Fall 1991

Qualified Plans and Identifying Tax Expenditures: A Rejoinder to Professor Stein

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I. INTRODUCTION

The Internal Revenue Code's treatment of qualified plans is generally characterized as a tax expenditure, a significant departure from normative income tax principles. In a 1988 article in the *North Carolina Law Review*, I dissented from this consensus.[1] In particular, I argued that, considering such traditional criteria as administrability, liquidity, and measurability, the Code's basic approach to funded deferred compensation plans could be viewed as an appropriate part of a normative income tax.[2] A policymaker, seeking not to subsidize funded deferred compensation plans but to tax them properly, could reasonably decide upon the essentials of current law rather than the available alternatives.

In a critique of these observations, Professor Stein contends that I am wrong, that the provisions of current law vis-a-vis qualified plans deserve the appellation tax expenditure.[3] I write this rejoinder to respond to Professor Stein's arguments and to explore the implications of our dispute.

In the first section of this rejoinder, I examine the underlying source of disagreement between Professor Stein and me, our differing perceptions of the choices confronting tax policymakers and

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1. Zelinsky, *The Tax Treatment of Qualified Plans: A Classic Defense of the Status Quo*, 66 N.C.L. REV. 315 (1988).

2. In the accepted parlance of tax expenditure analysis, the Code's "structural provisions necessary to implement a normal income tax" are denominated "the normative tax structure" while everything else in the Code is denominated an incentive, subsidy, or expenditure. S. SURREY & P. MCDANIEL, TAX EXPENDITURES 3 (1985).

3. Stein, *Qualified Plans and Retirement Policy: A Reply to Professor Zelinsky*, 9 AM. J. TAX POL'Y 225 (1991).

our consequently divergent approaches to the label "tax expenditure." I view policymakers as frequently facing, not a single, clearly preferred option, but rather a range of plausible alternatives each with its own problems and trade-offs. I am thus restrained in placing the label tax expenditure on a particular provision or proposal. This is particularly true in the area of funded deferred compensation, an area in which all of the available alternatives embody difficult choices.

Professor Stein, in contrast, identifies with a stronger formulation on the tax expenditure concept, one which holds that there is a single normative income tax from which to measure expenditure-type deviations. I view as oversimplified such an approach to identifying tax expenditures and as misplaced any confidence that such an approach will yield a single, clearly correct paradigm for taxing qualified plans.

In the second section of this Article, I examine Professor Stein's proposed regime for taxing qualified plans. Under Professor Stein's proposal, employers would defer deductions for plan contributions until their employees actually receive their plan distributions. Moreover, plan earnings, currently tax exempt, would be taxed annually at the employers' rates.

In a final section of this rejoinder, I explore the implications of the differences separating Professor Stein and me. Most notably, Professor Stein invokes his theoretical regime for taxing funded deferred compensation plans to defend the Code's extensive regulation of qualified plans on the grounds that such regulation properly channels the tax subsidy said to be embodied in current law. In contrast, I view the Code's regulation of qualified plans as theoretically unsound and increasingly unworkable, an overly elaborate scheme for targeting a tax subsidy that does not exist.

In sum, the dispute between Professor Stein and me can be analyzed on three levels: as a fundamental disagreement about the nature of the choices facing tax policymakers and about defining tax expenditures, as a more technical argument about the relative merits of current qualified plan law in comparison to Professor Stein's proposed alternative and, finally, as a dispute about the propriety of the Code's regulation of qualified plans.

At its most basic, Professor Stein's proposal is a plausible, but not compelling, choice from among the alternative approaches to the taxation of funded deferred compensation. A rational legislator, seeking a normatively correct tax treatment for qualified plans, could reasonably prefer the essentials of current law to the alternative regime Professor Stein posits. Those seeking to challenge the status quo must do better.

II. What Is A Tax Expenditure?

In criticizing my defense of the essentials of current law vis-a-vis qualified plans, Professor Stein characterizes as "fuzzy" my use of tax expenditure analysis.[4] Professor Stein is right to recognize that much of our disagreement reflects our differing approach to identifying tax subsidies. I would suggest, however, that fuzziness is in the eye of the beholder.

Fundamentally, Professor Stein and I disagree about the environment in which tax policymakers make choices and about the circumstances under which provisions should be labelled "tax expenditures." Professor Stein identifies with a strong formulation of the tax expenditure concept, a formulation premised on the existence of a single, clearly preferable course open to tax policymakers. In contrast, I perceive, as to the Code in general and qualified plans in particular, a range of plausible alternatives, each with its own benefits and disadvantages. From that viewpoint, it is a misleading oversimplification to believe that there is one true and right path available to tax policymakers.

As Professor Stein notes, proponents of the strong version of the tax expenditure concept begin their analysis with the Haig-Simons, or the economic, definition of income and purport to derive much of the authority for their position from this ideal.[5] Income, under the Haig-Simons definition, is the sum of (a) the increase in the taxpayer's net savings during the taxable period plus (b) the taxpayer's consumption during that period.

The Haig-Simons ideal has both great explanatory power and serious practical limitations.[6] The strength of Haig-Simons is its recognition of the economic equivalence of income from different sources. Interest paid by a municipality to a bondholder increases the bondholder's net worth in the same fashion as an interest payment by a corporate borrower. A taxpayer selling appreciated inventory experiences the same accretion to his taxpaying capacity as a taxpayer selling securities classified as capital assets. At the

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4. *Id.* at 252.

5. *Id.* at 251.

6. Professor Kahn has recently made similar observations. Kahn, *The Two Faces of Tax Neutrality: Do They Interact or Are They Mutually Exclusive?*, 18 N. Ky. L. Rev. 1, 2, 15 (1990).

time Simons was writing, the economic equivalence of different forms of income was a useful insight. It remains so today, suggesting a healthy skepticism towards ever present claims for favorable tax treatment premised on the particular source of income.

The Haig-Simons definition, while a helpful lodestar for evaluating claims for preferential treatment, is not a detailed or self-executing blueprint for a tax system. For example, the Haig-Simons definition does not take account of the administrative requirements of the income tax system. Similarly, the Haig-Simons definition of income does not address the question of liquidity, the problem that taxpayers' economic accretions do not always yield the cash with which to pay taxes.[7]

Thus, moving from the epigrammatic Haig-Simons ideal to a detailed tax system entails numerous elaborations and qualifications. The more orthodox proponents of tax expenditure analysis, with whom Professor Stein identifies, indicate that there is a single set of choices to be made in translating the Haig-Simons definition into a recognizable income tax. Such stalwarts of tax expenditure analysis speak of the single, normatively correct income tax, one acceptable path from the Haig-Simons ideal. In contrast, I speak of "a" normative tax, one of many acceptable options available.

