

Strategies and Techniques  
for Teaching Federal  
Income Tax Law

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# Strategies and Techniques for Teaching Federal Income Tax Law

**Adam Rosenzweig**  
Professor of Law  
Washington University School of Law

**Howard E. Katz**  
Series Editor  
Elon University School of Law



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Strategies and Techniques  
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Income Tax Law



# I. Introduction

Federal Income Tax can be the most invigorating, exciting, and intellectually stimulating course to teach in law school; at the same time, it can be potentially the most frustrating. The reason is that there is no such thing as a single course in federal income taxation. The topic is too big, the methodologies too diverse, and the coverage too broad. The tax laws affect every aspect of modern life, from birth to death, from family relationships to medical decisions, from running a small business to managing investments to time value of money. So every instructor of federal income tax must make fundamental decisions about what to cover and how to structure the course, with each decision incurring opportunity costs. Much like fingerprints or snowflakes, no Federal Income Tax course is exactly the same.

Even worse, there is no canon for Federal Income Tax, no core curriculum, and no one right way to teach the course. This is what can make Federal Income Tax both so exciting and challenging to teach. Thus, unlike with some courses, an instructor new to Federal Income Tax cannot simply copy the syllabus of a senior colleague or of the casebook authors, at least not without implicitly adopting the same core choices made by those instructors regarding coverage, scope, organization, and methodologies. The problem is that there is no guarantee that the instructor would necessarily agree with those choices.

This book is intended to provide an overview of some of the issues and considerations an instructor can take into account in developing his or her own course in Federal Income Taxation. It largely follows the organization of the general volume in this series for new law teachers by Howard E. Katz and Kevin Francis O'Neill, *Strategies and Techniques of Law School Teaching* (Wolters Kluwer 2009) (Katz & O'Neill) except that it focuses on the application of those principles to Federal Income Taxation.

The primary challenge in designing a course in Federal Income Tax is that it is the foundational course for a subject matter but is also (almost always) an upper-level elective. An instructor must try to make the class relevant, and broadly appealing, to second-year law students in general, at the same time making it sufficiently rigorous for students interested in pursuing advanced studies in taxation. At schools with a Tax LLM program, an instructor might

well confront a large number of students enrolled in Federal Income Tax as a prerequisite to pursue advanced tax law courses, whereas at law schools that do not offer a Tax LLM or that offer few, if any, advanced tax law courses, Federal Income Tax might well be the only exposure that students have to the tax law. A course designed for one situation could look quite different from a course designed for the other.

To this end, some relevant questions an instructor could confront include the following: (1) Is this the first time the instructor has taught Federal Income Tax and does the instructor have a background in the subject matter? (2) Do other instructors also offer Federal Income Tax on a regular basis at the same school? (3) What other tax law courses are offered at the school? (4) Do multiple instructors coordinate so as to provide a consistent lesson plan or should each adopt their own approach to the course? As evidenced by this list, the question of choice dominates the structuring, organizing, and teaching of Federal Income Tax. For example, is it more important that students have some exposure to time value of money or capital gains? Is it more important that students learn both medical expense deductions and charitable contribution deductions, or is one sufficient to cover below-the-line deductions? Is it worth covering the difference between cash method and accrual method accounting? Which is more important: judicial tax shelter doctrines such as economic substance doctrine or statutory ones such as wash sales or straddle rules?

These questions prove particularly important depending on the instructor's background and experience. An experienced practitioner with many years of tax practice might be most interested in exposing students to issues relevant to the practice of tax law, diving into some of the more technical areas of the subject. An experienced instructor in related fields, such as Corporations or Commercial Law, might be interested in exposing students to the pedagogical lessons of statutory interpretation or common-law case study through the lens of the tax law, without necessarily diving into specific issues in the same level of detail. A first-time instructor—perhaps one coming out of a research fellowship or directly from a PhD program—might just be trying to stay ahead of the class. The challenge of Federal Income Tax derives from the same thing that makes it exciting: There is no single correct way to teach the subject. For this reason, every first-time instructor must

develop an individualized approach to building and organizing the course, with a focus on the instructor's ultimate goals for the course.

Beyond the substance of the course, designing and teaching Federal Income Tax can be challenging because it is often the first course many students encounter in which they engage with a detailed statutory and regulatory-based legal regime. By the first semester of their second year of law school, law students typically have completed one year of intensive common law methodological study, including reading and outlining cases and engaging in Socratic dialogues with their professors in courses such as Contracts, Torts, or Constitutional Law.<sup>1</sup> So the instructor in Federal Income Tax must decide how to incorporate issues of statutory interpretation generally into the course. This has many facets. Should the instructor assign background readings or lecture on canons of statutory construction? Should the instructor begin the course with a complex statutory provision or a simple one? Should the instructor assign cases to highlight statutory issues or assign the statute itself with problems requiring the student to apply the statute to a set of facts? How many pages of Code and Regulations should be assigned per class in addition to casebook reading?

Another obstacle facing an instructor in designing a course in Federal Income Tax is the role of policy. One reason Federal Income Tax is such a fascinating course is precisely because it is used to effectuate policy in almost every area of daily life. Opportunities abound for instructors to devote countless hours to in-depth investigations of these policy areas. For example, when teaching the definition of income, the instructor could examine the differences between an income and consumption tax. When teaching personal exemptions for dependents, an instructor could examine whether the rules themselves construct familial relationships. When teaching the capital gains preference, an instructor could engage in an in-depth discussion of the role of the federal

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<sup>1</sup> This is not always the case. Many schools and instructors teach Criminal Law using a detailed analysis of the Model Penal Code and, of course, Civil Procedure is primarily a code-based course. However, the combination of a lengthy, detailed, statutory regime, coupled with complex regulatory rules and a subject that might intimidate some, makes the point relevant even for students who might have been exposed to statutory concepts in other courses prior to taking Federal Income Tax.

government in engaging in income and wealth redistribution. The possibilities are endless.

The issue of incorporating policy into class is particularly sensitive for Federal Income Tax, for the simple reason that most people enter law school with some opinion about taxes. Thus, it can be difficult at times to balance between policy, on the one hand, and politics, on the other, when discussing tax law. For example, when discussing the charitable contribution deduction, the *policy* question of whether to use the deduction as a means to subsidize the provision of public goods by private charity can be overwhelmed by the *political* argument that the government should not be involved in activities such as poverty relief at all. The manner in which any individual instructor deals with challenges such as these will ultimately turn on the instructor's vision for the course, including how to balance the course's competing goals.

In Federal Income Tax, similar to many other courses, the most important aspect of building the course is to begin with a clear vision for the course, including what the students ultimately should take away from the course. To borrow a saying, students can smell fear. So long as the instructor has a clear vision for the goals of the course and leads the students toward those goals, the course will be a success.

## II. The Big Picture

### A. THE THREE GOALS OF FEDERAL INCOME TAX

As mentioned in the introduction, the challenge of designing a course in Federal Income Tax comes in balancing the potentially competing goals of the course and addressing the multiple, and sometimes conflicting, interested constituencies. This section discusses those in more detail.

Although many instructors might disagree as to the specifics, most would agree that there are three primary goals of any course in Federal Income Tax (which are merely specific variations of those discussed in Katz and O'Neill):

1. *The methodology goal.* To train students how to read and interpret a detailed statutory and regulatory regime.

2. *The foundational goal.* To introduce students to the fundamental concepts and principles of the income tax necessary for advanced study of tax law.
3. *The doctrinal goal.* To train students in the specific doctrinal rules applicable to the income taxation of individuals.

At first glance, these three goals might seem truly to be one; that is, to teach tax law. In reality, however, this would be assuming away the question. Lawyers trained in tax law might simply assume that all three goals are core to the practice of tax law. After all, how could one practice tax law without some basic foundation in how to read and interpret a detailed statutory regime? How could one understand any specific doctrine applicable to the taxation of individuals without understanding the fundamental principles of the income tax?

From both a student's perspective and a law school's perspective, however, these goals could well be in tension. For example, if a school desired to use Federal Income Tax as a type of applied Legislation class for the majority of its students, the methodology goal would dominate. If, instead, a school wanted to use the course as the prerequisite for advanced tax classes in Corporate Tax or International Tax, where the doctrines applicable to individuals might not apply often, the foundational goal would dominate. If a school wanted students who have completed the course to be able to engage in individual tax practice, the doctrinal goal would dominate.

Similarly, students could enroll in Federal Income Tax for a number of competing reasons. Some might think the course is important for preparing for their state bar exam. Others might think it is important to practice in nontax transactional law such as Mergers and Acquisitions or Securities Law. Others still might really be interested in taking an advanced course such as Corporate Taxation but are required by the school to take Federal Income Tax as a prerequisite.

Balancing these three goals, therefore, is the ultimate challenge of designing any Federal Income Tax course. Each instructor must make his or her own judgment as to which goal(s) to pursue and which goal(s) the students and school emphasize. But the choice must be made.

Additionally, it could matter whether the instructor is offering the only Federal Income Tax course at the school or if multiple instructors offer Federal Income Tax on a regular basis. If the latter, it is possible for one course to be designed as the foundational course for students interested in advanced tax classes and the other to be designed as the high-level course intended for broad appeal to second-year law students. Not all instructors have the luxury of relying on multiple sections of Federal Income Tax being offered at their school, however.

## B. CHOOSING COURSE OBJECTIVES

Turning from the conceptual to the practical, how does an instructor start with the three goals of the Federal Income Tax course and turn it into an actual class? Again, unlike most law school courses, this question can depend on how the course is intended to fit into the law school curriculum.

### 1. Number of Credits

Given the scope, depth, and breadth of the subject matter, instructors could fill as much time as they are given in Federal Income Tax. In reality, however, the course must be structured within the confines of the credits awarded for the course by the school. Typically, this comes down to whether Federal Income Tax is a 3- or 4-credit course.

Unfortunately, there is no single answer to this question. As an initial matter, a 4-credit course can cover more material. Thus, choosing 4 credits for Federal Income Tax makes it a little easier to balance the three competing goals of the course. In other words, more time means more material can be covered.

But choosing 4 credits is not cost-free. There are instructor, student, and school considerations to take into account. First, from an instructor's perspective, a 4-credit course simply will take more time. Assuming that most schools attempt to match the number of credit hours with the number of in-class hours per week, choosing a 4-credit class means teaching four hours a week instead of three. As an initial matter, therefore, the instructor must determine whether the additional flexibility of a 4-credit class is worth the extra in-class time per week. Further, each additional

in-class hour also brings with it class preparation time. Assuming even a relatively conservative 3:1 ratio for class preparation, one additional credit hour would result in 4 additional work hours per week, or 52 additional work hours per 13-week semester. This can be particularly important if the instructor is also teaching one or perhaps even two other large classes in the same semester.

Related to this question is the issue of how much course credit the instructor's school gives for teaching a 4-credit class. Some schools require a minimum number of teaching credits per year or per semester for full-time instructors. At such schools, increasing Federal Income Tax from 3 to 4 credits could be a relatively easy way to reduce other teaching loads. However, other schools assign teaching responsibilities per class and not per credit hour. At these schools, increasing the course credit from 3 to 4 can result in no teaching relief because it counts as one course either way. This does not mean it is a bad idea to teach it as a 4-credit course, but it is one consideration to take into account.

