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Taxing Choices

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TAXING CHOICES

*Tessa R. Davis**

Tax has a choice problem. At all stages of the making of tax, choice plays a role. Lawmakers consider how tax will impact the range and appeal of choices available to an individual. Scholars critique how tax may drive an individual toward or away from a given choice. Courts craft stories of how an individual had either free or deeply constrained choice, using their perception of the facts to guide their interpretation of tax law. And yet for all the seeming relevance of choice to tax, we have no clear definition of what we mean when we talk about choice or agreement on whether and when it matters. Drawing upon the insights of contract theory on duress and unconscionability, this Article offers a taxonomy of choice in tax. It then applies the taxonomy to perennial debates in tax to reveal what we are actually talking about when we talk about choice in tax and the ways in which our reliance upon often vague and inconsistent ideas of choice opens the door to bias, perpetuates inequality, and leads tax to be in tension with some of its deep commitments.

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INTRODUCTION

$I = C + \Delta W$ ¹ Income can be *measured*. Loopholes can be *identified* and *excised*. Equations can be *solved*. If only we had the data and the resources, tax could be *perfected*. We could get things *right*.

Scholars and lawmakers regularly grant the definition of income an air of relative objectivity. Economic theory gives us a definition of income and the law places items in the appropriate bucket to determine a given individual’s income. Tax is simply the law of dollars and cents; a measuring of inflows and outflows that generates a taxable income figure to which we apply a rate. It is politics, special interests, or whims and foibles that corrupt tax. Were man but constant, tax were perfect.² Or so much of the literature suggests.

But what is tax *about*? How do we determine whether the scope and substance of tax is *right*? Traditional tax policy analysis offers three guardrails: efficiency, simplicity, and fairness or equity.³ Ostensibly, these three metrics exist to balance each other. A head tax could be quite efficient but fails miserably on equity grounds. Conversely, raising taxes on high income or high wealth individuals may yield equity gains but be rejected by some as distortionary or complex. While these metrics provide a sense of the potential tradeoffs of a tax provision, they do not provide an answer to the question of the proper boundaries of tax. And because they directly appeal to other disciplines—economics, philosophy, political theory—for their substance, they shift the discussion of norms and value judgments outside of tax. Believing the fiction that the value judgments in tax are not of tax

¹ This equation refers to the oft-cited Haig-Simons definition of income where income is equal to consumption plus changes in wealth in a given year. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY (1955).

² WILLIAM SHAKESPEARE, THE TWO GENTLEMEN OF VERONA act 5, sc. 4, 118–20 (paraphrasing Proteus).

³ For an introduction to core tax policy concepts, see LAURIE L. MALMAN ET. AL., THE INDIVIDUAL TAX BASE: CASES, PROBLEMS, AND POLICIES IN FEDERAL TAXATION 15 (3d ed. 2020).

minimizes or ignores the normative assumptions and positions embedded within tax.

Consider the example of choice in tax. Choice, understood as the voluntary exercise of will to select from a meaningful range of options, is an essential aspect of tax law and policy. It is also an undertheorized one. Tax stands in multiple postures to choice. The default position is that tax is best when it is passive, responding only to externally-shaped decisions. Where neutrality is the goal, tax is structured to keep external choices external—deferring gain at the formation of a business is permitted to ensure that tax law does not act as a roadblock to the individual’s desire to start a business, for example. But tax is also often used to shape choice by manipulating the cost of various options. An external goal of supporting energy efficiency gives rise to tax credits for certain investments—therein tax provides a means of achieving a non-tax policy goal.

But tax has a choice problem. Tax is of many minds when it considers the relevance of and defines choice. The first contribution of this Article is to clearly articulate the role that choice plays in tax law and policy. Where tax is understood as passive, it relies upon the assumption that individuals have unconstrained choice, therein embracing what this Article terms the choice as metric view. The non-recognition regimes of business entity formation are often justified on the basis of neutrality, for example.⁴ When instead tax aims to regulate and influence behavior, tax views choice differently. Therein directing choice is the express goal. So-called sin taxes are controversial examples of such use of tax as a driver of decision-making.⁵ This Article terms this second role of choice in tax, *choice as feature*. There are voluminous literatures on the wisdom or error of discrete examples of both the *choice as metric* and *choice as feature* roles of choice in tax. While some discussion of both is necessary, entering fully into the fray is not the focus of this paper. Instead, this Article makes the novel contribution of identifying the values that underlie appeals to both *choice as metric* and *feature* and in describing an undertheorized role of choice in tax: *choice as heuristic*.

Choice as heuristic describes the role perceived choice plays in defining income itself. Consider the example of employer-provided housing. The employee who must live on an oil rig to meet the demands of her position does not have taxable income in the form of the value of the housing provided

⁴ See, e.g., I.R.C. § 351 (setting out the basic rules for nonrecognition on formation of a corporation); I.R.C. § 721 (setting out the basic rules for nonrecognition on formation of a partnership).

⁵ See, e.g., Editorial Board, *Tax Soda to Help Fight Obesity*, BLOOMBERG (May 14, 2018, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2018-05-14/tax-soda-and-other-sugary-drinks-to-fight-obesity>; Editorial Board, *California’s Ban on Soda Tax Should Not Stand*, BLOOMBERG (July 23, 2018, 10:00 AM), <https://www.bloomberg.com/opinion/articles/2018-07-23/california-soda-tax-ban-should-not-stand>.

by her employer, per §119.⁶ How did Congress arrive at the decision to provide such an exclusion from income? It, alongside the courts, debated the extent to which the employee had a choice to do otherwise. Perceiving the range of options available to her to be at best limited, if not nonexistent, doctrine arrived at the conclusion that exclusion was appropriate.⁷ Her deeply constrained choice calls into question, for some, whether she has even received something of value—she might loathe living on the oil rig and thereby have reduced welfare from having to do so. For others, it is the lack of control she has over the receipt of the seeming in-kind benefit that pulls it from the income category. Setting aside whether the exclusion for qualifying employer-provided housing is good or bad tax policy, it is one of a multitude of examples of when courts, the Service, and Congress rely upon their perception of an individual's options—perceived choice or lack thereof—to determine the scope of the concept of income itself.

The taxonomy this Article offers is only a first step to deepening our understanding of the role of choice in tax, however. Examining theory on the nature of contract law and its defenses, specifically duress and unconscionability, can help us clarify how and why doctrinal and policy questions are framed as ones of individual choice. Combining the insights of contract theory with the taxonomy offered by the Article to reexamine key cases and perennial debates in tax makes clear that choice, as currently deployed, serves to obfuscate more than clarify, invites and perpetuates bias in the Code, and frequently puts tax in tension with its stated values and goals.

Part I of this Article explores how choice makes its way into tax law and policy, identifying the foundational and persistent doctrinal and policy questions in which choice is believed relevant. Part II provides a descriptive taxonomy that organizes and clarifies the many faces of choice in tax. Part III looks to contract law, an area premised upon concepts of choice, consent, and free will, to find an instructive and sophisticated understanding of the nature and import of both free and constrained choice. Part IV concludes by bringing the tax and contract concepts of choice together, revisiting key cases and debates in tax to explore the insights gained from a more deliberate exploration of the multiple roles and concepts of choice in tax, demonstrating the risks and limitations of the choice frame and raising issues for further work.

⁶ I.R.C. § 119. Section 119 provides an exclusion for employer-provided meals and housing premised, at least in part, on a notion and the rhetoric of choice.

⁷ Evaluating the extent of the employer's control over the meals and lodging provided is built into the statutory language: "There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—(1) in the case of meals, the meals are furnished on the business premises of the employer, or (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment." I.R.C. § 119(a).

I. THE STORY OF CHOICE IN TAX

In the traditional view, tax operates for two purposes and is bound by three metrics. Taxes exist, first and foremost, to raise revenue. A secondary purpose of taxes is to advance social policy. The revenue demands placed on tax are external in so far as tax law in isolation cannot dictate the proper amount of revenue to be raised. Revenue needs are, of course, driven by spending, which is, in turn, driven by complex decisions regarding what a government should and should not do. But the tough normative calls are made outside of tax. The challenge for tax is to determine how to best achieve those externally determined goals.

This is, of course, a caricature. But too often in tax, nuance and recognition of tax's normative aspects, are saved for the in crowd. A deeply political area, tax is both highly technocratic and must be made intelligible to a wide array of non-tax folks,⁸ particularly possible voters. And yet tax is often held at arm's length within the law, the academy, and popular imagination.⁹ Whatever the cause of this distance¹⁰ the narrative is impactful. The impulse to envision law as a set of clear rules that can be applied with precision and decisionmakers as referees calling balls and strikes is old and pervasive.¹¹ Fold in the deep relationship between tax and the seeming precision and objectivity of economics and the perceived gap between contextual, subjective judgment—the messiness of law—and tax widens.

An individual makes decisions about how to live her life. She chooses from a range of options, exercising her will, demonstrating her autonomy. Tax responds. Tax does not and should not choose for her. And all is well.

Fictional as it may be, this view—whether it is believed to be descriptive or aspirational—pervades tax. The real story is, of course, much more complex. This part sets out how and why tax and choice intersect. The first intersection is definitional: choice plays a role in our understanding of income. The second intersection comes at a higher level of abstraction,

⁸ For a charming example of an attempt to explain tax reform, see Liz Scheltens, et al., *The New US Tax Law, Explained with Cereal*, VOX (Jan. 12, 2018, 11:30 AM), <https://www.vox.com/videos/2018/1/12/16880952/tax-law-explained-with-cereal>.

⁹ For an engaging discussion on this aspect of tax exceptionalism, see Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663 (2019).

¹⁰ Tax exceptionalism can refer more narrowly to questions of administrative law and the extent to which the IRS should be bound by the Administrative Procedures Act. See, e.g., Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006); Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717 (2014). It can also refer to a more widely held view that tax is “other.” See also Scheltens, et al., *supra* note 8; Alice G. Abreu & Richard K. Greenstein, *Rebranding Tax/Increasing Diversity*, 96 DENV. L. REV. 1 (2018).

¹¹ GRANT GILMORE, *THE DEATH OF CONTRACT* 16 (Ronald K. L. Collins ed., 2d ed. 1995) (Alluding to Holmes's sense of how the law should and could evolve). At a higher level of abstraction, this is essentially the formalist/realist debate that has shaped and reshaped other areas of law.

shaping our views on the proper role of tax in society and the values that help us decide the hard cases.

Take the definitional intersection first. A tax system could tax a range of bases—income, consumption,¹² wealth,¹³ etc. In the United States, we’ve chosen income as our base.¹⁴ More specifically, our system aims to tax one’s net, rather than gross, income. Doing so requires defining two essential elements: income itself and the costs of earning income. This part discusses how this foundational step becomes bound up with notions of choice. Part II then refines the jumble into a taxonomy of choice in tax, comprehensively examining the uses and definitions of choice in tax as currently understood.

In any given year an individual will make countless decisions that impact her economic position. She may choose between renting and purchasing a home. She may accept a job or leave a job to start a new business. She may have a child or move an aging parent into her home. Because our tax system endeavors to tax her on her ability to pay,¹⁵ the system must be equipped to decide the impact of these decisions (if any) on her taxable income.¹⁶

Income must be defined. The dominant theoretical touchstone for the tax definition of income is the Haig-Simons economic definition of income: income = consumption + changes in wealth.¹⁷ That our tax system departs

¹² A consumption tax has many supporters. Starting with the same foundational formula, a consumption tax base would require solving for consumption, yielding a base of consumption = income – changes in wealth. For a discussion of what a consumption tax would entail and key aspects of the debate, see William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974); ALAN J. AUERBACH & LAWRENCE J. KOTLIKOFF, *DYNAMIC FISCAL POLICY* (1987); DAVID F. BRADFORD & THE U.S. TREASURY TAX POLICY STAFF, *BLUEPRINTS FOR BASIC TAX REFORM* (2d ed. 1984); Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807 (2005).

¹³ See, e.g., Press Release, Elizabeth Warren Warren, Jayapal, Boyle Introduce Ultra-Millionaire Tax on Fortunes Over \$50 Million, ELIZABETH WARREN (Mar. 1, 2021), <https://www.warren.senate.gov/newsroom/press-releases/warren-jayapal-boyle-introduce-ultra-millionaire-tax-on-fortunes-over-50-million>; Ari Glogower et al., *Why a Federal Wealth Tax Is Constitutional*, ROOSEVELT INST. (Feb. 11, 2021), <https://rooseveltinstitute.org/publications/why-a-federal-wealth-tax-is-constitutional>.

¹⁴ If you start reading the Code sequentially (arguably not the best of approaches) you’ll quickly be introduced to our chosen base—income—and the need to define § 1’s reference to taxable income.

¹⁵ For a discussion of ability to pay, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 20–30 (2002).

¹⁶ Income is, of course, a social phenomenon. Though not speaking of tax, an insight of renowned anthropologist is apropos: “Of human doings we have understandings ‘through causes,’ why they are made as they are, but of nonhuman things only through attributes, by what they are.” MARSHALL SAHLINS, *CULTURE IN PRACTICE: SELECTED ESSAYS*, 30 (1st ed. 2000).

¹⁷ See generally SIMONS, *supra* note 1; BORIS BITTKER, *A “Comprehensive Tax Base” as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967); STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* (1973); Edward D. Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1 (2010); Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 975–76 (1986).

from this concept in a multitude of ways is well-established,¹⁸ yet the definition remains an influential driver in tax policy. Even Simons noted its limits in setting out the definition of income:

That it should be possible to delimit the concept precisely in every direction is hardly to be expected. The task rather is that of making the best of available materials; for no very useful conception in “social science” or in “welfare economics,” will entirely satisfy the tough-minded; nor can available materials so be put together as to provide an ideal tax base. *But one devises tools of analysis which are useful, if crude; and a tax base may be defined in such manner as to minimize obvious inequities and ambiguities. Such at least is the present task.*¹⁹

The importance of Simon’s observation should not be discounted. Rather than an unbiased and objective process of placing inflows and outflows in clearly defined buckets—income, deduction, etc.—Simons himself recognized that accurately distinguishing taxable consumption, costs of producing income, and changes in wealth in all cases is likely impossible.²⁰ Yet too often the language of tax does not match the nuance of this essential definition and scholars and lawmakers either encourage or tacitly permit rhetoric that obfuscates rather than clarifies. And even more importantly, once an item is labeled, appeals to economic theory lend the labeling an air of objectivity as it obscures normative judgments. For those less familiar with the Code, a brief explanation of the path from gross to taxable income is helpful.

A. From Gross Income to Taxable Income: The Technical Process

By the time an individual arrives at the applicable tax rates²¹, she has winnowed her gross income²² down to a figure known as taxable income.²³ The Code offers a definition of gross income in § 61, drawing its language

¹⁸ Our realization requirement, grounded in *Eisner v. Macomber*, is an important departure from a pure income system. *Eisner v. Macomber*, 252 U.S. 189 (1920). It is also merely one of many such departures.

¹⁹ SIMONS, *supra* note 1, at 43 (emphasis added).

²⁰ SIMONS, *supra* note 1, at 54 (“At the outset there appears the necessity of distinguishing between consumption and expense A thoroughly precise and objective distinction is inconceivable.”).

²¹ I.R.C. § 1; IRS IRS Rev. Proc. 2020-45.

²² I.R.C. § 61.

²³ I.R.C. § 63 (note that the so-called Tax Cuts and Jobs Act (Pub. L. 115-97) made some changes to the process scheduled to sunset after taxable year 2025).

from that of the Sixteenth Amendment to define gross income as “all income from whatever source derived.”²⁴ The section then goes on to provide a non-exhaustive list of qualifying items such as compensation²⁵ and gains from dealings in property.²⁶ Though useful, § 61’s definition of income is far from comprehensive, relying, as it does, on the term it aims to define. Subsequent sections provide specific inclusions²⁷ and exclusions²⁸ from gross income which help flesh-out the concept but uncertainty remains and tax must look elsewhere to fill the gaps.

After identifying what economic benefits go into the income bucket, the next step is to identify the costs of earning that income. The basic regime that the Code establishes is that business costs²⁹ are recoverable while personal costs are not, with investment costs³⁰ falling somewhere in between. Specifically, § 262 provides that no individual may deduct personal costs, stating clearly that “(e)xcept as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.”³¹ The need then arises to identify the nature of a cost as business, personal, or investment.

Identifying income itself and sorting between business and personal costs are aspects of the same endeavor: defining an individual’s taxable income for a given year. Simons offers both a process and a caution for this sorting. Distinguishing consumption from the cost of earning income, he regrettably admits, relies upon understanding the intent of the individual

24 I.R.C. § 61. The Sixteenth Amendment, which authorized the modern income tax, reads as follows: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. CONST. amend. XVI.

25 I.R.C. § 61(a)(1).

26 I.R.C. § 61(a)(3).

27 See I.R.C. §§ 74–91 (in sections 71–91, one finds specific inclusions such as prizes and awards).

28 See I.R.C. §§ 101–140 (in part III of subchapter B, one finds items specifically excluded from income, such as I.R.C. § 102 Gifts and Inheritances).

