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# THE (TAX) POLICY ENTREPRENEUR

MIRIT EYAL-COHEN\*

## I

### INTRODUCTION

Stanley S. Surrey maintained a commitment to promoting policy throughout his professional life as it swung between academic and government service. After three years at UC Berkeley School of Law in 1950, he moved to Harvard Law School and remained there for over thirty years. His government tenure included two long stints in the Department of the Treasury. From 1937 through 1947, he was a temporary adviser and tax legislative counsel and from 1961 to 1969, he held the top executive branch tax policy post as Assistant Secretary of the Treasury for Tax Policy. Surrey was at the forefront of government tax policy and wielded remarkable influence while serving at the Treasury. No Assistant Secretary for Tax Policy has enjoyed such a significant public and congressional profile as Surrey: an annotated compilation of “chosen speeches and testimony” from his time in office amounts to more than 700 pages and those, to repeat, are only his selected speeches.<sup>1</sup>

Naturally, not everyone approved of Surrey’s work and actions. Over the years, scholars, politicians, and journalists have taken issue with his ideas and proposals. Steve Dean contends that Surrey assumed limiting the special “off-budget” status of tax expenditures would convince lawmakers to stop misusing them.<sup>2</sup> Yet in Dean’s opinion, the tax expenditure budget turned out to be a poor idea for fiscal control and enforcement due to its ambiguity.<sup>3</sup> Susannah Tahk maintains that Surrey’s ideas are no longer suited to today’s environment.<sup>4</sup> She criticizes the recent trend of using tax credits, contending that “the tax policy community listened so closely to Surrey, almost all of the most recently enacted tax-embedded social programs have taken the form of refundable credits.”<sup>5</sup> Tahk concludes that in the wake of Stanley Surrey’s fundamental work, previous

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1. See generally STANLEY S. SURREY, A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY (Lawrence Zelenak and Ajay K. Mehrotra eds., 2022) [hereinafter “Memoirs”] (Mehrotra and Zelenak note that an annotated compilation of only Surrey’s selected speeches and testimony during his time in office amounted to more than 700 pages).

2. Steven A. Dean, *The Tax Expenditure Budget is a Zombie Accountant*, 46 U.C. DAVIS L. REV. 265, 267–68 (2012).

3. *Id.* at 278.

4. Susannah Camic Tahk, *Everything is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67 (2013).

5. *Id.* at 78.

scholarship on this issue relied for too long on obsolete assumptions and, as a consequence, failed to grasp the significant benefits of incorporating social and regulatory policy within the tax code.<sup>6</sup>

Thomas Griffith goes so far as to disparage Surrey's income tax model as flawed and lacking a coherent normative principle.<sup>7</sup> Griffith also claims that Surrey fails to ground his ideal tax structure on principles of distributive justice or justify how preserving a progressive tax structure and net income tax base is optimal for the poor.<sup>8</sup> Boris Bittker and Edward Zelinsky criticize Surrey's theory as presupposing a consensus on the "proper" ambit of a tax and lacking a clearly defined set of normative principles against which expenditure-type variations may be measured.<sup>9</sup> Thus, the fundamental tenet of categorizing rules as either normative or incentive is intrinsically flawed.<sup>10</sup> Similarly, other scholars argue that Surrey's implicit assumption in labeling an exemption a subsidy rests on the erroneous belief that all income naturally belongs to the government.<sup>11</sup> Most recently, Michael Simkovic faulted Surrey's tax expenditure analysis for not including the realization requirement.<sup>12</sup> He went as far as assuming it was purposely omitted to avoid infuriating the wealthy and powerful.<sup>13</sup>

Joseph Thorndike counters such critiques, characterizing Surrey as a giant who is revered for his many contributions to tax policy. He argues that while the

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6. *Id.* at 106–07.

7. See Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 345 (1989) (criticizing the tax expenditure models advanced by Surrey and Professors William Andrews and Mark Kelman. He argues that all three models "share a critical flaw: none is grounded on a coherent normative principle").

8. *Id.* at 363–64 ("It does not explain why this tax base is appropriate. To support the normative claim that the tax base *ought* to be net income, Surrey needs to show that a net income tax base is consistent with an attractive principle of distributive justice. He does not do so.").

9. See Boris Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 247 (1969) (noting that the "cost" of a tax provision is computed by calculating the loss of tax revenue without taking into account changes in behavior); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1166 n.6 (1993) (highlighting arguments that some tax expenditures are actually consistent with the terms of a normative income tax). See generally Jonathan Babu, *The Tax Expenditure Budget: What The U.S. Can Learn From Germany*, 27 Seton Hall Legis. J. 163 (2002) (describing Boris Bittker's criticism of Professor Surrey's model as lacking a "normative" or ideal tax structure).

10. See Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 979 (1986) (exemplifying how working parents' child care expenditures can be considered a personal, non-deductible expense, or an occupational, deductible expense).

11. Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 996 (1999).

12. See Michael Simkovic, *Did New Deal Liberalism Steer Too Far to the Right?*, 174 TAX NOTES FED. 681, 683 (2022) (reviewing STANLEY S. SURREY, *A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY* (Lawrence Zelenak and Ajay K. Mehrotra eds., 2022)) (arguing that the realization requirement, which is within taxpayers' control, determines loss of income taxes on asset appreciation).

13. *Id.* at 684 ("[T]he most plausible explanation of the three offered is that Surrey was not willing to risk the wrath of wealthy and powerful interests that wished for the realization requirement to be thought of as a mere 'administrative convenience' rather than as an exceptionally expensive tax subsidy to the well-heeled.").

current tax system has many ills, it is unfair to judge Surrey's ideas by modern standards and project today's problems into the past.<sup>14</sup> Thorndike labels Surrey a "political entrepreneur,"<sup>15</sup> and implies that political entrepreneurs are more concerned with making a change rather than adhering to an ideology at the cost of losing political battles. Was Surrey genuinely an entrepreneur? And if so—of what kind?

This article aims not to opine on the content of Stanley Surrey's work, but to analyze innovation and entrepreneurship theories as they relate to political and legislative activities. In their recent seminal work, *A Half-Century with the Internal Revenue Code*, Lawrence Zelenak and Ajay Mehrotra compiled and annotated Surrey's memoirs between 1929 and 1980.<sup>16</sup> Their work provides a unique peek into Surrey's mindset and motivating considerations for many of his ideas and actions. Accordingly, this article employs Surrey's memoirs as a case study and an opportunity to consider the phenomenon of "policy entrepreneurship" by comparing and distinguishing it from traditional entrepreneurship. Part II begins by analyzing the origins of the term "entrepreneur" and how it has proliferated and been modified by mundane adjectives. "Political", "policy", "moral", and "social" entrepreneurship, all aim to signify the employment of unique traits. Part III describes Surrey's qualities and ideas to illustrate his success (and failure) in recognizing and seizing policy opportunities. Part IV concludes with suggestions for future research avenues on other policy entrepreneurial stances.

## II

### WHO IS THE ENTREPRENEUR?

Coined by eighteenth-century French economist Richard Cantillon, the word *entrepreneur* has entered the common parlance.<sup>17</sup> Joseph Schumpeter described entrepreneurs as economic leaders who create new combinations and innovations that challenge and ultimately topple the established economic order.<sup>18</sup> In recent years, the concept of entrepreneurship has proliferated. It no

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14. Joseph Thorndike, *Tax History: Soaking The Forgotten Man: Why New Dealers Taxed The Middle Class*, FORBES (May 23, 2022), <https://www.forbes.com/sites/taxnotes/2022/05/23/tax-history-soaking-the-forgotten-man-why-new-dealers-taxed-the-middle-class/?sh=36db5c8e6d55> [https://perma.cc/8EJM-J94M].

15. *Id.*

16. *See generally* Memoirs, *supra* note 1.

17. RICHARD CANTILLON, *ESSAI SUR LA NATURE DU COMMERCE EN GENERAL* 388 (Henry Higgs ed. & trans., Frank Cass & Co. Ltd. 1959) (1755) (The entrepreneur, in Cantillon's opinion, is an agent who acquires the means of production at specific prices that are unpredictable at the time). Similarly, French economist Jean-Baptiste Say characterized the entrepreneur as an agent who unifies the means of production and discovers the value of products. JEAN-BAPTISTE SAY, *CATECHISM OF POLITICAL ECONOMY* 29 (1816).

18. Joseph A. Schumpeter, *Economic Theory and Entrepreneurial History* (1949), reprinted in *ESSAYS ON ENTREPRENEURS, INNOVATIONS, BUSINESS CYCLES, AND THE EVOLUTION OF CAPITALISM* 254 (Richard V. Clemence ed., 1989). *See also* JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 555 (1954) (noting that the effect of entrepreneurial activity upon the industrial

longer refers to classic capitalist entrepreneurship, but has now been used to describe a variety of market players who engage in unique activities.<sup>19</sup>

Policy entrepreneurship is a concept developed in the public policy literature.<sup>20</sup> In a 1980 study, public policy scholar James Wilson described policy promoters as “skilled entrepreneur[s]” and “vicarious representative[s] . . . mobilizing latent public sentiment.”<sup>21</sup> In his recent work, *So you Want to be A Policy Entrepreneur?*, Michael Mintrom maintains that policy entrepreneurs work subtly to frame a debate in a way that promotes their goals.<sup>22</sup> They must become recognized authorities on the subject, build influential networks with people and organizations that share their vision, and show that they are committed to bringing an issue to fruition.<sup>23</sup>

Other experts in the field have noted, however, that there is no agreement on the bounds of the phenomenon of policy entrepreneurship and no consensus on its origins, motivations, or impact on government and citizens.<sup>24</sup> The term *policy* is commonly found adjacent to *public*, *political*, *bureaucratic*, *administrative*, and various other terms, but *policy entrepreneurship* is often used—especially in the legal literature—with no justification or citation, apparently on the assumption that the idea is either self-explanatory or sufficiently well known to make citation unnecessary.<sup>25</sup>

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structure is the consequent process of reoccurring destruction and reconstruction).

19. A trend in recent years is the proliferation of new entrepreneurial buzzwords and the promotion of their use. See, e.g., Justin Blount & Patricia Nunley, *What is a “Social” Business and Why Does the Answer Matter?*, 8 BROOK. J. CORP. FIN. & COM. L. 278 (2014) (social entrepreneurship as a term has gained usage but remains ill-defined); Justin W. Evans & Anthony L. Gabel, *Legal Entrepreneurship and the Strategic Virtues of Legal Uncertainty*, 57 AM. BUS. L.J. 593, 595 (2020) (defining legal entrepreneurship as “a strategy in which the firm is guided by a special type of attorney . . . [who] creates legal competitive advantages for the client by applying an entrepreneurial mindset to the uncertainties of the legal environment”); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 394 (1997) (norm entrepreneurs are “opinion leaders who explicitly aim to shape norms” who bring “sudden and dramatic norm changes”); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (coining the term “norm entrepreneurship” aimed at changing social norms (such as littering, smoking, and recycling) through what he calls “norm bandwagons” and “norm cascades”); Joseph P. Fishman, *Copyright Infringement and the Separated Powers of Moral Entrepreneurship*, 51 AM. CRIM. L. REV. 359, 360 (2014) (defining a moral entrepreneur as “an enterprising crusader who seeks to change existing social norms regarding particular conduct”); Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1667 (1998) (describing moral entrepreneurs as “mix[ing] self-interest with emotional appeal” to rally their followers behind a cause or incite animosity toward an opposing group rather than relying on reasoned argumentation).

