Henry Simons, despite Simons’ being, in sharp contrast to Surrey, a self-described “extreme conservative . . . [and] exponent of . . . nineteenth century liberalism.”<sup>131</sup> Both preferred the impersonality of decentralized market forces in setting economic returns to the scenario in which biased decision-makers, responding to the disproportionate political influence of well-connected insiders, decide who should do better, and who worse. In addition, both saw this principle as being advanced by a comprehensive income tax that had been shorn of preferences for particular taxpayers or industries.

Simons’ eagerness to embrace “laissez-faire economic principles . . . at the very moment when they were at their all-time U.S. low-water mark due to the Great Depression”<sup>132</sup> reflected a tetchy contrarianism and enjoyment of intellectual defiance as a self-dramatizing stance that Surrey did not share. Yet Surrey’s own unbroken path from an affluent upbringing, through attendance at elite institutions, to rapidly finding his professional footing after law school—all guided by his faith in the unequally distributed, but often-rewarded, trait of human intelligence—may likewise have encouraged rejection of broad anti-capitalist or anti-market narratives,<sup>133</sup> even amid the economic distress of the 1930s.

## 2. Injustice From “Favors” And “Special Privileges”

While the term “horizontal equity” invites focusing on the result—unequal treatment of A and B even though they are relevantly the same—Surrey appears to have cared more about the underlying decisional process. Again, he objected to the scenario where some taxpayers receive “special privileges” by reason of “Congress[’s lacking] the strength to resist political pressures for favoritism.”<sup>134</sup>

In his writing, Surrey does not describe this process as *self-consciously* corrupt—albeit, perhaps implicitly so. It reflects politicians’ limited knowledge, along with their understandable, yet still discreditable, willingness to be satisfied by listening to just one side. For example, when asked by lobbyists or well-heeled constituents for a special tax favor, “[t]he approach of the average congressman is to hear the private group, find out in general what it wants, [and] react

129. Wolfman, *supra* note 50, at 344.

130. Surrey, *supra* note 13, at 29.

131. Daniel Shaviro, *The Forgotten Henry Simons*, 41 FLA. STATE U. L. REV. 1, 6 (2013).

132. *Id.* at 10.

133. Unlike Simons, however, Surrey was not so pro-capitalist and pro-market as to oppose labor unions. Indeed (as noted above), he had worked for the NLRB, whereas Simons was fiercely anti-union. See Shaviro, *supra* note 131, at 15.

134. Surrey, *supra* note 13, at 29.

sympathetically for a variety of reasons . . . . [R]ecognition of some hardship . . . is all that the congressman needs.”<sup>135</sup> Such sympathy was all the more readily given as “the average congressman does not basically believe in the present rates of income tax in the upper brackets. When he sees them applied to individual cases, he thinks them too high and therefore unfair.”<sup>136</sup>

Yet, however innocently this method of decision-making was applied in a particular case, its inherent “favoritism”<sup>137</sup> could harm the “integrity of our tax system,”<sup>138</sup> which requires that “the load [be] distributed fairly.”<sup>139</sup> Moreover, its not being self-consciously corrupt hardly stands as a vigorous defense when the average Congressman’s deliberate naïveté puts him, at best, “in the position of the small boy inwardly seeking parental bounds for his conduct [via Treasury pushback] while outwardly declaiming against them.”<sup>140</sup>

Observers sometimes ask why Surrey’s commitment to horizontal equity did not similarly condemn wealthy taxpayers’ taking advantage of the realization requirement to defer tax on the economic gain from asset appreciation.<sup>141</sup> Surely one reason is that such deferral mattered less—at least, absent the rule, which Surrey opposed, under which it is permanently eliminated upon the asset-holder’s death<sup>142</sup>—in the absence of high interest rates, which emerged only near the end of Surrey’s life. Second, Surrey viewed the lack of broad public support for taxing unrealized gain, and for the Haig-Simons income definition’s full implementation, as an important practical constraint to keep in mind.<sup>143</sup> Yet his support for “concerted attack[s]” as necessary on tax shelters<sup>144</sup> makes it clear that he would have supported later eras’ legislative and regulatory attacks on aggressive realization-based tax planning.

Yet the fact that the realization requirement has a longstanding and at least plausible administrative rationale—rather than having been adopted as a special Congressional favor to those seeking special exceptions from the application of the general tax structure—places it, for Surrey, in a different moral category than, say, the municipal bond interest exclusion. He does not merely accept that awaiting realization might be administratively convenient. That could still be consistent with deeming the deferral a regrettable—even if necessary—violation

---

135. Stanley S. Surrey, *The Congress and the Tax Lobbyist: How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1161 (1957).

136. *Id.* at 1150.

137. Surrey, *supra* note 13, at 29.

138. Surrey, *supra* note 135, at 1181.

139. Surrey, *supra* note 13, at 29.

140. Surrey, *supra* note 135, at 1164.

141. See, e.g., Michael Simkovic, *Did New Deal Liberalism Steer Too Far to the Right?*, 174 TAX NOTES FED. 681, 681 (2022).

142. I.R.C. § 1014(b)(9).

143. Lawrence Zelenak, *Stanley Surrey and Taxing Unrealized Appreciation*, 86 LAW & CONTEMP. PROBS., no. 2, 2022, at 153, 162.

144. Surrey, *supra* note 15, at 16.

of horizontal equity, as measured relative to economic income. However, Surrey's focus on legislative motivation leans against taking such a view. A generally applicable administrative rule is simply different, within his framework, than granting special favors based on accepting the complainants' arguments at face value without recognizing any obligation to hear all sides.

