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WILL THE FEDERAL INCOME TAX HAVE A BICENTENNIAL?*

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I. INTRODUCTION

Will there be a *Florida State University Law Review* symposium issue in 2113 celebrating (or lamenting) the bicentennial of the federal income tax? In the conventional usage of tax policy wonks, "income" tax has a specific technical meaning. The defining characteristics of an income tax are that it taxes saved income (in addition, of course, to taxing income devoted to current consumption) and that it taxes the investment return on savings.[1] The taxation of saved income distinguishes an income tax from a consumption tax, and the taxation of investment returns distinguishes an income tax from a wage tax. Despite the income tax label, the federal income tax has very significant consumption tax features, including most prominently the exclusion from the tax base of unrealized appreciation and the long-term deferral of tax on most retirement savings.[2]

To the extent the income tax really does tax income, it has been under both academic and political assault for the past few decades. On the academic side, as noted by Daniel Shaviro, there are signs of "an emerging new consensus . . . that an ideal consumption tax is unambiguously superior to an ideal income tax, taking into account concerns of both efficiency and distribution."[3]

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* This Essay is a revised version of a portion of an earlier article. Lawrence A. Zelenak, *Foreword: The Fabulous Invalid Nears 100*, 73 LAW & CONTEMP. PROBS. i, vii-xvii (2010).

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1. The inclusion in the income tax base of savings and of investment returns follows from the standard economist's definition of a person's income for a particular period as "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question." HENRY C. SIMONS, PERSONAL INCOME TAXATION 50, 61-62, 206 (1938).

2. I.R.C. §§ 1001 (indicating that gains are taxed only when realized), 219 (providing for deferral of tax on contributions to individual retirement accounts), and 401-20 (providing rules for employer-provided pensions and individual retirement accounts).

3. Daniel Shaviro, *Beyond the Pro-Consumption Tax Consensus*, 60 STAN. L. REV. 745, 747 (2007). For examples of representative pro-consumption tax scholarship, see EDWARD J. MCCAFFERY, FAIR NOT FLAT: HOW TO MAKE THE TAX SYSTEM BETTER AND SIMPLER (2002) and Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax*, 58 STAN. L. REV. 1413 (2006). The emerging

On the political side, the federal income tax has been in the crosshairs of House Republicans for the last twenty or so years. In the mid-1990s, the Chairman of the House Ways and Means Committee repeatedly expressed his desire to "tear the income tax out by its roots and throw it overboard."[4] In 1998, the Republican-controlled House of Representatives did what it could to grant his wish, voting in favor of a bill to terminate the income tax at the end of 2002 (with the tax to be replaced by some unspecified new federal tax).[5] More recently, one of the two fundamental tax reform proposals offered in 2005 by President George W. Bush's Advisory Panel on Federal Tax Reform had so many consumption or wage tax features—including immediate expensing of all long-lived business assets and a tremendous expansion of the availability of Roth IRA-type[6] wage tax treatment for savings—that the Panel made a point of not labeling the proposed tax an income tax.[7]

The income tax may be in no danger of being replaced by a consumption tax or a wage tax as long as any one of the White House, the Senate, or the House of Representatives is controlled by Democrats. If, however, the survival of the income tax for a second century depends on a Republican monopoly over Congress and the White House never emerging at any point in the next hundred years, the income tax would seem to be in deep trouble.

This Essay contends that the long-term survival prospects of the income tax are better than the preceding discussion might suggest—but not because continued taxation of savings and of investment return is anywhere close to assured. Rather, this Essay offers two arguments demonstrating how the conventional wisdom has misunderstood what it is that makes the income tax the income tax. According to these arguments, the income tax could meaningfully be said to have survived even if the current system were replaced by certain forms of taxation that are not income taxes in the standard expert usage.

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consensus has certainly not gone unchallenged. Significant challenges include Shaviro, *supra*, and Chris William Sanchirico, *A Critical Look at the Economic Argument for Taxing Only Labor Income*, 63 TAX L. REV. 867 (2010).

4. Barbara Kirchheimer, *Archer Addresses Contract Compromises and Reform*, 66 TAX NOTES 1083, 1083 (1995) (quoting Rep. Bill Archer).

5. Tax Code Termination Act, H.R. 3097, 105th Cong. (2d Sess. 1998).

6. I.R.C. § 408A.

7. THE PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 163-64 (Nov. 2005), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/Simple-Fair-and-Pro-Growth-Proposals-to-Fix-Americas-Tax-System-11-2005.pdf [hereinafter PRESIDENT'S ADVISORY PANEL] (describing the expensing of business assets under the "Growth and Investment Tax Plan").