Similarly, the choice between a 3-credit or 4-credit course can affect the scheduling of the course. Some schools use a "block" system for course scheduling in which all 3-credit classes are taught at a certain time and all 4-credit classes are taught at different times. This can prove especially important because Federal Income Tax is typically an upper-level elective. If the only time available for a 4-credit course is Monday and Friday mornings at 8 a.m. but 3-credit courses can meet anytime throughout the week, the choice of credit hours could significantly affect enrollment. Although this should not be a primary consideration of the instructor, it must be taken into account. After all, even the best-designed course is not very useful if no students enroll.

On a related note, an often overlooked consideration involves potential conflicts between scheduling Federal Income Tax with other classes that might be of interest to the same students. For example, it is possible for Federal Income Tax to be scheduled against Corporations, forcing a student interested in a transactional practice to choose between the two. If the decision of the number of credits could potentially resolve any conflicts with related courses, that could also be a consideration in choosing the number of credit hours for the course.

That said, ultimately the choice of the number of credit hours for the Federal Income Tax course should come down to a pedagogical

one: How many hours do I, as the instructor, need to credibly teach the material I want to cover? Within the boundaries of this pedagogical focus, these other considerations might help the decision on the margins.

Turning to more specifics, some schools schedule 4-credit classes to meet twice a week for two-hour blocks while others schedule them to meet three times a week for one-and-a-third-hour blocks. The instructor must ask whether the pedagogical goal for the course would better fit within the format of two two-hour class sessions per week or three one-and-a-third hour sessions. Each has benefits and drawbacks, and there is no one clear answer, but asking the question could potentially assist instructors in designing the course.

For example, would three sessions a week make it easier to divide the course subjects into one subject per class session? Assuming a 13-week semester, are there really 39 separate subjects the instructors wants to cover? If so, is there any real benefit to adding an extra 20 minutes to each class session to increase the class from 3 credits to 4 credits? If teaching two two-hour sessions per week, should each hour cover a separate, unrelated topic or should the second hour of each class provide a deeper examination of a subject introduced in the first hour? If the former, the instructor could potentially assign up to 52 topics in a 13-week semester, whereas in the latter, the instructor might be limited to 26 topics. Of course, these are not mutually exclusive. An instructor might spend one two-hour class session covering two separate provisions, such as casualty losses and business expense deductions, and spend a single two-hour session on capital-gains-related issues. The thought exercise can help the instructor envision the scope of the course.

## 2. Cumulative Versus Subject-by-Subject

Perhaps the most fundamental pedagogical question that an instructor must face in developing a course in Federal Income Tax is whether to teach the course in a cumulative matter or as a series of separate topics. More specifically, the instructor must decide whether to adopt a single, unifying theme for the rules covered in the course or whether to analyze the individual rules as separate policy matters. Of course, this is not unique to Federal Income

Tax, but it does prove uniquely challenging in the course, primarily because of the potential scope and breadth of the course.

Importantly, neither approach will prove all-or-nothing. Independent subjects can have related policies, even if not all subject matters cleanly fit within a single theory of the course. As a conceptual matter, however, the instructor must decide which method is preferable as an organizing goal to determine which topics to cover and how to organize them.

The difficulty with this decision is that it overlaps substantially with the decision about which casebook to adopt, which is discussed in more detail later in this book. Fortunately, in the field of Federal Income Tax there are a sufficient number of casebooks with significantly different approaches to permit an instructor to adopt almost any approach to the course and have a casebook that fits within that approach. Thus, unlike in subject matters with one or two dominant casebooks, the instructor may first focus on the goals for the course and then try to find a casebook that fits those goals rather than first choosing a casebook and then trying to work within it.

What is meant by a cumulative approach? This can mean different things to different instructors, but for the most part it requires the instructor to adopt some unifying theme to the scope of the course. For example, one potential theme could be measuring taxpayers' relative ability to pay. Under this approach, all assigned provisions would be interpreted within this framework. For example, under this approach, the extremely broad definition of gross income adopted in Section 61, as interpreted in *Glenshaw Glass*, can make sense as a policy matter if, by adopting the broadest definition of income, Congress can then carve out specific exceptions for policy purposes. Each exclusion from gross income could in turn be interpreted within this framework; i.e., why did Congress exclude this item from the broad definition of gross income and thus not take it into account as part of ability to pay?

There is much to like in such an approach. An overarching theme provides structure to the course and a touchstone for the instructor and student to return to when any specific subject becomes confusing or overwhelming. The difficulty is that the Internal Revenue Code does not neatly fit within any one such theme. For example, how can the capital gains preference be justified if the intent of the tax law is to measure relative ability to pay? Of

course, there are policy reasons for the capital gains preference, but they might have to do with bunching, lock-in, and double tax concerns not necessarily related to ability to pay. The challenge for an instructor, therefore, is to find a way to integrate these disparate policies into the overarching theme for the course.

As a personal anecdote, I struggle each semester with whether to teach the Section 119 exclusion for employer-provided meals and housing. I typically cover Section 119 for several reasons. First, it provides an excellent opportunity for the students to engage in detailed statutory interpretation. Many students turn to their intuition or experience regarding whether meals are excluded from gross income; for example, whether meals the students eat during interview lunches with law firms are taxable to them. Of course, their intuition screams that such meals must not be gross income to them, and thus the students try to fit such meals within the confines of Section 119—which, of course, cannot be done. This provides an excellent opportunity to force students to start with the words of the statute rather than intuition. Second, Section 119 provides students an opportunity to engage with a detailed and comprehensive Supreme Court case addressing the issue with respect to employer-provided meals (*Commissioner v. Kowalski*). This case provides an excellent example of how to interpret a statute that incorporated a common-law term of art but also added additional statutory requirements (i.e., did it incorporate the old case law or repeal it?).

Covering Section 119 accomplishes several pedagogical goals in a single, relatively straightforward statute that can be introduced relatively early in the semester. So why struggle with the decision whether to include it? Simply because Section 119 is not that relevant to most practicing lawyers in the real world or to advanced tax courses. How can I justify dedicating one of my 39 class sessions to a relatively unimportant doctrine? If the big reveal at the end of the class session is that other rules apply to exclude most business meals from gross income in real-world settings, do I run the risk of making the students feel like I am “hiding the ball” or playing law professor games?

On the other hand, in semesters where I choose not to cover Section 119, I sometimes find myself referring back at times throughout the semester to the pedagogical lessons I would have covered in that provision. It is certainly embarrassing to be engaged in a

quasi-Socratic exercise with a student, hoping to lead the student to appreciate how Congress legislatively repealed prior case law through the enactment of a new statute, only to realize I have not yet introduced that concept to the class.

As can be seen from these examples, it is important to remember that there is no one correct approach. Instructors should choose the approach that best fits their pedagogical goals for the course and their instruction style and methodologies. Rather, the point of this discussion is that making the choice in designing the course can avoid problems arising in the middle of a semester in deciding how to cover a particular subject matter, or even worse, changing methodologies midway through a semester.

The decision whether to adopt a subject-by-subject or cumulative approach is related to big-picture issues—such as the types of students and the fit of the course in the school’s curriculum—and more fine-grained issues such as choosing a casebook, building a syllabus, and in-class techniques. These are discussed later.

### 3. Instruction Methodology

The next course objective the instructor must determine is the method of in-class instruction methodology. As with the other course objectives, this decision affects not only the design and pedagogical goals of the course, but also the choice of casebook and structure of the class.

As in many other courses, there are several methods for in-class instruction:

- a. *The Socratic method.* The traditional style of law school in-class methodology involving guided question-and-answer sessions with individual students over the assigned material that the students prepare in advance.
- b. *The problem method.* A modified version of the Socratic method using hypothetical problems to guide students to learn how to apply doctrinal law to facts.
- c. *The lecture method.* The traditional large-class method where the instructor explains the material to the students as a supplement to the assigned reading.

- d. *The student-led method.* The instructor assigns topics to the students to work through the material, either on their own or in small groups, and has the students work through their answers together.<sup>2</sup>

These methods are not unique to Federal Income Tax, nor are they mutually exclusive. Katz and O'Neill provide an excellent overview of them and is an excellent resource. In addition, there are myriad articles, such as those in the *Journal of Legal Education* among others, covering teaching methods and pedagogical goals in more detail than can be done here.

For these purposes, however, what is particularly important to Federal Income Tax is how the choice of method interacts with other course objectives. The problem method might work best for instructors adopting the foundational goal for the course; the Socratic method might work best for instructors adopting the methodology goal; and the lecture or student-led method might work best for instructors adopting the doctrinal goal. Similarly, the choice of method affects the material that can be covered and how the course is structured. An instructor adopting a time-intensive methodology, such as the Socratic method, might be able to cover less doctrinal material than an instructor adopting a less time-intensive methodology, such as the lecture method. Similarly, an instructor adopting a cumulative approach to course design might find the problem method more useful than the student-led method because the instructor can guide the discussion toward incorporating prior material where students might not necessarily do so on their own. To the extent an instructor wants to use Federal Income Tax to introduce upper-level students exposed primarily to a Socratic method to more collaborative problem solving in complex statutory regimes, the student-led method could be ideal.

Of course, in the real world no instructor in Federal Income Tax will adopt solely one method. Rather, the method can match the subject matter or timing in the semester. An instructor might lecture on cancellation of indebtedness income, use the problem method on the medical expense deduction, and use the Socratic

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<sup>2</sup> There are other methods as well. For example, the story method uses narratives surrounding leading cases as a way to teach the history and policy underlying certain doctrines. The client file method creates a fictional client file and applies it to the relevant subject matters throughout the semester. This method is more appropriate for upper-level tax courses than for Federal Income Tax, however.

method on gifts and bequests. It is not necessarily important to choose one and only one methodology, but rather to consider how methodology will fit into the larger goals of the course, including how much material can be covered and which goals the instructor wants to emphasize.

### C. THE CORE CONCEPTS IN FEDERAL INCOME TAX

As can be seen from the preceding discussion, it is difficult to identify a core curriculum for Federal Income Tax. Any list will exclude a topic that some think indispensable and include other topics that some think superfluous. Regardless, if time were not an issue, I believe most instructors would ideally want to cover the following concepts to one extent or another:

- Definition of gross income
- Statutory exclusions from gross income
- Statutory deductions from gross income
- Defining the taxable unit
- Timing issues
- Treatment of capital gains and losses
- Progressive rate schedules and marriage penalty
- Tax credits
- Tax shelters

This list covers most of the core topics that any instructor in Federal Income Tax would ideally cover, time and pedagogical goals permitting. That said, each broad subject could include vast differences in specific content. As just one example, there is no consensus of which I am aware regarding whether a Federal Income Tax course should cover the concept of nonrecognition. First, it is unclear where in the syllabus such a concept would go. Is it part of the definition of gross income? Is it a timing issue; i.e., a deferral of income built into the basis of deferred assets? Is it part of defining the taxable unit; i.e., through the rules applicable to marriage and divorce? Should the instructor teach a specific provision, such as like-kind exchange, in detail, or should the instructor merely identify the concept?

Similarly, instructors are divided over whether, and to what extent, to include detailed timing issues, such as original issue

discount (OID) or depreciation. I consider both topics central to teaching Federal Income Tax. In my opinion, absent some understanding of how the Internal Revenue Code deals with time-value, it is difficult to explain almost any anti-abuse rule. As I understand it, however, most instructors and casebooks disagree. The most common objection is that difficult subjects such as OID introduce unnecessary complexity that many students will find off-putting, with little pedagogical benefit for students not interested in pursuing advanced studies in tax law.