It is here that one might discern an at least indirect connection to Surrey's life experiences. Again, he favored the exercise of fair and unbiased judgment, be it through the application of meritocratic standards or the meticulous exercise of well-informed expertise. This differed, however, from willful favoritism and the exercise of bias. The latter was involved when Ivy League colleges and Wall Street law firms declined to admit the likes of Jews, Catholics, immigrants, African Americans, and women.<sup>145</sup>

In his academic career, Surrey showed a broader aversion to bias against particular groups, not limited to Jewish people. He objected to law schools' excluding women from their classes<sup>146</sup> and faculties<sup>147</sup> and voiced early support for racial equality and affirmative action.<sup>148</sup> All this could naturally relate to his deeming it fundamentally unfair when some people are treated better than others because the insiders are selectively taking special care of their own.

### 3. Surrey's Belief in Moderate Progressivity

While predominantly focusing on horizontal equity, Surrey also cared about tax progressivity.<sup>149</sup> Its receiving less attention in his work than horizontal equity partly reflects his viewing tax rate design as more of a political than a technical choice, and hence as not having an *ex ante* "right answer" that experts knew best, to the same degree as tax base design.

Surrey's support for progressivity fits well with his view that basic human decency should push one towards liberalism, and away from conservatism. Moreover, even though issues of horizontal and vertical equity are in principle distinct, his distaste for horizontal equity violations often has a vertical equity flavor. For example, he finds it offensive that, as a result of Congress's allowing capital gains treatment for stock options, wealthy executives may face lower

---

145. While the memoirs do not address women in the workplace (other than as law students and law professors), he appears at least implicitly critical of the House Ways and Means Committee's reluctance in 1942 to pass a deduction for working women's childcare expenses, on which he had worked while at the Treasury, because its members "believed mothers should stay at home." *Surrey Memoirs*, *supra* note 1, at 51.

146. *See id.* at 88 (acknowledging that Harvard's long-time refusal to admit women seemed "strange to a 1932 Columbia graduate who assumed the women present in that class just naturally belonged there").

147. *See Surrey Memoirs*, *supra* note 1, at xxiv (noting that Surrey helped his protégé Elizabeth Owens to become the first woman granted tenure at Harvard Law School).

148. Wolfman, *supra* note 50, at 345.

149. *See Surrey Memoirs*, *supra* note 1, at 44 (describing like-minded Treasury economists as having a "strong preference for a progressive income tax," as well as for horizontal equity).

marginal tax rates on their compensation than low-paid clerks.<sup>150</sup> Likewise, he condemns the “upside-down” character of preferential deductions and exclusions, which results from the items offering larger percentage subsidies to taxpayers in higher marginal rate brackets.<sup>151</sup> And he notes that a “windfall to upper-bracket taxpayers . . . is always the end result when tax exempt bonds are used.”<sup>152</sup> While emphasizing the technical inefficiency that results from the bonds’ revenue cost to the Treasury greatly exceeding the benefit conveyed to municipalities,<sup>153</sup> he also appears to find the “windfalls” distasteful.

His own preference for progressivity was fairly moderate, however. Again, he favored using the revenue from base-broadening to lower the extremely high top-end marginal rates of the 1950s and 1960s. He mainly rationalized this in terms of Congress’s and the public’s unease with the true substantive application of such high rates, thus leading to the rampant growth of tax preferences. Yet he also did not himself want such “fantastically high rates”<sup>154</sup> to apply effectively in practice. They would overly bias business decisions<sup>155</sup> and might even, at some point, “have an adverse effect on work and investment.”<sup>156</sup>

Surrey’s preference for only moderate progressivity at the top fit well with his generally pro-market and meritocratic sentiments. As Donald Lubick put it, “[w]hile not hostile to wealth, he was hostile to greed.”<sup>157</sup> Asking the rich to pay somewhat more, and to use their social and economic power responsibly, did not imply unease with significant after-tax inequality. Then again, however, Surrey did not live to see the last few decades’ rising income and wealth concentration at the very top.<sup>158</sup>

This aspect helps to make Surrey’s political legacy today surprisingly centrist. On the one hand, he was a classic “product of New Deal and Great Society liberalism,” whose career embraced the fifty-year run—from Franklin Roosevelt’s presidency to Ronald Reagan’s—of the “modern activist state.”<sup>159</sup> He also took positions on both corporate and international tax policy that would count today as markedly on the progressive side. On the other hand, by advocating lower tax rates and a broader base, Surrey helped to inspire the

---

150. *Id.*

151. *See Surrey Memoirs, supra* note 1, at 78 (noting the failure of the Treasury to understand the upside-down effect of medical deductions that were meant to alleviate burdens at lower marginal rates); *see id.* at 307 (describing Surrey’s defense of President Carter’s proposal to eliminate income tax deductions based on the upside-down effect of home mortgage interest deductions).

152. *Surrey Memoirs, supra* note 1, at 339.

153. *Id.*

154. *Surrey, supra* note 13, at 29.

155. *Id.*

156. *Id.* at 28.

157. Lubick, *supra* note 7, at 339.

158. *See* Daniel Shaviro, LITERATURE AND INEQUALITY: NINE PERSPECTIVES FROM THE NAPOLEONIC ERA THROUGH THE FIRST GILDED AGE 3 (2020).

159. *Surrey Memoirs, supra* note 1, at xxxi.