The first argument points out that there is significant expert dissent from the standard usage, and that according to the dissenters some types of consumption taxes are also properly described as income taxes. The second argument (in my view the more interesting and more important of the two) considers public understandings and intuitions about the essence of the income tax, and concludes that—despite the income tax label—the taxation of saved income and investment returns is rather far down the list of the defining features of the income tax. According to this argument, if enough of the other (and more important) defining features continued to exist after fundamental tax reform had eliminated the taxation of saved income and investment returns, then the income tax would have survived.

II. CONSUMPTION TAXES AS INCOME TAXES, ACCORDING TO THE DISSENTING EXPERTS

There is less-than-total agreement among experts concerning tax base terminology; some experts apply the income tax label to tax bases that would be considered consumption tax bases under conventional usage. A little more than a century ago, the prominent economist Irving Fisher argued that income should be defined as consumption.[8] Henry Simons strongly objected to Fisher's terminology,[9] but some later experts have followed Fisher's lead. Consider, for example, the title of William D. Andrew's seminal 1974 article extolling the merits of a cash-flow consumption tax, which would be administered in a manner similar to the income tax, but under which all savings would be deductible (and all spending out of savings would be taxable): "A Consumption-Type or Cash Flow Personal *Income* Tax."[10] Other scholars have also referred to a cash flow tax as a "consumed income tax,"[11] despite the fact that under the standard usage a cash flow tax is a quintessential consumption tax. In fact, this usage can be traced back at least as far as John Stuart Mill, who claimed that "[n]o income tax is really just from which savings are not exempted."[12] The implication, of course, is that a tax from which savings are exempted can still qualify as an income tax.

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8. IRVING FISHER, THE NATURE OF CAPITAL AND INCOME 101-18 (1906). What is usually called income, Fisher referred to as earnings or as earned income. *Id.* at 332-33.

9. SIMONS, *supra* note 1, at 98.

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

11. *See, e.g.*, J. Clifton Fleming, Jr., *Scoping Out the Uncertain Simplification (Complication?) Effects of VATs, BATs and Consumed Income Taxes*, 2 FLA. TAX REV. 390 (1995); George K. Yin, *Accommodating the "Low-Income" in a Cash-Flow or Consumed Income Tax World*, 2 FLA. TAX. REV. 445 (1995).

12. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 814 (Sir William Ashley ed., Augustus M. Kelley Publishers 1969) (1848).

The cash flow tax is not the only consumption tax (in standard expert usage) to be described by some experts as an income tax. The flat tax, designed by economists Robert E. Hall and Alvin Rabushka,[13] and formerly championed politically by Steve Forbes[14] and Dick Armey,[15] is basically a value-added tax, bifurcated into a business tax and a wage tax. In the standard usage, it is indisputably a kind of consumption tax. According to Hall and Rabushka, however, the flat tax is an income tax.[16] They describe the base of the tax as a "comprehensive definition of income."[17] Although they also describe the base of the flat tax as consumption,[18] they avoid contradicting themselves by explaining that, in their view, an income base and a consumption base are the same thing.[19]

In sum, there is a significant amount of non-standard expert usage under which at least some forms of consumption taxes—especially cash flow taxation and the Hall-Rabushka flat tax—are considered income taxes. Adoption of this non-standard usage would improve considerably the long-term survival chances of the federal income tax, as the income tax would be considered to have survived if the current system were replaced by either a cash flow tax or the flat tax. To be sure, improving the odds of survival of the income tax by adopting an unconventional definition of income is not a very profound move and may even be something of a trick. A more interesting question is whether the basic premise of this approach—the assumption that the survival of the income tax depends on the continued use of income as the tax base—is mistaken. Perhaps the income tax label does not capture the essence of the tax. Perhaps what makes the income tax the income tax is something other than the fact that its base is (in a very imperfect sort of way) income. I consider that possibility in the next part.

III. THE ELUSIVE ESSENCE OF THE INCOME TAX

I suspect the public, if asked,[20] would identify five defining features of the federal income tax: (1) it is a mass tax, imposed on the

13. ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX (2d ed. 1995).

14. Ernest Tollerson, *Bowing Out: Forbes Quits and Offers His Support to Dole*, N.Y. TIMES, Mar. 15, 1996, at A26 (summarizing the 1996 Forbes presidential campaign).

15. Freedom and Fairness Restoration Act of 1995, H.R. 2060 and S. 1050, 104th Cong. (1st Sess. 1995) (sponsored by Rep. Armey and Sens. Shelby, Craig, and Helms).

16. Robert E. Hall & Alvin Rabushka, *The Flat Tax: A Simple, Progressive Consumption Tax*, *in* FRONTIERS OF TAX REFORM 27 (Michael J. Boskin ed., 1996).