Along the same lines, many instructors might consider the text of certain Supreme Court decisions indispensable to the course. This list might include *Commissioner v. Glenshaw Glass*, *Duberstein v. Commissioner*, *United States v. Kirby Lumber*, and *INDOPCO v. Commissioner*. Yet I often find assigning and teaching the actual text of these cases not worth the trouble. The doctrine of these cases is typically pretty easy to explain in a few sentences. The complexities and unanticipated consequences that arise from them, however, can prove difficult for students to pull out in a Socratic-style dialogue. Instead, I prefer to teach subsequent, less foundational cases that attempt to reconcile a problem arising from one of these foundational Supreme Court cases.<sup>3</sup>

Conversely, many instructors cover “old” law as a way to help students frame a legal issue. One of the clearest examples involves the cases of *Corn Products* and *Arkansas Best*. To the extent that *Corn Products* can be read to adopt a business-related exception to the definition of capital asset, *Arkansas Best* clearly overrules it; to the extent that *Corn Products* can be read as providing a hedging exception to the definition of capital asset, it has clearly been superseded by statute. Then why assign *Corn Products* at all? Primarily because doing so permits the instructor an opportunity to demonstrate to students how even Supreme Court justices can let their intuition improperly color their interpretation of a statute, leading to potentially devastating unintended consequences. This,

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<sup>3</sup> One good example is *Olk v. United States*, a case in which the court held that tips to casino dealers were not gifts for federal income tax purposes. *Olk* demonstrates to students how a seemingly sensible rule (the *Duberstein* standard that a gift is determined by the detached and disinterested generosity of the donor) can lead to unexpected or even odd results in the real world—that a tip paid to a casino dealer cannot be a gift because the gambler had an irrational expectation of personal benefit.

in turn, helps students understand why the Supreme Court adopted the ruling it did in *Arkansas Best*, notwithstanding that the taxpayer might well have had the better argument based solely on the language of *Corn Products*.<sup>4</sup>

The following represents one example of how to attempt to integrate all of these moving parts into a single 4-credit Federal Income Tax course that meets three times a week for 13 weeks at 75 minutes per class session:

- Class 1: History and Policy of the Tax Laws
  - Whiskey Rebellion, Fries Rebellion, Tariff of Abominations
  - Key Cases: *Hylton*, *Pollack*, *Stone Tracy*
  - Sixteenth Amendment
- Class 2: Introduction to Gross Income
  - IRC: §§ 61, 1001(a)-(c), 83(a)(1), 74
- Class 3: The Role of Debt in Gross Income
  - IRC: §§ 61(a)(12)
  - Key Case: *Zarin v. Commissioner*
- Class 4: Limitations on Gross Income
  - IRC: §§ 1001(a), 1012
- Class 5: Introduction to Disposition of Property
  - IRC: §§ 1001(a)-(c), 1012
  - Key Case: *Cottage Savings*
- Class 6: Special Rules for Debt and Disposition of Property
  - Regs: § 1.1001-2(a)(1)-(2), (b), (c) Examples 1 and 2
  - Key Cases: *Crane*, *Tufts*
- Class 7: Special Rules for Debt and Disposition of Property (cont.)
  - Key Case: *Preslar v. Commissioner*
- Class 8: Exclusions from Gross Income: Gifts and Bequests
  - IRC: §§ 102, 1014(a), 1015(a)
  - Regs: Prop. Reg. § 1.102-1(f)

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<sup>4</sup> Note that this is different from defending the existence of the capital gains preference as a normative matter. Some instructors use *Corn Products* and *Arkansas Best* as examples of why the capital gains preference is poor policy. This is a perfectly valid approach, but not the subject of this section.

- Class 9: Exclusions from Gross Income: Employee Benefits
  - IRC: §§ 119(a)-(b)
  - Key Case: *Commissioner v. Kowalski*
- Class 10: Exclusions from Gross Income: Fringe Benefits
  - IRC: §§ 132(a)-(e)
  - Regs: § 1.62-2
- Class 11: Exclusions from Gross Income: Miscellaneous
  - IRC: §§ 104(a)(1)-(3), §§ 108(a), (b)(1)-(2), (d)(1)-(3), (e)(5)
- Class 12: Exclusions from Gross Income: Temporary v. Permanent Exclusions
  - Key Case: *Bailey v. Commissioner*
- Class 13: Intro to Assignment of Income
  - IRC: § 73
  - Key Cases: *Helvering v. Horst*, *Ferguson v. Commissioner*
- Class 14: Assignment of Income: Gifts
  - IRC: §§ 102(a)-(b)
- Class 15: Assignment of Income: Below-Market Loans
  - IRC: §§ 7872(a)-(d)
- Class 16: Assignment of Income: Divorce and Alimony
  - IRC: §§ 71, 215, 1041(a)-(c)
  - Regs: Temp. Reg. § 1.1041-1T(d), Q&A 10-12
- Class 17: Intro to Timing: The Cash Method
  - IRC: §§ 441(a)-(c), 446(a), 451(a)
- Class 18 – Special Issues in The Cash Method: Deferred Compensation
  - IRC: §§ 83(a)-(c), 409A
- Class 19: Intro to the Accrual Method
  - IRC: §§ 446(c)(2)
- Class 20: Special Issues in Accrual Method: Loans and Deposits
  - Key Case: *Commissioner v. Indianapolis Power & Light*

- Class 21: Special Issues in Accrual Method: OID
  - IRC: §§ 1272(a)(1); § 1273; §§ 1274(a)-(b)(2), (c)(1)-(2), (d)(1)
  - Regs: Reg. §§ 1.1272-1(a)(1), (b)(1); § 1.1272-1(g); § 1.1273-1(a)-(c)(ii); § 1.1273-2; § 1.1001-1(g)
- Class 22: Deferred Sales of Property
  - IRC: §§ 453(a)-(d), (f)
- Class 23: Introduction to Above-the-Line Deductions
  - IRC: §§ 62(a)(1)-(3)
- Class 24: Trade or Business Deductions
  - IRC: §§ 162, 262
  - Key Cases: *Mason & Dixon Lines*, *Trebilcock v. Commissioner*
- Class 25: Expenses Versus Capital Expenditures
  - IRC: § 263
  - Key Case: *Commissioner v. Idaho Power*
- Class 26: Mixed Business/Personal Expenses: Travel
  - IRC: § 162(a)(2)
  - Key Cases: *Hantzis v. Commissioner*, *Wilbert v. Commissioner*
- Class 27: Mixed Business/Personal Expenses: Education and Entertainment
  - IRC: § 274(a), (d), (h), (k), (l), (m), (n)
- Class 28: Depreciation
  - IRC: §§ 167(a), 168(a)-(e)(3)
  - Key Case: *Simon v. Commissioner*
- Class 29: Intro to Personal Deductions: Investment Expenses
  - IRC: § 212
  - Regs: Reg. § 1.212-1
- Class 30: Purely Personal Expenses: Charitable Contributions
  - IRC: §§ 170(a)(1), (b)(1)(B)
- Class 31: Purely Personal Expenses: Medical Expenses
  - IRC: §§ 213(a)-(d)
- Class 32: Personal Deductions: Limits and Policy
  - IRC: §§ 63, 67, 68

- Class 33: Special Issues in Timing of Deductions
  - IRC: §§ 461(a), 461(h)
  - Key Case: *Chrysler Corp. v. Commissioner*
- Class 34: Timing and Tax Shelters
  - Key Cases: *Knetsch*, *Estate of Franklin*, *Rice's Toyota World*
- Class 35: An Introduction to Capital Gains and Losses
  - IRC: §§ 1211(b), 1222
- Class 36: Special Issues in Capital Gains
  - Key Cases: *Corn Products*, *Arkansas Best*
  - Class 37: Introduction to Computing Tax Liability
  - IRC: §§ 151, 152
- Class 38: Progressive Rates and the Marriage Penalty
  - IRC: §§ 1(a)-(d), 2, 6013
  - Key Cases: *Druker v. Commissioner*, *Boyter v. Commissioner*
- Class 39: Tax Credits
  - IRC: § 32

Nothing in this list is indispensable, nor would any instructor be wrong to add or remove any particular subject from this list or change the order significantly. For example, in some years I do not cover Section 119 and replace it with Section 165, Casualty Losses; and in other years I do not cover divorce/alimony, choosing to replace it with bad debt deductions. What this list demonstrates is an approach to structuring the Federal Income Tax course that is intended to expose students to a cross section of the core concepts of Federal Income Tax, from defining gross income to progressive rates.

On that note, even if instructors might disagree as to the details, the pedagogical goals of a course structured in this manner emerge. Certain topics, such as the definition of gross income, the assignment of income doctrine, realization and capital gains, and progressive rate schedules, meet the *foundational goal* of the course. Any student taking Corporate Tax, International Tax, or Partnership Tax must have some familiarity with these basic concepts. Topics such as Section 119 and depreciation meet the *methodological goal* of the course; i.e., students learn how to interpret and apply a complex statute using tools of statutory interpretation. Topics such

as progressive rates, the marriage penalty, and tax credits meet the *doctrinal goal*, as these are rules with which I believe any student completing a course in Federal Income Tax should be familiar.

### III. Designing and Preparing the Course

#### A. INITIAL STEPS/WHAT TO READ

Instructors in Federal Income Tax are both fortunate and unfortunate in that there is no single canon on the subject. Unlike some topics, it is difficult to state that, to be a qualified instructor, one must have read a certain book or law review article or other source material. Of course, the instructor must have a working knowledge of the basic provisions of the Internal Revenue Code and the core doctrines underlying it, but this almost goes without saying. There are myriad articles that could be recommended, depending on what direction an instructor decides to take the course and in which direction an instructor desires to lead the conversation. Katz and O'Neill provide an excellent overview of issues to consider in this regard.

With respect to Federal Income Tax in particular, an instructor who intends to spend a significant amount of time discussing timing issues should be familiar with Daniel I. Halperin, *Interest in Disguise: Taxing the Time Value of Money*, 95 Yale L. J. 506 (1986) as a starting point. An instructor who intends to spend time discussing choice of tax base or optimal tax theory should be familiar with William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 Harv. L. Rev. 1113 (1973) as a starting point. An instructor who intends to delve into the complexities of taxation of the family unit and the marriage penalty should be familiar with Boris I. Bittker, *Federal Income Taxation and the Family*, 27 Stan L. Rev. 1389 (1974). An instructor wanting to teach tax expenditure theory should be familiar with Stanley S. Surrey and Paul R. McDaniel, *Tax Expenditures* (Harvard Univ. Press 1985).

These are just starting points, though. For example, an instructor could adopt a perspective on the tax law as it relates to gender, family, and intimate relationships. *See, e.g.*, Nancy C. Staudt, *Taxing Housework*, 84 Geo. L. J. 1571 (1995). An instructor could

delve into the limitations on the use of the tax laws for poverty relief and wealth transfers. *See, e.g.*, Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 Harv. L. Rev. 533 (1995). There is virtually no limit to the different potential avenues the instructor could follow in preparing for the course.

This leads to the ultimate difficulty with using the scholarly literature as a base for teaching Federal Income Tax: It can quickly turn into a form of quicksand from which the instructor might never return. A quick citation search on Google Scholar reports 212 citations to Alstott, 237 citations to Staudt, 248 to Halperin, 374 to Bittker, 524 to Surry & McDaniel, and 689 to Andrews. Even a cursory review of the sources citing these articles would swamp any reasonable preparation time for the course. Even worse, it could cause an instructor to lose focus on the core pedagogical goals he or she has adopted for the course in the first place.

This is not to say that scholarly research and writing is irrelevant to the teaching of Federal Income Tax. In fact, I am assuming that most instructors will have some familiarity with many, if not all, of these lines of literature. The deeper and stronger the knowledge of an instructor in a specific field of tax law, the better, more prepared, and more confident the instructor will be. This differs from the question of what is canonical to preparing to teach the course. Although I believe that strong research makes for strong teaching, I equally believe that there is no single canon for the Federal Income Tax course nor one proper way to structure the course.