The proponents of tax expenditure analysis in its strong form have been less than successful in specifying how to move from the terse Haig-Simons definition of income to the single, normatively correct tax. The Congressional Budget Act of 1974, enshrining the tax expenditure concept into federal law, uses the formula of "special" credits, deductions, and preferences.[8] A Code purged of tax provisions which are "special" is the normatively correct tax.

This approach, I respectfully suggest, does not take us very far.

The problem of translating the Haig-Simons ideal into a normative tax has been recognized from the time tax expenditure

7. Indeed, as an historical matter, the more active proponents of the Haig-Simons definition push its implications in some respects more vigorously than did Simons himself. The Haig-Simons view of income ideally leads to the yearly taxation of a taxpayer's unrealized gains as such gains increase the taxpayer's net worth and therefore his taxpaying capacity. However, Simons himself did not argue for a system taxing accrued appreciation annually but, instead, favored the recognition of previously untaxed appreciation upon the taxpayer's death or upon a lifetime gift of appreciated property. H.SIMONS, FEDERAL TAX REFORM 44 (1950).

8. 2 U.S.C. § 622(3).

analysis was first introduced and institutionalized. Professor Bittker, reflecting on the difficult issues that must be resolved to separate normative tax provisions from tax subsidies, observed that, as to such issues,

> one could lock forty tax experts in a room for forty days, and get no agreement—except as a surrender to hunger or boredom—even if they all could recite the complete works of Henry Simons by heart. For such issues, every man can create his own set of "tax expenditures," but it will be no more than his collection of disparities between the income tax law as it is, and as he thinks it ought to be.[9]

In Professor Kahn's words, "(i)t is not always obvious . . . which tax provision is to be classified as the normal principle and which provision is the exception."[10]

At one level, the proponents of tax expenditure analysis have prevailed in this dispute. Tax expenditure analysis is now firmly ensconced in the tax policy literature,[11] in the law school curriculum[12] and, via the Congressional Budget Act, in federal law.[13] At another level, the concerns raised by Professors Bittker and Kahn about the identification of tax expenditures remain unanswered and unanswerable. The problem is not merely one of borderlines and close cases, determining at the margin which tax provisions are subsidizing and which are normative. Rather, the proponents of tax expenditure analysis in its strong form cannot convincingly articulate a test for distinguishing provisions that are tax expenditures from provisions that properly serve to measure taxpayers' incomes.

In the context of qualified plans, the characterization of current law as a tax expenditure is typically justified on the grounds asserted by Professor Stein, *i.e.*, that the benefits of tax deferral via qualified plans advantage deferred over current compensation.[14] The formation of qualified plans is cited as evidence of taxpayer response to this subsidy favoring delayed over current

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9. Bittker, *Accounting For Federal "Tax Subsidies" In The National Budget*, 22 NAT'L TAX J. 244, 260 (1969).

10. Kahn, *supra* note 6, at 5.

11. *See, e.g.*, J.DODGE, THE LOGIC OF TAX 290 (1989).

12. *See, e.g.*, W. KLEIN, J. BANKMAN, B. BITTKER L. STONE, FEDERAL INCOME TAXATION 24 (8th ed. 1990).

13. The problems in identifying tax subsidies have manifested themselves in the preparation of the official tax expenditure budget. McLure, *The Budget Process and Tax Simplification/Complication*, 45 TAX L. REV. 25, 54-56 (1989).

14. Stein, *supra* note 3, at 229-31.

compensation.

There are two problems with this approach. First, it suggests that tax policymakers should be concerned with the issue of deferral to the exclusion of other competing criteria, *e.g.*, liquidity, administrability, measurability. While an almost exclusive concern with deferral is typical of much contemporary tax policy literature, such a perspective slights the other legitimate interests in the design of a tax system.

Second, Professor Stein's emphasis on deferral and its effects ultimately proves too much, suggesting that a subsidy exists whenever the tax system leads the taxpayer to pursue one course rather than another. However, virtually every tax (including Professor Stein's proposed treatment of qualified plans) creates situations in which some activities are encouraged relative to others. It makes the concept of a tax expenditure meaningless to view all such situations as indicating the presence of a "subsidy."

The income tax encourages, *ceteris parabis*, taxpayers to spend an hour in leisure rather than earning taxable income. The Code similarly stimulates individuals to perform services within their own households rather than earn income in the outside world and purchase domestic services with after-tax dollars. The owner of an unmortgaged home is not taxed on the earnings he could receive if he sold his residence and put the proceeds in certificates of deposit. The failure of the Code to tax currently unrealized appreciation encourages taxpayers to hold assets that appreciate in value rather than assets that generate currently taxable income. Nevertheless, for reasons of liquidity, administrability, and the like, no tax expenditure budget has ever reflected the "subsidies" created by the failure to tax leisure, the imputed value of household services, the implicit rental value of owner occupied housing, or unrealized appreciation nor is any such budget likely to reflect such "subsidies" in the future.

Professor Stein demonstrates that, under his proposed regime, current compensation will often be taxed more favorably than deferred compensation.[15] Under such a regime, will the tax expenditure budget reflect a subsidy for current compensation? It ought to if there is a tax subsidy every time the Code affects one economic decision over another.

In sum, it casts too broad a net to declare a subsidy whenever the tax law influences taxpayer behavior. As Professor Stein ac-

15. Stein, *supra* note 3, at 239.

knowledges, "having tax laws of any sort necessarily discourages some types of economic arrangements."[16] The corollary is that having tax laws of any sort advantages some arrangements over others. It stretches the label "tax expenditure" beyond usefulness to apply it to every such advantage.

I resolve this quandary by using traditional tax policy criteria, *i.e.*, equity, liquidity, measurability, administrability, simplicity, and acceptability, to evaluate the claim that an existing or proposed provision is a subsidy rather than an appropriate part of a normative income tax. As to qualified plans, I conclude that a policymaker, unconcerned with encouraging such plans but seeking to follow these traditional criteria, could reasonably prefer the essentials of current law to any of the available alternatives.

My approach puts us in a world of judgments and legitimate disagreements, a world in which there are frequently ranges of plausible choices rather than a single solution, a world which Professor Stein describes as "fuzzy." However, the real fuzziness is to be found in the claim that tax expenditure analysis can provide more than this. It would indeed be comforting if the categorization of tax provisions as normative or subsidizing could always be made with the degree of certainty and exclusivity asserted by the stalwarts of tax expenditure analysis. The world, however, is not always a comforting place.

