

Back to the Future for Taxation

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Taxation is an art, not a science, of measuring and auditing. Faced with the challenge of putting machine labor on a level playing field with human labor, the two leading forms of twentieth- and early twenty-first-century taxation, income taxation and general consumption taxation, were wrecked at their roots. What emerged from that wreckage was a return to historic norms: a series of excise taxes and charges, but this time with the avowed and focused purpose of not only raising revenue but also pricing and internalizing otherwise externalized harms to the self and to the biosphere.

From our vantage today in 2075 CE, it seems odd that the twentieth and early twenty-first centuries relied so heavily on income and general consumption taxes, as these were not extensively used in the centuries preceding. Our late twenty-first century thus represents a return to historic norms in our reliance on a broader array of taxes, though they are now designed to protect and harmonize with human health and planetary ecology, while at the same time affording human labor and human intelligence a level playing field with machine labor and machine intelligence. Although we all lived through this philosophical shift in taxation theory, it is useful to remember how we arrived at today's taxation paradigms.

The reason we have taxes (the why) is certainly simple enough: first, to raise money for the common good (or as others have phrased it, “to pay the Debts and provide for the common Defence and general Welfare,” that is, to pay for guns and for butter, to render unto Caesar); and second, to discourage the taxed activity or item, perhaps as a theoretical or practicable alternative to direct regulation.¹ Once one understands the why, the formalities of taxation then revolve around some basic, fundamental choices – the interrogatives of taxation:

- *What* do we tax? (Income, consumption, wealth, imports, exports, extractions, pollution, sinful behavior?)
- *Whom* do we tax? (Citizens, residents, married couples, households, businesses, religious institutions, charitable institutions?)
- *When* do we tax? (Upon accrual, upon realization of cash, upon sale, upon use, weekly, monthly, annually, upon a particular event such as death or in-

heritance or importation, upon completed construction, upon extraction, upon release of pollutants?)

- *How much* is taxed? (The amount consumed, the amount earned, the amount spent, the value of the import, the amount of CO₂ released into the atmosphere to produce that import?)
- *How* do we tax? (Central assessor, self-assessment, withholding agent?)
- *Where* do we tax? (Source, residence, allocation to a jurisdiction, apportionment among jurisdictions?)

In the abstract, answering the above questions is perhaps limited only by imagination. There have been taxes on such items and activities as dance halls, number of windows in residential mansions (as a proxy for size of home and/or conspicuous consumption), and tattoos and piercings.² One twentieth-century science fiction humorist even posited a tourist planet of the future, where billions of visitors gained so much weight on holiday that, collectively and over the years, they left the beautiful planet itself measurably lighter (less mass) upon their departure. Facing dire consequences, planetary authorities had to do something to arrest the systemic removal of needed mass: a departure “tax” on tourists’ incremental weight gain, presumably both to discourage overeating and to compensate for importing off-world mass to replenish the planet.³ Perhaps a “pound of flesh” should not and cannot serve as a forfeiture penalty in a commercial contract, but it can be the basis for taxation!⁴

In practice, however, designing a tax system is constrained by the kinds of data that can be assembled, measured, and audited. As an early maestro of taxation and public finance once observed: “The art of taxation consists in so plucking the goose as to obtain the largest possible amount of feathers with the smallest possible amount of hissing.”⁵ But, for all the theoretical capaciousness of taxation, the twentieth and early twenty-first centuries settled on two preferred modes of taxation almost to the abandonment of all other forms: income taxes and general consumption taxes.⁶ For a time, then, dormant were the arts of taxation as behavioral nudges or regulatory disincentives, or even of taxation as drawing from diversified sources.⁷ This impoverishment of taxation flowed principally from just a handful of root causes.