29 I.R.C. § 162 provides the basic framework for deducting trade or business expenses: “There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.” If a cost is not an expense—essentially if it will produce income in multiple years, it is classified as an expenditure and cost recovery will occur over multiple years. See also I.R.C. § 263.

30 I.R.C. § 212 (note that the TCJA suspended I.R.C. § 212 through taxable year 2025).

31 I.R.C. § 262. The prohibition existed in prior versions of the Code. See, e.g., I.R.C. § 24 (“Items not deductible (1) Personal, living, or family expenses); see also Revenue Act of 1913, ch. 16, 38 Stat. 114 (1913) (“That in computing net income for the purpose of the normal tax there shall be allowed as deductions: First, the necessary expenses actually paid in carrying on any business, *not including personal, living, or family expenses . . .*”).

making the outlay.³² But his observation that the “unwelcome criterion of intention”³³ was “inescapable” has not always been given sufficient attention. Simons was right that intent is relevant in defining income. Challenges in policy and doctrine reflect the fact that subjectivity is “inescapable” but tax has yet to fully explore the “unwelcome criterion.”³⁴ He was also correct that the need to assess intent is daunting. Intent muddies the waters, undermining the fiction of objectivity, precision, and neutrality. But the definitional questions persist and it’s in our attempts to answer them that perceptions of the scope and nature of individual choice come to bear on tax.

B. Giving Income Meaning

A classic case, *United States v Gotcher*³⁵ provides a ready means of seeing how the definitional question brings together choice and tax and hints at the second intersection of the two: where a choice frame becomes a way of importing normative priors. Part II further explores how choice becomes an interpretive tool to define income, describing this use as choice as heuristic. Part IV will continue the discussion of how the use of choice as a frame in tax reflects and reifies subjective judgment and particular normative priors about what tax is. What follows here is a brief introduction to the *Gotcher* case and representative perennial debates over the proper treatment of childcare, commuting, and medical costs that introduce the story of choice in tax.

In *Gotcher*, the court considered whether the taxpayers, John and Lois Gotcher, had in-kind income in the form of a trip to Germany paid for by Volkswagen and affiliated dealers.³⁶ The Eastern District of Texas held in

³² There is a parallel here to challenges addressed in contract theory and explored in Part III. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271–74 (discussing the challenge of assessing intent in many traditional understandings of contract).

³³ SIMONS, *supra* note 1, at 54.

³⁴ A ready doctrinal example may be found in the doctrine on the tax treatment of gifts. Whether a transfer counts as a gift depends, in part, on the intent of the donor. See *Comm’r v. Duberstein*, 363 U.S. 278, 285–86 (1960) (“A gift in the statutory sense, on the other hand, proceeds from a ‘detached and disinterested generosity,’ *Commissioner of Internal Revenue v. LoBue*, 351 U.S. 243, 246, 76 S.Ct. 800, 803, 100 L.Ed. 1142; ‘out of affection, respect, admiration, charity or like impulses.’ *Robertson v. United States*, *supra*, 343 U.S. at page 714, 72 S.Ct. at page 996. And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor’s ‘intention.’ *Bogardus v. Commissioner*, 302 U.S. 34, 43, 58 S.Ct. 61, 65, 82 L.Ed. 32. ‘What controls is the intention with which payment, however voluntary, has been made.’ *Id.*, 302 U.S. at page 45, 58 S.Ct. at page 66 (dissenting opinion).”).

³⁵ 401 F.2d 118 (5th Cir. 1968).

³⁶ *Gotcher v. United States*, 259 F. Supp. 340, 343 (E.D. Tex. 1966). The Service assessed a deficiency, taking the position that the trip constituted income. The taxpayers paid the additional tax and then originated a refund suit in the Eastern District of Texas.

favor of the taxpayers, finding that the “entire trip had a business purpose.”³⁷ Enter the need to assess intent that concerned Simons. Though not using language as explicit as that of the Fifth Circuit, the lower court emphasized what it perceived as an absence of choice as to whether to accept the trip, writing:

While the invitations extended to the dealers to make the Volkswagen tour *did not specifically order* or require the dealers and their wives to make the tour, *it is only fair to conclude that such invitations had the practical effect of being an order or directive*, at least from the viewpoint of the dealer. The dealers were aware of the desire of VWOA that the Volkswagen dealers and their wives make the tour; therefore, it would only be natural that a dealer, upon receiving an invitation, would feel that in the interest of good business relations in the future with VWOA and the independent distributor from whom he obtained his vehicles, parts and accessories, he was compelled by sound business judgment to accept the invitation on behalf of himself and his wife unless he were in a position to furnish good reasons why he could not accept same.³⁸

To answer the income question, the court needed to evaluate whether the trip was properly construed as income to the Gotchers.³⁹ Formally, that evaluation turned upon whether the trip served a business purpose for the provider⁴⁰ so the court dedicates some time to why the companies brought the dealers to Germany. As it searches for such intent, it emphasized that the trip would build stronger relations between American dealers during a time in which strong “‘Buy American’ campaign[s]” and the recent memory of World War II meant that dealers “needed to be convinced of or sold on the Volkswagen concept.”⁴¹ Having established the companies’ motivations, the court then turns to consider the mental state of the Gotchers regarding the trip.

³⁷ *Id.* at 345.

³⁸ *Id.* at 343 (emphasis added).

³⁹ *Id.* at 344 (“It is clear that in order for an economic or financial benefit to constitute taxable income, it must be in the nature of compensation.”). This statement is, of course, too narrow. Many forms of income are not in the nature of compensation for services rendered—e.g., capital gains, windfalls—and are still rightly categorized as income. On the facts of this case, however, the compensation frame is appropriate.

⁴⁰ *Id.* (“As above indicated, there was a sound business reason from the standpoint of VW, VWOA, Inter-Continental and Economy for giving the expense paid trip to the Plaintiffs and the I.R.S. so recognized because [they allowed the companies a deduction].”).

⁴¹ *Id.* at 341.

In its analysis of the *Gotchers*, the court uses its perception of the range of choices available to the couple to decide whether the trip is income. Foreclosing disagreement, the court writes that it is “only fair to conclude” that the *Gotchers* had to accept the trip.⁴² The “invitations” were in name only “[having] the practical effect of being an order or a directive”⁴³ Embracing language like “compelled” and “only [] natural” the court finds no accession to wealth where it perceives a lack of choice where individual will is constrained.⁴⁴ The court’s reading of the facts is not implausible—building “good business relations” with the car manufacturers seems a laudable goal. But it simply does not hold that the trip was not income because the facts support the view that the *Gotchers*’ accepting the trip was good business sense. Rather the court relies heavily on language of compulsion and restricted or nonexistent choice to support its holding. The case was then taken up by the Fifth Circuit on appeal, the opinion of which is explored in the next Part. The important point for the moment is to see the ways in which choice is used to help define income and how doing so invites subjective judgment. The basic approach of the choice frame is not unique to *Gotcher*, as exemplified by the three classic, perennial debates in the individual income tax explored below: the proper treatment of medical, commuting, and childcare costs. A brief primer for the key questions in each for those without a tax background follows.

1. §213 and Medical Care

First entering into the Code in 1942, the medical expense deduction joined then § 23—a provision that listed deductions allowable in computing “net income.”⁴⁵ The statute was intended to apply to extraordinary medical expenses.⁴⁶ Medical care was to be “broadly defined” with the focus being on care to “prevent[] or alleviat[e]...a physical or mental defect or illness.”⁴⁷

⁴² *Id.* at 343.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Revenue Act of 1942, Pub. L. No. 77-753, 56 Stat. 697.

⁴⁶ S. REP. NO. 1631-77, at 1397 (1942) (“Only such expenses are deductible as exceed 5 percent of the net income computed without the deduction. The maximum deduction allowable is \$2,500 in the case of a head of a family or a husband and wife filing a joint return; in all other cases, the maximum is \$1,250. This allowance is recommended in consideration of the heavy tax burden that must be borne by individuals during the existing emergency and of the desirability of maintaining the present high level of public health and morale.”).

⁴⁷ *Id.* (“It is not intended, however, that a deduction should be allowed for any expense that is not incurred primarily for the prevention or alleviation of a physical or mental defect or illness.”).

The medical expense deduction endured and remains an important individual deduction, now found in § 213.⁴⁸

The difficult work of § 213 is done in its definition of medical care.⁴⁹ Section 213(d) defines medical care as “amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.”⁵⁰ The role of choice as an interpretive tool in § 213 comes into relief when one considers medical care that is pulled outside the statutory definition. In 1990, Congress added a cosmetic surgery exception to § 213(d), defining cosmetic surgery as “any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.”⁵¹ Importantly, cosmetic surgery that is “necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease”⁵² remains within the medical care definition. So what § 213(d)(9) excludes is elective cosmetic surgery—that which is “voluntary” or unnecessary.⁵³ Medical care, it follows, is care that is compelled by forces outside the individual’s control. Stated differently, care which the individual is understood to have no choice but to pursue.⁵⁴

2. Commuting and Childcare Costs

Childcare and commuting costs raise a similar question and have both long been the subject of vociferous debate.⁵⁵ Doctrinally, at issue is whether

⁴⁸ I.R.C. § 213 provides a deduction for qualifying medical care for the taxpayer, her spouse, and certain dependents.

⁴⁹ I began exploring the role of choice in § 213 in Tessa Davis, *Freezing the Future: Elective Egg Freezing and the Limits of the Medical Expense Deduction*, 107 KY. L.J. 373 (2019) (considering how existing precedent applies to reproductive technologies and highlighting the role of perceived choice in doctrine).

⁵⁰ I.R.C. § 213(d).

⁵¹ I.R.C. § 213(d)(9)(B).

⁵² I.R.C. § 213(d)(9)(A).

⁵³ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101–508, § 11342, 104 Stat. 1388 (1990) (denying a deduction for unnecessary cosmetic surgery); see also 136 CONG. REC. 30570 (October 18, 1990) (“[T]he committee determined that expenses for cosmetic surgery and other similar procedures should not be eligible for the medical expense deduction, unless the procedure is necessary to ameliorate a deformity arising from a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease. Expenses for purely cosmetic procedures that are not medically necessary are, in essence, voluntary personal expenses, which like other personal expenditures (e.g., food and clothing) generally should not be deductible in computing taxable income.”).

⁵⁴ See generally Davis, *supra* note 49; Tessa Davis, *Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality & Marriage*, 19 Cardozo J.L. & Gender 1 (2012–2013).

⁵⁵ The law is settled in this area with costs classified as commuting being viewed as nondeductible consumption decisions. The scholarly debate and cases are rife with the rhetoric of choice and the use of

amounts paid to get to work or for childcare to enable one to work outside the home are costs of earning income or taxable consumption. The foundational case for commuting, *Commissioner v. Flowers*⁵⁶ stands for the principle that commuting costs are paradigmatic personal costs.⁵⁷ Traveling to and from work is not a cost of producing income, but instead a function of a personal decision to live in a given place. Its corollary in the childcare realm is *Smith v. Commissioner*,⁵⁸ which similarly held that childcare costs are paradigmatic personal costs. As in *Gotcher*, in both cases one finds the courts using a choice frame, asking whether the individual had the ability to choose differently, as they decide on the proper tax treatment.

Tax has turned the question of intent flagged by Simons into one of choice, using it as a proxy for intent. Whether an individual has income from an in-kind benefit conferred by another turns, in part, upon whether she had any “choice” but to accept.⁵⁹ That a woman “chooses” to work frames her childcare costs as taxable personal consumption.⁶⁰ Too often, however, the notions of choice to which legislators, courts, and scholars appeal are cribbed and inconsistent. A better theory of choice in tax is needed.

Tax law and policymakers use choice not only to determine the base but to shape the bounds of Tax itself. Should tax be passive or active in its relationship with individuals—shaping or merely responding to their lives unfolding? What is or should be the relationship between tax law and the market? Will it intercede, overriding its “logic” or attempt to influence its course? Ill-defined and inconsistent notions of choice arise throughout the literature and are baked into the doctrine that answer these foundational questions. Part II offers a taxonomy of choice in tax as a first, necessary step to better conceptualizing the role choice plays in shaping tax.

II. A TAXONOMY OF CHOICE IN TAX

The problem of choice in taxation is multifactorial but it stems, in no small part, from the use (and frequent misuse) of economic theory as a principle driver of tax policy. That tax policy has a strong free-market streak is not news. Much tax policy analysis holds that minimizing tax’s distortions on decision-making is an essential element of good tax policy. Stated

perceived *choice as heuristic*. *Andrews v. Comm’r*, 931 F.2d 132, 137 (1st Cir. 1991) (“[L]iving expenses duplicated as a result of business necessity are deductible, whereas those duplicated as a result of personal choice are not.”). See *infra* Parts III and V.

⁵⁶ *Comm’r v. Flowers*, 326 U.S. 465 (1946).

⁵⁷ See also 26 C.F.R. § 1.162-2(e).

⁵⁸ *Smith v. Comm’r*, 113 F.2d 114, 114 (2d Cir. 1940).

⁵⁹ See *infra* Part III discussion of choice as heuristic and the *Gotcher* case.

⁶⁰ See *infra* Part IV discussion of childcare costs and *Smith*, 113 F.2d at 114.

differently, tax shouldn't direct or constrain free choice, or so the thinking goes. *Choice as metric* describes the tendency of policy and decisionmakers to use the (real or perceived) impact of tax on an individual's ability to freely exercise choice as a means of labeling something good or bad tax policy. It is equally axiomatic that tax law is often used as a means of directing individuals or entities toward or away from a given choice. *Choice as feature* describes when policy and decisionmakers expressly use the ability of a tax to influence behavior—to push an individual toward or away from a given choice. *Choice as metric* and *choice as feature* are two sides of the same coin; whether the goal is to avoid behavioral distortions or embrace them, both choice as metric and as feature shape tax by crafting the boundaries of what is or is not a tax concern. The *choice as heuristic* category arises not from how tax law functions in society but from efforts to define the very thing we aim to tax: income.

A. *Choice as Metric*

That taxes may impact an individual's behavior is an oft-lamented reality of tax law. The extent of the impact of a tax on behavior depends on an array of factors—the salience of the tax,⁶¹ non-tax drivers,⁶² the incidence of the tax,⁶³ and elasticity of the response⁶⁴ to name a few.⁶⁵ Setting aside the rich literatures on whether and when neutrality is a proper goal in taxation, it cannot be contested that minimizing the distortionary effects of a tax is a goal of many policy and lawmakers. This Article terms this goal—the preservation of free choice—*choice as metric*.

⁶¹ See, e.g., Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145 (2009); Andrew T. Hayashi, *The Legal Salience of Taxation*, 81 U. CHI. L. REV. 1443 (2014); Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253 (2011).

⁶² The impacts of the marriage bonus/penalty are a ready opportunity to remind ourselves of the nontax drivers. Our system creates tax savings (bonuses) and tax increases (penalties) for some married couples when you compare their tax liability as a married couple to their combined tax liability when unmarried. The prospect of a bonus or penalty could influence a couple's decision to marry, but there is also clearly a multitude of nontax drivers of that decision.

⁶³ Incidence refers to who pays a tax. Consider the commonly-used example of the corporate tax. Ostensibly, the corporation is responsible for paying any income tax owed on the corporate earnings (nominal incidence). The real responsibility (real incidence) may fall elsewhere if the corporation can essentially pass the tax cost through to labor (in the form of lower wages) or the consumer (through higher prices).

⁶⁴ Elasticity of response turns upon the availability and uptake of substitutes. If an individual has a highly-elastic response, she will more readily substitute an untaxed or lower-taxed good for the taxed good; an inelastic response is one where the individual cannot or will not substitute a different good, even as the price of the taxed good increases.

⁶⁵ Some of these terms may go by different names—e.g. fairness rather than equity or simplicity rather than administrability—but the character remains (essentially) the same.

Consider the following example: Erika is a recent veterinary school graduate. She and a classmate, Jenna, believe that the best decision for their practice would be to operate as a limited liability company (an LLC). Jenna has saved \$100,000 cash to invest in the business and Erika owns a small office building that she'd like to use as their office. The building is worth \$300,000 and she holds it with \$100,000 basis.⁶⁶ Jenna could contribute the cash and Erika the building to their newly-formed LLC in exchange for their ownership interests. Tax, then, has a decision to make. Does the swap of the building for the ownership interest trigger tax on Erika's \$200,000 of built in gain⁶⁷?

The tax answer to this question is no. Under subchapter k, Erika's contribution of property in exchange for her ownership interest is treated as a nonrecognition transaction.⁶⁸ To do otherwise would risk distorting her decisionmaking process, driving her away from her preferred choice by making it too costly.⁶⁹ Here, as in countless other examples throughout our tax system, tax tries to take a hands-off approach. The system is expressly structured to avoid the risk of influencing or constraining an individual's choices by imposing a cost. Preservation or maximization of free choice is, then, a key metric by which tax is measured.

B. Choice as Feature

Tax is not always as retiring as the prevalence of the choice as metric category would suggest, however. Doctrine and scholarship frequently reflect a willingness to embrace the regulatory potential of tax. Whether by placing a tax on a given choice, thereby increasing its cost, or by reducing cost via a tax preference, a multitude of provisions expressly exist to structure or direct an individual's choices. Such provisions fall within the *choice as feature* category.

