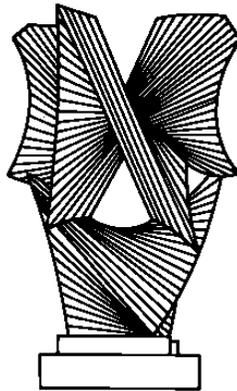


# CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 168  
(2D SERIES)



## **Truth in Government: Beyond the Tax Expenditure Budget**

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# Truth in Government: Beyond the Tax Expenditure Budget

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“[T]he Administration believes that the concept of ‘tax expenditure’ is of questionable analytic value.”<sup>1</sup>

President Bush sparked a minor firestorm within the Beltway by including these words in his fiscal 2002 budget analysis.<sup>2</sup> This was not because the tax expenditure budget—which sets out the implicit cost of various deductions and provisions of the tax code—was viewed as beyond criticism. Various aspects of the tax expenditure budget have been attacked since its inception, and the particular objection raised by the 2002 budget document—the absence of a normative baseline for determining what constitutes a tax expenditure<sup>3</sup>—was among the earliest to surface.<sup>4</sup> Rather, it was the language of the attack that seemed remarkable. It sounded to many like the opening salvo in a battle to overturn the Congressional requirement that such a budget be constructed and published as part of the annual budget.<sup>5</sup>

Public evidence of this battle remains scarce. Indeed, the language contained in the following year’s budget seems to back away from prior year’s blanket condemnation of the tax expenditure budget. The 2003 budget states merely that A[t]he Administration believes the meaningfulness of tax expenditure estimates is uncertain and that the ‘tax expenditure’ presentation can be improved by consideration of alternative or additional tax bases.”<sup>6</sup> Yet it

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<sup>1</sup>BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2002, ANALYTICAL PERSPECTIVES 61 (2001)[hereinafter 2002 BUDGET].

<sup>2</sup>See Heidi Glenn, *Bush Administration Questions Value of Tax Expenditures List*, 91 TAX NOTES 535, 535 (2001); Martin Sullivan, *Administration Reignites Old Battle Over Tax Expenditures*, 91 TAX NOTES 701, 701 (2001) (“the text of the Bush budget jolted tax policy aficionados to attention”).

<sup>3</sup>2002 BUDGET, *supra* note 1, at 61.

<sup>4</sup>See, e.g., Bruce Bartlett, *The End of Tax Expenditures as We Know Them*, 92 TAX NOTES 413, 414-17 (2001) (recounting history of disputes over existence and meaning of baseline); Boris I. Bittker, *Accounting for Federal ‘Tax Subsidies’ in the National Budget*, 22 NAT’L TAX J. 244, 247 (1969); Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 TAX NOTES 1661, 1661 (1992); Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L. J. 1155, 1166-67 (1988).

<sup>5</sup>See Bruce Bartlett, *supra* note 4, at 413; Heidi Glenn, *supra* note 2, at 535.

<sup>6</sup>BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2003, ANALYTIC PERSPECTIVES 95 (2002)[hereinafter 2003 BUDGET].

is hard to believe that the 2002 budget language was an error, or a misrepresentation of the Administration's feelings towards the tax expenditure budget. A substantial faction probably favors its elimination, which means the issue will probably resurface in the not-very-distant future.<sup>7</sup> And when it does, we should be prepared to discuss the relevant issues.

Those issues include both those raised by the President and others that are routinely ignored. The most important is that all the sources of information we have about government spending suffer from problems similar if not identical to those identified in the tax expenditure budget. Take, for example, the absence of an agreed-upon baseline of a "normal" tax system against which to measure "tax expenditures". A central theme of the article is that the same baseline problem exists for several clear substitutes for tax expenditures, regulation and the non-enforcement of across-the-board rules. Even the seemingly obvious baseline of zero expenditures for determining the amount of cash subsidies can be challenged as incompletely theorized and misleading. The breadth and depth of the baseline and other problems throw into question the wisdom of excoriating the tax expenditure budget in particular. If improving the utility of information distributed about the direction and function of government is the desired end, one must focus at least as much on the interaction between the various information sources as on the merits or demerits of any particular source of information. And once we do that, this article argues, it becomes clear that the better path involves the publication of more, rather than less, information. In particular, the article contends that it would be helpful to publish an admittedly flawed regulatory budget to serve as a companion to the tax expenditure budget as part of the annual budget process.

## **I. Introduction: The Importance of Information in a Democratic Society**

Though reasonable people disagree about precisely which policy initiatives constitute "rent-seeking" (as opposed to "good public policy"), all agree that in theory, government can be misused to extract money from a poorly-organized majority and to redistribute it to an undeserving but well-organized minority.<sup>8</sup> In addition to the implicit unfairness of such

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<sup>7</sup>The public silence may indicate only that the battleground has shifted to behind the closed doors of the Congressional budget committees.

<sup>8</sup>This insight underlies the school of thought known as "public choice theory." See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 286-87 (1962); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 35 (1965). For a summary of the literature on interest group theory, see, e.g., Einer L. Elhauge, *Does Interest Group Theory Justify More Intrusive Review?*, 101 *YALE L. J.* 31, 35 (1991); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 *U. PA. L. REV.* 1, 36-45 (1990); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 *VA. L. REV.* 275, 285 (1988). The intellectual lineage of public choice theory stretches at least as far back as James Madison. See Edward A. Zelinsky, *James Madison and Public Choice at Gucci*

activity, this raises serious efficiency concerns. Not only do groups waste their time and energy seeking (or opposing) such redistribution,<sup>9</sup> but the method of redistribution may induce additional undesirable behavior.<sup>10</sup> Price-support programs may lead farmers to plant covered crops rather than others that can be sold at a profit on the open market; “favorable” regulation may cause utility companies to continue to utilize out-dated, pollution-spewing equipment rather than invest in newer and cleaner technology. Some amount of rent-seeking<sup>11</sup> is endemic to all societies and all political systems,<sup>12</sup> and perhaps to all human relationships.<sup>13</sup> However, most people also believe that steps can be taken to minimize its amount. Political systems and institutions can be designed to reduce the rewards from rent-seeking behavior, thereby reducing the resources invested in this unproductive endeavor and correspondingly increasing the resources devoted to productive enterprises.<sup>14</sup> A legal system sensitive to public choice concerns must identify these arrangements and institutions.

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*Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L. J. 1165, 1171 (1993).

<sup>9</sup>See DENNIS MUELLER, *PUBLIC CHOICE II*, at 229-35 (1989); James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* 3, 22-23 (1988); Einer Elhauge, *supra* note 8, at 43.; Daniel Shaviro, *supra* note 8, at 38.

<sup>10</sup>See Daniel Shaviro, *supra* note 8, at 341; GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* 19 (1989).

<sup>11</sup>As the previous paragraph illustrates, the term “rent-seeking” is used to describe two quite different types of socially destructive behavior. One use of the term refers to attempts to extract personal gain at the expense of the larger society. See Gordon Tullock, *Rent Seeking and Tax Reform*, 6 *CONTEMP. POL. ISSUES* 37, 37 (1988) (“My personal definition of rent seeking essentially is using resources to obtain rents for people where the rents themselves come from something with negative social value.”). This use of the term is associated with concepts such as “negative log-rolling”, where each interest group constituency receives a share of governmental largesse, but each ends up worse off than if there had been no largesse at all, see Daniel Shaviro, *supra* note 8, at 37, and “collective action problems,” where a combination of free-riding and organizational disparities allow small, concentrated groups to take advantage of more diffuse majorities. See Einer Elhauge, *supra* note 8, at 37-38. “Rent-seeking” can also refer to attempts to appropriate (through the political system or otherwise) gains generated by beneficial transactions. The resources expended in such efforts to achieve such transfers of wealth are “wasted”, thus offsetting the gains (or consumer surplus) generated by the underlying transaction. See Daniel Shaviro, *supra* note 8, at 38. This Article considers both forms of misbehavior to be “rent-seeking.”

<sup>12</sup>Although the public choice literature focuses on rent-seeking in representative democracies, this is a function of the context within which such scholars are working. Similar analytic methods could no doubt be employed to explain the rise and fall of court “favorites” and other phenomenon in autocratic regimes.

<sup>13</sup>A number of academics analyze employment relationships and labor laws in terms of “rent-seeking” opportunities. See, e.g., Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 *MICH. L. REV.* 419, 491 (1992); Paul H. Rubin and Peter Shedd, *Human Capital and Covenants Not To Compete*, 10 *J. LEGAL STUD.* 93, 97 (1981). Others have looked at marriage and divorce through the same lens. See Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 *GEO. L. J.* 2423, 2440 (1994).

<sup>14</sup>See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *supra* note 8, at 289-94; Edward A. Zelinsky, *supra* note 8, at 1172 (outlining Madisonian solution); *id.* at 1173 (summarizing “contemporary agency scholarship”); Einer Elhauge, *supra* note 8, at 44-46 (summarizing proposals for using judicial review as counterbalance to interest group capture).

In democratic systems, rent-seeking is partly a function of agency problems, arising from the public's lax monitoring of its agents.<sup>15</sup> These agents include both the politicians responsible for generating laws and the bureaucrats entrusted with administering and enforcing them. In less technical terms, this means that politicians and bureaucrats cater to special interests because the public fails to punish them for doing so—by throwing them out of office<sup>16</sup>—often enough. Many explanations exist for the public's failure to punish offending politicians. Some believe that the problem consists of a lack of easily accessible and comprehensible information.<sup>17</sup> The public would punish politicians more if they knew the extent of their transgressions, just as they take action against corporations once they have been revealed to be major polluters.<sup>18</sup> This belief has led to calls for the provision of better, more accessible information about the actions of government officials.

Of course, the public provision of information about governmental behavior serves a broader purpose in democratic societies than the control of rent-seeking behavior. Governance often requires establishing priorities, making hard decisions based on incomplete information, or choosing between competing values. Voters need to know whether the actions taken by their government accord with their personal beliefs and preferences<sup>19</sup> to intelligently choose between returning incumbents to political office and seeking new alternatives.

Finally, information about past and current government programs can help government officials make better decisions. It helps avoid the creation of duplicative

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<sup>15</sup>See Daniel Shaviro, *supra* note 8, at 39-40 (describing “efficient shirking” by voters).

<sup>16</sup>Politicians can be directly voted out of office. Punishing bureaucrats is more difficult, especially when they are protected by civil service regulations. However, many of the top-level bureaucrats are political appointees. Those who serve under them can be fired (even under civil service regulations) for insubordination should they fail to abide by the policies set by their department heads; as a practical matter, though, it may be difficult to differentiate between active disobedience and less-than-stellar (but not discharge-worthy) performance.

<sup>17</sup>One prominent public choice theorist explains that because interest groups realize that a direct transfer of public monies to their group would be too “raw,” they try to conceal what is really going on from the public at large. See GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT-SEEKING* 19 (1989).