First, income taxes and general consumption taxes were wildly successful in raising revenue, and revenue to pay for the burgeoning nation-states (and their expanding military and social justice ambitions) became the premier imperative, with taxation simply the handmaiden for this larger, greater cause. There is a compelling thesis that, as a nation-state and its economy emerge, the government sector grows faster than the overall economy, first with military expenditures and next with social spending growing even faster than overall government expenditures.⁸ (This, of course, is a bounded thesis, true perhaps for a duration of time at a country’s nascent-

cy, in that, by definition, nothing save technology can grow exponentially forever at higher growth rates than its overall environment; the plateau comes for us all.)⁹ One studied observer of late twentieth-century American political economy quipped: “Liberals think [a value added tax or “VAT,” the leading form of general consumption taxes, is] regressive and conservatives think it’s a money machine,” and thus the United States may one day enact a VAT when they reverse their positions.¹⁰

Second, the West waged and then decisively won the Cold War, and in its campaigns and victory laps around the globe concluded that its habits and choices must be good habits and choices, a “secret sauce,” if you will – necessary, sufficient, and universal, for all nations across space and time, for both economic prosperity and political liberty.¹¹ Younger nations, from Pakistan to Tanzania to Croatia to South Sudan, readily or reluctantly agreed, and so both the Cold War victors and their protégés signed on to the replication – nay, mass production – of this secret sauce, including the heavy reliance on income taxation and general consumption taxation.¹² Today, the Kiplingesque “just so” feel to the secret sauce conclusion seems obvious; but in those heady days of Cold War victory and ensuing global victory laps, the “just so” conclusion was so correct that it was barely possible to fathom a different syllogism.¹³

Third, there is a propensity to stick with the known, particularly if (like income taxes and general consumption taxes) they are money-making machines: if it ain’t broke, don’t fix it. And, for a long time, income taxes and general consumption taxes were not really broken.

We tax what we can realistically measure. The income tax in its modern forms arrived toward the end of the nineteenth and beginning of the twentieth centuries, propelled in large part by the conceit that business income (and by questionable extension, personal income) could be reliably compiled, measured, and audited.¹⁴ This reminds one of the “streetlight effect,” also known as the “drunkard’s search principle.” In the modern telling, a man at night frantically, perhaps drunkenly, searches for his lost keys under a lamppost at the edge of an unlit park.¹⁵ A vigilant constable passes by and asks the man how long ago he lost his keys near the lamppost. The man replies that he lost his keys some hours ago, inside the park during daylight, but that he is searching now under the lamppost at night, outside the unlit park, because the light is better over here. And so it is with measurement: sometimes we measure what is easy enough, what is within the realm of the possible, what we think we know, not because it is correct in any idealistic sense but because it is achievable. As they say, and as is literally true in this case, it is “good enough for government work.”¹⁶

Before income taxes were part of the secret sauce, and perhaps in an attempt to thwart widespread adoption, an early scholar warned that “income” is an irredeemably vague, subjective concept, full of “conundrums” (specifically, bound-

any problems).¹⁷ What to do regarding goods and services produced within the household for consumption by that household (like making dinner for the family, helping kids with their homework, growing fresh vegetables in one's own garden, or shoveling snow from one's driveway)? What of the annual imputed rental income from personal capital expenditures (like one's home or one's car)? What of personalized, noncash perks (or pitfalls) from employment or self-employment (like working as the personal assistant to the famed Miranda Priestly, something that assistant Emily valued but assistant Andrea did not)?¹⁸ Are government services received a form of consumption and income? Are taxes paid over to government (particularly state and local government) a form of consumption expenditure to live in a better community (that is, nondeductible in an income tax)? While these entrenched conundrums are insoluble and thus persist in all income taxes, income taxation was nevertheless simply too much of a money-making machine to be ignored by the rising, ambitious nation-states of the nineteenth and twentieth centuries. Render unto Caesar.