17. *Id.*

18. HALL & RABUSHKA, *supra* note 13, at 40-41.

19. *Id.* at 40 ("[I]t is a comprehensive income tax (the base is GDP) with a 100 percent immediate write-off of all business investment at the level of the business enterprise. It is a consumption tax because it removes all investment spending from the tax base.").

20. There has been extensive public opinion polling on a wide range of tax issues, but

bulk of the population; (2) it is imposed directly on individuals as taxpayers (as contrasted with the indirect effects of a retail sales tax or a value-added tax); (3) it is imposed on inflows (receipts) rather than on outflows (expenditures); (4) it features progressive marginal tax rates; and (5) it uses exclusions, deductions, and credits to adjust tax liabilities in response to various aspects of taxpayers' economic circumstances. Perhaps the public would also include (as the experts would think it should) a sixth feature: (6) its base is income, as distinguished from either wages or consumption. My guess, however, is that the sixth feature is considerably less perspicuous to the public than the first five. Whether or not the tax base includes investment income is of little or no personal significance to most taxpayers because most taxpayers have little or no investment income.[21] Similarly, that the tax base includes some saved income is of little or no personal significance to most taxpayers, both because they currently consume the bulk of their earnings and because most of what they do save is excluded from their tax base under either the rules governing qualified employment-based retirement savings or the rules governing individual retirement accounts.[22]

If I am right about the public's sense of the income tax, is the public wrong to attach greater significance to the features that do not appear in the experts' definition of the income tax than to the experts' defining feature? The imagined question to the public is about the essence of the income tax—what makes the tax what it is—*not* about the source of the name of the tax. If the tax happened to be named after its rate structure instead of its base—the "unflat tax" instead of the "income tax"—such a change would have no effect on the essence of the tax. It is not unusual for things to be named after their incidental features rather than their essential features. The fact that the office of the president of the United States is the president's office is more important than the shape of the office, and yet it is called the Oval Office (and that office is in the White House, the most significant attribute of which is decidedly not its color). Similarly, the income base of the income tax might be no more important—

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to the best of my knowledge there has never been any polling concerning what features of the income tax are crucial to its identity. The absence of such polling questions is not surprising because the answers to the questions would not reveal whether the respondents supported or opposed those features.

21. On 2006 income tax returns, solidly middle income taxpayers—with adjusted gross incomes in the range of $75,000 to $100,000—reported taxable interest income aggregating only 2.4% of their aggregate salaries and wages, reported ordinary dividends aggregating only 1.8% of salaries and wages, and reported capital gains (including both capital gains distributions and net gains on sales of capital assets) aggregating only 3.0% of salaries and wages. *See* Justin Bryan, *Individual Income Tax Returns, 2006*, STAT. OF INCOME BULL., Fall 2008, at 5, 21-23 (calculations based on Table 1).

22. I.R.C. §§ 219 (individual retirement accounts), 401-20 (qualified employment-based retirement savings).

might even be less important—than the other five defining features, despite being the source of the name.

The survival of the core of the current federal tax *called* the income tax does not depend uniquely on whether there continues to be a federal tax with an income base. Some prominent scholars plausibly claim that the difference between an income base and a consumption base is of only limited significance, because (1) taxpayers can and do avoid income taxation of risky investment returns by making portfolio adjustments in response to the tax, and (2) the unavoidable income taxation of the risk-free rate of return is almost trivial, given how low the risk-free rate of return has been over most of the past century.[23] If those scholars are right, then the income tax base may be the *least* important of the defining features of the so-called income tax. In short, it would be perfectly reasonable for the public to believe that the taxation of income (as contrasted with the taxation of consumption or wages) is not of the essence of the current federal income tax.

Different proposals for substantially modifying or replacing the current federal income tax would result in the survival of different numbers of the six features of the current tax. The table set forth below indicates which features would persist following the adoption of five leading reform proposals. For purposes of the table, the first two features of the current income tax, mass taxation and direct taxation of individuals, are combined into a single feature, mass direct taxation of individuals. This is because any plausible replacement for the income tax would have to involve mass taxation; the interesting question is whether that mass taxation would be direct (as with the current income tax) or indirect (as with a retail sales tax or value-added tax (VAT)).

The five proposals considered are (1) Michael Graetz's proposal to introduce a federal VAT, retaining the income tax only for those taxpayers with six-figure incomes;[24] (2) the "Growth and Investment Tax Plan" (GITP), featuring immediate deductions for the cost of all long-lived business assets, proposed in 2005 by the President's Advisory Panel on Federal Tax Reform;[25] (3) The "flat tax" proposed by Robert E. Hall and Alvin Rabushka, which would have two components: (a) a

23. *See, e.g.*, David A. Weisbach, *The (Non)Taxation of Risk*, 58 TAX L. REV. 1 (2004). *But see* Lawrence Zelenak, *The Sometimes-Taxation of the Returns to Risk-Bearing Under a Progressive Income Tax*, 59 SMU L. REV. 879, 889-90 (2006) (suggesting that the historically low inflation-adjusted risk-free rates of return may not be a good indication of real risk-free rates of return in the future).

24. Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 282 (2002).

25. PRESIDENT'S ADVISORY PANEL, *supra* note 7, at 163-64 (describing the treatment of the cost of long-lived business assets under the GITP).

flat-rate business tax imposed on a base identical to the base of a VAT, except that a deduction for salaries and wages paid would be allowed, and (b) a tax imposed on individuals, at the same flat rate, on salaries and wages in excess of a rather high exemption level;[26] (4) a federal retail sales tax (or VAT) introduced as a complete replacement for the federal income tax;[27] and (5) a cash flow consumption tax with progressive marginal tax rates, resembling the current income tax except that (a) all savings would be deductible and (b) all consumption spending would be taxable (including spending financed by savings and spending financed by borrowing).[28]

Proposal	**Mass direct taxation of individuals?**	**Taxation of inflows rather than outflows?**	**Progressive marginal rates?**	**Significant use of exclusions, deductions, and credits?**	**Tax imposed on saved income and investment returns?**	**Number of retained features of current income tax**
(1) VAT-plus-elite income tax	no	no[29]	yes[30]	no[31]	yes[32]	2
(2) GITP	yes	yes	yes	yes	no[33]	4

26. *See* HALL & RABUSHKA, *supra* note 13, at 55-64.

27. *See generally* NEAL BOORTZ & JOHN LINDER, THE FAIRTAX BOOK: SAYING GOODBYE TO THE INCOME TAX AND THE IRS (2005) (arguing that the federal income tax should be replaced by a federal retail sales tax).

28. *See, e.g.*, MCCAFFERY, *supra* note 3. Edward McCaffery has been the leading academic advocate of such a system. *Id.*

29. The elite income tax would continue to tax inflows, but for most people the relevant tax would be the outflow-taxing VAT.

30. Graetz proposes a single rate for the income tax imposed on six-figure incomes. Graetz, *supra* note 24, at 284-86. Viewing the VAT and the elite income tax as an integrated system, however, the combined rate of the VAT and the income tax (applicable to high-income persons) would be higher than the stand-alone rate of the VAT (applicable to low-income and moderate-income persons).

31. The "no" characterization is debatable. The elite income tax would retain deductions for home mortgage interest, charitable contributions, and medical expenses, and a replacement for the earned income tax credit (EITC) for low-income workers would be introduced into the payroll-tax system. Graetz, *supra* note 24, at 295-96 (income tax deductions), 290-93 (EITC replacement). However, for the majority of the population neither eligible for the EITC replacement nor subject to the income tax, the "no" characterization would clearly be correct.

32. The "yes" characterization is debatable, because tax would not be imposed on the saved income and investment returns of the majority of the population not subject to the elite income tax. On the other hand, the bulk of saved income and investment returns would belong to the minority of taxpayers subject to the income tax, so the "yes" characterization seems appropriate.

33. Actually, the GITP would retain a sort of residual tax on investment returns—a 15% tax rate applicable to dividends, capital gains, and interest. PRESIDENT'S ADVISORY PANEL, *supra* note 7, at 152, 159. The panel considered this residual taxation insufficient to justify describing the GITP as an income tax, *id.*, and that judgment seems reasonable.

Proposal	**Mass direct taxation of individuals?**	**Taxation of inflows rather than outflows?**	**Progressive marginal rates?**	**Significant use of exclusions, deductions, and credits?**	**Tax imposed on saved income and investment returns?**	**Number of retained features of current income tax**
(3) The flat tax	yes	yes	no[34]	no[35]	no	2
(4) Sales tax (or VAT)	no	no	no[36]	no	no	0
(5) Progressive cash flow tax	yes	yes	yes	yes	no[37]	4

As indicated in the right-hand column of the table, two of the proposals that would be considered non-income tax proposals under the standard usage of tax experts—the GITP and the progressive cash flow tax—retain four of the five defining features of the current income tax. A proposal that *would* be considered an income tax proposal under standard expert usage—the VAT-plus-elite-income-tax—retains only two of the five defining features.