So where does that leave the new instructor? Fortunately, perhaps unique to Federal Income Tax, there is a surfeit of casebooks available for the instructor to choose. Rather than turn first to academic articles as the foundation for the course, I would recommend starting with a review of the casebooks. This at first might seem strange. After all, how is an instructor supposed to choose a casebook that fits his or her pedagogical and methodological goals if the foundation for the choice is built on the casebooks themselves?

The reason turns, in part, on the justification for there to be so many casebooks in this particular subject in the first place. The diversity of casebooks represents an impressive breadth in course coverage, pedagogical goals, use of history and policy, teaching

methods, and doctrinal coverage. For this reason, even a brief review of the available casebooks for Federal Income Tax can help instructors shape and frame what they ultimately want the class to look like and what they want to cover as a substantive matter. For example, some textbooks adopt a survey-based approach to the material, others adopt case studies and discussions, and others still adopt detailed problems. Some contain lengthy editorial commentary and others contain little. Some have a unifying policy or organizational theme running throughout and others do not.

Solely as an example, my co-authors and I organize our casebook around what we conceptually refer to as the “taxing formula.” Of course, there is no such thing in the Internal Revenue Code. Rather, the taxing formula is what we refer to as the organizational structure of calculating final tax liability by starting with gross income and subtracting above-the-line deductions, itemized deductions, and personal exemptions, then applying rates and subtracting credits. My co-authors and I believe that this approach provides a useful organizational structure to the course that students can use to build their understanding of the material. Admittedly, there are drawbacks to such an approach. Timing rules for income and timing rules for deductions end up in different chapters. Issues like the marriage penalty are deferred until the late chapters on progressive rates and not earlier chapters on assignment of income.

That said, for the instructor completely new to the course, surveying all of the available casebooks in Federal Income Tax could prove daunting. For this reason, it might be preferable to work backward, from a student perspective. Put differently, the instructor could start by consulting with some of the available study aids that students typically use. As I tell my students, the value of study aids depends on what the reader is looking to gain from them. For example, *Federal Income Taxation* published by Foundation Press (originally authored by Marvin Chirelestein, now co-authored with Lawrence Zelenak) is the classic hornbook-type study aid for the course. The book provides an excellent structural overview of the subject and conceptual framework for the course. However, as described by the authors themselves:

Our approach . . . is anything but comprehensive. All sorts of topics are omitted which the student may encounter

in the classroom and desire more information about . . . . But we have not attempted to write a treatise, or a summary of Code sections, or a manual which can be used to answer specific questions about the tax law. Instead, the aim . . . is to disclose the structural characteristics of the income tax mechanism . . . . We have tried to sketch the outline of the house—or at least one wing of it—but have made no effort to furnish all the rooms. This concept has led to a selected coverage of the law (to put it mildly).

Marvin Chirelestein and Lawrence Zelenak, *Federal Income Taxation* (12th ed.) at Preface (here and elsewhere, Chirelestein). As this passage indicates, the study aid is typically intended to supplement a course, not help build one. Although I believe Chirelestein is an invaluable contribution to the field, an individual instructor's goals for the course might or might not correspond with the organizational structure of that particular book.

After a review of the relevant study aids and available casebooks, an instructor can more narrowly target the areas in which he or she feels the need for additional background material. Topics or themes that prove common to most or all casebooks and with which the instructor feels less familiar could well prove to be the best area for additional reading. For instructors who are seeking additional exposure to a particular subject matter within the course, a problem-based study aid such as David Cameron, *Questions & Answers: Federal Income Tax* (Lexis-Nexis) could prove useful. Similarly, if an instructor comes from a corporate law background and every casebook has some discussion of an individual taxpayer provision such as the earned income tax credit, that instructor might want to narrowly target additional research on the topic. By contrast, if a particular casebook contains a lengthy discussion on issues arising in subdeveloping real property and no other casebook contains such material, the instructor could either disregard this subject as a source of additional research (if the instructor chooses not to adopt the book) or focus on it as a source of additional research (if the instructor chooses to adopt the book).

## B. COMMON PITFALLS AND CHALLENGES

I often tell my students that Federal Income Tax is a fascinating subject because it is the one area of law that affects virtually every area of people's lives, from birth to death, marriage to divorce, education to health care, and of course owning and operating a business. It is for precisely this same reason that Federal Income Tax can touch on particularly difficult or sensitive subject matters.

A temptation in Federal Income Tax, therefore, is to constantly relate the material to current debates. This can prove particularly true in Federal Income Tax because there is always some debate in the political or public policy sphere related to taxes—from whether to raise or lower the top marginal rate to whether to permit same-sex couples to file joint returns. There is nothing inherently wrong with incorporating current events into the class so long as it does not distract from the core pedagogical and methodological goals of the course.

Conversely, many courses in Federal Income Tax either attempt to avoid politically or personally sensitive issues or treat them in the same manner as more straightforward issues. I believe this is a disservice both to the subject matter and to the students. Students in an upper-level law school class will soon be practicing lawyers (or other professionals). They will engage with matters that arise in the real world. One of the goals of my course is for students who have completed the course to be able to identify and analyze difficult issues in the real world. Failing to expose students to sensitive subjects because the class conversation could be awkward or difficult fails this pedagogical goal.

In addition, there are a number of subjects that broach the dreaded “math” aversion for which law students are infamous (even if only apocryphally). Avoiding subject matters solely because they potentially expose students to basic arithmetic also fails to serve the best interests of the students.

This section discusses a number of examples and some alternative ways to discuss the issues in class. Of course, it is not exhaustive in any way, nor is it intended to reflect the most pressing issues facing instructors. Rather, the discussion that follows represents a

cross section of issues that are representative of the different types of issues an instructor might face in constructing the course.

## 1. Debt

The role of debt is crucial to the Federal Income Tax course. From the claim of right doctrine, to the debt exception to gross income, to Section 61(a)(12) Cancellation of Indebtedness (“COD”) income, to *Crane* and *Tufts*, debt forms the core of many of the doctrinal and policy complications in the course.

Yet, in the modern era of legal education, debt also plays a prominent personal role in the lives of many, if not most, students. Many students fear graduating with unsustainable debt or worry that student loans will make it impossible for them to achieve the quality of life they had aspired to upon entering law school. It is crucial, then, to instill an appreciation of the role that debt plays in the tax law while also being sensitive to the reality of the personal relationship many students have with debt. There are several ways to try to do so. At a minimum, it is important not to appear callous or uncaring regarding debt. This can prove more challenging than would first appear. The reason has to do with the methodology typically used to teach such matters—primarily the Socratic, quasi-Socratic, and problem method of teaching.

For example, assume an instructor is teaching the concept of COD income. For the issue to arise, there must first be some reason for a borrower to undertake debt. In a traditional Socratic or problem method, the instructor might use some given set of facts to establish the debt for purposes of discussion. This could be a mortgage on a house, or it could be credit card debt, or it could be student debt. Second, the instructor must hypothesize or describe a scenario in which the obligation to repay is relieved for some reason. There are two realistic situations where this would occur: (1) when interest rates rise, or (2) when the borrower faces financial hardship. Thus, to lead a student to understand why the COD income rules work the way they do, the instructor must lead a student to discuss one of these scenarios. At the same time, both of these scenarios could potentially be troubling to someone facing significant student debt. The prospect of interest rates rising significantly in the face of non-fixed-rate student loans could be

considered daunting to many students and, of course, none want to contemplate scenarios in which they would be unable to satisfy their debt due to financial hardship.

This, in turn, can lead the discussion away from basic doctrinal premises to policy or political debates very quickly. One common form might be for the student to assert that as a matter of fairness student debt should not count for purposes of COD income (anecdotally, I have faced this numerous times). The instructor faces a difficult choice at this point. A pure Socratic instructor would permit the student to pursue this line of reasoning, guided through questions by the instructor, so the student would achieve an understanding on his or her own as to the difference between a policy-based exclusion of COD income and the underlying doctrinal question of whether a particular item of COD income is included in gross income under Section 61. This might conflict with the doctrinal goals of the course, however. There might not be enough time in the class to permit the students on call to work through the material and come to an understanding of the issue on their own. It could well be a disservice to other students who understand the difference to permit one student to force the class on a divergent path.

Even worse, the entire class dialogue could devolve from a doctrinal and policy analysis to a political debate over the role of student debt. This issue is particularly sensitive for the instructor. Dismissing this point of view out of hand, either as wrong or irrelevant, can potentially come across as arrogant, self-serving, out-of-touch, or even wrong-headed. At some point an instructor could not only lose control of the debate but also of the class itself if the class begins to feel that the instructor has a hidden agenda that conflicts with their policy preferences. Such a presumption can prove particularly pernicious in a class setting using a quasi-Socratic or problem method because the instructor rarely provides a clear answer to a problem but instead permits students to struggle with the analysis under the instructor's guidance. So long as students believe this process is undertaken in good faith it can be extremely productive. Once students believe the process is not being undertaken in good faith or is being used to "hide the ball," it might no longer prove useful as a pedagogical tool.

Typically, however, the discussion of debt in class does not rise to the level of a significant disruption to class or challenge for the

instructor. Being sensitive to the issue up front can ensure this result.

## 2. Marriage Penalty/Bonus

The marriage penalty/bonus provides an excellent pedagogical tool for students in Federal Income Tax. First, it requires an appreciation of several different doctrines to understand why it arises in the first place. Second, it provides an excellent opportunity for students to see firsthand how unexpected consequences can arise from making seemingly neutral baseline policy decisions. Third, it can open what some might consider to be a dry subject—progressive rate tables—to a lively discussion of intrafamily dynamics and public policy.

What then is the potential danger of teaching the marriage bonus/penalty? The danger involves confronting implicit assumptions about gender and sexuality roles both within the family and in society as a whole. Of course, the marriage penalty/bonus is a mathematical concept: The penalty applies when two spouses of roughly equal market earnings marry and combine their incomes under a single rate schedule, and the bonus applies when a single earner marries a spouse with little to no market income. Often, however, students can, either subconsciously or intentionally, assign gender roles to these concepts. Put more bluntly, an instructor might confront a situation where a student would say something along the lines of “The penalty applies when the woman works and the bonus applies when the woman stays home.”

Knowing this is a possibility, the instructor must decide how to address the topic of gender roles in the marriage penalty and bonus context. Should the instructor address gender roles early in the conversation? For example, should the instructor discuss how nonmarket earnings such as child care or housework are considered imputed income and not included in gross income, and thus it is the imputed income doctrine and not the legal status of marriage that is causing the penalty or bonus? Should the instructor embrace this stereotype as a way to emphasize how facially neutral tax laws can reinforce existing gender stereotypes in society? Should the instructor attempt to downplay the gender role issue and merely state that it could apply equally whether a male spouse or female spouse is the market earner or the nonmarket earner?

Similarly, whatever approach the instructor adopts, he or she might also need to consider whether, and how, to incorporate same-sex marriage into the discussion. Until recently, same-sex married couples were not considered married for federal income tax purposes. Was this a subsidy for married, two-earner, same-sex couples and a penalty for married, one-earner, same-sex couples (effectively the opposite of the standard marriage bonus/penalty analysis)? Would the fact that both spouses were of the same sex change the story regarding the implicit incentives toward market work in the economy? If the conclusion from the previous discussion of the marriage penalty/bonus was that it worked as a disincentive for women to enter the market economy, how would that work in a male same-sex marriage?