20. John W. Lee & W. Eugene Seago, *Policy Entrepreneurship, Public Choice, and Symbolic Reform Analysis of Section 198, the Brownfields Tax Incentive: Carrot or Stick or Just Never Mind?*, 26 WM. & MARY ENV’T L. & POL’Y REV. 613, 631 (2002).

21. Sheldon D. Pollack, *A New Dynamics of Tax Policy?*, 12 AM. J. TAX POL’Y 61, 74 (1995).

22. Michael Mintrom, *So You Want to be A Policy Entrepreneur?*, 2 POL’Y DESIGN & PRAC. 307, 316 (2019).

23. *Id.* at 316–17.

24. David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 300 (2008). See also Lee & Seago, *supra* note 20, at 639 (explaining multiple paths for a policy entrepreneur).

25. Pramodita Sharma & James J. Chrisman, *Toward a Reconciliation of the Definitional Issues in the Field of Corporate Entrepreneurship*, 23 ENTREPRENEURSHIP THEORY & PRAC. 11, 12 (“Entrepreneurship has meant different things to different people.”).

Some erroneously associate policy entrepreneurship with political entrepreneurship and lobbying, which often create negative externalities.<sup>26</sup> The latter has been linked to advancing proposals that lack broad support or normative appeal by engaging in idiosyncratic, undemocratic, and possibly rent-seeking behavior.<sup>27</sup> The Public Choice theory points to permissive campaign funding rules, a surfeit of lobbyists, and the two-party system as sources of entrepreneurship.<sup>28</sup> Alas, public policy scholars disagree as to whether policy entrepreneurs are political actors motivated by something beyond narrow self-interest, an influential interest group, or improved chances of re-election, and some would exclude any motivational component whatsoever.<sup>29</sup> This article establishes a distinction between political and policy entrepreneurship. It argues that policy entrepreneurship is an instrument for avoiding, rather than according with, the public choice paradigm. It demonstrates that policy entrepreneurship seeks to sidestep political rent-seeking rather than facilitate the actions of interest groups aiming to pass legislation that has widely dispersed benefits and narrowly concentrated costs.<sup>30</sup>

Moreover, the depiction of policy entrepreneurs does not rest on theories of capitalist entrepreneurship, but draws largely from the literature on social change, social movements, political leadership, public choice theory, and institutionalism.<sup>31</sup> Scholarship by the forefathers of entrepreneurship theory, such as Jean-Baptiste Say and Joseph Schumpeter, has rarely been discussed in connection with policy entrepreneurship.<sup>32</sup> This article remedies that neglect and goes beyond considering policy entrepreneurship only in relation to public regulatory strategy. It equates policy entrepreneurs with capitalist entrepreneurs and argues that the former are leaders in spurring policy change who, as shown throughout the literature, play a distinct role in the legal system.<sup>33</sup> From this perspective, policy entrepreneurs are balanced players who advocate policy ideas

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26. See Mintrom, *supra* note 22, at 317 (“While there may be times when policy entrepreneurs work to establish advocacy coalitions, it is reasonable to expect that they more frequently engage in actions that serve to build on the strengths of coalitions that already exist in some form.”).

27. See also Michael Mintrom & Phillipa Norman, *Policy Entrepreneurship and Policy Change*, 37 POL’Y STUD. J. 649, 659 (2009) (explaining how policy entrepreneurs can use their knowledge of the system to strike when an opportunity window opens).

28. See, e.g., William H. Riker, *The Two-Party System and Duverger’s Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753, 764 (1982) (criticizing violating public choice ideas about voter participation).

29. Lee & Seago, *supra* note 20, at 639 (“Policy entrepreneurs adopt policy proposals in order to promote their own interests, gain favors and obligations for future bargaining (‘Public Choice’ notion) or just because they personally favor those particular policies as a matter of ideology or otherwise.”); Lisa Grow Sun & Brigham Daniels, *Externality Entrepreneurism*, 50 U.C. DAVIS L. REV. 321, 326 (2016) (coining the phrase “externality entrepreneurs” as legal and political actors that aim to capture the attention of legal and political decision makers by strategically identifying and promoting externalities).

30. Sun & Daniels, *supra* note 29 at 379; Mintrom, *supra* note 22, at 317.

31. Pozen, *supra* note 24, at 305.

32. *Id.*

33. See *id.* at 301 (“The basic shared understanding of policy entrepreneurs is that they are ‘political actors who promote policy ideas’ in the hope of effecting change.”).

with the goal of fostering equitable legislative, administrative, or regulatory change. They are significant contributors to the policy process.<sup>34</sup>

Capitalist and policy entrepreneurs share a set of talents, techniques, and personality qualities, including the ability to persuade, negotiate, build a coalition, and create movement in an intended direction.<sup>35</sup> They combine strategic and social-psychological components in their actions and motivation.<sup>36</sup> Both policy and capitalist entrepreneurs serve as “agents of change” within their distinct niches, but policy entrepreneurs are not as risk tolerant as capitalist entrepreneurs because if they fail, policy entrepreneurs will often still have their existing or previous jobs. However, unlike capitalist entrepreneurs, policy entrepreneurs are usually motivated by non-financial moral goals. Many—if not most—of them do not generally offer entirely new ideas; instead, they devise new ways to package, promote, and apply existing ideas in the grand scheme of their targeted policy.<sup>37</sup>

Both capitalist and policy entrepreneurs often pursue their goals with extraordinary devotion.<sup>38</sup> They are typically goal-oriented and extremely focused on achieving their aim, exhausting every resource until they achieve their purpose.<sup>39</sup> Timing is extremely important to their success. Instead of advocating for their ideas with equal fervor at all times, they may wait for the right moment, changes in the political guard, or a tipping point in public opinion that creates new opportunities for reform.<sup>40</sup> Policy entrepreneurs uncover connections and shared patterns in the creation of legislation and policy norms and even forecast such developments.<sup>41</sup> They often adopt a strategic approach and creatively persuade relevant legislators and regulators to embrace their proposals.<sup>42</sup> At times, they must wait for the right policy window to open to optimize their chances of successfully finding amenable lawmakers.<sup>43</sup>

How is policy entrepreneurship different from political entrepreneurship and lobbying? Both phenomena involve raising funding and awareness, strategically using the media, appealing to broadly shared ideals, redefining public discourse, or any combination of these tactics.<sup>44</sup> They may require not only political

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34. See Lee & Seago, *supra* note 20, at 639 (explaining multiple paths for a policy entrepreneur).

35. See Mirit Eyal-Cohen, *Through the Lens of Innovation*, 43 FLA. ST. UNIV. L. REV. 951, 959 (2016) (noting traits that are common to all entrepreneurs).

36. Pozen, *supra* note 24, at 334.

37. *Id.* at 301.

38. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 182 (1995).

39. Some people who are interested in policy will, in addition to contributing their time, energy, and reputation, invest their own money resources in order to further their cause. One such example from more recent times is Ralph Nader. Pozen, *supra* note 24, at 302.

40. *Id.* at 303.

41. *Id.* (“Successful policy entrepreneurship thus demands ‘excellent antennae’ for reading the sociopolitical landscape and identifying possible pressure points.”).

42. See *id.* (noting that a policy entrepreneur must be able to convince decision makers to “adopt her preferred solution” when the opportunity arises).

43. *Id.* at 336.

44. See *id.* at 302 (noting that policy entrepreneurship may involve aggressive fundraising and

guidance, but also negotiating among various actors and helping to deal with related problems, solutions, and political allies. Yet policy entrepreneurs' actions are not self-interested and are characterized by originality. They seek to garner support for their ideas to increase the likelihood that they will benefit the general public. They work to foster, translate, and implement creative ideas in public sector practices or to create new goals, procedures, organizations, or programs in that sector.<sup>45</sup> Policy entrepreneurs are, in this sense, proactive, as opposed to reactive, and are known for influencing rather than responding to outside political pressures.<sup>46</sup> Policy entrepreneurs usually lay a foundation in advance on the agenda and convince decision-makers to adopt their plans.<sup>47</sup> Therefore, good instincts and the ability to read the sociopolitical scene are essential to successful policy entrepreneurship.<sup>48</sup>

Nevertheless, researchers who attempt to define policy entrepreneurship seem to entertain contradictory opinions on a number of the phenomenon's significant facets. Some academics believe that the term policy entrepreneur should be reserved solely for political officials,<sup>49</sup> while others contend that nongovernmental actors should also be defined as policy entrepreneurs,<sup>50</sup> or that the term should be reserved solely for nongovernmental actors.<sup>51</sup> Moreover, some scholars believe that the term should be used only for individuals who have genuinely succeeded in bringing about political change, while others deny that successful change is a prerequisite. The next part describes Stanley Surrey's activities promoting key concepts in tax policy within these frameworks as a governmental actor and a scholar.

### III

#### SURREY'S ENTREPRENEURIAL ACTIONS

Stanley Surrey's half-century of actions and pursuits in the field of tax law establish him, like capitalist entrepreneurs, as seeing opportunities, not constraints. While most people perceived constraints as hurdles, Surrey navigated through them toward a fixed goal. Like entrepreneurs, Surrey was optimistic, positive, tenacious, and comfortable with ambiguity in political or legislative environments.<sup>52</sup> Comparable to entrepreneurs, Surrey did not miss the opportunity to shape the tax code in every professional engagement he

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lobbying).

45. See Mintrom & Norman, *supra* note 27, at 653 (discussing how policy entrepreneurs work with others to create solutions that drive change).

46. Pozen, *supra* note 24, at 301.

47. *Id.* at 303.

48. See Mintrom, *supra* note 22, at 316 (noting how problem framing, which requires social acuity and skills in conflict management and negotiation, is crucial for policy entrepreneurs).

49. Pozen, *supra* note 24, at 303.

50. *Id.*

51. *Id.*

52. Memoirs, *supra* note 1, at 209.



undertook. He produced and examined the value of ideas—even failed proposals—rather than dismissing them as too farfetched. While working for the government, he did not accept standard bureaucratic procedures as the current way of doing things and—like entrepreneurs—reexamined issues and looked for new paths and perspectives.<sup>53</sup>

Surrey was passionate about his mission—to advance tax policy—as entrepreneurs often act with excitement and dedication when focusing on their goals. His underlying philosophy held a strong commitment to horizontal equity, broadening the tax base to maintain low marginal rates, and greater transparency of tax expenditures. Moreover, when things did not go his way, he was a fixer, not a blamer.<sup>54</sup> He moved mountains to accomplish his goals.<sup>55</sup> When faced with his biggest challenge during the nomination for the position of Assistant Secretary of Treasury, he overcame strong opposition from interest groups—the subject of his disdain.<sup>56</sup> Surrey did not bow down to political pressures but pushed through toward his objective. Faced with a formidable task, he realized that he had to complete it himself because his professional reputation was at stake. No one was going to resolve the issue for him.<sup>57</sup> The subsequent subparts will demonstrate such traits via Surrey's actions, which warrant him the title "Policy Entrepreneur."

#### A. Legal Reformer

As opposed to political entrepreneurs and lobbyists held on a retainer, policy entrepreneurs are not concerned with a particular client's interests.<sup>58</sup> The clients of policy entrepreneurs are the societies in which they act. Their mission is to improve the regulatory environment in which they act. Their objective is to advance policy agendas that improve public practices and resources.

