

GOOD INTENTIONS: ADMINISTRATIVE FIAT AND THE GENERAL WELFARE EXCLUSION

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ABSTRACT

Since its introduction in 1913, the federal income tax has viewed income expansively, subjecting virtually all types of enrichment as gross income unless Congress explicitly exempted the income from taxation. But in the income tax's second decade, the Bureau of Internal Revenue created an exception to the broad reach, an exception not grounded in any type of congressional enactment. The Bureau's practice of excluding certain benefits began innocuously in the late 1930s by excluding certain social security benefits from gross income. Over the decades, the IRS has used what it now refers to as the "general welfare exclusion" to exclude from gross income everything from subsistence benefits to payments made to preserve historic buildings. Confronted with difficult questions surrounding poverty and ability to pay, the general welfare exclusion has provided a way for the IRS to resolve complex and unanticipated questions about whether certain government welfare benefits constitute gross income.

The general welfare exclusion, however, relies upon an enigmatic foundation of administrative rulings and decisions completely unhooked from any statutory authority or direction. While this administratively created general welfare exclusion is broad and affects tens of millions of taxpayers, it nonetheless has been largely overlooked by taxpayers, tax scholars, and even legislators.

This Article does three things. First, it comprehensively traces the development and evolution of the general welfare exclusion. Second, it highlights the problems created by the ad hoc nature and lack of tether to any legislative authority. Third, it provides a path by which the general welfare exclusion can continue to benefit low-income taxpayers while reducing the complexity and overreach of the IRS.

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TABLE OF CONTENTS

INTRODUCTION	1413
I. THE GENERAL WELFARE EXCLUSION	1414
A. <i>Birth and Early Development</i>	1414
B. <i>Developing a Framework</i>	1418
1. <i>Job Training—A Distinction Without a Difference</i>	1419
2. <i>Application to New Situations</i>	1422
3. <i>Formalizing the General Welfare Exclusion</i>	1425
C. <i>A Pliable and Amorphous Solution</i>	1427
1. <i>The Necessity of Means Testing</i>	1427
2. <i>Nonprofits and Businesses</i>	1429
3. <i>Cleaning Up the Rules(?)</i>	1432
4. <i>Revisiting the Rules. Again</i>	1434
5. <i>A Focus on Homeowners</i>	1438
6. <i>Where We Are (and Are Not) Now</i>	1440
II. PARSING RATIONALES AND JUSTIFICATIONS	1442
A. <i>Administrative Discretion</i>	1443
B. <i>Assessing the Tax Revenue Impact of the General Welfare</i> <i>Doctrine</i>	1444
C. <i>The Circularity of Taxing General Welfare Benefits</i>	1448
D. <i>Political Winds and the Perceived “Wrongness” in Taxing the</i> <i>Poor</i>	1451
E. <i>Rationales that Reject the General Welfare Exclusion</i> <i>Doctrine</i>	1453
III. CREATING LEGAL CERTAINTY AND CONSISTENCY	1455
A. <i>The General Welfare Exclusion and the Force of Law</i>	1456
B. <i>Congressional Direction</i>	1458
C. <i>Codification of the General Welfare Doctrine</i>	1464
D. <i>Review and Revision of IRS Policies, Rulings, and</i> <i>Pronouncements</i>	1466
CONCLUSION	1468

INTRODUCTION

Tens of millions of taxpayers benefit from one of the largest exclusions from gross income without even being aware. Through its discretionary administrative authority, the Internal Revenue Service (IRS) has excluded from gross income billions of dollars of government welfare benefits.¹ Although few would argue that subsistence benefits should be taxable, the IRS has expanded the exclusion in an ad hoc manner inconsistent with federal income tax principles. As a result of this ad hoc expansion, much of the modern general welfare exclusion bears little relationship to its initial formulation.

The IRS's practice of excluding benefits began innocuously in the late 1930s by excluding certain social security benefits from gross income without explanation or authority. Over the decades, the IRS has used what it now refers to as the "general welfare exclusion" to exclude from gross income everything from subsistence benefits to payments made to preserve historic buildings. Confronted with often difficult but arguably worthy situations, the general welfare exclusion has provided a way for the IRS to resolve complex and unanticipated questions about whether certain government welfare benefits constitute gross income. The general welfare exclusion, however, relies upon an enigmatic foundation of administrative rulings and decisions completely unhooked from any statutory authority or direction.

While this administratively created general welfare exclusion is broad and affects tens of millions of taxpayers, it nonetheless has been largely overlooked by taxpayers, tax scholars, and even legislators. As recently as 2006, almost seven decades after the IRS first promulgated the general welfare exclusion, commentators accurately asserted that it "is a relatively unknown income exclusion doctrine that continues to fly under the radar of even most tax practitioners."²

In this Article, we look to remedy this oversight and add to the limited scholarship critically addressing the general welfare exclusion. Part I of this article will discuss the historical development, growth, and different threads of the general welfare exclusion. It will trace the first innocuous "Office Decision" issued by the IRS in 1938 about the taxability of social security benefits to the informal administrative codification intended to cover a plethora of difficult tax issues presented regularly to the IRS. Although few

1. In this article, the term "welfare" will be used in its broadest and most colloquial meaning to refer to payments made by a government authority "for the promotion of the general welfare (that is, based on individual or family need), and . . . not [for] compensation for services." I.R.S. Info. Ltr. 2014-0029 (Aug. 13, 2014), 2014 WL 4952661.

2. Robert W. Wood & Richard C. Morris, *General Welfare Exclusion Can Mean Tax-Free Money*, CAL. TAX LAW., Winter 2006, at 31, 33.

be grudge the necessity and importance of excluding subsistence benefits such as food, medical, and housing welfare benefits from gross income, the general welfare exclusion now deals with a multiplicity of complex federal and state government welfare benefit payments that were unimaginable and unanticipated at the time of the doctrine's origin.

Part II will parse possible rationales and justifications for the IRS's alacrity in exempting billions of dollars of general welfare benefits from taxable income. The part will discuss the source of the IRS's administrative discretionary authority to formulate the exclusion. It will then discuss possible rationales or justifications for the exclusion. It will conclude with a discussion of the reasons why Congress needs to assert its authority over the exclusion.

Finally, Part III will argue that the general welfare exclusion either should be codified in tax law or should be promulgated in Treasury regulations subject to review through the Administrative Procedures Act. The section will discuss the importance of Congress providing express guidance with respect to the exemption of gross income from taxation, even in the face of excluding subsistence benefits for the indigent. In the few instances where Congress has grappled with these issues, it has provided a model for federal legislation that would ensure that congressional legislative intent with respect to the taxation of welfare benefits is consistently and equitably administered.

I. THE GENERAL WELFARE EXCLUSION

Over the last ninety years, the IRS's development of its general welfare exclusion can be followed through a trail of pronouncements and rulings. Unmoored from any statutory text, the IRS has struggled to apply its sense that certain benefits paid as a result of individual (and sometimes corporate) need to an ever-changing landscape, resulting in a sprawling and ill-defined, if well-meaning, doctrine.³

A. *Birth and Early Development*

The Sixteenth Amendment to the U.S. Constitution allowed Congress to impose an unapportioned tax on Americans' "incomes, from whatever source derived."⁴ When Congress enacted the first modern income tax, it took advantage of the breadth of taxation allowed by the Constitution. In its

3. For general discussions of the general welfare exclusion, see generally Charlotte Crane, *Government Transfer Payments and Assistance: A Challenge for the Design of Broad-Based Taxes*, 59 SMU L. REV. 589 (2006); Robert W. Wood & Richard C. Morris, *The General Welfare Exception to Gross Income*, TAX NOTES, Oct. 10, 2005, at 203.

4. U.S. CONST. amend. XVI.

1913 enactment it taxed taxpayers' "entire net income arising or accruing from all sources."⁵

Congress defined this taxable net income as including "gains, profits, or income" from, among other things, professions, businesses, and property.⁶ Ultimately, Congress defined income to include gains, profits, and income "derived from any source whatever."⁷ The Supreme Court explained that "[t]he broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power."⁸

Notwithstanding the potential breadth of Congress's power to tax, however, both Congress and the Treasury Department almost immediately started to cabin what the federal government would tax in certain areas. At the same time Congress defined net income to include income from whatever source, it also excluded from the tax base gifts, inheritances, and proceeds from life insurance policies and annuity contracts.⁹

Similarly, early in the life of the modern federal income tax, the Treasury Department ("Treasury") began to administratively exclude some types of income from the tax base. In 1919, for instance, Treasury announced that it would not tax "[b]oard and lodging furnished seamen in addition to their cash compensation."¹⁰ It proceeded to issue regulations clarifying that where an employer provided housing to its employees "for the convenience of the employer" rather than as compensation, employees could exclude the housing from their gross income.¹¹ Eventually Congress codified this Treasury-created exemption from gross income.¹²

In the 1930s, Treasury created what eventually evolved into the general welfare exclusion, another of these administratively created exemptions from gross income. Unlike the exclusion for housing provided for the convenience of the employer, though, the general welfare exclusion has (mostly) not been codified.¹³ A look through the history of the general welfare exclusion shows that Treasury and the IRS created it based not on any legal or tax principles but rather on what appears, based on their

5. Revenue Act of 1913, ch. 16, § II(A)(1), 38 Stat. 114, 166.

6. *Id.* at 167.

7. *Id.*

8. *Helvering v. Clifford*, 309 U.S. 331, 334 (1940).

9. § II(B), 38 Stat. at 167.

10. O.D. 265, 1 C.B. 71, 71 (1919).

11. Samuel D. Brunson, *God Is My Roommate? Tax Exemptions for Parsonages Yesterday, Today, and (if Constitutional) Tomorrow*, 96 IND. L.J. 521, 526 (2021) (quoting T.D. 2992, 2 C.B. 76 (1920)).

12. See I.R.C. § 119.

13. It was, however, codified with respect to "Indian general welfare benefits." I.R.C. § 139E; see also *infra* text accompanying notes 403–08 (discussing the Indian general welfare exclusion in more depth).

discretionary authority, as an intuitive sense of fairness.¹⁴ Given that the IRS's initial focus was on exempting from taxation amounts intended for retirement and subsistence benefits, this assumption would seem reasonable. This intuitive sense, however, lacked rigor and has resulted in a relatively unintelligible set of rules that provide some benefit to poorer taxpayers relying upon the exclusion to exclude subsistence welfare payments but, at the same time, provide opportunity for wealthy taxpayers to recharacterize income as excludable from gross income. The general welfare exclusion developed from several different threads. The first occurred in the 1930s, after Congress enacted the Social Security Act. The 1935 enactment of the Social Security Act provided that, upon reaching the age of sixty-five, certain individuals would receive a lump-sum payment of 3.5% of their wages.¹⁵ Three years later, the IRS announced, without any explanation, that these lump-sum payments "are not subject to income tax in the hands of the recipients."¹⁶ In the same year, and with precisely the same lack of explanation, the IRS announced that lump-sum payments made to a deceased employee's estate under the Social Security Act would also not represent income to the estate.¹⁷

In 1939, Congress amended the Social Security Act, replacing its earlier Old-Age Insurance benefits with Old Age, Survivors, and Disability Insurance.¹⁸ This new insurance program allowed the government to make payments to certain survivors of beneficiaries.¹⁹ Two years later, with the same lack of explanation, the IRS again announced that these sundry payments would also not represent income in the hands of recipients.²⁰ In

14. To deal with a complicated tax-administration structure that functioned in a largely ad hoc manner, in the 1860s, Congress gave the Commissioner of Internal Revenue broad authority to make rules regulating internal taxation. Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673, 1696–97 (2014). In the 1920s, Congress tamed this sprawling tax system by gathering the rules in the U.S. Code, to some extent obviating the need for the broad regulatory authority it had granted the Commissioner. *See id.* at 1705. Still, for decades Treasury and the Commissioner continued to create the regulatory framework for the tax law that they saw fit. *See id.* at 1705–07.

15. Social Security Act, ch. 531, § 204(a), 49 Stat. 620, 624 (1935). It is important here to point out that the formulation used—3.5% of wages—was racially inequitable. In defining *wages*, the Social Security Act excluded amounts paid for agricultural labor and domestic services. *Id.* § 210, at 625. This exclusion, while facially neutral, was intended as a proxy for Black workers. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 109 (2011). Moreover, the program was administered at the state level, giving Southern states yet another lever with which to discriminate on the basis of race. *Id.*

16. I.T. 3194, 1938-1 C.B. 114, 114.

17. I.T. 3229, 1938-2 C.B. 136.

18. Prentiss Cox, Note, *Social Security Netting Regulations: Balancing Administrative Convenience with the Rights of Beneficiaries*, 73 MINN. L. REV. 1143, 1145 (1989) (first citing Social Security Act, ch. 531, tit. II, §§ 201–210, 49 Stat. 620, 622–25 (1935); and then citing Social Security Act Amendments of 1939, ch. 666, tit. II, §§ 201–209, 53 Stat. 1360, 1362–78).

19. *Id.* (citing Social Security Act Amendments of 1939 §§ 201–209).

20. I.T. 3447, 1941-1 C.B. 191.

1957 it reaffirmed this idea, holding (without explanation) that survivors-insurance benefit payments made to the children of deceased individuals under the Social Security Act were not gross income to the child.²¹

A decade and a half later, Congress again amended the Social Security Act to provide unemployment benefits to federal employees.²² The IRS unsurprisingly again extended its rulings on various social security payments and excluded these payments from the gross income of federal employees.²³ It again declined to explain its reasoning beyond the fact that this exclusion was consonant with its previous exclusions of payments under the Social Security Act.²⁴ The second thread in the development of the general welfare exclusion occurred in the early 1950s. The IRS used its administrative prerogative to expand need-based exclusions beyond the realm of payments under the Social Security Act. In 1953 it ruled that employees did not have to include payments from their employer to help them rehabilitate property damaged or destroyed by a tornado.²⁵ The tornado damaged and destroyed a number of houses, cars, and other personal property in the area.²⁶ One of the largest employers in the area established a fund to make contributions to employees and retirees of the company.²⁷ This fund made payments to non-executives to cover rehabilitation costs in excess of their insurance for damages caused by the storm.²⁸

Payments from employers to employees are a quintessential element of gross income, referred to expressly as such in the Code.²⁹ The tax law is skeptical that payments from employers to employees are anything other than compensation. For instance, while Congress has excluded gifts from gross income, it has also said that, as a general rule, a transfer from an employer to an employee does not qualify as a gift.³⁰ Where Congress wants

21. Rev. Rul. 57-344, 1957-2 C.B. 112. The payments did count toward the child's support, however, in calculating whether the child's guardian could take a personal exemption deduction for the child. *Id.*

22. Rev. Rul. 55-652, 1955-2 C.B. 21 (citing Act of Sept. 1, 1954, Pub. L. No. 83-767, 68 Stat. 1130).

23. *Id.*

24. *Id.*

25. Rev. Rul. 131, 1953-2 C.B. 112, 113. The revenue ruling was probably issued in response to the deadly outbreak of tornados in 1953. *See, e.g., Remembering the May 11, 1953 Waco Tornado: "The Deadliest Tornado in Texas Since 1900"*, NAT'L WEATHER SERV., <https://www.weather.gov/fwd/wacotormay1953> [<https://perma.cc/8XXP-QLYE>] (last visited Apr. 20, 2023).