A related concern with discussing the marriage penalty/bonus is that it involves discussing the definition of marriage. This raises two potentially sensitive topics. First, as discussed previously, it raises the issue of same-sex marriage, which can be politically sensitive. Second, it raises the issue of marriage as an institution; i.e., is marriage an appropriate line upon which to make distinctions in the tax law? As an anecdotal example, one semester I had an outspoken politically liberal student and a deeply conservative religious student in my class. In response to the marriage penalty/bonus discussion, the liberal student explained that marriage was “stupid” and using it in the tax law was “stupid” as well. The conservative religious student took offense at this portrayal of marriage and used personal experience to try to defend marriage as an institution. I was taken aback, to say the least; I managed to steer the conversation back to line-drawing in the tax law more generally, but the topic could easily have gotten out of hand quickly.

The point is that marriage as an institution can, at times, be a politically sensitive subject. Since the tax law uses the legal status of marriage to distinguish between similarly situated taxpayers, there is no way to discuss the tax law issues of the marriage penalty and bonus without potentially touching on some of these sensitive topics as well.

### 3. Cosmetic Surgery

Cosmetic surgery provides an excellent pedagogical tool for Federal Income Tax. It forces students to walk through a statute

with a general rule (§ 213(a)), a definitional section (§ 213(d)(1)(A)), an exception to the general rule with its own exception (§ 213(d)(9)(A)), and a subsection-specific definitional rule (§ 213(d)(9)(B)). Having students walk through these provisions and understand how they interact and apply to fact patterns can provide useful lessons on how to interpret and apply a complex statutory regime.

Of course, cosmetic surgery presents other difficulties as well. As an initial matter, one of the primary forms of cosmetic surgery that the statute was directed at was breast-enhancement surgery. It is obvious on its face why this can potentially be a sensitive topic in the classroom. But even less sexually charged topics such as facelifts and hair implants can raise sensitive issues, particularly if students in the class have had such procedures. These topics touch on issues of gender norms, ageism, and vanity in a way that provides a potential minefield for an instructor.

In one semester, I decided to approach these issues by hypothetically proposing that they applied to me. Specifically, I suggested that I had recently undergone hair transplant surgery (which I had not) as a way to focus the discussion on the statutory requirements for medical care. Unexpectedly, several students found this disquieting to the point where they were having difficulty engaging with the statutory analysis. I was taken aback that an issue of my personal appearance would be relevant to the students in discussing an issue of law. Perhaps this was simply an example of a male faculty member (i.e., me) confronting for the first time the issue of students judging a teacher based on appearance, an issue that I have been told female faculty members confront regularly. Perhaps it was just idiosyncratic to this class. Regardless, I attempted to use the unease with the immediacy of the hypothetical to directly force the class to confront the normative assumptions underlying Section 213.

This minefield is made even more dangerous by the specific language adopted in Section 213(d)(9). That section defines cosmetic surgery as any surgical procedure that is directed at improving appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease. But what is an illness or disease for these purposes? Can depression over one's appearance qualify? If so, would a rhinoplasty—better known as a “nose job”—qualify as cosmetic surgery? This also

raises the issue of sex reassignment surgery. Is changing sex directed at appearance or to treat a disease? Should the tax law look to the *Diagnostic and Statistical Manual for Mental Disorders (DSM)* for a definition of disease or to an independent Federal tax definition? Recall at one point the *DSM* identified homosexuality as a disorder. There is a fair chance that the instructor on occasion will have at least one student—if not many—in class who identifies as homosexual or transgender, or maybe even has undergone sex reassignment surgery. Thus, discussing how the statute could define these identity traits as a “disease” can prove particularly sensitive.

This problem only gets worse when the instructor turns to the exception to the cosmetic surgery exclusion. Section 213(d)(9) provides that cosmetic surgery may qualify for a medical expense deduction if the procedure is “necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from accident or trauma, or disfiguring disease.” In this provision, Congress explicitly chose to incorporate the terms *deformity* and *abnormality* into the Code. Thus, to apply the statute, the lawyer must determine whether a taxpayer is deformed or abnormal for these purposes. This, in turn, requires identifying what is properly formed or normal and some baseline on which to do so. Of course, this raises a number of potentially troubling normative assumptions and correspondingly potentially difficult or awkward classroom conversations.

Although exceedingly difficult in the abstract, this becomes even more fraught in its application. It appears that this provision was intended to permit deductions for such procedures as reconstructive surgery after car accidents and corrective surgery for cleft lip. To reach that conclusion, however, one must first label someone born with a cleft lip as “deformed” or someone in a car accident as “disfigured.” For students who might have personal experience with either, this could be disconcerting, if not traumatic. The instructor must then confront whether other conditions could be considered to meet this definition. Could a taxpayer contend that being born with physical features, such as a nose or breasts, the size of which are more than two standard deviations from the mean argue that they are “abnormal”? Is “normal” measured against local standards, national standards, or global standards?

What about cosmetic procedures intended to lighten skin color or change eyelid shape?

The point of this exercise is not to answer these questions but to demonstrate just how quickly a conversation about a rather technical statutory provision can lead to extremely sensitive topics for many students. For this reason, many instructors might be inclined not to cover a topic such as cosmetic surgery. Although this would be completely understandable, and defensible, I have chosen to teach the subject because it satisfies many of my pedagogical goals for the course. This, in turn, means that I must not shy away from very difficult issues while demonstrating sensitivity to all the different potential constituencies involved. Thinking through these issues before class can permit an instructor to attempt to do so. Problems tend to arise in class when an instructor does not anticipate such sensitivities and thus could unintentionally appear callous or uncaring.

#### 4. Depreciation

Depreciation might seem like an odd topic for which to express concern about personal or political sensitivities. Yet, without fail every year the one topic over which I hear the most consternation from students is depreciation.

Depreciation deductions are a relatively simple in theory. In fact, Section 167, which grants the deduction, is quite short and straightforward. The idea that taxpayers should be able to reduce their income to reflect an amount by which their property is exhausted due to wear and tear over time strikes most as intuitively correct. Conversely, the statutory accelerated cost recovery mechanism found in Section 168 strikes fear into the hearts of many law students. The question that logically follows is this: Why teach Section 168 at all? Why not simply cover Section 167 (and perhaps the famous *Simon* case) and move on?

This is a perfectly reasonable position to take, and in fact one taken by many instructors, but not necessarily because students are intimidated by the math. As most practicing tax lawyers know, the basic depreciation tables are published in Rev. Proc. 87-57 and available in most statutory supplements. Many instructors feel that teaching the mechanics of Section 168 is not worth the opportunity cost in terms of class time because the answer to any

one depreciation question can be so easily determined by applying these tables.

That said, I do cover the mechanics of depreciation, for two reasons. First, I believe it is important for good lawyers to be able to look behind the numbers and understand the policy behind a detailed statutory scheme. Working through the reasons for the midyear convention and the asset-life schedule prove helpful in understanding the mechanics—and thus the policy—of Section 168. Second, and perhaps more important, I think it is important to help students confront certain irrational fears. As lawyers, my students might be confronted with many different, complex topics in practice. Lawyers need not, and should not, try to be accountants or bankers, but they cannot be afraid to even venture into an area of law solely because numbers are involved.

Because my pedagogical goal is to challenge students who might have a fear or aversion to mathematical concepts, I must at the same time be sensitive that many students will feel uncomfortable or intimidated by the material. As discussed in more detail later, for this one topic, I often use Microsoft PowerPoint slides with the mathematical answers on them in class, and I circulate the slides to the students for the issue of depreciation when I do not typically do so. This serves two purposes. First, it signals to the students that I know it is challenging or even frightening for some of them. Second, it relieves some of the anxiety during class time so that the class can focus on the concepts rather than anxiously jotting down numbers.

Every instructor should make his or her own decision as to whether and to what extent to cover Section 168 in the manner that best fits his or her teaching style. This discussion is only intended to highlight how an instructor's pedagogical choice can influence the teaching method choice in part by being sensitive to the learning styles of the students in the class.

### C. CHOOSING COURSE MATERIALS/CASEBOOK

As mentioned earlier, there are numerous choices for a casebook in Federal Income Tax. In fact, *casebook* is probably not even the correct word for the options in this course. Many books refer to themselves as “Problems and Materials” or “Cases and

Materials,” and others refer to themselves simply as “Federal Income Taxation,” while others include “Doctrine, Structure, and Policy” in the title. Even a cursory glance demonstrates that the casebooks take very different approaches to the same material. For this reason, there is a casebook for almost any preferred pedagogical goal or teaching method.

Conversely, the sheer number of books available can seem overwhelming at times. This can potentially lead to two problems: (1) a selection bias, and (2) path dependence (discussed in more detail in Katz and O’Neill). In other words, instructors have an incentive to pick the book with which they are most familiar and then stay with it forever. Unfortunately, these could well be the two worst things an instructor could do in selecting class materials.

Rather, an instructor should focus on the pedagogical goals of the course and the preferred teaching methods and then select a book that best fits both. For example, an instructor wishing to teach a Code-heavy course focusing on the nuts and bolts of doctrine with intensive problems would likely prefer a problems-based book, whereas an instructor preferring to focus on policy and structure might prefer a book with more commentary and examples. A third instructor attempting to teach students how to approach tax issues like a judge might well prefer a book primarily focusing on case law with little in the way of commentary, problems, or examples. Multiple variations on all three types are available in Federal Income Tax. Thus, to reiterate a point from earlier, it is crucial for the instructor to review at least a representative cross section of teaching materials and books to determine which type best fits his or her preferred teaching methods and pedagogical goals for the course.

For these reasons, many instructors force themselves to change casebooks on some regular interval. Changing casebooks involves incurring substantial upfront costs in terms of time and effort. The benefits can be significant, however. One danger in a field such as Federal Income Tax is that, over time, one’s perspective on the subject narrows. As an instructor teaches the same material from the same book repeatedly over time, it might be easy to think that is the only way to teach or organize the material. Changing casebooks forces an instructor outside of this comfort zone, potentially providing both pedagogical and substantive insights.

A related point has to do with the teacher's manual. Implicit in choosing a casebook involves choosing the teacher's manual, but not all teacher's manuals are created equal. Some include extensive commentary on the materials. Some include recommended teaching methodologies for the material. Some include detailed answers to the problems. Others leave the problems open-ended and include a detailed explanation as to why the authors selected those problems and materials. As with the casebook, there is no one right or wrong choice.

Finding a teacher's manual that fits well with an instructor's goals and methods, while supplementing the instructor's weaknesses, can make all the difference between a positive and negative experience in teaching the class. This requires the instructor to be self-aware of both the instructor's strengths and weaknesses as a teacher. For example, an instructor who feels comfortable with policy and less comfortable with quasi-Socratic methods might choose a book with a teacher's manual that focuses on how to dissect cases with students. An instructor who feels comfortable with the Code provisions but wants certainty on guiding students through hypotheticals might choose a book with a teacher's manual that focuses on answering the problems in detail. This choice is extremely important, and sometimes overlooked, but it is also important to remember that as an instructor gains experience, he or she will rely less on the manual, making the choice of the casebook itself increasingly important over time.

The next decision an instructor must make is whether to require a hard-copy statutory supplement for the class. Traditionally this was not even a question, as virtually every Federal Income Tax course required a printed hard-copy statutory supplement. More recently, however, because the Internal Revenue Code is available electronically to most students, the instructor must decide whether to permit electronic access to the statutory material. Many believe this is a terrible idea. Printed supplements permit students to have all the necessary statutory and regulatory materials in a single volume that can be brought to class and easily cross-referenced and tabbed. The primary concern with the electronic version is that there might be no way to replicate this, such as by clicking on a hyperlink in an electronic version of the statute. Further, the electronic version will contain vast amounts of unrelated statutory content, potentially confusing students.