Reagan era's Tax Reform Act of 1986<sup>160</sup>—viewed by some as embodying a new “market-conforming . . . [and] neoliberal tax policy paradigm”<sup>161</sup> that would dominate the next few decades. Yet this overlap with the subsequent rise of neoliberalism—or alternatively, its selective cooptation of some of his New Deal-inspired views—should not be interpreted as suggesting that he would have been anything but appalled by the 1980s' and 1990s' widespread departures from, and rejection of, many of the precepts of New Deal liberalism.

### III

#### THE WORK OF A TAX MORALIST

##### A. Theory And Practice

One thing that Surrey's background clearly shows is the difference between a moralist and a zealot. While strongly, or even rigidly, committed to his preferred version of tax reform, the underlying commitments that help motivate it—whether or not one shares them all—are fairly mainstream, conventional, and multifaceted. He recognizes the need for tradeoffs, such as between efficiency and distributional concerns. His viewing tax expenditures as verging on *never* being justified reflects both their upside-down effect, which he presumes would almost never be a plausible design feature of a direct spending program, and a set of political economy concerns. These include not only his underlying aversion to the exercise of biased judgment in favor of insiders, but also a precociously sophisticated understanding of interest group politics,<sup>162</sup> and a belief regarding the distinctive optics of income taxation that many others, to this day, share.<sup>163</sup>

##### 1. Support For The Investment Tax Credit

One episode that has drawn especial pushback, given its uneasy relationship to Surrey's general views, is his role in the Kennedy Administration as the “godfather”<sup>164</sup> of a then-brand-new type of tax expenditure, the investment tax credit (ITC). Richard Musgrave viewed this episode as showing that “history has also its sense of humor,”<sup>165</sup> although he notes Surrey's reasons for preferring the

160. *Id.* at xxvi.

161. Duane Swank, *The Spread of Neoliberalism: U.S. Economic Power and the Diffusion of Market-Oriented Tax Policy* 3 (Ctr. for Eur. Stud. Working Paper No. 120, 2004), [https://ces.fas.harvard.edu/uploads/files/Working-Papers-Archives/CES\\_WP120.pdf](https://ces.fas.harvard.edu/uploads/files/Working-Papers-Archives/CES_WP120.pdf) [<https://perma.cc/R3QE-AXA3>].

162. See Surrey, *supra* note 135, at 1153 (discussing the supremacy of political compromise and interest group pressure over “‘technical’ tax arguments” when Congress decides tax issues).

163. See generally Shaviro, *supra* note 3; Edward Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Process*, 36 OHIO N. L. REV. 1 (2010). For a contrary view of the tax system's distinctive optics, see generally David Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004).

164. Musgrave, *supra* note 41, at 336.

165. *Id.*

ITC to the more conventional use of accelerated depreciation. It “would be more explicit and less distorting in its effects on investment; moreover, it would leave the way open for subsequent reform toward economic depreciation.”<sup>166</sup>

Zelenak and Mehrotra criticize Surrey’s response on *Firing Line* when William F. Buckley noted the contradiction between the ITC and his general view of tax expenditures. They characterize him as “weakly offer[ing], ‘Well, I don’t think that one can be an absolutist about these things . . . . Everybody knows [the ITC] has nothing to do with the tax system.’”<sup>167</sup> Yet history has proved the latter claim exactly right. The fact that the ITC, unlike accelerated depreciation, looked like a deliberate departure from simply measuring net income surely contributed to its proving so “ephemeral.”<sup>168</sup> The general ITC periodically came and went between 1962 and 1986, and then was permanently—at least so far—repealed.<sup>169</sup>

Thus, the ITC episode neither greatly contradicts Surrey’s general stance, nor shows especial flexibility. Asked by his superiors in the Kennedy Administration to design a stimulative and pro-investment policy to be administered through the tax system, he did as much as he could to make it clearly distinguishable from ordinary tax expenditures. He also had no reason, despite his generally pro-market sentiments, to oppose Keynesian macroeconomic stimulus that could be delivered through either monetary or fiscal policy—including use of the tax system. One lesson the Great Depression had definitively taught a generation of policymakers—although it needed to be relearned after the 2008 Great Recession—was that business downturns can be eased through budgetary stimulus.<sup>170</sup>

## 2. Too “Theoretical”?

The fact that Surrey otherwise so consistently stuck to a set of general principles inevitably encouraged critics to level what he called the “derogatory” critique that his analysis was “too theoretical — just what a . . . professor[] would

166. *Id.* The ITC was less distortionary than typical proposed uses of accelerated depreciation for two reasons. First, its preferentiality did not vary in the same way with a given asset’s actual economic life. Second, its value did not vary with the taxpayer’s marginal rate—leaving aside the case where a taxpayer has no positive tax liability for it to offset. Surrey recognized this problem and noted that it could be addressed by making the ITC “refundable to a taxpayer not having enough tax liability to absorb it,” thus effectively transforming it into the equivalent of direct spending. *See* Surrey, *supra* note 12, at 250.

167. *Surrey Memoirs*, *supra* note 1, at xlii.

168. *Id.* at xxviii.

169. *See, e.g.*, Rachael I. Lambert, *The History of the Investment Tax Credit* (2013) (B.A. thesis, Columbus State University) (available online at [https://csuepress.columbusstate.edu/cgi/viewcontent.cgi?article=1134&context=theses\\_dissertations](https://csuepress.columbusstate.edu/cgi/viewcontent.cgi?article=1134&context=theses_dissertations) [<https://perma.cc/L4Y4-97MZ>]) (discussing today’s tool of choice for incentivizing investment (relative to an income tax baseline) is expensing, which, unlike an ITC, does not look as if it has “nothing to do with the tax system,” given that it is netting outlays against inflows).