26. Rev. Rul. 131, 1953-2 C.B. 112, 112.

27. *Id.* at 112-13.

28. *Id.* at 113.

29. *See* I.R.C. § 61(a)(1).

30. *Id.* § 102(c)(1).

to exclude employer payments from an employee's gross income, it frequently expressly excludes those payments.³¹

As payments from an employer to employees with no statutory exclusion, these tornado rehabilitation payments would, by default, be included in the employees' gross incomes, subject to tax.³² The IRS decided, however, that the payments did not constitute gross income.³³ This time, however, it provided an explanation for its decision. The employer's payments, the IRS explained, were not based on services rendered by the recipients and were unrelated to the amount or type of services the employees rendered to the employer.³⁴ Rather, the fact and amount of the payments was based solely on employee need, with the goal of returning employees to the economic position they had been in prior to the tornadoes.³⁵ As a result, the IRS deemed the payments "gratuitous and spontaneous" and outside the reach of gross income.³⁶

Up until this point, these two threads of exclusions from gross income were unconnected. Moreover, they were not related in any way to *general welfare*. But in 1957, the IRS introduced a new thread of exclusion and, in that thread, also introduced the idea of general welfare. The State of Pennsylvania made certain benefit payments to blind residents as well as other "persons requiring relief."³⁷ The IRS decided that because the payments came from a "general welfare fund in the interest of the general public," recipients did not have to include the payments in gross income.³⁸ While payment from a general welfare fund has no relevance in statutory tax law, this revenue ruling introduced explicitly the idea of the general welfare as a reason for excluding certain payments from income.

B. Developing a Framework

In 1963, the IRS started to pull some of these threads together. In the early 1960s, Congress enacted the first post-World War II job-training legislation. The Area Redevelopment Act focused on training residents of

31. For instance, Congress has chosen to exclude various fringe benefits from employees' gross income. *See id.* § 132. And in certain limited situations, an employee can exclude employer-provided housing from gross income. *See id.* § 119.

32. The U.S. Supreme Court has expansively defined taxable income to include "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

33. Rev. Rul. 131, 1953-2 C.B. 112, 113.

34. *Id.*

35. *Id.*

36. *Id.*

37. Rev. Rul. 57-102, 1957-1 C.B. 26. The benefits to the blind were provided under Pennsylvania Public Assistance Law, No. 399, 1937 Pa. Laws 2051, *amended by* Act No. 387, 1953 Pa. Laws 1361.

38. Rev. Rul. 57-102, 1957-1 C.B. 26.

depressed areas for entry-level jobs.³⁹ The Manpower Development and Training Act also provided job training, primarily to adults but also to youth.⁴⁰ Both Acts authorized states to provide payments to participants equal to what they would have received in unemployment insurance.⁴¹

The IRS decided that these payments were not taxable.⁴² In coming to that conclusion, it looked both to its Social Security Act precedents and to the Pennsylvania payments to the blind.⁴³ Because the benefit payments would help recipients find better employment, the IRS believed they fell in the same category as the other unemployment benefits “made for the promotion of the general welfare.”⁴⁴

1. Job Training—A Distinction Without a Difference

The IRS had still not defined what it meant either by *the promotion of the general welfare* or by *payments coming from a general welfare fund*. Another revenue ruling from the 1960s started to give shape to what the IRS was trying to accomplish, though. It determined that payments to people enrolled in work-training programs under the Economic Opportunity Act of 1964 did have to include those payments in gross income.⁴⁵

The payments under the Economic Opportunity Act differed from the other job-training-program payments in one primary way: the IRS viewed the relationship between sponsors of and participants in these particular work-training programs as having an employer-employee relationship.⁴⁶ The payments, then, were not gratuitous payments made to support participants as they learned a new skill.⁴⁷ Rather, they were compensation for services rendered, the quintessential form of gross income.⁴⁸ While enrollees’ work undoubtedly included some job training, the IRS believed that the payments they received were compensation.⁴⁹ Shortly after issuing this revenue ruling, the IRS released a new revenue ruling clarifying that its analysis did not turn on whether an employer-employee relationship existed.

39. Kisha Bird, *Against All Odds: Community and Policy Solutions to Address the American Youth Crisis*, 15 U. PA. J.L. & SOC. CHANGE 233, 242 (2012) (discussing Area Redevelopment Act, Pub. L. No. 87-27, 75 Stat. 47 (1961)).

40. *Id.* (discussing Manpower Development and Training Act, Pub. L. No. 87-415, 76 Stat. 23 (1962)).

41. Rev. Rul. 63-136, 1963-2 C.B. 19, 20.

42. *Id.* at 21.

43. *Id.* at 20.

44. *Id.*

45. Rev. Rul. 65-139, 1965-1 C.B. 31 (citing Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508).

46. *Id.* at 32.

47. *See id.*

48. *Id.*

49. *Id.*

Rather, the determinative factor was whether the payment represented compensation for services performed.⁵⁰

The IRS had still not laid out specifically what constituted payments for the promotion of the general welfare, but it made clear that compensation for services performed did not qualify as an excludable payment for the promotion of the general welfare. As long as taxpayers received payments directly for services performed, they had to include those payments in gross income. If the payments were not compensatory, though, but were for the promotion of the general welfare, they could be excluded, even if the payments were made by a taxpayer's employer.⁵¹

Even this dichotomy—payments from a general welfare fund or payments for services performed—was, in some circumstances, an imperfect dichotomy. The IRS soon had to determine the tax consequences of a work-relief program. Under that program, a state required welfare recipients to work on public roads to repay the state for some portion of the welfare benefits they had received.⁵² Absent a medical waiver, welfare recipients would lose welfare benefits if they refused to work.⁵³ In deciding the tax consequences, the IRS looked to its previous rulings. It had determined that payments from a general welfare fund in the interest of general welfare could be excluded from gross income.⁵⁴ But it had also decided that payments in exchange for services could not be excluded.⁵⁵

In the case of work relief programs, the IRS ruled that welfare beneficiaries had to multiply the number of hours they worked for the state by the applicable hourly rate for such work.⁵⁶ That amount represented compensation for services and participants in the work relief program had to include that amount in gross income.⁵⁷ To the extent welfare benefits exceeded that amount, they could be excluded as payments from a general welfare fund in the interest of the general welfare.⁵⁸

Almost immediately after the IRS fleshed out this bifurcated approach, it started to undermine its new standard. In 1968, the IRS returned to the question of payments under the Economic Opportunity Act and the

50. Rev. Rul. 66-240, 1966-2 C.B. 19.

51. See Rev. Rul. 131, 1953-2 C.B. 112, 113.

52. Rev. Rul. 67-144, 1967-1 C.B. 12, 12.

53. *Id.*

54. *Id.* at 13.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* The IRS reiterated this bifurcation in the mid-1970s when it reviewed payments made under the Comprehensive Employment and Training Act of 1973, Pub. L. No. 93-203, 87 Stat. 839. Again, it decided that payments made in exchange for services were includible in gross income. To the extent payments were made only to participate in job training, however, recipients could exclude those payments as payments for the general welfare. Rev. Rul. 75-246, 1975-1 C.B. 24.

Manpower Development and Training Act.⁵⁹ The IRS had previously ruled that payments for people undergoing job training pursuant to these Acts were excludable from gross income.⁶⁰ Here, however, the program was being implemented by a tribal council to teach construction skills.⁶¹

The tribal council's program was based, in part, on the idea that participants learn better and faster by "participating in actual home construction."⁶² As a result, the program was divided into classroom instruction, mock-ups, and actual construction.⁶³ If the IRS had looked to its recent ruling on work relief programs, the participants in the job training would have needed to include in gross income those payments that compensated them for the actual new home construction. Instead, though, the IRS held that because the intent of the payments was to train unemployed and underemployed individuals, the earlier job training precedent applied here and participants in the program did not need to include payments they received in gross income.⁶⁴

At around the same time, the IRS considered a state-level program that paid a stipend to school dropouts and the unemployed while they participated in a job training program.⁶⁵ Though the program was not a federal program, the IRS decided that its earlier precedent still applied.⁶⁶ The payments were intended to "aid recipients in their efforts to acquire skills that will enable them to obtain better employment."⁶⁷ Therefore, the IRS said, notwithstanding that the payments were not pursuant to a federal statute, they did not constitute income to the recipients.⁶⁸ This interpretation freed the IRS to expand the exclusion to benefits beyond those solely granted and under control of Congress such as benefits granted by local leaders under municipal, county and state programs.⁶⁹

59. Rev. Rul. 68-38, 1968-1 C.B. 446.

60. See *supra* notes 41–44 and accompanying text.

61. Rev. Rul. 68-38, 1968-1 C.B. 446, 446. The question of general welfare payments to Native Americans becomes a new category of general welfare exclusion payments in the future. See *id.*

62. *Id.* at 447.

63. *Id.*

64. *Id.* at 448.

65. Rev. Rul. 68-133, 1968-1 C.B. 36.

66. *Id.* at 37.

67. *Id.* at 38.

68. *Id.*

69. See *Tax Reform: What it Could Mean for Tribes and Territories: Hearing Before the S. Comm. on Fin.*, 112th Cong. 30 (2012) (statement of Sarah H. Ingram, Comm'r, Tax Exempt & Gov't Entities, Internal Revenue Serv.) [hereinafter Ingram Testimony] ("[T]he general welfare exclusion applies equally to general welfare program payments of all governments, tribal, federal, state, and local.").

2. *Application to New Situations*

In the 1970s, the IRS's exclusion of certain types of welfare benefits from gross income exploded. The decade began with the IRS reiterating its position that unemployment insurance payments under the Social Security Act did not constitute gross income.⁷⁰ It went on to explain its position that certain (though not all) welfare payments should be excluded from gross income,⁷¹ including stipends paid to encourage individuals to participate in job training programs.⁷²

The IRS next considered an "experimental welfare program."⁷³ Worried that traditional welfare programs, which reduced benefits by the amount of income a recipient earned in fact discouraged people from work, a university paid out benefits that fell by less than the amount recipients earned.⁷⁴ It funded the payments through a federal grant and paid out benefits based on family size and income.⁷⁵ The IRS referred to its decade-old ruling that payments made out of a general welfare fund in the interest of the general public were excludable from income.⁷⁶ Here, the IRS did not say that the payments came from a general welfare fund but, because they were "in the nature of general welfare payments" and were intended to aid the poor, the IRS again said that the payments were not includable in gross income.⁷⁷

In the mid-1970s, the IRS opened a new front in its exclusion from income of payments made for the general welfare of the public. It considered "Replacement Housing Payments" made to individuals who lost their homes as a result of an urban renewal project.⁷⁸ The payments—up to \$5,000 or \$15,000 depending on which statute they derived from—were to help recipients find a "decent, safe and sanitary dwelling of modest standards."⁷⁹ The IRS determined that recipients of these replacement housing payments did not need to include the payments in their gross income.⁸⁰ Its reasoning was two-fold. First, the IRS said, the payments were "in the nature of welfare payments."⁸¹ As welfare payments, these housing

70. Rev. Rul. 70-280, 1970-1 C.B. 13.

71. I.R.S. Gen. Couns. Mem. 34,424 (Feb. 8, 1971).

72. Rev. Rul. 72-340, 1972-2 C.B. 31.

73. Rev. Rul. 73-87, 1973-1 C.B. 39, 40.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. I.R.S. Gen. Couns. Mem. 34,957 (July 21, 1972).

79. *Id.*

80. *Id.*

81. *Id.*

subsidies fit directly within IRS precedent excluding payments for the general welfare of the public from gross income.⁸²

At least as important to the IRS was congressional intent. One of the statutes creating these replacement housing payments provided that “[n]o payment received under this subchapter shall be considered as income for the purposes of” the Code.⁸³ Though it only applied directly to one type of replacement housing payment, the IRS believed that this statutory exclusion indicated that Congress intended for replacement housing payments under both federal statutes to be excluded.⁸⁴

The IRS also considered a New York fund for the victims of crime. Crime victims who had suffered personal physical injury as a result of the crime could apply to the New York State Crime Victims Compensation Board for reimbursement.⁸⁵ The Board would reimburse them for out-of-pocket expenses and lost earnings resulting from the crime-related injury.⁸⁶ Again, the IRS found that the payments were in the nature of welfare payments and as such excludable from victims’ gross income.⁸⁷

That same year, the IRS ruled on a Maryland program that made payments to adoptive parents who met all of the state’s qualification requirements except for the financial wherewithal to support the adopted children.⁸⁸ The adoptive parents and the state agreed on how much the state would pay and for how long the payments would continue.⁸⁹ The IRS believed that these payments were disbursements from a general fund made to “further[] the social welfare objectives of the State.”⁹⁰ These payments too were excluded from parents’ gross income.⁹¹

During the decade, the IRS revisited its precedent on when government payments are payments for job training and when payments are payments for services. It considered a short-term state program that paid unemployed

82. Rev. Rul. 74-205, 1974-1 C.B. 20, 21.

83. 42 U.S.C. § 4636.

84. I.R.S. Gen. Couns. Memorandum 34,957 (July 21, 1972). This conclusion was not inevitable. In fact, the opposite assertion is perhaps even more plausible: the fact that Congress could mention the exclusion of income explicitly in one statute suggests that by leaving it out of the other, Congress did not intend to exclude the other payments. Nonetheless, because the IRS believed that the payments were for the general welfare of the public, it had other grounds on which to base its exclusion.

85. Rev. Rul. 74-74, 1974-1 C.B. 18.

86. *Id.* at 18.

87. *Id.* at 19. This conclusion makes sense as a corollary to the fact that the law excludes damages resulting from personal physical injury from gross income. I.R.C. § 104(a)(2). The New York crime victims’ fund probably did not qualify under this statutory exclusion because compensation did not come from the perpetrator. Still, it is an odd choice to exclude these payments as general welfare payments when an analogy to personal injury would have been more apt.

88. Rev. Rul. 74-153, 1974-1 C.B. 20.

89. *Id.* at 20.

90. *Id.*

91. *Id.*

individuals to help clean up after a natural disaster.⁹² The IRS looked at the state's purpose in implementing this plan. It believed that the state's overriding goal was to get the work done, not to train the participants.⁹³ Though it had earlier allowed the exclusion of some incidental payment for services,⁹⁴ and even though it had earlier determined that an employer-employee relationship was irrelevant to the includability of the payment,⁹⁵ the IRS mentioned that an employer-employee relationship existed when it determined that the stipends were includible in gross income.⁹⁶ But its conclusion rested primarily on the fact that participants received the "prevailing wage rate," which suggested they were being compensated for services performed.⁹⁷ The IRS also considered payments made under the Disaster Relief Act Amendments of 1974, a federal disaster relief program to victims of the disaster. Under the program, a qualifying person or family could receive up to \$5,000 per disaster.⁹⁸ The grants covered costs related to food, relocation, legal services, and crisis counselling.⁹⁹ The grants were designed to help low-income individuals meet otherwise-unmet needs.¹⁰⁰ The IRS ruled that because these were "governmental payments made in the interest of the general welfare" and because they were not compensation for services performed, recipients could exclude the payments from their gross income.¹⁰¹

In 1973, Pennsylvania created a grant program for the victims of flooding.¹⁰² Under the program, the governor could make grants of up to \$3,000 to individuals whose home or personal property was damaged or destroyed by one of two floods.¹⁰³ To the extent the recipient of a grant had not previously taken a deduction for a casualty loss, the IRS decided that the grants were not includable in gross income.¹⁰⁴ The IRS did not explain

92. Rev. Rul. 74-413, 1974-2 C.B. 333.

93. *Id.* at 334.