A carbon tax is a ready example of the *choice as feature* classification. Policymakers acknowledge the negative externalities of carbon emissions. Seeking a means of driving emitters away from a reliance on carbon, such policymakers may embrace the market solution of increasing the cost of carbon via a tax. While such a tax could raise revenue, the revenue raised

⁶⁶ Basis is a way of expressing and tracking historic cost. See I.R.C. §§ 1011-1016 for essential rules.

⁶⁷ I.R.C. § 1001 defines gain as the excess of amount realized over adjusted basis. Essentially, what you received in a sale or other disposition over your historic cost.

⁶⁸ I.R.C. § 721 (requirements for nonrecognition), § 722 (implementing nonrecognition in the partner's basis in her partnership interest), and § 723 (partnership's basis in contributed assets to preserves tax attributes) set up the nonrecognition regime for the formation of a partnership.

⁶⁹ The additional cost is the tax on any as yet unrealized gain that would be triggered absent a nonrecognition rule.

may be secondary to the primary goal: incentivize the development and adoption of alternative energy sources. So-called sin taxes exist not only to raise revenue but to attempt to drive individuals to choose not to consume the disfavored good, such as cigarettes or sugary beverages. Herein the ability of tax law to influence an individual's choices is a *feature*—a power to embrace rather than an outcome to avoid.

Choice as feature provisions are not always used to increase the cost of an activity or good. Many preferences should also be understood as examples of provisions that embrace the choice as feature role of choice in taxation. The exclusion of interest on state and local bonds, for example, exists to steer individuals toward investing in state and local governments by effectively increasing the rate of return.⁷⁰ Tax incentives for energy efficient appliances or for businesses or homes to utilize solar panels exist to encourage individuals to choose to invest in such goods.⁷¹ Whether a tax provision makes a transaction, good, or business form more or less costly, the policymakers who embraced tax as the means of doing so embraced the incentive power of tax; they embraced a tax provision's ability to influence choice as feature rather than a bug.

C. *Two Sides of the Same Coin*

Choice as metric and *choice as feature* rely upon and reflect the market focus that dominates tax law and policy. When choice is a metric by which we evaluate tax policy we are elevating notions of efficiency and placing faith in the logic of free markets. Tax, in this view, is strongest when it is neutral—when it is not influencing or distorting individual decision making. *Choice as feature* is the inverse of *choice as metric*—proceeding from an express desire to influence choice. The tension between these two views plays out in the form of the tax expenditure literature which is, in large part, a set of arguments over what tax *should* be—how and when it should be more than an accountant, passively taking stock of an individual's market transactions.⁷²

⁷⁰ I.R.C. § 103.

⁷¹ See, e.g., I.R.C. § 25D (“(a) Allowance of credit In the case of an individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of the applicable percentages of— (1) the qualified solar electric property expenditures, (2) the qualified solar water heating property expenditures, (3) the qualified fuel cell property expenditures, (4) the qualified small wind energy property expenditures, and (5) the qualified geothermal heat pump property expenditures, made by the taxpayer during such year.”).

⁷² See generally William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343 (1989); STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* (1973); STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985); Stanley Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679 (1988); Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They*

Advocates of a comprehensive tax base have long waved the *choice as metric* banner. The basic contention can be summed up as follows: a broader base with fewer exemptions yields more revenue with fewer distortions.⁷³ Elevating the *choice as metric* view of tax, adherents of this approach to tax policy cast a deeply skeptical eye on law that embraces the *choice as feature* view of tax. Those that embrace the regulatory potential of tax are on the opposing side of the comprehensive tax base coin. Eschewing the search for (fetishization of) neutrality in all things tax, thinkers in this space either elevate the role of *choice as feature* in tax or, more sweepingly, challenge the idea of that tax can be neutral as to choice.⁷⁴ The particular policy ends sought may differ, but scholars and policy makers in this camp have a basic comfort with using tax to influence behavior. Underappreciated by comparison is the third role of choice in tax which this Article identifies: *choice as heuristic*.

D. Choice as Heuristic

With over one hundred years of development of our modern income tax, our definition of income is voluminous if not always robust. To define income, we draw upon many code provisions, regulations, extensive case law, administrative pronouncements, and economic theory. Some issues are uncontroversial—an individual’s wages clearly give rise to gross income.⁷⁵ But the history of intellectual development of the concept of income has involved close calls and controversial decisions. And many of those have or continue to be framed as assessments of choice. *Choice as heuristic* describes when courts, the Service, legislators, and scholars ground the concept of income itself in the rhetoric and subjective perception of choice.

Because the Code itself does not provide a comprehensive definition of income,⁷⁶ doctrine needs other touchstones. The most enduring judicial definition of income comes from *Glenshaw Glass*.⁷⁷ Therein, the court defined income as “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”⁷⁸ The “clearly realized” language refers to the decision not to account for fluctuations in value as they

Fit Worse in a Far From Ideal World, 31 STAN. L. REV. 831, 831–884 (1979); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004).

⁷³ See, e.g., SURREY, *supra* note 17; Kleinbard, *supra* note 17.

⁷⁴ See, e.g., Zelinsky, *supra* note 17, at 975–76; Bittker, *supra* note 17.

⁷⁵ I.R.C. § 61.

⁷⁶ See *supra* Part I.

⁷⁷ *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

⁷⁸ *Id.*

occur but to instead wait to tax until a realization event.⁷⁹ The meaning of “accession to wealth” is not immediately clear. Enter case law to help define the concept.

Recall the *Gotcher* case introduced in Part II. The district court held for the Gotchers. The Fifth Circuit comes to essentially the same conclusion as the lower court, but makes more explicit the role of choice in its analysis. Judge Thornberry, drawing upon precedent, writes that “in analyzing the tax consequences of an expense-paid trip one important factor is whether the traveler had any choice but to go.”⁸⁰ The “lack of control” over the decision to go and the schedule in Germany, in the court’s view, undermines either or both the accession to wealth and dominion elements of *Glenshaw Glass*.⁸¹ Consistent with the lower court, the Fifth Circuit views Mr. Gotcher as being beholden to the demands of the companies providing the trip, using such language as “sound business judgment necessitated his accepting the offer” and “[b]esides having no choice but to go”⁸² Though the court concedes that Mr. Gotcher was not formally “forced to go,” it accepts the trial court’s finding that Mr. Gotcher effectively had no choice, and relies upon that lack of choice to pull the trip out of the very definition of income itself.⁸³

Linking sound business purpose to a lack of choice is a curious move. Taken literally, if the realities of the relationship between dealers and the manufacturers meant that the Gotchers truly had no choice but to accept the trip, the Gotchers lacked the ability to exercise their judgment. It would be immaterial whether it was sound business judgment or a poor business decision. By emphasizing that “such invitations had the practical effect of being an order or directive”⁸⁴ the court undermines the idea that the Gotchers exercised judgment at all. They simply did as was required. Of course, in reality, the Gotchers could have chosen not to go, but the court dismisses that option without consideration. The Gotchers had no choice, thus it was good business judgment to go—it was good business sense to go, thus the Gotchers had no choice. The tautology here assumes its conclusion.

Skeptics will contend that the analysis in *Gotcher* reflects a deliberative weighing of all the facts and circumstances. Both courts assert that they are

⁷⁹ Herein the *Eisner v. Macomber* opinion has enduring relevance. Therein, the court offered a different, narrower definition of income as gains derived from capital, labor, or both combined. Realization events include the obvious sales or exchanges and the less obvious, such as findings. *Eisner v. Macomber*, 252 U.S. 189 (1920).

⁸⁰ *United States v. Gotcher*, 401 F.2d 118, 123 (5th Cir. 1968); *Gotcher v. United States*, 259 F. Supp. 340, 343 (E.D. Tex. 1966).

⁸¹ *Glenshaw Glass* provided the still-controlling definition of income as accessions to wealth, clearly realized, over which the taxpayer has complete dominion. *Glenshaw Glass Co.*, 348 U.S. 426.

⁸² *Gotcher*, 401 F.2d at 123 (emphasis added).

⁸³ *Id.*

⁸⁴ *Gotcher v. United States*, 259 F. Supp. 340, 343 (E.D. Tex. 1966).

discerning the primary purpose of the trip from the facts available. If the trip serves primarily business purposes, it is excludable; if not, it is includible. This analysis tracks the business/personal distinction that is the hallmark of identifying deductible outlays from those that are taxable consumption. And the relevance of choice to either question is not immediately clear. But both courts make much of their sense of what the Gotchers had to do—the constraints on their choice. Though the intent of the provider is explored as well, the courts emphasize what they perceive as a lack of choice as justification for keeping the arguable economic gain out of the Gotchers' income. Choice, then, or more precisely the court's sense of (1) the range of choices available to the individual, and (2) how such an individual would respond to the choices available is a heuristic for understanding income itself.

III. THEORIZING CHOICE IN TAX: LESSONS FROM CONTRACT LAW

Looking to other areas of law can help deepen our understanding of the nature of choice in tax. Contract law and scholarship, specifically, have deep, rich, and still evolving discussions on the nature of choice and how the law should respond to constraints on choice. The concept of choice rests at the core of contract law as it wrestles with the nature of autonomy, voluntary agreement and when, whether, and how to enforce agreements made.⁸⁵ Of the many areas of law that must wrestle with choice, contract is a particularly fruitful area to examine as it shares many underlying values with tax.⁸⁶

Tax is of course, not contract. Setting aside whether one views the dividing line between public and private law as impermeable or porous, contract law comes to bear on relationships between persons in a direct way while tax is concerned with the relationship between an individual and the state.⁸⁷ So while one cannot assume that discussions of choice in either area map perfectly onto the other, it is also wrong to dismiss the lessons that may be learned from crossing doctrinal lines.⁸⁸ And, as this part makes clear, there

⁸⁵ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

⁸⁶ MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19–21 (2014) (reflecting on how choice crosses doctrinal boundaries).

⁸⁷ *But see generally* Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617 (2016) (arguing that we should be more cognizant of the way in which tax shapes relationships between individuals and how one person's compliance or noncompliance, as well as decisions regarding administrability, can meaningfully impact other individuals).

⁸⁸ Contract scholars have drawn insights into the nature of duress from criminal law considerations of the same. *See, e.g.*, Patrick Atiyah, *Economic Duress and the Overborne Will*, 98 L.Q.R. 197 (1982) (“Thus what we have here is a unanimous and authoritative rejection of the ‘overborne will’ theory,

is good reason to question how separate are the concepts and uses of choice in both.

Contract is “[about] the realization of reasonable expectations that have been induced by the making of a promise[;]”⁸⁹ “designed to protect the expectations of the contracting parties[;]”⁹⁰ “a legally enforceable promise . . . the morality of [which] depends upon the validity of consent;”⁹¹ “is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”⁹² Each of these statements reflect significant threads in the broader literature on what contract is and what it *should be*.

A respect for autonomy⁹³ that stitches contract tightly to voluntary action is a unifying thread in contract theory. But scholars diverge in their understanding of the meaning of those terms and the weight and respect they give to constraints. And these areas of divergence are instructive.

doubtless overlooked in the contract cases mentioned above because this was a criminal case. But any suggestion that these remarks are for that reason inapplicable in the law of contract is surely unacceptable. First, it is clear that in the passages referred to above the Law Lords were not discussing a doctrine of peculiar application to the criminal law, but the very nature and meaning of the concept of duress. They were addressing themselves to fundamentally juristic questions involved in the meaning of concepts like intention, act, will and voluntary conduct—all concepts which are just as relevant in contract law as in the criminal law. Secondly, two of their lordships, Lord Wilberforce and Lord Simon, actually referred if only *en passant* to the analogy of contract law (see pp. 680 and 695) to justify the views they were upholding in relation to the criminal law. In doing this, Lord Wilberforce and Lord Simon may well have been guilty of a certain disingenuousness having regard to the fact that the overborne will theory has undoubtedly held the field in contract law for many years, but that does not alter the fact that these two, at least, showed clearly enough that they regarded the new analysis as applicable to the law of contract.”)

⁸⁹ 1 CORBIN ON CONTRACTS § 1.1 (2020).

⁹⁰ *Id.* 1 WILLISTON ON CONTRACTS § 1:1 (4th ed.) (“The heart of ‘contract’ is thus found both in its promissory nature and in its enforceability.”).

⁹¹ Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 165–68 (2017).

⁹² RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

⁹³ *See, e.g.*, Kim, *supra* note 91, at 166 (“There are several grounds upon which state interference in contractual matters is justified. One of the most often cited is that a contract promotes the autonomy of individuals by allowing them to decide how to allocate their property rights.”); Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006) (“The traditional picture of contract is the time-honored meeting of the minds. The traditional picture imagines two autonomous wills coming together to express their autonomy by binding themselves reciprocally to a bargain of exchange.”).

For some, contract is, at its core, about an exercise of individual will;⁹⁴ about the morality of promising.⁹⁵ Grounded in a view of law and society that gives primacy to robust and secure property rights,⁹⁶ this understanding of contract keeps broader social conditions at arm's length. Adherents to the contract as promise theory see respect for and public enforcement of private ordering as expressly tied to self-determination and championing autonomy.⁹⁷ Others embrace a less openly moralistic tone but a similar commitment to decontextualized analysis of contract controversies in the interest of keeping contract law in a *laissez-faire* posture.⁹⁸ There is a heavy

⁹⁴ Literature on the history and dominant trends in contract is rich. The works cited here are particularly helpful in both their scope and depth. See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1012 (1985) (“In the earlier part of the nineteenth century, a will theory of contract dominated the commentary and influenced judicial discussion. Contractual obligation was seen to arise from the will of the individual. This conception of contract was compatible with (and early cases appear sympathetic to) an emphasis on subjective intent: Judges were to examine the circumstances of a case to determine whether individuals had voluntarily willed themselves into positions of obligation. In the absence of a ‘meeting of the minds,’ there was no contract. This theory paid no particular attention to the potential conflict between a subjective intention and an objective expression of that intention. The idea that contractual obligation has its *source* in the individual will persisted into the latter part of the nineteenth century, consistent with the pervasive individualism of that time and the general incorporation into law of notions of liberal political theory. Late nineteenth-century theorists like Holmes and Williston, however, began to make clear that the proper *measure* of contractual obligation was the formal expression of the will, the will objectified. Obligation should attach, they reasoned, not according to the subjective intention of the parties, but according to a reasonable interpretation of the parties’ language and conduct.”); Atiyah, *supra* note 88; John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237 (1942); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (2d ed. 2015); GILMORE, *supra* note 11; Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 N.W. U. L. REV. 877 (2000); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (1985).

⁹⁵ FRIED, *supra* note 94; cf. Barnett, *supra* note 32, at 304 (“The consent that is required is a *manifestation of an intention to alienate rights.*”) (emphasis in original).

⁹⁶ FRIED, *supra* note 94, at 7–8, 46 (“It is a first principle of liberal political morality that we be secure in what is ours—so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expend our powers in the world. . . . [W]hatever we accomplish and however that accomplishment is judged, morality requires that we respect the person and property of others, leaving them free to make their lives as we are left free to make ours. This is the liberal ideal. . . This is the ideal that distinguishes between the good, which is the domain of aspiration, and the right, which sets the terms and limits according to which we strive. This ideal makes what we achieve our own and our failures our responsibility too—however much or little we may choose to share our good fortune and however we may hope for help when we fail.” Contract, in this view, “expand[s] human liberty by recognizing the self-imposed obligation of promises . . .”).

⁹⁷ *Id.* at 19 (“The promise principle was embraced as an expression of the principle of liberty—the will binding itself, to use Kantian language, rather than being bound by the norms of the collectivity There is reliance because a promise is [morally] binding, and not the other way around.”).

⁹⁸ For discussions of this vein in the development of contract doctrine, see GILMORE, *supra* note 11, at 103–04; LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA—A SOCIAL AND ECONOMIC CASE STUDY* 20 (1965) (“‘Pure’ contract doctrine is blind to details of subject matter and person The abstraction of classical contract is not unrealistic; it is a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy or the completely free market in the name of social policy. The

emphasis among these theorists on the private nature of contract as essential to respect for free will, autonomy, and the wisdom of a free market.⁹⁹ This view of contract stands in tension with key elements of both the realist and relational understandings. Pushing back against decontextualized (often presented as objective analysis)¹⁰⁰, thinkers in the realist/relationist vein emphasize the public nature of contract—its role as an area of law that does and always has placed limits on private bargaining.¹⁰¹ Rather than a set of rules governing discrete transactions between strangers,¹⁰² contract, in this view, does and should account for power,¹⁰³ for context,¹⁰⁴ for relationships,¹⁰⁵ and for its role in shaping how we relate to one another. The debates between scholars at opposite ends of this spectrum are both about

law of contract is, therefore, roughly coextensive with the free market. Liberal nineteenth century economics fits in neatly with the law of contracts so viewed. It, too, had an abstracting habit. In both theoretical models—that of the law of contracts and that of liberal economics—parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision”); Dawson, *supra* note 94, at 262–71.