170. Surrey states in his memoirs that his academic career through 1961 (when he went to the Treasury Department) had left him with “[s]ome understanding of fiscal policy issues—probably as much as lawyers possessed—but a realization that the analysis and framing of those issues are not in the lawyers’ domain.” *Surrey Memoirs*, *supra* note 1, at 104.



do.”<sup>171</sup> Surrey hated this critique of being “too theoretical,” which the power of cliché and stereotyping ensured he would encounter regularly.<sup>172</sup>

Rather than just shrug it off, however, Surrey went to extraordinary lengths in his career to ensure that he would *not* just be a theorist, but also have extensive practical knowledge. For this reason, he consistently pursued a “good acquaintance with the working bar and some feel for their problems, activities, and daily life,”<sup>173</sup> including through weekly lunches with the tax group at a leading Boston law firm, along with other regular meetings with practitioner groups,<sup>174</sup> and “consulting on behalf of clients or advising clients directly, since such work broadened my insights into the practice of tax law.”<sup>175</sup> Indeed, many decades before business and tax deals classes became standard law school fare, he created an advanced tax seminar at Berkeley Law School in which “each week a different tax practitioner . . . presented to the students a combined tax and business problem on which he was currently working.”<sup>176</sup> He aimed to leave practitioners no choice but to respect his “technical knowledge,” even if they could not be wholly dissuaded from deeming him an “unrealistic fellow.”<sup>177</sup>

Likewise on the theoretical front, rather than just relying on the “strands” that he had first intuited while working as Roswell Magill’s tax research assistant, Surrey pursued extensive contacts with economists, especially favoring the “small group”<sup>178</sup> among them who could understand the “link between [their] theoretical world . . . and the government world of decision-making.”<sup>179</sup> Thus, in addition to inviting practitioners to co-lead tax deals classes, he also pioneered co-teaching tax policy seminars with economists and business school professors.<sup>180</sup> Moreover, while eager to learn from economists whatever he could, he was jaundiced about those who “knew only how to write and talk in economic jargon,”<sup>181</sup> as well as cynical about those whose purported econometric findings not only rested on well-concealed assumptions, but “always seemed to support [their] viewpoints . . . [and] individual biases.”<sup>182</sup> No economist wannabe or manqué, he aimed rather

---

171. *Id.* at 116.

172. *See id.* at 151 (“[T]ax policy debating points are the same the world over, and one staple criticism . . . is that [of being] ‘too theoretical.’ This contention, however, generally marks a position that is being taken for different policy reasons.”). *See also id.* at 163, 174 (disparaging a Harvard colleague who, while at the Treasury Department, misrepresented a policy disagreement by averring that “those of us who are trying to *do* things find that what he might theoretically like is not in fact practical” (emphasis added)).

173. *Id.* at 104.

174. *Id.* at 239.

175. *Id.* at 102.

176. *Id.* at 84.

177. *Id.* at 104.

178. *Id.* at 102–03.

179. *Id.* at 103.

180. *Id.* at 88–89.

181. *Id.* at 103.

182. *Id.* at 211.

to promote mutual knowledge—and his own understanding of proper tax policy design—through open intellectual exchange between two groups that had complementary realms of intellectual comparative advantage.

Much as Surrey hated being deemed overly theoretical and impractical, this is exactly the charge that he leveled at economists whose “dream goal” it was to fully integrate the individual and corporate income taxes.<sup>183</sup> In late-career academic writing, he accused such economists of living “almost in a dreamlike world” and pursuing “tax theology” in lieu of useful or realistic analysis.<sup>184</sup> The echo of how he himself was commonly criticized is striking. What nonetheless justified it, in his view, was such economists’ neither (a) seriously thinking through the practical obstacles to full integration, which no country had ever adopted, nor (b) presenting persuasive empirical evidence regarding the empirical magnitude of the efficiency concerns on which they “plant[ed] their flag of integration,”<sup>185</sup> nor (c) giving due weight to the fact that such partial integration measures as dividend tax relief would offer a “revenue bonanza” to “upper bracket shareholders.”<sup>186</sup> In sum, he viewed them as simply not having done the hard work in support of their tax policy views that he felt he had been doing for decades in support of his own.

## B. Tax Expenditure Analysis

Above all else, Stanley Surrey “was and is identified with the tax expenditure concept and the regular production by the federal government of tax expenditure budgets.”<sup>187</sup> To be sure, this does not take account of his arguably even more influential work in “invent[ing] the ideal of tax reform as a base broadening, rate cutting measure.”<sup>188</sup> However, the gradual fading of that concept, after decades at centerstage,<sup>189</sup> has left tax expenditure analysis as, indeed, his main legacy—unless one chooses instead his work in international tax policy, which arguably has proven even more enduring,<sup>190</sup> but which I leave for another day.

Depending on one’s perspective and expectations, Surrey’s tax expenditure work was either an extraordinary success or a disappointing failure. On the plus side, it made him “one of the rare academics who succeeded in putting his ideas into legislative action and administrative policy.”<sup>191</sup> Even beyond official

---

183. *Id.* at 314.

184. Surrey, *supra* note 17, at 335.

185. *Id.* at 340.

186. *Id.* at 339.

187. *Surrey Memoirs*, *supra* note 1, at xxxviii.

188. Avi-Yonah & Fishbien, *supra* note 8, at 121.

189. See, e.g., Daniel Shaviro, *1986-Style Tax Reform: A Good Idea Whose Time Has Passed*, 131 TAX NOTES 817 (2011) (discussing three main reasons why the rationale of the 1986 reforms is no longer in favor).