There is no one correct answer to this question. I originally required students to use the printed statutory supplement. I now permit students to choose their method of accessing the material. The theory behind my change is that these students will soon be practicing lawyers and they will need to make these decisions for themselves. In this way, the choice is self-enforcing. Students who choose a method that works well for them will do better in the class than students who choose poorly or only out of convenience. That said, I do not permit students to pass when called on in class or otherwise fail to answer questions in class based on the excuse of not having access to the Code. All assigned provisions—including Code and Regulations sections—are mandatory; only the source is optional.

## **IV. In the Classroom**

### **A. OVERARCHING PRECEPTS**

As discussed earlier, how an instructor chooses to balance the three potentially competing goals of the Federal Income Tax course will drive how the instructor teaches the course. The decision whether to use a problem method, lecture method, or student-led method will turn, with each topic, on the ultimate pedagogical goals of the instructor and the time permitted to cover the material.

In drafting the syllabus, each instructor must balance maintaining flexibility in achieving the goals of the course with specificity in disclosing the contents of the course to students. In particular, this arises with respect to the question of whether to assign the entire semester's reading assignments in the syllabus. I do not assign readings in the syllabus, but rather assign readings weekly, for two reasons. First, not every semester is identical in coverage, and this permits me to tailor the readings to different subject matters in different semesters. Second, not every group of students learns the same way or at the same speed. Weekly reading assignments permit me to tailor the reading to the unique pace of each semester's class and not to force the class into a schedule that might not work.

Finally, I use weekly assignments to prevent students from reading ahead. The pedagogical reason for this is that I structure the material for the semester to be cumulative, meaning material assigned later in the semester requires an understanding of the material from earlier in the semester. I am concerned that students who read ahead might obtain only a superficial knowledge of the material. In a cumulative course, once a student falls behind it becomes increasingly difficult for that student to catch up. Adopting weekly reading assignments cannot force students to prepare in advance, but it does limit the ability of students to read ahead and thus permits me to control the development of the material in the manner intended. Although assigning readings weekly in this manner is more work for the instructor, I have found that, for me, it better achieves my goals for the course.

It is not necessary to assign readings weekly to achieve these goals, however. Many instructors lay out reading assignments for the semester as an aspirational goal and then make adjustments throughout the semester. This can be done as addendums to the syllabus or simply as replacement reading assignments. Others stay on the assigned reading schedule as a way to ensure coverage. Which method to adopt turns solely on the instructor's teaching methods and pedagogical goals.

The two other issues to consider in the classroom include how to use the physical space and what role class notes should play. With respect to physical space, many new teachers tend to stand behind the protection of a lectern and rarely move out from behind it. Although there is nothing inherently wrong with this, there is nothing inherently right with it either. Some of the most successful instructors walk the room while teaching. I know of some that walk up to students and look them directly in the eye when calling on them. In larger classrooms, some instructors might stand in the well instead of standing behind the podium. In smaller classrooms, some instructors might stand at the board, and others might sit with the students. The most important thing to remember is to find a way to incorporate everyone in the class. If the class meets in a large room and it is difficult to project your voice, walking the aisles might make more sense. If the class meets in a smaller room and class can be held in a more conversational style, sitting with the students might make sense.

The decision on how to use physical space also is related to the decision on how to use class notes. Class notes are as unique to instructors as fingerprints. Some use detailed outlines of the material for the day, almost a “super-outline” of the cases and discussions for the class. Some actually script out portions of the class. Others bring only the answers to the assigned problems and no other material. Some post their outlines on PowerPoint during the class, and others protect class notes as if they were state secrets. There is no one correct way to use class notes, but their use can and will interact with the choice of goals and methodologies for the course as well as the instructor’s use of the physical space. In other words, greater reliance on class notes makes it harder to permit students to lead a discussion, and also makes it harder to leave the lectern. Personally, I only include answers to the assigned problems in my class notes. I do this for two reasons. First, I primarily use the student-led and problem methods in which I guide students through answering the assigned problems. This means deferring to where the students begin the analysis and permitting them to make mistakes and work their way through them. Second, I want to engage students directly by walking out from behind the podium. To do so, I cannot be tied to specific class notes sitting on the podium.

Each instructor’s use of class notes will necessarily correspond to his or her choices, however, and there is no one correct way to incorporate class notes into class.

## B. THE FIRST DAY

Walking into a large classroom for the first time can be intimidating for anyone. Doing so in a class such as Federal Income Tax, which lacks any consensus on a clear starting point among teachers of the subject, can prove even more so. For an instructor who has prepared in advance, selected a clear teaching method and pedagogical goals for the course, chosen the appropriate casebook, reviewed the teacher’s manual, and surveyed additional literature in any areas in which the he or she felt supplementation could help, it need not be. Confidence in the knowledge of the material and the direction of the class through preparation can go a long way toward crafting a successful semester. As famed college basketball

coach John Wooden said, “Success is peace of mind attained only through self-satisfaction knowing you made the effort to do the best of which you’re capable.”

That said, it can be difficult to choose the topic for the first day. There is no easy way to start a class. Any method will feel abrupt. Some review the syllabus and the scope of the course, and then open the floor for questions about the course. Others prefer to jump directly to an assigned problem. Still others prefer to discuss background and policy, and some open the floor to the students to get a feeling about any prior knowledge on the subject the students come to class with.

I always start the Federal Income Tax course with some background on history and policy. More specifically, I lead a class discussion on the history behind the Article I, Section 8, taxing power and the Section 9 Apportionment Clause. The class then moves on to discuss how tax policy drove many of the most important issues in U.S. history, from the first use of federal force under the Constitution (the Whiskey Rebellion) to the first pardon for conviction under the Alien and Sedition Acts (the Fries Rebellion) to the first formal claim of state nullification of a federal law (the Tariff of Abominations). This leads to the Supreme Court cases of *Hylton* and *Pollock*, among others, and ultimately to the enactment of the Sixteenth Amendment. I then open the floor to the class to discuss why income should be the proper base for funding the federal government, including discussions of implicit distributive differences between different tax bases such as property taxes or tariffs. I then move to traditional policy goals, introducing the concepts of horizontal and vertical equity and basic ideas of efficiency analysis. This proves more than enough for students in one 1.25-hour class session.

There are a few nice aspects of this approach. First, it provides a relatively accessible introduction to the material for students unfamiliar with the subject. Second, it is helpful as a way to frame the introduction to Section 61 in the second class session. By understanding why the Sixteenth Amendment reads the way it does, students can better understand why Section 61 reads the way it does. It also helps students understand the problem with the language adopted by the Supreme Court in *Eisner v. Macomber* and ultimately why the Court abandoned that approach in *Glenshaw Glass*. The discussion about the choice of tax base helps students

understand why *Glenshaw Glass* focused on accessions to wealth and why Section 61 is written so broadly in scope. It also sets the tone for future classes in which much more complex and technical provisions will be analyzed by reminding the students to look for context, history, and policy as part of understanding and applying a statutory regime.

I am certain that my approach is not the majority one, and that many instructors would object to it. For example, some might start the first class by calling on students to discuss an assigned problem regarding a detailed statute. Because there is no one correct way to structure the course, I cannot disagree with such critics. All any instructor can do is to find his or her own voice that fulfills the pedagogical goals that the instructor has chosen for the course.

## C. DAY TO DAY

Katz and O’Neill provide an excellent analysis of issues to consider in how to conduct the classroom. With respect to Federal Income Tax in particular, there are two key choices the instructor must make in conducting the class on a day-to-day basis: how to select students to participate in class and how to grade for attendance and participation. Once these are confronted, two related choices emerge: whether to provide a “takeaway” for each class and whether to review the material from the prior class to begin each new class session.

### 1. Attendance and Participation

Typically, although not always, Federal Income Tax is a large class in a lecture-hall type classroom. Thus, it can be difficult at times to keep track of student attendance and participation. There are many ways to deal with this. One would be to require a seating chart and to credit students for attendance based on the seating chart. Another would be to have a sign-in sheet and credit attendance based on that. Some instructors use flashcards with the students’ names and pictures and go through the cards to check attendance. Some are able to quickly and easily remember all the names and faces of the students and thus can measure attendance by sight. Others might struggle to do so. Most important, if the instructor has indicated in

the syllabus that attendance and participation count toward the final grade, the instructor must have some clear and consistent method, regardless which one, to keep track of attendance and participation.

The second difficulty in managing the class is student participation, specifically how much to manage (i.e., encourage or discourage) student participation and discussion and how much to credit it toward the final grade. As in most classes, there is an inherent tension involved. Student engagement and discussion is valuable, both as a teaching method (i.e., student-led methods) and a pedagogical tool (keeping students engaged and interested in learning). However, it is also possible for students to take the class on a wrong track and for individual students to dominate an entire class session. Managing this balance proves one of the trickiest aspects of teaching the course in Federal Income Tax.

I attempt to deal with this in two ways. First, if a topic raised by a student is completely off-subject, or I fear it would overly delay the class from discussing the assigned material, I offer to discuss the issue after class or at office hours. Most times, I find this permits the class to return to the topic at hand. Second, the instructor can always return the class to the assigned topic by calling on a student to answer the next assigned question or problem. One particularly helpful aspect of using assigned problems is that they serve as a sort of outline or script for the conduct of the class session itself. If the instructor knows there are 75 minutes in a class and three problems to work through, the instructor must move on at some point during the class session to the second problem and leave enough time to get to the third problem. Because students typically want the answers to the assigned problems, most will move on if the instructor offers to do so.

## 2. Calling on Students

The decision on how to organize the course then leads to the second issue in managing a course in Federal Income Tax: the instructor's method of calling on students. This can prove more difficult than it would seem at first. Random cold-calling proves effective at forcing students to prepare in advance out of fear of being called on, but interests of fairness (and, to the extent that participation is counted in final grades, grading) require the instructor to find some way to call on everyone in the class. This

often means that once a student is called on, he or she assumes an exemption from being called on again, thereby removing the incentive to prepare. This can be addressed by repeatedly calling on students who have previously participated, but this would no longer be random and, if done improperly, could leave some students not being called on over the course of the semester. In the worst-case scenario, this could be perceived as arbitrary or unfair by the students.

Taking volunteers resolves most of these problems, but brings with it problems of its own. In particular, relying on volunteers can mean that a handful of students could dominate classroom discussion based on personality rather than knowledge of the material. Conversely, relying on volunteers can mean that more reserved students might feel left out or even disconnected when they might otherwise find the material engaging. This is particularly problematic in courses such as Federal Income Tax where a large percentage of the class might feel intimidated by the subject matter itself.

Other alternatives exist within the middle of this spectrum, including calling on students alphabetically or assigning students to small groups and assigning problems to the groups. Each faces a similar tension. Again, there is no right way. I have used random cold-calling, alphabetical assignments, and small groups, and have found benefits and detriments to all of them.

As discussed in Katz and O'Neill, every instructor at some time will encounter unprepared students. Each instructor will deal with this in his or her own way, but one decision the instructor must make is whether to permit students to pass, as well as a policy on the number of permissible passes and how they could affect student grades. Typically, I do not permit students to pass unless they have e-mailed me before class with a particular reason. This can mean every once in a while I will call on a student who is unprepared. In that situation, I simply ask the student to read the problem out of the book, then to read the relevant statutory provision, and then to attempt to answer the question.