Surrey did his best not to take sides. As an academic, he was neither pro-taxpayer nor pro-government. Instead, he was pro-policy. Although at Treasury he was charged with maintaining the government interest, he was constantly guided by the principle of fairness. Equity and fairness were much of the same for Surrey.<sup>59</sup> His optimal tax code aimed at avoiding creating economic favors for

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53. See, e.g., Stanley S. Surrey, *Past and Prologue in Tax Policy*, 17 CAN. TAX J. 88, 92 (1969) (explaining that tax reform needed innovative solutions); STANLEY S. SURREY, *TAX POLICY AND TAX REFORM: SELECTED SPEECHES 1961–1969*, at 173 (William F. Hellmuth & Oliver Oldman eds., 1973).

54. For example, he joined the navy out of patriotic duty and when the recruiting officer rejected him for a post at the Commission due to his progressive background, he embarked on a campaign and successfully overruled it. *Memoirs*, *supra* note 1, at 68.

55. For example, while a law professor at Berkeley, Surrey was called to return to Washington to work on an important drafting project on excess profits tax. He was able to convince his dean and Treasury official to allow him to participate by dictating a letter exchange between the two to approve his temporary leave. *Id.* at 81.

56. *Id.*

57. *Id.* at 192 (Surrey strategically and shrewdly began a three-week mission of telephoning, inquiring, and straightening the turmoil of the situation, realizing "no one else would.").

58. *Id.* at 104 ("But the practitioner's goals is still the right answer for the client.").

59. *Id.* at xxii.

taxpayers or budget deficits. He pushed for rules that maintained a higher degree of horizontal equity, or equal treatment between taxpayers in equal levels of income, and vertical equity, which imposed progressively higher tax burdens to distinguish between taxpayers with unequal levels of income. His reform proposals combined the taxpayers' equal burdens philosophy as well as the government's balanced budget and wide tax-base considerations while promoting efficiency. On the one hand, he described the process of legislative drafting as extremely complex by delicately putting together technical definitions that require practical drafting knowledge and experience.<sup>60</sup> On the other hand, when examining a particular rule, he viewed it in the context of the goal of the rules—that is, to be fair and administrable—as well as the integrity of the entire legal system.

For example, Surrey's first position in 1933, after a few short months working in a law firm, involved the Legal Division of the National Recovery Administration (NRA) going over the complaints of NRA code violations made generally by competitors.<sup>61</sup> Surrey's job was to decide which of the complaints filed with the NRA had merit and should be prosecuted in court. He took his duties beyond simply a technical examination of the facts of the alleged violations and examined them from a policy perspective. He inquired whether the code provision was in accordance with NRA policies and, by his own admission, "stretched this inquiry into whether the provision made any economic or industry sense, or instead was the work of an overzealous attorney or code administrator, sometimes catering to a particular part of the industry."<sup>62</sup> Indeed, Surrey determined in several cases that the code provision could not be defended as a rational policy and recommended not proceeding with litigating the alleged violation. His decisions were usually followed by an amendment of the code, positioning Surrey as a policy guardian early on in his legal career.<sup>63</sup> Accordingly, Surrey made sure his draft opinions on the National Labor Relations Board (NLRB) were not dry like other administrative decision-making, but long (as much as 121 pages) with dramatic narrative backed by the legal finding of facts.<sup>64</sup> He considered his government work as a critical and prime opportunity to make a change: "The realization what it meant to represent the United States Government and the faith these workers had in their Government and a Government-run election was gratifying but sobering."<sup>65</sup>

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60. Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS., no. 4, 1969, at 673, 697.

61. The NRA was a federal agency created by Roosevelt's New Deal Administration to stimulate business recovery by addressing issues such as unfair trade practices, minimum wages, maximum work hours, and union rights. *Memoirs*, *supra* note 1, at 11 n.29.

62. *Id.* at 11.

63. *Id.* at 11 ("I thus came to occupy an interesting policy position, and dealt with government figures way above me in status.").

64. One such decision was later upheld by the Second Circuit. *Id.* at 17–18.

65. *Id.* at 17.

As a serial entrepreneur,<sup>66</sup> once he made an impact, Surrey's eagerness to make a further change motivated him on to his next challenging endeavor. Although he could have become a leading member of the bar had that road been available at that time,<sup>67</sup> he was eager to take on opportunities that would allow him to reform the law. Surrey embarked on his government tax career in 1937, serving for a decade as a temporary advisor and thereafter as Assistant Legislative Counsel. Yet he did not perceive himself as an ordinary Treasury technical staff member; instead, he perceived himself as a Treasury official.<sup>68</sup> He viewed his main responsibilities as advocating and defending policy suggestions. In his eyes, he was a policymaker with the responsibility of outlining the administration's priorities, presenting their tax plans, and making recommendations in a reasonable fashion.<sup>69</sup>

During his lifetime, Surrey participated in major tax acts from 1938 until the 1980s from the various seats he held, whether at Treasury or in academia.<sup>70</sup> His regard for tax structure and concern for equity naturally led to an interest in tax policy issues and decisions.<sup>71</sup> As a scholar, Surrey has continuously proposed ways to correct the tax code via his numerous articles and engagements with professionals and congressional testimonies.<sup>72</sup> He contributed substantially to defining the canons of tax policy on which tax experts focused their debates. It included an expansion of the tax base with excluded or exempt sources of income, doing away with unjustifiable loopholes and tax expenditures, improving the tax system's revenue-raising capacity, and reducing the footprints of special interest groups.<sup>73</sup> His testimonies in congressional hearings and his articles on the effects of lobbying categorized him as a "tax reformer" and "base broadener."<sup>74</sup>

Surrey not only had an impressive depth of knowledge on the individual statutes, tax provisions, case law, and theories of tax law, but he also had the unique ability to see how they all meshed together and could serve revenue-raising goals in a fair and administrable manner.<sup>75</sup> He was a visionary who did not

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66. See, e.g., Mirit Eyal-Cohen, *Innovation Agents*, 76 WASH. & LEE L. REV. 163, 222 (2019) (describing the unique actions of serial entrepreneurs).

67. Memoirs, *supra* note 1, at xix–xx n.47 (citing historians who describe continuous antisemitism in the elite bar during the Great Depression and New Deal era).

68. *Id.* at 66.

69. *Id.*

70. *Id.* at 103.

71. Sheldon D. Pollack, *Tax Reform: The 1980's in Perspective*, 46 TAX L. REV. 489, 514 (1991).

72. Memoirs, *supra* note 1, at 97.

73. *Id.*; John W. Lee, *Class Warfare 1988-2005 Over Top Individual Income Tax Rates: Teeter-Totter from Soak-The-Rich to Robin-Hood-In-Reverse*, 2 HASTINGS BUS. L.J. 47, 55–56 (2006) (describing Senator Bill Bradley as following Surrey's "large idea" of lowering income rates through broadening the income tax base).

74. Memoirs, *supra* note 1, at 99 ("It is only when the academic can meet the practitioners on the latter's own ground and talk with knowledge and understanding about their problems that the academic is really listened to."). *Id.* at xxxiii (noting Surrey's 1957 Harvard Law Review article, *The Congress and The Tax lobbyist—How Special Provisions Get Enacted* was most unflattering to Congress, suggesting it regularly sneaks special interest tax legislation past an unsuspecting public).

75. *Id.* at 161 (discussing foreign investment incentives).

mind doing things contrary to standards in the mainstream government and political fields. For instance, in the summer of 1960, while at Harvard, Surrey collaborated with public finance economists Professor E. Cary Brown of M.I.T. and Professor Richard Musgrave of Johns Hopkins University to prepare a seventy-page memorandum on “Tax Policy” for the John F. Kennedy campaign.<sup>76</sup> The memorandum was quite innovative and took the opposite position of the Treasury’s top officials at that time, which maintained an approach of keeping tax legislation to a bare minimum. The memorandum embodied a commitment to economic growth and, years after, served as guidance on tax policy and investment incentives. It served as a research tool for the Kennedy presidential campaign, and Surrey’s political savvy was obvious, as he suggested running the plan past prominent congressional leaders before releasing it to the public.<sup>77</sup> As entrepreneurs often learn, successfully introducing a product to the market requires careful consideration of several factors, one of the most important of which is the product’s packaging. Surrey speculated that influential lawmakers like Wilbur Mills would reject the plan out of hand if they learned of it in the media, but could be persuaded to support it if given an early look and asked for their feedback.

Nonetheless, that memorandum also contained a substantial deviation from Surrey’s tax policy.<sup>78</sup> The Surrey–Musgrave–Brown memorandum proposed enacting the Investment Tax Credit, one of the most controversial business tax breaks.<sup>79</sup> Surrey defended his decision and the sharp departure from his aversion to business tax expenditures and his wide tax-base philosophy that this approach was better than larger annual depreciation allowances.<sup>80</sup> Moreover, Surrey explained that it is essential to reassess the investment credit and put an expiration date on such a measure.<sup>81</sup> It seems like ideologist Surrey was making concessions when he faced the need to win over voters in the run-up to the election. He preferred providing the business community an investment tax credit over faster cost-recovery deductions that businesspeople were advocating for at the time. Years later, during his appearance on *Firing Line*, Surrey was

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76. *Id.* at 176 (“[W]hile I considered myself able to handle those tax policy issues that turned on broad policy concepts or legal aspects, I thought that the public finance issues should be dealt with in the first instance by experts.”).

77. *Id.* at 185 (“The role envisaged in this Report for tax policy was thus completely at variance with the current Treasury posture, under which the top policy people had little interest in tax matters and there was little action in the Congress.”).

78. *Id.* at 179 (“[W]e then turned to recommendations for tax legislation which it would be desirable to enact in 1961. Here we had before us Sorensen’s request on something to encourage business investment.”).

79. See Mirit Eyal-Cohen, *Lessons in Cyclical Fiscal Activism*, 48 CONN. L. REV. 873, 876 (2016) (describing the motive behind enacting the investment tax incentives as a temporary fiscal experiment and its failure to achieve its goal).

80. Memoirs, *supra* note 1, at 181 (“The credit offers flexibility and the depreciation change does not.”).

81. *Id.* (“Since it will be desirable a few years later to reassess the investment tax credit, it is probably helpful to place an automatic termination date in the legislation.”).

unable to provide a convincing defense to such discrepancy and policy vulnerabilities.<sup>82</sup>

Surrey's appointment as Assistant Secretary for Tax Policy also demonstrated his entrepreneurial spirit through his commitment to meaningfully promoting tax policy and changing the standard processes at the Treasury. During Surrey's first stint at Treasury, he learned that tax policy issues were handled as part of the duties of the General Counsel with special assistants sometimes called to handle such matters. These arrangements were unsatisfactory to Surrey at that time and demonstrated that tax policy was not a Treasury priority. Similar to entrepreneurs with independent personalities and core thinking, his desire to influence the tax agenda during his second assignment at Treasury made him determined to obtain more autonomy and authority. Thus, Surrey proposed creating a new position—Assistant Secretary for Tax Policy—with a designated focus and control over tax policy operations.<sup>83</sup> Surrey's commitment to closing loopholes spurred many attacks on this nomination as the new Assistant Secretary for Tax Policy.<sup>84</sup> During his confirmation hearings, he needed to somewhat curtail his views in light of direct attacks from senators and congressmen, and the need for his nomination to gain political support. Yet upon his confirmation in 1961, he maintained this new role as a safeguarder of policy views.<sup>85</sup> He reorganized Treasury and created the Office of International Tax Counsel to work on tax policy to complement matters pertaining to international taxation, the Division of Tax Research that worked on tax policy matters, and the Office of Tax Analysis that worked on legislative tax proposals.<sup>86</sup>

Surrey went on to demonstrate his entrepreneurial skills as a problem solver when assuming various roles in tax organizations. At the Brookings Institute, Surrey chaired and organized conferences, ensuring that all participants, including lawyers and accountants, were able to understand and engage with economists. Surrey did so by forcing participants to strip away the technical jargon and references from their disciplines; for example, he noted that “lawyers referring to Code section numbers are of no help to economists and economists expressing themselves in the shorthand they use when talking within the fraternity are no help to outsiders.”<sup>87</sup> While serving as president of the National Tax Association (NTA)<sup>88</sup> Surrey conducted a survey of current problems the

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82. *See id.* at xlii (quoting Surrey weakly offering an explanation to the TV host Buckley, “Well, I don’t think that one can be an absolutist about these things.” And as Buckley pressed Surrey further he answered, “Everybody knows it [the Investment Tax Credit] has nothing to do with the tax system.”). *But see id.* at 208 (Surrey’s impression was quite different; he noted that he “was able to give my answers to his questions and then go on to turn the conversation to what I had desired to get on the record.”).