94. *See supra* notes 41-44 and accompanying text.

95. *See supra* note 50 and accompanying text.

96. Rev. Rul. 74-413, 1974-2 C.B. 333, 334.

97. *Id.*

98. I.R.S. Priv. Ltr. Rul. 75-0226-0870A (Feb. 26, 1975).

99. *Id.*

100. Disaster Relief Act Amendments of 1974, Pub. L. No. 93-288, 88 Stat. 143.

101. I.R.S. Priv. Ltr. Rul. 75-0226-0870A (Feb. 26, 1975). The IRS formalized this private letter ruling in a formal revenue ruling the next year. *See* Rev. Rul. 76-144, 1976-1 C.B. 17.

102. Rev. Rul. 75-28, 1975-1 C.B. 68, 68. The Revenue Ruling probably relates to the terrible flooding experienced in Pennsylvania during Hurricane Agnes. *See Hurricane Agnes: The 45th Anniversary*, NAT'L WEATHER SERV., <https://www.weather.gov/ctp/Agnes> [<https://perma.cc/3R8X-NY24>] (Hurricane Agnes was "one of the most costly natural disasters in Pennsylvania history.")

103. Rev. Rul. 75-28, 1975-1 C.B. 68, 68.

104. *Id.* at 69. For a discussion of the benefit, see Act of May 11, 1973, No. 13, 1973 Pa. Laws 27, 27-28.

its justification for excluding the grants and did not mention either the general welfare or any type of means testing.¹⁰⁵

In the mid-1970s, the Department of Housing and Urban Development began making assistance payments to lower-income families who owned homes.¹⁰⁶ These payments were means tested and the IRS determined that in substance they were interest subsidies intended to make home ownership more achievable.¹⁰⁷ Because the payments depended on income and because they were “in the nature of general welfare,” recipients could exclude the payments from gross income.¹⁰⁸ Regardless of the tests, this interpretation effectively allowed the IRS to expand the exclusion to exclude increasingly larger housing benefits that would go beyond the commonly understood exclusion for subsistence types of welfare payments.

3. Formalizing the General Welfare Exclusion

In 1975, the IRS took an in-depth look in a General Counsel Memorandum at where it had arrived with respect to the excludability of general welfare payments.¹⁰⁹ In this memorandum, it introduced the term “general welfare exclusion” as a description of this area of law.¹¹⁰ And it acknowledged that the general welfare exclusion “is not founded on specific statutory or regulatory authority.”¹¹¹ Still, given its long history of excluding payments made for the general welfare, the IRS believed it was “well within its authority” to find federal expenditures excludable from gross income, as long as Congress intended for those payments to be excluded, even if Congress failed to explicitly state its intent.¹¹²

The IRS did not believe its authority to exclude payments from income was limited to federal payments, though. It explained that it had also excluded analogous state payments, eventually justified through recourse to the general welfare.¹¹³ Looking at the history of the newly named general

105. Rev. Rul. 75-28, 1975-1 C.B. 68.

106. Rev. Rul. 75-271, 1975-2 C.B. 23.

107. *Id.*

108. *Id.*

109. I.R.S. Gen. Couns. Mem. 36,470 (Oct. 31, 1975).

110. *Id.*

111. *Id.*

112. *Id.* The question became even easier when Congress *did* state its intent that the payment be excludable from income. For instance, in 1973, Congress established a Foster Grandparent Program. That program provided that the federal government could make grants to low-income individuals who were at least sixty years old who volunteered at hospitals, homes for neglected or dependent children, and other places that served children with special needs. Domestic Volunteer Service Act of 1973, Pub. L. No. 93-113, § 211(a), 87 Stat. 394, 402. The Act explicitly provided that no payment made under the provisions of the Act “shall be subject to any tax or charge.” *Id.* § 418, 87 Stat. at 413. The express statutory exemption meant that the IRS did not have to look at whether the payment was made for the general welfare to exclude it from recipients’ gross income. See Rev. Rul. 78-80, 1978-1 C.B. 22, 23.

113. I.R.S. Gen. Couns. Mem. 36,470 (Oct. 31, 1975).

welfare exclusion, the IRS decided that payments for general welfare could be excluded from income as long as the payments were not “intended to compensate an individual in the sense of making a return to him for something he has rendered to the state.”¹¹⁴

Soon the IRS clarified that the fact that a government payment was not in exchange for services did not, by itself, qualify for the general welfare exclusion. The IRS looked at the tax consequences of the Alaska Longevity Bonus Act.¹¹⁵ Under the Act, the state would make a payment of \$100 per month to residents of Alaska who were at least sixty-five years old and who had lived in Alaska for twenty-five years or more.¹¹⁶

On its face, these payments would appear to meet the general welfare exclusion requirements the IRS had established to this point. They were paid to residents by the government and recipients did not perform any services for the state in exchange for the payments. The IRS did not believe, however, that these payments qualified for its administratively created exclusion from income.¹¹⁷ Alaska made payments to all residents who met the age and residency requirements, “regardless of financial status, health, educational background, or employment status.”¹¹⁸ Payments that did not take into account some measure of need did not fall within the definition of payments for the “general welfare.”

Payments made by the federal government to individuals who had lost their jobs as a result of increased imports, on the other hand, qualified for the general welfare exclusion.¹¹⁹ Similarly, payments made to people displaced as a result of federal urban renewal could be excluded from gross income under the general welfare exclusion.¹²⁰

In 1974, Congress created a program under which the Department of Housing and Urban Development provided home rehabilitation grants to certain low-income individuals.¹²¹ Under this program, homeowners who lived in certain defined areas of cities and who did not earn more than \$5,000 per year could receive grants of up to \$3,500.¹²² The grants were to be used to correct code violations that endangered the health, safety, or welfare of the household.¹²³ After the homeowner had corrected these critical violations, they could use any remaining money to correct

114. *Id.*

115. Rev. Rul. 76-131, 1976-1 C.B. 16.

116. *Id.* at 17.

117. *Id.*

118. *Id.*

119. Rev. Rul. 76-229, 1976-1 C.B. 19.

120. Rev. Rul. 76-373, 1976-2 C.B. 16.

121. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 103(a)(1), 88 Stat. 633, 637 (codified at 42 U.S.C. § 5303).

122. Rev. Rul. 76-395, 1976-2 C.B. 16.

123. *Id.* at 17.

noncritical code violations, then deficiencies that could become code violations, then finally to make general property improvements.¹²⁴ The IRS held that these payments were in the nature of general welfare without explaining how it came to this conclusion.¹²⁵ This again freed the IRS to expand the reach of the exclusion beyond providing basic housing subsistence benefits. There is clearly a distinction from payments made to house an individual to payments intended to improve a taxpayer's housing situation.

C. A Pliable and Amorphous Solution

While the general welfare exclusion had existed for more than four decades by the mid-1970s, its scope and contours were still moving and still uncertain. As the IRS revisited old questions and answered new ones, it at times narrowed and at other times expanded the reach of the general welfare exclusion. What it failed to do was provide any type of certainty to payors or recipients of government money.

1. The Necessity of Means Testing

One way the IRS undermined certainty about the scope of the general welfare exclusion in its fifth decade and beyond was through inconsistency about whether excludable payments for the general welfare had to be means tested. For instance, the IRS returned to the general welfare exclusion's application to Native Americans in 1977. It had to determine the tax consequences of grants under the Indian Financing Act of 1974.¹²⁶ The Act attempted to "stimulate and increase Indian entrepreneurship and employment" by providing equity for Native Americans and Tribes to start businesses on or near reservations.¹²⁷ Under the Act, qualifying people could receive grants of up to \$50,000.¹²⁸ Grants were available to Native Americans and to Tribes that could raise at least sixty percent of the capital they needed but were otherwise unable to raise adequate capital.¹²⁹

These grants were not means tested. In fact, recipients needed to have access to a substantial amount of capital to qualify.¹³⁰ Nonetheless, the IRS

124. *Id.*

125. *Id.*

126. Rev. Rul. 77-77, 1977-1 C.B. 11, 11.

127. Indian Financing Act of 1974, Pub. L. No. 93-262, § 401, 88 Stat. 77, 82 (codified as amended at 25 U.S.C. § 1521).

128. *Id.* § 402, 88 Stat. at 83.

129. *Id.*

130. For example, assume that a taxpayer wanted to be eligible for the maximum grant of \$50,000. To qualify, the taxpayer would need to provide capital equal to \$75,000 ($\$50,000/.4 = \$125,000$. $\$125,000 - 50,000 = \$75,000$).

decided that the payments were substantially analogous to the means-tested housing assistance payments it had excluded previously from recipients' gross income.¹³¹ Likewise, the IRS decided that these payments to Native Americans and to Tribes were for promotion of the general welfare and could thus be excluded from recipients' gross income.¹³²

In spite of this, the IRS continued to rely on means testing as a justification for excluding general welfare payments. The IRS next had to opine on a provision of the Public Safety Officers' Benefits Act of 1976. Under this Act, if a public safety officer died from injuries incurred in the course of duty, the government could pay the officer's heirs a \$50,000 benefit.¹³³ The government could also make an interim payment of up to \$3,000 to heirs if they demonstrated need and the government was likely to make the benefit payment.¹³⁴ If the government determined that the heirs did not qualify for the payment, they had the obligation to return the interim payment.¹³⁵ The government could waive the repayment obligation, though, if the recipient demonstrated that repaying the advance payment would cause them hardship.¹³⁶

The Code provided that heirs could exclude the \$50,000 benefit from their gross income as damages for personal injury.¹³⁷ The Code did not speak, however, to the discharge of a recipient's duty to repay the advance payment. The IRS nonetheless believed that because the discharge was the result of economic hardship, discharging an heir's obligation to repay the amount was made for the promotion of the general welfare.¹³⁸ Heirs could thus exclude the amount they received and did not have to repay from their gross income.

That same year, the head of the witness protection program in the Department of Justice asked about the taxability of payments made to individuals in witness protection.¹³⁹ Under the federal witness protection program, the federal government relocates certain witnesses to a different part of the country and gives them new identities.¹⁴⁰ They must find new

131. Rev. Rul. 77-77, 1977-1 C.B. 11, 11.

132. *Id.* at 12.

133. Public Safety Officers' Benefit Act of 1976, Pub. L. No. 94-430, § 701(a), 90 Stat. 1346, 1346 (codified as amended at 42 U.S.C. 3796).

134. *Id.* § 701(b).

135. *Id.* § 701(d).

136. *Id.*

137. I.R.C. § 104(a); *see* Rev. Rul. 78-46, 1978-1 C.B. 22, 22 ("The benefit paid to the surviving dependents is excludable from gross income under section 104(a) of the Internal Revenue Code of 1954.") (citation omitted).

138. I.R.C. § 104(a); *see* Rev. Rule 78-46, 1978-1 C.B. 22, 22 ("[B]ecause of a showing of an economic hardship, the discharge of the liability for repayment is in the nature of a relief payment made for the promotion of the general welfare . . .").

139. I.R.S. Gen. Couns. Mem. 37,028 (Mar. 3, 1977).

140. *Id.*

jobs within 120 days of entering the program but, during that time, they receive assistance in paying for food and housing.¹⁴¹ While the IRS maintained its position that compensation had to be included in gross income, it also decided that these payments were not compensation for testifying.¹⁴² Most witnesses got a standard per diem while they testified; few went into witness protection and received governmental support for living expenses.¹⁴³

Though the statute was silent on the question of whether Congress wanted to exclude these witness protection payments from gross income, the IRS opined that Congress intended these payments to be welfare payments.¹⁴⁴ It analogized the payments to earlier housing relocation payments it had exempted from gross income.¹⁴⁵ And ultimately, because the IRS believed the payments were not compensatory and were paid “to ensure the welfare of the protected witnesses,” it decided that the payments were excludable from gross income.¹⁴⁶

The IRS decided that an Ohio program that provided credits to the elderly and the disabled to reduce the cost of their winter energy use was also for the promotion of the general welfare.¹⁴⁷ The credits reduced qualifying residents’ energy bills by 25% and energy companies collected that 25% from the state government.¹⁴⁸ To qualify, a resident had to be head of household, had to be at least sixty-five years old or “totally and permanently disabled” and had to have income of \$7,000 or less.¹⁴⁹ Qualifying residents did not have to include the credits in their gross income.¹⁵⁰

2. *Nonprofits and Businesses*

In 1979, the IRS revisited its earlier ruling that tornado victims could exclude tornado rehabilitation payments made by their employer from their gross income.¹⁵¹ Its changed stance reflected the case of a nonprofit organized by a group of savings and loans organizations.¹⁵² The savings and loans funded the nonprofit, which used its assets to make grants to members of the savings and loans organizations whose homes had suffered damage

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Rev. Rul. 78-170, 1978-1 C.B. 24, 24.

148. *Id.*

149. *Id.*

150. *Id.*

151. I.R.S. Gen. Couns. Mem. 38,032 (Aug. 1, 1979).

152. *Id.*

from natural disasters.¹⁵³ The nonprofit determined the amount of the grants based on homeowners' needs and beneficiaries used these grants to repair their homes.¹⁵⁴

While the new program differed from the tornado rehabilitation payments—grants were made by lenders, not employers—in broad strokes they were similar. The IRS determined that, its earlier ruling notwithstanding, these payments did not qualify for the general welfare exclusion.¹⁵⁵ The general welfare exclusion, as it had developed over the intervening decades, “applied to governmental expenditures that are either federal or nonfederal in origin.”¹⁵⁶ A payment made by a nongovernmental actor—including a nonprofit—did not qualify for the general welfare exclusion.¹⁵⁷

The IRS also narrowed the general welfare exclusion in another dimension. It looked at government payments made to trades or businesses.¹⁵⁸ It determined that even where such payments were based on the business's need, they did not qualify for the general welfare exclusion.¹⁵⁹ In spite of some inconsistent precedent, the general welfare exclusion was only available to individuals; payments to farms and other businesses could not qualify for this administrative exception to the broad tax base.¹⁶⁰

Subsequently, the IRS asserted that it had never applied the general welfare exclusion to businesses.¹⁶¹ This absolutist position created a potential inconsistency in the law: some federal aid programs were available both to individuals and businesses.¹⁶² A business, under the IRS's theory of the general welfare exclusion, could never exclude income on the basis of general welfare.¹⁶³ So could the tax law face such “divergent tax treatment for the two groups?”¹⁶⁴ The IRS suggested that it could not, which would mean that a payment available both to individuals and businesses could never qualify for the general welfare exclusion.¹⁶⁵

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. I.R.S. Gen. Couns. Mem. 37,920 (Apr. 5, 1979).