<sup>18</sup>The Toxic Release Inventory, section 313 of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. " 11,001-11,050 (1994), has been acclaimed as one of the most successful anti-pollution laws in recent history. See Bradley C. Karkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 956 (2002) (TRI “a smashing policy success”). By requiring facilities in specified industrial sectors to file annual disclosures of their releases of some 650 listed toxic substances, “[i]t subjects the environmental performance of facilities and firms to an unprecedented degree of scrutiny by their peers, competitors, investors, employees, consumers, community residents...and the public in general.... These external monitors often have powerful tools at their disposal...which they use to discipline poor performances.” Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L. J. 257, 261-262 (2001). This law has been credited with “dramatic reductions” in reported releases. *Id.* at 259.

<sup>19</sup>Opponents often describe decisions that they disagree with as “rent-seeking” or interest group “grabs” whether or not they meet the technical definition of “rent-seeking” found in footnote 11, *supra*.

programs, and can provide general information regarding the financial or other consequences of particular government actions.

## II. The Tax Expenditure Budget as a Provider of Information

### A. The History of the Tax Expenditure Budget

The tax expenditure budget was developed as just such an informational aid. In the late 1960's, Stanley Surrey, developed a theory that "special" tax rules which reduced tax liability had the same economic and social effects as direct government expenditures, and should be analyzed accordingly for economic and political purposes.<sup>20</sup> He pioneered the concept of the "tax expenditure budget" to catalogue both such provisions and their cost in terms of foregone tax revenue.<sup>21</sup> The budget identifies "departures from the normal tax structure" and estimates the revenue the government would have collected in the absence of those provisions, and thus the implicit cost of these provisions. When he became the Assistant Secretary of the Treasury for Tax Policy during the Kennedy and Johnson administrations, Surrey worked tirelessly to convince Congress of the need to publish a tax expenditure budget as part of the President's annual budget.<sup>22</sup> These efforts did not come to fruition until 1974, long after Surrey returned to his Harvard professorship.<sup>23</sup> Only then did

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<sup>20</sup>See Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706 (1970); see generally Jonathan Barry Forman, *Origins of the Tax Expenditure Budget*, 30 TAX NOTES 538 (1986) ("Surrey gave the phrase 'tax expenditure' its first public exposure on November 15, 1967 in a "[sic] speech to the Money Marketeers, a New York Financial group."); Edward A. Zelinsky, *supra* note 8, at 1165 n.1 (detailing Surrey's role). Living as he did in a less cynical era, Surrey worried less about self-interested government actors than about irrational or careless decisionmaking. Surrey believed that the use of tax expenditures interfered with "the ability of the Government to maintain control over the management of its priorities" by undercutting the budget process, see Stanley S. Surrey, *supra*, at 731, and avoided the oversight of the "appropriate congressional committee charged with the legislative area involved", see *id.* at 728. He hoped that publication of a tax expenditure budget would lead to the elimination of tax expenditures and their replacement (when appropriate) with direct expenditure programs. See STANLEY SURREY, *PATHWAYS TO TAX REFORM* 38-39 (1973); Victor Thuronyi, *supra* note 4, at 1155. The continued survival of tax expenditures shows them to be more deeply-rooted—and more attributable to deliberate political decisions than ignorant or careless governance—than Surrey initially contended.

<sup>21</sup>See Jonathan Barry Forman, *supra*, at 538-539.

<sup>22</sup>See Jonathan Barry Forman, *supra* note 20, at 540 ("Surrey devoted a great deal of effort to getting the Bureau of the Budget to agree to include the tax expenditure analysis in the budget...").

<sup>23</sup>Surrey earlier convinced the Secretary of the Treasury to include a tax expenditure budget in his Annual Report. *Id.* at 540. The first tax expenditure budget appeared as an appendix to the Annual Report of the Secretary of the Treasury for the Fiscal Year 1968. See U.S. Department of the Treasury, Annual Report of the Secretary of the Treasury on the State of Finances for the Fiscal Year Ended June 30, 1968, at 322-40 (1969) (Exhibit 29). This practice, in modified form, survived the change of administrations in 1970. See U.S. Department of the Treasury, Annual Report of the Secretary of the Treasury on the State of Finances for the Fiscal Year Ended June 30, 1970, at 306-08, (1971) (list of "tax aidsh"). The Ways and Means Committee began printing Treasury/Joint Committee on Internal Revenue Taxation estimates of federal tax expenditures on an annual basis in 1972. Jonathan Barry Forman, *supra*, at 542 (detailing legislative background). The Joint Committee continues to publish a list of tax expenditures on an annual basis. The Joint Committee analysis of

Congress pass legislation mandating the inclusion of a tax expenditure budget in the annual federal budget report.<sup>24</sup>

Although this act requires a listing of “tax expenditures” in the budget, it provides little in the way of guidance about either the form or content of such a listing. As a result, the presentation of the tax expenditure budget has varied over time. Initially, the budget was compiled using “a practical variant of a comprehensive income tax” as the baseline or “normal tax” against which deviations were measured.<sup>25</sup> Beginning in 1983, however, the budget displayed tax expenditures measured against a revised baseline, entitled the “reference tax” in addition to the normal baseline. The normal and reference tax baselines differ in their treatment of the rate structure,<sup>26</sup> government transfer payments,<sup>27</sup> accelerated depreciation,<sup>28</sup> and some foreign income.<sup>29</sup> The 1982 budget was the first to add a table displaying the various tax expenditures in terms of their “outlay equivalents”—or how much money the government would have to transfer to get the same economic effect as the tax expenditure.<sup>30</sup> Beginning in 1995, the budget included a table estimating the cost in present value terms of provisions leading to tax deferrals (as opposed to total forgiveness).<sup>31</sup>

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tax expenditures varies in some respects from that produced by Treasury for use in the Presidential budget document *See* Joint Committee on Taxation, *Estimates of Federal Tax Expenditures for Fiscal Years 2000–4*, December 22, 1999, *reprinted in* 86 TAX NOTES 103, 107–9 (2000) (outlining differences between the tax expenditure budgets).

<sup>24</sup>The Congressional Budget Act of 1974 mandated the preparation of an annual tax expenditure budget. Congressional Budget and Impoundment Control Act of 1974, Pub. Law No. 93-3444, ' 308, 88 Stat. 297, 313 (1974) (current version at 2 U.S.C. ' 640(c)(3) (200–)). *See generally* Bruce Bartlett, *supra* note 4, at 414 (detailing legislative history of tax expenditure budget); Jonathan Barry Forman, *supra* note 20, at 542–44 (legislation sponsored by Sen. Javits).

<sup>25</sup>ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *TAX EXPENDITURES: RECENT EXPERIENCES* 108 (1996). Both the executive branch and congressional staffs agreed on a common concept of a “normal tax” during this period. *See* BUDGET OF THE UNITED STATES, FISCAL 1985, SPECIAL ANALYSES G-1 (1985)[hereinafter 1985 BUDGET].

<sup>26</sup>The normal tax baseline uses the maximum rate of corporate tax as its baseline, treating the lower tax rate applied to the first \$10 million of corporate income as a tax expenditure, while the reference tax takes the entire tax schedule as a baseline. Similarly, the reference tax does not treat the preferential tax rate for capital gains as a tax expenditure. *See* 2003 BUDGET, *supra* note 6, at 112.

<sup>27</sup>The normal tax baseline treats all cash transfers from the Government to individuals as gross income, and exemptions of such transfers from the tax base as tax expenditures. The reference baseline ignores these transfers. *Id.* at 113.

<sup>28</sup>The reference tax baseline, unlike the normal tax baseline, ignores accelerated depreciation. *Id.*

<sup>29</sup>The normal tax baseline treats the deferral of tax on income of controlled foreign corporations as a tax expenditure while the reference tax baseline does not. *Id.*

<sup>30</sup>*See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 25, at 108; 1985 BUDGET, *supra* note 25, at G-12. The amount differs from the tax expenditure amount primarily because the government transfers would be subject to tax upon receipt. *Id.* at G-12.

<sup>31</sup>ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 25, at 110.

All of these changes were attempts to improve the quality of the information provided by the tax expenditure budget. As detailed below, however, many continue to attack imperfections in the tax expenditure budget.

## **B. Continuing Questions About Quality**

The quality of the information conveyed by the tax expenditure budget has been subject to question from its inception. These criticisms focused, and continue to focus, on two issues. One is the baseline issue, the question of what to consider as “normal” for purposes of identifying and measuring deviations or “tax preferences”. The other is simply the reliability of the numbers associated with the identified preferences. These are not minor quibbles whether one’s aim is to identify legislative misbehavior in catering to “special interests” or merely to learn how the government has directed its limited resources. For both, one needs to know to whom such largesse has been directed and in what amounts. Unfortunately, the tax expenditure budget continues to fall short of perfection on these measurement issues.

### **1. The Baseline Issue**

One of the earliest critics of the tax expenditure budget, Boris Bittker, noted that, [t]o effect a ‘full accounting,’ then, we must first construct an ideal or correct income tax structure, departures from which will be reflected as ‘tax expenditures’ in the National budget..... If the lack of an agreed conceptual model makes it impossible to say whether a large number of structural features of the existing federal income tax laws are, or are not, ‘tax expenditures,’ the proposed ‘full accounting’ may turn out, in the end, to be only a partial accounting. In this event, it will succeed in bringing some issues to the fore only to conceal others;....<sup>32</sup>

Bittker went on to detail a number of areas in which no “agreed conceptual model” existed.<sup>33</sup> Later critics have reiterated these concerns,<sup>34</sup> sometimes adding a political twist. Several have alleged that Surrey’s “subjective vision” implemented in the “normal tax” baseline (and, to a lesser extent, the “reference tax” baseline) targets those provisions aiding

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<sup>32</sup>Boris I. Bittker, *supra* note 4, at 248, 258-59. *See generally* Jonathan Barry Forman, *supra* note 20, at 539 n.15 (“This issue is central in the early debate over the validity of the tax expenditure concept.”). Even those relatively comfortable with Surrey’s choice of a Haig-Simons income baseline quarreled with his resolution of the ambiguities inherent in that concept as well as his incorporation of generally accepted tax and accounting structures. *See, e.g.*, Victor Thuronyi, *supra* note 4, at 1155 (“[T]hese compromises have made the idea of a normative income tax so inherently subjective that it deprives the tax expenditure concept of its persuasive force.”); *id.* at 1167-70 (summarizing positions of critics); Douglas A. Kahn and Jeffrey S. Lehman, *supra* note 4, at 1663.

<sup>33</sup>Boris I. Bittker, *supra* note 4, at 250-58.