83. *Memoirs*, *supra* note 1, at 187, 190.

84. *Id.* at 190 & n.32 (describing the opposition to Surrey’s nomination and that his attacks on loopholes triggered many protests).

85. *Id.* at 317.

86. *Id.* at 35.

87. *Id.* at 208.

88. The NTA is the most diverse professional organization focused on taxation and fiscal policy. It combines professionals with diverse backgrounds in the federal, state and local fiscal field such as

NTA was facing—such as aging membership, inconsistent voice, and choice of topics in conferences—and suggested methods to solve them.<sup>89</sup> Furthermore, in November 1980, in his presidential annual opening address, Surrey seized the opportunity to present “a full-fledged discussion of current tax policy issues.”<sup>90</sup> In his speech during that meeting, *Our Troubled Tax Policy: False Routes and Proper Paths to Change*, Surrey harshly criticized existing policy efforts, such as the push for a shift from income to consumption taxes and the integration of corporation and individual taxes. He also attacked the use of convoluted econometric presentations in congressional committee testimonies and claimed it was a “cheap trick” to impress members of Congress who never questioned those models’ assumptions and typically accepted the economists’ viewpoints and biases.<sup>91</sup>

Yet, the successful delivery of ideas in political and legislative arenas was not easy. It often required craftsmanship, networking, and calling-in favors.<sup>92</sup> As will be depicted next, Surrey developed strategic approaches and shrewd ways to frame his proposals so his ideas would pass muster with legislators and decision-makers at various ranks.

### 1. Strategic Framing of Government Spending

Surrey’s work has been described as highlighting the basic difference between expenditure inside and outside tax law.<sup>93</sup> Sheldon Pollack had opined about Surrey’s entrepreneurial endeavor to form the tax expenditure budget.<sup>94</sup> He pointed out that Surrey began to draw attention within political circles for pragmatic reasons. Accounting for the costs associated with tax loopholes to make their true costs more transparent was long considered a theoretical exercise and “an ivory tower notion.”<sup>95</sup> Surrey’s idea was a game changer in today’s political economy. Nowadays, lobbyists for different expiring tax breaks battle each other for the limited pool of money available for tax incentives under budget rules mandating revenue-neutral legislation.<sup>96</sup>

Surrey admitted that his interest in tax policy was based on the belief that the tax structure could possess a rational, integrated character and that the goal of tax policy was to always work in that direction.<sup>97</sup> He had an aversion to tax breaks

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administrators, economists, lawyers, accountants, and academics. See NAT’L TAX ASS’N, nta.org; *Memoirs*, *supra* note 1, at 152, 210 (describing the diversity at NTA and his actions).

89. *Memoirs*, *supra* note 1, at 212.

90. Stanley S. Surrey, *Presidential Address: Our Troubled Tax Policy: False Routes and Proper Paths to Change*, 73 PROC. ANN. CONF. ON TAX’N HELD UNDER AUSPICES NAT’L TAX ASS’N-TAX INST. AM. 1, 1–13 (1980).

91. *Memoirs*, *supra* note 1, at 210.

92. Pozen, *supra* note 24, at 322.

93. Conor Clarke & Edward Fox, Note, *Perceptions of Taxing and Spending: A Survey Experiment*, 124 YALE L.J. 1252, 1257 (2015).

94. Pollack, *supra* note 71, at 517 n.99.

95. *Id.*

96. *Id.*

97. *Memoirs*, *supra* note 1, at 103.

and loopholes borne out of his strong commitment to tax equity and fairness.<sup>98</sup> He was skeptical about the efficacy and legitimacy of subsidies for businesses. For example, in 1957, Surrey coined the phrase “tax equilibrium” when he assisted in preparing the government’s brief on appeal to the Supreme Court on a matter relating to campaign contributions by beer distributors.<sup>99</sup> In Surrey’s eyes, “tax equilibrium” meant that “neither business nor private persons could lobby at the government’s expense through tax deductions for lobbying expenditures.”<sup>100</sup>

It is worthwhile, though, to mention that one of his first actions as Assistant Treasury was to the contrary of such statements. In 1961, in accordance with the New Economics theory that put a growing focus on economic stimulus,<sup>101</sup> Surrey became increasingly open to using the tax system to manage the economy and orchestrated the enactment of one of the most complex and hefty tax expenditures to the Tax Code: the Investment Tax Credit. Enacted in 1962, suspended in 1966, restored in 1967, repealed in 1969, reinstated in 1971, increased in 1975, and rescinded in the tax reform of 1986, the investment tax credit was a failed experiment in manipulating the economy and an unwanted government market intervention through cyclical fiscal activism.<sup>102</sup> In his memoirs, Surrey fails to engage in deep or reflective self-analysis of his digression and simply notes that the investment credit was viewed as part of the Kennedy administration’s focus on increasing business investment as a way spur to economic growth.<sup>103</sup> He insisted on accepting such deviation from his philosophy as it was temporary and was not meant as an anti-recession measure.<sup>104</sup> Yet complexity, as well as growing public disdain for cyclical legislation and fiscal activism, were cited as reasons for the investment credit’s demise.<sup>105</sup>

Outside of this episode, Surrey maintained his aversion to loopholes and deviations from an ideal tax base. Surrey was not the first to make a connection between tax breaks and indirect government spending.<sup>106</sup> Yet he is best known

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98. See generally George K. Yin, *Who Speaks for Tax Equity and Tax Fairness?: Stanley Surrey and the Tax Legislative Process*, 39 VA. TAX REV. 39–110 (2019).

99. Memoirs, *supra* note 1, at 95; Cammarano v. United States, 246 F.2d 751 (9th Cir. 1957), *aff’d per curiam*, 358 U.S. 498 (1959).

100. Memoirs, *supra* note 1, at 96. In a thank you letter from the Counsel for the government (later Federal Judge on the Court of Claims), Surrey noted the surprise of Justice Frankfurter that a Harvard professor created it, concluding that “Though the term ‘tax equilibrium’ does not appear in the opinion, the concept does; and I feel sure that the idea was one of the controlling factors.”

101. Stanley S. Surrey, *Federal Tax Policy in the 1960s*, 15 BUFF. L. REV. 477, 478 (1966).

102. See 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, 15 (1990) (“The Kennedy approach, however, today is recognized as . . . fundamentally flawed.”). See also George E. Zeitlin, Stephen D. Gardner & Douglas M. Galin, *Federal Income Taxation*, 1967 ANN. SURV. AM. L. 717, 719 (describing the investment tax credit as unpopular and ominous rumblings).

103. Memoirs, *supra* note 1, at 179, xxvii.

104. *Id.*

105. Eyal-Cohen, *supra* note 79, at 879.

106. Memoirs, *supra* note 1, at xxix n.91.

for his relentless efforts and success in increasing their salience in the tax expenditure section of the United States Budget, which served as a model for other countries. Like entrepreneurs who formulate strategies to create an effective product or outcome,<sup>107</sup> Surrey's efforts focused on stigmatizing these covert expenditures and shaping the opinions of other tax professionals on the matter.<sup>108</sup> As opposed to many other academics, his preoccupation with tax expenditure analysis was not a theoretical exercise.<sup>109</sup> Rather, his triumph can be attributed to his remarkable ability to harness both theory and practice.

In 1967, while serving as Assistant Secretary of the Treasury for Tax Policy, Surrey introduced the "tax expenditure analysis" as "an approach to the income tax that divides the law into two parts, the normative structure and the special provisions that are essentially a form of government spending."<sup>110</sup> He coined the term "tax expenditures" to mark tax benefits such as deductions for property tax, mortgage interest, consumer interest, charitable contributions, medical expenses, and capital gain treatment as government payments that narrowed the tax base. They provided preferential treatment to only a specific group of taxpayers who benefitted from a lower ordinary income rate. Surrey argued that these tax breaks are "government financial assistance given through the tax system rather than through the direct methods of the regular budget . . . ."<sup>111</sup> He pivoted the discussion on this topic into tax policy or tax reform by pointing out that these tax expenditures are measurable and should be eliminated.<sup>112</sup>

Surrey believed these expenditures were policy decisions that severely depleted the U.S. budget. He was concerned that, whether initiated by either political party, such spending would go unnoticed by legislators or the general public, stating that "the appropriateness, equity, and vitality of a tax system depend upon constant attention."<sup>113</sup> Surrey was on a tangible mission to achieve legislative and public awareness for tax preferences. He exerted tireless efforts to convince lawmakers and other tax officials to think in terms of tax expenditures and, having done so, to get rid of, or at least reduce them.<sup>114</sup> Indeed, Surrey was

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107. Mirit Eyal-Cohen, *Legal Mirrors of Entrepreneurship*, 55 B.C. L. Rev. 719, 757 (2014). See also Rajshree Agarwal, David Audretsch & M.B. Sarkar, *The Process of Creative Construction: Knowledge, Spillovers, Entrepreneurship, and Economic Growth*, 1 STRATEGIC ENTREPRENEURSHIP J. 263, 263 (2007) (outlining strategic entrepreneurship).

108. Memoirs, *supra* note 1, at xxxvii (describing Kaplow (one of Surrey's vocal critics) admitting unequal tax treatment may result from welfare-reducing government favors to political allies).

109. Memoirs, *supra* note 1, at xxix ("[S]urrey's preoccupation with tax expenditures demonstrates not only his

melding of ideas and actions as an 'activist scholar' but also his desire to reveal the many ways in which the modern fiscal state was distributing the fruits of post-WWII American capitalism.").

110. Memoirs, *supra* note 1, at 120.

111. STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* vii (1973).

112. See, e.g., William D. Jordan, *Pathways to Tax Reform: The Concept of Tax Expenditures*, 52 TAX. L. REV. 1041, 1041, 1046 (1974) (book review) (describing the effect of Surrey's tax expenditure analysis on the tax discussion and practice at that time).