159. *Id.*

160. *Id.*

161. I.R.S. Gen. Couns. Mem. 38,237 (Feb. 15, 1980).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* The IRS did not definitively arrive at this conclusion, however. In the memorandum, it was considering a federal fuel credit available to individuals and businesses. Before addressing the question of divergence, the IRS had determined that the fuel credit was more regulatory than it was for the promotion of the general welfare. *Id.* Thus, the IRS did not *have* to arrive at the question of whether a payment made to individuals could qualify for the general welfare exclusion. *See id.*

The IRS began to ignore this policy in response to newly offered benefits and requests for guidance with respect to the exclusion. In 1980, it looked at federal and state grants made to the owners of properties on the National Register of Historic Places.¹⁶⁶ The federal government made grants to states which, in turn, made grants to those responsible for the buildings on the National Register.¹⁶⁷ Those responsible, the IRS explained, could be government units, tax-exempt organizations, or “taxpayers, including individuals, corporations, and unincorporated entities.”¹⁶⁸

The fact that a for-profit business could receive the grant should have been reason enough for the grants to fail to qualify for the general welfare exclusion. After all, the grants were available to both individuals and businesses.¹⁶⁹ But that was not the reasoning the IRS used in concluding that the grants did not qualify. Rather, it looked at the substance of its general welfare exclusion.¹⁷⁰ Because the government based the grants on the ownership of qualifying property rather than a recipient’s “financial status, health, educational background, or employment status” and because the grants were not “intended to improve the living conditions of low-income homeowners,” they were not made for the promotion of the general welfare.¹⁷¹ Recipients had to include the grant payments they received in their gross income.¹⁷²

While this rule stood for most of 1980, Congress decided to overrule the IRS. It amended the National Historic Preservation Act in 1980 to provide that recipients would not have to pay taxes on grants they received after December 12, 1980.¹⁷³ Congress’s amendment of the law did not, however, change the IRS’s earlier analysis. These National Register grants did not become excludable under the general welfare exclusion. Rather, they become excludable because Congress explicitly excluded them from taxpayers’ gross income.

166. Rev. Rul. 80-330, 1980-2 C.B. 29, 29.

167. *Id.* (Authorizing the “establish[ment of] a program of matching grants-in-aid to states.”).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 202(b), 94 Stat. 2987, 2993; Rev. Rul. 82-195, 1982-2 C.B. 34, 34 (citing National Historic Preservation Act Amendments of 1980, *supra*).

3. *Cleaning Up the Rules(?)*

In the mid-1980s, the IRS expended some effort distinguishing payments for the general welfare from gifts. It first returned briefly to disaster relief payments.¹⁷⁴ It distinguished disaster relief payments from gifts because disaster relief payments were compensatory.¹⁷⁵ They functioned more like insurance payments than payments made from “detached and disinterested generosity.”¹⁷⁶ As such, recipients could exclude disaster relief payments under the administratively created general welfare exclusion rather than the statutory exclusion for gifts.¹⁷⁷

It then turned back to Alaska. In 1980, Alaska created a dividend program through which it annually distributed a portion of its earnings to all adult residents of the state.¹⁷⁸ The state intended for this dividend to encourage residents to both involve themselves in the management and expenditure of its energy fund and stay in Alaska.¹⁷⁹ The IRS held that the dividend did not qualify as a gift; Alaska created the dividend not out of disinterested generosity, but to provide a benefit for itself.¹⁸⁰ Moreover, as with earlier Alaska Longevity Bonus Act, this dividend did not qualify for the general welfare exclusion.¹⁸¹ As with the Longevity Bonus, Alaska paid the dividends to all residents, irrespective of their need, health, education, or employment status.¹⁸²

The next time the IRS looked at the general welfare exclusion, it again narrowed its application. It looked at an individual who had purchased a building from the Urban Redevelopment Authority in a low-income area.¹⁸³ As part of the purchase agreement, the purchaser agreed to allow the Urban Redevelopment Authority to restore the building’s façade, agreed to maintain that façade, and to rehabilitate and maintain the building’s interior.¹⁸⁴ In part the purchaser did these things with federal and state grants.¹⁸⁵

174. I.R.S. Gen. Couns. Mem. 39,228 (May 4, 1984).

175. *Id.*

176. *Id.* (citing *Comm’r v. Duberstein*, 363 U.S. 278 (1960)).

177. *Id.*

178. Rev. Rul. 85-39, 1985-1 C.B. 21, 21.

179. *Id.* at 21–22.

180. *Id.* at 22.

181. *Id.*

182. *Id.*

183. I.R.S. Non Docketed Serv. Advice Rev., 1986 IRS NSAR 8068, 1986 WL 766063 (June 16, 1986).

184. *Id.*

185. *Id.*

The purchaser sought to exclude the grants from his gross income, claiming the general welfare exclusion applied.¹⁸⁶ He argued that the general welfare exclusion applied to social benefit programs that promoted the general welfare of the *community*.¹⁸⁷ But the IRS disagreed. The Native American example, it said, “appears to be extending the ‘general welfare’ exclusion beyond the limits normally recognized by the Service.”¹⁸⁸

Here, the IRS pointed out, the payments were not means-tested.¹⁸⁹ They could go to needy individuals who otherwise could not afford to repair historic buildings they owned, but they could also go to “structures purchased for use in the production of income by developers and absentee landlords.”¹⁹⁰ The IRS reiterated its policy that the general welfare exclusion not only required means-testing, but could only benefit individuals.¹⁹¹ If a business could receive the benefit, the benefit did not qualify for the general welfare exclusion.¹⁹²

Early in the 1990s the IRS revisited payments made to individuals in witness protection.¹⁹³ This time, however, it looked at state witness protection programs rather than the federal program.¹⁹⁴ This time, instead of broadly ruling on whether contractual payments made to individuals in witness protection qualified for the general welfare exclusion, the IRS looked at each type of payment received by a witness and determined that the majority of payments were includible in gross income.¹⁹⁵

In looking at the tax consequences of these payments, the IRS addressed the history of the general welfare exclusion.¹⁹⁶ For the first time, it asserted that the expansion of the general welfare exclusion to payments by states “was initially problematic” because the original justification for the general welfare exclusion was that Congress intended the federal, excluded payments to be untaxed.¹⁹⁷

186. *Id.* At the same time, he used the amount he paid to increase his basis in the property, an inconsistent position that likely raised red flags for the IRS. *Id.*

187. *Id.* His position was not frivolous; in at least one case, the IRS allowed the exclusion of grants that benefited Native American entrepreneurship at large. *See supra* notes 126–32 and accompanying text.

188. I.R.S. Non Docketed Serv. Advice Rev., 1986 IRS NSAR 8068, 1986 WL 766063 (June 16, 1986).

189. *See id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Field Serv. Advisory, 1992 WL 1354887 (Mar. 24, 1992); *see supra* notes 139–46 and accompanying text.

194. Field Serv. Advisory, 1992 WL 1354887 (Mar. 24, 1992).

195. *Id.*

196. *Id.*

197. *Id.*

Eventually, though, the exclusion expanded to state payments “by administrative fiat.”¹⁹⁸ As a result, it is possible for state witness protection payments to qualify for the general welfare exclusion. Do they, though? The IRS believed that it should treat state payments similarly to the federal payments.¹⁹⁹ But it decided to be more specific about what the general welfare exclusion excluded. Here, it decided that excluded payments were those payments made for “expenses that relate to basic living needs.”²⁰⁰ Under that standard, protected witnesses could exclude travel expenses the government paid in relocating them.²⁰¹ They could not, however, exclude medical insurance or rental reimbursements for two cars.²⁰² These things, the IRS held, were “excessive benefit[s]” that did not relate to basic living needs.²⁰³

Varying slightly from that reasoning, the IRS conceded that while the cost of a security system in a new home might be an excessive benefit, in this case, it related to the witness’s “safety as a direct result of his participation in the program.”²⁰⁴ It thus met the requirements for the general welfare exclusion.²⁰⁵ As for stipends paid to witnesses, the IRS decided that they could, under certain circumstances, qualify for the general welfare exclusion. If the state paid those stipends to all witnesses, the IRS would treat the stipends as compensatory and includible in gross income.²⁰⁶ If, however, the stipends only went to witnesses in witness protection and the state used the stipends to reduce the hardship witnesses faced, they qualified for the general welfare exclusion.²⁰⁷

4. *Revisiting the Rules. Again.*

After 1992, the general welfare exclusion sat fallow for much of the rest of the decade. The IRS did not take it up again until 1998, when it had to consider relocation payments made to the victims of flooding in the Midwest.²⁰⁸ As the result of the flooding, the President declared a portion of the upper Midwest a disaster area.²⁰⁹ Residents of the area could receive assistance moving from their flood-damaged homes to new homes.²¹⁰ The

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Rev. Rul. 98-19, 1998-1 C.B. 840, 840.

209. *Id.*

210. *Id.*

federal government funded the assistance and it was distributed by state and local governments.²¹¹

More than two decades earlier, the IRS had determined that relocation payments made to individuals displaced by urban renewal qualified for the general welfare exclusion.²¹² Based on that precedent—and with no further analysis—the IRS decided that these relocation payments also qualified for the general welfare exclusion.²¹³ It came to this conclusion without addressing whether the relocation payments looked at the recipients' financial status, health, or any of the other criteria it had previously invoked in analyzing the general welfare exclusion.²¹⁴ Moreover, the only criterion that the law authorizing relocation payments makes on recipients is that the “grantee” (that is, the state or local government) has to find the recipient “to be appropriate.”²¹⁵

The following year, the IRS again found itself confronting questions about payments in the general welfare. In 1996, President Clinton signed a law eliminating Aid to Families with Dependent Children, a welfare law that had been federalized as part of the New Deal, and replaced it with Temporary Assistance to Needy Families (TANF).²¹⁶ The new welfare law created block grants to states that gave states more flexibility in determining what recipients had to do to qualify for the payments.²¹⁷ In spite of its flexibility, TANF required that “specified percentages of individual recipients engage in work activities” or states would face penalties.²¹⁸ The flexibility of TANF created complexity for the IRS's general welfare exclusion analysis. It acknowledged that TANF payments could both promote the general welfare *and* compensate recipients for services they performed.²¹⁹ At the same time, payments generally did not exceed what recipients would have received under prior law that were based on family need.²²⁰ With that in mind, the IRS laid out three criteria it would consider in evaluating TANF payments: (1) whether payments for work were received only from state or local welfare agencies; (2) whether individuals' eligibility was based on need; and (3) whether the size of payments was based on welfare law and the number of hours worked was limited by the

211. *See id.*

212. *Id.* (citing Rev. Rul. 76-373, 1976-2 C.B. 16); *see supra* notes 78–84 and accompanying text.

213. Rev. Rul. 98-19, 1998-1 C.B. 840.

214. *Id.*

215. 42 U.S.C. § 5305(a)(11).

216. Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN'S L.J. 1, 2–3 (2004) (citing 42 U.S.C. §§ 601–19).

217. I.R.S. Notice 99-3, 1999-1 C.B. 271, 271.

218. *Id.*

219. *Id.*

220. *Id.* at 271–72.

size of an individual's payment.²²¹ If the answer to all three questions was yes, the TANF payment would meet the general welfare exclusion.²²²

The creation of TANF also affected Native American Tribes. Under TANF, tribal governments, like state and local governments, received block grants from the federal government and, in turn, had to provide "means and training for self-sufficiency and personal responsibility."²²³ One tribal government created a business initiative to make grants of between \$5,000 and \$100,000 to attract businesses to tribal lands, thus creating jobs for members.²²⁴ The grants were primarily aimed at businesses that could not otherwise get financing.²²⁵ To receive the grants, an individual had to be an enrolled member of the Nation and had to submit an application to an economic development task force.²²⁶ The IRS mentioned its standards for the general welfare exclusion, including that payments made regardless of recipients' financial, health, educational, or employment status do not qualify for the exclusion.²²⁷ However, it said, payments made from governments under "legislatively provided social benefit programs for promotion of the general welfare" automatically qualify for the general welfare exclusion.²²⁸ Here, the payments were made under the 1974 Indian Financing Act which had been expressly enacted to increase the general welfare.²²⁹ As a result, the IRS held that these grants qualified for the general welfare exclusion.²³⁰

In 2001, the IRS looked at living expense payments made by the Federal Emergency Management Agency (FEMA) to fire victims who were uninsured or underinsured.²³¹ The Code excludes from gross income such living expense payments from insurance companies to an individual whose home becomes uninhabitable as the result of fire.²³² The IRS believed that, in the interest of the "wise administration" of the tax law, the FEMA payments should also be excluded.²³³ After a careful and exhaustive review, though, the IRS could not find any exclusionary provision.²³⁴ So it turned to the general welfare exclusion. In this case, because the FEMA payments

221. *Id.* at 272.

222. *Id.* It is also worth noting that under the IRS's analysis, payments that are excluded under the general welfare exclusion also do not qualify as earned income for the earned income tax credit. *Id.*

223. I.R.S. Priv. Ltr. Rul. 1999-24-026 (June 18, 1999).

224. *See id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. I.R.S. Chief Couns. Advisory 200114044, 2001 WL 334245 (Apr. 6, 2001).

232. I.R.C. § 123(a).

233. I.R.S. Chief Couns. Advisory 200114044, 2001 WL 334245 (Apr. 6, 2001)

234. *Id.*

were not based on recipients' financial situation and because they were a substitute for damages against the United States (which would be taxable income), the IRS did not believe the general welfare exclusion applied.²³⁵ Because FEMA made the payments under the authority of the Stafford Act, though, the IRS believed these payments represented a close question for the application of the general welfare exclusion.²³⁶ A less close question arose under a Massachusetts program. Under the program, senior citizens could "volunteer to provide services" to a city or town and, in exchange, would receive a property tax abatement of up to \$500.²³⁷ The IRS determined that the general welfare exclusion did not apply to these property tax abatements. This is because abatements were not based on need,²³⁸ a criterion that the IRS had consistently required for exclusion. The IRS pointed out that it only ignores the question of need when it came to natural disasters and catastrophes.²³⁹

After September 11, 2001, the Lower Manhattan Development Corporation made grants to individuals and families who lived near the site of the attack on the World Trade Center.²⁴⁰ The amount of the grant was related to how long recipients would commit to continue living in the area and was intended to be commensurate with their increased costs.²⁴¹ The IRS determined that "[g]overnmental payments to help individuals and families meet disaster-related expenses are based on need."²⁴² In other words, while the general welfare exclusion generally requires some inquiry into the financial situation of recipients, in the context of disasters, the *need* criterion is met without any such inquiry.²⁴³ While the IRS had been moving this direction for some time, September 11 represented an explicit and significant expansion of the general welfare exclusion.