Of more recent origin was the invoice-based, valued added tax (VAT), the world's leading form of general consumption taxation.¹⁹ Essentially a post-World War II phenomenon, the VAT started as a successful attempt to rationalize the hodgepodge of *ad hoc*, turnover and excise taxes that preceded it. (As an example of the hodgepodge, recall these classic Beatles lyrics: "If you drive a car, I'll tax the street; if you try to sit, I'll tax your seat; if you get too cold, I'll tax the heat; if you take a walk, I'll tax your feet . . . 'Cause I'm the Taxman, yeah, I'm the Taxman.")²⁰ But the real genius of the VAT was its ability to put (if desired) all different kinds of personal consumption on a level playing field and its solution to the problem of "cascading," as follows. From the vantage point of a consumption tax, the proper base for taxation is personal consumption by consumers (not activities of or income of a business); thus, any *ad hoc* excise taxes imposed on business or business transactions must be recovered or credited by the businesses in some way (or, alternatively, limited to the proper layer of consumption value generated by that business for the ultimate consumer in the consumer supply chain), lest that imposed tax gets trapped in the supply chain as an artificial business production cost at each level of business production. For example, with regard to the farmer who grows wheat, the miller who mills that wheat into flour, and the baker who bakes that flour into bread for consumers, VAT paid by these businesses at each step of the consumer supply chain must be recovered within the business sector (or, equivalently, be limited to the layer of consumption value generated by these businesses), such that when the consumer finally consumes (that is, buys the bread), there has not been unrecovered tax-upon-tax-upon-tax-upon-tax (known as cascading) along each step of business production in the consumer supply chain.

But for all its genius, the VAT suffers from the same ingrained conundrums as the income tax. Indeed, in that income is typically and tautologically defined as

consumption plus changes in net savings, and the foregoing income tax conundrums center largely around what is (or is not) consumption and when and where said consumption happens, the above conundrums plague a consumption tax just as much as they plague an income tax. Particularly telling is the boundary problem between consumption versus operating expenses and investment: for instance, is that academic conference in a sunnier clime part of the job description, or is it (at least in part) a form of consumption? But as with the income tax, so too with the VAT: definitional imprecision and measurement infirmities notwithstanding, a money-making machine is hard for ambitious nations to abjure.

Once entrenched, the money-making machines of income taxation and general consumption taxation became essential ingredients of the West's secret sauce, and scholars and governments naturally focused on refining, broadening, and comparing the two money-making machines.²¹ What are the linkages between an income tax and a consumption tax? Which would be fairer? Which would be more administrable? Which leads to fewer distortions? When does a consumption tax equate to a wage tax? When does an income tax equate to a wealth tax? How can the base of a tax be broadened, thus achieving the Platonic ideal of making the applicable tax base as comprehensive as possible (in contrast to leaving "loopholes" untouched)? Indeed, one particularly robust and entertaining scholarly debate focused on whether horizontal equity ("those with the same amount of income or consumption, as applicable, should pay the same amount of tax") is an independent, normative principle or is instead entirely derivative of the normative principle of vertical equity ("those with more should pay more tax").²²

Outside the scholarly realm, the compare-and-contrast of income taxation and general consumption taxation seemed to some as, well, academic. For most of the world's population in the twentieth and early twenty-first centuries, lifetime consumption was very close to lifetime income, and often very substantially ahead of lifetime income, requiring redistributive transfer payments from government to help people bridge the difference and make ends meet. In such cases, a debate between income tax and consumption tax can seem misfocused, for if the excess of consumption over income were taxable, that would simply require even larger redistributive transfer payments to cover the increased tax burden on the excess. For those lucky enough to have lifetime income that exceeded their lifetime consumption needs, in most cases the excess was modest, again making a debate between the two tax bases somewhat academic. Only at the very top end of society, where both income and consumption were staggering, might there be an impactful debate over the two competing tax bases of income versus consumption.