113. Memoirs, *supra* note 1, at 173.

114. *Id.* at xxxix.



able to get the Treasury Department to make such indirect spending more visible, and the first set of federal tax expenditure estimates for the fiscal year was published in 1968.<sup>115</sup>

In the decades following Surrey's focus on tax expenditures, the discussion about the function and value of tax spending has only increased.<sup>116</sup> Professor Beverly Moran described Surrey's analysis of the tax expenditure budget as "pioneering work" and claimed Surrey was ahead of his time in identifying a phenomenon that would come to be seen as the relationship between the earned income tax credit and traditional welfare.<sup>117</sup> Surrey pointed out that, indicatively, the key instances of hidden government spending involved the upward distribution of wealth.<sup>118</sup> The complexity of the tax code allows politicians to promote tax rules that mainly benefit the wealthy without opposition.<sup>119</sup> Lawrence Zelenak credited Stanley Surrey with establishing the concept of tax expenditures by influencing the government to publish annual tax expenditure budgets.<sup>120</sup> Though Surrey was unsuccessful in convincing the government to remove tax expenditures, his fallback option was supporting tax credits over tax deductions, as he viewed the former as a superior way to increase capital formation.<sup>121</sup> Zelenak suggests that Surrey is responsible for the remarkable shift in the design of personal tax expenditures from deductions to credits.<sup>122</sup> Alas, in Zelenak's eyes, Congress had interpreted Surrey's critique of "upside-down subsidies" overbroadly and replaced even deductions Surrey would have found justifiable.<sup>123</sup>

Be that as it may, Surrey's tax policy was not confined to domestic tax equity. The next subpart will discuss Surrey's entrepreneurial activities in the foreign tax arena focused on promoting international tax fairness and being conscious of other nations' welfare and economic rights.

## 2. Effective Global Impact

When Surrey left Treasury in 1947, he admitted to having limited knowledge of foreign tax policies. Yet, "all this changed when I came to Harvard in 1950, and international taxation became an important part of my life."<sup>124</sup> In 1952, with

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115. *Id.*

116. Clark & Fox, *supra* note 93, at 1255.

117. Beverly Moran, *Wealth Redistribution and the Income Tax*, 53 HOW. L.J. 319, 327 (2010).

118. *Id.*

119. *Id.* at 327.

120. Lawrence Zelenak, *Giving Credits Where Credits are (Arguably) Due: A Half Century's Evolution in the Design of Personal Tax Expenditures*, 24 FLA. TAX REV. 51, 54 (2020).

121. *Id.* at 55 ("Surrey also had, however, a fallback position—that, if Congress was unwilling to cleanse the Internal Revenue Code of a particular tax expenditure, it should at least reform the expenditure to eliminate the "upside-down effect" of tax subsidies structured as deductions and exclusions. . . . Surrey contended that a credit . . . would be a policy improvement over a deduction . . .").

122. *Id.* at 142 ("Congress chooses a credit because it has internalized Surrey's upside-down critique of deductions.").

123. *Id.* at 109.

124. *Memoirs*, *supra* note 1, at 132.

the cooperation of the United Nations (UN), he created the Harvard Law School International Program in Taxation: a program that aimed to train foreign tax professionals to spread tax policy around the undeveloped world, to promote trade and investment between countries, and to conduct research in the field of international tax law.<sup>125</sup> Through this program, Surrey helped train students, scholars, lawyers, public officials, and university teachers from all over the less developed world, many of whom later occupied top tax positions in their countries and adopted some of Surrey's international tax policies.<sup>126</sup> Surrey recounts meeting these trainees when negotiating tax treaties as assistant secretary and receiving much satisfaction from the knowledge spillover the program provided.<sup>127</sup>

The program's research activities included the World Tax Series, which contained the most comprehensive store of knowledge of foreign countries' tax systems and provided guidance for developing and improving them.<sup>128</sup> As with his other activities, here too, Surrey brought together professionals from the disciplines of law, economics, accounting, and public administration.<sup>129</sup> Following the success of the International Tax Program, a new International Legal Studies wing was added to Harvard Law School to house faculty, classrooms, and a library devoted exclusively to continuous development in this area.<sup>130</sup> Throughout these foreign activities, Surrey designed classes and published articles and books as part of his undertaking to increase knowledge of foreign tax systems.<sup>131</sup> He participated in several tax missions abroad, such as in Japan, Puerto Rico, Venezuela, Argentina, and various Arab countries, to design fair and efficient tax systems.<sup>132</sup> Participating in these missions enabled him to become the leading expert in foreign tax policy that designs optimal tax systems based on foreign countries' cultures and priorities. While he realized that political compromises were necessary to pass tax legislation, Surrey did not believe in making those compromises *ex ante*. Accordingly, when preparing blueprints for foreign tax systems, he stressed the importance of keeping optimal designs as

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125. *Id.*

126. *Id.* at 136, 142 ("Among the early members of these seminars was Helmut Debatin, then on the Staff of the West German Finance Ministry and later in West Germany, followed by a career as an Under Secretary in the United Nations, and Pierre Kerlan, then in the International Tax Division of the French Ministry of Finance, and later its Chief and to become the senior tax official in the ranks of career international tax officials.").

127. *Id.* at 136.

128. *Id.* at 138.

129. *See infra* Part III.B.1.

130. *Memoirs, supra* note 1, at 133 n.21.

131. *See, e.g., Current Issues in the Taxation of Corporate Foreign Investments*, 56 COLUM. L. REV. 815 (1956); STANLEY S. SURREY, D.T. SMITH & IRA T. WENDER, U.N. DEP'T OF ECON. AFFS., UNITED STATES INCOME TAXATION OF PRIVATE UNITED STATES INVESTMENT IN LATIN AMERICA (1953).

132. *Memoirs, supra* note 1, at 141. By Surrey's own attestation, the international mission to rebuild Japan in the aftermath of World War II was his most important and left a strong impression on him. *See generally* Ajay K. Mehrotra, *From Seligman to Shoup: The Early Columbia School of Taxation and Development*, in *THE POLITICAL ECONOMY OF TRANSNATIONAL TAX REFORM: THE SHOUP MISSION TO JAPAN IN HISTORICAL CONTEXT* 44 (W. Elliot Brownlee, Eisaku Ide & Yasunori Fukagai eds., 2013).

safeguards and important aspects of tax policy. Equality, efficiency, and economic development are in constant need of balancing, and if concessions are made *ex ante* in blueprint reports, Surrey noted, it will prevent policymakers and the public from appraising their importance.<sup>133</sup>

Another notable achievement in foreign tax policy involved the issue of “tax sparing” and the Pakistan double taxation treaty. In that instance, the United States entered into bilateral tax treaties to reduce or eliminate the possibility of double taxation of income in situations when one country is taxing on the basis of the source of income and the other taxes the same income on the basis of worldwide income.<sup>134</sup> Surrey began a campaign in the Senate Foreign Relations Committee against approving a provision in the Pakistan treaty—one that would have set a precedent for other forthcoming tax treaties—providing international firms “a tax sparing credit” from their U.S. tax liability, determined by the difference left from the foreign tax rate. Surrey thought that such a renouncement of U.S. tax revenues as a policy matter should be an issue to be determined by Congress rather than a tax treaty. His objection was successful, and the Pakistan episode earned him the reputation as the culprit in the eyes of developing countries, who prevented the United States from agreeing to tax sparing.<sup>135</sup>

Upon his return to Harvard from Treasury, Surrey took a more active part in the activities of the International Fiscal Association (IFA), the only organization of its kind on the global stage to assist nations with global fiscal coordination.<sup>136</sup> In 1968, he was part of the new UN Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries, and thereafter the Special Advisor to the Rapporteur of this Group. The group’s work produced the UN Model Tax Treaty, most of which Surrey admitted to having drafted. Surrey directed the agenda, guided the discussions, resolved disagreements among members, and drafted the group’s main findings and recommendations for its reports.<sup>137</sup> He planned the substantive part of the annual meetings called “Congresses,” which included documentary material, discussion sessions, and seminars.<sup>138</sup>

Surrey was seen as a positive force in the international tax field. He earned the respect and admiration of even those who had opposing opinions on tax policy. As testimony to his acclaimed foreign tax impact, an affiliated group of

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133. Memoirs, *supra* note 1, at 151.

134. *Id.* at 159.

135. *Id.* at 171 (“[I]t became widely known throughout the international tax world, especially among developing countries, that Surrey was the evil genie preventing the United States from agreeing to tax sparing and that belief persists today . . . I suppose no other issue in the international tax area has been so identified the world over with a particular individual.”).

136. The IFA acted as a confederation of national branches and welcomed anyone with an interest in taxation on a global scale. The biggest categories of members are tax executives of corporate companies, followed by attorneys, accountants, government officials, and academics. The organization’s professional activities focus predominantly on producing comparative tax law studies. *Id.*

137. Memoirs, *supra* note 1, at 225.

138. *Id.*

the IFA, the Bureau of Fiscal Documentation, presented Surrey with a Silver Medal during the Sydney 1978 Congress for his contribution to the international tax field.<sup>139</sup> Although Surrey did not foresee the importance of international tax law in shaping U.S. tax policy, he played a pivotal role in shaping it.<sup>140</sup> Indeed, he possessed a remarkable ability to pay attention to details with a well-rounded perspective, expound on “all the problems,” and acted behind the scenes (and at their forefront) to advance his ideal tax system in a creative, albeit risk-averse, manner, as the next subpart portrays.<sup>141</sup>

## B. Generating And Seizing Opportunities

Policy entrepreneurs create opportunities by identifying an issue, finding a solution, and attracting decision-makers to implement it.<sup>142</sup> When Surrey began his legal career, law firm associates knew little about tax policy, and legal education focused on history and technical aspects.<sup>143</sup> Even economic departments taught abstract fiscal policies rather than institutional facets of taxation. Surrey’s first tax post at the Office of Tax Legislative Counsel at Treasury—a non-political, non-partisan office that oversaw the tax legislation writing process—was an ideal place to receive training and education in tax policy formation and approaches to many practical issues.

Surrey liked working at the Treasury. He especially liked the fact that the staff had technical knowledge and backgrounds in tax law, although, according to him, they lacked an understanding of tax policy.<sup>144</sup> Surrey proudly recounts his first products of success—section 820 of the Revenue Tax Act of 1938, which provides exceptions to the statute of limitations in certain tax cases<sup>145</sup>—a section he wrote by himself that Congress adopted in full.<sup>146</sup> Another successful endeavor involved establishing private letter rulings as closing agreements that provide finality and reduce tax disputes between taxpayers and the Bureau of Internal Revenue (Bureau).<sup>147</sup> Moreover, he took much pride in simplification efforts that

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139. *Id.* at 283 (describing his surprise and excitement receiving this medal).

140. *See generally* Reuven S. Avi-Yonah, *All of a Piece Throughout: The Four Ages of U.S. International Taxation*, 25 VA. TAX REV. 313, 338 (2005); *Memoirs, supra* note 1, at 132.

141. *Memoirs, supra* note 1, at 43.

142. Lee & Seago, *supra* note 20, at 643 (discussing the use of media coverage to link brownfield rehabilitation to prominent environmental concerns and pointing to tax incentives as a solution to the high cost of brownfield cleanup).

143. *Memoirs, supra* note 1, at 27.

144. *Id.* at 79 (“[T]he Treasury personnel already had a strong technical base. What they lacked was an understanding of tax policy issues.”).

145. Revenue Act of 1938, Pub. L. No. 75–553, § 820, 52 Stat. 447, 581. *See also* John M. Maguire, Stanley S. Surrey & Roger J. Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L.J. 509 (1939) (reviewing the legislative history, strengths, and weaknesses of section 820).

146. *Memoirs, supra* note 1, at 28 (explaining that Surrey’s “first legislative effort achieved immortality, or least a life that has lasted for over 45 years”).