One aspect unique to Federal Income Tax could be the presence of students who are accountants or who have taken accounting as undergraduates and thus might be both less prepared and more knowledgeable about the subject at the same time. These students

typically are engaged with the material and interested in the subject, and might be eager to participate in all levels of discussion. There are two potential problems with this scenario. The first is how to deal with any individual students who might be dominating the time for the class session. This is not unique to Federal Income Tax and is discussed in Katz and O'Neill. The second, however, is that such students might believe that they know the material based on their accounting background, which at times can differ significantly from the legal rules. For example, a student with an accounting background might believe in a "conservative" definition of income where income does not accrue until it is nearly certain to be collected. This is contrary to the Section 61/*Glenshaw Glass* definition of income as all accessions to wealth. Similar incongruities can arise with respect to the rules for tax depreciation versus accounting amortization as well as tax accrual versus accounting accrual rules. There are numerous ways to deal with such a situation, but what is most important for an instructor in Federal Income Tax is to be prepared when such a situation arises.

As a side note, one issue that every instructor must confront is whether to use first names or last names to address the students. Although law school is no longer like *The Paper Chase*, it still remains a professional school. For this reason, many instructors prefer the formality of using last names. This might be particularly true for new instructors.<sup>5</sup> Others prefer the more conversational style of using first names as a way to focus on the material rather than on the formalities of the classroom. Regardless which approach is taken, using it consistently throughout a single semester can prove important.

### 3. The Takeaway

The third issue to consider as part of conducting class is whether to provide a single "takeaway" for each class session. The answer to this question depends on a number of factors, including not only the decision on how to structure the course (including 3 or 4 credits), but also the pedagogical goals and the teaching

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<sup>5</sup> Unfortunately, I am aware of anecdotes involving both younger and female instructors who have felt the need to adopt a highly formalistic style in dealing with students in response to some students assuming an inappropriate level of familiarity or according them less respect than their more senior male colleagues.

methods adopted. For example, an instructor who decides not to assign a single issue to a class session and to adopt a quasi-Socratic method might not want to attempt to force each class session to have a single, clear takeaway lesson. By contrast, an instructor who assigns a specific provision or case to a class session and uses the problem method could well end every class by writing the answer to the problem on the board (or on PowerPoint).

Students tend to like takeaways. For difficult subject matter with often confusing doctrines, clear takeaways provide something for the student to hold onto in learning the material. This, in turn, can reduce stress and anxiety during class and potentially lead to a more engaged dialogue with the students. Takeaways also satisfy one of the core methods of learning, repetition. Stating an issue at the beginning of class, analyzing it in depth during class, and then repeating the general rule at the end of class only reinforces the lesson. For these reasons, having a prepared takeaway to end every class can prove beneficial.

The problems with a takeaway are the flip side of the strengths. Takeaways reduce complex material to simpler generalizations, which might be all the students retain from the class session. This then further homogenizes the class for purposes of the exam, making it even more difficult to allocate grades on a curve. Students, knowing a takeaway is coming at the end of class, might have little incentive to engage in detailed or nuanced analysis during the class session. To the extent the instructor has adopted a quasi-Socratic or student-led teaching methodology, the takeaway undermines the benefits of this method.

#### 4. The Review

Another issue to consider is whether to begin each class session with a brief review of the material covered in the prior class session. The main benefit of the review is the same as the takeaway, repetition. Simply repeating a point enough times might be enough for students to learn it. Some of the negatives of the review are also similar to the takeaway; for example, students might have little incentive to engage, knowing a review is coming. Personally, I have found the takeaway not to work, but I find that the review does. Why would this be the case?

I find the review more helpful than the takeaway for two reasons. First, starting class is always a somewhat abrupt, awkward moment. A review of the material from the last class somewhat eases this transition. Similarly, a review provided at the beginning of class penalizes students who enter late or who are not paying attention at the beginning of class. This serves to reinforce attendance and participation policies. Second, and more relevant to my class sessions, the review provides the instructor the opportunity to fit the material from the prior class into the unifying theme for the course. In my case, the review permits me to explain why the material arose in the context it did, how it fits into the “taxing formula,” and how it relates to the material for the day. This reinforces the use of the problem method during the class session itself. Knowing that I will provide a five-minute review at the beginning of the next class means I do not need to try to cut off the student working through an assigned problem to reserve time at the end of class to provide a takeaway.

That said, the review and takeaway are similar enough that whether to use one or the other often turns solely on preference and teaching style. Regardless, some form of repetition in material can be useful, regardless which method is adopted.

#### D. TECHNOLOGY

Personally, I find technology—PowerPoint slides in particular—mostly distracting in Federal Income Tax. Often, I find students focus on copying what is on the slide rather than engaging with the material or discussion, even if the material is cut and pasted from the casebook or Internal Revenue Code. To the extent one uses a quasi-Socratic or student-led method, the slides can be overly rigid in that topics cannot be reorganized to fit where the students are leading the discussion. In other words, whatever is next on the slide is what will be discussed next. Although this can serve as a useful commitment device and organizing principle, it can often prove overly restrictive as well.

I have three exceptions to this general rule, however. First, I use slides whenever math is involved in answering a problem. For example, I use slides when teaching depreciation deductions. I also post these slides after class for the students so that they will

focus on discussing and understanding the legal concepts rather than copying down the numerical answers.

Second, I use slides to diagram the facts of certain factually complex cases.<sup>6</sup> I find that leaving the facts of the case up on a slide during class discussion can open the space during class for the students to engage with the concepts rather than obsess over the detailed facts of a complex case. I typically do not post these slides for the students on the theory that the slides should serve as a basis for classroom discussion rather than as a supplement for reading and briefing the case.

Third, I sometimes use slides to provide some levity, such as playing sound effects or displaying pictures or video. These can involve YouTube videos, clips from movies, or recent news articles. As would be expected, because these are solely for in-class amusement, I never post these slides for the students. Of course, every instructor would need to decide whether and to what extent any such use of PowerPoint or YouTube or other technology fits their personality and teaching style.

## V. Review and Exam

Perhaps the hardest part of constructing any class is the examination. For better or worse, most large law school classes such as Federal Income Tax utilize a single, end-of-semester exam to assign grades. The challenge is to craft an exam that fairly reflects the material covered throughout the semester without being so overwhelming as to make it impossible to finish within the allotted time. A related challenge is finding a way to craft questions that do not necessarily disadvantage one student over another based solely on issues unrelated to the course material. For example, an exam that favors fast readers or writers over slower ones would be testing something other than the material at issue. Similarly, an exam that tested only on one narrow statutory provision after a semester of covering a wide cross section of law could reward the student who happened to focus review on that one section over the student who prepared the material from the entire class but spent much less time on that one provision.

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<sup>6</sup> Two examples are *Tufts* and *Knetsch*.

Whenever a student asks me what is going to be on the examination, I respond with a version of the following: “The examination is intended to be a fair reflection of the course. This means any material assigned in the reading, covered in a problem, or discussed in class is eligible to be on the exam, but it would not be a fair reflection of the course for an issue briefly discussed in the reading, not covered by a problem, and not discussed in class to comprise a significant portion of the examination.”

I use this quote for two reasons. First, I do so to avoid any potential appearance of impropriety. If I respond with the same answer every time the question is asked, no student can feel as if any one student might receive an unfair advantage. Second, I do so to emphasize to the students that the exam is intended to reflect *my* course in Federal Income Taxation. That is, the exam should reflect the substantive and pedagogical goals I set forth in structuring the course in the first place. I often combine this with a warning not to rely exclusively on outside study aids or outlines that typically consider a number of issues not covered in the course.

To that end, one significant benefit of using a problem-based method in selecting a casebook and structuring a class is that the problems can serve as the basis for the exam questions. In this manner, the exam will always reflect material covered in the class; in other words, because the exam questions will be based on problems discussed in class, the exam will always reflect the class. Further, I can tailor the exam questions each semester to that semester’s class by changing the facts of an assigned problem to match the conversation from the quasi-Socratic or student-led conversations that arose during class. This has multiple benefits. First, it provides an easy way to tailor the examination to each semester’s class. Second, it rewards students who were active participants in the classroom discussion and penalizes students who did not attend those class sessions.

The next question the instructor must face in crafting the examination is the type of exam question. Again, the type of exam question should be tailored to meet the goals of the course chosen by the instructor in designing the course. To this end, I use three types of questions on a single exam: (1) long-fact-pattern, issue-spotting questions, (2) short-fact-pattern, single-issue questions (which I sometimes refer to as “you know it or you don’t” questions), and (3) policy-based questions.

In designing long-fact-pattern, issue-spotting questions, I typically start with three or four assigned problems from class and try to combine them into a single fact pattern. For example, I might write an exam question about a law student who intends to start his or her own law firm after graduation who rents an office and prints business cards before passing the bar exam, and who takes clients out to dinner after trials and often fails to collect all of his or her billed time. In a single question, this raises Section 162 business deduction issues such as minimum education requirements and travel away from home, as well as statutory limits under Section 274 and timing issues on the collection of fees and bad debt deductions. If the instructor desired, a capital gains issue could also easily be added. The fact patterns for these types of questions typically run approximately one page, single-spaced.

In designing single-issue questions, I typically rely on one of the assigned problems based on technical subject matter such as depreciation, original issue discount, or installment sales. These questions have clearly correct answers and reward students who prepared the problems in advance and attended and participated in class. Often, I will only change the names of the parties from those in the assigned problems. Sometimes I will add some explanatory facts, such as why the parties are engaging the transaction. In this manner, such questions reward students who prepared the problems and attended class for those sessions, as they will likely spot the issue immediately and thereby save significant time. Students who expend significant time during the exam attempting to research these types of questions will often run out of time, making them self-enforcing. These questions are typically one paragraph in length.

Policy-based questions are often the most difficult to draft. It is important for the question to reflect a policy debate assigned in the reading or discussed in class so the exam fairly reflects the course. At the same time, it is important that the students not feel like they are being asked to guess the opinion of the instructor or provide purely political opinions, but rather to use the tools learned in class to engage in a substantive, policy-based analysis. For this reason, I often draft the policy question in terms of a debate over a particular provision of the tax law, presenting both sides and asking students to explain why they agree with one side or the other. For example, a question might read “A debate

has arisen in the Internal Revenue Service over the taxation of frequent flier miles. One side believes their value should be included in gross income in the same manner as nonexcluded fringe benefits, whereas the other believes they should be excluded from gross income as a form of rebate. You are the advisor to the IRS Chief Counsel. What would you advise, and why?" In this way, by clearly delineating two reasonable alternative positions, the students are forced to undertake a policy analysis using the tools discussed in class. These questions are typically one paragraph in length.

There are other types of problems that many instructors have used with great success as well. In particular, many instructors supplement issue-spotting questions with multiple-choice or short-answer questions. Multiple-choice and short-answer questions correspond well with the doctrinal goal, whereas issue-spotting questions correspond well with the methodological goal, and "you know it or you don't" questions correspond well with the foundational goal. Whether and to what extent to use multiple-choice, short-answer, or issue-spotting questions should correspond to the instructor's goals for the course.