In the end, taxation is about measurement, and a century or two of tax administration and scholarship had shown that measurements are inherently imprecise: for when even mathematics (Gödel's Incompleteness Theorems) and

the physical sciences (Heisenberg's Uncertainty Principle) must accede to limits on knowledge, it is small wonder that a human construct like taxation has limits on both accuracy and precision. More fundamentally, however, the century or two of tax administration and scholarship had shown that, even in practice and not just in theory, the ideal of a comprehensive tax base was itself a false idol. To wit, "income" and "consumption" are not so much Platonic ideals elusive to feasible measurement as they are fluid social constructs of policies and choices, reflecting embedded judgments about what can and cannot, and what should and should not, be taxed.²³ In the end then, income and consumption are whatever a particular society (in time and place) defines them to be, for a normal baseline is in the eye of the beholder: one person's perception of an anomaly (a "loophole") from an idealized norm of "income" (or "consumption") is for another person just part of the ideal definitional baseline.²⁴

Funny enough, late twentieth-century scholars and practitioners thought it would be the taxation of financial income, rather than other irredeemable definitional vagaries in the two leading tax systems, that would force change. Like their coreligionists a century earlier, some saw the difficulty in taxing financial income as so challenging that it argued for abandoning an income tax in favor of a general consumption tax.²⁵ In retrospect, the Cassandras were mistaken, for measuring and taxing financial income proved a much easier task than differentiating consumption from expenses and investment.

This false emergency regarding financial income started with some rather simple propositions. In many worldwide income tax systems, so-called classical systems, debt was taxed differently than equity – the first giving rise to deductible interest payments and the latter giving rise to nondeductible yield payments. But from a finance or economics perspective, debt and equity are not discrete concepts with a crisply demarcated boundary line, but rather a spectrum of financial priorities and claims against a particular financial balance sheet. Thus, taxing debt and equity so differently was tantamount to taxing red, green, and violet as though each color were something definitively demarcated rather than a soft milestone along a single, indivisibly continuous color spectrum upon which one color bleeds gently into the next. Soon enough, scholars concluded that debt versus equity was not so much a measurement problem in an income tax, but rather a coordination problem between corporate business income (the corporate income tax) and personal household income (the personal income tax). Framed as a coordination problem (known as "integration"), scholars then offered a variety of solutions, if legislators should want one; many legislatures declined the offer from academia, and so perhaps the problem was not as pressing as some thought it to be.²⁶

Next came a more serious challenge to taxation of financial income: the "realization" requirement started to look increasingly outdated. Realization demands

that an asset must be sold, typically for cash, for the income therefrom to be properly measured – as opposed to measuring the income if, as, and *when* the asset appreciates in value in the hands of its owner.²⁷ (To be fair, where it applies, the realization requirement represents a fundamental challenge in taxing not only financial income, but also in taxing income from appreciating real assets such as real estate, precious metals, artwork, and so on.) Because of the very valuable opportunity to defer paying taxes on income until the same was realized, one twentieth-century scholar labeled the realization requirement as the “Achilles’ heel” of the income tax.²⁸ (Many years later, the U.S. Supreme Court of the early twenty-first century all but enshrined this Achilles’ heel as a constitutional principle that could not be compromised, rather than a mere statutory framework that the U.S. Congress could change.)²⁹ In any event, the realization requirement, and the concomitant challenge to measuring and taxing financial income, were very real issues but, like debt versus equity, were also very solvable and therefore not existential to the continuing viability of the income tax as a money-making machine for government. By simply taxing realized gains with an “interest charge” for the holding period of deferral – something that tax scholars call “retrospective taxation” – the problem is sufficiently (albeit crudely) solved.³⁰ Good enough for government work, render unto Caesar continued to prevail.

What finally broke the income and consumption tax systems was machine labor – both physical and mental, and of sufficient quantity and quality – advanced to the point at which very little space remained for human capital (physical or mental) to compete directly and effectively with tax-advantaged machine capital.