147. *Id.* at 29–30; *see also* Mirit Eyal-Cohen, *Preventive Tax Policy: Chief Justice Roger J. Traynor’s Tax Philosophy*, 59 HASTINGS L.J. 877 (2008) (describing in length the collaboration between Surrey and Traynor on this issue).

created the standard deduction and the joint filing status for married couples; pillars of our tax system today almost seventy years later.<sup>148</sup>

Nevertheless, an inevitable part of the entrepreneurial process is failure.<sup>149</sup> As entrepreneurs often do, Surrey also experienced certain moments of defeat during his academic and government service. Some of his most notable proposals were not implemented by Congress. For example, his mutual project with Roger Traynor regarding reform of tax case adjudication was not adopted in full by the legislature. In 1938, Traynor and Surrey wrote about an anomaly where the Board of Tax Appeals first considered most tax issues caused by Bureau deficiency letters.<sup>150</sup> Appeals for such matters went to eleven circuits which created much uncertainty. Only in high monetary cases that survived the certiorari process did the Supreme Court provide judicial finality. Thus, taxpayers' lawyers and government attorneys attempted to create controversy when the first Circuit Court ruling went against them, prolonging Circuit Court litigation.<sup>151</sup> Three or four Circuit Court rulings were needed to create a disagreement and award certiorari. The inevitable outcome was excessive litigation, Circuit disparity, and, frequently, a decade before judicial consistency and clarity were created by a Supreme Court decision. Moreover, there was a forum shopping problem with taxpayers' choice to either contest the asserted deficiency or pay the tax claimed and sue in the local District Courts, where a jury trial was available on request, or in the Washington Court of Claims.

Traynor and Surrey proposed giving the Board of Tax Appeals original authority over refunds and deficiencies in all income, estate, and gift tax matters.<sup>152</sup> The Board would be divided into five boards to accelerate case processing and compensate for the removal of localized district courts. Alas, although Surrey and Traynor campaigned the proposal with the tax bar, Congress created the U.S. Tax Court as an Article I court that travels nationwide.<sup>153</sup> Nevertheless, to this day, its decisions are still appealable to the various circuit courts and forum shopping among district courts and the Court of Claims still persists.

Like entrepreneurs, Surrey was able to recover quickly from certain defeats

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148. See *Memoirs*, *supra* note 1, at 74–75 (“This alternative was, as I called it, a ‘split income’ approach under which a husband and wife would total their income, divide the total by two, compute the tax on each half under the regular rate scale, and then add the two tax liabilities to find the total tax.”); see also Stanley S. Surrey, *Family Income and Federal Taxation*, 24 TAXES 980 (1946).

149. Eyal-Cohen, *supra* note 107, at 751 (noting that “entrepreneurial failure is just as important as entrepreneurial success.”).

150. Roger John Traynor, *Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393, 1394 (1938) (Surrey’s name did not appear per the request of his supervisor at Treasury Herman Oliphant); Roger John Traynor & Stanley S. Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 LAW & CONTEMP. PROBS., no. 2, 1940, at 336.

151. *Memoirs*, *supra* note 1, at 32.

152. See Mirit Eyal-Cohen, *supra* note 147, at 879 (providing background on the unique collaboration between Roger Traynor and Stanley Surrey on this and other matters).

153. 26 U.S.C. § 7441.

and build new bridges and new combinations of resources, cultivate friendships, form networks, and learn about better ways to advance his ideas as will be established next.

### 1. Building Policy Bridges And Consensus

During the years 1938–1947, Surrey’s first term at Treasury provided him with much knowledge about the tax legislation process and the political arena—knowledge he later applied in his career and passed on to his trainees. Working with a large bureaucracy such as the Bureau gave him a rare glimpse into the hard work of its agents, as well as its conservatism and the challenges of affecting changes.<sup>154</sup> Surrey was able to observe and take part in various tax legislative processes, including participating in Treasury presentations in public hearings and committee executive sessions, drafting tax sections, and taking part in House and Senate floor debates.<sup>155</sup> He had the opportunity to witness legislators in action and develop respect for them—despite their lack of tax expertise—due to their determination to make an impact in their field.<sup>156</sup> Moreover, in such Congressional presentations, Surrey learned to master the art of self-censorship in public speaking to avoid offending the legislators’ sensibilities.

During this period, Surrey established a foundation of connections and allies—predominantly left-leaning liberals—which he later utilized throughout his career in government and academia. He did so not only when dealing with the bureau officials, but also with non-government tax professionals, such as lawyers, accountants, businessmen, labor officials, and lobbyists, who were all seeking Treasury approval for their proposals. He learned to sort out their opinions when they came before Treasury to urge the adoption of their tax proposals. His criteria for doing so were whether their proposals had “broad policy measures or narrow technical issues, whether involving tax benefits in general or special client-oriented legislation.”<sup>157</sup> He respected those professionals who perceived the government’s doubts and problems with deference and despised those who “relied instead on wielding levers of power and influence.”<sup>158</sup>

Surrey also worked closely with outstanding public finance figures at Treasury—he wished to understand how they approached problems. Through this experience, Surrey developed an ability to pose the right questions, focus on the most important issues on the table, and respect tax economists’ ability to be both persuasive and able to push their prescriptions to lawyers who were clueless about their methodologies.<sup>159</sup> Subsequently, he began generating bridges and opportunities for cooperation between lawyers and economists around the topic

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154. *Memoirs*, *supra* note 1, at 66.

155. *Id.* at 65 (explaining that Surrey “had the combination of a front row center seat and [was an] important member of the cast for all of the tax drama from 1939 through 1944”).

156. *Id.*

157. *Id.* at 67.

158. *Id.*

159. *Id.* at 43.

of tax policy.<sup>160</sup>

Surrey took advantage of opportunities to advance tax policy in many aspects of his life. He established a commitment to tax equity and saw the Treasury's role as a safeguard to the fairness of the tax system.<sup>161</sup> He realized that the way to create a policy change involves educating not only students but also professionals and Congressional representatives. During his teaching days at Harvard Law School, he served as an expert witness and testified on tax policy problems before Congress. He spoke to professional and business audiences on policy debates and technical topics.<sup>162</sup> Some of those people would take his ideas and incorporate them into their discussions and practice of tax law. During these opportunities to advance tax policy, Surrey spoke strongly against tax cuts for foreign investment income and countered the efforts of most foreign investment corporations and the Treasury Department at that time.<sup>163</sup>

According to Schumpeter, entrepreneurs generate economic development by executing novel combinations.<sup>164</sup> Similarly, Surrey saw a need to integrate interdisciplinary resources such as legal and economic knowledge. He craftily combined people and resources, from American legislators to foreign officials, from political representatives to members of the media, from legal scholars to economics professors, and from the local bar to international practitioners. These new combinations were helpful in developing a comprehensive tax policy during Surrey's life.<sup>165</sup> For example, while at Berkeley, Surrey developed a seminar on "Advanced Taxation," which integrated tax practitioners from the San Francisco Bar into his classroom.<sup>166</sup> This unique combination of practice and academia at that time was also sustained through his new monthly lunch meetings—the "Surrey club"—at which current legislative and administrative developments were discussed as they appeared in tax practice situations.<sup>167</sup> Surrey was strategically enabling himself, as a law professor, to build connections with and join "the tax bar elite of the locality," which was not previously welcoming to Jewish practitioners.<sup>168</sup>

True to his commitment to advance policy, he accepted a position at Harvard Law School because he considered it "the preeminent law school and closer base

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160. *Id.* at 67.

161. *Id.* at 43.

162. *Id.* at 156.

163. *Id.* See also *Topics Relating to the General Revenue Revision of the Internal Revenue Code: Hearings Before H. Comm. on Ways & Means*, 85th Cong. 1143 (1958) (statement of Stanley S. Surrey, Professor of Law, Harvard Law School).

164. JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* (1934), reprinted in *THE ENTREPRENEUR: CLASSIC TEXTS BY JOSEPH A. SCHUMPETER* 48–50 (Markus C. Becker, Thorbjørn Knudsen & Richard Swedberg eds., 2011).

165. *Memoirs*, *supra* note 1, at 146.

166. *Id.* at 84–85.

167. *Id.* at 85 ("So with the help of a few lawyers, we organized monthly lunch meetings—the "Surrey club"—at which we discussed current legislative and administrative developments, as well as current tax practice situations.").

168. *Id.* at 85.

of operations for one interested in tax policy.”<sup>169</sup> There too, Surrey maintained meaningful connections to the tax bar—particularly in Washington and Boston—through monthly meetings and luncheons that discussed current tax issues and provided insights into the perspectives of practicing tax lawyers.<sup>170</sup> Surrey also continued his interdisciplinary approaches and created a new law school seminar on “Current Tax Policy,” co-taught with economics and business professors to provide his students with the foundations of tax policy from both legal and economic perspectives.<sup>171</sup> Surrey admitted that it was also to keep himself informed about current trends in economic and fiscal policies.<sup>172</sup> He appreciated collaborating with economists who were able to build a bridge with lawyers—not just talk jargon that only their peers understood.<sup>173</sup> Co-teaching and maintaining solid relationships with public finance economists such as Carl Shoup, Roy Blough, and Richard Musgrave significantly influenced Surrey’s writing and speeches on an optimal tax base and provided a bridge between “the theoretical world of the fiscal policy economists and the government world of decision-making.”<sup>174</sup> This interdisciplinary focus helped establish Surrey as an exceptionally well-rounded tax policy expert compared to other tax scholars or attorneys in his time.

In bringing together new combinations and planning the best strategy to pass on his ideas, Surrey sometimes chose to step aside to avoid the controversy directed at him.<sup>175</sup> For example, in 1954, Surrey worked on the Income Tax Project at the American Legal Institute (ALI), an elite legal organization composed of judges, practicing lawyers, and law professors.<sup>176</sup> He enjoyed his work with the ALI, as he noted it provided him with close contact with the most gifted and progressive legal practitioners on ways to improve the law as policy through the model Federal Income Tax Law.<sup>177</sup> He took personal pleasure in designing and envisioning the ideal tax system from taxpayers’ and legislators’ points of view.<sup>178</sup> At ALI, he created the Tax Policy Committee, an objective research and advisory body, to guide the reporter on a restatement of tax law and

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169. *Id.*

170. *Id.* at 101.

171. *Id.*

172. *Id.* (“Not having an academic background in economics and not seeing the time to obtain that background, and more important to maintain it, this seminar device seemed, shall I say, the most economical approach. Ever since this start I continued the seminar, always with a Harvard economics professor.”).

173. *Id.* at 102

174. *Id.* at 103.

175. *Id.* at 169.

176. *Id.* at 107 (including ex officio members consisting of the Chief Justice and Justices of the Supreme Court of the United States, the chief judge of each United States Court of Appeals, the Attorney General, and the Solicitor General of the United States, the chief justice or chief judge of the highest court of each state, deans of law schools and incumbent bar association officials).

177. *Id.* at 101.