<sup>34</sup>*See* Victor Thuronyi, *supra* note 4, at 1170; Douglas A. Kahn & Jeffrey S. Lehman, *supra* note 4, at 1663.

businesses and wealthier taxpayers while overlooking those aspects of the tax system (such as the progressive rate structure) that benefit lower-income individuals and others (such as the corporate income tax) that target higher income taxpayers.<sup>35</sup> As implemented, the argument goes, the tax expenditure budget (even as modified by the addition of the reference tax baseline) incorporates a liberal agenda.<sup>36</sup>

There is little doubt about the validity of these criticisms. The tax expenditure budget, as currently constructed (and probably however constructed<sup>37</sup>) imperfectly reflects the political considerations underlying the construction of the tax code. As such, it provides an incomplete and inaccurate measure of special interest influence. It is full of oddities. For example, while the deduction for charitable contributions is treated as a tax expenditure, the treatment of some entities as tax-exempt is not.<sup>38</sup> The implicit assumption that all tax expenditures are bad<sup>39</sup> can also be distracting. There is no particular reason to believe that tax expenditures are any more likely than direct expenditures to be the result of special interest pandering rather than a legitimate mechanism for overcoming a collective action problem.<sup>40</sup> Nor is it clear, as some have suggested,<sup>41</sup> that Congressional decision making would be improved by remitting control over various tax expenditures to the Congressional subcommittee with jurisdiction over the substantive area affected.<sup>42</sup> And at this point, it is hard to argue, at Surrey did, that many of the provisions result from Congressional failures to “know what was being spent through the tax system or for what purposes...[because] there was no accounting” for them.<sup>43</sup> It may well be time to rethink the way some of the

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<sup>35</sup>See, e.g., Bruce Bartlett, *supra* note 4, at 419. Of course, if the corporate income tax is considered a tax expenditure, one would have to reconsider treating the realization requirement as one as well, since it allows shareholders to exclude (sometimes permanently) the income generated from corporate investments from the shareholders’ income tax base. The two adjustments may come close to canceling each other out.

<sup>36</sup>*Id.* at 421 (revision of tax expenditure budget would be a “threat to liberal dominance of the tax reform debate”); see also Gene Steuerle, *The New Old Tax Expenditure Debate*, 95 TAX NOTES 1671 (2002).

<sup>37</sup>See Boris Bittker, *supra* note 4, at 251 (a “full accounting” of departures from the Haig-Simons model would be “a formidable undertaking”); Boris Bittker, “‘Comprehensive Income Base’ as a Goal of Income Tax Reform”, 80 HARV. L. REV. 925, 929 (1967) (citing Pechman, *What Would a Comprehensive Individual Income Tax Yield?*, I 1959 COMPENDIUM 251, 259) (“To determine the extent of erosion, we must first have some notion as to what the tax system ought to be. Since this is to a large extent a matter of equity, and since equity judgments are highly personal, no single standard will meet everybody’s approval.”).

<sup>38</sup>This cannot be justified as a method of avoiding double-counting since many tax-exempt organizations earn income as well as raise money through tax-exempt donations.

<sup>39</sup>See Boris Bittker, *supra* note 4, at 248 (“not insignificant” that initial “minimum list” of tax expenditures seemed to be “limited to those provisions that the incumbent Secretary of the Treasury wants Congress to repeal”).

<sup>40</sup>Although critics of tax expenditures have long alleged that the tax system is more susceptible to rent-seeking than direct expenditure programs, the one empirical study of this issue suggests that little or no difference in results flow from admitted differences in procedure. See Edward A. Zelinsky, *supra* note 8, at 1190–91.

<sup>41</sup>See Stanley S. Surrey, *supra* note 20, at 728–29; Victor Thuronyi, *supra* note 4, at 1161.

<sup>42</sup>See Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 402–04 (1998) (unifying budget by function would generate timing mismatches).

<sup>43</sup>See Stanley S. Surrey, *supra* note 20, at 730.

ambiguities in the Haig-Simons income concept are being resolved and broaden (or shorten) the list of tax expenditures to cover more (or less) than those Surrey would have preferred to “move...—to the extent that government assistance is still considered desirable—from the tax expenditure budget to the regular budget” in the form of direct expenditure programs.<sup>44</sup>

But the proper response to this criticism lies in a reexamination of the list of tax expenditures, broadening and deepening the level of public exposure, not scrapping the whole instrument. The criticism in no way refutes the underlying insight that specially favorable tax rules constitute a form of government subsidy or expenditure, nor suggests that the information we have should be suppressed.

## 2. The Numbers

The choice of the baseline affects the identification of tax expenditures. Some tax provisions that are treated as tax expenditures under one baseline do not appear as tax expenditures under another. Picking the “wrong” baseline can generate misleading information. But voters and politicians also can be misled if they believe that a particular tax expenditure is much more (or less) costly than it actually is. And many suspect that the tax expenditure budget, as currently formulated, makes many such errors, perhaps enough to make the schedule worse than useless.

One problem flows from the lack of good information about those utilizing various tax expenditures. Tax returns contain enough information to detail who claims how much in mortgage interest deductions and, more recently, the government has begun collecting information regarding receipts of tax exempt interest. But tax returns do not provide the government with the identity of the taxpayers affected by, and thus the amount of tax lost due to, the exclusion of interest on life insurance savings, exceptions from imputed interest rules, or most of the employee fringe benefit exclusions.<sup>45</sup> Even the number assigned to the amount of tax lost to the step-up in the basis of capital gains at death is questionable, since an accurate computation requires knowledge of decedents’ asset bases—and it is precisely the government’s (or anyone else’s) lack of such knowledge that justified the repeal of section 1023 in 1978.<sup>46</sup> Similar information deficits exist with respect to other tax expenditures.

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<sup>44</sup>See Stanley S. Surrey, *supra* note 20, at 737-38.

<sup>45</sup>None of this information is required to be reported on individual tax schedules. See Form 1040.

<sup>46</sup>See Howard J. Hoffman, *The Role of the Bar in the Tax Legislative Process*, 37 TAX L. REV. 413, 487-488 (1982) (discussing role of perceived “unreasonable recordkeeping burdens” on repeal of section 1023).

Of course, other sources of information exist which, like tax returns, can provide a starting point for determining the cost of various tax expenditures. Estimators use a variety of governmental databases, ranging from census results to national income and product accounts, as well as numerous private industry sources. But extracting the necessary information takes both time and money; and periodically one hears unsettling rumors regarding the priority (or lack thereof) accorded preparation of this document by the chronically overworked Treasury staff. Although the consensus seems to be that this estimating process has improved over time,<sup>47</sup> it surely remains far from perfect.

Nor do the problems with the figures end there. Because of interactions between various rules, the amount of tax revenue lost under the existing tax rules is of only limited value in determining the effects of modifying or eliminating such rules, the real “cost” of such provisions.<sup>48</sup> The various tax expenditures often serve as substitutes for one another; eliminate one and another grows in significance.<sup>49</sup> For example, eliminating the tax preference for state and local bonds may cause investment to shift from such bonds into housing, another non-taxable asset. Revenue gains associated with such a rule change thus may be minimal even if though the rule exempting state and local bond interest from income appears to generate a large revenue loss on the tax expenditure budget.

In sum, substantial, valid concerns have been raised about the construction and interpretation of the tax expenditure budget. Moreover, there is no easy (or even difficult) way to completely remedy these problems. It would be easy to conclude that the tax expenditure budget fails at its intended purpose, of providing both government officials and the voting public with information regarding the government’s true priorities, including opportunistic behaviors, and thus should be abolished. But that conclusion is too simplistic, if for no other reason than that similar problems afflict other sources of information on governmental priorities. As the next section points out, the rest of the federal budget document suffers from equally serious—and indeed almost identical—problems. If the objections to the tax expenditure budget warrant its elimination, they would also warrant ceasing publication of the remainder of the budget.

### **III. Matching Defects in the Regular Federal Budget**

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<sup>47</sup>See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 25, at 110.

<sup>48</sup>This problem is acknowledged in the explanation accompanying the tax expenditure budget. See 2003 BUDGET, *supra* note 6, at .

<sup>49</sup>Again, this was a problem noted by Professor Bittker in 1969. See Boris L. Bittker, *supra* note 4, at 247.

At first glance, the “regular” federal budget, estimating the amounts to be expended by the government over the next fiscal year, appears unproblematic. After all, in the absence of government, there would be no governmental expenditures. Thus, the use of a zero expenditure baseline as the measure of governmental financial largesse—and power—makes intuitive sense. Further reflection, though, reveals that this zero expenditure baseline is as problematic as the “normal” (or “reference tax”) baselines. Nor are the numbers generated under that baseline particularly trustworthy; large discrepancies often arise between planned and actual expenditure levels. The closer one looks, the more similar the two types of budgets—the tax expenditure budget and the regular budget—appear, warts and all.

### **A. The Baseline Problem in the Regular Budget**

Political analysts and ordinary citizens routinely look at the amounts projected in the budget to be spent on various groups as evidence of the direction and extent of governmental (warranted and unwarranted) favoritism. The more money directed at any particular group, the greater its presumed political influence—a term not to be confused with social merit.<sup>50</sup> For example, the members of the (non-farming) public generally regards a \$100 million increase in payments to farmers as an indicia of successful “rent-seeking” behavior by that political group.<sup>51</sup> That is, they view the additional expenditure as a diversion of \$100 million that properly belongs to them (or to governmental programs that they favor) to the farm lobby. Further, many believe that the polity as a whole is worse off as a result of this transfer either because of the higher tax burden<sup>52</sup> or because their preferred programs would have generated higher social benefits than the farm programs actually being financed.<sup>53</sup> Moreover, they may see such successful transfers as encouraging the further development of the socially useless lobbying industry.<sup>54</sup> The federal budget, in short, provides a road-map of contemporary rent-seeking successes, as well as providing an illustration of the current government’s relative priorities..

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<sup>50</sup>The difference between a “socially valuable expenditure” and “socially wasteful rent-seeking” lies in the eyes of the beholder. Reasonable people can, and frequently do, disagree over the proper characterization of particular government payments. To a large extent, such disagreements can be expressed as disagreements over “priorities” discussed *supra* TAN 19.

<sup>51</sup>Farmers undoubtedly view such sums as proper recognition of their importance in society and to the economy. Once again, the distinction between “rent-seeking” and differing priorities or views of the world is blurry.

<sup>52</sup>Higher by an amount in excess of \$100 million, since additional monies must be raised to finance the collection and processing of that \$100 million. In addition to the higher extraction, many would contend that they would have been able to put the money to a better use than the government.

<sup>53</sup>*See supra* note 11 (defining rent-seeking).

<sup>54</sup>*See id.*

But there is less information provided by using a zero-expenditure baseline than meets the eye. First, the treatment of all expenditures as evidence of rent-seeking (achieving) understates the use of the government's taxing power as a mechanism to overcome collective action and free rider problems. Further, the apparent beneficiaries of many programs may be quite different from the real, economic beneficiaries; looking only at who receives the funds may divert attention from the identity of the real recipients of government largesse. Each of these problems is discussed below.