The IRS continued with this disaster-related exception to its ordinary standards the following year. It held that amounts flood victims received from the state government to pay for or reimburse medical expenses, temporary housing, and transportation qualified for the general welfare

235. *Id.*

236. *Id.*

237. I.R.S. Chief Couns. Advisory 200227003, 2002 WL 1445002 (July 5, 2002).

238. *Id.*

239. *Id.* Even if a town limited the program based on senior citizens' income it would not qualify for the general welfare exclusion. The payments were in exchange for work and the general welfare exclusion does not apply to compensation for services. *Id.*

240. I.R.S. Notice 2002-76, 2002-2 C.B. 917, 917.

241. *Id.*

242. *Id.*

243. *Id.* at 217–18. Later the IRS clarified that the general welfare exclusion only applies to individual recipients. Businesses that received grants from the New York state government as a result of September 11 could not exclude those payments under the general welfare exclusion. I.R.S. Notice 2003-18, 2003-1 C.B. 699.

exclusion.²⁴⁴ The state enacted emergency legislation appropriating the funds, the flood was a presidentially declared disaster, and the amounts paid were commensurate with the losses and expenses victims faced.²⁴⁵ Again, though the funds were not means-tested, because they related to a disaster, recipients could exclude them under the general welfare exclusion.²⁴⁶

The IRS then turned its attention back to non-disaster payments. It determined that a Native American tribal program that provided forgivable mortgage loans to tribal members who demonstrated need qualified for the general welfare exclusion.²⁴⁷ A tribal program that provided educational assistance to members with income below the national median could also be excluded as a payment for the general welfare.²⁴⁸ Similarly, reimbursements made by a government agency to family members of individuals with developmental disabilities qualified for the general welfare exclusion when the amount of reimbursement was based on a family's financial need.²⁴⁹ Under no circumstance, though, could payments to businesses qualify for the general welfare exclusion.²⁵⁰ In the post-1992 period, as the IRS continued to confront varied questions of whether certain types of income fit within the scope of the general welfare exclusion, the IRS continued its ad hoc application, looking more to questions of equity than to whether the exclusion fit within the framework of the tax law.

5. *A Focus on Homeowners*

Over the next several years, the IRS issued a number of private letter rulings laying out the scope of the general welfare exclusion as it applies to homeowners. It first considered a city program intended to preserve older neighborhoods.²⁵¹ Under that program, the city compensated the owners of multiunit housing that had previously been single-family housing for the costs of returning it to its original form, as well as for lost rent.²⁵² The city did not means test the program; moreover, the IRS pointed out, the payment was not to bring housing back to a livable standard and it largely went to

244. Rev. Rul. 2003-12, 2003-1 C.B. 283, 284-85.

245. *Id.* at 283.

246. *Id.* at 284.

247. I.R.S. Priv. Ltr. Rul. 2003-36-030 (Sept. 5, 2003).

248. I.R.S. Priv. Ltr. Rul. 2004-09-033 (Feb. 27, 2004). Occasionally, the Tribe would provide similar educational assistance to members with income above the median. In those cases, the general welfare exclusion would not apply. *Id.*

249. I.R.S. Priv. Ltr. Rul. 2004-51-022 (Dec. 17, 2004).

250. Rev. Rul. 2005-46, 2005-2 C.B. 120, 122 ("A grant that a qualifying business receives under a state's program to reimburse losses that any qualifying business incurred for damage or destruction of real and personal property on account of a disaster is not excludable from gross income . . . under the general welfare exclusion.")

251. I.R.S. Priv. Ltr. Rul. 2006-25-006 (June 23, 2006).

252. *Id.*

investors.²⁵³ As a result, payments under the program were not for the benefit of the general welfare and could not be excluded from recipients' income.²⁵⁴ Another city implemented a program to rehabilitate downtown buildings.²⁵⁵ The IRS denied the general welfare exclusion here; promotion of the general welfare, it explained, looks at familial need.²⁵⁶ Payments to rehabilitate commercial buildings cannot qualify for the general welfare exclusion.²⁵⁷

The IRS's decision did not foreclose the possibility of a rehabilitation program qualifying for the general welfare exclusion. In a different program, a city had an easement over driveway approaches.²⁵⁸ To fix broken driveways, the city reimbursed homeowners half of the cost of repair.²⁵⁹ It would reimburse senior citizens and disabled persons the full cost of the repair.²⁶⁰ The fifty percent reimbursement did not constitute income because it represented the city's share of the cost of repair (because the city owned a property interest in the driveway).²⁶¹ And because the one hundred percent reimbursement was available based on age and disability, it qualified for the general welfare exclusion.²⁶²

A crisis in another state that affected resident homeowners' health, safety, and general welfare led that state to create a program to ameliorate the crisis.²⁶³ The amelioration included grants to implement fixes and the payment of interest on private loans.²⁶⁴ These benefits were means-tested, aimed at low- and moderate-income individuals.²⁶⁵ The IRS determined that the benefits qualified for the general welfare exclusion.²⁶⁶

That ruling appears to mark a shift in who could qualify for the general welfare exclusion, raising the income ceiling for qualification. Another county program intended to provide housing and training to county residents who were not only low-income but moderate-income.²⁶⁷ In that ruling, there

253. *Id.*

254. *Id.*

255. I.R.S. Priv. Ltr. Rul. 2007-09-008 (Mar. 2, 2007).

256. *Id.*

257. *Id.*

258. I.R.S. Priv. Ltr. Rul. 2007-22-005 (June 1, 2007).

259. *Id.*

260. *Id.*

261. Because this was the city's liability, as opposed to the taxpayer's, the city's payment of the amount would not be an accession to wealth for the taxpayer and thus would not be gross income as defined by the U.S. Supreme Court. For a discussion of what constitutes gross income, see *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) ("Here, we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.")

262. I.R.S. Priv. Ltr. Rul. 2007-22-005 (June 1, 2007).

263. I.R.S. Priv. Ltr. Rul. 2008-08-012 (Feb. 22, 2008).

264. *Id.*

265. *Id.*

266. *Id.*

267. I.R.S. Priv. Ltr. Rul. 2010-01-013 (Jan. 8, 2010).

was no question that the payments generally qualified for the general welfare exclusion. But the payments were also available to low- and moderate-income county employees.²⁶⁸ The IRS decided, though, that as long as they had to qualify under the same terms as non-county employees, the payments were not compensation for services but, instead, payments made for the general welfare.²⁶⁹

The IRS also applied its low- or moderate-income rule to a program that reimbursed taxpayers up to \$500 if they purchased an Energy Star-rated boiler or furnace.²⁷⁰ Because the program intended to help low- and moderate-income taxpayers reduce their winter energy consumption, the IRS decided that the reimbursements qualified for the general welfare exclusion.²⁷¹

In the aftermath of the 2000s Great Financial Crisis, the government created programs to help homeowners.²⁷² The HFA Hardest Hit Fund worked to prevent foreclosures in states where home prices had declined by more than twenty percent from their peak, or “the unemployment rate equals or exceeds the national average.”²⁷³ To qualify for help under these programs, homeowners needed to demonstrate that they had suffered from financial hardship as the result of, among other things, unemployment, medical conditions, divorce, or the death of a spouse.²⁷⁴ These payments qualified for the general welfare exclusion.²⁷⁵

6. *Where We Are (and Are Not) Now*

The IRS also applied the low- and moderate-income rule to tribal payments. It determined that tribal payments to low- and moderate-income tribal members who lost their land during flooding qualified for the general welfare exclusion.²⁷⁶ The IRS continued to receive questions from tribal governments about the tax consequences of payments to members, though, and decided it would issue formal guidance.²⁷⁷ A year later, the IRS proposed a safe harbor under which tribal payments to members would be

268. *Id.*

269. *Id.*

270. I.R.S. Chief Couns. Advisory 200908025 (Feb. 20, 2009).

271. *Id.*

272. *Helping Responsible Homeowners*, WHITE HOUSE: PRESIDENT BARACK OBAMA <https://obamawhitehouse.archives.gov/economy/middle-class/helping-responsible-homeowners> [https://perma.cc/55NV-P54X] (last visited Apr. 20, 2023) (“To address [the Great Financial Crisis], President Obama and his Administration have taken a broad set of actions to stabilize the housing market and help responsible American homeowners.”)

273. I.R.S. Notice 2011-14, 2011-11 I.R.B. 544, 544.

274. *Id.*

275. *Id.* at 546.

276. I.R.S. Priv. Ltr. Rul. 2008-45-025 (Nov. 7, 2008).

277. I.R.S. Notice 2011-94, 2011-49 I.R.B. 834.

deemed to meet the requirements of the general welfare exclusion.²⁷⁸ The safe harbor soon became unnecessary, though: in 2014 Congress enacted the Tribal General Welfare Exclusion Act which codified the general welfare exclusion as it applied to Native American Tribes.²⁷⁹ Under the codified exclusion, payments can be excluded from income where those payments are made by a tribal government, are subject to specified guidelines and do not discriminate in favor of the Tribe's governing body, and the benefits are available to any tribal member who meets the guidelines, are for the promotion of general welfare, are not lavish or extravagant, and do not represent compensation.²⁸⁰

That codification of the Indian general welfare exclusion largely ended the IRS's need to issue rulings in that corner of the general welfare exclusion world. It did not, however, end questions relating to the general welfare exclusion more broadly. For instance, the IRS looked at a Massachusetts program that provided an income tax credit to certain low-income senior taxpayers who paid property taxes.²⁸¹ The credit reduced their state income tax liability and was refundable; if the credit exceeded a taxpayer's income tax, the state paid the excess to the taxpayer.²⁸²

The IRS found that because the program was means-tested and because payments were made by the state, it generally qualified for the general welfare exclusion.²⁸³ In certain situations, though, recipients of the credit may have taken a federal income tax deduction for the real estate taxes in a prior year.²⁸⁴ Where that happened, the tax benefit rule trumps the general welfare exclusion and, to the extent the taxpayer took a deduction in a prior year, they had to include the credit in income in the year they received it.²⁸⁵

In 2018, the IRS reiterated that, other than disaster-related grants, to qualify for the general welfare exclusion, programs need to be means-tested.²⁸⁶ A state program that helped homeowners improve their houses did not qualify because the program was based on a house's location and age, not on the income of its owner.²⁸⁷

278. I.R.S. Notice 2012-75, 2012-51 I.R.B. 715.

279. Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883 (codified at I.R.C. § 139E).

280. I.R.C. § 139E(b). The codification of the Indian general welfare exclusion basically adopted the safe harbor the IRS had created that same year. See Rev. Proc. 2014-35, 2014-26 I.R.B. 1110.

281. I.R.S. Chief Couns. Advisory 201423020 (June 6, 2014).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* The tax benefit rule "generally requires a taxpayer to include in gross income recovered amounts that the taxpayer deducted in a prior taxable year to the extent those amounts reduced the taxpayer's tax liability in the prior year." Rev. Rul. 2019-11, 2019-17 I.R.B. 1041, 1041 (citing Rev. Rul. 93-75, 1993-2 C.B. 63).

286. I.R.S. Priv. Ltr. Rul. 2018-15-005 (Apr. 13, 2018).

287. *Id.*

Two years later, however, the IRS undermined both its 2018 guidance and its general requirement that payments qualifying for the general welfare exclusion must be means-tested. The IRS looked at a Connecticut program that helped homeowners pay for repairs to their house's concrete foundation.²⁸⁸ The state had received a number of complaints about crumbling foundations and determined that the deterioration was caused by "presence of pyrrhotite in the concrete mixture used to pour the foundations"²⁸⁹ The IRS decided that, as long as a homeowner had not taken a casualty loss deduction for the cost to repair their foundation, state payments qualified for the general welfare exclusion.²⁹⁰ The program was not means-tested and the IRS did not explain why it qualified in spite of being broadly available to all homeowners.²⁹¹

While the 2020 IRS guidance does not return the general welfare exclusion to square one, it significantly and unnecessarily complicates the question of when the general welfare exclusion applies. While it appeared settled that a government payment had to look to income, wealth, age, health, or some other individual characteristic to qualify for exclusion, it is no longer clear when that is the case. In its 2020 guidance, the IRS allowed beneficiaries to exclude the benefits they received from gross income without respect to these characteristics.²⁹² This underscores a significant problem with the general welfare exclusion: as an administratively created tax doctrine, with no basis in statutory language, its scope remains ambiguous and its contours subject to administrative whim and slippage.

II. PARSING RATIONALES AND JUSTIFICATIONS

In its rulings the IRS has provided little, if any, substantive justification for the existence and purpose of the general welfare exclusion. The IRS has expended little effort to quantify its cost to taxpayers. Rather, the IRS has used its judicially recognized administrative discretion in choosing not to collect taxes on income it has administratively chosen to exclude from the Code's fulsome definition of "gross income." In support of the use of its discretion, however, it is important to try to discern the economic impact of its use and the rationales for its advancement.

It is easy to excuse or dismiss the impact of the general welfare doctrine. Although many beneficiaries would not owe taxes on these payments even

288. I.R.S. Announcement 2020-5, 2020-19 I.R.B. 796.

289. *Id.*

290. *Id.*

291. *See id.*

292. *Id.*

without the general welfare exclusion,²⁹³ the doctrine's sweeping scope as it exempts federal, state, and local benefit programs should be measured. In addition, it is important to parse the rationales for its employment. For example, the doctrine could be justified on grounds that the loss of tax revenue is minimal.²⁹⁴ There are several practical and normative rationales that potentially could be advanced for justifying the exclusion. This would include, for example, the possible circularity and futility of clawing back payments in the form of taxes on amounts distributed to the indigent. The IRS's reluctance to tax general welfare benefits could also be found in a general reluctance to tax the indigent.²⁹⁵ Ultimately, however, these rationales do little to explain the IRS's general welfare exclusion from gross income in contrast to standard tax practices.

A. Administrative Discretion

While the IRS treats the general welfare exclusion as a doctrinal piece of tax law, subject to precedent and administrative rules, that does not really reflect its place in the constellation of tax rules. Rather than affirmative tax law, the general welfare exclusion represents the IRS declining to tax income that is subject to tax.²⁹⁶ In its rulings and other pronouncements, the IRS implicitly acknowledges this—a significant portion of its rulings and other writings on the general welfare exclusion initially cite Section 61 of the Internal Revenue Code for the proposition that all income is taxable unless it is explicitly exempted.²⁹⁷

Congress did explicitly exempt one and a half corners of the general welfare exclusion. The Code excludes gross income any “Indian general welfare benefit.”²⁹⁸ It also expressly excludes from gross income any “qualified disaster relief payment.”²⁹⁹ Congress has not codified any other part of the general welfare exclusion. Rather, when the IRS applies the

293. In 2023, the standard deduction means that unmarried taxpayers must earn more than \$13,850, and married taxpayers more than \$27,700, before they begin to owe taxes. Rev. Proc. 2022-38, 2022-45 I.R.B. 445. To the extent general welfare benefits are paid to individuals with income below these amounts, they would not owe taxes on the payments with or without the general welfare exclusion.

294. As discussed below, there is a lack of statistical data on the economic effect or cost of the exclusion. For a discussion of whether subsistence benefits would be taxed if there were no exclusion, see *infra* notes 314–17 and accompanying text.

295. The IRS appears to never have expressly conceded that its policy is based on a concern of taxing those in indigent circumstances, instead creating other rationales to justify the exclusion. See, e.g., *supra* notes 37–38 and accompanying text.

296. See I.R.C. § 61 (gross income includes “all income from whatever source derived”).

297. See, e.g., Rev. Proc. 2014-35, 2014-26 I.R.B. 1110 (“Under § 61(a), except as otherwise provided in subtitle A, gross income means all income from whatever source derived.”).