190. See Avi-Yonah & Fishbien, *supra* note 8, at 121 (“Surrey’s most lasting contribution was his articulation and implementation of the single tax principle in international taxation.”).

191. Simkovic, *supra* note 141, at 681.

measures, scholars and leading NGOs in the tax world have regularly made use of the tax expenditure concept, based on recognizing its substantial—even if not wholly unchallengeable—conceptual merit.<sup>192</sup> On the minus side, it failed to achieve not only its intended aim of reducing the actual use of tax expenditures,<sup>193</sup> but even the degree of academic consensus in its favor that Surrey had sought. “Instead, a significant strand of legal academic work has deprecated the normative basis of tax expenditure analysis.”<sup>194</sup>

Here I will address two topics. First, did Surrey oversell tax expenditure analysis, reflecting the downside of his functioning as a moralist with policy ambitions, rather than just as a scientist with purely analytical ones? And relatedly, does this help explain its attracting so much academic pushback? Second, why has it had so little practical effect?

### 1. Did Surrey Oversell Tax Expenditure Analysis?

The core of tax expenditure analysis has perhaps never been better set forth than by David Bradford in a working paper published more than twenty years ago.<sup>195</sup> Here he describes the supposed “secret Bradford plan”<sup>196</sup> to cut both taxes and spending:

Step 1 of the Bradford plan is to cut the weapons procurement request in the defense budget to zero. Taken by itself, this would harm defense capacity. Step 2, designed to offset this unfortunate effect, calls for enactment of a new “weapons supply tax credit” (WSTC). To qualify for the WSTC, manufacturers will sign appropriate documents prescribed by the Secretary of Defense . . . . [requiring delivery of the very same weapons as before.] The WSTC, which may be transferred to other taxpayers without limit, may only be used in payment of income tax. Step 2 is, apparently obviously, a tax cut.<sup>197</sup>

At the end of the day, while the Bradford plan would ostensibly cut both taxes and spending, “economic reality would be unaffected.”<sup>198</sup> Moreover, calling the WSTC a “tax cut”—the same term that would be used to describe, say, reducing marginal tax rates—is clearly misleading, and would invite policymakers to engage in deliberate deception.

Tax expenditure analysis responds to such linguistic malpractice by reclassifying the WSTC as “really” spending. Unfortunately, however,

---

192. See e.g., *Tax Expenditures*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/feature/tax-expenditures> [<https://perma.cc/B8WT-5GNX>] (the Tax Policy Center prominently features a discussion of tax expenditures on its website).

193. See Kleinbard, *supra* note 163, at 2 (discussing the United States’ tax system’s “extraordinary reliance on tax expenditures”).

194. *Id.*

195. See generally David Bradford, *Reforming Budgetary Language* (CES-IFO, Working Paper No. 619, 2001), <https://www.cesifo.org/en/publications/2001/working-paper/reforming-budgetary-language> [<https://perma.cc/23YC-RKAL>].

196. *Id.* at 7.

197. *Id.* at 7–8.

198. *Id.* at 8.

“[e]conomics tells us that [such a] label is uninformative.”<sup>199</sup> For example, “[i]t is a commonplace of public finance that transfer payments . . . and taxes . . . are entirely symmetric.”<sup>200</sup>

As I have noted elsewhere, a pertinent distinction that *is* economically meaningful concerns that between what Richard Musgrave, Surrey’s close colleague and friend, labeled the allocative and distributional branches of the fiscal system:

Allocation affects the amount, use, and character of all assets in society, while distribution affects who has what. Thus, paying police and building roads are allocative activities, while using income measures to determine tax liabilities or transfer receipts is distributional. Tax expenditures are best defined as mainly allocative rules that, as a formal matter, are found within the (ostensibly mainly distributional) tax system.<sup>201</sup>

How could Surrey have run into controversy when he was making so “analytically unassailable”<sup>202</sup> a point? True, he was—no doubt wisely—avoiding any direct use of Musgrave’s more formal economics jargon. As Bradford notes, the problem was that, by “conceiv[ing] of tax expenditures as deviations from some sort of ideal or normal version of the tax”—a term that might “tend[] to be interpreted normatively, as what the system ‘should’ be,” he “naturally attracted controversy.”<sup>203</sup>

Bradford himself, for example, given his “particular policy preference for consumption rather than Haig-Simons income taxation,”<sup>204</sup> questioned Surrey’s classifying the “consumption-type treatment of retirement savings under the existing income tax . . . as a subsidy to such savings.”<sup>205</sup> He noted that, “if a consumption type tax is taken as the reference standard, the retirement savings provisions are ‘correct’ and capital income taxes would be regarded as a negative subsidy (i.e., a tax).”<sup>206</sup> So there was no analytically unassailable case requiring Bradford to view income tax preferences for retirement saving as purely allocative policies that, for political economy reasons, should likely be replaced, if at all, with direct spending.

Surrey’s standard reply to such critiques was that we in fact have an income tax, rather than a consumption tax, and therefore *that* is objectively the correct baseline. Yet it was no secret that he supported income taxation,<sup>207</sup> making this

---

199. Shaviro, *supra* note 3, at 188.

200. Bradford, *supra* note 195, at 5–6.

201. Shaviro, *supra* note 3, at 188.

202. Bradford, *supra* note 195, at 29.

203. *Id.*

204. *Id.* at 30.