Professor Stein correctly notes that my understanding of a normative income tax is "broader" than the understanding of those who introduced the tax expenditure concept into political and academic debate.[17] In this context, Professor Stein quotes approvingly Professors Surrey and McDaniel as indicating that Code provisions deviating from "the general economic definition of income" should be considered part of a normative tax only if such provisions "historically have been regarded as essential aspects of the structure of the Sixteenth Amendment income tax."[18] This is their alternative to the formulation of discarding "special" credits and deductions on the path to the one and only normative tax.

The statement of Professors Surrey and McDaniel is revealing in a number of respects. First, under this definition, the status of a tax provision as normative or subsidizing is to be evaluated "historically." As Professor Stein demonstrates, the present tax treat-

16. *Id.* at 255.
17. *Id.* at 254.
18. *Id.*

ment of qualified plans has deep historic roots in the Code.[19] It is unclear why that history carries no weight in the thinking of Professor Stein and others.

Indeed, as an historical matter, Henry Simons thought that the deferral of tax liability was not a serious concern[20] and, for much of the early history of the income tax, the time value of money was not perceived as a central issue in the structure or administration of the tax.[21] Concern for the implications of tax deferral is a relatively recent phenomenon. History thus does not buttress the characterization of current law vis-a-vis qualified plans as a tax expenditure because of the effects of deferral.

Perhaps in recognition of this, Professor Stein reformulates the appeal to the past by stating that there is no "historic inevitability" to the Code's current treatment of funded deferred compensation plans.[22] This observation is both correct and irrelevant. Congress could reasonably have selected another tax scheme from the range of alternatives vis-a-vis qualified plans. The point is Congress did not. It is therefore the burden of those challenging the status quo to prove the superiority of their proposals. It is not the obligation of those defending current law to demonstrate the "inevitability" of the path Congress actually took.

Second, the key to the Surrey-McDaniel definition of a tax expenditure is the identification of the "essential aspects" of a normative tax. This test, however, brings us back to (and leaves unanswered) Professor Bittker's concerns: Who is to determine what is "essential" in the Code? What criteria are to be used in determining what is "essential?" The test of essentiality tell us nothing more than the test of specialness.

Finally, under the test advanced by Professors Surrey and McDaniel and endorsed by Professor Stein, Professor Stein's own proposed regime for qualified plans looks suspiciously like a tax expenditure since it departs from the economic definition of income but has no historic roots in the Code. Under the Haig-Simons defi-

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19. *Id.* at 232.

20. H.SIMONS, *supra* note 7, at 127, labelling the matter of deferral a "mosquito argument," a "moderate price" for a workable tax system.

21. *See* the comments of Undersecretary of the Treasury Marion B. Folsom indicating that, prior to 1934, taxpayers had great discretion in establishing depreciation allowances on the theory that only matters of timing were involved. Address at National Press Club Luncheon Meeting (March 24, 1954) quoted in U.S. DEPARTMENT OF THE TREASURY, ASSET DEPRECIATION RANGE (ADR) SYSTEM 202 (1971). I am indebted to Hillel Sommer, a graduate student at the Yale Law School, for bringing this source to my attention.

22. Stein, *supra* note 3, at 254.

nition, plan participants experience income as a result of the accrual of pension benefits. Such accrued benefits constitute unrealized increases in the participants' net worths, a classic form of economic income. However, in his article, Professor Stein (correctly, in my judgment) eschews any attempt to tax this economic income to plan participants. He accepts the provisions of current law that delay participant taxability until plan benefits are actually distributed to them and focuses, instead, upon the tax treatment of employers and plan earnings.

In short, tax expenditure analysis has performed a useful function, educating the public and policymakers and improving the quality and quantity of the scrutiny given the Internal Revenue Code.[23] Tax expenditure analysis can bring some of the clarity of the Haig-Simons ideal to our discussion of tax issues. It is useful to force the proponents of tax provisions to acknowledge their intention to subsidize when such intentions exist, to require that tax provisions be scrutinized as to their normative propriety, and to compare proposed subsidies through the tax system with the direct expenditure alternatives.

However, we live in a world in which there frequently are broad ranges of plausible alternatives and trade-offs, not a single way of translating the economic definition of income into a workable, normative tax. Hence, there are invariably judgments which must be made in characterizing Code provisions as tax expenditures or as normative parts of the income tax. And the burden of persuasion ought be on those seeking to characterize the status quo as a tax subsidy.

In eschewing my approach and instead associating himself with what he correctly labels the "conventional"[24] formulation of tax expenditure analysis, Professor Stein has assumed a heavy burden, *i.e.*, that he can demonstrate that his proposed regime is not one of many acceptable approaches to qualified plans, but is the single appropriate course available in translating the Haig-Simons ideal into the normative tax. As I will demonstrate in the next section, Professor Stein has not carried this burden.

23. For example, in Title XI of the Omnibus Budget Reconciliation Act of 1990, a number of energy and small business tax provisions were explicitly acknowledged to be tax incentives. Such truth-in-labelling surely helps the quality of tax policy discussion.

24. Stein, *supra* note 3, at 252.

III. Professor Stein's Proposed Tax Regime for Qualified Plans

Most of my 1988 article is devoted to a comparison of current law with the two most commonly suggested replacement schemes, taxing participants on their accrued (but unpaid) plan benefits and taxing participants on employer contributions (rather than on plans' subsequent distributions to such participants).[25] I argued that Congress, seeking a normatively correct approach to qualified plans, could reasonably prefer the essentials of current law—current deductibility of employer contributions, no taxation of plan earnings, taxation of benefits to participants and beneficiaries on actual distribution—to either of these two alternative schemes for taxing plan participants.

It is significant that Professor Stein, in his article, makes no effort to defend either of these proposals in the face of the argument that considerations such as liquidity, measurability, and administrability could rationally lead Congress to accept the status quo. Thus, in an important respect, there appears to be a degree of agreement between Professor Stein and me: I suggest that current law, as a normative matter, is at least as attractive as taxing plan participants currently on their accrued benefits or their employers' contributions and Professor Stein makes no effort to justify either of these commonly suggested proposals.