298. I.R.C. § 139E(a).

299. *Id.* § 139(a).

administratively created general welfare exclusion that it developed over decades, it is declining to enforce the tax law as written.³⁰⁰

This refusal to enforce falls within its legal authority. The Supreme Court has recognized that administrative agencies enjoy administrative discretion, a concept derived from prosecutorial discretion.³⁰¹ Administrative discretion allows the IRS to decline to enforce portions of the tax law if it decides, for whatever reason, not to enforce them. Its nonenforcement decisions are not subject to judicial oversight or taxpayer challenge.³⁰²

As a result, the IRS cannot be required to collect taxes on payments made for the promotion of the general welfare. Still, the administrative creation of a quasi-doctrine does present problems in the tax law. Without a legislative text it is difficult for taxpayers to rely on, or even interpret, the general welfare exclusion. As we have seen, the development of the quasi-doctrine has been ad hoc and inconsistent. It can extend at the IRS's discretion and can contract nearly as easily and unpredictably.

B. Assessing the Tax Revenue Impact of the General Welfare Doctrine

It is possible that excluding general welfare benefits costs the government little revenue given the existence of a large standard deduction and historical personal exemptions.³⁰³ It is possible that even if indigent individuals had included these welfare benefits in their gross income, they still may not have been subject to tax. However, in spite of the extraordinary reach of the general welfare exclusion, there appears to have been no attempt to assess the amounts of taxes saved or the demographics of the taxpayers enjoying the benefit, unlike what is traditionally done when Congress considers changes to federal tax law.

In addition, there appears to have been no analysis of those taxpayers that actually benefit from the doctrine. To the extent that general welfare benefits are means tested, it is likely that they largely benefit low-income taxpayers and may not come at any additional tax cost.³⁰⁴ However, the IRS

300. *See id.* § 61.

301. *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985). The Supreme Court grounded its approval of administrative discretion on three principles. First, the decision of whether to enforce a provision requires an agency to balance a number of considerations, an inquiry the agency itself is best positioned to make. Second, in declining to enforce a part of the law, agencies do not exercise coercive force over liberty or property. And finally, administrative discretion is a natural outgrowth of prosecutorial discretion, another concept endorsed by the Supreme Court. Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 164 (2016).

302. *Heckler*, 470 U.S. at 837.

303. For a discussion of whether subsistence benefits would be taxed if there was no exclusion, see *infra* notes 314–17 and accompanying text.

304. By means testing the exclusion, the exclusion would generally only benefit those paying a minimal amount of federal income tax.

applies its means-testing requirement inconsistently³⁰⁵ and, moreover, does not create a bright-line cutoff even where there is means testing. It is possible—and, in fact likely—that at least some beneficiaries of the general welfare exclusion would have owed taxes on the benefits they receive. Taxpayers of all economic demographics potentially benefit from the doctrine, raising questions of fairness and equity as well.

The effect of the exclusion is also magnified considering that these benefits are probably also excluded from state and local income tax as well. For example, the calculation of a state's taxable income often directly or indirectly references the amount of gross income on a taxpayer's federal income tax return.³⁰⁶ If an amount is excluded from gross income for federal income tax purposes, it will probably be excluded unless a state expressly "adds back" the amount into a taxpayer's taxable income for that state.³⁰⁷ If these general welfare benefit exclusions do not appear in federal adjusted gross income or federal taxable income and are not expressly added back by a state taxing authority, it is unlikely that the benefits are taken into account for state and local income tax purposes. And excluding general welfare benefits almost certainly costs states tax revenue; state standard deductions tend to be significantly smaller than the federal standard deduction, with the concomitant result that lower-income taxpayers may owe state income taxes even if they owe no federal income tax.³⁰⁸

This lack of accountability of the cost of this exemption of welfare benefits would never be sanctioned by or permitted to Congress. The Congressional Budget Office provides an estimate of the cost to the government of all significant legislation.³⁰⁹ Members of Congress often use these cost estimates in deciding whether to vote for legislation or not. For example, Senator Joe Manchin has justified his opposition to an expanded child tax credit in part on the \$185 billion price tag the Congressional

305. See *supra* notes 288–291 and accompanying text.

306. See UTAH STATE TAX COMM'N, UTAH INDIVIDUAL INCOME TAX RETURN (2022), <https://tax.utah.gov/forms/current/tc-40.pdf> [<https://perma.cc/VPX3-AVJ6>] (listing federal adjustable taxable income on line 4).

307. South Carolina, for example, provides for specific exclusions to add back for purposes of calculating the amount of income subject to tax for a South Carolina taxpayer. See S.C. DEP'T OF REVENUE, SC1040 INSTRUCTIONS 2020 at 2 (2020), https://dor.sc.gov/forms-site/Forms/Sc1040Instr_2020.pdf [<https://perma.cc/S4G2-UWYM>] ("Additions to federal taxable income . . .").

308. Arizona, Connecticut, Idaho, Maine, Minnesota, Missouri, New Mexico, North Dakota, South Dakota, Vermont, Wisconsin, and Washington, D.C. have standard deductions, personal exemptions, or a combination of the two that are near the federal standard deduction in amount. Katherine Loughead, *State Individual Income Tax Rates and Brackets for 2021*, TAX FOUND. (Feb. 17, 2021), <https://taxfoundation.org/state-income-tax-rates-2021/> [<https://perma.cc/VR77-6C43>]. In the other states with income taxes, the upfront deductions are significantly lower than the federal standard deduction.

309. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1545 (2020).

Budget Office attached to the provision.³¹⁰ In many cases, if Congress wants to pass costly legislation (including legislation that excludes one type of income from taxation) it has to offset the revenue loss by raising revenue in other places.³¹¹

The IRS, by contrast, faces no such financial scrutiny in its discretionary choices. No Executive Branch analogue to the Congressional Budget Office creates estimates of the costs of its enforcement priorities. Where the IRS chooses not to enforce the tax law in a manner that benefits taxpayers, taxpayers who receive the benefit have no incentive to challenge the enforcement while the group of taxpayers that does not benefit is so diffuse that they also do not have incentive to challenge the non-enforcement.³¹² And even if taxpayers had incentive to challenge the IRS's general welfare exclusion, they would lack standing to challenge it.³¹³

It is possible that much of the income excluded from gross income would have been excluded from gross income regardless because of the historical use of personal exemptions and the standard deduction. After all, historically, the personal exemption has exempted from taxation a significant amount of gross income. Prior to 2018, each individual taxpayer (subject to phase-outs for higher income individuals) was entitled to a personal exemption of \$4,050.³¹⁴

The standard deduction similarly excludes gross income through the granting of an arbitrary amount of deduction. In 2021, the standard deduction for unmarried individuals was \$12,550 and for married couples filing a joint return it's \$25,100.³¹⁵ Prior to 2018, the standard deduction for unmarried individuals was \$6,350 and for married couples filing a joint return it was \$12,700.³¹⁶

Prior to 2018, a family of four would have had to have in excess of \$28,900 of taxable income before they would have been subject to income tax on any general welfare benefits.³¹⁷ In 2021, that same family would have had to have received income in an amount greater than \$25,100, even though the personal exemption was no longer available. It is important,

310. Tami Luhby, *Manchin Thinks the Child Tax Credit Is Too Generous—But Republicans Are Responsible for That*, CNN (Jan. 5, 2022, 12:05 PM) <https://www.cnn.com/2022/01/05/politics/manchin-child-tax-credit-income-limit/index.html> [<https://perma.cc/A7PS-ELY5>].

311. Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 509 (1998). While Congress is not legally bound to offset revenue loss, it has developed a strong norm in favor of doing so. *Id.*

312. Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, 227 (2013).

313. *Id.* at 244.

314. Rev. Proc. 2016-55, 2016-45 I.R.B. 707, 713.

315. Rev. Proc. 2020-45, 2020-46 I.R.B. 1016, 1022.

316. Rev. Proc. 2016-55, 2016-45 I.R.B. 707, 712.

317. $\$4,050 \times 4$ (family members) = \$16,200 (personal exemptions) + \$12,700 (standard deduction) = \$28,900.

however, to put those numbers in perspective with respect to actual benefits currently being paid by the federal and state governments.

Currently there are over eighty different federal welfare benefit programs offered by the United States.³¹⁸ These benefits include not only typical subsistence type of welfare benefits such as food assistance such as the Supplemental Nutrition Assistance Program (SNAP), but also a variety of general welfare program payments that would not traditionally be characterized in this way.³¹⁹ For example, a review of the IRS general welfare exclusion doctrine rulings discussed above shows application of the doctrine to a wide-variety of situations, including among others, programs for the blind, job-training, mortgage assistance payments, crime victim compensation, relocation payments, home rehabilitation, and winter energy consumption costs.

The number of individuals receiving need-based federal welfare benefits is a good proxy for the potential reach of the of the doctrine. But because the IRS does not have to account for the costs of its administratively created exclusions, it has no incentive to quantify the costs of the general welfare exclusion. Without quantifying those costs, it cannot weigh them against the benefits. This analysis would be useful since it provides a proxy for the number of individuals that are not only eligible for need-based federal welfare benefits, but may also be eligible for benefits under local or state need-based programs.

Though we do not have actual data on the amount of excluded general welfare benefits that would be taxed if not excluded, we can point to the scope of excludable benefits. The Congressional Research Service (CRS) has done extensive research on need-tested benefit programs. In a review of the “nine major need-tested programs in 2012,”³²⁰ the CRS estimated that up to 135 million persons were potentially eligible for benefits under these programs.³²¹ The CRS estimates that “106 million persons (1 in 3 persons in the population) actually received benefits from one of these programs in

318. *CRS Report: Welfare Spending the Largest Item in the Federal Budget*, S. COMM. ON THE BUDGET, 112TH CONG. (Oct. 18, 2012), <https://www.budget.senate.gov/newsroom/budget-background/crs-report-welfare-spending-the-largest-item-in-the-federal-budget> [<https://perma.cc/U9KY-6JJB>].

319. *Id.*

320. CONG. RSCH. SERV., R44327, NEED-TESTED BENEFITS: ESTIMATED ELIGIBILITY AND BENEFIT RECIPIENT BY FAMILIES AND INDIVIDUALS (2015), <https://crsreports.congress.gov/product/pdf/R/R44327> [<https://perma.cc/3HD4-LCH3>] [hereinafter CONG. RSCH. SERV., NEED-TESTED BENEFITS]. These programs include the following: Supplemental Nutrition Assistance Program (SNAP); the Earned Income Tax Credit (EITC); Supplemental Security Income (SSI); subsidized housing assistance; the Additional Child Tax Credit (ACTC); the special supplemental nutrition program for Women, Infants, and Children (WIC); Temporary Assistance for Needy Families (TANF) cash assistance; the Child Care and Development Fund (CCDF); and the Low-Income Home Energy Assistance Program (LIHEAP). *See id.*

321. *Id.*

2012.”³²² The CRS estimated that with respect to just these programs, “an estimated 25% of families that received benefits from one or more of the selected programs received a total of \$9,027 or more.”³²³

In 2013, the Cato Institute looked at the value of benefits a typical single parent with two children received in each state.³²⁴ While the amounts were stylized and varied by state, the authors estimated that, depending on the state, the benefits ranged from about \$17,000 to about \$49,000 in 2013 dollars.³²⁵ In all states, then, at least some beneficiaries of welfare benefits would receive more than the standard deduction amount and would, absent the general welfare exclusion, potentially owe taxes on a portion of those benefits.

If the benefits excluded under the general welfare exclusion were limited to subsistence benefits such as food, a large amount of the benefits excluded from gross income would probably not have been subject to tax because of the standard deduction and personal exemptions.³²⁶ Due to the lack of measurement, however, this assumption has never been tested. Many of the welfare benefits discussed above, however, focus on benefits other than subsistence payments.³²⁷ That seems to undercut the purported goal of the general welfare exclusion though, because it is an administrative creation, it lacks the type of legislative history that would clarify the doctrine’s goals.

Because of the nature of these and other welfare-type programs and their eligibility tests, many of the individuals or families eligible may not be characteristically “indigent” as normally understood, but still be receiving benefits on a need-based criteria. For example, “a substantial portion of families that received aid had pre-welfare incomes above the poverty line in 2012.”³²⁸

C. *The Circularity of Taxing General Welfare Benefits*

Without a clear elaboration of the IRS’s reasons for the general welfare exclusion, we can only attempt to reverse-engineer a justification. One

322. *Id.*

323. *Id.*

324. MICHAEL TANNER & CHARLES HUGHES, CATO INST., THE WORK VERSUS WELFARE TRADE-OFF: 2013: AN ANALYSIS OF THE TOTAL LEVEL OF WELFARE BENEFITS BY STATE 3 (2013), https://www.cato.org/sites/cato.org/files/pubs/pdf/the_work_versus_welfare_trade-off_2013_wp.pdf [<https://perma.cc/TNF6-AUN2>].

325. *Id.* at 4–5.

326. *See supra* note 293.

327. *See generally* I.R.S. Non Docketed Serv. Advice Rev. 8068, 1986 WL 766063 (June 16, 1986) (payments to restore facades); I.R.S. Priv. Ltr. Rul. 2006-25-006 (June 23, 2006) (payments to preserve neighborhoods); Rev. Rul. 74-74, 1974-1 C.B. 18 (crime victim compensation payments); I.R.S. Gen. Couns. Mem. 37,028 (Mar. 3, 1977) (witness protection payments).

328. CONG. RSCH. SERV., NEED-TESTED BENEFITS, *supra* note 320.

possible justification is the inefficiency of the government providing a welfare benefit to a low-income taxpayer only to then claw back part of the benefit through federal income taxes. For example, it makes little sense to require a taxpayer to pay taxes on welfare benefits that she is receiving because the taxpayer lacks the resources to pay for the benefits in the first place.

In spite of this, however, there is no legal or constitutional reason that the government could not collect taxes on payments for the general welfare. As the IRS notes in its rulings, gross income includes “all income from whatever source derived.”³²⁹ While that definition is circular—defining “gross income” as “income”—the Supreme Court has clarified that gross income is “accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”³³⁰ Payments for the general welfare meet that definition.³³¹

Still, there are compelling practical reasons for excluding these payments from gross income. Under the IRS’s general formulation of the general welfare exclusion, to qualify, a program must take potential recipients’ financial status into account.³³² Taxing these payments would reduce the value of general welfare payments. Rather than receiving and using a \$5,000 subsistence payment, for instance, a taxpayer in the lowest tax bracket would have to pay taxes of \$500 on the benefit and would only have \$4,500 after taxes to meet their needs.³³³

Congress could, of course, solve this problem by grossing up general welfare payments. Instead of targeting an amount to pay, it could determine the after-tax amount it wanted recipients to receive. For instance, if recipients are in the ten-percent tax bracket and Congress wants them to receive \$5,000 after taxes, it could make a general welfare payment

329. I.R.C. § 61(a).

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

331. There have been constitutional challenges to the federal government imposing taxes on payments it made. In the first three iterations of the modern income tax, Congress exempted from taxation the salaries of the sitting president and the compensation of federal judges currently in office. *Evans v. Gore*, 253 U.S. 245, 259 (1920), *overruled by* *United States v. Hatter*, 532 U.S. 557 (2001), *and* *O’Malley v. Woodrough*, 307 U.S. 277 (1939). When Congress changed its mind and attempted to tax federal judges on their salaries, the Supreme Court held that that constituted a diminution in their salary, which violated the Constitution. *Evans*, 253 U.S. at 264. For the next dozen years, Congress excluded federal judge salaries from taxation. In 1932, though, it required judges appointed after 1932 to include their judicial salaries in gross income. *O’Malley*, 307 U.S. at 282. The Supreme Court upheld this provision, partially reversing its decision in *Evans*. *Id.* at 282–83. In 2001, it finished overruling the *Evans* decision, holding that the Compensation Clause of the Constitution does not prevent Congress from applying a generally applicable tax to judicial salaries, whether the judge was appointed before or after the application of the tax. *Hatter*, 532 U.S. at 567.