Computer scientists defined (then, as now) artificial general intelligence as the inflection point at which machine artificial intelligence equals or surpasses human intellectual capabilities across a wide range of cognitive tasks. But the income and consumption tax inflection point, of course, came much sooner: the point at which machine capital and human capital were such close substitutes (in terms of mobility and cognition) that it was simply unfair to give machine capital a tax advantage over human capital, and it became necessary to tax human capital on a par with machine capital. Indeed, some of today’s economic historians contend that this inflection point arrived much sooner than is generally appreciated, that we tax-advantaged machines over *unskilled* human capital very early on (thus contributing to inequality), but that the phenomenon of tax-advantaging machines over humans was not sufficiently noticed, appreciated, or politicized until the impact on *skilled* human capital became painfully obvious.³¹

In essence, a level playing field between machine labor and human labor compels – nay demands – a level playing field between man and machine when it comes to food, shelter, clothing, education, medicine, cosmetics, and even re-

tirement and death. If electricity (or the assets that create it and transmit it) is a deductible expense for machinery, then so too should food be a deductible expense for human capital; if a building is deductible for housing machinery, then so too should a personal residence be deductible for housing human capital; if a waterproof tarp or an electromagnetic shield is a deductible expense for machinery, then so too should a raincoat (and clothing generally) be a deductible expense for human capital; if operating systems and software upgrades are a deductible expense for machinery, then so too should primary, secondary, and continuing education be a deductible expense for human capital; if an oil change or maintenance inspection is a deductible expense for machinery, then so too should vitamins, allergy shots, and annual physicals be deductible expenses for human capital; if refurbishing a smart building is a deductible expense for machinery, then so too should hair coloring, braces, rhinoplasty, knee and hip replacements, gender-affirming surgery, and (obviously) cybernetic implants be deductible expenses for human capital; if decommissioning and disposal costs are a deductible expense for machinery, then so too should retirement and burial costs be deductible expenses for human capital.³²

Once the playing field was leveled in this way, at first gradually but then more vigorously, deductible operating expenses for human capital swallowed nearly the entire consumption tax base such that there was not much left to tax, save excessively conspicuous consumption (which is typically the province of a very small portion of the population that could be reached more directly with luxury taxes).³³ For the income tax, the situation became similarly bleak: because the income tax base (by definition) equals the consumption tax base plus net savings (with consumption representing the lion's share), hollowing out the consumption portion of the income tax base left for taxation only excessively conspicuous consumption (luxury) and net savings. This in turn prompted two questions: First, what is so peculiar or wrong with saving such that it should be taxed (and thus concomitantly disincentivized)? Second, to paraphrase one contemporary scholar's incisive assessment of early twenty-first-century taxation, why do we require so many unnecessary tax returns when we are taxing only a very small, upper echelon of the population that has that level of conspicuous consumption and savings?³⁴

Sometimes, with enough time, the iconoclasts become the icons. Luddites never succeed in rolling back technological progress, but their intellectual heirs, with much justification, insisted on a leveled taxation playing field for both man and machine. As we now know, this leveling, combined with the unsolvable and ingrained conundrums that were the true Achilles' heel (rather than realization), wrecked and rolled back the money-making machines of income taxation and general consumption taxation.

In that wreckage of the collapsed money-making machines, there came a return to basics and a focus on taxes as a toolkit for both raising revenue and mit-

igating harm. Once most consumption could not be taxed on account of the leveled playing field principle – leaving savings subject to tax, but why should it be a sin to save rather than consume? – there was renewed focus on what can be measured, what should be taxed, and what might raise enough revenue to pay for government.

Excepting occasional populist VAT-zero-rating (that is, a tax rate of 0 percent for consumer basics such as food and clothing), the twentieth- and early twenty-first-century income and consumption taxes were obsessed with broadening the base and treating different forms of consumption/income on a par with all other forms of consumption/income. In other words, very unlike today, the level playing field of that era was envisioned as “all forms of consumption are equal in a consumption tax” and “all forms of income (and the consumption component thereof) are equal in an income tax.” Thus, in general, progressivity back then (and there was much of it) came from the *amount* of income and consumption – with higher rates applying to higher levels of income and consumption – but not the *type* of income or consumption.