Instead, Professor Stein posits an alternative approach to the taxation of qualified plans that focuses, not upon the taxation of employees, but upon the treatment of employers. Instead of permitting employers, as under current law, to deduct their qualified plan contributions at the time such contributions are made, Professor Stein would defer employers' deductions for plan contributions until the time distributions are made to participants.[26] Professor Stein would also tax plan earnings as though such earnings belong to the employer sponsoring the plan.[27] Professor Stein characterizes his proposed regime as taxing qualified plans similarly to unfunded, unsecured deferred compensation arrangements. He likens his scheme to "treating the funds in retirement plans as a bookkeeping reserve of the employer."[28]

Professor Stein apparently does not want Congress actually to

25. Zelinsky, *supra* note 1, at 334-56.
26. Stein, *supra* note 3, at 227.
27. *Id.*
28. *Id.*

adopt this approach in the Code. Rather, by establishing that there is a single, normatively correct treatment for qualified plans, Professor Stein seeks to preserve the characterization of current law as a tax expenditure. This characterization, in turn, justifies the Code's extensive regulation of qualified plans via its rules as to nondiscrimination, vesting, participation, coverage, and the like. Professor Stein thus seems to align himself, not with the commentators who would abolish the perceived tax subsidy of current law, but with those who accept that subsidy and seek to channel it in the interests of national retirement policy.

Professor Stein's proposal is a plausible alternative to the status quo, an alternative (like the others) with its own significant problems and trade-offs. However, given Professor Stein's underlying premise of the single, normatively correct tax, his burden of proof is higher than mere plausibility. Professor Stein must show that his posited regime is the only course available if we seek the normatively correct taxation of qualified plans, that his scheme is the only acceptable means of translating the Haig-Simons definition of income into a normative tax. Professor Stein needs to demonstrate that a reasonable legislator, uninterested in subsidizing qualified plans but concerned with the correct tax treatment of such plans, must prefer Professor Stein's alternative to the essentials of current law. Professor Stein has not met this burden.

Professor Stein is quite open about some of the problems with his proposed regime for qualified plans but asserts that these problems are "less serious"[29] than the shortcomings of current law. For example, Professor Stein acknowledges that, under his proposal, two employers making identical outlays will experience different tax results if one pays current compensation (presently deductible) while the other contributes the same amount to a qualified plan (deductible only in the future).[30] Professor Stein similarly acknowledges the liquidity problems under his regime for employers who will make nondeductible plan contributions and then owe income taxes on these amounts.[31] Professor Stein minimizes these as the problems of "transition," a euphemism for a major disruption

29. *Id.* at 251. The quoted phrase is used by Professor Stein specifically to compare the treatment of multiemployer plans under his proposed regime with the provisions of current law. However, I think the phrase is an apt summary of Professor Stein's overall view of his suggested scheme for taxing qualified plans, *i.e.*, that the problems with his proposal are preferable to the problems of current law.

30. *Id.* at 242.

31. *Id.* at 234.

of the nation's economy.[32] Professor Stein also admits that the labor market adjustments on which he relies for transition will be considerably less than perfect.[33]

Professor Stein also acknowledges that his proposed regime for taxing qualified plans will effectively overtax some employees who seek funded deferred compensation. However, he minimizes the significance of this difficulty.[34]

Professor Stein further notes that his proposal "is not easily adapted" to multiemployer plans, given the difficulties of allocating such plans' income and distributions among multiple sponsoring employers.[35] One solution to this problem, attempting to attribute earnings and plan distributions accurately to individual employers, would be difficult to implement in an administrable fashion. An alternative approach would be the assumption of a flat rate tax for all employers sponsoring multiemployer plans. This tack, however, risks overtaxing and undertaxing those employers whose actual effective tax rates are above or below the assumed flat rate. Indeed, Professor Stein acknowledges that, of the possible approaches to multiemployer plans under his regime, none is "without problems."[36]

Similarly, Professor Stein's proposed regime is potentially troubling to a legislator sensitive to the fact that some employers such as state and local governments are tax exempt and some private employers are effectively tax-exempt because of net operating losses or other tax attributes. Professor Stein predicts that his proposed limitation on employer deductions will cause reduced plan contributions and benefits as employers respond to the nondeductibility of their contributions.[37] However, denying deductions for plan contributions will have no impact on states, municipalities, charities and other tax-exempt employers. Similarly, as to such exempt organizations, treating plan assets as a bookkeeping reserve results in no tax on plan earnings since these organizations are in the zero tax bracket.

Thus, Professor Stein's scheme might trigger reduced benefits for participants employed by taxable organizations but not change matters for participants working for exempt employers. Some

32. *Id.* at 235.
33. *Id.* at 241.
34. *Id.* at 239.
35. *Id.* at 250.
36. *Id.* at 251.
37. *Id.* at 236.

might view this result with equanimity or might define the real problem as the tax-exempt status of charities, local governments, and corporations with net operating loss carryovers. Just as reasonably, a member of Congress could view the essentials of current law as preferable to the introduction of disparities among participants employed by taxable and exempt organizations.

Professor Stein, sensitive to these problems, acknowledges that his proposed regime might need "special rules" to deal with plans sponsored by exempt employers.[38] He does not specify what these rules would be. However, I think it is a fair inference that any such rules would introduce further complexities and trade-offs into this already difficult area.

Professor Stein's regime is similarly problematic to apply in a case in which a payment to a participant precedes the employer's corresponding contribution to the plan.[39] In such an instance, the general rule Professor Stein proposes, to permit deductions upon distribution rather than contribution, would accelerate the employer's deduction, permitting such a deduction earlier than under current law. Congress might promulgate a special rule for such a case to delay the employer's deduction until the time of the employer's contribution to the plan. However, there seems no principled basis for such an exception. Again, this quandary can be resolved by staying with the status quo and its rule mandating deduction at the time of contribution.

There are yet other grounds on which a rational legislator could, as a normative matter, prefer the essentials of current law to Professor Stein's alternative for taxing funded deferred compensation plans. Consider, in this respect, two identical employers except that one contributes to a qualified plan in addition to its other expenses. Professor Stein proposes that this contribution not be immediately deductible. As a matter of accurate income measurement and equity, I challenge the propriety of levying the same tax on these two employers despite one's additional outlays to a qualified plan. Such outlays are legitimate expenses incurred in the conduct of the employer's business. Denying deductibility for those expenses overstates the employer's income and consequently inflates its tax liability relative to others who have not made qualified plan contributions.

From an acceptability perspective, I believe most taxpayers

38. *Id.* at 248.

39. *See* Zelinsky, *supra* note 1, at 351-52.

would share this response and am, despite Professor Stein's assurances,[40] skeptical that the nondeductibility he proposes will be perceived by taxpayers as fair or proper—or that it should be so perceived.

Professor Stein's proposed regime would also create a tax disparity between the employer's sponsorship of its own plan of funded deferred compensation and the employer's involvement in the nation's ultimate pension program, the federal social security system. Present law treats employers' contributions to social security in the same fashion as employers' payments to qualified plans. Both types of contributions generate immediate deductions for employers. Under current law, neither type of contribution generates earnings taxable to the employer. Presently, neither social security payments nor qualified plan distributions to the employee have tax consequence for the employer.