205. *Id.*

206. *Id.*

207. For most of Surrey’s career, there was little talk of replacing the income tax with a comparably progressive consumption tax, and thus he appears to have seen no need to address the issue. Once that issue rose to the forefront of academic discussion, however, he responded sophisticatedly, and in very much the same terms that one might expect to hear today from those who are similarly disposed. In particular, while he agreed that a consumption tax could at least in principle be equally progressive, might

response rather convenient. Moreover, we have always in practice had a “hybrid” income-consumption tax,<sup>208</sup> and the question of where, as between these two poles, it ought to be situated has continuously been controversial. Consumption tax advocates had no good reason to view movement towards the income tax pole as superior tax policy, even granting the possibility that government spending—such as through Social Security—might be used to address, say, the income tax’s discouragement of retirement saving. Moreover, whereas foes of increasing the tax system’s progressivity might have their concerns allayed by Surrey’s idea of accompanying base-broadening with rate reduction so that it was distributionally neutral, no such offset was being offered to consumption tax proponents.<sup>209</sup>

In short, one could reasonably—whether or not fairly—view Surrey as over-extending his analytically unassailable point about certain types of special tax provisions in such a way as to effectively short-circuit (by winning) a set of ongoing debates about proper tax base design. Similar concerns could also arise in other cases where he might be viewed as using tax expenditure analysis in such a way as to end, in effect by diktat, ongoing debates about what distributional policy through the tax system should look like.

For example, consider charitable and medical deductions, which William Andrews argued make normative sense within the structure of a federal income tax.<sup>210</sup> Even if one finds these arguments unpersuasive, as I do, and agrees with Surrey that any partial federal reimbursement for such outlays should not automatically have an upside-down structure—as happens if they are deductible—extensive analysis of the competing arguments is needed before one can reach any such conclusions. Such a debate is likewise unduly short-circuited by Surrey’s purporting to resolve them via the putatively “normal” design of the tax.<sup>211</sup>

The existence of such disputes, in which Surrey might reasonably be viewed as seeking to derive an undue political advantage from seemingly neutral claims about the tax’s objective structure, had further adverse spillover effects on the

---

be more efficient, and was more horizontally equitable if one based such comparisons on lifetime income, he argued that its proponents were overlooking the “political, economic, and social power” that wealth has even when it is not currently being spent. See Surrey, *supra* note 15, at 1–2.

208. William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1120 (1974).

209. As Surrey recognized, consumption tax proponents might differ from income tax proponents simply by reason of applying horizontal equity with respect to lifetime income, rather than current year income. Surrey, *supra* note 15, at 1.

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

211. In response to Andrews, Surrey agreed that “[w]hether medical expenses and charitable contributions constitute ‘consumption’ are issues that must be debated in structuring taxes on consumption . . . . But all of this is a far cry from the structure of an *income* tax, a tax which does not focus on ‘consumption’ but on ‘income.’” Surrey, *supra* note 12, at 20. This overlooks the point that income is commonly thought of as equaling consumption plus saving. Allowing (or not) deductions for medical expenses and charitable contributions pertains to defining current-year consumption, which is taxable under *both* systems.

reception of tax expenditure analysis. In particular, it appears to have adversely affected the reception of his treating administrative features of the income tax, such as the realization requirement, as within its normal structure.

Surrey stood on strong ground when he argued, in effect, that the concession of not taxing unrealized gain is made by Musgrave's distributional branch. Moreover, if the rationale for this concession is purely administrative, then presumably no one would seriously consider replacing it with Haig-Simons income taxation *plus* the provision of direct subsidies to those with unrealized gains. Thus, a key purpose to be served by tax expenditure analysis—identifying cases where the use of government spending in lieu of tax concessions *was* a plausible alternative—did not apply here.

Yet the reasonableness of such points could easily be overlooked, once Surrey's claim to be relying neutrally on the tax system's "normal" structure had been subsumed into bona fide debates about tax base design. The existence of such debates encouraged those on the other side to ask whether the asserted normal structure deserved the degree of normative weight that he appeared to be giving it. And once *that* became the question, the problems associated with realization—the "Achilles heel of the income tax,"<sup>212</sup> as Andrews once called it—might naturally be viewed as weighing heavily on the negative side. Thus, Surrey's entire line of argument, including even its analytically unassailable elements, ended up being undermined by the interplay between what one might call its rhetorically more aggressive aspects and its forgiving treatment of realization.

These tensions could push even reputable academic commentators into losing any semblance of a balanced perspective. To Douglas Kahn and Jeffrey Lehman, for example, Surrey was suggesting that all provisions *not* constituting tax expenditures are "somehow pure, safe, and good,"<sup>213</sup> whereas any item to which he assigned the label was "somehow corrupt, dangerous, and evil," such that even "[t]o flirt with them is to call one's probity into question."<sup>214</sup> Kahn and Lehman then dismiss all of tax expenditure analysis as equivalent to a fanciful scenario in which purported "zookeeping experts" demand that "panda bears" be banished from the National Zoo based on their own wholly arbitrary beliefs that (1) "normative zoos" should "house no animals other than bears(!)," and (2) "panda bears" are actually "raccoons."<sup>215</sup>

Speak of throwing out the baby with the bathwater! Despite their disclaiming intellectual "nihilis[m],"<sup>216</sup> Kahn and Lehman entirely lose sight of the clear

---

212. William D. Andrews, *The Achilles' Heel of the Comprehensive Income Tax*, in *NEW DIRECTIONS IN FEDERAL TAX POLICY FOR THE 1980S* 278, 280 (Charles E. Walker & Mark A. Bloomfield eds., 1983).

213. Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 *TAX NOTES* 1661, 1662 (1992).

214. *Id.* at 1663.

215. *Id.* at 1665.