178. *Id.* at 113 (“It was a heady task, challenging, and somewhat awesome. No one had attempted such a task before, and indeed it seemed almost presumptuous to undertake yet it offered the promise of progress if logic, imagination, and technical knowledge could be carefully applied.”).



enable him to influence ultimate policy choices.<sup>179</sup> Having some reputation as a strong government man, a liberal reformer with anti-tax practice bias, Surrey chose to step aside from heading the Tax Policy Committee at the ALI and acted under its guidance. Although Surrey commented in his memoirs that such action was meant to look after the benefit of advancing tax policy rather than his self-acclamation, it well may be that Surrey was avoiding taking a risk of entering into controversy and disagreements with members of this rather conservative body of elite legal experts.<sup>180</sup>

Being shunned by them in the past, Surrey strategically was hoping to mobilize himself as a law professor in tax bar circles. These networks allowed him to remain cognizant of the tax bar's positions and concerns regarding various tax policy matters.<sup>181</sup> He remained friendly and linked to practicing attorneys, although his opinions often differed greatly from theirs. He realized his role in making new combinations and building bridges between practice and academia, and creating links with the tax bar through his teachings. He viewed academics as able to help change the tax bar's focus on clients' interests when the former presented and defended the public's point of view. In 1957, he was even nominated as a member of the governing Council of the Tax Section, and indeed, younger lawyers were changing the focus from the client toward accepting responsibility for fairly weighing the concerns of the government and the public.<sup>182</sup>

Lastly, Surrey performed some behind-the-scenes consultations with law firms but was careful to maintain an unbiased image as an academic focused on a legislative and public interest outlook.<sup>183</sup> Surrey loved the ocean and used his sailboat excursions to build his friendships with many businesspeople, attorneys, and judges, albeit he noted that "tax discussion was not permitted and legal conversation kept to a minimum."<sup>184</sup> Admittedly, though, absent from his social and professional networks were corporate leaders and businesspersons.<sup>185</sup> Perhaps Surrey would have gained an even more well-rounded perspective had he been able to take a risk and mingle with a crowd he perceived as self-interested loophole-seeking taxpayers. Nonetheless, the political and economic conditions in which Surrey acted were not always certain, as many entrepreneurs have often realized.<sup>186</sup> Navigating his career under unsettled conditions, Surrey remained

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179. *Id.* at 122.

180. *Id.* at 111.

181. *Id.* at 89. For example, when trying to promote his Tax Court proposal with Roger Traynor, he utilized his academic skills to write reports and articles read by lawyers, vocally advocated the proposal with the tax bar, and indeed was able to soften its opposition to his proposal. *Id.*

182. *Id.* at 101.

183. *Id.* at 99.

184. *Id.* at 235.

185. *Id.* at 105 ("Further, though I had good personal but not close relationships with a number of tax executives, I was not well known in business circles. . . . the image would be that of a tax reformer and an academic and therefore—what shall I say—'unsound' or at least 'unrealistic.'").

186. Mirit Eyal-Cohen, *The Cost of Inexperience*, 69 ALA. L. REV. 859, 866 (2018) (discussing the costs involved with regulatory uncertainty).

determined to promote his policy ideas, as the next subsection demonstrates.

## 2. Defusing Uncertainty

Entrepreneurs are often risk-takers having to act in environments of uncertainty and make judgments in situations of ambiguity, all without being able to assess probability or probabilities.<sup>187</sup> Surrey was not much of a risk-taker as a policy entrepreneur and thus missed some opportunities to make an even bigger impact. Policy entrepreneurship is the process of achieving a distinctive, sustainable position through the deliberate and innovative use of one or more legislative and political flexibilities.<sup>188</sup> Tax law involves not only lawmaking but also administrative rulemaking and judicial interpretation by multiple lower courts in distinct jurisdictions. Consequently, it involves a high degree of complexity and administrability, which are sources of much uncertainty for all parties involved.

Indeed, the political and economic conditions of Surrey's times were often unstable, and he had to operate in uncertain environments. Once political tides shifted in 1947, Surrey felt he could not remain at Treasury as it was not offering him the same liberty to promote his ideas. He began looking for a venue that would let him execute his tax policy aspirations. He refused to remain in a position where political considerations were taking priority over tax policy, and decisions were being made on the basis of "what business or political pressure, or both, were involved."<sup>189</sup> Accordingly, Surrey declined prestigious positions, such as Assistant House Legislative Counsel, "as too confining a position since it was not policy-oriented."<sup>190</sup> Private tax practice in Washington also offered attractive salaries, but Surrey admits that he held back because he was still interested in government service and was not willing to compromise his morals for the sake of clients.<sup>191</sup> When an opportunity to join the Berkeley School of Law arose, he noted that law school was a good base of operations to advance his continued interest in government and policy affairs.<sup>192</sup> Equipped with the legal and economic ties from his first term at the Treasury, Surrey decided to leave and promote his policy ideas in his next venture—academia.

In similar uncertain times later in his career, Surrey mentioned that, compared to the climate of the 1960s (during Kennedy's New Frontier and

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187. Frank Knight distinguished between risk—events with a likelihood that can be estimated probabilistically—and uncertainty—events with unknown likelihood. See FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 19–20 (1921); see also Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 433 n.2 (2009).

188. Pozen, *supra* note 24, at 322.

189. Memoirs, *supra* note 1, at 76 (describing hearing on behalf of Treasury on reorganized railroad industry).

190. *Id.*

191. *Id.* ("I was not so sure I wanted to change roles—from problem solving as a government official where the goal was the correct overall answer to problem solving as a practitioner where the goal was the best answer for a client.").

192. *Id.* ("Teaching seemed clearly closer to the first goal.").

Johnson's Great Society), the mid-1970s presented an entirely different set of challenges for tax planners.<sup>193</sup> Stagflation, a combination of slow economic development and rising inflation, prompted the Carter administration to prioritize tax refunds for individuals and tax cuts as a form of fiscal stimulus.<sup>194</sup> The major policy changes to the tax system, which Surrey advocated at that time, appeared improbable. Perhaps this pattern can point to Surrey's missed opportunities. While Surrey insisted his policy ideas are founded on neutral scientific assumptions, Surrey's morals and ideology played a major role in his life.<sup>195</sup> Surrey was an avid liberal and Democrat.<sup>196</sup> He often measured people's character and traits first and, for most, on whether they belonged to the "correct side of the political map."<sup>197</sup> Nevertheless, during the change in political shifts and uncertain legislative environment when interest groups influenced tax policy in their favor, Surrey took a step back from government service and assumed the position of an academic outsider.<sup>198</sup> He excused his choice to leave government as not ideal for advancing progressive ideas.<sup>199</sup> Although he maintained connections to the White House and sustained the trust and respect of key policymakers, it is possible he would have been able to better facilitate and advance several of his fundamental tax policy concepts had he controlled his aversion to conservative ideology.<sup>200</sup> Although he was willing to work with the

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193. *Id.* at 30.

194. *Id.*

195. *Id.* at xlii (quoting Firing Line TV show host Buckley attacking Surrey and noting, "[O]n the one hand you are a moralist, a tax moralist, and on the other hand you feign that scientific detachment by the very simple expedient of saying the fact of the matter is the American people voted a progressive rate . . . you really aren't a scientist . . . but you insist that your observations are scientific in nature whereas in fact, I think that they are based on a highly articulated set of personal value principles."). See also Daniel Shaviro, 'Moralist' versus 'Scientist': Stanley Surrey and the Public Intellectual Practice of Tax Policy (N.Y.U. Sch. of L. Working Paper No. 22-24, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4143601](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143601) [https://perma.cc/H3G7-W8CK] (criticizing some of Surrey's scientific claims as being driven by his political and moral inclinations).

196. Memoirs, *supra* note 1, at xxxi ("[A]s a self-proclaimed 'good Democrat,' Surrey was both a product of new deal and Great society liberalism, and a bystander in the waning days of the modern activist state from his early days.").

197. See, e.g., *id.* at 43 ("Most of the Treasury economists of this period had liberal-leaning fiscal views, a strong preference for a progressive income tax, and a strong regard for 'tax equity,' for treating people with equal incomes equally in the tax laws."); *id.* at 223 ("Tom was a liberal tax reformer . . .").

198. *Id.* at 214 ("During the Nixon and Ford Administration I had little direct contact with the Treasury Department. Though my successors—Edwin S. Cohen as Assistant Secretary and John Nolan as his Deputy—were friends, they saw me, correctly, as a Democrat and too liberal for them, particularly Cohen, and certainly for the Republican Administration."). See also *id.* at xxiii ("When Republicans took control of Congress in 1947, Surrey lamented that treasury officials had lost their influence over tax policy; he thus began to consider other career options.").

199. *Id.* at 76 ("Working with a Republican Congress was not very interesting or congenial on policy issues. . . . decisions on technical issues were being made on the basis of what business or political pressures, or both . . . the change was not pleasing."); *id.* at 103 ("This acquaintance covered most of the liberal-leaning economists who took an interest in federal tax issues."). But see *id.* at 102 (noting that when working with Wilbur Mills, the Republican Chairman of House Ways and Means Committee, Mills "had a sincere interest in improving the tax system, and this interest was responsible for the hearings").

200. For more on Surrey's liberal and Democratic morals, see Shaviro, *supra* note 195, at 1.

tax bar regardless of its client-oriented inclination and contradictory opinions to his, that opposition was natural to him since their perspectives varied.<sup>201</sup> Nonetheless, he was generally unwilling to make the same concessions for Republicans with opposing ideologies.

Surrey stayed inside his comfort zone by functioning as an outside policy advisor to liberal-leaning politicians during the Nixon and Ford administration on tax policy matters. He maintained his commitment to tax equity and base-broadening, while opining on an approach that seemed reasonable to alleviate economic conditions.<sup>202</sup> For example, he served as a political advisor to Democratic Senator Edward Kennedy on the Senate Finance Committee, who did not have a background in tax matters. However, with Surrey's guidance, Kennedy soon became the leading tax reformer in the Senate and was looked up to by other like-minded senators for his substantive positions and legislative tactics. The 1976 Revenue Act in Congress was the high point of tax reform in the Senate. A primer on tax reform prepared by Surrey and McDaniel proved helpful for Kennedy's team, which treated it as the "bible" on floor debates on the 1976 act.<sup>203</sup>

This misstep on Surrey's behalf may have cost him the opportunity to play a more significant role with government officials and politicians who did not have much experience, knowledge, or access to the topic of taxation. Legislators pay attention to policy entrepreneurs, particularly when they lack the tools to make policy choices on their own.<sup>204</sup> Instead of filling such a vacuum with his ideology, Surrey preferred during conservative dominance to throw down the towel, which allowed his avowed nemesis—interest group activists—to gain greater control over tax legislation during those times.

Acting outside of Treasury allowed him more freedom to scrutinize its actions, and he joined several scholars and practicing lawyers' opposition to Treasury's Asset Depreciation Range (ADR).<sup>205</sup> He did so via two main tactics: one was opposing Treasury's move during the hearing on the proposed regulation. Second, Surrey and others adjudicated the matter in court proceedings by picking plaintiffs with standing and attacking the Treasury's authority to promulgate such regulation.<sup>206</sup> Alas, Surrey failed to advocate for and influence those who were not in favor of his policy ideas. Congress acted on

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201. *Memoirs*, *supra* note 1, at 104–05 (“My work with the tax bar had generally cast me in the ranks of the opposition at meetings or in articles, since my views often conflicted with the positions being advocated by practicing lawyers on current issues in the technical field. The opposition was understandable in the sense that our vantage points necessarily differed because our professional work differed.”).

202. *Id.* at 102.

203. *Id.* at 222 n.68 (“Kennedy had the compendium printed in full in the Congressional Record. 122 Cong. Rec. 22283–22319 (1976).”).

204. *See id.* at 43 (describing Colin Stam’s “skill in explaining proposals in outrageously simple terms, which covered up major problems and led as a result to committee acceptance without any understanding of the issues”).

205. *Id.* at 215–16.