In the abstract, Professor Stein's proposal for the taxation of qualified plans could be extended to employers' social security contributions, delaying employer deductions until the subsequent payment of benefits, allocating the earnings of the social security trust fund among employers and assessing tax at employers' respective rates. If, however, the problems adapting Professor Stein's regime to multiemployer plans are "daunting," applying his proposal to social security is beyond the pale.

Hence, Professor Stein's proposal for qualified plans would create a disparity between employers' immediately deductible social security taxes and employers' contributions to private plans, deductible only on a delayed basis when employees receive their benefits. Some might be unconcerned about this disparity or might favor it to bolster employers' support for the social security system. Just as plausibly, a member of Congress could object to a tax code that metes out discrepant treatment to employers' economically similar social security and qualified plan contributions.

Finally, a rational legislator could reject Professor Stein's proposal to treat qualified plans as employer bookkeeping reserves for the simple reason that they are not. The assets of qualified plans are not mingled with the employer's general assets and are not available to the employer's creditors. A legislator, concerned about the equity and acceptability of the tax system, could reasonably be troubled by treating employers as owning something they do not.

In short, Professor Stein's proposed scheme for taxing quali-

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40. Stein, *supra* note 3, at 236.

fied plans is plausible but by no means compelling. His suggested regime would create significant problems with respect to and among employers just as the commonly suggested alternatives to the status quo, taxing to participants their accrued benefits or their employers' contributions, create problems with respect to and among plan participants. While Professor Stein minimizes the problems associated with his proposed scheme as "less serious" than the difficulties of the status quo, a rational legislator, concerned about equity among employers, administrability, employer liquidity, measurability, and acceptability could reasonably prefer current law, as a normative matter, to Professor Stein's alternative.

IV. WHY DOES IT MATTER? PTOLEMY'S SYSTEM AND THE CODE'S REGULATION OF QUALIFIED PLANS

Why does it matter if I am wrong and Professor Stein is right? First, our differing perspectives on qualified plans lead to contrasting assessments of the possibilities for further broadening of the federal income tax base. If, as Professor Stein contends, the Code's qualified plan provisions constitute a tax expenditure, the federal income tax appears quite susceptible to more base-broadening reform of the sort Congress enacted in 1986. If, on the other hand, there is, as I argue, no qualified plan tax expenditure, the aggregate tax subsidies thought to be embodied in current law are reduced significantly and the opportunities for additional, base-broadening reform of the income tax are diminished accordingly.

If the present qualified plan regime is a tax subsidy, it is the mother of all tax subsidies, by a substantial margin the largest tax expenditure in the Code.[41] Given a consequently high estimate of the aggregate tax expenditures extant in the tax law, it is reasonable to suggest that the "Tax Reform Act of 1986 only scratched the surface"[42] in eliminating preferences in the Code and to conclude that there are revenues plausibly obtainable from further efforts to

41. *See, e.g.*, Hoerner, *Tax Expenditures To Cost Nearly $400 Billion in 1991*, 50 TAX NOTES 913 (March 4, 1991) discussing the tax expenditures identified in the President's proposed fiscal 1992 budget and listing the "(e)xclusion of employer pension plan contributions and earnings" as the largest such tax expenditure for calendar 1991, an expenditure of over $64 billion out of total tax expenditures of approximately $398 billion. The next largest tax expenditure listed in the President's proposed fiscal 1992 budget is the deduction for home mortgage interest, calculated at slightly under $40 billion for calendar 1991. *See also Tax Expenditures In The Fiscal 1992 Budget*, *id.* at 931.

42. Hoerner, *Tax Expenditures To Cost Nearly $400 Billion in 1991*, *supra* note 41, at 916.

expand the base of the income tax by eliminating tax expenditures.

In contrast, classifying present law vis-a-vis qualified plans as normatively acceptable leads to a reduced estimate of the tax subsidies embedded in current law. This implies that increased revenues from the income tax can only be obtained by more concentrated attention on the smaller tax expenditures remaining on the list[43] or by raising income tax rates.

Second, Professor Stein's and my divergent perspectives about qualified plans lead to different prescriptions for the elaborate Code provisions regulating such plans. Professor Stein would largely retain those regulatory provisions. I would scrap them.

Some who believe current law embodies a qualified plan tax expenditure seek elimination of that expenditure. Others, accepting the perceived qualified plan subsidy as a permanent feature of the Code, desire to regulate that subsidy in the interests of retirement security for rank-and-file employees.

The Code, not surprisingly, reflects both of these perspectives, although with different degrees of enthusiasm. While the perceived tax expenditure for funded deferred compensation has obviously not been eliminated, it has over the years been pruned through a variety of restrictions on contributions and benefits.[44] To one determined to eventually purge the qualified plan tax subsidy from the Code, these limitations are sensible interim steps in the enhancement of the federal fisc.

More wholehearted has been the regulation of the qualified plan tax subsidy to ensure retirement security for plan participants. Today, the Code's qualification requirements for pension and profit-sharing arrangements constitute an elaborate statutory maze, bewildering even by the standards we have come to expect in the tax law.[45] These complex, increasingly unworkable statutory requirements are designed to guarantee that the perceived qualified plan tax subsidy results in meaningful pension and profit-sharing participation for rank-and-file employees. That design, in turn, reflects an unwillingness to accept the pattern of plan participation and benefits resulting from market forces and a consequent

43. This observation should not be construed as agreement with the characterization as tax expenditures of all of the other items usually listed as such. In particular, I have reservations about treating the deduction for state and local taxes as a tax expenditure. *See* Zelinsky, *The Deductibility of State and Local Taxes: Income Measurement, Tax Expenditures and Partial, Functional Deductibilty*, 6 AM. J. TAX POL'Y 9 (1987).

44. *See, e.g.*, I.R.C. § 415.

45. *See, e.g.*, I.R.C §§ 410, 411, 416, and 417.

determination to override legislatively the retirement security decisions which employers and employees would make on their own.

In his response, Professor Stein is quite supportive of this second set of concerns. He does not explicitly advocate elimination of the qualified plan subsidy through the implementation of his proposed tax regime. Professor Stein does seek to justify the Code's provisions relating to nondiscrimination, participation, coverage, vesting, and the like by establishing that his regime is the normatively correct one and that current law thus embodies a subsidy to be regulated by Congress. Professor Stein correctly notes that, from my perspective, legislation to channel the qualified plan tax expenditure is unnecessary: there is no reason to regulate a tax subsidy when no such subsidy exists.[46] Under my approach, if Congress seeks to override legislatively the retirement security decisions emanating from market forces,[47] it could not do so in the guise of administering a tax subsidy.