Of course, a glance at the numbers in the right-hand column is not sufficient to determine whether the current federal income tax would persist in essence, even if not in name, if a particular reform proposal were adopted. It would not necessarily be right to conclude that the essence of the current tax system survives when the replacement system retains at least three of the five defining features of the current system and that the essence does not survive when the replacement

34. Although the flat tax as proposed by Hall and Rabushka has only one positive tax rate, HALL & RABUSHKA, *supra* note 13, the exemption allowance under the wage tax portion of the flat tax functions as a zero bracket. Thus, the tax can be understood as really featuring two tax brackets—a zero-rate bracket and a positive-rate bracket. In addition, the structure of the wage-tax portion is readily adaptable to the introduction of any number of progressive marginal rates, if Congress should so desire. *See* David F. Bradford, *What are Consumption Taxes and Who Pays Them?*, 39 TAX NOTES 383, 384-86 (1988) (describing the "X tax" under which progressive marginal rates would apply to the wage-tax portion of the flat tax).

35. Although the flat tax as proposed by Hall and Rabushka does not allow any deductions (other than the personal allowances designed to shelter subsistence-level income from the wage tax), HALL & RABUSHKA, *supra* note 13, there would be no technical difficulty in introducing exclusions, deductions, and credits into the wage-tax portion of the flat tax.

36. The Boortz and Linder sales tax proposal features a "prebate"—a universal refund of the sales tax on subsistence consumption—which mimics the effect of a tax with a zero rate on subsistence consumption and a single positive rate on above-subsistence consumption. BOORTZ & LINDER, *supra* note 27, at 81-90.

37. McCaffery explains that a progressive cash flow tax will impose a burden on the returns to saving of a taxpayer who saves in a low-consumption year to finance a high level of consumption in a later year. Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 814-15 (2005).

system retains two or fewer of those features. Mere counting is inadequate both because it is not clear that all features are equally significant[38] and because in many cases it is debatable whether a replacement should or should not be characterized as retaining a particular feature (a problem suggested by the footnotes to nine of the twenty-five yes-or-no answers in the table).

The question of whether the income tax should be considered to have survived the enactment of these various proposals finds an analogue in Derek Parfit's analysis of the survival (or not) of personal identity over time.[39] For Parfit, continued personal identity is a matter of two things.[40] The first is direct psychological connectedness of memory and of other psychological features, such as intention, belief, and desire.[41] There is a direct memory connection (for example) between Z today and X of twenty years ago if Z can remember having had some of X's experiences. Parfit emphasizes that "[c]onnectedness can hold to any degree."[42] The second element of continued personal identity is psychological continuity—"the holding of overlapping chains of *strong* connectedness."[43] Even if Z remembered none of X's experiences (so that there was no memory connectedness between Z and X), there would be memory continuity if Y of ten years ago remembered many of X's experiences, and Z today remembers many of Y's experiences. Because direct connectedness diminishes over time,[44] personal identity also weakens over time. Parfit argues that in some cases of significant reduction in direct connectedness identity is not determinate. In such a case, "it would be an empty question whether the resulting person would be me."[45] Similarly, although we can confidently conclude that the income tax survives when Congress tinkers

38. As shown in the table, the flat tax has only two of five income-tax-like features. Although the presence of only two features suggests the flat tax is not an income tax, that conclusion is not inevitable if one puts considerable weight on those features, or on some feature not included in the table. Former Ways and Means Committee Chairman Bill Archer wanted to replace the income tax with a federal retail sales tax or VAT. Clay Chandler, *Archer Calls for End to Income-Based Tax; Lawmaker Wants Levy Tied to Consumption*, WASH. POST, June 6, 1995, at D1. Archer's opposition to income taxation extended to the Hall-Rabushka flat tax because he viewed it as a type of income tax: "In my common sense, if your wages are going to be taxed before you get them, that's an income tax." Jacqueline Rieschick, *March Madness Spurs Trash Talk on Tax Reform*, 78 TAX NOTES 1209, 1210 (1998) (quoting Rep. Bill Archer). Archer's remark suggests that, for him, withholding at the source was the essence of income taxation.

39. DEREK PARFIT, REASONS AND PERSONS 199-347 (1984). For a more detailed summary of Parfit's analysis (on which this paragraph is based), see Lawrence Zelenak, *Tax Policy and Personal Identity Over Time*, 62 TAX L. REV. 333, 338-43 (2009).

40. PARFIT, *supra* note 39, at 205-07, 262.

41. *Id.*

42. *Id.* at 206.

43. *Id.*

44. *See id.* at 276-77, 306.

45. *Id.* at 239.

with the tax rate schedules, and that it would not survive if replaced by a retail sales tax, there may be no real answer to the question of whether it would survive in some of the intermediate cases.

Subject to all of these qualifications and caveats, however, it would be at least plausible to conclude both (1) that the essence of the current federal income tax would survive the adoption of either the GITP or a progressive cash flow tax (despite the loss of the experts' income tax label in both cases), and (2) that the essence of the current federal income tax would not survive the adoption of the VAT-plus-elite income tax (despite the survival of a tax with an income base).