Yet, in terms of personal health or biosphere impact, not all forms of consumption and income are equal: eating an apple is not the same as eating a steak; drinking some water is not the same as drinking some whiskey; wearing cotton is not the same as wearing polyester; buying and using a bicycle is not the same as buying and using a motorcycle; planting renewable crops is not the same as felling a tree; producing glass and paper is not the same as producing plastic. Because we needed something new to tax, why not tax the things that are most harmful to our environment and ourselves, as a way of both raising revenue and nudging us away from the harmful and toward the beneficial?³⁵ Thus, what emerged from the wreckage of income taxation and general consumption taxation was a series of excise taxes and charges, with the avowed and focused purpose of not only raising revenue but also pricing and internalizing otherwise externalized costs. Today, we now see these nudges as the definitive form of leveling the playing field: that is, forcing both consumers and producers to internalize the harms – pollution, overfishing, deforestation, poor personal health choices, and so on – inflicted upon self or upon planet, and not otherwise priced or paid for sufficiently by the private markets. In short, our era’s solution to the tragedy of the commons is to tax the use of the commons.³⁶

Taxation scholars of the twentieth and early twenty-first centuries had long propounded these kinds of sin taxes (sinning against ourselves, sinning against the biosphere), and generations of idealistic students and scholars advocated for them vigorously.³⁷ But not until the money-making machines of income taxation and consumption taxation were wrecked did we come full circle to systems of taxation that consigned particular activities and items (but not others) to taxation,

something once derided as *ad hoc* and hodgepodge when income taxes and general consumption taxes (and their elusive, false idol of a comprehensive tax base) were ascendant.³⁸ With sins and sin taxes as our new polestar, we now tax more conceptually (and, for our time, more properly): first, taxing the “end user” committing (or, perhaps, who could have least-cost avoided) the sin, such that the “end user” today can be either a business (as the issue of cascading is not relevant once a personal consumption tax base is abandoned) or a natural person; and second, taxing at a particularized tax rate for the externality so as to price properly the otherwise externalized harm to ourselves and our biosphere. Again, the timeless fundamentals of taxation demand that something can be measured and audited for it to be taxed effectively. So, even today, in the late twenty-first century, we do not live in a world where every harmful activity and item is adequately taxed (or even taxed at all) as a way of internalizing the externality, but we have made enormous progress in that direction. *Lord, we ain’t what we oughta be. We ain’t what we want to be. We ain’t what we gonna be. But, thank God, we ain’t what we was.*³⁹

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ENDNOTES

¹ U.S. Const., art. I, § 8, cl. 1; and Matthew 22:21 (KJV). For insight into how seriously Caesar and his deputies took tax collection, see Anna Dolganov, Fritz Mitthof, Hannah M. Cotton, and Avner Ecker, “Forgery and Fiscal Fraud in Iudaea and Arabia on the Eve of the Bar Kokhba Revolt: Memorandum and Minutes of a Trial before a Roman Official (P.Cotton),” *Tyche* 38 (2023), <https://tyche.univie.ac.at/index.php/tyche/article/view/9224>.

² Patrick Jarenwattananon, “How Taxes and Moving Changed the Sound of Jazz,” NPR, April 16, 2013, <https://www.npr.org/sections/ablogsupreme/2013/04/16/177486309/how-taxes-and-moving-changed-the-sound-of-jazz?ft=1>; Tax Foundation, “The Weird Way Taxes Impact Behavior” (Tax Foundation, 2020), <https://files.taxfoundation.org/20200909103740/The-Weird-Way-Taxes-Impact-Behavior.pdf> (accessed December 19, 2024); Arkansas Code Ann. § 26-52-316(a)(6) (2024); and Arkansas Department of Finance and Administration, Agency 006.05, “005-GR-9.10: Services Subject To Tax—Body Piercing, Tattooing, and Electrolysis,” in *Arkansas Rules: Gross Receipts Tax Rules*;