Although there would be no government expenditures in the absence of government, there would be no taxes either. As a result, individuals and corporations would have more money.<sup>55</sup> One suspects that much of this extra money would go towards the purchase of benefits normally provided at the governmental level. After all, most people would still want roads, schools, sewer systems and the like.<sup>56</sup> This is a long way of making the obvious point that to a large extent, tax monies are expended to benefit the very people who pay the tax. The zero expenditure baseline fails to differentiate redistributive (which may or may not represent rent-seeking, or socially inefficient pandering to special interests) expenditures from self-financed benefits, situations in which the government is best viewed as a neutral stakeholder, the device used to overcome free rider problems endemic to the provision of public goods. To make political sense of the information provided by the regular budget, one must differentiate between expenditures that consist of the return of particular taxpayers' tax monies in the form of services and those that result in a net gain to some subgroup of taxpayers, since only the latter could be characterized as the result of "rent-seeking."<sup>57</sup> The failure to do so is highly misleading, as to both the identity and amount of potential rent-seeking and priority-setting.

In a sense, this baseline flaw is the converse of the baseline flaw in the tax expenditure budget. There, the argument goes, the baseline has been shaped by invisible, and politically contestable, judgments about a "normal" tax system. In the regular, zero-expenditure baseline budget, the authors have made no such judgments about a non-redistributive baseline expenditure pattern, but instead have left the judgments to readers. Unfortunately, many of those readers, whether politicians or potential voters, will not realize

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<sup>55</sup>That is, they would unless (as seems likely) that the economy would disintegrate due to the absence of effective governmental power; anarchy is not generally conducive to economic growth. The point of this hypothetical is not to praise or condemn the no-government world, but to stress an often overlooked aspect of tax payments and receipts.

<sup>56</sup>It may well be impossible to get the same level of benefits through market provision due to free-rider and other collective action problems endemic to the provision of public goods. Indeed, the need to overcome such problems constitutes a standard justification for the existence of government. *See* MANCUR OLSON, *supra* note 8, at 100.

<sup>57</sup>*See supra* note 11 (defining "rent-seeking"). Alternatively, if not rent-seeking, such expenditures could be analyzed as the outcome of legitimately contested governmental decisions.

that such judgments must be made (let alone how to make them) to intelligently analyze the information.

Relying on budget numbers can be misleading for another reason. The actual beneficiaries of federal expenditures may well be someone other than the apparent beneficiaries. To take an obvious (and well-known) example, the identity of the primary beneficiary of Medicare is unclear. Is it the seniors who receive medical care they might not have received otherwise—or doctors, who now have a much larger group of paying patients to support their practices? Who benefits who benefits from subsidized federal student loans to medical students—the students who take advantage of them, the universities (and their employees) which rely on the existence of such loan programs when determining their tuition schedules, or the future patients who gain from the presence of more doctors? Similar ambiguity exists in the tax expenditure context. It is, for example, unclear whether the deduction for home mortgage interest benefits home buyers (the apparent beneficiaries) or home sellers (who can thereby charge higher prices for their homes) more. A reasonable voter's classification of the expenditure as "rent-seeking", as merely violating their vision of the public good, or of being good public policy may differ depending on the "real" beneficiary of the government expenditure. In all of these cases (and many others), the simple numbers provided in the federal budget are deceptive, appearing to convey more information than they actually do.

As with tax expenditures, even if one felt reasonably comfortable with the operation of the baseline(s), the categorization of particular expenditures as self-financed benefits or general benefits or special benefits, a second, independent reason for suspicion of the document exists: questions about the accuracy of the numbers put in the various categories.

## **B. The Numbers**

Since the federal budget covers actual expenditures, expenditures from accounts tracked by federal bureaucrats, one might think that (at least in relation to the zero baseline) there could be nothing uncertain, nothing controversial, about the numbers found in the budget. But one would be wrong, for two reasons. The first is the interrelationship between various programs, the same sort of interrelationship that undermines the usefulness of the tax expenditure budget. The other is the role of entitlement programs.

Just as taxpayers who lose “their” tax expenditures may gravitate towards investment in other tax-favored activities, individuals profiting from one governmental program may migrate to another if their original program is shut down. As a result, the use of a zero expenditure baseline to score the costs of such programs is misleading. The real cost is the difference (if any) between the cost of the program and the cost of the replacement program.<sup>58</sup> For example, eliminating the Section 8 housing program is unlikely to save the government the \$17.5 billion stated cost of the program<sup>59</sup> since the loss of section 8 benefits will cause some of the benefited families to qualify for other forms of government benefits. Likewise, farm subsidies—commonly lambasted as the result of pernicious rent-seeking, reflecting the excessive electoral power of the farm interests—are less costly than the zero baseline suggests. If such subsidies did not exist, at least some of those individuals currently engaged in farming would exit the profession, undoubtedly damaging the businesses formerly patronized by them. Perhaps they would abandon their communities altogether. Though this string of events may well be efficient (and desirable) in the long run, in the short-run, the dislocations would be significant—and the persons and businesses affected by it undoubtedly would be partially subsidized by government aid. Such aid may come in the form of food, housing and medical assistance and vocational training programs for displaced farmers and others in the transitional period; it may come from federal contributions to infrastructure projects (such as roads and sewer systems) necessitated by the consequent demographic shifts. Those costs could be substantial. One could find similar linkages among other programs. Were Medicaid expenditures reduced, leading some to forgo medical care, one suspects that social security disability payments would increase as the unmitigated consequences of health problems drove people from the work force.<sup>60</sup> Like the revenue losses associated with particular tax expenditure provisions on the tax expenditure budget, the expenditures figures attributed to with particular programs on the federal budget likely overestimate the amount to be saved through the program’s elimination.

Another source of inaccuracy in the federal budget (at least, viewed prospectively) comes from the fact that not all programs are funded by a flat dollar amount. Some very large federal programs are “entitlement” programs; the authorizing statutes guarantee benefits to all those meeting the programs’ qualifications. Entitlement programs include Medicare, Medicaid, unemployment insurance, food stamps<sup>61</sup>—and the payment of interest on the federal debt, to name just a few. When constructing the budget, officials estimate the amount of such expenditures. However, as they are the first to admit, these estimations

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<sup>58</sup>Of course, the same argument can be made to minimize the amount of dead-weight loss generated by rent-seeking, monopolization and other economically harmful phenomenon. *See*

<sup>59</sup>2003 BUDGET, *supra* note 6, at 184.

<sup>60</sup>Similar criticisms have been leveled against the revenue estimates contained in tax expenditure budgets. *See* Bruce Bartlett, *supra* note 4, at 417-18; Boris Bittker, *supra* note 4, at 247.

depend on the accuracy of economic projections, projections which often prove inaccurate.<sup>62</sup> Some inaccuracy is inevitable, given that economics is not an exact science and unexpected events can intervene. However, politics also can play a role in deciding upon the underlying economic assumptions. The party in power often stands accused of picking assumptions to generate budgetary results in line with its political agenda.<sup>63</sup> And although at year's end, the executive has to publish (as part of the following year's budget) a comparison of actual to estimated totals, that does little to separate truly unexpected from predictable deviations, deviations masked by the party in power to further its legislative agenda.

### C. The Baseline Problem in Equal Outflow/Expenditure Budgets

These limitations of the zero baseline budget have been implicitly recognized by those who have tried to use another method, another baseline, to determine whether regions of the country (including states) have been treated fairly. They compare the tax revenues collected from each region or state to federal expenditures made within the same area.<sup>64</sup> The implicit (and often explicit) assumption is that each region or state should receive its—and only its—money back in the form of federal expenditures on public services. When judged against this baseline of equal tax outflows and expenditure inflows, it appears that some regions and states profit at the expense of others.<sup>65</sup> Whether the differences in treatment can be explained by variations in political power and bare-knuckled rent-seeking, as some contend, or results from social welfare maximizing decisions is less clear. Indeed, as explained below, this equal inflows and outflows baseline, like the zero-expenditure baseline, can be misleading as often as it is helpful even on the narrower issue of whether any redistribution is occurring.

In the first place, the location of an expenditure may not be a particularly good proxy for the location of the expenditure's intended or actual beneficiaries. Thus, the equal tax

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<sup>61</sup>2002 BUDGET, *supra* note 1, at 324.

<sup>62</sup>*See id.*, at 4-5.

<sup>63</sup>*See* ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 54 (2000) (“The assumptions are where political opportunism and manipulation thrive.”).

<sup>64</sup> *See, e.g.*, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 312 (Table No. 470); JAY H. WALDER & HERMAN B. LEONARD, THE FEDERAL BUDGET AND THE STATES: FISCAL YEAR 1999 at 4 (24th ed. 2000) (table 1); Lynn A Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J. L. & POLITICS 21, 39-40 (1997) (Tables 2 & 3).

<sup>65</sup>*See, e.g.*, U.S. DEPARTMENT OF COMMERCE, *supra* note 64, at 312 (“Each state runs a balance of payments surplus or deficit with the federal government. Put another way, each state indirectly subsidizes or is being subsidized by the other states.”); Wayne King, *Sun Belt Renews Battle over Federal Funds*, N.Y. TIMES, July 24, 1987, at D-19 (learning of a study showing disparity between federal revenues collected and expended in region, “a coalition of Southern lawmakers vowed today to wield their legislative power to send more money southward”); Daniel Patrick Moynihan, *Yes, New Yorkers Pick Up Tab for Other States*, N.Y. TIMES, Sept. 21, 1995, at A22.

outflows and expenditure inflows baseline may underestimate or overestimate the actual match of tax burdens and government benefits. For example, taxpayers in the east surely benefit from federal expenditures on western national parks and forests.<sup>66</sup> They will also benefit from the construction of a nuclear waste depository in Nevada. Indeed, it would be ludicrous to contend that the relative “overfinancing” of Nevada (relative to New York, say) that will result from what promise to be massive federal expenditures on that repository indicates the success of rent-seeking behavior by Nevada.<sup>67</sup> More generally, it would seem wrong to imply that Massachusetts is profiting from rent-seeking merely because Massachusetts-based companies happen to be the low bidders on an inordinately high number of lucrative (or at least expensive) federal contracts.<sup>68</sup>

This would not be a problem if all states or regions naturally received approximately the same ratio of generally beneficial expenditures relative to their tax collections. However, there is no reason to assume such a convenient state of affairs exists, and some to suspect it does not. The location of many general benefit expenditures are geographically determined. For example, naval bases have to be built near good harbors on large, navigable bodies of water. If, for strategic reasons, Congress decides to emphasize building up the navy rather than the army, coastal states will appear to benefit in expenditure terms at the expense of inland states. But it would be unreasonable to treat those facts as evidence of the relative mistreatment of Iowa unless one is prepared to attack the bona fides of the decision to build up the Navy, as opposed to, say, the air force.<sup>69</sup> Nor does Iowa have any natural features comparable to those found in, say, Wyoming, limiting the desirability of federal spending on national parks in that state. And there appears to be only one Yucca Mountain.