If one accepts the multi-feature account of the essence of the current federal income tax system (despite its undeniable lack of precision), how would one evaluate the system's long-term prospects? Crystal ball gazing a century into the future may be a hopeless exercise. Who, in 1913, could have predicted the events—from the Great Depression, to World War II and the Cold War, to the Reagan Revolution—that shaped the development of the income tax in its first century? And who has any idea today what the United States will be like in 2113? (How much of it, for example, will be under water?) Less ambitiously, however, it may be possible to make meaningful prognostications over the next decade or two.

The survival of the income tax over that shorter time frame is likely under the multi-feature approach to defining survival. By contrast, the survival of the income tax would be very doubtful under an approach focused exclusively on the propriety (according to the usual terminology of experts) of the continued use of the income tax label. Income as a tax base may be in serious trouble over the next few decades. The George W. Bush Administration repeatedly proposed "Retirement Savings Accounts" (RSAs) and "Lifetime Savings Accounts" (LSAs) that would have greatly expanded the availability of wage tax treatment for savings.[46] The long-term strategy seemed to be a sort of slouching away from an income tax base, culminating in a tax system with too little remaining taxation of investment income to be fairly described as an income tax. Although the Bush Administration did not achieve this goal, and the Obama Administration has shown no interest in pursuing it, it is easy to imagine future administrations

46. *See, e.g.*, Patti Mohr, *White House Begins Selling Its Tax Cut to Congress*, 98 TAX NOTES 631, 633-34 (2003); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2007 REVENUE PROPOSALS 5-10 (2006), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2007.pdf. Contributions to RSAs and LSAs would not have been deductible, but the investment returns would have been permanently tax-exempt. The Bush Administration's RSA and LSA proposals were the inspiration for the "Save for Retirement" and "Save for Family" account proposals of the President's Tax Reform Panel. PRESIDENT'S ADVISORY PANEL, *supra* note 7, at 119-21, 159.

and Congresses—particularly Republican ones—reviving RSA and LSA proposals and perhaps prevailing. A tax reward for thrifty savers has obvious political appeal, and the incrementalism of the approach is more likely to succeed than any attempt to eliminate all vestiges of an income tax base in one fell swoop. And although there may be only an attenuated connection in the tax arena between intellectual movements and political outcomes, it is also noteworthy (as mentioned earlier) that income as a tax base has lost much of its support among tax policy experts in the past few decades.[47] All things considered, then, the long-term survival chances for income as the tax base are not particularly good.

By contrast, the long-term survival chances for the other defining features of the current income tax—mass direct taxation of individuals; taxation of inflows rather than outflows; significant use of exclusions, deductions, and credits; and a modestly progressive marginal tax rate structure—seem quite good. As Michael Graetz has wryly observed, in recent years

> Congress ha[s] used the income tax the way [his] mother employed chicken soup: as a magic elixir to solve all the nation's economic and social difficulties. If the nation has a problem in access to education, child care affordability, health insurance coverage, or the financing of long-term care, an income tax deduction or credit is the answer.[48]

As Graetz explains, the attraction is bipartisan; Republicans like almost any tax cut, and Democrats realize their favorite spending programs are more politically viable as tax expenditures than as direct expenditures.[49] Moreover, members of the House Ways and Means and Senate Finance Committees can increase their campaign contributions by sending the message that they are always open to the enactment of new tax subsidies.[50] And the administrative costs of delivering subsidies through the income tax are generally much lower than the administrative costs of delivering nontax subsidies.[51]

In short, Congress seems hopelessly addicted to the extensive use of exclusions, deductions, and credits in lieu of direct spending pro-

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47. *See supra* note 3 and accompanying text.

48. Graetz, *supra* note 24, at 274.

49. *Id.* at 275.

50. Milton Friedman, Remarks at the Sixth Meeting of the President's Advisory Panel on Federal Tax Reform 117-18 (Mar. 31, 2005); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 914 (1987).

51. *See, e.g.*, Janet Holtzblatt, *Choosing Between Refundable Tax Credits and Spending Programs*, 93 PROC. ANN. CONF. ON TAX'N 116, 122 (2001) (comparing the substantial direct administrative costs of the food stamp program with the minimal direct administrative costs of the earned income tax credit).

grams—and thus also addicted to the existence of mass direct taxation of individuals' inflows as the vehicle for the delivery of subsidies. By now, the addiction seems so strong that even if (in some alternate universe) there were no need for a revenue-producing direct mass tax, Congress might opt for a zero-revenue direct mass "tax" solely for its usefulness as a vehicle for delivering subsidies. There might never have been a direct mass tax,[52] but once such a tax was enacted and Congress discovered the joys of tax expenditures, the elimination of direct mass taxation became very unlikely.