332. See *supra* notes 126–36 and accompanying text.

333. In 2021, the lowest tax bracket imposes taxes at a rate of ten percent. That means that an unmarried individual pays taxes of ten percent on her first \$9,950 of taxable income. Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

of \$5,555.56.³³⁴ After paying taxes of about \$555, the recipient would have \$5,000 left.

But while, as a technical matter, a gross-up would work, it ignores the realities of taxpaying. Calculating and paying taxes imposes costs on taxpayers. If welfare benefits, for example, became taxable, it is possible that many taxpayers would only be filing a tax return because the welfare benefits would now be taxable. The IRS estimates that it costs nonbusiness taxpayers an average of \$140, and takes them eight hours, to file their tax return.³³⁵ The cost of filing a tax return does not redound to the benefit either of the taxpayer or the government.³³⁶ Grossing up the beneficiary of a payment for the public welfare does not, then, fully make the recipient or the government whole. Because excluding general welfare payments from income eliminates this economic waste, it makes sense for the government to exclude it.

A related justification for the exclusion of payments for the general welfare applies specifically to in-kind benefits provided by the government. Where the government makes an in-kind general welfare payment to an individual, that individual may not have the liquid assets to pay taxes on the benefit. The liquidity issue applies to any in-kind payment such as food or rental vouchers,³³⁷ but it is especially important in the case of an individual receiving means-tested welfare benefits who is less likely to have liquid assets they could use to pay the tax.

The circularity rationale cannot on its own justify the non-taxation of government-provided welfare benefits, though. The government routinely makes payments to individuals upon which it collects taxes without worrying about circularity. For example, the federal government employees approximately 2 million individuals, excluding an additional 600,000 U.S. Postal Service employees and more than 1 million individuals on active duty in the military, all of whom are taxpayers subject to federal income tax.³³⁸ Because the federal government imposes taxes on a federal employee's federal salary, the circularity issue is not unique to the welfare benefits

334. To calculate the amount of the gross-up, divide the after-tax amount by (1 - tax rate). Here, that would be $5,000/(1 - 0.1) = 5,555.56$.

335. See INTERNAL REVENUE SERV., 1040 (AND 1040-SR) INSTRUCTIONS 108-09 (2021), <https://www.irs.gov/pub/irs-prior/i1040gi--2021.pdf> [<https://perma.cc/4CNH-897D>].

336. See, e.g., Edward H. Warren, *Taxability of Stock Dividends as Income*, 33 HARV. L. REV. 885, 899 (1920) ("Tax returns are already highly complex; a great amount of time has to be spent to make accurate returns, and the time so spent is sheer economic waste.")

337. See, e.g., Jay A. Soled, *Surrogate Taxation and the Second-Best Answer to the In-Kind Benefit Valuation Riddle*, 2012 BYU L. REV. 153, 176 n.78.

338. Mike Maciag, *Federal Employees by State*, GOVERNING (Oct. 3, 2013), <https://www.governing.com/archive/federal-employees-workforce-numbers-by-state.html> [<https://perma.cc/B2AT-J5A6>].

exclusion discussion. The argument shouldn't justify the IRS's reliance on it as policy rationale for the exclusion.

Moreover, from a horizontal equity perspective, it is difficult to articulate a justification for taxing private sector employees but not public sector employees.³³⁹ The Supreme Court explained that by taxing federal judges, Congress recognized that, notwithstanding the constitutional protections of their salaries, federal judges (and, by extension, other federal employees' without the same constitutionally-protected salary levels) "are also citizens" who must "shar[e] with their fellow citizens the material burden of the government"³⁴⁰ Congress, the Court went on, was committed to "a non-discriminatory tax laid generally on net income"³⁴¹

All of this suggests that federal employees are not an apt comparison for welfare recipients. When the government pays its employees, it is acting in its capacity as an employer. Like other employers, it pays market-rate compensation, and, like other employees, federal employees pay taxes on their compensation.³⁴²

By contrast, to the extent there is a private sector analogue to the recipients of state welfare benefits, that analogue would be the recipients of private charitable aid. The tax law excludes gifts from a recipient's gross income.³⁴³ And the Supreme Court has defined these excluded gifts as payments made, not in exchange for services, "but out of affection, respect, admiration, charity or like impulses."³⁴⁴ So while the circularity problem does not fully justify the IRS's general welfare exclusion policy, neither does the fact that federal employees pay taxes on their incomes fully undermine it.

D. Political Winds and the Perceived "Wrongness" in Taxing the Poor

While the general welfare exclusion developed over time and in response to myriad questions and circumstance, a general thread of alleviating poverty seems to run through most of its applications.³⁴⁵ The general

339. For a discussion of horizontal equity in taxation, see *Policy Basics: Tax Equity*, COMMONWEALTH INST. (July 2018), <https://thecommonwealthinstitute.org/research/policy-basics-tax-equity/> [https://perma.cc/CD9B-U8GH] ("Horizontal equity—sometimes called 'equal justice'—is concerned with equal treatment for those taxpayers in similar situations and with roughly equal ability to pay.").

340. *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939).

341. *Id.*

342. *Federal Employee Compensation Package*, U.S. OFF. PERS. MGNT. <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/federal-employee-compensation-package/> [https://perma.cc/3SAF-DGCF] (last visited Apr. 20, 2023) ("The Federal Government offers competitive base pay").

343. See I.R.C. § 102(a).

344. *Robertson v. United States*, 343 U.S. 711, 714 (1952).

345. See *supra* Part II.

welfare exclusion may be grounded in an effort to further society's interest and policies in alleviating poverty.³⁴⁶ Policymakers over the past century emphasize continually the need to confront the economic difficulties faced by the indigent.³⁴⁷ Taxing these benefits arguably conflicts with society's interest in protecting those in need, subjecting the IRS to criticism of indifference and heartless efforts to collect taxes from those least able to pay.

The need to alleviate poverty permeates general public statements pronounced by government leaders. It is important to place the initial IRS office decision in 1938 in the context of the birth of those statutory benefits as part of Franklin Delano Roosevelt's New Deal.³⁴⁸ In a campaign address, President Roosevelt asserted that the government had a "continuous responsibility for human welfare, especially for the protection of children.' That duty and responsibility the federal government should carry out promptly, fearlessly, and generously."³⁴⁹ Politicians continue to echo Roosevelt's challenge in words, if not in deeds, providing additional support for the IRS's benevolence.³⁵⁰

As a practical matter, it is doubtful that anyone even today would praise the IRS for aggressively taxing the welfare recipients on the benefits they receive. If anything, reversing a policy to tax these benefits today would probably generate additional antagonism toward the IRS.³⁵¹ It has recently

346. See *supra* Section I.C.6.

347. See *supra* Part II.

348. In his presidential nomination address in 1932, he mourned that "Washington has alternated between putting its head in the sand and saying there is no large number of destitute people in our midst who need food and clothing, and then saying the states should take care of them, if there are." Franklin D. Roosevelt, Presidential Nominee, Democratic National Convention, Presidential Nomination Address (July 2, 1932).

349. *Franklin D. Roosevelt: Call for Federal Responsibility*, COLUM. UNIV., <http://www.columbia.edu/~gfw10/fdr.newdeal.html> [https://perma.cc/HWK4-77DY] (citing THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1938–1950 (Samuel I. Rosenman ed. 1941) (last visited Feb. 7, 2022)). Roosevelt noted that "[t]he first obligation of government is the protection of the welfare and well-being, indeed the very existence, of its citizens." *Id.*

350. Similar to the New Deal, President Lyndon B. Johnson focused on promoting his "Great Society" to help end poverty. See Sidney M. Milkis, *Lyndon Johnson, the Great Society, and the "Twilight" of the Modern Presidency*, in THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM 1, 2–3 (Sidney M. Milkis & Jerome M. Mileur eds., 2005). Johnson saw the Great Society as a program that would "show the way to new opportunities for millions of our fellow citizens. It will provide a lever with which we can begin to open the door to our prosperity for those who have been kept outside." President Lyndon B. Johnson, Special Message to Congress Proposing a Nationwide War on the Sources of Poverty (Mar. 16, 1964). Other recent U.S. Presidents have all advocated caring for the poor. In their inaugural addresses, Joseph R. Biden advocated fighting "[d]isease, joblessness, hopelessness," President Joseph R. Biden, Jr., Inaugural Address (Jan. 20, 2021); Donald J. Trump discussed "[m]others and children trapped in poverty," President Donald J. Trump, Inaugural Address (Jan. 20, 2017); Barack Obama remembered "the lessons of our past, when twilight years were spent in poverty." President Barack Obama, Second Inaugural Address (Jan. 21, 2013).

351. Cf. Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition*, 8 PITT. TAX REV. 125, 153 (2011) (explaining that due to unpopular enforcement, the IRS faces public outcry with limited benefit).

faced significant outcry, for example, at revelations that it audits beneficiaries of the earned income tax credit at rates similar to the highest-income taxpayers and disproportionately targets lower-income communities for audits.³⁵² Such a change would probably require something similar to the congressional piecemeal action, as explained below, with respect to the taxation of social security benefits and unemployment compensation.³⁵³

E. Rationales that Reject the General Welfare Exclusion Doctrine

It is difficult to argue that the IRS has come to the wrong conclusion in creating the general welfare exclusion. From both an equitable and a practical perspective, it makes sense to exclude government social safety net payments from gross income. To the extent that the government uses those payments to provide an economic floor for citizens, taxing those payments would cost both the government and recipients of social safety net payments with the benefits largely flowing to third parties.

In spite of our belief that the idea underlying the general welfare exclusion is correct, though, we believe that it should not continue in its current iteration. And we believe this for several largely connected reasons.

First, the general welfare exclusion violates the central tenets of income tax policy. As the IRS acknowledges, by default, general welfare payments are the type of receipts that qualify as gross income.³⁵⁴ The Supreme Court has recognized that the “definition of gross income under the Internal Revenue Code sweeps broadly.”³⁵⁵ Exclusions from this broad sweep of

352. See Paul Kiel, *It's Getting Worse: The IRS Now Audits Poor Americans at About the Same Rate as the Top 1%*, PROPUBLICA, (May 30, 2019, 10:16 AM) <https://www.propublica.org/article/irs-now-audits-poor-americans-at-about-the-same-rate-as-the-top-1-percent> [https://perma.cc/765P-PU3L]; Paul Kiel, *IRS: Sorry, but It's Just Easier and Cheaper to Audit the Poor*, PROPUBLICA (Oct. 2, 2019, 2:47 PM), <https://www.propublica.org/article/irs-sorry-but-its-just-easier-and-cheaper-to-audit-the-poor> [https://perma.cc/V2PE-FCZY].

353. See *infra* notes 405–13 and accompanying text. General welfare benefits for the indigent may also violate traditional religious charitable norms as well, potentially prompting the IRS to create an exclusion. The responsibility to the indigent is an integral part of a variety of different religions and/or philosophies and would also serve potentially as a societal rationale or norm for the general welfare exclusion. These sentiments can be seen clearly in the Jewish, Christian, Islamic, and Hindu traditions, among others. See, e.g., *Deuteronomy* 15:11 (“Thou shalt open thine hand wide unto . . . thy poor, and to thy needy”); *Luke* 3:11 (“He that hath two coats, let him impart to him that hath none; and he that hath meat, let him do likewise.”); *Quran* 2:14, 9:71 (“[P]ractice regular charity”); Jayaram V, *The Ten Main Duties (Dharmas) in Hinduism*, HINDUWEBSITE <https://www.hinduwebsite.com/buzz/the-ten-main-duties-in-hinduism.asp> [https://perma.cc/8GEK-N55U] (last viewed Apr. 20, 2023) (“[C]harity (dana) is one of the highest virtues.”).

354. See I.R.C. § 61(a) (“[G]ross income means all income from whatever source derived . . .”).

355. *United States v. Burke*, 504 U.S. 229, 233 (1992).

gross income are matters of legislative grace, dependent on congressional decision-making.³⁵⁶

Or at least exclusions other than the general welfare exclusion are matters of legislative grace. The development of the general welfare exclusion over the last ninety years by the IRS makes it an outlier not just to the breadth of the definition of gross income but also to the method by which income falls within an exception to that breadth. Rather than Congress determining that taxpayers should be allowed to exclude certain general welfare payments from their gross income, the IRS has unilaterally made that decision.

The idea that the IRS must create this exclusion because Congress is for some reason unable to do it is belied by the fact that Congress has codified portions of the general welfare exclusion.³⁵⁷ Its legislative exclusion of “Indian general welfare benefit[s]”³⁵⁸ and “qualified disaster relief payment[s]”³⁵⁹ demonstrate that Congress is capable of excluding payments made for the general welfare when it chooses to do so. As a result, there is no need for the IRS to circumvent the otherwise-absolute rule that Congress excludes items from gross income as a matter of legislative grace in the single circumstance of payments for the general welfare.

Second, the haphazard and ad hoc method through which the general welfare exclusion has emerged has led to a doctrine that is ambiguous and self-contradictory. We know that the general welfare exclusion means that cash aid payments based on need are excluded from the recipient’s gross income (though it is unclear *why* they are excluded given the lack of any statutory basis). But we also know that there are enormous inconsistencies when it comes to job training.³⁶⁰ Again, with no statutory hook, the development of the general welfare exclusion announces that payments for job training are excludable from gross income, unless the payments are for work the trainee performs.³⁶¹ The IRS is inconsistent in answering whether a job trainee who is required to work as part of the job training nonetheless can exclude amounts they receive from their gross income.³⁶²

Similarly, payments to rehabilitate housing developed originally from grants to low-income individuals to improve the housing they owned. But that exclusion expanded to include almost any rehabilitation grant,

356. See *Vazquez v. Comm’r*, 73 T.C.M. (CCH) 2016 (1997).

357. Courts and commentators have long debated whether the failure of Congress to act is an indication of acquiescence to the status quo. For a discussion of the failure of Congress to act and the Doctrine of Acquiescence, see generally Garry G. Fujita, *Should the Doctrine of Acquiescence Compel the Supreme Court to Uphold Quill?*, 82 STATE TAX NOTES 831 (2016).

358. I.R.C. § 139E(a).

359. *Id.* § 139(a).

360. See text accompanying *supra* notes 45–69.

361. *Id.*

362. See *supra* notes 92–97 and accompanying text.

irrespective of the homeowner's financial wherewithal.³⁶³ In the last five years, the IRS has taken contradictory stances over whether non-means-tested programs that help homeowners repair their homes qualify for the general welfare exclusion.³⁶⁴ And it has not explained its reasoning in any case. Without a statutory basis or any type of explanation, homeowners who benefit from these programs cannot know whether to include the aid they receive in their gross income.