Another approach would be to amend the tax and expenditure comparisons by first removing all “general” benefits and associated tax revenues from the calculations. However, there is no more prospect of reaching agreement on the list of “general benefits” (let alone how to allocate the costs of those benefits among states’ tax revenues) than on the list of tax expenditures. Should expenditures on the space program be regarded as benefiting merely the states in which related expenditures are made (primarily Florida and Texas, where the

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<sup>66</sup>*But see* Lynn A. Baker & Samuel H. Dinkin, *supra* note 64, at 41 n. 63 (arguing federal wealth redistribution to western states not justified by disproportionate federal ownership of western lands).

<sup>67</sup>Nevada’s populace and politicians vehemently oppose the construction of a Nevada depository; however, everyone else is happy to have it located outside their state. *See* John J. Fialka, *Nuclear-Plant Neighbors Lobby For Yucca*, WALL ST. J., June 20, 2002, at A4.

<sup>68</sup>Unless, of course, one can make a case that letting the contracts in the first instance resulted from rent-seeking behavior. Such behavior is hardly unknown; it is widely acknowledged that political rather than military concerns undergird some of the decisions regarding the purchase of some weapons systems.

<sup>69</sup>Of course, if the navy programs could be carried out equally well in any one of several coastal states, one might expect to see those states engaging in rent-seeking behavior. *See supra* note 11 (defining rent-seeking).

space stations are located), or all states? And what about farm subsidies, which to many are the archetype rent-seeking success? A case can be made for the desirability, at a national level, of maintaining domestic food-producing capacity as a hedge against a variety of foreign disasters, and farm-state legislators regularly make it. Nor are they alone in trying to clothe “pork” in the mantle of “the national interest”. Virtually all spending programs are marketed to Congress and the public as being in the public interest, rather than as unprincipled grabs on the federal treasury.<sup>70</sup>

In sum, the problems identified in the tax expenditure budget have equally serious counterparts in the regular federal budget and its variants. No budget document provides as much useful information as one might hope; each is susceptible precisely to the political manipulation and misinterpretation it is supposed to constrain or illuminate. Nor is substantial improvement possible. Most of the identified flaws are inherent in the instruments.

Given these flaws in the information used by the public to inform them about the activity of their elected and appointed officials, the persistence and effectiveness of rent-seeking behavior (as well as, perhaps, the general phenomenon of voter apathy) is hardly surprising. Nor can we expect perfection from political actors acting on the basis of such imperfect information. But the point of this discussion is not to bemoan the existence of imperfections in our democratic system. It is instead to put the flaws inherent in the tax expenditure budget in context. The discussion is meant to highlight the fact that these flaws are no worse than those prevailing in another data set that we rely upon to guide our political analysis and determine our voting patterns, and which no one would suggest should be eliminated. Having decided that some information is better than none in that context, to be consistent, we should make the same decision when it comes to the tax expenditure budget. At some point, numbers may be so unreliable as to be worthless, but judging from related contexts, those found in the tax expenditure budget do not deserve that categorization. And once that point is accepted, it becomes possible to suggest that the issue should not be whether the tax expenditure budget device should be retained, but rather whether we should be adding to the list of imperfect information devices readily available for public inspection. Is it now time to require the addition of a “regulatory budget” to the annual budget publication?

#### **IV. The Case for a Regulatory Budget**

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<sup>70</sup>*See supra* note 17.

The difficulties with composing the tax expenditure budget do not undercut Surrey's original insight, that subsidies can be delivered through the tax system as effectively as through direct government spending, and that intelligent law-making and voting requires taking both types of subsidies into account. From a recipient's point of view, it makes no difference whether a government bestows a \$1000 check or excuses the recipient from paying \$1000 in taxes by promulgating a favorable tax rule. Instead, the problem with Surrey's analysis was that it stopped too soon; he should have added government regulation as an alternative method for delivering \$1000 payments to favored interests. From a recipient's point of view, what matters is the bottom line: whether it is \$1000 richer in the end. The method by which the \$1000 is delivered is irrelevant. At least, it is a matter of indifference for the recipient; as detailed below, it may make a substantial difference to the rest of society because the choice of delivery mechanism may have efficiency effects. It is because of those effects on society that we should be wary of structuring the political system to make one delivery mechanism more attractive than the others.

### **A. The Substitution Effect**

One of the justifications for publication of the tax expenditure budget was that, in its absence, legislators could grant privileges to special interest groups without their constituents' knowledge, and essentially beyond their oversight.<sup>71</sup> The argument originally went further: Surrey believed that legislators were unaware of the benefits being provided to these special interest groups.<sup>72</sup> The hope was that inclusion of the tax expenditure budget in the federal budget document would force both legislators and the public to scrutinize tax rules as carefully as direct expenditure provisions, and end what seemed to be a drift towards increased use of this under-the-table method of catering to rent-seekers and others.<sup>73</sup> Although the introduction of the tax expenditure budget did not markedly succeed in lowering the growth of tax expenditures,<sup>74</sup> tax expenditure provisions now seem to be receiving as much political scrutiny and oversight as direct spending programs.<sup>75</sup>

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<sup>71</sup>See Jonathan Barry Forman, *supra* note 20, at 538 ("Politicians could emphasize the sharply progressive statutory tax rates when they spoke to average citizens. At the same time they granted high-income constituents so many special provisions that virtually nobody paid tax at those high marginal rates."); Edward A. Zelinsky, *supra* note 8, at 1168 ("...such subsidies, undisclosed in the federal budget, were not subject to the same scrutiny as direct monetary expenditures...").

<sup>72</sup>See Stanley S. Surrey, *supra* note 20, at 730 (tax incentives "not comprehended within the Government.... No one really knew what was being spent through the tax system or for what purposes."); Jonathan Barry Forman, *supra* note 20, at 541-542 (...[Weidenbaum] testified before the Subcommittee on Economy in Government of the Joint Economic Committee, in an effort to make Congress aware of the many ways that the government subsidized the private sector through a variety of off-budget mechanisms.").

<sup>73</sup>See Stanley E. Surrey, *supra* note 20, at 737-738.

<sup>74</sup>The baseline problem resurfaces—it is impossible to know to what degree, if at all, publication of the tax expenditure budget constrained the growth of tax expenditures because we do not know what would have happened in its absence. However, the received wisdom is that the budget had at most a limited impact on the

But this increase in transparency may not have improved overall government accountability or manageability. Transparency with respect to tax code provisions provides only a glimpse into darkness so long as regulatory rules are nontransparent. It is possible that, to the extent the tax expenditure budget has been effective in tempering at least the most outrageous in interest group grabs<sup>76</sup> in the tax arena, all it has really succeeded in doing is diverting those efforts to other subsidy delivery mechanisms subject to less political scrutiny by legislators and voters. In particular, if a special interest group has enough political power to obtain a \$1000 subsidy, and if obtaining it through a tax subsidy becomes more difficult as a political matter because of the publication of the tax expenditure budget, it may go instead for a favorable regulatory ruling, one which reduces its costs by \$1000.<sup>77</sup> After all, \$1000 is \$1000, no matter the method of delivery. Such redirection is plausible because, although many if not most of regulatory rulings are “public” in the sense that they have to be published in publicly available agency documents, these documents are less widely distributed and in less accessible form than the annual federal budget document. No central compilation of agency actions and associated costs exists, let alone is published, distributed and read on an annual basis as is the federal budget document.

Thus, to the extent the tax expenditure budget has any effect on the overall level of tax expenditures, it may be redirecting rent-seeking rather than reducing its total. And unfortunately for us all, it is likely that that redirection will make us all worse off. The next section explains why.

## B. Why Redirection Matters

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continued growth in tax expenditures. See Jonathan Barry Forman, *supra* note 20, at 545 n.67 (“Nevertheless, tax expenditures continue to grow at a much faster rate than appropriations.”); Gene Steurle, *Some Thoughts on the Status of Tax Expenditures*, 68 TAX NOTES 485, 485 (1995); Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L. J. 407, 408 (1999) (Internal Revenue Code “has apparently become the vehicle of choice for disbursing government funds). Nonetheless, the steady chorus of attacks on the tax expenditure budget leads to the suspicion that it has at least a marginal effect on behavior.

<sup>75</sup>See Edward A. Zelinsky, *supra* note 8, at 1194. The mechanisms through which this scrutiny takes place remains somewhat separate from those overseeing direct expenditures, much to the discomfort of some analysts who, like Surrey, would prefer a more functionally unified budgetary process. See, e.g., Victor Thuronyi, *supra* note 4, at 1192; Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight under the Government Performance and Results Act*, 35 WAKE FOREST L. REV. 751, 789-90 (2000).

<sup>76</sup>Such “grabs” may be characterized as “rent-seeking” or contested policy judgments, depending on one’s political proclivities.

<sup>77</sup>I do not mean to suggest that such regulatory alternatives are available in all situations. Indeed, practical and political impediments may make regulatory initiatives impossible. But as the amount of government regulation increases, so too do the opportunities for regulatory favoritism. See JAMES BUCHANAN & GORDON TULLOCK, *supra* note 8, at 286-87.

Although all methods of paying \$1000 may be equal from the point of view of the special interest recipient of government largesse, they may not be equivalent from the perspective of others in the society, either those who finance the payment or those who are secondarily affected by the payment. Consider the example of steel subsidies. In recent years, the steel industry has been in financial trouble. According to the steel manufacturers, its problems stem from its inability to charge prices high enough to cover its costs—not its operating costs, but its fixed costs. Although its operating costs, the companies claim, are low enough to survive competition, they have been hobbled by their obligation to provide medical benefits to a large cadre of former steelworkers. Those costs could be “avoided” were the companies to declare bankruptcy, but both shareholders and former employees would suffer from such a course of action. From the steel industry’s point of view, having the government assume those costs is far preferable. But how could those costs be assumed? Several alternatives exist, each of which has different social and distributional implications. The government could simply give the steel companies enough money to pay retiree health costs, or agree to put those retirees under a federal health insurance plan. Doing so would spread the cost of the subsidy over all U.S. taxpayers. So too would a tax expenditure, provided by an exceptionally generous depreciation rule for steel-making equipment, for example. The imposition of a tariff, by contrast, shifts the burden to consumers of steel who are forced to pay higher prices for their purchases. Were the payment to be made in the form of relaxed environmental rules or enforcement of existing rules, the payment would come from those affected by the resulting pollution; it would be exacted in the form of higher medical costs, and lower or more unpleasant life expectancies. This raises an obvious fairness issue, as between one burdened group and another. But beyond the fairness issue is a larger efficiency concern: the total costs inflicted as a result of either a tariff or a relaxation of pollution standards may exceed the social costs that would have been created had Congress just paid the desired amount of money directly, in a cash grant, or provided an equivalent amount of tax relief. Both of these concerns are further elaborated below.