The survival of progressive marginal rates does not seem quite as assured as the survival of tax expenditures and the direct mass taxation of inflows. The intellectual foundation of progressive marginal tax rates has been undermined by optimal-tax analysis. The objective of optimal-tax analysis[53] is to determine what marginal tax rate structure, in combination with a system of universal cash transfers, will maximize a chosen social welfare function (SWF)[54] under various assumed conditions (relating to the distribution of wage-earning abilities in society, the elasticity of the labor supply, and the rate at which the marginal utility of money declines). Different optimal-tax simulations, based on different factual assumptions and using different SWFs, can produce very different levels of transfer payments and very different levels of taxation. However, as a leading optimal-tax scholar has explained, "One of the main conclusions to be drawn from the Mirrleesian optimal non-linear income tax model is that it is difficult (if at all possible) to find a convincing argument for a progressive marginal tax rate structure throughout" the societal wage distribution.[55] As in the case of the shift in expert opinion concerning the

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52. *See* Lawrence A. Zelenak, *The Federal Retail Sales Tax that Wasn't: An Actual History and an Alternate History*, 73 LAW & CONTEMP. PROBS. 149 (2010) (describing how during World War II Congress might have chosen a federal retail sales tax—rather than an expansion of the income tax—as the tool of mass taxation, but for the Roosevelt Administration's unwavering opposition to a sales tax).

53. *See, e.g.*, MATTI TUOMALA, OPTIMAL INCOME TAX AND REDISTRIBUTION (1990) (a comprehensive monograph on optimal income taxation); J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971) (the seminal work in the field); Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*, 53 TAX L. REV. 51 (1999) (including a nontechnical introduction to optimal income tax analysis).

54. An SWF specifies how the well-being of individuals contributes to the overall well-being of society. A simple utilitarian SWF, for example, values equally the well-being of each member of society. At the other extreme, a maximin social welfare function (commonly associated with the political philosophy of John Rawls) is concerned solely with the well-being of the least well-off members of society. JOHN RAWLS, A THEORY OF JUSTICE 75-83, 152-56 (1971).

55. TUOMALA, *supra* note 53, at 14. For a wide range of factual assumptions and SWFs, optimal tax rate structures feature rising marginal rates through the bottom decile of the wage distribution and *falling* marginal tax rates through the remaining nine deciles. *Id.* at 95-99. *But see* Zelenak & Moreland, *supra* note 53, at 62-71 (demonstrating that optimal tax analysis *does* support progressive marginal tax rates in the absence of univer-

relative merits of income taxation and consumption taxation, it is difficult to predict how much, if at all, a change in academic views will influence political outcomes.

Public attitudes toward progressive marginal rates are probably more important politically than the views of academics. In this regard it is noteworthy that Robert E. Hall and Alvin Rabushka, the developers of the particular consumption-tax proposal known as *the* flat tax, were sufficiently persuaded of the political attractiveness of a single ("flat") rate that they named their tax after its rate structure, rather than following the nearly universal approach of naming taxes after their bases.[56] On the other hand, opinion polling indicates considerable public support for progressive tax rates,[57] and in the almost three decades since *the* flat tax was originally proposed[58] neither the Hall-Rabushka tax nor any other single-rate tax has even come close to enactment as a replacement for the current federal income tax. The George W. Bush Administration, for example, demonstrated no interest in eliminating progressive marginal tax rates, in marked contrast with its strong interest in moving toward a consumption-tax base.[59]

Moreover, it is debatable whether the Hall-Rabushka proposal and other proposals for taxes with a single positive rate are accurately described as flat-rate tax proposals. In fact, the wage-tax portion of the Hall-Rabushka proposal (like most other so-called single-rate proposals) actually features two tax rates: a zero rate on subsistence-level wages produced by "a generous personal allowance" in the wage tax, and one positive rate imposed on above-subsistence wages.[60] Hall and Rabushka do not think this prevents their tax from being flat. In this respect they are intellectual heirs of Walter Blum and Harry Kalven, who argued that a tax applying a single positive rate above an exemption level was different in kind, rather than merely in degree, from a tax with multiple positive rates—so much so that they

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sal cash transfers and arguing that universal cash transfers are politically unrealistic in the United States).

56. *See* HALL & RABUSHKA, *supra* note 13.