Professor Stein acknowledges that all is not well with the increasingly complicated and unadministrable Code provisions regulating qualified plans. He is careful to suggest that certain of these provisions may require revision.[48] However, Professor Stein is committed to the basic statutory structure channelling the qualified plan subsidy and to the premises of tax subsidization and legislative intervention upon which that statutory structure is built. Professor Stein leaves the impression that the flaws of this structure are marginal, soluble without fundamental reform.

In contrast, I think that the evident problems of the Code's qualified plan provisions cannot be dismissed this easily. Rather, these problems are serious in nature and are the logical outgrowth of the proposition upon which these provisions are based, *i.e.*, the need to regulate the qualified plan tax subsidy in the interests of retirement security as such interests are defined legislatively rather than shaped by market forces.

Looking at the Code provisions regulating qualified plans, I am reminded of the saga of the ancient astronomer Ptolemy and his scientific system based on the belief that the sun revolved around the earth.[49] Starting from this premise (quite reasonable

46. Stein, *supra* note 3, at 225-26.

47. In this context, market forces should be understood broadly to include collective bargaining processes. With a few exceptions, *e.g.*, section 410(b)(3), the Code's regulation of qualified plans applies to plans subject to collective bargaining.

48. Stein, *supra* note 3, at 256.

49. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 68-69 (2d ed. 1970).

for its time), Ptolemy and his successors developed a sophisticated and convincing astronomical system explaining the movement of the stars, a system which, for most of recorded history, formed the basis for received astronomical wisdom. Over the centuries, Ptolemy's scheme was adapted to incorporate new observations and data. As a result, a once relatively simple arrangement became increasingly convoluted as it was modified in response to new information. By the end of the system's development, it had become enormously complex to accommodate the observations scientists had accumulated over the centuries since Ptolemy. Ultimately, the Ptolemaic system failed, not because of the details over which the cognoscenti argued, but because the premise upon which Ptolemy had built the system was false.

In my judgment, we are in the initial stages of a similar, long-term decline of the qualified plan provisions of the Internal Revenue Code. As these provisions become more complex and unworkable, it becomes increasingly unlikely that employers can comply with them, that employees can understand them, that professionals can master them, or that government can enforce them. While qualified plan experts debate esoteric points like Ptolemaic scholars, the underlying system has become enveloped in an aura of unreality. My guess is that virtually every qualified plan in America is in technical violation of some aspect of the convoluted legal framework now governing such plans. It is also my impression that, with regard to plan distributions, there is widespread noncompliance with the particulars of the Code.

I am not alone in my assessment. One set of commentators, reflecting on the legislative penchant for "annual, mindless changes" to the legal framework governing pension and profit-sharing arrangements, has decried the resulting "fairyland atmosphere" in which they practice qualified plan law.[50] The Special Committee on Pension Simplification of the New York State Bar Association has similarly observed that,

> (t)he qualified pension plan is increasingly attended by the unqualified pension professional. We can think of nothing that would strike more terror among pension professionals than a requirement that they pass a "closed book" proficiency examination testing comprehension of post-ERISA legislation. Were such a requirement to be established for government pension law specialists, I.R.S., D.O.L.

50. Helm & Goldstein, *Pension Reform/Simplification—An Urgent Need: Practical Proposals from the Front Lines*, 25 GEORGIA L. REV. 91, 93 (1990).

> and P.B.G.C. offices around the country would be decimated. This is not meant as an indictment of people but of laws. In pensions, at least, the "government of laws" has gone too far by half. The result has been massive (but often inadvertent) noncompliance despite the expenditure of greatly increased administrative fees in order to achieve compliance, a growing number of plan terminations, and widespread and increasing disenchantment with the pension benefit scheme of compensation. In short, we are seeing growing dysfunction of the private pension institution.[51]
>
> It is not hyperbole to suggest that there are two bodies of federal pension rules in this country, the official law and the underground law, with the overwhelming majority of the Nation's pension plans inadvertently operating under the latter because of inability to cope with the former. It is self-evident that the governed cannot "consent" if they cannot comprehend.[52]

The Internal Revenue Service has apparently come to similar conclusions, recently promulgating formal administrative procedures mitigating the effects of noncompliance with the Code's qualified plan provisions. The impetus for these procedures, as explained by Service officials, was the recognition of the impossibility of full compliance with the Code's regulatory scheme.[53]

As was the case with Ptolemy's system towards the end of its existence, marginal reforms in the Code provisions relating to funded deferred compensation plans may prolong matters, simplifying the more convoluted aspects of current law, and thereby making them more workable.

However, such reform efforts, commendable as they are, do not reach the heart of the matter. Like the details of Ptolemy's system, most of the Code's current provisions regulating qualified plans, viewed in isolation, are potentially defensible starting from an assumed need to channel legislatively the qualified plan subsidy in the interests of retirement security and a corresponding distrust

51. SPECIAL COMM. ON PENSION SIMPLIFICATION, N.Y. STATE BAR A., A PROCESS AWRY: CALL FOR SIMPLIFICATION AND RATIONALIZATION OF THE FEDERAL PENSION LAWS 7 (1988) *reprinted in* 8 AM. J. TAX POL'Y 75, 79 (1989).

52. SPECIAL COMM. ON PENSION SIMPLIFICATION, *supra* note 51, at 47. *See also* Evans, *Researchers Advocate "Kind But Firm" IRS*, 49 TAX NOTES 949, 951 (November 26, 1990), reporting evidence of improper taxpayer calculation of the 10% tax on premature qualified plan distributions.

53. See the interview with Martin I. Slate, Director of the Employee Plans Division of the Internal Revenue Service, and William B. Posner, Assistant Director of the Employee Plans Division, in CCH, *IRS Procedures for Resolving Plan Qualification Defects* (1991) at 10 ("Our examination program in the key district offices showed us that it is impractical to expect perfect plans."). In this context, "perfect" is a euphemism for full compliance.

of market outcomes in the context of funded deferred compensation. At some point, it becomes necessary to reassess the system as a whole and reexamine the premises which have led to the present state of affairs. This point, I suggest, is reached when the reforms needed to keep the system going themselves indicate the need to rethink the system's fundamentals.[54]

Hence, the significance of the disagreement between Professor Stein and me. Professor Stein would perpetuate the logic of the qualified plan tax subsidy: federal dollars, in the form of revenue foregone, are being spent to override market allocations of retirement resources to ensure retirement security for rank-and-file workers; the Code's elaborate regulation of qualified plans channels this tax subsidy to implement Congress', rather than the market's, vision of retirement savings. If these premises are correct, we should accept the basic statutory scheme currently regulating qualified plans and engage in relatively marginal efforts to simplify that scheme and make it more workable.