The choice of question format and the number of questions will depend on two crucial questions: (1) whether the grades in the class are subject to a curve, and (2) the instructor's method of rewarding preparation and organization. For classes graded on a strict curve, the most important aspect of drafting an exam is ensuring a distribution of grades on the exam that can fit within the assigned curve. For this reason, it is important to include sufficient questions with enough issues (including, if the instructor desires, multiple-choice or short-answer questions) to ensure such a distribution. The simplest way to accomplish this would be to have questions, or issues within a question, of varying degrees of difficulty. The harder the question or issue, the fewer students will receive credit. Too easy an exam could result in bunching of scores at the top, making it difficult to impose a curve. Too hard an exam might result in bunching of scores at the bottom, also making it difficult to impose a curve. For this reason, an exam would ideally include questions or issues of varying difficulty.

This directly relates to the manner of rewarding prepared students and well-organized answers. The two most common methods to do so are time limits and word limits. Time limits reward

students who are prepared in advance and who organize their thoughts before writing. Students who are not prepared or who do not organize their thoughts tend to write longer, less coherent answers. Such students will typically run out of time before properly identifying most of the issues in an issue-spotting question or could fail to reach a policy-based question due to poor time management. Because time management is an important skill for many practicing lawyers, it is also typically fair to reward students with better time management as well. Conversely, one significant problem with time limits is that they could reward fast typists over slower ones or could artificially impose excess stress on students and thus test stress management rather than time management.

A related issue, however, is whether to use overall time limits or question-by-question time limits. Each has its benefits. Question-by-question time limits permit the instructor to focus the attention of the students on the problems with the greatest number of issues or most complex issues. Similarly, question-by-question time limits also avoid the problem of some students running out of time and failing to receive any points on certain questions. Overall time limits, by contrast, permit greater flexibility to students in structuring their own exam answers. Students tend to possess different strengths and are comfortable with different issues. Thus, some students might want to use more time on the issue-spotting question, whereas others might prefer to use more time on the policy question. Strict question-by-question time limits do not permit students to allocate their time accordingly.

Word limits address a number of these concerns. There is no reward for speed in typing for exams using word limits, at least to the extent speed equates with longer answers. Similarly, word limits reward organization and brevity. In addition, word limits remove the need for most, if not all, time limits. Thus, word limits might be most appropriate for instructors preferring to adopt take-home style exams and less appropriate for in-class timed exams. Perhaps the biggest detriment of word limits is how to enforce them (assuming the instructor cannot put a cap on the students' word processor program). The first option would be to stop reading at the word limit and disregard even correct answers after that point. This approach requires significant discipline on behalf of the instructor to disregard correct answers beyond the word limit. The second option is to impose a penalty for exceeding the word limit.

Depending on the penalty, however, some students might still feel it is in their interest to exceed the limit and identify more issues.

I have used a number of approaches, but I ultimately settled on an in-class, timed exam with an overall time limit and question-by-question assigned points that correspond to recommended times. For example, in a 4-credit course, I could assign a four-hour examination with a total of 240 points allocated among the problems on the exam (say, 90 points to Problem 1, 60 points to Problem 2, 60 points to Problem 3, and 30 points to Problem 4). I advise students that, in general, the amount of points allocated to a question is intended roughly to correlate with time, but that students are permitted to allocate their time as they see fit. Although no exam option is perfect, one aspect of this approach I like is that, for upper-level students, it emphasizes time management as a skill, one that many lawyers will need in the real-world practice of law.

A related issue is whether the exam should be open-book or closed-book (or some limited open-book variation). Again, the instructor's choice should correspond to his or her selected goals for the course. Because I teach the course based on the statute and rely on the statute significantly during the course I do not believe it would fairly reflect the course for me to adopt a closed-book exam. I cannot memorize the Internal Revenue Code, nor do I expect my students to do so. More difficult is the decision to be completely open-book or only permit limited materials such as the statutory supplement. I have adopted a completely open-book exam on the theory that, combined with an overall time limit, it is self-enforcing. Students who spend significant time attempting to learn something original during the exam period will run out of time and students who do not will have the material as reference if need be. By contrast, an instructor who adopts multiple-choice questions might well prefer closed-book exams to avoid testing who can read the fastest as opposed to who learned the doctrine during class. As mentioned earlier, whichever method is chosen should fairly reflect the material covered in the class.

Another issue to consider is whether to take student questions during the exam period. This is a difficult issue, and many schools have adopted mandatory rules on the subject. For schools that have not done so, it is important for instructors to decide their policy early in the class and make the rule clear to the students. The answer to this question typically turns on whether exams are

scheduled or open. For scheduled exams, there seems to be little downside to an instructor taking student questions up to the date of the exam. No students will receive an unfair advantage and all students will have an equal chance to ask questions during that period.

For schools with open exam periods, however, the issue proves more difficult because there are two competing, reasonable arguments. First, taking questions throughout the exam period could disfavor students who, for scheduling reasons, might need to take the exam early during the period. Second, and perhaps more troubling, an incentive could arise for students taking the exam early in the period to guide other students in what questions to ask of the instructor based on the content of the exam. Although I never assume bad faith of my students, it is possible for students to give hints unintentionally as to what was on the exam to other students in the class (perhaps even statements in passing such as, “I can’t believe he tested us on that issue”). Conversely, closing questions during the exam period can hurt students who need that period to organize their thoughts, build an outline, and develop their questions.

I find this issue to be exceedingly difficult. I see both sides and often struggle with the decision. Ultimately, however, I have decided not to take questions during an open exam period (whereas I would take questions up to the date of a scheduled exam). In exchange, I promise the students in the class that if I receive questions from multiple students on a single topic I will post a generic version of the question and answer to the course website for all students to use. In this way, no students can feel that any others received an unfair advantage in preparing for the examination.

The final issue to consider in drafting and grading an examination is the exam answer key. Some instructors draft complete model answers and compare student answers to the model. Other instructors draft a detailed answer key with issues and subissues, and points assigned to each one. Still others draft an outline-based answer key identifying the relevant issues per question by grading each problem holistically. Regardless which approach any individual instructor adopts, it is preferable to draft some form of answer key at the time the instructor drafts the exam rather than waiting until grading begins. First, this ensures that the number of points assigned to a problem matches up with the number of issues in

the problem. Second, this ensures that the instructor remembers exactly what issues a question was intended to cover when written instead of attempting to re-create this at a later date.

Most important, however, an answer key of some sort is critical to ensure some level of uniformity in grading. Especially in classes where exams are graded blind and on a curve, uniformity in assigning grades is crucial. No grading methodology will completely remove the human element of grading (except for computer-graded multiple-choice exams), but clear answer keys provide some framework on which to grade in a uniform manner across exams.

This can be particularly important in large classes. No matter how diligent the instructor, when reading a large volume of exams the instructor will have periods of higher energy and lower energy, and periods of greater attention and lesser attention. Having some objective tool to focus the grading can smooth these differences over time and ensure some semblance of objectivity and uniformity in grading.

Katz and O'Neill provide an excellent overview of exam grading techniques. The technique I use is to grade one problem at a time rather than one exam at a time. Then, for each exam question I attempt to randomly distribute the exams. In this manner, no one entire exam is subject to being graded when I am tired or frustrated. At most, only one question on an exam could be subject to the individual circumstance of the grader. Combined with an objective and clear answer key, a relatively fair distribution of grades can be determined and placed on the curve. Although this likely makes grading take longer than grading each exam in its entirety, I believe that it is the fairest way to distribute grades on a curve within the class.<sup>7</sup>

Lastly, the instructor must have some policy on whether and to what extent students are permitted to review exams after grades have been submitted and released. Every instructor at some point will confront a student who wants to review an exam or even challenge a grade. I have found this is particularly prevalent in Federal Income Tax for two reasons. First, as occurs in a number of courses, students often feel they deserve a certain grade regardless the exam

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<sup>7</sup> Note that this method applies for large classes with anonymous exams graded on a curve with at least one issue-spotting question. Other classes and exams might well have other preferred approaches. Regardless, the goal is to find a way to minimize the possibility of implicit or unconscious bias in distributing grades.

results because they “worked hard” in the course. Second, students often want to debate the award of points to particular questions (arguing in favor of more points for their answers).

In a curved class, the response to these types of inquiries is relatively straightforward: There are no objective grades, and nobody is entitled to any grade other than in comparison to their classmates. The amount of points awarded to any individual question or issue is solely relative and not absolute. Thus, the only way to understand the amount of points awarded to any individual question or issue would be to review the exams for the entire class, build a distribution of points, and then compare the answer to that distribution. Relatedly, it is often useful to focus the student not on total points but on issues or questions on which the student scored near the top of the class as compared to those closer to the bottom. This focuses the students’ attention on issues or analyses that they did not include instead of disputing the raw number of points awarded to issues that they did discuss on the exam. On exams in classes that are not curved, however, the instructor might often be forced to discuss the specifics of individual answers.

Whether curved or not, either scenario reinforces the benefit of having a clearly defined grading key drafted prior to grading the exams and applied consistently to all the exams. Many students might be unhappy with individual grades, but the reassurance that there is some semblance of objectivity and consistency is often enough to assuage many student concerns. The instructor can then focus on ways to improve test taking in the future, whether it be issue spotting, time management, citation, or other aspects of test taking.

This then leads to another issue to consider with respect to exams and grading, whether to post model answers or actual sample answers from prior exams. This issue proves more difficult than it would first appear. At first, it would seem there would be no downside to sharing either a model answer or an actual sample answer from an old exam. In fact, I used to do both as a matter of course. Over time, however, I ran into some unexpected difficulties. First, with respect to model answers, I found that (as would be expected) my model answer was always more complete and detailed than I could expect from even the best student exam under timed conditions. This led to students feeling overwhelmed during the actual exam.

Providing actual sample student answers from past exams addresses this particular problem. Doing so raises a different problem, however, as the sample answer is one of the best only in comparison with the others from the applicable semester. The sample answer might miss a significant issue, be poorly organized, or otherwise not represent how I would ideally want students to approach an exam. Thus, without supplementing the sample, I found providing actual sample answers ultimately could lead to more harm than good. Supplementing the sample would return to the problem of unrealistic expectations as with a model answer. Perhaps I had a few unusual bad experiences or I am particularly sensitive to these issues, but for these reasons I have adopted a policy of not posting model or sample answers to problems.

Instead, I post old exams for the class and hold a question-and-answer session regarding the old exam at the end of the semester. In addition, I offer to meet with any student individually to discuss the exam questions and walk through the actual grading key I used for that exam. I do not “grade” practice answers on the theory that grades are curved, so I cannot assign a grade to a single practice exam. In addition, I offer to meet with individual students to discuss their old exams and walk through the grading key I used on their exams. Again, I do not reopen grades, nor do I permit debating raw points assigned to individual scores. Taken together, my experience has been that most students find the combination to be fair and objective and do not complain about the lack of model or sample answers.

Exams and grading are among the least enjoyable and most difficult, but perhaps the most important, aspects of teaching. This is particularly true in classes such as Federal Income Tax where the subject matter could vary so substantially across casebooks, courses, and instructors. What matters most is for each instructor to find the method that works best for them and to find a way, both in substance and in appearance, to be objective and consistent across the students in the class. So long as students perceive the course exam and grades to be fair—at least in the sense of nonbiased—any approach the instructor prefers can work.

## **VI. Conclusion**

I find teaching Federal Income Tax to be invigorating. Every semester's students are different, each group has its own personality, and every year I challenge myself to try something new. This can result in a steep learning curve for the teaching of Federal Income Tax, but once over the steepest part, teaching the course can prove continuously rewarding and enjoyable. No book or manual can cover all the issues an instructor will face in developing a course in Federal Income Tax, but hopefully this book can help instructors begin the process. The best advice I received in teaching Federal Income Tax is the advice I will conclude with: Make the course your own and have fun! The more enthusiastic and energetic the instructor is about the material, the better the class will be for everyone.