### **1. Fairness Concerns**

The choice of subsidy mechanism may determine where the economic burden of the subsidy will be placed. Appearances in this regard may be deceiving, however; the burden may be reallocated before the fact, as part of a trade-off in the legislative process, and after the fact, through the movement of prices and behavior in our market economy. Thus, the difference between subsidy mechanisms from a fairness perspective may be more apparent than real; at any rate, it is more complicated than ordinarily envisioned.

It is tempting to assert that direct expenditures and tax expenditures distribute costs in the “fairest” fashion.<sup>78</sup> Direct expenditures are paid out of general taxes, which have been collected from the population based on criteria that have survived the scrutiny of the political process; a very large part are financed by taxes ostensibly levied based on the contributor’s (taxpayer’s) “ability to pay”; to the extent the need to make such expenditures generates an increased need for government revenues, those increases will be financed through agreed upon rate increases levied on the “ability to pay” base. Although there are many disputes about how well the actual tax systems live up to that stated goal, no other funding mechanism even attempts to attain that goal; it would be surprising if they came closer to achieving it. Similarly, when it comes to tax expenditures, to the extent one analogizes them to subsidies, the same would be true. If one thought of them solely in terms of their effect in depressing revenues, the analysis would be virtually the same. The existence of the expenditures requires Congress to raise general tax rates to generate enough revenue to meet the governments spending priorities.

By contrast, regulation imposes burdens on those being regulated and the parties dealing with them. Raising production costs may inflate prices of the goods or services being produced, as well as depress output. Though in some cases these regulatory costs should be viewed as leading to the proper internalization of social costs of production, in other cases the regulation may be over or under-compensatory. For example, critics of the Endangered Species Act and other land preservation laws routinely argue that it leaves a few landowners—the last to develop—bearing the cost of an entire region’s habitat loss.<sup>79</sup> Likewise, the Americans with Disabilities Act leaves some employers with quite expensive “accommodation” responsibilities even in the absence of a causal link between the employment relationship and an employee’s disability. Because these expenses are discontinuous as between employers, very often the result is a transfer of wealth from the employer to the employee.<sup>80</sup>

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<sup>78</sup>Here one runs into the ubiquitous baseline problem once again. One cannot determine the “fairest” method of funding without some underlying conception of what “fairness” entails. Although some contend that “fairness” requires linking tax burdens to government benefits, the difficulties involved in determining who benefits from public goods leads many others to believe that “fairness” requires linking tax burdens to “ability to pay.” The two conceptions of fairness can obviously conflict, although perhaps not as often as some fear, given that those with relatively high incomes generally derive relatively high benefits from operating within a stable governmental structure. To put the same thought another way, the government may matter more to a merchant than a subsistence farmer.

<sup>79</sup>See, e.g., Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 346 (1997); David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655, 656 (1995) (arguing this feature leads to accelerated development of land).

<sup>80</sup>See Samuel Issacharoff & Justin Nelson, *Discrimination With A Difference: Can Employment Discrimination Law Accommodate the Americans With Disabilities Act?*, 79 N.C.L. REV. 307, 344-45 (2001).

However, this broad brush approach likely overstates the difference between direct payments, tax expenditures, and regulation, at least under current law. Under the budget procedures now in effect, Congress and the President do not establish new tax rates each year based on the desired expenditures for the year. That is, their baseline reference is not a budget of zero and tax rates of zero.<sup>81</sup> Rather, they start with an overall budgetary target largely based on the prior year's experience, and try to keep spending within that range. As a result, whether talking direct expenditures or tax expenditures, because different proposals compete for the same pot of funds, the "economic burden" of any particular expenditure item most properly can be described as falling on the recipients of the proposal(s) squeezed out (or left un-enacted) to create room for the programs that are funded. This may always have been true, but it has become painfully obvious under the current budget procedure.

The current procedure<sup>82</sup> begins with the President; he drafts a budget which is forwarded to the houses of Congress.<sup>83</sup> There, separate House and Senate budget committees draft budget resolutions<sup>84</sup> (which may or may not have correspond to the President's budget),<sup>85</sup> which are eventually reconciled and passed in the form of a concurrent resolution. These resolutions set the broad outlines of the budget by establishing revenue and expenditure targets both for the federal government as a whole and for a number of different functional subdivisions of that government.<sup>86</sup> The budget is split into two parts for purposes of these resolutions. The first part covers discretionary spending programs that receive periodic, usually annual, appropriations, and the second part covers direct spending programs and tax provisions that typically remain in effect until repealed.<sup>87</sup> The resolutions set a spending cap for the discretionary portion of the budget while the direct spending portion is limited by "PAYGO," which requires a revenue or direct spending offset for any revenue or direct spending legislation "that increases the deficit in any fiscal year."<sup>88</sup>

Starting in 1997, the discretionary portion of the budget was divided further between defense and non-defense expenditures, and then again into portions that corresponded to the

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<sup>81</sup>Although such "zero-based-budgeting" has its advocates, it has been rejected because "these budget processes challenge human limitations, requiring lawmakers to consider vast numbers of factors in designing programs and allocating resources to them." Elizabeth Garrett, *supra* note 42, at 392-93.

<sup>82</sup>The current budget process was enacted by the Congressional Budget and Impoundment Control Act of 1974. Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at 2 U.S.C. ' 601 (200 ). Many of the most noted features of that process, however, were added by the Budget Enforcement Act of 1990. *See* ALLEN SCHICK, *supra* note 63, at 23-24 & Figure 2-5 (BEA created discretionary funding caps and PAYGO rules).

<sup>83</sup>*See* ALLEN SCHICK, *supra* note 63, at 74.

<sup>84</sup>*See id.* at 117.

<sup>85</sup>*See id.* at 105.

<sup>86</sup>*See id.*

<sup>87</sup>*See* Elizabeth Garrett, *supra* note 42, at 398.

<sup>88</sup>*See id.* at 400.

jurisdiction of the thirteen appropriations subcommittees.<sup>89</sup> The appropriate appropriations subcommittee then decides how to spend the money allocated to its purview.<sup>90</sup> To survive to enactment, a subsidy proposal must have successfully competed for limited funds against all other discretionary programs within the jurisdiction of a particular subcommittee; even before that, the subcommittee must have won the competition for such funds among all other potential committees, and the discretionary budget as a whole must have been allocated funds at the expense of the defense budget. Realistically, subsidy proponents generally have to identify offsetting savings in other discretionary expenditures; in the words of one commentator, they must adopt the role of “funding predators.”<sup>91</sup>

The rules for tax expenditures are different in form but similar in substance. Though the baselines for revenue and expenditure amounts are derived from current law rather than artificial spending caps, supporters of new tax expenditures also have to locate offsets to meet the PAYGO requirements. Proponents of tax expenditures appear to have more offset options than did proponents of subsidies. Because most tax and entitlement measures fall within the purview of the House Ways and Means and Senate Finance committees, the offset options available to proponents of new expenditures are not limited to a subset of programs related loosely by subject matter.<sup>92</sup> Proponents of new tax expenditures for education could try to fund them by cutting back on favorable agricultural tax provisions.

However, the difference between tax expenditures and subsidies is less clear than it first appears. Nothing keeps subsidy proponents from targeting unrelated offset options earlier in the allocation process. For example, proponents of a new education program could try to convince members of the budget committees to reduce funds allocated for agricultural subsidies to allow for an increase in educational funds. If successful at that level, they would have to prevail a second time, at the subcommittee level, because they would have to convince members of the education subcommittee to allocate those new funds to their particular program. But proponents of tax expenditures face a similar two-step burden. Supporters of one new tax expenditure could and did poach offset proposals promulgated by proponents of another tax expenditure. Thus, it is not enough for proponents of a particular tax expenditure to successfully target an offset opportunity; they too have to convince the relevant committee to dedicate the cost/revenue savings to their cause. It is not unusual for

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<sup>89</sup>*Id.* at 398-99.

<sup>90</sup>*See* ALLEN SCHICK, *supra* note 63 at 114.

<sup>91</sup>*See* Elizabeth Garrett, *supra* note 42, at 399-400. “Emergency” spending is exempt from the caps, and thus from the search for offsetting costs. The lack of criteria or assessments for designating spending as “emergency” allows it to be used as a “significant loophole.” *See* ALLEN SCHICK, *supra* note 63, at 62. Over the years, Congress has designated many routine and foreseeable expenditures (such as the cost of the decennial census) as “emergencies”. *Id.*

<sup>92</sup>*See id.* at 401.

proponents of a particular tax expenditure to win the first battle only to see the new funding capacity directed towards a different tax expenditure.<sup>93</sup> Such an outcome obviously makes it harder to obtain the desired tax expenditure, in that it forces the proponents to come up with yet another offset suggestion.

Ultimately, then, both forms of government aid require proponents to survive challenges by both distant and close competitors in a two-step process. And, most importantly for these purposes, success comes at a price in terms of squeezing out some other claimant for government largesse—a claimant who may lack political clout rather than social merit, and in any case, is likely to be totally unrelated to the new beneficiaries. In short, when looking at who really (as opposed to theoretically) funds direct expenditures and tax expenditures, those sources may not be any more “fair” (in terms of a general “ability to pay” conception of fairness or in terms of being proper internalizers of social harms created by an activity) than are the sources “funding” regulation.

The Senate recently voted to extend these budget rules for six months beyond their September 30, 2002 expiration date.<sup>94</sup> Whether they remain in place beyond the new March, 2003 deadline remains to be seen. If these rules are replaced, the new budget procedure may bring the process closer to the more simplified (and presumptively fair) distribution of costs than the current procedure. Or it may not; only time will tell whether future budget or tax processes will provide differential levels of “fairness.”

Though at present and perhaps in the future, there might not be much to choose from on the fairness issue, the same cannot be said about the efficiency issue. One cannot generalize and say that tax expenditures or direct spending always creates less deadweight loss than regulation. However, one can say that generally speaking, the different funding mechanisms have different behavioral effects, raising different efficiency concerns. The government should take these concerns into account when choosing between the different funding mechanisms. Procedural requirements that “stack the deck” in favor of one mechanism over another unwisely reduce the impact of these concerns in the political calculus.

## 2. Efficiency Concerns

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<sup>93</sup>See Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 524-25 (1998) (noting “no enforceable property rights in its discovery...[of] a weakly defended target to use as an offset”).

<sup>94</sup>Warren Rojas, *Senate OKs Six-Month Extension Of Budget Enforcement Tools*, 97 TAX NOTES 321, 321 (2002).