216. *Id.*

advances that tax expenditure analysis makes possible beyond the sort of formalistic classifications that would classify the WSTC, no less than lowering marginal rates, as a tax cut.<sup>217</sup> Yet their benighted overreaction to the provocation that they perhaps oversensitively attribute to tax expenditure analysis testifies to an at least rhetorical failure on Surrey's part in trying to make it do too much work.

This failure, in turn, seems to have been rooted in a fundamental aspect of his worldview: his meritocratic belief that credentialed experts both can and should establish the basic conceptual categories that others will then dutifully accept. Thus, for example, he treats it as a dispositive response to Andrews' arguments about medical expenses and charitable contributions that "most economists would classify these items as tax expenditures. Hence their place in the Tax Expenditure Budget."<sup>218</sup>

Even within the realm of the experts, this does not work very well when opinions are deeply split. But it is not just a matter of dispute regarding *which* arguments have indeed been duly adjudged correct. Kahn and Lehman also express a more widely held—and generally commendable—distaste in American intellectual culture for the rhetorical move of trying to settle debates by appealing to authority. Worse still, they espy in Surrey a rejection of the principle holding that "the ultimate choice must rest with the citizen and not the oracle."<sup>219</sup> In a nominally democratic and egalitarian society where the challenge of elitism is routinely hurled at experts—often by members of rival business and political elites that collectively enjoy far greater power and cultural prestige than the expert<sup>220</sup>—this posture of claiming higher authority can leave one feeling decidedly uncomfortable and exposed.

## 2. Why Has Tax Expenditure Analysis Had so Little Practical Effect?

The degree of academic pushback against Surrey's claim of an expert consensus in favor of tax expenditure analysis would likely have doomed its chances of political efficacy, had such chances been significant in the first place. It meant that those supporting the continued use of special tax breaks could point to a genuine split in the field. In effect: if the experts don't generally agree with Surrey, then why should we even reach the issue?

This is not to say, however, that even a robust academic consensus in favor of tax expenditure analysis as formulated by Surrey—starting, say, with a rousing Bittker endorsement—would have made any significant difference politically. One really needs a theory of legislative politics in order to assess any such claim.

---

217. As Edward Kleinbard noted more than a decade ago, "gentle parody to illustrate the empty formalism of our concepts of Government revenues and Government expenditures . . . rel[ying] on hyperbole to make its point" has now "lost its punchline" as similar real-world examples (such as certain energy sector tax credits) proliferate. Kleinbard, *supra* note 163, at 2.

218. Surrey, *supra* note 12, at 21.

219. Kahn & Lehman, *supra* note 213, at 1662.

220. See Shaviro, *supra* note 158, at 115.

Leading academic theories—for example, those emphasizing the power of economic elites or, alternatively, of business-oriented interest groups and industries<sup>221</sup>—offer little ground for optimism in this regard.

The belief that tax expenditure analysis could be politically efficacious seems easiest to endorse under a naïve public interest view of politics as a good faith inquiry into the question of what is best for us all. Or, one might imagine its acquiring political influence via acceptance of its main premises by the general public. This, however, would seem to require quite unrealistic levels both of public engagement and understanding with respect to tax policy, and of actual majoritarian influence over the legislative process—in tension with the views of leading political scientists.<sup>222</sup>

Neither Surrey nor, to my knowledge, any subsequent proponent of his views has ever grounded support for the potential political efficacy of tax expenditure analysis in such questions of *realpolitik* as who in the political realm might be expected to favor it, and on what grounds they might see its use as benefiting them. Surrey appears to have relied instead on the hope that, with proper presidential leadership, well-intentioned and well-informed experts at the Treasury Department would be allowed by Congress to guide the tax legislative process.<sup>223</sup>

Surrey's own memoirs offer little evidence in support of such a scenario's realism. A case in point involves the Carter Administration, during which he served as a consultant while also having links to various friends and protégés in top Treasury positions.<sup>224</sup> Despite his apparent influence—and close public association, by this time, with tax expenditure analysis—consider what happened once the newly elected President Carter had chosen in 1977 to prioritize energy legislation ahead of tax reform. The Administration then decided to:

[U]se the tax system as the vehicle to carry the program – tax credits for certain activities, a denial of deductions for other activities, and excise taxes on other activities . . . . [This] was directly contrary to what was the necessary approach of a tax reform program, that of reducing tax expenditures and instead to use direct programs to accomplish desired goals.<sup>225</sup>

The Carter energy bill's reliance on tax expenditures does not appear to have been mere coincidence. More likely, it reflected a belief among the proponents that this might be politically advantageous or administratively convenient, or

---

221. See, e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSPS. ON POL.* 564, 564 (2014) (finding significant empirical support for theories of economic-elite domination and biased pluralism, and a lack of support for theories of majoritarian electoral democracy and majoritarian pluralism).

222. See *id.* at 577 (“Our analyses suggest that majorities of the American public actually have little influence over the policies our government adopts.”).

223. See, e.g., Surrey, *supra* note 135, at 1182 (making the case for presidential and Treasury leadership); Yin, *supra* note 82, at 109 (“Surrey’s faith in expertise and fierce commitment to tax equity and fairness led him to believe that Treasury should play the dominant role in the legislative process.”).