⁹⁹ See, e.g., FRIED, *supra* note 94, at 93–94, (expressing concern over a robust understanding of duress, stating “In fact, duress covers many kinds of a situations in which it does not seem right to treat a *knowing* act of agreement as binding because in one way or another it is felt that there was no fair choice. This intuition, however, poses a dilemma for contract doctrine and for the theory of contract as promise, of contract as autonomous self-determination. If a promisor knows what he is doing, if he fully appreciates the alternatives and chooses among them, how can it ever be correct to say that this was not a free choice? . . . The problem is not just theoretical; it is (and has traditionally been seen to be) a make-or-break challenge to the liberal economic theory of the market. For if the market is to be justified on any other than the instrumental ground of leading to the most efficient allocations of resources, it must be because the market is the system of free men freely contracting (promising) with each other.”)

¹⁰⁰ GILMORE, *supra* note 11, at 16, 45, (criticizing the Holmesian notion that contract was objective stating “Another aspect of the theory was that the courts should operate as detached umpires or referees, doing no more than to see that the rules of the game were observed and refusing to intervene affirmatively to see that justice or anything of that sort was done,” and “The law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals, and judge the parties by their conduct.”).

¹⁰¹ Dalton, *supra* note 94, at 1010 (“Since at least the mid-nineteenth century, the discourse of contract doctrine has tried to portray contract as essentially private and free. At all times, nonetheless, traditional doctrine has uneasily recognized a public aspect of contract, viewing certain state interests as legitimate limitations on individual freedom. But this public aspect has traditionally been assigned a strictly supplemental role; indeed, a major concern of contract doctrine has been to suppress ‘publicness’ by a series of doctrinal moves.”). See generally Radin, *supra* note 93.

¹⁰² See ATIYAH, *supra* note 88.

¹⁰³ See, e.g., Dawson, *supra* note 94, at 253 (writing on how the concept of economic duress requires contract “to take a stand on that central issue of modern politics, the control of economic power.”).

¹⁰⁴ See, e.g., GILMORE, *supra* note 11, at 64 (discussing Corbin favorably, stating, “Corbin’s abiding interest was in what he called the ‘operative facts’ of cases; he had no love for, indeed little patience with, doctrine. . . . [A] sufficient reason for comparative historical study of cases in great number is that fact that such study frees the teacher and the lawyer and the judge from the illusion of certainty; and from the delusion that law is absolute and eternal, that doctrines can be used mechanically, and that there are correct and unchangeable definitions.”).

¹⁰⁵ See, e.g., IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS YALE UNIVERSITY PRESS (1980)).

what they see contract law doing *in fact* and what they believe contract law *should do*. Whether a particular scholar is “right” in her assessment of what contract law *is, has been, or will be*, is separate from the insights gained from their debates. Particularly relevant are the themes and undercurrents of the debate and how they come into full view in contract defenses, specifically duress and unconscionability.

An enforceable bargain. A promise. An agreement. Built into contract law is the idea that for one to be bound she must have had some degree of volition. Offer and acceptance need to be voluntary¹⁰⁶—the result of the individual’s consent.¹⁰⁷ Ideas of volition, in turn, connect to notions of will, autonomy, freedom, and the relation of law to each. How contract assesses volition¹⁰⁸—its presence, absence, and limits—in turn offers insights on the nature of choice. Contract recognizes, through defenses like duress and unconscionability, that constrained choice or a complete lack of choice—that agreement stemming from a dearth of meaningful options¹⁰⁹ or force of threat or circumstance—may lack the requisite voluntariness to justify enforcing a given contract.¹¹⁰ Exploring differing notions of duress and unconscionability: clarifies (1) the connection between choice frames and autonomy; (2) the constraints or influences on choice that give courts, lawmakers, and scholars pause; and (3) other values that are bound up with autonomy in the choice frame.

Consider duress first. Duress, depending upon its nature, may so undermine the essential element of voluntary agreement as to make a contract entirely unenforceable (void) or merely voidable.¹¹¹ At least three broad understandings of duress have developed.¹¹² In the first, duress is found when there is unlawful, usually physical, infringement on the exercise of free

¹⁰⁶ Kim, *supra* note 91, at 170 (“[T]here are three conditions required for consent to be valid: an intentional act, knowledge, and voluntariness.”).

¹⁰⁷ FRIED, *supra* note 94, at 43, 45 (“The need for acceptance shows the moral relation of promising to be voluntary on both sides. It is part of the intuitive force behind the idea of exchange” and “Promises—and therefore contracts—are fundamentally relational; one person must make the promise to another, and the second person must accept it.”); Kim, *supra* note 91, at 168 (“Yet, while all contracts require consent as a prerequisite, the meaning of consent is often obscure.”).

¹⁰⁸ Kim, *supra* note 91, at 170 (“[C]onsent is not a line to be crossed but a dynamic state that varies depending upon the circumstances. To say “yes” means to agree, but the way that “yes” is said and the acts to which it grants permission may be subject to dispute. A reluctant acquiescence, even if not physically forced, may not merit the same moral or legal deference as an enthusiastic engagement.”).

¹⁰⁹ *Id.* at 205 (“The doctrine of unconscionability allows a court to refuse to enforce a contract where the party seeking avoidance lacked meaningful choice and the terms of the contract are unreasonably one-sided.”).

¹¹⁰ *Id.* at 172 (“The condition of voluntariness is difficult to define and requires contextual analysis.”).

¹¹¹ *Id.* at 198.

¹¹² Dalton, *supra* note 94, at 1024–38.

will.¹¹³ In the second, duress is found when the contract entered into is believed to be profoundly unfair. In the third, duress is found when the threats made to the coerced party are deemed improper.¹¹⁴

Will and promise focused theories of contract tend to advocate a narrow duress doctrine. Duress, in this view, is essentially limited to threats of physical violence or extortion from the party seeking agreement but little else.¹¹⁵ Because such forces rob the individual of her ability to freely choose to exercise her will, she cannot be understood to have agreed to anything.¹¹⁶

¹¹³ FRIED, *supra* note 94, at 93 (“Duress is a vice in the making of an agreement. Moreover, the vice is not the least bit cognitive: The victim of duress is all too aware of what is happening and what will happen to him. Duress relates not to rationality or cognition but to freedom or volition. Just as contract as promise excludes obligations assumed by people who do not know what they are doing . . . so also it excludes cases in which assent is not voluntary.”) (citation omitted).

¹¹⁴ See, e.g., *Tarpy v. San Diego*, 1 Cal. Rptr. 3d 607, 614 (Cal. Ct. App. 2003) (“In addition to statutory duress, the law recognizes the concept of economic duress as a basis for vitiating a coerced party’s consent to an agreement. (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644, 76 Cal.Rptr.2d 615.) Economic duress does not necessarily involve an unlawful act, but may arise from an act that is so coercive as to “cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract.” (*Ibid.*; cf. *Rich & Whillock, Inc. v. Ashton Development, Inc.*, *supra*, 157 Cal.App.3d at p. 1158, 204 Cal.Rptr. 86 [indicating that the act must be “wrongful”].)”).

¹¹⁵ See RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. a (AM. L. INST. 1932) (“Much more commonly duress consists of threats that cause such fear as to induce the exercise of volition, so that an undesired act is done. In duress of the latter type neither the threats alone nor the fear alone is duress. The same threats may cause fear in one person and not in another. The test of what act or threat produces the required degree of fear is not objective. The threat need not be such as would put a brave man, or even a man of ordinary firmness, in fear.”); RESTATEMENT (SECOND) OF CONTRACTS § 174 (AM. L. INST. 1981) (“If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.”); see also FRIED, *supra* note 94, at 95 (“Consider three cases: I. An armed robber threatens his victim on a dark and lonely street: “Your money or your life.” II. One of many competing supermarkets in an affluent suburb offers shoppers peas at thirty-nine cents a can. III. One stamp collector offers another a “Penny Black” at a steep price, knowing that the buyer needs just this stamp to complete a set. Duress is clearly present in the first and absent in the second case.”); Nancy S. Kim, *supra* note 91, at 172–73, describing the connection between voluntariness and consent and stating “Undoubtedly, an individual who is physically forced to manifest consent is not consenting voluntarily An individual who is threatened with physical violence is also not consenting voluntarily. . . . Generally, however, the condition of voluntariness is only deemed to be lacking if the pressure to consent came from the party seeking or benefiting from the consent.”).

¹¹⁶ See, e.g., FRIED, *supra* note 94, at 92 (“A promise given under duress, though knowingly made, is not freely made.”). Cf. Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L.J. 1305, 1321 (2019) (offering an argument that consent approaches to defenses fail to explain the area, stating, “Setting ignorance aside, what about lack of meaningful choice? Here too consent-based objections face difficulties. Consider one possible response: meaningful choice is not required for consent to be valid. Individuals may lack a meaningful choice about whether to consent to a life-saving surgery, for example, yet quite extensive liability waivers may be valid nonetheless. So long as consent is not secured through fraud, coercion, or duress—the response continues—lack of meaningful choice does not necessarily invalidate consent. If this response is correct, the fact that individuals lack a meaningful choice about whether to lose their rights under the terms of accountability waivers does not necessarily undermine the validity of those waivers. So objecting to accountability waivers on the grounds that individuals lack meaningful choice does not by itself show that those waivers are invalid.”).

The actions of another may have resulted in the seeming acquiescence to be bound, but the law should not respect her assent because it lacked volition.¹¹⁷ To find and enforce a contract herein would undermine rather than support autonomy. What choice existed here was illusory or so constrained as to effectively be so. Or so the thinking goes.

Others take a broader view of duress, grounding their approaches in an essential insight: all choices are shaped by external forces.¹¹⁸ Stated differently, the imagined free will of classical and promise contract theory is a fiction. The insight is succinctly stated: “Consider first the voluntariness of the assumption of obligation. This notion presumes the capacity to choose, but choice in exchange transactions and relations, as *anywhere else*, is by its nature pressured, not voluntary: if one does not assume the obligation, one does not get what one wants.”¹¹⁹ More modest arguments consistent with this critique put voluntariness and constraints on choice on a spectrum, arguing that contract should account for conditions shy of the physical threats that duress usually requires.¹²⁰ Both the modest and full-throated versions of this critique, however, agree that making the validity of a contract hinge upon an exercise of free choice is a tricky thing in the real world.

Rejecting the will theory of contract¹²¹—and the narrow concept of duress that it imagines—these theorists understand duress as a means of addressing substantively unfair agreements, not an absence of volition.

¹¹⁷ GILMORE, *supra* note 11, at 84 (“In no civilized system of law will such extorted ‘agreements’ be enforced; in our system, we explained that they were unenforceable because they lacked “consideration.”); DALTON, *supra* note 94, at 1027 (“Including duress within the core of contract doctrine seemed appropriate, even necessary, to nineteenth century will theorists, who believed that enforcement of contracts was all about implementing the free wills of the parties. They believed contract required assent; voluntarism was the heart of contractual obligation. In developing a body of duress doctrine, the crucial issue was therefore the reality of assent.”); FRIED, *supra* note 94 at 92–111.

¹¹⁸ See, e.g., DALZELL, *supra* note 94, at 239 (“We speak of a contract as being ‘voluntary,’ the result of “free will,” but it is easy to forget that a will exercises its freedom only in selecting one of several possible courses of action. I agree to pay ten cents for a loaf of bread, not because I want to give the baker ten cents, but because that’s the only way I can get the bread. I am choosing between alternatives, giving up the dime or doing without the bread. If my will were completely unrestrained, I should almost certainly prefer to get the bread and also keep the money. My freedom is simply the opportunity to decide whether I will give up the ten cents, or do without the bread—to choose one of two courses, neither of which is entirely satisfactory. That is, I am “free” to select the lesser of two evils; so far as the present point is concerned, that is exactly the situation I was in when I signed the contract at the point of a gun.”); ROBERT L. HALE, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 612 (1943) (“[A]ll money is paid, and all contracts are made, to avert some kinds of threats.”).

¹¹⁹ Macneil, *What We Know*, *supra* note 94, at 503 (emphasis added).

¹²⁰ Kim, *supra* note 91, at 172 (“But in addition to physical force, bodily reflexes, and threats of physical force, there is a range of circumstances that diminish or degrade the condition of voluntariness.”).

¹²¹ Dalton, *supra* note 94, at 1029 (On duress as a response to “substantive unfairness:” “The arbitrariness of the choices made by formalist duress doctrine, and particularly its exclusion of economic duress, made it exceptionally vulnerable to attack. As early as the 1920’s, Hale noted that all contracting involves a measure of coercion, and that the advantaged person enjoys that position because the legal system has created entitlements for him.”).

Rather than being limited to asking whether the individual was compelled to agree (a focus that begs questions of how threatening the force was, how believable, how a person *should* respond, and the like), this view of contract and duress asks different questions: What was the relative bargaining power of the parties?¹²² Do broader questions of social justice, including considerations of economic power, demand the state intervene?¹²³ Was the threat improper? Which conditions that constrain choice matter? Some scholars in this space argue for a robust notion of duress that would invalidate a wider array of agreements¹²⁴ while others are less focused on the specific bounds of duress and more on ensuring that contract simply acknowledge its regulatory nature.¹²⁵ But the grounding is the same: choices are not infinite and will is always constrained, so to make the validity of a contract turn upon whether there was choice—whether will was constrained—misses the mark and makes the doctrine of duress a lackluster and inconsistent response.

What duress *should* be remains a subject of debate¹²⁶ but the realist insight on choice seems self-evident. The individual who signs a contract rather than be shot signs the contract out of a fear of the alternative.¹²⁷ It is imprecise to say she had no choice but to sign. It is far more precise to say the alternative presented was wholly unacceptable. If all choice is constrained then duress-as-constrained-choice/duress-as-absence-of-will falls apart.¹²⁸ What we profess is about constrained choice/absence of will

¹²² Dalzell, *supra* note 94, at 240 (“It seems more reasonable to say that a contract or payment secured by duress is defective not because of some difference in the nature of the consent, but because of the impropriety of the alternative presented; that is, of the pressure used.”).

¹²³ Dawson, *supra* note 94, at 253.

¹²⁴ Broad notions of economic duress, for example, would make void or voidable a much wider array of agreements than does current doctrine.

¹²⁵ Dalton, *supra* note 94, at 1030 (“Employing Hale’s insights, the Realists argued that the scope of the doctrine of duress could readily be expanded, and that the doctrine should reflect sensible policies plainly articulated rather than some metaphysical notion of ‘free will.’” The Realist message was, “If contract law is to be ‘public,’ let us be clear what public concerns are being met.”); Radin, *supra* note 93, at 1233 (“The liberal public-private distinction has been central to the notion of public enforcement of private ordering. Hence, it is central to the traditional notion of contract. Private ordering has been thought of as the expression of free will privately, but in the context of a juridical infrastructure. The juridical infrastructure is necessary to set out the limits of contract—delineate what is off the bargaining table, such as baby-selling, contracts in restraint of trade, murder for hire—and also to police transactions for coercion and fraud. These limits, I would say, are necessary to the idea of private ordering. The legal realists deconstructed the public-private distinction by showing that contract, which is supposed to be private, cannot exist without its public infrastructure, its infrastructure of legality.”).

¹²⁶ Dalton, *supra* note 94, at 1024–38 (Dalton deconstructs contract as a whole, including, duress with an eye toward revealing the underlying narratives, the stories that contract tells the world about itself and those that shape the doctrine. She addresses duress specifically at pages 1024–38).

¹²⁷ Dalzell, *supra* note 94, at 238–39 (“Faced with the choice that was offered, the victim of duress gives a genuine consent rather than suffer the alternative consequences.”).

¹²⁸ See Dalton, *supra* note 94, at 1024–38; Dalzell, *supra* note 94, at 238–39; Dawson, *supra* note 94, at 253; and Macneil, *Challenges and Queries*, *supra* note 94.

is, in fact, a judgment about which constraints we *believe* should invalidate an agreement and which should not, or which agreements are acceptable as a matter of social policy and which are not.¹²⁹ A classification that turns upon whether the individual “had any choice” attempts to hold at arm’s length more difficult policy questions and, perhaps even more damaging, to cloak policy judgments with a veneer of objective assessment. Here duress bleeds into the doctrine of unconscionability.¹³⁰

Consider the problem of adhesion contracts—a point of entry to the unconscionability defense and a fruitful area in which scholars wrestle with the nature of volition and choice. In contemporary examples such as clickwrap¹³¹, shrinkwrap¹³² and similar terms, one finds different forces than common notions of duress.¹³³ Rather than physical force or wrongful actions of a party to the contract, the players in such cases are market forces or the constrained choice consumers face because the company with which they’re

¹²⁹ GILMORE, *supra* note 11 (discussion of how what duress really developed to police was a dividing line between good faith and bad faith agreements).

¹³⁰ Kim, *supra* note 91, at 206 (“If, as this Article argues, consent is a condition (or more precisely, a state which is the result of a set of conditions) rather than an on/off switch, it is not absent or destroyed in the case of unconscionability. It is, however, diminished or diluted compared to the consent of someone with plenty of choices who enters into a contract with eagerness and enthusiasm. Where a party seeks to escape performance on the grounds of unconscionability, there is no new information or situation that invalidates consent, only an inability or a disinclination to perform, which is justified if the other party’s behavior is exploitative or opportunistic. The voluntariness condition is diminished, but not to the extent required to prove duress. Because of this, unconscionability is said to be a sliding scale, meaning that the knowledge and voluntariness conditions are determined by the egregiousness of the drafting party’s conduct.”).