The deadweight loss associated with tax levies is a well-explored economic topic. As tax rates rise, taxpayers change their behavior: switching away from taxable activities (such as work) to non-taxable activities (such as leisure), reconfiguring their taxable activities to lower the effective tax rate, and the like. Economists even believe they can accurately measure the amount of this distortion; they claim that the deadweight loss equals the square of the tax rate.<sup>95</sup> However, changes in the tax base (as opposed to tax rates) engender different types of distortions that may not be measured as easily. For example, the addition of the investment tax credit stimulated capital investment, often to the detriment of investment in human capital and the use of labor generally. Tax expenditures function as adjustments to the tax base. The precise distortions engendered by each depends on the particular features of the tax provision. Excluding employer-provided health insurance from income, for example, encourages employer-provided, as opposed to self-provided, health insurance.<sup>96</sup> It may—or may not—increase the total amount of purchased health insurance, but even if it does, it does so at some cost in terms of the effects on job mobility and policy design. Regulation also distorts behavior; indeed, that is usually the point of regulation. The regulation may be “efficient” or distort behavior in desirable ways, or do the opposite. Forcing paper mills to install antipollution equipment raises the cost of producing paper, forcing users of paper to internalize the cost of the manufacturing process rather than externalizing it onto those who live in the vicinity—or downstream or downwind—of the paper mill in the form of ill health and unpleasant living conditions.

The choice between different funding techniques thus represents a choice among different forms (and amounts) of distortion. Consider again the example of subsidies to the steel industry. If the government’s only goal were to provide the steel industry with a stated sum on money, say \$30 million dollars, it could transfer the sum by writing a check on the federal treasury. It could pay for the check either through higher taxes (increasing the work/leisure distortion) or higher debt (perhaps leading to inflation, which would have its own distorting effects). From the steel industry’s point of view, the money would keep some operations in business that would have collapsed, to the benefit of their employees and (particularly) their former employees and shareholders. Or it could enact a tax expenditure

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<sup>95</sup>See David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORN. L. REV. 1627, 1650-1651, 1656 & fn. 122 (1999).

<sup>96</sup>It has been suggested that this tax treatment is responsible for the development of our current, unsatisfactory system of financing health care. See, e.g., Gene Steurle, *The Case for a Tax Credit or Voucher for Providing Health Care to the Nonelderly—Part Four: The Poor Design of Current Tax Preferences for Employer-Provided Insurance*, 52 TAX NOTES 1219 (1991). Others blame it for causing excessive spending on medical services and contributing to health care inflation. See, e.g., Louis Kaplow, *The Income Tax as Insurance: The Casualty Loss and Medical Expense Deductions and the Exclusion of Medical Insurance Premiums*, 79 CALIF. L. REV. 1485, 1497 (1991); Feldstein & Friedman, *Tax Subsidies, The Rational Demand for Insurance and the Health Care Crisis*, 7 J. PUB. ECON. 155, 176 (1977); Feldman & Dowd, *A New Estimate of the Welfare Loss of Excess Health Insurance*, 81 AM. ECON. REV. 297 (1991).

favoring the steel industry—say, specially favorable depreciation rules for steel-making equipment, which would encourage steel manufacturers to upgrade their equipment, helping manufacturers of such equipment and possibly hurting those employed by or living in the vicinity of some existing steel facilities. Or it could allow a special deduction for certain types of research or development expenses that previously had to be capitalized, which in addition to conferring benefits to the companies with respect to their pre-existing research programs would likely lead to an expansion of those programs at the expense of some other capital projects, such as equipment upgrades. The current plan provides for a tariff to encourage domestic steel purchasers to purchase domestically produced steel. The guaranteed market undoubtedly will have some impact on producers' behavior. It will allow them to charge higher prices, and perhaps to avoid necessary restructuring in the way they do business. It will also adversely impact domestic users of steel, who (if competing against producers from other countries purchasing steel at lower world prices) may decide to move more of their operations abroad. One result of sugar price supports has been the decimation of the American candy industry. Domestic steel workers may save their jobs at the expense of domestic workers in steel products, just as domestic sugar growers saved theirs at the expense of domestic candy makers.

Nor are these farm and steel industries isolated examples of places where the government essentially has a choice of how to deliver its largesse. Additional scenarios abound. Mining companies can obtain (and at various points of time, have obtained) government support through direct subsidies, favorable tax rules, or the weakening of environmental regulation. So, too, have the nation's railroads, utility producers, and a host of manufacturing enterprises.

The point is not that one set of distortions is necessarily smaller or better than the other (though one might be), only that they are different and that those differences should be taken into account when deciding between the alternative courses of action. If procedural restrictions make one course of action less attractive than its alternatives—perhaps because the course is subject to much more public or even Congressional disclosure than the other -- then these procedural considerations will play a larger role in the political process and efficiency concerns a correspondingly smaller role. If one believes that governments should be encouraged to choose the most efficient methods accomplishing their ends, this seems to be problematic.

At first blush, this concern suggests that the tax expenditure budget may be worse than useless. Publishing such a budget focuses legislative and public attention on (and the concomitant political fall-out from) benefits delivered to special interest groups through this

mechanism. Although the intended effect was to diminish the overall amount of such payments, it may instead just divert these payments to another mechanism where they will be less politically visible. Coupling the questionable effects on the overall amount of interest group payments with the likelihood of efficiency losses generated by the need to funnel these payments into a more limited choice of delivery mechanism suggests that the tax expenditure budget does more harm than good. But further reflection suggests that this is the wrong message.

### **V. Combating Redirection: Regulatory Budgets?**

If, in fact, the public exposure created by the creation and publication of the tax expenditure budget decreases the ability of special interest groups or minority interests to obtain that form of governmental favoritism, it may redirect much of the political pressure to other, less visible—and possibly less efficient—arenas such as government regulation. Restoration of “information parity” between tax expenditures and government regulations by eliminating the tax expenditure budget may well limit some of this redirection. But the result will still be far from the desired level playing field between delivery mechanisms because one, government expenditures, will remain subject to a higher level of public exposure. Indeed, if one takes the parity argument seriously, one would have to advocate ceasing publication of the entire federal budget.

There is another alternative. Any level of scrutiny can be consistent with the goal of achieving parity between the various rent-seeking opportunities. All that is required is that the various opportunities be subjected to the same level of scrutiny. Instead of reducing scrutiny of tax expenditures, we could increase opportunities for public scrutiny of regulation and enforcement decisions. A concerted effort could be made to more effectively disseminate information regarding regulatory initiatives, both legislative and administrative, in a manner similar to or even in conjunction with the dissemination of information regarding tax and direct expenditures. Such dissemination would relieve interested members of the public or their representatives in the press of the burden of tracking down such information on a bill, by bill, regulation by regulation basis.<sup>97</sup> The General Accounting

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<sup>97</sup>Much of the information discussed in the next section already exists, because it is required to be gathered as part of agency decision-making processes. *See* Tan 98–99. Much is already in the public domain. However, it is available in scattered and sometimes truncated form. One has to know what one is looking for to find it. The same was true of at least some of the tax expenditure material prior to the early 70s. Treasury would provide the information (at least to legislators) upon request; after 1968 a complete budget could be found in Treasury reports. *See* note 23 *supra*. And beginning in 1972, the House Ways and Means Committee began publishing those reports in its committee publications. *Id.* But proponents of the Tax Expenditure Budget were not satisfied with this level of disclosure was insufficient and continued to push for its inclusion in the more widely circulated federal budget document. *See* Tan 22–24.

Office or Office of Management and Budget could be entrusted with the task of maintaining a central repository of such information, with lists of the different regulations, their associated costs and benefits, cross-referenced by affected interest groups. The annual publication of a “regulatory budget” as part of the annual budget document would provide Congress and the public with much more information about the strength of interest groups than it has now. For example, Congress and the public would have a much better idea of the power exerted by the oil industry if it could obtain not only the federal budget and the tax expenditure budget, but also the effect of rulings by administrative agencies such as OSHA, the EPA, BLM and the like. But what would such a budget look like?

### **A. Cost-Benefit Analysis**

Government regulation, whether imposed by legislation or agency action, can have profound behavioral consequences, with concomitant financial impacts. It often shifts costs from one party to another, or at the very least, changes the form in which those costs are imposed. For example, anti-pollution rules may impose costs on manufacturers while benefiting members of the air-breathing, water-drinking public, who, in the absence of regulation, would have suffered some combination of filtering, medical and health costs. Of course, much if not all of the costs imposed on manufacturers may be passed through to consumers in the form of higher prices for the products they produce; to the extent those consumers consist of members of the air-breathing, water-drinking public, the costs will have shifted only in form—though if the regulation is efficient, the total of such costs should be somewhat lower as a result of the regulation. But regulation, like direct expenditures, can be the focus of rent-seeking, in both directions. Governments can regulate too much or too little at the behest of special interest groups. The question is how to tell if—and just as importantly, how to communicate to the general public when—it is doing either. That is, on what basis can one monitor regulatory moves in the search for undue influence?

The desire to come up with a mechanism for monitoring the activities of administrative agencies is as old as such agencies. In recent years, most politicians and academics have focused on cost-benefit analysis.<sup>98</sup> Some have suggested requiring agencies to publish on an annual basis, the costs and benefits of regulations put in place during that

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<sup>98</sup>See, e.g., Robert H. Frank and Cass. R. Sunstein, *Cost Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 323-24 (2001) (cost-benefit analysis generally accepted by Congress, courts and the executive); Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?*, 29 J. LEG. STUD. 913 (2000); Matthew D. Adler and Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEG. STUD. 1105 (2000); Gary S. Becker, *A Comment on the Conference on Cost-Benefit Analysis*, 29 J. LEG. STUD. 1149 (2000); Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEG. STUD. 971 (2000).

year.<sup>99</sup> Others have suggested that agencies be granted annual “budgets” demarcated in terms of costs (or net costs) imposed by regulation.<sup>100</sup> But while tabulations of the costs and benefits of regulations may be valuable for some purposes (including serving as an internal limit on interest group capture<sup>101</sup>), they are far from perfect for purposes of determining the extent of agency influence for two reasons. One has to do with inherent defects in the construction of cost-budget analyses; the other is that special interest influence may be reflected by the absence of regulations, rather than their existence.

## 1. The Numbers, Again

A cost benefit analysis requires the estimation of two numbers: costs and benefits. Unfortunately for all concerned, such numbers are often difficult to estimate accurately.

Sometimes the problem lies in the non-monetary nature of perceived costs and benefits. For example, a substantial literature has developed over the question of how to value a human life.<sup>102</sup> Controversies have also arisen over the value of biodiversity, pristine scenery, and clean air and water. Estimates of costs of compliance have also proven to be unreliable as the development of new technology or simply new approaches using old technology often brings them far below original projections.<sup>103</sup>

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<sup>99</sup>There has already been some movement in this direction. The Regulatory Accountability Provision of 1996 requires the director of the OMB to provide Congress with estimates of the total annual benefits and costs of all federal regulatory programs as well as individual regulations; such reports were produced in 1997, 1998 and 2000. Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEG. STUD. 873, 892 (2000); see generally Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1139 (2001) (“Bills requiring agencies to use cost-benefit analysis have been routinely proposed in Congress since 1995. Some federal regulatory statutes already require it and many more are interpreted to allow it.”).