206. *Id.* at 216.

the matter and closed the issue.<sup>207</sup> Another instance included the favorable tax treatment of U.S. Domestic International Sales Companies (DISC).<sup>208</sup> Surrey wrote an article for the Washington Post attacking the proposal and appeared in hearings on the matter. Here, too, Surrey failed to advocate the issue with politicians from the opposing moral side and chose to maintain his distance from the political arena. Congress again stepped in and legislated the matter.<sup>209</sup>

On the other hand, in 1973, Republican Chairman Wilbur Mills of the House Ways and Means Committee invited Surrey to appear in hearings on tax reform to talk about “Objectives and Approaches to Tax Reform and Simplification.”<sup>210</sup> Surrey utilized this opportunity to discuss his policy ideas about increasing fairness and restoring efficiency while practicing prudence with the expenditure of government funds.<sup>211</sup> It is also worthwhile mentioning that in the mid-1970s Surrey advised the Chief of the Joint Committee Staff, a dominant Republican figure on the Hill at that time, on current legislation, political positions, and tactics. In those conversations, Surrey would present the positives and negatives of an issue and how to avoid jeopardizing the chief’s position in Congress by “treading carefully” against committee members with apparent “conservative bents.”<sup>212</sup> Surrey claims his actions behind the scenes were successful, and he “steered the Committees to reform positions” in the 1975 and 1976 revenue acts, along with the backing of other politicians who respected Surrey’s expert guidance treating him as a “willing ally.”<sup>213</sup> Years later, Robert Goulder’s *Forbes* article alleged that Surrey’s “fingerprints were all over” tax reforms of that time.<sup>214</sup>

Despite his repulsion from the actions of interest groups, he found himself advising several liberal public interest lobbying groups for their dedication to fairness and removing loopholes—the creed of Surrey’s philosophy. Surrey teamed up with an old friend from Treasury, Tom Field, who had similar ideas on tax reform and consciousness regarding special preferences in the tax system.<sup>215</sup> They later established “Tax Notes”—a leading tax periodical to this day—to keep current on tax legislation and policy and inform readers of the

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207. Revenue Act of 1971, Pub. L. No. 92-178 § 109, 85 Stat. 497, 508 (formerly codified at IRC § 167(m)).

208. *Memoirs*, *supra* note 1, at 217.

209. Revenue Act of 1971 §§ 501–07, 991–97, 6686.

210. *General Tax Revision: Panel Discussions before the House Comm. on Ways and Means*, 93d Cong. 117 (1973) (oral testimony and written statement on “Objectives and Approaches to Tax Reform and Simplification”).

211. *Memoirs*, *supra* note 1, at 220.

212. *Id.* at 223.

213. *Id.*

214. See Pollack, *supra* note 21, at 66 (citing to the effect of Surrey’s tax policy on the 1986 Act years after his death); Robert Goulder, *Stanley S. Surrey—The Greatest U.S. Tax Scholar?* *FORBES*, Jun 8, 2022, <https://www.forbes.com/sites/taxnotes/2022/06/08/stanley-s-surrey—the-greatest-us-tax-scholar/?sh=195e59b2c598> [<https://perma.cc/UR5S-N2YQ>].

215. *Memoirs*, *supra* note 1, at 223.

actions of interest groups in Congress and the Treasury.<sup>216</sup> Fields also formed “Taxation with Representation,” which engaged in public interest lobbying on tax issues in Congress and convinced Surrey and other reform-minded experts to advise the organization on substance and tactics of the Hill. Surrey also advised Ralph Nader and Robert McIntyre of Citizens for Tax Justice, a public interest group formed in 1979 to promote fairness for middle- and low-income taxpayers, closing corporate loopholes, and efficiency in taxation.<sup>217</sup>

Surrey even experimented with corporate lobbying to procure information on the methods and tactics of such practices. He helped lobby behind the scenes for technical statutory amendments on corporate reorganization because he wanted to get a first-row seat to see “how the machinery of obtaining a special Code amendment really operated.”<sup>218</sup> Rather than taking the initiative himself though, as many entrepreneurs do, Surrey suggested that a Washington tax firm handle the actual proposed statutory amendment in the Senate. He kept in close touch with the steps, strategies, and drafting. The statutory change was passed successfully, and Surrey concluded that he “knew a little more about ‘how special tax provisions get enacted.’”<sup>219</sup> Aside from the goal of increasing his knowledge, Surrey was inspired by other factors, as will be discussed next.

### 3. Striving For Achievement, Motivation, And Affiliation

Sheldon Pollack refers to tax policy entrepreneurs as lobbyists and “individuals who promote their own particular causes (rather than those of political parties).”<sup>220</sup> He describes the motives and strategies of tax policy entrepreneurs as “peddling ideas” that have become desirable to the market at that moment.<sup>221</sup> In Pollack’s eyes, policy entrepreneurs form unanticipated partnerships because some topics suit both their policy perspectives and personal goals. He attributes much of the public interest in tax policy in the 1980s media’s attention to the actions of policy entrepreneurs, who had relatively high impacts on tax policy and orchestrated much of the 1980s tax legislation.<sup>222</sup> Yet, as this article stated above, *policy* entrepreneurs are depicted here in contrast to *political* entrepreneurs—lobbyists and interest groups that take advantage of the tax system to shape their own strategy.<sup>223</sup> This leaves one wondering, What drives the policy entrepreneur?

Psychology Professor David McClelland, renowned for his human motivation and achievement theory, asserted that human entrepreneurs’ decision-making is

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216. *Id.* at 224.

217. *Our Mission*, CITIZENS FOR TAX JUST., <https://ctj.org/about/> [<https://perma.cc/9US6-QTA6>].

218. *Memoirs*, *supra* note 1, at 99.

219. *Id.* at 100.

220. Pollack, *supra* note 21, at 74.

221. *Id.*

222. *Id.* at 84–85 (“The importance of public interest groups in influencing tax policymaking is directly connected to the rise of the popular media as a force in its own right in shaping the tax policy agenda.”).

223. *Secid* at 78 (criticizing Surrey by stating that it is not clear why these ideas became so popular, as they floated around prior to his involvement).

successful when motivated by three elements: achievement, affiliation, and power.<sup>224</sup> Indeed, Surrey was motivated by his affiliation as a professor at Harvard and a Treasury official, which opened many doors from international delegations to political advisory to professional consultations. He worked with powerful people, made connections in the highest places, and became known as a respected authority in his field. His sense of achievement was evident in his memoirs when he was successful in defeating tax breaks or promoting legislation that increased tax equity and fairness. For example, a policy proposal known to this day as “the Surrey Plan” suggested achieving horizontal equity between couples in community property states and non-community property states, thus halting the abuse of “family partnerships” to shift tax burdens.<sup>225</sup> Surrey proposed a “split income” approach and pushed that plan in the Senate, which enacted his concept in the Revenue Act of 1948 for income, gifts, and estate purposes as well.

Throughout nearly fifty years of academic research, law school teaching, professional institute work, and government service in the tax field, Surrey compiled many casebooks and articles. He developed a program for foreign tax officials and headed international tax missions to examine and reform foreign tax systems.<sup>226</sup> Surrey was actively involved in almost every major tax change during that time, especially while at the Treasury. He advised and testified before congressional tax committees on various aspects of the tax system and tax policy. Professionals and lawmakers looked for advice and expertise when formulating rules. Possessing the utmost entrepreneurial motivation, Surrey was able to seize opportunities and diffuse ambiguity in rulemaking.

#### IV

#### CONCLUSION

Vocabulary may change reality. The definition of policy entrepreneurship could result in valorizing mundane behavior simply because it is for the public benefit. For this reason, one should be careful when appraising and using the concept. More research is needed to identify how stakeholders respond to policy entrepreneurs and which approaches increase the latter’s performance. Understanding the policy entrepreneur’s motives and actions, and how he differs from his proverbial cousin, the political entrepreneur, will provide deeper insights into adopting and disseminating local and national rules and policies.

This article demonstrates that while many attributes and circumstances led to changes in tax policy, the magnitude of Surrey’s entrepreneurial qualities and efforts has been underestimated. The entrepreneur in the capitalist framework is often a jack-of-all-trades, arranging old elements in unexpected ways to make

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224. See DAVID C. MCCLELLAND, *ACHIEVING SOCIETY* 43 (1961) (explaining the phenomenon of entrepreneurship and economic growth by applying methods of behavioral science).

225. Revenue Act of 1948, Pub. L. No. 80-471 § 301, 62 Stat. 110, 114, 117.

226. Memoirs, *supra* note 1, at 103 (“As an academic, I was on the faculty of the foremost law school in the country and in the top ranks of my field.”).

something new and valuable. In the policy entrepreneurship context, acting as a scholar, policymaker, and government official provided Stanley Surrey with the ability to promote tax policy for fifty years of actively operating in the field of taxation. Surrey had more influence on the mid-century development of federal income tax law than any other scholar or government official. His emphasis on tax policy has had a lasting effect to this day in academia, government, and professional circles. Although Surrey's memoirs suggest that he lacked work-life balance,<sup>227</sup> scholars and lawyers who worked alongside Surrey—and their subsequent generations of trainees—thereafter pursued other careers with a more balanced perspective on the tax system and were better equipped with tools to evaluate and promote tax policy.

Surrey considered tax policy as “the wisdom of the [tax] provisions.”<sup>228</sup> His optimal tax design was an effective and equitable income tax structure defensible as proper tax policies within the boundaries of governmental and political realities.<sup>229</sup> His mission was to reinforce the notion that issues pertaining to tax planning and administration are crucially essential and often complex, thus necessitating methodical analysis. He was a highly motivated entrepreneur in the tax field with expert knowledge of law and connections with highly ranked professionals in both fields. His professional and global networks, his passion for knowledge of tax policy and tax legislation, alongside his experience with tax administration practices were essential in achieving his goals as a global leader in the tax world.

Policy entrepreneurs' capacity to manage the narrative as experts, develop a support network, and keep their determination is frequently more important than current data or studies suggest. Surrey's work was dynamic and high stakes, demonstrating that his personality, rather than his position, determined the breadth of his contributions to the subject of taxation.<sup>230</sup> In this sense, Stanley Surrey serves as an illustration of the phenomenon and the first instance of *the* tax policy entrepreneur. Others who might have or will follow suit will have a high bar to earn such a label. Perhaps a lesson from Surrey's half-century as a tax policy entrepreneur that future policy entrepreneurs can take is to overcome risk aversion. Surrey's legacy in the tax world is invaluable. Yet had he remained on the sideline during uncertain conditions, he could have gained more influence on people who differ in their policy thinking. Preserving the integrity of the law

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227. *Id.* at xivii (“[T]here is also no introspection about Surrey's basic life choices. The memoirs leave the reader with the impression that Surrey devoted almost his entire waking existence to his professional life, leaving very little time for family or leisure . . .”).

228. *Id.* at 113.

229. *Id.* at 150 (“The Report, as can be gathered, focused on an equitable tax system without preferences and incentives. In some respects it was an ideal tax system—perhaps better overall than the United States then possessed under its income tax—and written for a liberal government.”).

230. See, e.g., Reuven S. Avi-Yonah, *All of A Price Throughout: The Four Ages of U.S. international Taxation*, 25 VA. TAX REV. 313, 315-316 (2005) (“The second period lasted from 1960 until the end of the Carter Administration. It was dominated by the concept of capital export neutrality, an emphasis on residence-based taxation, as well as the personality of Stanley Surrey.”).



necessitates striking a balance between morals and public policy interests.