¹³¹ Clickwrap refers to the familiar “I agree” boxes that everyone reading this article has clicked through when navigating modern, heavily-internet-mediated life. See Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 842-46 (2007).

¹³² Shrinkwrap describes contract language that asserted that an individual entered into a contract and agreed to all terms by simply unwrapping a software box (hence, shrinkwrap). For further discussion, see Kim, *supra* note 131, at 838–42.

¹³³ See, e.g., *Williams v. Walker Furniture*, 350 F.2d 445, 449–50 (D.C. Cir. 1965) (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.”)

contracting has monopoly-type power and influence.¹³⁴ To many scholars, the “take it or leave it”¹³⁵ nature of such contracts—and the tendency of courts to uphold them nevertheless—goes to the heart of contract itself.

Unconscionability claims are often asserted in adhesion or boilerplate cases because of the focus on unfair terms and unequal bargaining power. Doctrinally, unconscionability is a fact specific inquiry¹³⁶ commonly held to have two aspects: procedural unconscionability and substantive unconscionability.¹³⁷ Procedural unconscionability asks if “a party lacked meaningful choice as to whether to enter the agreement.”¹³⁸ Substantive unconscionability asks whether “the contract terms are unreasonably favorable to one party” such that they are “so outrageously unfair as to shock the judicial conscience.”¹³⁹ Consider a classic clickwrap scenario: your work requires you to regularly create and edit documents. A software download, (call it, Macrohard Language) exists to enable you to do and is so widely-adopted. To use the software you have to click “I Agree” to a laundry list of terms and conditions. The dominance of the company offering the software and the necessity of it for your work make alternatives scarce or functionally nonexistent, calling into question the voluntariness of your agreement.¹⁴⁰ You clicked the box or you opened the package¹⁴¹ but what choice did you have?¹⁴² Unconscionability, then, turns our attention to how non-physical

¹³⁴ See Kim, *supra* note 131, at 821–22 (“But, in fact, in many cases, due to the systemic bargaining imbalance within a particular market segment, the terms have become so uniform and standardized that the consumer effectively has no choice.”).

¹³⁵ See generally Kim, *supra* note 91; Kim, *supra* note 131; Radin, *supra* note 93; Encarnacion, *supra* note 116.

¹³⁶ See Fox v. Computer World Servs. Corp., 920 F. Supp. 2d 90, 97–98 (D.C. Cir. 2013). “This is determined under the totality of the circumstances; “the court must ask whether ‘each party to the contract, considering his obvious education or lack of it, ha[d] a reasonable opportunity to understand the terms of the contract, or [whether] the important terms [were] hidden in a maze of fine print and minimized by deceptive [] practices.’” Fox, 920 F. Supp. 2d at 98 (quoting Williams v. Walker–Thomas Furniture Co., 350 F.2d 445, 449 (D.C.Cir.1965)) (alterations in original).

¹³⁷ Fox, 920 F. Supp. 2d at 90.

¹³⁸ *Id.* at 97.

¹³⁹ *Id.* at 99.

¹⁴⁰ Kim, *supra* note 91, at 206 (“The defense of unconscionability is a way to show the deficiency of the voluntariness and knowledge conditions. The factors—unfair, one-sided terms and a lack of bargaining power—suggest that either the party did not know what the contract said (deficient knowledge condition) or had no alternatives (deficient voluntariness condition).”).

¹⁴¹ Kim, *supra* note 131, at 801 (“The judicial transmutation of constructive assent into actual assent undermines one of the fundamental principles underlying contract law—that of individual autonomy.”).

¹⁴² Offering a dignity-focused critique of adhesion contracts. See Encarnacion, *supra* note 116, at 1319 (“There are several reasons to think that boilerplate accountability waivers involve impoverished choice. Even if we somehow knew that a take-it-or-leave-it waiver of an important right appeared in the fine print, it is often unreasonable to expect us to ‘shop’ for better terms given the high cost of doing so or low likelihood of finding materially different terms. What’s more, even if individuals could in theory

forms of influence such as power disparities and economic pressures can so constrain choice as to hollow out volition.

Should such a contract never be enforced? Not necessarily¹⁴³ but, scholars argue, you cannot call what happened in formation of the contract voluntary. Contracts scholar Margaret Radin observes that such cases lead one to believe that: “The liberal theory of voluntary exchange transactions between autonomous individuals is now vestigial. The idea of voluntary willingness first decayed into consent, then into assent, then into the mere possibility or opportunity for assent, then to merely fictional assent”¹⁴⁴ Scholar Nancy Kim writes in a similar vein: “‘Assent’ has thus been construed to mean acquiescence rather than *agreement*. While one of the objectives of contract law is universally acknowledged as being the promotion of individual autonomy, ‘assent’ is thus stripped of any requirement of voluntariness or volition.”¹⁴⁵ There may be valid reasons to enforce many adhesion contracts but what such critics seek is clarity on what contract is doing rather than what it *purports to do*. In accepting constructive assent or deeply-constrained choice, contract may be privileging a notion of efficiency,¹⁴⁶ rejecting the specific circumstances for the fiction of the rational man¹⁴⁷, or aiming to reduce transaction costs.¹⁴⁸ Autonomy and choice matter for contract, unless something else matters more.

But such contracts are regularly enforced. Both duress and unconscionability remain contested and controversial, and the bar for establishing them is high (or, stated differently, what contract labels as a volitional act and meaningful choice is low). YouTube’s market space is

shop around for better terms, in many markets we are unlikely to find a substitute good or service without a similar waiver. This is because competition frequently fails to weed out problematic terms. And this should come as little surprise. Problematic boilerplate terms including accountability waivers quickly become industry norms, at least when they are perceived by firms as cost-saving devices. Even Chief Justice Roberts commented during oral argument in *Carpenter v. United States* that ‘you really don’t have a choice these days if you want to have a cell phone.’ He might just as well have added that you ‘don’t really have a choice’ about whether your interactions with cell phone companies will be governed by boilerplate containing arbitration clauses. So not only does competition fail to weed out accountability waivers and other problematic terms, competition may in fact serve to entrench their use.”)

¹⁴³ Margaret Jane Radin, *32nd Annual Sullivan Lecture: Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 *CAP. U.L. REV.* 617, 624–30 (2012). Adhesion contracts may, for example, reduce transaction costs in a way that benefits economic activity.

¹⁴⁴ Radin, *supra* note, 93, at 104.

¹⁴⁵ Kim, *supra* note 131, at 817 (emphasis added).

¹⁴⁶ Radin, *supra* note 93, at 1231 (Assent turns “then [in]to mere efficient rearrangement of entitlements without any consent or assent.”).

¹⁴⁷ Radin, *supra* note 143, at 630 (“In other words, a reasonable person—meaning the economically rational person—would choose this. This is the final stage in the decay of the idea of agreement; the attempt to do away with individual consent altogether.”).

¹⁴⁸ Kim, *supra* note 131, at 817 (“[It instead] reflects another of contract law’s goals, which is to encourage and facilitate economic transactions.”).

apparently not so dominant as to eradicate “meaningful choice.”¹⁴⁹ The power disparity that allows an employer to condition employment on an agreement to arbitration is not per se unconscionable.¹⁵⁰ What lessons can tax take, then, from both contract doctrine in this space and scholars’ criticisms of it?

At least three insights emerge from contract theory on formation of contract and the unconscionability and duress defenses: First, choice gains its substance from what we understand to be constraints on choice. Deciding when, whether, and whose choices matter turns choice into a frame for understanding a problem or issue. This first insight connects to the second, that a choice frame makes for a weak and indeterminate foundation. Contract cares about choice because it cares about autonomy—choice is the means of assessing a complex commitment. But, as the debates within contract demonstrate, choice is not a measurable phenomenon; it is malleable and subjective. If a realist persuasively argues that economic conditions compelled an individual to agree to oppressive terms, a formalist can respond

¹⁴⁹ *Song Fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 62 (D.D.C. 2014) (“Plaintiffs argue that YouTube has ‘overwhelming power in its chosen market’ and that Song fi, as a ‘small, independent music compan[y],’ had no choice but to accept the Terms of Service. Pl. Mem. at 9. Though YouTube is undoubtedly a popular video-sharing website, it is not the case that Plaintiffs lacked any kind of meaningful choice as to whether to upload their video to the YouTube website and agree to the conditions set forth by YouTube. Plaintiffs could have publicized the LuvYa video by putting it on various other file-sharing websites or on an independent website. Moreover, the fact that Plaintiffs lacked bargaining power does not render the entire contract or the forum selection clause procedurally unconscionable. *Fox*, 920 F. Supp. 2d at 98 (finding plaintiff had ‘meaningful choice’ about whether to sign agreement even though it was presented as condition of employment without further negotiation); *2215 Fifth St. Assocs.*, 148 F.Supp.2d at 56 (finding forum selection clause enforceable despite ‘the relative disparity in the bargaining positions of the parties throughout the negotiation process’ because ‘the presumption in favor of enforcing a forum selection clause applies even if the clause was not the product of negotiation’) (quoting *Marra v. Papandreou*, 59 F. Supp. 2d 65, 70 (D.D.C. 1999).”).

¹⁵⁰ *Fox v. Computer World Servs. Corp.*, 920 F. Supp. 2d 90, 97–98 (D.D.C. 2013) (“Fox argues that the arbitration agreement is procedurally unconscionable because it was presented to him on a ‘take it or leave it basis and buried within a larger series of new employee documents sent to him electronically for acknowledgement,’ and CWS and C2 did not disclose that they were joint-employers. Pl.’s Opp. at 13. A contract is procedurally unconscionable where a party lacked meaningful choice as to whether to enter the agreement. *Urban Invs.*, 464 A.2d at 99. ‘Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.’ *Williams v. Walker–Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). Specifically, the court must ask whether ‘each party to the contract, considering his obvious education or lack of it, ha[d] a reasonable opportunity to understand the terms of the contract, or [whether] the important terms [were] hidden in a maze of fine print and minimized by deceptive [] practices.’ *Id.* The evidence in this case demonstrates that Fox had a meaningful choice as to whether to sign the arbitration agreement. First, the fact that the Agreement was presented to Fox as a condition of employment without further negotiation does not render it unenforceable. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, (1991) (‘Mere inequality in bargaining power [] is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.’). Second, the Agreement was not ‘hidden in a maze of fine print’ but was presented as separate document with the title ‘AGREEMENT TO ARBITRATE’ in all capital letters and in bold font.”).

by arguing that such constraints aren't problems for contract. Taken together, these first two insights lead to a third, how one uses and critiques the choice frame is often a proxy for other debates¹⁵¹ such as formalism vs. realism, faith in markets vs. skepticism thereof, and the utility and application of the public vs. private law debate. Choice becomes the window dressing for other normative commitments and priors.

Consider a final illustrative comparison: Charles Fried, promise theorist and advocate of a narrow notion of duress writes:

It would be absurd to say that a choice is free enough to ground a promise only if it is in some sense gratuitous or unmotivated. If only unmotivated choices were free, courts would be committed to reviewing on grounds of duress all contractual choices that issued from the parties' goals and desires. If on the other hand duress focuses only on the relative wealth or advantages of the parties to a transaction and disparities in these are held to undermine the voluntariness of the choice, then we might just as well redistribute evenly, holding the rich but not the poor to their bargains. Either view is inconsistent with the concept of contract as promise, as autonomy.

The problem is not just theoretical; it is (and has traditionally been seen to be) a make-or-break challenge to the liberal economic theory of the market. For if the market is to be justified on any other than the instrumental ground of leading to the most efficient allocations of resources, it must be because the market is the system of free men freely contracting (promising) with each other. Doubts about the moral status of calculated choices as embodied in bargains (or, as in the case of the uncle's promise, even in gifts), doubts that lead these choices to be validated only if they accord with an external, imposed judgment, undermine the case for the market and the case for promising as well.¹⁵²

Fried pushes back on a broader definition of duress that would consider the economic power (which itself builds upon the realist/relational insight that economic power or lack thereof constrains as much as a gun) by essentially rejecting that such constraints should be understood as coercion. "Calculated" yes; coercion, no. He pairs this idea with the argument that any broader definition of duress or recognition of the coerced nature of all

¹⁵¹ Dalton, *supra* note 94, at 1008–11.

¹⁵² FRIED, *supra* note 94, at 94.

decisions would turn contract law from private to public law;¹⁵³ from an area of law that allows private parties to exercise their will and bind themselves, into a system of “ad hoc” redistribution when such distributive justice concerns should be the focus of tax (an area of public law).¹⁵⁴ Only a narrow definition of duress, in this view, keeps the messy political questions at bay, protects the operation of a free-market system, and best respects individual autonomy. And yet by persisting in the idea that contract is solely about respecting the individual’s ability to choose to bind her future self and by drawing a line as to what counts as coercion, Fried makes just such judgements. He chooses, consistent with the classical view of contract, to pretend that contract is wholly-private and that its most important goal must be to preserve the functioning of a free-market system.¹⁵⁵

Realist and relational theorists, in contrast, view contract as both public and private. In her excellent article deconstructing contract doctrine, Clare Dalton summarizes the view as follows:

Thus, even in this objectified form, the will theory of contract was equated with the absence of state regulation: The parties governed themselves; better yet, each party governed himself.

The Realists made it impossible to believe any longer that contract is private in the sense suggested by this caricature. By insisting that the starting point of contract doctrine is the state’s decision to intervene in a dispute, the Realists exposed the fiction of state neutrality. As Morris Cohen argued:

[I]n enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy.

¹⁵³ *Id.* at 104–06.

¹⁵⁴ *Id.* at 106.

¹⁵⁵ Dalton, *supra* note 94, at 1013 (“At its most radical, the Realist critique portrays the ‘publicness’ of contract as overshadowing its ‘privateness.’ According to Cohen, ‘[T]he law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.’ Thinking about contract from this perspective revealed that the state’s interest in maintaining a free enterprise system-while policing its excesses-was at work in doctrines such as duress and consideration. Problems of power-the state’s power over individuals, and the power of individuals over one another-came into focus.”).

From this vantage point, the objectivist reliance on intent as the source of contractual obligation was a blatant abdication of responsibility, a failure to address and debate the substantive public policy issues involved in decisions about when and how courts should intervene in disputes between contracting parties.¹⁵⁶

Contract is, then, at all times, public. As its defenses shape the bounds of when the state will intervene, it takes a position on normative questions that impact the relationship between the individual and the state. Nonintervention in private agreements in the interest of free markets and subjective assessment of choice does not keep contract private nor does it keep it normatively neutral.¹⁵⁷

The roles of choice in tax parallel the same disagreements. The next part combines contract theory with the taxonomy of Part II to yield new insights into old problems. *Choice as metric* and *feature* rely upon their own fictions regarding the possibility of tax being wholly-neutral regarding choice. *Choice as heuristic* employs notions of duress that toggle between realist/relationalist and classical theories of contract. And much of our critique of instances of bias in the Code (my own included) often works within a choice frame even as we challenge the consequences of that frame. This next Part explores these parallels.

IV. CHOICE AND TAX: PERENNIAL DEBATES REVISITED

Tax is complicated. It shapes and is shaped by the relationship between the state and its citizens. It shapes and is shaped by beliefs of what we owe each other. It is both public and personal. That such a wide-ranging and impactful area seeks to lend its boundaries and substance an air of objectivity is unsurprising. So tax often dresses up, consciously or un- nuanced, normative judgments in the trappings of observable metrics and conditions. Like contract theory on duress, it frames and reframes questions to punt, to

¹⁵⁶ Dalton, *supra* note 94, at 1012–13 (emphasis omitted).

¹⁵⁷ GILMORE, *supra* note 11, at 103–104 (“I suppose that laissez-faire economic theory comes down to something like this: If we all do exactly as we please, no doubt everything will work out for the best. . . . It seems apparent to the twentieth century mind. . . . that a system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves and to act, so to say, as their own self-insurers. As we look back on the nineteenth century theories, we are struck most of all, I think, by the narrow scope of social duty which they implicitly assumed. No man is his brother’s keeper; the race is to the swift; let the devil take the hindmost. For good or ill, we have changed all that. We are now all cogs in a machine, each dependent on the other. The decline and fall of the general theory of contract and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond.”)

avoid, to make the subjective seem objective, often using the language of choice to cloak its normative judgments. This Part revisits key cases and perennial challenges in tax to reexamine them with the help of the taxonomy in Part II and the insights of contract theory explored in Part III. Doing so illustrates the limited explanatory power of the choice frame, its inconsistencies, its connection to bias in the definition of income, and how its often competing commitments put tax in tension with itself.

This Part will show how the concerns that animate the duress and unconscionability defenses and the debates over the nature of choice and consent in contract are echoed in tax. But duress is hard to win, as is unconscionability. To be clear, I am not asserting that the notions of duress discussed in the tax authorities in this Part map perfectly onto those of contract. Even less so that a court would find duress or unconscionability standards met in the cases and policy questions raised. Courts uphold clickwrap and other adhesion contracts.¹⁵⁸ Profoundly unequal bargaining power does not establish the unconscionability of a contract.¹⁵⁹ For all that contract makes of the importance of free exercise of will, it regularly upholds contracts where consent is mere fiction—where an individual had no choice but to agree. What does track across the two areas, however, is the frame. The basic sense that how constrained or unconstrained an individual's options are—how free was her will; how voluntary was her action—matters; is a way of understanding and interpreting the proper scope and application of the law. So too does the tendency of that frame to import and disguise other commitments and serve as a proxy battle for other arguments. Stated differently, the parallels aren't about the doctrine of duress and unconscionability but rather the concerns that gave rise to them and that are taken up by their critics.