57. *See* KARLYN BOWMAN & ANDREW RUGG, AM. ENTER. INST., PUBLIC OPINION ON TAXES: 1937 TO TODAY 34 (2012) (reporting results of a 1981 Harris poll in which a majority of respondents found it was "fair" that "higher-income people not only have to pay more in taxes but must pay a greater percentage of their income in taxes," and of a 2005 AP/Ipsos poll in which a majority of respondents thought that those "who earn more money should pay a higher tax rate on their incomes than people who earn less").

58. HALL & RABUSHKA, *supra* note 13 (first edition published in 1985).

59. The Executive Order creating the President's Advisory Panel on Federal Tax Reform instructed the Panel that its proposals should be "appropriately progressive." Exec. Order No. 13,369, 70 Fed. Reg. 2323 (Jan. 7, 2005). By contrast, the order indicated the Panel could offer one or more non-income tax proposals, as long as it offered "[a]t least one option . . . us[ing] the Federal income tax as the base for its recommended reforms." *Id.*

60. HALL & RABUSHKA, *supra* note 13, at 53-54.

gave the single-positive-rate tax its own adjective, "degressive."[61] Despite the protestations of Hall, Rabushka, Blum, and Kalven, a tax featuring a single positive rate above an exemption level has both of the features essential to a progressive marginal tax rate structure: the existence of more than one tax rate, and the application of the higher rate(s) to higher levels of income.

A forecast limited to the next few decades might predict that (1) the survival of progressive marginal tax rates in the narrower sense of the term—requiring the existence of at least two positive rates of tax—is probable, and (2) the survival of progressive marginal tax rates in the broader sense of the term—as including the "degressive" rate structures of Blum and Kalven—is nearly certain.

IV. CONCLUSION

Summing up the life expectancies of the major features of the existing income tax: Although the income tax base is in considerable peril, three of the other features—mass direct taxation of individuals, taxation of inflows rather than outflows, and the continued availability of an array of exclusions, directions, and credits—are almost certain to survive for decades, and the final feature—progressive marginal rates—is more likely than not to survive. If the income tax base disappears, but three or four of the remaining features persist, would the resulting tax still be the income tax? Reasonable minds can differ on the answer to that question. There is much to be said, however, in favor of a "yes" answer. The survival of an income base, as contrasted with a consumption base or a wage base, may not be necessary to the survival of the core of the current federal income tax. There is no objective way of determining something as amorphous as the essence of a tax system, so there is no reason to expect a consensus as to whether the essence of the income tax would have survived in various possible futures. The argument offered here is negative at its core—not in favor of any particular view of the essence of the current federal income tax, but against the assumption that the "income tax" label captures the essence of the tax.

My focus is on the survival of essential features, not of labels; but it would not be surprising if the income tax label, as well as the income tax essence, survived the decline and fall of the income tax base. Suppose that over the next few decades Congress gradually slouched away from an income tax base, eventually arriving at a point at which the tax base could no longer be fairly described as income (at least according to standard expert usage), but without disturbing the other key features of the current system. It would be rea-

61. Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 506-16 (1952).

sonable to conclude that the core of the current tax system had survived, even if tax experts would say the tax was no longer an income tax. It also seems likely that the income tax label would survive the gradual dismantling of the income tax base. A cynic might attribute the survival of the income tax label to the boiling frog effect—just as urban legend claims that a frog will allow itself to be boiled to death as long as the water temperature is raised gradually,[62] perhaps the income tax label can endure as long as the income tax base is gradually eroded. But the label might also survive for a better reason. The income tax label may come to be understood nonliterally as a shorthand reference to the several key features of the current tax system, rather than as a literal description of the base of the tax. There are instances of things being named after nonessential features, losing those nonessential features, and retaining their names—think of the nongreen greenrooms of television fame[63] or (for tax aficionados) the nonblue bluebooks produced by the Staff of the Joint Committee on Taxation.[64] Perhaps the income tax is destined to become another example of that phenomenon.

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62. *See, e.g.*, Paul Krugman, *Boiling the Frog*, N.Y. TIMES, July 13, 2009, at A19 ("Real frogs will, in fact, jump out of the pot—but never mind. The hypothetical boiled frog is a useful metaphor . . . .").

63. *See* William Safire, *The Greenroom Effect*, N.Y. TIMES, Apr. 23, 1989, at SM16 (explaining that the use of the term in the theater predates the advent of television by several centuries, that the term may or may not have been based on the wall color of early greenrooms (the origins of the term are lost in the mists of time), and that the term is routinely used today even when nothing in a particular greenroom is actually green).

64. Bluebooks are prepared by the Staff of the Joint Committee on Taxation to describe recently enacted tax legislation. *See, e.g.*, STAFF OF JOINT COMM. ON TAXATION, 111TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 110TH CONGRESS (Comm. Print 2009). Their covers are frequently gray, but that does not affect their status as bluebooks.