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- ⁴ William Shakespeare, *The Merchant of Venice*, ed. Barbara A. Mowat and Paul Werstine (Folger Shakespeare Library, 2011), 1.3.155–163.
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- ⁸ Ludger Schuknecht, “The Growth of Government Expenditure over the Past 150 Years,” in *Public Spending and the Role of the State: History, Performance, Risk and Remedies* (Cambridge University Press, 2020), 17–35; and Esteban Ortiz-Ospina and Max Roser, “Government Spending,” Our World in Data, October 2016, amended 2023, <https://ourworldindata.org/government-spending> (accessed December 19, 2024).
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- ²² For a summary of this spirited exchange, see Paul R. McDaniel and James R. Repetti, “Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange,” *Florida Tax Review* 1 (10) (1993): 607, 608–613.
- ²³ For a summary of the pioneering work of Stanley S. Surrey and Paul R. McDaniel, as well as a discussion of the continuing utility of a “normal” baseline, see Leonard E. Burman, “Is the Tax Expenditure Concept Still Relevant?” *National Tax Journal* 56 (3) (2003): 613–628. See also Eric A. San Juan, “The Distributive State and the Function of Tax Expenditures,” *The Tax Lawyer* 71 (3) (2018): 673–715.
- ²⁴ Staff of the Joint Committee on Taxation, *Estimates of Federal Tax Expenditures for Fiscal Years 2023–2017*, JCX-59-23 (Joint Committee on Taxation, Congress of the United States, 2023), <https://www.jct.gov/publications/2023/jcx-59-23>.
- ²⁵ Joseph Bankman and David Weisbach, “The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax,” *Stanford Law Review* 58 (5) (2006): 1413, 1415.
- ²⁶ Alvin C. Warren and Michael Graetz, *Integration of the U.S. Corporate and Individual Income Taxes: The Treasury Department and American Law Institute Reports* (Tax Analysts, 1998).
- ²⁷ Joint Committee on Taxation, *Present Law and Issues Related to the Taxation of Financial Instruments and Products*, JCX-56-11 (Joint Committee on Taxation, Congress of the United States, 2011), <http://www.jct.gov/publications.html?func=startdown&id=4372>; and Al-