A. *Choice and the Inherent Bias of Income*

Examining choice in contract illustrated how malleable it is as a concept. While often defended as an observable, assessable metric for determining how well the law is supporting normative commitments, choice is, in fact, in the eye of the beholder. When tax uses *choice as heuristic*—as a frame for defining income—it invites subjective judgment (and the bias that often follows) in through the front door.

¹⁵⁸ See discussion *supra* Part III.

¹⁵⁹ See *supra* text accompanying notes 137–51.

1. *Gotcher* Revisited

Return once again to *Gotcher*. In that case we find a close connection between *choice as heuristic* and concern for constrained choice that undergird the contract defenses of duress and unconscionability. Mr. Gotcher was “compelled.” He “had no choice but to go.” The invitation was a “directive.” Just as duress or unconscionability can invalidate an agreement in contract, similar concerns can, seemingly, pull an arguable gain out of classification of income. But in keeping with realist critiques, the court’s focus on constrained choice lacks the explanatory power it claims. There are at least two problems with the court’s approach. First, assuming *arguendo* that the Gotchers had no choice but to accept the trip, it is not self-evident why constrained choice should remove an item or benefit from the income category.¹⁶⁰ Tax does not have the same commitment to autonomy and volition (and thereby, choice) as does contract—at least not on its face. Second, by making the range (or lack thereof) of choices available to an individual an element of the definition of income the court invites the injection of biases into the definition of income.

Compare the Fifth Circuit’s and the lower court’s opinions on whether Mrs. Gotcher’s trip gave rise to income.¹⁶¹ Both use choice as a heuristic for defining income, using language and concerns that echo contract defenses.¹⁶² And both come to different conclusions. The lower court held in favor of the taxpayers, finding no income for the provision of either the wife or the husband’s trip.¹⁶³ That opinion reads:

The inclusion of the dealers wives on the tours to Germany was based on the belief of and realization by VWOA that today the American wife exercises a substantial influence in family investments. Due to the fact that a Volkswagen dealer, on the average, makes an investment in the neighborhood of \$250,000.00 in his dealership sales and services facilities, it would be desirable and advisable for the wife to acquire first hand as much information as possible about her husband’s stock-in-trade, what kind of company produces the product he sells, and what may be the character of the organization behind the product so that she, when discussing with her husband on the advisability of making

¹⁶⁰ Within the bounds of the case, the court finds Mr. Gotcher experience seems to undermine, in the court’s view, both the gain and control elements of the definition of income in *Glenshaw Glass*. Connection to ability to pay concept. See *United States v. Gotcher*, 401 F.2d 118, 121 (5th Cir. 1968).

¹⁶¹ *Id.*

¹⁶² See discussion *supra* Part II.

¹⁶³ *Gotcher*, 259 F. Supp. at 344–45, *aff’d in part, rev’d in part*, 401 F.2d 118.

an investment which could have such a substantial effect on their future, would be better equipped to exercise her judgment and form an intelligent opinion— and, from VWOA’s standpoint, hopefully would be more likely to encourage her husband to take the risk of investment.¹⁶⁴

Though the analysis is initially framed as one of the provider’s beliefs,¹⁶⁵ it quickly shifts to one that seeks to understand the mind of the husband. If he is inclined to consult with his wife on significant financial investments, it would be “desirable and advisable” for her to be informed.¹⁶⁶ Accepting implicitly that such a man could exist, the trial court believed, then, that such a husband could plausibly feel compelled—to have no choice but to bring his wife—in the same way he felt compelled to accept the trip. If that is true and if—as the *choice as heuristic* frame embraces—constrained choice (like the concerns of duress and unconscionability) pulls an item out of income, Mrs. Gotcher’s in-kind trip should be excluded.

The Fifth Circuit, by contrast, saw Mrs. Gotcher’s presence as wholly elective. Its discussion of Mrs. Gotcher distills down to one concern: that she seemed to play no formal role in the business.¹⁶⁷ What is striking is the totalizing language that the court adopts in discussing the relevance of her presence. It is “[o]nly when the wife’s presence is necessary to the conduct of the husband’s business [that] her expenses [are] deductible under Section 162.”¹⁶⁸ It must be established “that the wife made the trip only to assist her husband in his business.”¹⁶⁹ The husband, by contrast, was permitted more

¹⁶⁴ *Id.* at 342.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ The Fifth Circuit was not persuaded by VWOA’s asserted rationale and questioned Mrs. Gotcher’s role:

As for Mrs. Gotcher, the trip was primarily a vacation. She did not make the tours with her husband to see the local dealers or attend discussions about the VW organization. This being so the primary benefit of the expense-paid trip for the wife went to Mr. Gotcher in that he was relieved of her expenses. He should therefore be taxed on the expenses attributable to his wife. *See* *Disney v. United States*, *supra*. Nor are the expenses deductible since the wife’s presence served no bona fide business purpose for her husband. Only when the wife’s presence is necessary to the conduct of the husband’s business are her expenses deductible under section 162. *Acacia Mutual Life Insurance Co. v. United States*, D. Md. 1967, 272 F. Supp. 188, 201. Also, it must be shown that the wife made the trip only to assist her husband in his business. A single trip by a wife with her husband to Europe has been specifically rejected as not being the exceptional type of case justifying a deduction. *Warwick v. United States*, E.D. Va. 1964, 236 F. Supp. 761; *See also Silverman v. Commissioner of Internal Revenue*, 8th Cir. 1958, 253 F.2d 849.

Gotcher, 401 F.2d at 124.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (emphasis added).

leeway. The court expressly allows him to derive a range of benefits from the trip because it agreed that he had no choice but to go.¹⁷⁰

Unlike the lower court, the Fifth Circuit was unwilling to accept that the husband could depend upon his wife's counsel. The Fifth Circuit did not reject the relevance of choice to the inquiry.¹⁷¹ It embraced the rhetoric and notion of duress as constrained choice.¹⁷² And yet it came to a different conclusion. Why? Because *choice as heuristic* is indeterminate in ways similar to choice in contract; taking substance from one's subjective understanding of what counts as constraint. The Fifth Circuit rejected that narrative the lower court accepted—not because it was objectively clear that the lower court's view was erroneous but simply because they did not believe it.

In *Gotcher*, then, we find not only a connection between the sense of impaired choice and volition that undergird duress and unconscionability and *choice as heuristic*, but the inconsistency and bias that using choice as a heuristic invites into the definition of income. Both points come into relief in the medical expense deduction explored in the next part.

2. Medical Expenses

The judiciary is not alone in using choice and duress to define income, however. In § 213, we find a statute that reflects congressional reliance on *choice as heuristic*. Grounded in a notion of duress that toggles between the overborne will of duress and constrained choice, and substantive unfairness shared by duress and unconscionability, the definition of medical care

¹⁷⁰ Here the court defers to the trial court's generous interpretation: "Some of the days were not related to touring VW facilities, but that fact alone cannot be decisive. The dominant purpose of the trip is the critical inquiry and some pleasurable features will not negate the finding of an overall business purpose. See *Patterson v. Thomas*, *supra*. Since we are convinced that the agenda related primarily to business and that Mr. Gotcher's attendance was prompted by business considerations, the so-called sightseeing complained of by the Government is inconsequential. See *Peoples Life Ins. Co. v. United States*, 373 F.2d 924, 930 (1967). Indeed, the district court found that even this touring of the countryside had an indirect relation to business since the tours were not typical sightseeing excursions but were connected to the desire of VW that the dealers be persuaded that the German economy was stable enough to justify investment in a German product. We cannot say that this conclusion is clearly erroneous. Nor can we say that the enthusiastic literary style of the brochures negates a dominant business purpose. It is the business reality of the total situation, not the colorful expressions in the literature, that controls. Considering the record, the circumstances prompting the trip, and the objective achieved, we conclude that the primary purpose of the trip was to induce Mr. Gotcher to take out a VW dealership interest." *Id.* at 122.

¹⁷¹ *Id.* at 123 ("The decision suggests that in analyzing the tax consequences of an expense-paid trip one important factor is whether the traveler had any choice but to go. Here, although taxpayer was not forced to go, there is no doubt that in the reality of the business world he had no real choice.")

¹⁷² *Id.*

demonstrates the role of the choice frame in importing bias into tax law and policy.

In 2017, the Eleventh Circuit handed down its opinion in the case *Morrissey v. United States*.¹⁷³ Joseph Morrissey's case arose out of over \$100,000 he spent, along with his then partner and now husband, to become a parent. The couple used egg donation, in vitro fertilization, and surrogacy to have a child. After his claim for a deduction under § 213 was disallowed,¹⁷⁴ Professor Morrissey brought a refund claim in district court, a suit that would ultimately be appealed to the Eleventh Circuit.¹⁷⁵ In it, and § 213, we find the indeterminacy of *choice as heuristic* and the very different notions of duress that underlie the statute and the IRS and the courts' reasoning.

Section 213's definition of medical care as written and interpreted uses a concept of duress less focused than was *Gotcher* on overborne will or constrained choice and more on the substantive unfairness of the scenario in which the individual finds herself; moving the analysis in the direction of concerns that blur the line between duress and unconscionability and that lead some to push for broader notions of duress in contract. The logic is fairly straightforward: if an individual requires surgery to fix a broken bone or chemotherapy to combat cancer, she faces a scenario she did not desire and which presents her with the stark options of proceed with (and pay for) care or risk potentially avoidable, profound health consequences. While in *Gotcher* the focus was on whether the individual could exercise free choice, in § 213 it is on the perceived fairness of the situation in which she finds herself.¹⁷⁶

Return to *Morrissey*. As part of his rationale for disallowing a medical expense deduction to Mr. Morrissey, Revenue Agent Gary Shepard focused on Mr. Morrissey's choice to use egg donation, in vitro fertilization, and surrogacy to have a child.¹⁷⁷ Conveying his sense that disallowing the deduction was plainly supported by the language of the Code, Agent Shepard wrote: "The first reason [for disallowance] is because there is no Medical Condition. The Taxpayer does have the ability to have children with a

¹⁷³ *Morrissey v. United States*, 871 F.3d 1260, 1272 (11th Cir. 2017).

¹⁷⁴ *Morrissey v. United States*, 226 F. Supp. 3d 1338, 1346 (M.D. Fla. 2016), *aff'd*, 871 F.3d 1260 (11th Cir. 2017).

¹⁷⁵ *Morrissey*, 871 F.3d at 1262.

¹⁷⁶ This focus tracks that of broader notions of duress, including economic duress, where contract theorists recognize that an individual may willingly choose to enter into any array of agreements that appear unbalanced, unfair, or exploitative, because of the profoundly challenging situation in which he finds himself.

¹⁷⁷ Opening Brief of Plaintiff-Appellant at 4, *Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017) (No. 17-10685), 2017 WL 1232286, at *4 ("During the course of the audit, Shepard stated that Morrissey was not entitled to the deduction because it was Morrissey's 'choice' not to pursue heterosexual intercourse to conceive. A-19-2 ¶ 26.").

member of the opposite sex but, not the same sex. The Taxpayers [sic] decision not to have children with a member of the opposite sex is a personal choice and not a Medical Condition.”¹⁷⁸ Mr. Morrissey, a gay man, unsurprisingly and necessarily challenged Agent Shephard’s position as part of his argument in both the Middle District of Florida and on appeal in the Eleventh Circuit.¹⁷⁹ The Service, for its part, disclaimed Agent Shephard’s analysis in its formal disallowance letter, describing the perception of homosexuality as a choice as a “surprisingly outdated way of thinking about sexual orientation.”¹⁸⁰ Nevertheless, the supervisory agent came to the same conclusion¹⁸¹: that the assisted reproductive technology costs were nondeductible personal expenses rather than qualifying medical care—they were consumption that should remain in income. The Eleventh Circuit upheld the District Court’s opinion, framing Mr. Morrissey’s use of assisted reproductive technologies as elective.¹⁸²

But the use of choice as a heuristic by both the Service and the courts in this space holds only against superficial examination. Under existing precedent, a heterosexual couple can deduct the costs of fertility care used to have a child while a gay man cannot. In the former case, the care is viewed as medical care necessary to overcome infertility. In the latter case, as seen in *Morrissey*,¹⁸³ the use of the same technologies is viewed as elective care. But if it is the *nonvolitional nature* of the circumstances that require care that

¹⁷⁸ *Id.* at 4–5.

¹⁷⁹ *See generally id.*; Plaintiff’s Motion for Summary Judgment and Incorporated Memorandum of Law, *Morrissey v. United States*, 226 F. Supp. 3d 1338 (M.D. Fla. 2016) (No. 8:15-cv-2736-RAL-AEP), 2016 WL 8904752.

¹⁸⁰ Plaintiff’s Motion for Summary Judgment and Incorporated Memorandum of Law, *supra* note 179, at 4 (“There, IRS Appeals Officer Neera P. Kar aptly summarized the issue in a memorandum analyzing the appeal: ‘[t]he taxpayer, a gay man, is de facto infertile and requests to be treated the same way to avoid unequal treatment that is also unconstitutional.’ Stip. Joint Ex. 3 at p. USA0000040. She noted that disallowing the deduction based on the idea that homosexuality is a choice ‘reflects a surprisingly outdated way of thinking about sexual orientation’ and emphasized that, for *Morrissey*, ‘this is not a matter of choice rather it is impossible to conceive, thus, it is a medical condition.’ *Id.* at p. USA0000041.”).

¹⁸¹ Opening Brief of Plaintiff-Appellant, *supra* note 177, at 4–5 (“During the course of the audit, Shephard stated that *Morrissey* was not entitled to the deduction because it was *Morrissey*’s ‘choice’ not to pursue heterosexual intercourse to conceive. A-19-2 ¶ 26.”).

¹⁸² For further discussion of reproductive care broadly and *Morrissey* specifically, *see* Davis, *supra* note 54, at 10, 37; Davis, *supra* note 49, at 401–03; Anthony C. Infanti, *Dismembering Families*, in CHALLENGING GENDER INEQUALITY IN TAX POLICY MAKING: COMPARATIVE PERSPECTIVE 159, 173–74 (Kim Brooks et al. eds., 2011); Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications of Magdalin v. Commissioner for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 WIS. L. REV. 1283, 1294–96 (2009); Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1126–27, 1139 (2004).

¹⁸³ *See also* *Magdalin v. Comm’r*, No. 09-1153, 2009 U.S. App. LEXIS 28966, at *1–2 (1st Cir. 2009).

undergirds the notion of duress in § 213, there is no clear reason to distinguish between a heterosexual couple and Mr. Morrissey. Doing so suggests bias. The decision that prompted the need for care is the decision to have a child. If the choice—volition—autonomy connection is as strong as some in contract assert, and if tax embraces similar values—as the choice frame suggests—there is a strong argument that the deduction should be allowed in both cases. Both an infertile heterosexual couple and a homosexual couple (or indeed a single man or woman regardless of sexuality) require medical assistance to have a biological child.¹⁸⁴ To distinguish the two cases and call the latter's a personal consumption decision and the former's necessary medical care requires establishing the normative taxpayer as a fertile, heterosexual individual.¹⁸⁵ A choice frame invites the judge to consider what *he* would do faced with the same circumstance; to envision a “normal” taxpayer.¹⁸⁶ Predictably biased decisions follow.

It is unclear, then, what notion of duress or unconscionability-like conditions Congress and the courts contemplate in § 213. Perhaps substantive unfairness rather than a notion of duress similar to the heuristic used in *Gotcher*. The choice frame adds little value, herein as it is indeterminate in itself and cannot fix which choice matters. Is the desire to have a child the relevant choice and because one can choose not to have a child, those who seek such care aren't facing a constrained choice or duress? Tax uses a similar logic to distinguish business from personal in the “origin of claim”¹⁸⁷ doctrine. But that doctrine does not apply here. More importantly, such an approach is inconsistent with the language of § 213 as interpreted over its nearly eighty-year history. We do not refuse medical care classification to the surgery to fix a torn ligament because the individual injured himself skiing, for example. Instead, we focus on the obvious need for the care and challenge that it presents.

Considering *Gotcher* and § 213 together yields four insights that deepen our understanding of the nature of choice in tax and the risk its uses present.

¹⁸⁴ Adoption is, of course, an option but the option of pursuing having a child that shares one or both parents' DNA is oft-pursued and raises questions for § 213.

¹⁸⁵ Davis, *supra* note 54, at 22–23.

¹⁸⁶ See Tsilly Dagan, *Commuting*, 26 VA. TAX REV. 185, 194 (2006) (considering the normative taxpayer in commuting); Shannon W. McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559, 572–73 (2016) (considering the normative family); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 76–77, 79 (1993) (considering the normative model of marriage).