If, on the other hand, my point of view is right, marginal reforms are distantly second best choices. Rather, we ultimately require a fundamental overhaul to jettison much of the statutory framework presently governing qualified plans. In the world I postulate, decisions about retirement security would be shaped by market forces or by a Congress that could not advance its intervention under the tax subsidy banner.

Shorn of the camouflage of the tax law, such legislative intervention would, procedurally and substantively, meet greater political and intellectual resistance than it has to date. Procedurally, pension legislation stripped of its tax veneer could not be bundled into the omnibus tax bills, which have become standard for Congress to adopt on a more or less annual basis. Pension legislation would be subject to closer congressional scrutiny once removed from these large assemblages of tax provisions with almost irresistible legislative momentum.[55] Substantively, proposed pension leg-

54. As I discuss *infra*, text accompanying notes 59-79, the SLOB rules represent such a reform, which should force reexamination of the system of qualified plan regulation and its fundamental assumptions.

55. It is not merely retirement legislation which, packaged as part of an omnibus tax bill, is consequently protected from heightened congressional scrutiny. I suspect that the Code's provisions pertaining to greenmail and golden parachute payments were enacted more easily because they were bundled into omnibus tax legislation. *See* Zelinsky, *Greenmail, Golden Parachutes and the Internal Revenue Code: A Tax Policy Critique of Sections 280G, 4999 and 5881*, 35 VILL. L. REV. 131, 189 (1990).

islation, deprived of the mystique of the tax law, could no longer be defended in terms of the federal governments' spending its own subsidizing dollars.[56] Pension legislation would instead be recognized as a direct regulation of the employer/employee relationship, obligating proponents of such legislation to identify the market failure justifying such intervention or to acknowledge openly the paternalistic nature of their program.[57] At this point in the discussion, something of a paradox emerges for, as Professor Stein notes, I become the challenger to things as they are and Professor Stein wraps himself in the mantle of the status quo, defending the Code's interventionist framework as to vesting, participation, and the like.[58] That reversal of roles does not trouble me for I am content to carry the burden of proof regarding the breakdown of the current Code provisions regulating qualified plans and the resulting need to rethink the premises upon which these provisions are based.

In carrying this burden, my prime evidence would be the recently adopted separate line of business (SLOB)[59] regulations.[60] Section 414(r), added to the Code by the Tax Reform Act of 1986, permits, under certain circumstances, an employer sponsoring a pension or profit-sharing plan to satisfy some of the Code's coverage requirements independently with respect to each of the employer's distinct lines of business. Under this provision, for exam-

56. *See, e.g.*, Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1, 32-33, 64 (1990). Professor Watson would extend the current scheme of pension regulation on the grounds, *inter alia*, that the tax expenditure made by the federal government via present law gives it "an interest in covering as many workers as possible under the private retirement system . . . The private retirement system is, in large part, a creature of federal tax policy and exists only through federal tax incentives." If, on the other hand, present law does not embody a qualified plan tax subsidy, the regulation of pension and profit-sharing arrangements cannot be rationalized in this fashion as the channelling of the federal government's money.

57. Instructive in this regard was the utter failure of the proposal for a Mandatory Universal Pension System (MUPS). Lacking the mystique of the tax law, MUPS garnered no appreciable support in Congress. For background on MUPS, see J. LANGBEIN & B. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 35-38 (1990).

58. Stein, *supra* note 3, at 225-26.

59. I did not make up this acronym. *See, e.g.*, 18 BNA Pension Reporter No. 7 (February 18, 1991) ("The SLOB rules are overly complex and may be too restrictive to be used by many employers, according to benefit practitioners interviewed by BNA."); 19 Tax Management Compensation Planning Journal No. 2 (February 1, 1991) ("IRS to Release SLOB Regulations Soon").

60. These regulations, with supplementary information, were published at 56 Fed. Reg. 63420 (December 4, 1991) and are reproduced at 18 Daily Tax Report (BNA), No. 232, Special Supp. 12, December 3, 1991.

ple, a conglomerate selling diversified products and services may be able to apply the coverage rules of section 410(b) separately with respect to each of its various business units.[61]

Stylistically, the final SLOB regulations, implementing and interpreting section 414(r), are typical of the qualified plan regulations promulgated in recent years by the Treasury. The draft SLOB regulations are complex and detailed including myriad examples, safe harbors, and a flowchart[62] with twenty-three cells to guide the reader through the SLOB regulatory maze. If the employer satisfies each step in the maze, the employer is generally rewarded with a determination that it operates through "QSLOBs,"[63] lines of business which, for coverage purposes, will qualify for recognition as separate.

The SLOB regulations contemplate that the employer seeking to satisfy section 414(r) will initially divide itself into its lines of business.[64] These preliminary determinations of the employer are subject to a test of reasonableness, a test to which the regulations give little content other than to indicate that professional service employers will never satisfy it.[65] The second stage under the SLOB regulations is scrutiny of the lines of business identified by the employer to establish whether such lines are "organized and operated separately" from one another.[66] In making this determination, the regulations require that the lines of business demarcated by the employer constitute distinct organizational units with substantially their own workforces, managements, and financial accounting systems. A variety of rules and examples implement this concept of separateness. Central to these are the allocation to a line of business of employees if "more than a negligible portion" of such employees' services is devoted to that particular line of business.[67] The employer's lines of business are, under the regulations, upgraded from separate to qualified if, *inter alia*, these lines pass

61. Treas. Reg. § 1.414(r)-2(c)(2), examples 1 through 5.

62. See Treas. Reg. § 1.414(r)-(0)(c).

63. I did not make up this one either. *See id.*

64. Treas. Reg. § 1.414(r)-2.

65. Treas. Reg. § 1.414(r)-(2)(b)(3)(iii) sets forth the reasonability test for an employer's initial determination of its lines of business. Treas. Reg. § 1.414(r)-(2)(c)(2), examples 9, 10, and 11, indicates, without explanation or elaboration, that a law firm, a medical clinic, and a management consulting firm cannot satisfy this test. This arbitrary conclusion is not surprising given the historic hostility of the Treasury and the Service to personal service employers.