<sup>100</sup>See Eric A. Posner, *Controlling Agencies with Net Benefit Accounts: A Thought Experiment*, U. PA. L. REV. (forthcoming 2002).

<sup>101</sup>See Gary S. Becker, *supra* note 98, at 1152 (“Cost-benefit analysts ....can influence political outcomes by making enough voters aware of the true effects of different policies.”); Matthew D. Adler and Eric A. Posner, *supra* note 98, at 1141 (cost-benefit analysis “forces agencies to be clear about the basis of their decisions, and this facilitates monitoring by other actors”).

<sup>102</sup>See, e.g., Matthew D. Adler and Eric A. Posner, *supra* note 98, at 1141 & Appendix Tables A1 and A2 (listing different valuations for human life and discount rates used by agencies); John Broome, *Cost-Benefit Analysis and Population*, 29 J. LEG. STUD. 953 (2000); W. Kip Viscusi, *Risk Equity*, 29 J. LEG. STUD. 843, 845-853 (2000) (describing empirical studies); John D. Graham & James W. Vaupel, *The Value of a Life: What Difference Would It Make?*, 1 RISK ANALYSIS 89-95 (1981).

<sup>103</sup>See Winston Harrington, Richard D. Morgenstern, and Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 16-18, Resources for the Future Discussion Paper (Jan. 1999), available online at [http://www.rff.org/disc\\_papers/1999.htm](http://www.rff.org/disc_papers/1999.htm) (visited June 24, 2002) (finding that agencies frequently overestimate costs because of technological innovations). Indeed, very early on, scholars suggested adopting “technology-forcing” regulations that would spur the development of cost-reducing technologies. See Bruce Ackerman and William Hassler, *CLEAN COAL/DIRTY AIR* (1981).

Further, one cannot make the comfortable assumption that the resulting errors will be randomly distributed. The uncertainties involved in generating these numbers opens opportunities for interest groups to affect outcomes. In the absence of generally agreed upon market guidelines, an agency has to rely on expert opinion to determine the value of costs and benefits. Often, these experts hold wildly varying opinions; the agency has to decide how to reconcile the unreconcilable, or choose to pay attention to one and dismiss the other.<sup>104</sup> Allegations of improper influence are far from infrequent (though generally unproven). But the point remains: an agency-produced cost-benefit analysis may reflect interest group capture rather than reveal its existence.

The numbers on their face, then, may be less than revealing of the desired information. But even if the numbers could be trusted, any compendium of cost-benefit analyses of adopted regulations would be a radically incomplete measure of interest group influence because such influence may take the form of refusing to regulate or otherwise intervene as well as the actual issuance of rules.

## **2. The Non-Interference Alternative**

Just as Congress may grant financial favors to a few by not taxing them, agencies may grant favors by not regulating activities which “should” be regulated, i.e. where a regulation would be justified if judged solely on cost-benefit grounds.<sup>105</sup> For example, an agency may have the power, under the prevailing statute, to forbid a certain mining technique on grounds that it pollutes watersheds, and, because of interest group pressure, decide not to issue such a regulation thus allowing the destructive mining process to proceed. But a compendium of the costs and benefits of regulations that have been issued would completely miss that type of favoritism. Nor, unfortunately, can one simply publish a table outlining the differences between the “socially optimum” set of regulations and those actually in force (or enacted in a given year) since the definition of that social optimum would be controversial, to say the least. Finally, the compilation or publication of differences between U.S. and foreign regulations in a given area would not necessarily be helpful, inasmuch as the foreign regulations may themselves have been influenced by (the same or different) interest group concerns.

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<sup>104</sup>See Eric Posner, *supra* note 100, at 1146 (“the intangibles are significant enough to leave the agency with wide discretion”)

<sup>105</sup>See Peter L. Kahn, *The Politics of Unregulation*, 75 CORNELL L. REV.280, 284-85, 291-92, 312 (1990). One prominent empirical study suggests that interest groups are particularly effective in blocking government action. See KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 314-15, 395-96, 398 (1986).

These criticisms of a unified cost-benefit analysis schedule are strongly reminiscent of those leveled in earlier parts of this paper about the current federal budget document. The pervasive nature of the baseline and measurement problems cannot be denied. On the other hand, it is hard to believe that having this information readily available would make the American press or public (or even legislators) less knowledgeable about the role played by governmental institutions and less adequate to play their role in the governing process. The real question, really, is whether this information is enough. It may well be desirable to gain a second perspective on agency action, one which focuses as much on agency inaction as positive action. Just as the tax expenditure budget points out the significance of “negative collections” by the government, the “contact audit” described in the next section may shed some light on the phenomenon of “negative regulation”, or decisions by agencies not to regulate.

### **B. The Contact Audit**

Coming up with a way intelligibly to present information about the influence of interest groups on agency actions is important because it has the potential for reducing the total amount of rent-seeking, as well as ensuring the efficient delivery of that which persists, as well as informing the public about the content of government action in general. Standard tools for monitoring agency actions, however, are only partially successful in accomplishing this goal. Another approach may be helpful. One such approach is suggested by the recent controversy regarding energy industry input into the energy deregulation rules:<sup>106</sup> the “contact audit” or “contact schedule.” Agencies could be required to report the identity/affiliation, number and extent (perhaps measured by time) of contacts with non-governmental representatives with respect to every regulatory procedure, whether it culminated in the issuance of a regulation or not. A report card could then be constructed for each such agency action (or inaction), containing the number of such contacts and the interests they represented. At the very least, such lists would reveal the extent of special interest concern about an issue; at best, it may encourage agencies to seek out alternative viewpoints to avoid the embarrassment of appearing to make one-sided decisions—and having heard those viewpoints, to make better decisions.

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<sup>106</sup>Vice-President Cheney chaired an energy tax force entrusted with the task of crafting the executive’s energy deregulation policy. After the financial collapse of Enron, one of the major players in the energy and energy-trading market, amid allegations of fraud and malfeasance, both the General Accounting Office and Congress attempted to get information regarding contacts between Cheney, Enron and other energy industry officials. The administration initially refused to provide this information, claiming executive privilege. After the GAO filed suit to obtain the list of witnesses appearing before the energy tax force and a Senate committee subpoenaed records of contacts between Enron and the White House, the information was released. See Eric Herman, *Government Releases Enron Info White House Acts Hours After Senate Subpoenas*, N.Y. DAILY NEWS, May 23, 2002, at 67.

Requiring the construction and publication of such schedules would not be without problems. Deciding which members of the agency and which contacts should be reported would be problematic. One would have to balance fears about routine avoidance of reporting requirements with workload concerns—to say nothing of the possibilities for obscuring information about substantive contacts by camouflaging them in a host of routine transactions. For example, if contacts only had to be recorded after the initiation of a regulatory procedure, it would not be surprising to see the formal initiation of such procedures delayed until the agency was farther along in its deliberative process.<sup>107</sup> Alternatively, lobbyists might attempt to influence Congressional officials or staff members, both as to underlying substance and also the need to lean on agency personnel. Such indirect influence may leave few obvious fingerprints. And to the extent the contact audit is effective in collecting and promulgating relevant information, one would have to accept the possibility that the information may be used to increase interest group power, by enabling group members to better monitor attempts at free-riding and other forms of misbehavior by each other.<sup>108</sup>

Further, the information provided would be less than a perfect proxy for interest group capture: many instances of one-sided representation could be explained as reflecting the fact that some would be helped but no one would be hurt by the adoption (or non-promulgation) of the rule under consideration. And special interests may prevail even in a hard-fought situation, where many opponents had their say. However, one can hope that it will forestall inadvertent, “stealth” catering to special interests out of ignorance created by one-sided information gathering.

Once again, the problems detailed above resemble quite closely the problems identified in the direct expenditure and tax expenditure (and cost benefit analysis) budgets. What we learned from those contexts should be carried over to this one: we should not let yearning for what we cannot have stand in the way of reaching for the best of what is available. When deciding whether information should be provided to the public, the ultimate question is whether the information would, on balance, improve governmental (and voter) decisionmaking. And we should apply the same standards to all the various information sources.

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<sup>107</sup>See Elizabeth Garrett, *Interest Groups and Public Interested Regulation*, 28 FLA. ST. U. L. REV. 137, 139 (2000) (“Lawmakers and other political players....can seek to manipulate rules and procedures so that they do not operate as roadblocks.”).

<sup>108</sup>See *id.* at 140 (“Ironically, maximizing opportunities for participation has also maximized the opportunity for strategic behavior.”).

Both baseline and measurement problems are ubiquitous. We long ago decided that they should not stand in the way of publishing the zero-expenditure baseline budget. A similar decision was made with respect to the tax expenditure budget almost thirty years ago, and should be reaffirmed. It is time to do the same for both a unified cost-benefit schedule and a contact audit. Pairing the two will give readers an idea both of major agency actions and decisions not to act, just as we currently provide information about spending that takes place directly and indirectly, by forgoing tax collections. Although providing such schedules in the federal budget document will not guarantee that all legislators, let alone all voters, internalize and fully digest the limited implications of this material, it will make governmental decisions somewhat more transparent. It would be a step in the right direction.

### **Conclusion**

Monitoring requires information about the subject being monitored. And no one would dispute that using perfect information—perfectly accurate, perfectly complete—in the monitoring process is the ideal. But like all ideals, this one is often impossible to attain. To avoid paralysis, people are forced to rely on incomplete information. This does not mean that they should treat the information they receive as perfect. Indeed, knowledge of the shortcomings of one's information stream can be a critical factor in decision making. It justifies leaving open the possibility of altering behavior as additional information becomes available, or compensating for systemic skews in the information stream. This is as true in the budget context as in any other. None of the current sources of information is perfect. But the response should not be to ignore the information that is available. It defies belief that politicians would be better behaved (i.e. engage in less rent-seeking behavior) if the budget or the tax expenditure budget were kept secret, or made available to the public in a less digestible form. The solution is to try to make those sources of information better, either by changing them or by supplementing them with other sources of information. This article suggests two candidates for such supplementation, both aimed at an obvious substitute for behavior which the publication of the current budget and tax expenditure budget is aimed at exposing to public view. Like the budgets that preceded it, the cost-benefit schedule and contact audits will not provide perfect information. But by improving transparency, they should provide voters with better information than they now have. It is perhaps more academic and much cleaner to criticize all devices that build on artificially constructed baselines, but it is more useful to think of ways in which we can improve real decisionmaking and monitoring processes.

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