¹⁸⁷ *United States v. Gilmore*, 372 U.S. 39, 45–46, 49 (1963) (“For these reasons, we resolve the conflict among the lower courts on the question before us (note 4, *supra*) in favor of the view that the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was ‘business’ or ‘personal’ and hence whether it is deductible or not under § 23(a)(2). We find the reasoning underlying the cases taking the ‘consequences’ view unpersuasive.”).

First, the *choice as heuristic* frame relies upon often vague and poorly-defined notions of duress in tax. If contract notions of duress and unconscionability developed because contract started from a point of privileging an idea of free choice as essential to agreement, tax takes the reverse tack. Duress or unconscionability-type constrained choice or the substantive unfairness of situation in which the individual finds herself are understood to undermine the very nature of potential benefits received or costs incurred as consumption—as income. Second, the *choice as heuristic* frame and its notions of duress cross governmental branch boundaries, popping up in judicial opinions, administrative action, and shaping legislation. Third, the frame is indeterminate. Consistent with the realist critique that free choice is a fiction, evaluating choice in interpreting income reveals more about the decisionmakers than it does the nature of the item they are trying to classify. This third insight flows into the fourth: that the *choice as heuristic* frame invites bias into the definition of income. Rather than an objective assessment of whether an individual's choice was constrained, the *choice as heuristic* frame and understanding of the relevance of constraints on choice it embraces, becomes about *whose* choices matter for tax, skirting the questions of *whether* and *when*.

This part has considered *choice as heuristic* in isolation to better understand the nature of choice therein, informed by the insights drawn from contract theory. The next part considers the ever-present debates over the tax treatment of commuting and child and dependent care costs—areas where *choice as heuristic* and *choice as metric* clash. Examining these issues with the taxonomy and contract theory reinforces the insights made in this part and adds a fifth.

B. *Childcare and Commuting: Shifting Duress and the “Free-Market” Fallback*

Considering commuting and childcare costs exposes the limits of both the *choice as metric* and *heuristic* approaches. Foundational cases on both issues use choice as a heuristic and come to the same conclusion: commuting and childcare are consumption activities that should remain in income. Yet the duress and unconscionability-type concerns that seemed to undergird the use of choice as a heuristic, which kept or pulled items from the definition of income in other spaces, are not so much absent here as they are ignored. The analysis of childcare and commuting costs remains committed to the idea that choice is a valuable heuristic—that duress matters in tax—but amplifies the role of *choice as metric* instead. In doing so, tax privileges its position as “free market” champion in the face of market failures and often truly-constrained choice, consistent with veins of contract theory.

1. Childcare

How tax law treats childcare is both long-settled and highly-disputed.¹⁸⁸ *Smith v. Commissioner* set out the foundational approach in 1939 and that understanding of the issue has essentially held.¹⁸⁹ In that case, Henry and Lillie Wright Smith attempted to deduct the costs of employing nursemaids, arguing that such expenses were the costs of both parents being employed.¹⁹⁰ The Smiths advanced a plausible approach: a “‘but for’ test [where] but for the nurses the wife could not leave her child; but for the freedom so secured she could not pursue her gainful labors.”¹⁹¹ The Board of Tax Appeals, imagining a flood of claims for deductions of “‘personal’ expenses” rejected the “but for” test,¹⁹² relying upon a *choice as heuristic* frame.

The BTA spends a paragraph of its only five-paragraph opinion on Mrs. Smith’s *choice*. Its opinion identifies Mrs. Smith’s decision as novel, writing “[w]e are told that the working wife is a new phenomenon.”¹⁹³ The wife’s responsibility to care for the children and decision to work outside the home are both framed as her choices. The opinion states that “[t]he wife’s services as custodian of the home and protector of its children are ordinarily rendered without [...] compensation.”¹⁹⁴ It goes on to state that “[h]ere the wife *has chosen to employ others to discharge her domestic function . . .*” The framing of the perceived choice therein comes into relief. In the BTA’s view, the woman could stay home and perform her duties as a wife (the tax-free option) or she could choose to incur the additional cost to work outside the home. While the BTA concedes that some personal expenses can be deducted as costs of earning income, the childcare expenses do not fall into that category.¹⁹⁵

¹⁸⁸ See, e.g., Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 987, 1005–06 (1993); Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921, 921–22 (2009); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1573, 1576 (1996); McCormack, *supra* note 186, at 563.

¹⁸⁹ *Smith v. Comm’r*, 113 F.2d 114, 114 (2d Cir. 1940) (affirming the BTA decision); *see infra*, Part I.

¹⁹⁰ *Smith v. Comm’r*, 40 B.T.A. 1038, 1038–39 (1939).

¹⁹¹ *Id.* at 1038.

¹⁹² *Id.* at 1039.

¹⁹³ *Id.* (It is unclear here whether the comment expresses a note of skepticism of whether the phenomenon is, in fact new).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1039–40, *aff’d*, 113 F.2d 114 (2d Cir. 1940) (“We are not unmindful that, as petitioners suggest, certain disbursements normally personal may become deductible by reason of their intimate connection with an occupation carried on for profit. In this category fall entertainment, *Blackmer v. Commissioner*, 70 Fed.(2d) 255 (C.C.A., 2d Cir.), and traveling expenses, *Joseph W. Powell*, 34 B.T.A.

Shifting from a choice frame to offer another that he perceives as distinct, Boardmember Opper writes that the dividing line between deductible and nondeductible costs that have some personal element is one of those that “as a matter of common acceptance and universal experience are ‘ordinary’ or usual as the direct accompaniment of business pursuits”¹⁹⁶—the aforementioned entertainment, travel, and specialty wardrobe expenses¹⁹⁷—and “those which, though they may in some *indirect*, and *tenuous* degree relate to the circumstances of a profitable occupation, are nevertheless personal in their nature.”¹⁹⁸ Personal is here defined as “of a character applicable to human beings generally, and which exist on that plane regardless of the occupation, though not necessarily of the station in life, of the individuals concerned.” This shift in frame appears to abandon the question that seemed essential to the *choice as heuristic* frame—whether the individual faced constrained choice.

Choice as heuristic’s lack of explanatory value may have driven the BTA to attempt to reject that frame. It is obvious that both the very question of whether Mrs. Smith had any choice and the nature of her choice could easily be interpreted differently. To draw upon the BTA’s own language, one’s “station in life” greatly impacts whether paying for childcare is a choice.¹⁹⁹ If an individual cannot afford to stay at home to care for his or her child, the decision to pay for childcare is not an unconstrained choice, it is a cost necessary to earning income. But the BTA punts. It does not reject the relevance of choice or the notions of duress baked into the choice as heuristic frame but decides to favor another: choice as metric. Recognizing that the choice as heuristic frame could easily lead to allowing rather than denying a deduction, the BTA attempts both to maintain choice as a heuristic while rejecting it *on this issue*; it pushes tax to formally assume neutrality. This move mirrors contract’s picking up and putting down its commitment to volition and free choice.

The debates over the tax treatment of childcare distill down into a *choice as heuristic* and *choice as metric* clash.²⁰⁰ Advocates of broader recovery for caregiving costs adhere to the choice as heuristic frame, essentially arguing that folks facing childcare costs are under duress whether defined as

655; *aff’d.*, 94 Fed. (2d) 483 (C.C.A., 1st Cir.), and the cost of an actor’s wardrobe, Charles Hutchison, 13 B.T.A. 1187. The line is not always an easy one to draw nor the test simple to apply.”)

¹⁹⁶ *Id.* at 1039.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1039–40, *aff’d.*, 113 F.2d 114 (2d Cir. 1940). The BTA looks to *Welch v. Helvering*, 290 U.S. 111 to support its interpretation of ordinary.

¹⁹⁹ *Id.* at 1040.

²⁰⁰ Or, if you embrace the goal of using tax to influence behavior, *choice as feature*. Well known examples of such provisions include §401 retirement savings accounts and § 529 education savings accounts.

constrained choice or substantive unfairness.²⁰¹ While specific iterations of the argument differ in focus—gender inequality, economic inequality, racial inequality—the core of the argument is the same: if one must or does work outside the home, one must seek caregiving help, often at significant cost. You have no other choice. Stating the argument differently, the critique is not that choice is a bad heuristic or that duress doesn't matter for tax but rather that current law fails to adequately account for the duress many individuals face. And lawmakers seem to recognize the logic of this argument, providing (limited) carveouts for caregiving such as the dependent care exemption,²⁰² child tax credit,²⁰³ and expanded brackets for heads of households.²⁰⁴

The arguments against any or broader recovery for caregiving embrace the *choice as metric* view. Framing caregiving costs as tax expenditures, those carrying the banner for the logic of *Smith* opinion maintain the position that choice matters for tax but just not here. Here the importance of keeping tax in a free market posture—purportedly neutral as to individual decisionmaking—trumps the relevance of the actual constraints on choice faced by those with caregiving responsibilities. Not unlike the classical contract argument²⁰⁵ for a narrow notion of duress, those elevating *choice as metric* over *heuristic* may recognize the presence of duress but respond: that's not or cannot be tax's problem.²⁰⁶ Or, more generously, argue that other values take precedence. A similar conflict plays out in the doctrine and debates over commuting costs.

201 Cf. Radin, *supra* note 147.

202 I.R.C. § 152 (reduced to 0 until taxable year 2026).

203 I.R.C. § 24. Both the 2017 TCJA and 2021 American Rescue Plan temporarily expanded the amount and availability of the child tax credit.

204 I.R.C. § 1 (setting out rates and tax brackets for determining tax liability); 26 U.S.C.A. § 2 (defining head of household).

205 See, e.g., FRIED *supra* note 94, at 104–106 (“On these assumptions the charge of unfairness seems sentimental and not a little unjust. Both the merchant [selling on credit] and the employer [accepting no risk] are offering their supposed ‘victims’ further options, enlarging their opportunities; if the alternatives seem harsh, that is a misfortune for which none of the parties to these contracts is responsible.” Contract without meaningful duress or unconscionability seems unfair “until we recall that liberal political theory (and practice) accept distributive justice as a goal of collective action, but one to be pursued by the collective as a whole, funded by the general contributions of all citizens. Redistribution is not a burden to be borne in a random, ad hoc way by those who happen to cross paths with persons poorer than themselves. . . . Liberal democracies have chosen to effect redistribution (to assure a social minimum) by welfare benefits on the one hand and by general taxation based on overall ability to pay on the other.”).

206 See, e.g., SURREY, *supra* note 17. Stanley Surrey originated the tax expenditure concept and literature that followed. Both the definition of a tax expenditure (as a departure from the normative tax base) and whether they are problematic are perennial debates in tax law and policy.

2. Commuting

In the key commuting case, *Commissioner v. Flowers*, the taxpayer was offered a position as general counsel for a railroad company headquartered in Mobile, Alabama. Mr. Flowers had established his home and law practice in Jackson, Mississippi beginning in 1903. The position as general counsel that he accepted over three decades after establishing his practice in Jackson required him to regularly be in Mobile, Alabama. Rather than move, Mr. Flowers maintained his home in Jackson and traveled regularly in 1939 and 1940 to Mobile. He then attempted to deduct the costs of his travel to Mobile. The Tax Court denied the deduction. The Fifth Circuit then reversed and remanded the case. Ultimately, the Supreme Court denied the deduction on the grounds that the costs were taxable consumption.

The differences between the opinions, as in *Gotcher*, illustrate the limited explanatory power of the *choice as heuristic* frame and its potential for introducing or reifying bias in the Code. Because the taxpayer claimed the expenses as a trade or business deduction the courts were tasked with interpreting the provision authorizing such deductions. Then, as now, the statute in question provided a deduction for travel expenses “while away from home in pursuit of business....”²⁰⁷ The lower court focused on the meaning of the word home²⁰⁸ while the Supreme Court demurred from entering that fray,²⁰⁹ focusing instead on the nexus between the commuting costs and the business activity. But the two analyses are not as separate as the Court suggests, as the discussion of *Hantzis* that follows that of *Flowers* makes clear. Regardless of the particular portion of the statute in which the courts grounded their analysis, a comparison makes clear that both used their

²⁰⁷ I.R.C. § 162 (The relevant code section was then § 23(a)(1)(A). In its current iteration, the deduction is available per § 162. That section reads, in pertinent part: “There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including— . . .

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;”

²⁰⁸ *Flowers v. Comm’r*, 148 F.2d 163, 164 (5th Cir. 1945), *rev’d*, 326 U.S. 465 (1946) (“the decision turns at last upon the meaning of the word home in Section 23(a)(1) of the Internal Revenue Code.”).

²⁰⁹ *Flowers*, 326 U.S. at 472 (“We deem it unnecessary here to enter into or to decide this conflict. The Tax Court’s opinion, as we read it, was grounded neither solely nor primarily upon that agency’s conception of the word ‘home.’ Its discussion was directed mainly toward the relation of the expenditures to the railroad’s business, a relationship required by the third condition of the deduction. Thus even if the Tax Court’s definition of the word ‘home’ was implicit in its decision and even if that definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad’s business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction.”).

perception of the range of choices available to the taxpayer and their sense of the appropriate response to render their opinions.

Addressing the lower court first, the Fifth Circuit reads the word “home” in the statute to mean one’s home in a common sense:

The Tax Court held that home, as used in this section, means the post, station, or place of business, where the taxpayer is employed; and that on these trips the petitioner was not away from home in the pursuit of a trade or calling.

We find no basis for this interpretation. There is no indication in the statute of a legislative intention to give the word an unusual or extraordinary meaning. For the court to do so would be an invasion of the legislative domain. We think the word home as used in the statute means that place where one in fact resides. Home is the fundamental idea of domicile, and yet there is a difference in the legal conception of the two words. Domicile expresses the legal relation existing between a person and the place where he has his permanent home in contemplation of law. Home denotes the principal place of abode of one who has the intention to live there permanently.²¹⁰

Even more interesting for this Article, however, is what precedes the court’s interpretation of the meaning of home. The court dedicates nearly half of its decision to crafting a narrative in which Mr. Flowers had no decision but to remain in Jackson. In short, they craft a story of duress not unlike that in *Gotcher*. Judge Holmes notes that the taxpayer had lived in Mississippi “all [] his life.”²¹¹ The home in which Mr. Flowers lived was built “on the same plot of ground where he ha[d] lived since 1912.”²¹² His church and social clubs were in Jackson. He had been a dutiful taxpayer there and created a thriving business there, indeed “the only business or profession that he has ever had” was built in Jackson.²¹³

²¹⁰ *Flowers*, 148 F.2d at 164, *rev’d*, 326 U.S. 465 (1946).

²¹¹ *Id.* at 163.

²¹² *Id.*

²¹³ *Id.* at 163–64. The court’s full, uninterrupted narrative reads as follows: “The taxpayer was born in Mississippi, and has been a citizen of that state all of his life. Early in his career as a lawyer, he moved to Jackson, and has lived there with his family since 1903. The house that constitutes his present residence is on the same plot of ground where he has lived since 1912. He built that house and, in the usual and ordinary meaning of the word, it is his home. In a broader sense, Jackson may be called his home. His church and club affiliations are there; he has been a qualified voter in Jackson since 1903; there he pays all of his taxes; there, each year since 1903, he has duly paid his license fee to practice law, the only business or profession he has ever had. Since he entered private practice, he has always been a member of a law firm in Jackson, and he is not the senior member of the firm of Flowers, Brown, and Hester, which firm he organized in 1922.”

The court goes on to emphasize that these connections are not just “social.” Rather, in its view, the only prudent business decision Mr. Flowers could have made was to remain in Jackson. Noting the difficulty of building business goodwill and the uncertainty of whether his position as general counsel would continue, the Fifth Circuit places great weight on what it sees as a limited range of choices available to Mr. Flowers—a duress-type standard similar to that in *Gotcher*. Its analysis of what home does or should mean in the Code is comparatively thin.²¹⁴ The clear impression the Fifth Circuit’s opinion leaves is that if it were in Mr. Flower’s shoes, it would have made the same decision, which was—in its view—the only real option he had.²¹⁵ Once again, then, choice is used as a heuristic. More specifically, the court views Mr. Flowers as having no real opportunity to exercise choice—as being under something like duress as constrained will.

The Supreme Court views and uses Mr. Flowers’s perceived choices very differently. Focusing its attention on deciding whether the commute was sufficiently connected to the business activity, the Court writes that to be deductible, the costs of travel to work must be driven by “[t]he exigencies of business rather than the personal conveniences and necessities of the traveler”²¹⁶ Specifically, the Court asks whether the expenses were connected to the employer’s business. The case, in the Court’s view, “is [then] disposed of quickly.”²¹⁷ This is the move that ostensibly shifts the choice frame, but it is window-dressing—new terms for the same logic. The logic of the Court is as follows: the railroad company hired Mr. Flowers. They hired him to work in Mobile. He unreasonably and against any conceivable interest of the railroad company chose to remain in Jackson when he could have chosen to move to Mobile (or implicitly, have turned down the job).²¹⁸ Because he did

²¹⁴ Though this interpretation of the meaning of home in tax would not endure, it highlights the influence of normative judgments on the proper relationship to community and work. See Dagan, *supra* note 186; see also Tsilly Dagan, *Ordinary People, Necessary Choices: A Comparative Study of Childcare Expenses*, 11 THEORETICAL INQ. L. 589, 596 (2010) (discussing how time has brought change to the social conception of the interaction of the family; therefore, leading courts to realize their defining childcare as a “personal” expense is an “uneasy position”).