224. See *Surrey Memoirs*, *supra* note 1, at 313, 316.

225. *Id.* at 313.



both. While Surrey bemoans the energy advisors' lack of a "tax background,"<sup>226</sup> he notes without comment the decision to develop the program "almost in secret," and with the Treasury Department—filled with his acolytes—being "scarcely consulted."<sup>227</sup> Moreover, while he mentions the failed energy bill's adverse effect on the Administration's subsequent turn to tax reform, he appears well-aware that its rapid and ignominious collapse had resulted from missteps other than its use of tax expenditures.<sup>228</sup>

The memoirs also are generally devoid of naïveté regarding tax reform's political salability. For example, he notes that "[i]t is best in a [presidential] campaign, as I learned in the Kennedy campaign, to stay away from tax issues, since they have a capacity whatever their merits largely to annoy rather than please people."<sup>229</sup> He also agrees that Congressional staffers who shared his views were best advised to appear "officially . . . neutral" while expressing their "liberal tax reform bent . . . [only] softly, when [they] could."<sup>230</sup>

Once one abandons Surrey's hope that presidential white knights will succeed in commanding the hack politicians in Congress to embrace with all due meekness the superior wisdom of Treasury experts, one is left with a failure of the moralist approach that nonetheless endures as a major contribution by Surrey the scientist. Tax expenditure analysis, for all its conceptual problems and overreach, enriches the field intellectually, by helping us to move past mere form towards a deeper inquiry regarding the relationship between distributional and allocative goals in the tax system.

Moreover, one should keep in mind two practical successes that are attributable to his efforts regarding tax expenditure analysis. First, Congress did indeed institutionalize the tax expenditure budget, which continues to be a feature of annual budgetary reporting. This expands public knowledge, even if it has not discernibly advanced base-broadening. Second, as Lawrence Zelenak has noted, Surrey's critique of upside-down tax benefits has helped to stimulate "a remarkable shift in the design of personal tax expenditures—from deductions dominating credits in the late 1960s to the dominance of credits over deductions today."<sup>231</sup>

To be sure, Surrey might have further strengthened the science, at the expense of the failed moralism, by not trying to use tax expenditure analysis to settle open debates within the tax policy community. Yet he would not be so widely remembered today, nearly forty years after his death, had he not so greatly advanced tax policy thinking, in ways that both reflect and transcend the

---

226. *Id.*

227. *Id.*

228. *See id.* at 314.

229. *Id.* at 214.

230. *Id.* at 217.

231. Lawrence Zelenak, *Giving Credits Where Credits Are (Arguably) Due: A Half Century's Evolution in the Design of Personal Tax Expenditures*, 24 FLA. TAX REV. 51, 57 (2020).

particular autobiographical and motivational roots of his work that his memoirs help to illuminate.

#### IV

#### CONCLUSION

The Surrey versus Bittker divide in models for good tax scholarship has something of a Beatles versus Rolling Stones character. Just as the early Stones' faux rebel-outlaw image helped position them as ostensibly the more bracing and authentic group, so Bittker's caustic takedowns of ambitious Theories of Everything suggest a more modern—or even post-modern—and refreshingly skeptical sensibility than Surrey's. Bittker also avoids the suspicion that lingers around Surrey of sometimes sacrificing pure science to the needs of his view of morality.

Yet the tax expenditure debate between them can also support a very different spin. Surrey was an idealist who wanted to make a positive difference in the world. Bittker's response has an air of logic-chopping for its own sake, in the pursuit of rhetorical effectiveness at the expense of any concern about real-world impact.<sup>232</sup> In the Trump and Putin-polluted early-mid-twenty-first century, perhaps the time has come once again to appreciate idealists who are willing to risk, not just their scientific purity, but also hostility and public political defeat, as the price of pursuing one's altruism.

Surrey is a very mid-twentieth century figure, and hence more tied to elitist and meritocratic values than we might be entirely comfortable with today. He appears to have believed strongly in the American Dream, at a time when it had more credibility than it does now. He worried less about economic inequality at the top than developments since his death might now seem to demand. Moreover, while the anti-Semitism that he must have experienced—although it remains unmentioned in his memoirs—may have influenced him intellectually, he seems to have thought, with his era's optimism, that invidious bias was on the way out. Hence, it need only be confronted in the most general and abstract terms, as the intellectual sin of favoritism or listening to just one side.

I myself end this project viewing my own leanings, which are more on the Bittker than the Surrey side of the spectrum, as somewhat of a selfish intellectual indulgence. For a final reminder of Surrey's personal commitment, consider the following anecdote that he offers in a footnote concerning the 1970s:

A word on the perils of having a Senator in for a visit at home. It was not long before [Senator Edward] Kennedy lit a cigar. But cigars are high on my wife's negative list. After greeting the Senator, my wife had retired upstairs. I saw I was in a no-win position. Paul [McDaniel] simply observed the scene. I decided that this time the Nation's interests came first and if the Senator concentrated best when he was smoking, so be it.

---

232. In fairness to Bittker, however, his 1972 book *THE CASE FOR BLACK REPARATIONS* shows another side to his intellectual commitments.

There was not full agreement on my wife's part, putting it mildly, as I learned after Kennedy left.<sup>233</sup>

Surrey presents this anecdote as mild domestic comedy. One imagines his wife objecting to cigar smoke on aesthetic grounds ("Not in my living room!"). In fact, however, this happened only a few years after Surrey tells us—also just in a footnote—that he had "suffered a severe heart attack (massive coronary infarct)."<sup>234</sup> Perhaps, then, her anger concerned his willingness to risk his own health and life in the cause of advancing tax reform by cultivating an important Senate ally.<sup>235</sup> And perhaps Surrey is not just joking when he says that "the Nation's interests came first."<sup>236</sup>

---

233. *Surrey Memoirs*, *supra* note 1, at 237 (note h).

234. *Id.* at 236.

235. This happened around the time that, as Surrey tells us, Kennedy had become "the leading tax reformer in the Senate." *Id.* at 221.

236. I have been told that a heart attack was the cause of Surrey's death in 1984.