66. Treas. Reg. § 1.414(r)-3.

67. Treas. Reg. § 1.414(r)-3(c)(5)(i).

"administrative scrutiny."[68] Such scrutiny can be satisfied by compliance with certain safe harbors or by obtaining an administrative ruling from the Service.[69] Either course will entail extensive testing by the employer as to the composition and distribution of its workforce.[70] The employer who progresses successfully through administrative scrutiny is then rewarded with the determination that it conducts its affairs through QSLOBs. At that point in the regulatory maze, all employees are allocated to one of the employer's QSLOBs pursuant to a variety of tests: the substantial-service employee, the residual shared employee, and the employer's dominant line of business.[71] Finally, after completing this allocation, the employer is able to apply certain of the Code's coverage rules separately with respect to each of its QSLOBs.[72]

While the voluminous nature of the SLOB regulations promises exhaustive guidance for taxpayers, the regulations contain numerous points conducive to conflict between employers and the Service, *e.g.*, the reasonableness of employers' determinations of their lines of business, whether employees provide more than a "negligible portion" of their services to different lines of business. Indeed, notwithstanding their apparently exhaustive nature, the regulations caution that literal compliance will be ignored if the employer does not operate QSLOBs "for bona fide business reasons."[73]

For many employers, compliance with the SLOB regulations will be time-consuming and expensive, entailing the collection, analysis, and presentation of significant quantities of data. Even then, employers will confront substantial uncertainties under the regulations leading to inadvertent noncompliance on the part of some conscientious taxpayers.

Much time, energy, and skill was evidently expended by the government lawyers who drafted the SLOB regulations. Private sector attorneys and fringe benefit consultants must now devote additional effort to master the proposed regulations while employers seeking to satisfy the SLOB rules must invest significant resources in their compliance activities. Now that the SLOB rules have been finalized, some employers will alter their qualified plans

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68. Treas. Reg. § 1.414(r)-5(a).
69. Treas. Reg. § 1.414(r)-6.
70. *See*, Treas. Reg. § 1.414(r)-5(b).
71. Treas. Reg. § 1.414(r)-7.
72. Treas. Reg. §§ 1.414(r)-8, -9.
73. Treas. Reg. § 1.414(r)-(1)(d)(2).

and their methods of operation to satisfy the SLOB tests. Ultimately, the judiciary will be called upon to resolve the conflicts which will arise under the SLOB regulations between taxpayers and the Service. According to the views advanced by Professor Stein, these are the regrettable, but ultimately necessary, costs of fine-tuning the qualified plan subsidy.

In contrast, I view the SLOB rules as a truly Ptolemaic exercise, a complicated, resource-consuming refinement of the already overly elaborate system of qualified plan regulation, a refinement that suggests the need to rethink the system's interventionist premises. The SLOB rules, reduced to their essentials, are a constrained and complex form of deregulation implying the possibility and, indeed, the desirability of more extensive deregulation of qualified plans and, ultimately, the feasibility of dismantling the Code's system of plan regulation as a whole.[74]

The proponents of the SLOB concept openly argued that the Code's coverage tests, applied to employers in different businesses, placed such employers "at a competitive disadvantage" in the marketplace and that, in such cases, employers should be allowed flexibility in plan coverage via the SLOB rules "for competitive market reasons."[75] Consistent with this intent, the SLOB rules recognize the legitimacy of market forces in determining plan participation as between different lines of business. Under the SLOB regulations, for example, in the case of a qualifying employer operating a commercial airline along with other nontransportation businesses, market forces will be allowed to determine different patterns of plan coverage for the airline's workers and for the nontransportation employees.[76]

Once the legitimacy of market forces is acknowledged in the restricted context of qualified plan coverage issues relating to separate lines of business, it is difficult to find a limiting principle that precludes market forces from the other areas governed legislatively by the Code's qualified plan provisions. If Congress is prepared to allow market forces free play as between different lines of business, why should Congress not also permit market forces to govern retirement arrangements within each line of business? If it is appro-

74. This logic has not been lost of members of the employee benefits community. *See* Parham, *IRS Issues Separate Business Lines Regs*, 27 PENSION WORLD 6 (No. 4, April, 1991).

75. See supplementary information accompanying the proposed SLOB regulations, 56 Fed. Reg. 63420; Daily Tax Report (BNA), No. 232, Special Supp. S-13, Dec. 3, 1991.

76. Treas. Reg. § 1.414(r)-5(c)(4), ex. 1.

priate for market forces to determine that an employer's airline employees will have greater (or lesser) qualified plan coverage than the employer's other workers, why is it inappropriate for such forces to govern the distribution of retirement resources within the universe of the employer's airline employees? Why not let the market decide whether the minimum age for plan participation ought be twenty-two or twenty-five or thirty?[77] Why not similarly let employees and employers on their own determine whether the employer's plan should have an eight year vesting schedule or a twelve year vesting schedule?[78]

In sum, the elaborate, deregulating SLOB rules are a convoluted adaptation of the system of qualified plan provisions, a tentative, complex suspension of the system which suggests that the interventionist premises of the system are flawed and ought be reexamined.[79] As a result of such a reexamination, I would leave much of the qualified plan rules behind, abandoning the notion of a qualified plan tax subsidy and thus jettisoning the need for the Code provisions channelling that subsidy.

V. Conclusion

The disagreement between Professor Stein and me can be analyzed on several different levels: as a dispute about the nature of the choices facing tax policymakers and the identification of tax expenditures, as a debate about the relative merits of the present tax treatment of qualified plans, and as an argument about the Code's elaborate regulation of qualified plans. In asserting the clear superiority of his proposed qualified plan regime to the alleged subsidy embodied in current law and in invoking the strong version of tax expenditure analysis, Professor Stein assumes the burden of proof that, in defining a normative income tax, his proposal is, not one of many reasonable alternatives, but, rather, is

77. *Cf.* I.R.C. § 410(a)(1)(A)(i).

78. *Cf.* I.R.C. § 411(a)(2).

79. In this vein, the proposal advanced by Labor Secretary Lynn Martin as Pension Opportunities for Workers' Expanded Retirement is, in large measure, an effort to deregulate the Code's complex and unworkable pension rules for small employers. For discussion and description of this proposal, see *Bush Administration Unveils Proposal To Expand, Simplify Nation's Pension System*, Daily Tax Report (BNA), May 1, 1991 at G-6; Durgin, *401(k)s star in expansion effort*, 19 Pensions & Investments 1 (No. 10, May 13, 1991); *Administration's Pension Proposal Seen as Somewhat 'POWER-Less'; JCT Rates Super-IRA as Big Drain*, 51 Tax Notes 549 (May 6, 1991); *Labor Secretary Proposes Simplified Pension Plan for Small Employers*, Pension Plan Guide (CCH) 1 (No. 846, May 3, 1991).

unequivocally preferable to the status quo. Despite the obvious thoughtfulness of his piece, Professor Stein has not carried that burden.