²¹⁵ A somewhat tantalizing sentence toward the end of the opinion makes the author wonder what the court’s opinion would be of current UBI proposals: “When at home, he is allowed to deduct sums estimated to be sufficient to provide him and his dependents with the necessities of life.” *Flowers*, 148 F.2d at 165.

²¹⁶ *Flowers*, 326 U.S. at 474.

²¹⁷ *Id.* at 472–73 (“Turning our attention to the third condition, this case is disposed of quickly. There is no claim that the Tax Court misconstrued this condition or used improper standards in applying it. And it is readily apparent from the facts that its inferences were supported by evidence and that its conclusion that the expenditures in issue were non-deductible living and personal expenses was fully justified”).

²¹⁸ *Id.* at 473 (“The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad’s business as were his personal and living costs in Jackson. They were

not, the travel to his job has no connection to the production of his income but is instead merely a “personal convenience.”²¹⁹

The subjective judgment (and bias that it often imports) is, again, a part of what shapes the courts’ differing opinions. In the Fifth Circuit’s opinion, the court gave credence to Mr. Flowers, the individual, who is *also* a worker.²²⁰ Viewing Mr. Flowers in this way, the court then turned to assessing the range of choices available to Mr. Flowers, perceiving them to be quite limited. Mr. Flowers could move from his long-established home, casting off all social and business ties and risking his long-term economic stability for a potentially temporary appointment, or he could take the less-risky route of maintaining his ties to Jackson while also meeting his work responsibilities in Mobile. The Supreme Court, by contrast, views Mr. *Flowers*—and the normal taxpayer for which he is a stand-in—as someone if not actually able to move anywhere anytime, someone who *should* be. It

incurred solely as the result of the taxpayer’s desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad’s legal business.”)

219 *Id.*

220 In this observation, I am building upon the work of Tsilly Dagan. In her excellent article revisiting the tax treatment of commuting, Professor Dagan calls into question the utility of the business/personal dichotomy in determining whether commuting expenses are deductible or not. In its current iteration, Dagan finds the business/personal distinction, and the ordinary and necessary elements of the § 162 deduction that it informs, lacking any normative baseline. Dagan writes:

Conventional wisdom tried to solve this problem by attempting to more carefully distinguish the business-motivated expenses from the non-business ones. However, the causal link test is elusive, absent a normative base line that would establish what should be considered business-related (and thus deductible) and what should not. In other words, the business-private purpose is incapable of providing conclusive answers in complex cases simply because the distinction is not significant in itself. There are other substantive normative considerations that underlie the question at stake.

Dagan, *supra* note 186 at 194.

On the issue of commuting specifically, Dagan similarly notes that the framing of the question matters as does our assumption about who the average taxpayer should be:

Current law disallows commuting expenses, yet it excludes certain employer provided commuting and parking benefits from taxable income. Conventional wisdom bases the allowability of commuting expenses on a causal link between the expense and the income it helped produce. In this vein, courts and commentators focus on taxpayers’ ‘real’ motivation for commuting. Is commuting the result of the taxpayer’s need to get to work or rather of her preference to live at a distance from her work? This conventional inquiry into taxpayers’ ‘real’ motivation (and thus the search for a causal link) is not only practically problematic due to verification difficulties, but is also conceptually misguided because the search for such motivation is based on hidden assumptions as to where one should live. Specifically, if we assume that a taxpayer should live near her workplace, then her decision to live at a distance from it and to commute is deemed to be a personal choice of residence. In contrast, if we take her place of residence as a given and her commuting as an inevitable result of her need to get to work, then the expenses associated with the commute can easily be regarded as ordinary and necessary for the production of income. The only way to choose between these two perspectives (or any other in-between alternative) is by providing a normative account of where, if anywhere, we expect people to reside.

Id. at 188.

is only by operating with the assumption that one should and can live close to work that a decision not to can be unequivocally framed as a consumption choice with no nexus to the production of income.²²¹ By operating with different assumptions about who the normative taxpayer is, the courts can both claim to be assessing Mr. Flowers's choice while arriving at opposite conclusions. However, if the range of choices available to Mr. Flowers is a function of the decisionmaker's normative priors than using choice as a heuristic explains little but illuminates much. Where a taxpayer's behavior tracks the decisionmaker's biases regarding who a taxpayer is and how she should act, the decisionmaker will perceive the choices available to the taxpayer to match her priors.

Nearly four decades after the Supreme Court's seminal decision in *Flowers*, circuit courts continued to struggle with defining income in the commuting space.²²² They also continued to use perceived choice as a

²²¹ See Dagan, *supra* note 214; William A. Klein, *Income Taxation and Commuting Expenses: Tax Policy and the Need for Nonsimplistic Analysis of "Simple" Problems*, 54 CORNELL L. REV. 871, 874–78 (1969); Lawrence Zelenak, *The Income Tax and the Costs of Earning a Living*, 56 TAX L. REV. 39, 46 (2002).

²²² There is often an assumed tension between the interests of the employer and the employee. In *Flowers*, this tension is found in the Court's writing over any nuance in both the taxpayer's and the company's motivations embracing sweeping statements such as the following:

The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal and living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad's legal business. The railroad did not require him to travel on business from Jackson to Mobile or to maintain living quarters in both cities. Nor did it compel him, save in one instance, to perform tasks for it in Jackson. It simply asked him to be at his principal post in Mobile as business demanded and as his personal convenience was served, allowing him to divide his business time between Mobile and Jackson as he saw fit. Except for the federal court litigation, all of the taxpayer's work in Jackson would normally have been performed in the headquarters at Mobile. The fact that he traveled frequently between the two cities and incurred extra living expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer.

Flowers, 326 U.S. at 473–74.

The taxpayer's continuing to live in Jackson and work in Mobile is "unnecessary and inappropriate to the development of the railroad's business"; "[t]he railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer." *Id.* As Tsilly Dagan has aptly observed, the law supports a norm of person-as-worker. See Dagan, *supra* note 214. However, there is an undercurrent of further assumptions in the business/personal deduction cases—namely that the individual is an unwilling worker whose happiness is in tension with the goals and productivity of the employer. If we adopted a more collaborative view of the employer/employee relationship, we might see a richer picture. In permitting flexibility, the railroad company may have been able to retain a valued, experienced employee, a far cry from the no-employer-benefit view the court adopted. But adopting an adversarial understanding of the

heuristic but with modification. In the later commuting case of *Hantzis v. Commissioner*²²³, the court remains committed to a belief in the relevance of choice but shifts its discussion of duress. The opinion is more contextual, more willing to recognize a broader range of constraints on choice. In *Hantzis*, Mrs. Hantzis accepted a summer job as a legal assistant at a law firm in New York.²²⁴ Her husband, a professor at Northeastern University, remained in Boston.²²⁵ The couple deducted the costs of Mrs. Hantzis's travel between Boston and New York, as well as the rent on her New York apartment.²²⁶ The First Circuit held that the need to maintain and travel between two homes, "albeit wholly reasonable," was "a choice dictated by personal . . . considerations and not a business or occupational necessity."²²⁷ Accordingly, it disallowed the deduction, though on different grounds than did the Tax Court.

The outcome in *Hantzis* is in line with the realist insight that a choice frame is essentially unmoored. What it illuminates more brightly than *Flowers* (and consistent with *Smith*) is the values that the choice frame can be made to fit. Mrs. Hantzis's shared home was Boston, while, in the First Circuit's view, her tax home was New York.²²⁸ Formally, Mrs. Hantzis did have a choice as to where she lived. However, that choice was deeply constrained by realities and considerations that the First Circuit viewed as reasonable but to which it ultimately accords no weight. She could choose not to accept the job to avoid the additional cost of an apartment in New York. She could choose not to return to Boston during the entire ten-week term of her employment. She could choose to commute between New York and Boston on a daily basis. Instead, she and her husband chose the option that allowed (1) him to meet the requirements of his summer teaching responsibilities at Northeastern, and (2) her to meet the requirement of her presence at her position in New York. The "business exigencies" of her and her husband's respective presence at their jobs to discharge their duties are hardly absent. Nor is it clear that Mrs. Hantzis incurred the costs of living in New York and traveling between Boston and New York for solely personal reasons. Her work required that she be New York. Other constraints compelled her and her husband to maintain two homes. And yet the court still

employee/employer relationship structures and clarifies (however falsely) the court's assessment of taxpayer choice.

²²³ *Hantzis v. Comm'r*, 638 F.2d 248, 249 (1st Cir. 1981).

²²⁴ *Id.* at 249.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 254.

²²⁸ *Id.* The Tax Court, unlike the First Circuit, found that Boston was Mrs. Hantzis's home. *Id.* at 254–55.

purports to use the presence or absence of choice to guide its interpretation of the nature of the costs at issue. It goes so far as to recognize the constraints as real and reasonable, but then simply rejects such constraints as creating duress that is relevant to tax. Duress is, quite simply, whatever a court, lawmaker, or other decisionmaker determines it to be. And by ignoring the constraints it acknowledges, the court elevates the *choice as metric* view—the idea that tax should be neutral as to choice rather than direct or prefer a given choice. Such emphasis and reliance on choice in this way, as it does in contract, reflects a commitment to a cribbed notion of autonomy, a selective-blindness to constraint, and a particular “free-market” posture.

The *choice as metric* view does not negate the relevance of choice to tax; it makes doctrine the fiction that individuals have unconstrained choice. Scholars and critics of both the tax treatment of commuting and childcare have long recognized the limits of the choice frame. Lack of affordable housing and exclusionary housing practices may prohibit individuals from living anywhere near their job.²²⁹ High childcare costs, limited availability, and the essential nature of the care to allow one to work—highlighted most recently by the exigencies of the COVID-19 pandemic—make a discussion of choice and childcare comical. By defaulting to a choice as metric view, the current tax treatment of commuting embraces a formal rejection of easily-identifiable constraints on choice, privileging the fiction of free choice that underlies choice as metric in the face of market failures, a move that brings tax in tension with its redistributive commitments.

C. *Reckoning with Choice in Tax*

Bittker’s essential critique of the concept of a comprehensive tax base holds: there is no indisputable, wholly-neutral way to define income.²³⁰ So too does the value of Surrey’s work to explore and critique the equivalence between direct spending programs and tax expenditures.²³¹ The enduring problem for tax is to determine how to be guided by the validity of both of these threads. The foregoing discussion has illustrated how tax tries to navigate this space, toggling between different views on the relevance to and nature of choice and constraint in tax. This descriptive contribution does not lead to any necessary normative prescriptions. Nevertheless, the effort to

²²⁹ See, e.g., Zelenak, *supra*, note 221 at 46 (“In light of land-use patterns in most U.S. metropolitan areas, featuring substantial distances between the location of the housing supply and the location of the job supply, the tax system’s assumption that all commuting expenses are a matter of personal choice is simply wrong.”).

²³⁰ The same is true for any base. Because our system generally aims to tax income, however, income is the focus.

²³¹ See generally SURREY, *supra* note 17.

better conceptualize choice in tax does yield some guiding principles and areas for future work.

First, tax is not and cannot be neutral as to choice. Stated differently, *choice as metric* is a fiction. It may assume a formal position of neutrality but, just as in contract, the analytical framework that purports to preserve free choice willfully turns a blind eye to constraints on choice. Such a view is fundamentally unworkable and would reify bias and inequality, often undermining the essential redistributive function of tax. Tax cannot escape taking a position on choice, but it can be far more deliberate.

Second, the principles that guide how we fill inevitable gaps in doctrine—those issues that fall through the meshwork of statute, regulation, and case law—matter. Here, *choice as heuristic* looms large. When courts, agencies, legislators, and scholars use the perceived presence or absence of choice to interpret income, they appeal to concerns similar to those that gave rise to contract concepts of duress and unconscionability. If duress matters for tax, however, we need a better definition of the concept itself. Current law picks up and puts down the ideas without elaboration. Constrained choice and substantive unfairness matter unless they don't (a parallel issue in contract). When decisionmakers are presented with cases where the choice as heuristic frame is clearly insufficient—where an individual faces constrained choice, for example—they respond not by questioning whether the heuristic is valuable but rather by ignoring those constraints. Duress matters, but just not the duress you face. Such an approach to duress has led to the often biased and inconsistent concept of income we now employ. But as we dress up the judgments of whose choices matter and our disagreements over the scope of constraints on choice, in the language of legal and economic categories, we distance ourselves from the normative assumptions that underlie them. A concept like duress or unconscionability in tax has appeal²³²—it can speak to ideas of fairness and ability to pay—but it cannot carry the load it currently bears.

²³² See e.g., James Alm, *Is the Haig-Simons Standard Dead? The Uneasy Case for a Comprehensive Income Tax* 15 (Tulane Univ. Working Paper Series, Paper No. 1806, 2018), <https://pdfs.semanticscholar.org/e398/09b4a1bfd909cc7fac98df6c3f82f5e5dc6.pdf>. (highlighting that the presence of discretion or lack thereof places an item in the consumption category or pulls it out: "To the extent that an individual has discretion over medical expenditures or even over property losses, then these types of deductions represent voluntary consumption expenditures, which should be included in H-S income. A similar reasoning suggests that the case for state and local tax payments as an allowable deduction from H-S income is weak. These tax payments may simply reflect the discretionary decision of an individual to live in a jurisdiction with more government services financed by higher taxes, so that the higher tax payments may again reflect greater voluntary consumption expenditures, as suggested by a Tiebout-type equilibrium."); Deborah Geier, *The Taxation of Income Available for Discretionary Use*, 25 VA. TAX REV. 765, 770 (2006) (arguing that our tax expenditure debates are not about income and consumption but rather disagreement in our attempt to exempt "nondiscretionary income" from taxation in favor of taxing "discretionary income.").

Tax instead should be more open to other values and concepts to shape doctrine and fill doctrinal gaps. Tsilly Dagan suggests tax law could shift to consider maintenance of community and identity in determining the tax treatment of commuting, for example.²³³ Just as the realists and relationalists in contract²³⁴ or property²³⁵ map the connections between essential elements of doctrine in those areas to allocations of legal, political, and economic power, tax could better account for how the definition of income is bound up with economic and political power.²³⁶ Exposing what the choice as metric, feature, and heuristic frames assume, what they ignore, and what they privilege, opens the door to other frames, other values that could help create a more consistent and equitable code.

V. CONCLUSION

Writing on the development of the contract doctrine of consideration, Gilmore describes the appeal of objective metrics:

Thus Holmes was willing to accept *Raffles* as a correctly decided case but insisted that it must be explained “objectively.” Now, if you accept the result of a case, what difference does it make how you explain the result? In this context I think that it makes a good deal of difference. If (“in contract as elsewhere”) the “actual state of the parties’ minds” is relevant, then each litigated case becomes an extended factual inquiry into what was “intended,” “meant,” “believed” and so on. If, however, we can restrict ourselves to the “externals” (what the parties “said” or “did”), then the factual inquiry will be much simplified and in time can be dispensed with altogether as the courts accumulate precedents about recurring types of permissible and impermissible “conduct.” By this process questions, originally perceived as questions of fact, will resolve themselves into questions of law. Broadly conceived, the Holmesian version of consideration theory is the classical illustration of this approach: questions of “fairness,” “good faith,” “duress,” “fraud” and the like are all dealt with as

²³³ See Dagan, *supra* note 214, at 592; Dagan, *supra* note 186 at 187.

²³⁴ See *supra* Part II.

²³⁵ See, e.g., Gregory S. Alexander, Eduardo M. Penalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009). The authors of this article have rich pieces in their own right but this article provides an excellent point of entry.

²³⁶ Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1, 1–3 (1996) (exploring whose autonomy tax supports).

questions of law under one or another of the aspects of the bargain theory of consideration.²³⁷

Consider this restatement: If (in tax as in elsewhere) the “actual state of the parties’ minds” is relevant, the actual constraints on action available to them meaningful, then each Form 1040 becomes an extended factual inquiry into what was “experienced,” “intended,” “meant,” “believed” and so on. If, however, we can restrict ourselves to the “externals” (what the parties “said” or “did”), the observable transactions in which they engaged, then the factual inquiry will be much simplified and in time can be dispensed with altogether as the statutes fill the gaps and as courts accumulate precedents about what counts and what does not as “income” and as “cost:” By this process, questions, originally perceived as questions of policy, will resolve themselves into questions of mechanics. Broadly conceived, the development and use of the concept of choice in tax is the classical illustration of this approach: questions of “fairness,” “good faith,” “duress,” “ability to pay” and the like are all dealt with as questions of law under one or another of the aspects of the concept of income.

Choice makes its way into tax in the definition of income itself in attempts to make seem objective what is subjective. And *choice as metric* and *feature* miss the mark in setting the bounds of tax, as they fail to recognize the fiction around which they orbit—that tax can be neutral as to choice. *Choice as heuristic* goes even further, baking a flawed frame into foundational concepts. To really reckon with choice in tax, we need both a good accounting—both descriptive and normative—of its roles in doctrine and policy. This Article offers a start.

²³⁷ GILMORE, *supra* note 11, at 42.