- vin C. Warren, "Financial Contract Innovation and Income Policy," *Harvard Law Review* 107 (2) (1993): 460–492.
- ²⁸ William D. Andrews, "The Achilles' Heel of the Comprehensive Income Tax," in *New Directions in Federal Tax Policy for the 1980s*, ed. Charles Edward Walker and Mark A. Bloomfield (Ballinger Publishing Company, 1983), 278, 280.
- ²⁹ *Moore v. United States*, 602 U.S. 572 (2024).
- ³⁰ Alan J. Auerbach, "Retrospective Capital Gains Taxation," *American Economic Review* 81 (1) (1991): 167–178; Stephen B. Land, "Defeating Deferral: A Proposal for Retrospective Taxation," *Tax Law Review* 52 (1996): 45–117; Internal Revenue Code §§ 453A, 665–668 and 1291 (2025); and Treasury Regulation § 1.1275-4(c) (2025).
- ³¹ Sujoy Ghosh, dir., *Anukul* (Boundscript Motion Pictures, 2017), a short film in Hindi, with English subtitles, based on the prescient, eponymous short story of the same name. See also Satyajit Ray, *The Collected Short Stories*, trans. Gopa Majumdar (Penguin Random House India, 2016), 233–235.
- ³² Today's cybernetic implants promise to blur further the remaining distinctions between man and machine, as once predicted by twentieth-century science fiction. See, for example, Paul Verhoeven, dir., *Robocop* (Orion Pictures, 1987); Isaac Asimov, "The Bicentennial Man," in *The Bicentennial Man and Other Short Stories* (Doubleday, 1976), 135; and Harve Bennett, exec. prod., *The Six Million Dollar Man* (ABC, 1973).
- ³³ Leveling the playing field between man and machine required so much more than a "depreciation" or "depletion" allowance for human capital: it required a fundamental reassessment of what constitutes consumption and (by extension) personal income. But the idea of a tax allowance for human capital, perhaps along the lines of percentage depletion for natural resource exploration (that is, a tax allowance not necessarily limited by tax basis in the human capital), had been posited long, long ago. See, for example, Steven A. Bank, *High Rates and Low Taxes: Tax Dodging in Mid-Century America* (Cambridge University Press, forthcoming), summarizing the congressional testimony of (then) Screen Actors Guild president Ronald Reagan in *Hearing on General Revenue Revisions Before the H. Comm. on Ways and Means*, 85th Cong. 2 (1958) (testimony of Ronald Reagan, Motion Picture Industry Council and Hollywood AFL Film Council). On hormone therapy and sex reassignment surgery as deductible medical care, see Internal Revenue Service, "O'Donnabhain v. Commissioner, 134 T.C. 34 (2010) T.C. Docket No. 6402-06," *Internal Revenue Bulletin* No. 2011-46, November 21, 2011, <https://www.irs.gov/pub/irs-aod/aod201103.pdf>.
- ³⁴ See Michael Graetz, *100 Million Unnecessary Returns: A Simple, Fair, and Competitive Tax Plan for the United States* (Yale University Press, 2008).
- ³⁵ Richard H. Thaler and Cass R. Sunstein, *Nudge: The Final Edition* (Yale University Press, 2021). See also Brian Galle, "A Response: What's in a Nudge?" *Administrative Law Review Accord* 3 (1) (2017): 1–19.
- ³⁶ Alexandra Spiliakos, "Tragedy of the Commons: What It Is & 5 Examples," Harvard Business School Online, February 6, 2019, <https://online.hbs.edu/blog/post/tragedy-of-the-commons-impact-on-sustainability-issues>; M. S., "The Irony of the Tragedy of the Commons," *The Economist*, February 24, 2011, <https://www.economist.com/democracy-in-america/2011/02/24/the-irony-of-the-tragedy-of-the-commons>; and Salvatore Villani and Maria Viscolo, "Taxation of Global Commons as a Tool to Reduce Economic In-

equalities and Strengthen the Resilience of Tax Systems,” in *The Palgrave Handbook of Climate Resilient Societies*, ed. Robert C. Brears (Palgrave Macmillan, 2021).

- ³⁷ For example, see Sean Lowry, *Federal Excise Taxes: An Introduction and General Analysis*, CRS Report R43189 (Congressional Research Service, 2013), <https://www.congress.gov/crs-product/R43189>; D. Andrew Austin, *Economics of Federal User Fees*, CRS Report R45463 (Congressional Research Service, 2019); Dale Jorgenson, “Time to Tax Carbon,” interview by *Harvard Magazine*, September–October 2024, <https://www.harvardmagazine.com/2014/08/time-to-tax-carbon>; and Jonathan Masur and Eric A. Posner, “Toward a Pigouvian State,” *University of Pennsylvania Law Review* 164 (1) (2015): 94–147.
- ³⁸ That is, pre-twentieth-century modes of taxation have been brought back into our late twenty-first-century present. See Robert Zemeckis, dir., *Back to the Future* (Universal Pictures, 1985).
- ³⁹ Martin Luther King Jr., “A Promise Unfulfilled,” address to the New York State Civil War Centennial Commission, New York City, 1962 (quoting the imperfect grammar but perfect pithiness of a nineteenth-century slave preacher), available at <https://www.npr.org/2014/01/20/264226759/a-promise-unfulfilled-1962-mlk-speech-recording-is-discovered>.