Even Congress recognizes that ambiguity in the tax law is a problem.³⁶⁵ Among other things, ambiguity increases taxpayers' burden in complying with the law, may discourage voluntary compliance, and even increases the burden on the IRS to administer the law.³⁶⁶ Wealthy taxpayers can navigate this complexity by hiring tax attorneys and accountants to help them comply with even the most ambiguous parts of the law.³⁶⁷ While it may be costly, wealthy taxpayers are likely to hire tax advisors anyway and, in any event, can afford the cost.³⁶⁸

Taxpayers who receive means-tested benefits, by contrast, are often not in the financial position to hire tax advisors. They are forced, then, to navigate the complexity of the IRS-created general welfare exclusion on their own. They face the full brunt of the costs of tax-related ambiguity.

III. CREATING LEGAL CERTAINTY AND CONSISTENCY

The fact that since the 1930s, the IRS has continuously provided that taxpayers can exclude payments made for the general welfare from their gross income suggests that this exclusion has the blessing of Congress. After all, Congress should be aware of this policy and has amended the federal income tax countless times without countering the IRS's general welfare exclusion. The Supreme Court has held that where the IRS has a long-standing position and "Congress has made no change in it though the Code has been re-enacted" on multiple occasions, its silence "bespeaks congressional approval."³⁶⁹

Of course, the fact that Congress has not disapproved of the general welfare exclusion is not, by itself, evidence that Congress approves or that the IRS is correct in its interpretation. While the Supreme Court recognizes the age and consistency of agency interpretation and the silence of Congress

363. For a discussion of housing rehabilitation grants, see *supra* Section I.C.5.

364. See *supra* Section I.C.5.

365. See Sarah B. Lawsky, *Formalizing the Code*, 70 TAX L. REV. 377, 381 (2017).

366. See *id.*

367. See Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 351, 380 (2005).

368. See *id.*

369. *Corn Prods. Refin. Co. v. Comm'r*, 350 U.S. 46, 53 (1955).

in the face of the interpretation as evidence of congressional approval, “neither antiquity nor contemporaneity with the statute is a condition of validity.”³⁷⁰ And the general welfare exclusion may suffer under this analysis precisely because it does not represent the IRS’s statutory interpretation; rather, it represents the IRS’s enforcement priorities.

Moreover, because there is no statutory hook, the general welfare exclusion does not provide taxpayers with any certainty. Certainty with respect to the application of tax rules is important to taxpayers.³⁷¹ Without an explicit provision in the Code stating that gross income does not include payments made for the general welfare, the IRS could change its mind at any point and start requiring recipients of these payments to include the payments in their gross income and pay taxes on them. And upon becoming taxable income, the general welfare payments (reduced by taxes paid) would provide less benefit to recipients who rely on those benefits to provide for their and their families’ needs. It is critical then that Congress provide a consistent and principled approach to the issues and concerns that have arisen with respect to the general welfare exclusion doctrine and provide legislative guidance and direction. In the absence of such guidance, Treasury must consider promulgating regulations under its authority that will fill out and solidify the reach and limitations of the doctrine. At worst, the IRS should consider promulgating appropriate notices and direction with respect to application of the general welfare exclusion doctrine.

A. The General Welfare Exclusion and the Force of Law

The IRS’s development of the general welfare exclusion consistently points out that the doctrine contravenes the general rule of the Code. Courts have interpreted Section 61’s inclusion of “all income from whatever source derived”³⁷² to broadly encompass virtually every taxpayer receipt of value. Exclusions must “fall within an explicit exclusion to § 61, [or] they are included in a taxpayer’s gross income.”³⁷³ By contrast to this general rule, the IRS has developed the general welfare exclusion over the last ninety years or so. And the development has occurred, not through formal

370. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996).

371. See ASS’N OF INT’L CERTIFIED PRO. ACCTS., TAX POLICY CONCEPT STATEMENT 1: GUIDING PRINCIPLES OF GOOD TAX POLICY: A FRAMEWORK FOR EVALUATING TAX PROPOSALS 3, <https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf> [<https://perma.cc/9C8F-A5LU>] (last visited Apr. 20, 2023) (“Certainty – The tax rules should clearly specify how the amount of payment is determined, when payment of the tax should occur, and how payment is made.”).

372. I.R.C. § 61(a).

373. *Am. Fam. Mut. Ins. Co. v. United States*, 815 F. Supp. 1206, 1209 (W.D. Wis. 1992) (citing *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955)).

regulatory channels, but through revenue rulings and other less formal guidance.³⁷⁴

Even if this creation of an administrative exception to inclusion of gross income was unambiguous and were applied consistently—which it is not—its development and promotion through informal regulation presents a problem. The place of revenue rulings in the regulatory pantheon of the IRS has shifted dramatically over time. In 1965, the Supreme Court announced that revenue rulings lacked the force of law because “The Commissioner’s rulings have only such force as Congress chooses to give them” and Congress had declined to grant them the force of law.³⁷⁵

In the intervening years, however, revenue rulings have shifted “squarely into the force of law gray zone with respect to both Administrative Procedure Act (APA) procedural requirements and *Chevron* eligibility.”³⁷⁶ *Chevron* provides a two-step inquiry to determine whether courts will respect an agency’s regulatory pronouncements as legally binding.³⁷⁷ Where the agency pronouncement meets the requirements of *Chevron*, courts are deferential to its determinations and treat the agency’s regulation as legally binding.³⁷⁸ If it does not qualify for *Chevron* deference, courts apply a less-deferential review.³⁷⁹

A number of courts have, over the last decade or so, declined to grant *Chevron* deference to revenue rulings.³⁸⁰ In doing so, they have cited both the IRS’s recent assertions that revenue rulings do not have the same effect as Treasury regulations and the fact that these regulatory documents do not go through notice and comment procedures.³⁸¹ Moreover, several Supreme Court Justices have recently questioned whether *Chevron* should be good law, even as applied to Treasury regulations.³⁸² The future of judicial deference to administrative rulings is currently in flux,³⁸³ which puts the viability of the IRS’s administratively created general welfare exclusion in doubt.

Moreover, irrespective of whether revenue rulings generally qualify for *Chevron* deference (assuming *Chevron* continues to be good law), the rulings that have developed the general welfare exclusion almost certainly do not. To invoke such deference in the first place, the Supreme Court told

374. See *supra* Part II.

375. *Dixon v. United States*, 381 U.S. 68, 73 (1965).

376. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 504 (2013).

377. See *id.* at 484.

378. See *id.*

379. See *id.* at 484–85.

380. See *id.* at 507.

381. See *id.* at 507–08.

382. See Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L. REV. 565, 566–67 (2021).

383. See *generally id.*

courts to first look at whether Congress itself spoke to the issue legislatively.³⁸⁴ If it did not, or if its legislation was ambiguous, then courts look at whether the agency's gap-filling "is based on a permissible construction of the statute."³⁸⁵

The general welfare exclusion, however, does not represent an interpretation of an ambiguous section of the Code *or* a permissible construction of the Code. Rather, it is a rule created by the IRS out of whole cloth, one which, in fact, runs counter to the Code's broad definition of "income." With no statutory hook, its contours are subject to the whims and preferences of the IRS. While taxpayers can look to the history, development, and current practices of the IRS, they cannot anticipate how the IRS will respond to novel circumstances or even, going forward, to circumstances it has ruled on in the past. Even in circumstances that were relatively well-developed, the IRS has changed its mind about the application of the general welfare exclusion.³⁸⁶

But even more critically, it subverts the design of our tax system. Congress did not leave a gap for the IRS to fill through legislative delegation.³⁸⁷ And the U.S. Treasury has not issued regulations pursuant to the Administrative Procedure Act³⁸⁸ to give the IRS discretion to create the general welfare exclusion. To create a lasting, predictable exclusion, then, requires congressional action, perhaps with assistance from the Treasury Department to fill in gaps.

B. Congressional Direction

The IRS's own general welfare rulings underscore the lack of congressional participation in the creation and development of the rule. As the IRS acknowledges consistently in its rulings on the general welfare exclusion doctrine, "Section 61(a) of the Internal Revenue Code and the Income Tax Regulations thereunder provide that, except as otherwise provided by law, gross income means all income from whatever source derived."³⁸⁹ In spite of that bold and declaratory statement, these rulings

384. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

385. *Id.* at 843.

386. See *supra* notes 287–291 and accompanying text.

387. There are no examples where Congress has delegated power to the IRS to exclude general welfare benefits at its own discretion.

388. Administrative Procedure Act, Pub. L. 79–404, 60 Stat. 237, as amended (1946).

389. I.R.S. Tech. Advice Memo. 2000-22-050 (Jun. 2, 2000); see also Ingram Testimony, *supra* note 69 ("Section 61 of the Internal Revenue Code (Code) provides that gross income includes all income, from whatever source derived, unless a specific exception in the Code applies. This provision establishes the general rule that income will be taxed unless it is expressly excluded from taxation.").

always follow with a “however” that contradicts and contravenes this axiom with respect to general welfare benefits.³⁹⁰

The general welfare exclusion has developed in an ad hoc fashion as the IRS has decided to confront the question of whether such payments constitute gross income. From questions about the taxation of social security benefits,³⁹¹ the questions have randomly turned to a wide variety of areas such as payments made to benefit individuals in programs for the blind,³⁹² to benefits paid in conjunction with job training,³⁹³ and to payments made to rehabilitate housing.³⁹⁴

Given that the general welfare exclusion has existed in one form or another since 1938, Congress should be aware of its existence. Arguably it has acquiesced already in the area,³⁹⁵ tacitly approving the IRS’s treatment of payments under the general welfare exclusion.³⁹⁶ Courts also often give deference to longstanding administrative doctrines that lay undisturbed by Congress.³⁹⁷

There are several problems, however, with relying upon congressional silence in this arena. First, Congress has moved forward and by statute has excluded from gross income several specific general welfare benefits, albeit decades after the initial issuance of IRS rulings. Second, Congress has reversed the IRS rulings in several circumstances, passing statutes that subject such items to taxation. Third, even if Congress has acquiesced to some or all, that doesn’t provide any guidance as to the scope of the exclusion.

Payments made for disaster relief and mitigation provide a prime example of Congress asserting its authority in the area, despite decades of

390. See Ingram Testimony, *supra* note 69 (“[T]he IRS has consistently concluded that payments made to individuals by governmental units, under legislatively provided social benefit programs, for the promotion of the general welfare, are not includible in a recipient’s gross income.”).

391. See I.T. 3194, 1938-1 C.B. 114.

392. See Rev. Rul. 57-102, 1957-1 C.B. 26.

393. See Rev. Rul. 63-136, 1963-2 C.B. 19.

394. I.R.S. Non Docketed Serv. Advice Rev. 8068, 1986 WL 766063 (June 16, 1986) (payments to restore facades); I.R.S. Priv. Ltr. Rul. 2006-25-006 (June 23, 2006) (payments to preserve neighborhoods).

395. For a discussion of congressional acquiescence, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); Matthew Baker, *The Sound of Congressional Silence: Judicial Distortion of the Legislative-Executive Balance of Power*, 2009 BYU L. REV. 225.

396. In spite of the lack of congressional intent, the IRS has asserted that the GWE doctrine “has been developed in official IRS guidance and recognized by the courts and Congress over a fifty-five year period.” See Ingram Testimony, *supra* note 69, at 2. Ingram makes the argument despite what appears to be only one case discussing the doctrine and no examples of congressional acknowledgement. In a similar vein, the IRS has also asserted with respect to the earlier social security rulings that it believed that Congress “intended that such benefits be not subject to tax.” Rev. Rul. 57-1, 1957-1 C.B. 15, 16.

397. See Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1825–26 (2015).

silence. The IRS issued numerous administrative rulings between 1975 and 2005 regarding the exclusion from gross income for disaster related payments. In 2002, Congress stepped in with definitive statutory language with respect to government payments made to victims of disasters.³⁹⁸

Congress provided a comprehensive exclusion for gross income for disaster relief and mitigation payments, specifically excluding a “qualified disaster relief payment,”³⁹⁹ a “qualified disaster mitigation payment,”⁴⁰⁰ or certain amounts received as payment under the Air Transportation Safety and Stabilization Act.⁴⁰¹ Although Congress added much clarity and certainty to the area, it also left certain amounts of ambiguity. In addition to the explicit types of income excluded by the Code, the law also excludes amounts paid by governmental bodies “in order to promote the general welfare” in connection with a qualified disaster.⁴⁰² Since passage of Section 139, the Treasury Department has not yet issued any treasury regulations interpreting Section 139. In addition, the IRS has not issued any additional administrative guidance with respect to the issue as well.

In a similar vein, the IRS issued numerous administrative rulings beginning in 1959 evaluating whether various tribal welfare benefits were gross income. In spite of this administrative activity, however, even the IRS acknowledged that “[t]ribes have expressed their concern to [the IRS] that the IRS has not consistently applied the general welfare exclusion.”⁴⁰³ To rectify this uncertainty, Congress again codified a portion of the general welfare exclusion with the passage of the Tribal General Welfare Exclusion

398. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (codified as amended in scattered sections of the I.R.C.).

399. I.R.C. 139(b). The definition of a qualified disaster relief payment is comprehensive:

(b) Qualified disaster relief payment defined. For purposes of this section, the term “qualified disaster relief payment” means any amount paid to or for the benefit of an individual—

(1) to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster,

(2) to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster,

(3) by a person engaged in the furnishing or sale of transportation as a common carrier by reason of the death or personal physical injuries incurred as a result of a qualified disaster, or

(4) if such amount is paid by a Federal, State, or local government, or agency or instrumentality thereof, in connection with a qualified disaster in order to promote the general welfare,

but only to the extent any expense compensated by such payment is not otherwise compensated for by insurance or otherwise.

Id.

400. I.R.C. § 139(g).

401. I.R.C. § 139(f).

402. I.R.C. § 139(b)(4).

403. See Ingram Testimony, *supra* note 69, at 4.

Act of 2014.⁴⁰⁴ Since passage of the Act, the IRS has not issued any additional rulings with respect to tribal general welfare benefits.

Congress provided a comprehensive exclusion from gross income for a “qualified Indian health care benefit.”⁴⁰⁵ In addition it created a statutory exclusion from gross income for “Indian general welfare benefits.”⁴⁰⁶ In defining this benefit, however, the statute provides that the benefit be for the “promotion of general welfare,”⁴⁰⁷ without providing any statutory guidance for what constitutes the general welfare. Because the Treasury Department again has not yet issued any regulations interpreting these sections, presumably the IRS will look to its own administrative rulings in determining when a payment is for the promotion of general welfare.⁴⁰⁸

There are several other examples of Congress acting on a piecemeal basis with respect to similar issues, although there appears to be no legislative history explaining its motivation.⁴⁰⁹ Their intent, however, appears self-evident given the specificity of their actions and language. For example, in 2007, Congress provided in I.R.C. Section 139B (benefits provided to volunteer firefighters and emergency medical responders) that “gross income shall not include . . . any qualified payment.” made to volunteer firefighters and emergency medical responders⁴¹⁰ The IRS had previously held that “such payments constituted compensation for services performed.”⁴¹¹ In 2015, Congress provided in I.R.C. Section 139F that gross income does not include “[c]ertain amounts received by wrongfully incarcerated individuals.”⁴¹² Similarly, this provision provided legal certainty given that there was ambiguity prior to passage of Section 139F as to whether such amounts were excludible from gross income.⁴¹³

Adding to the complexity of determining how to decide whether payments fit within the contours of the general welfare exclusion, at times Congress exempts federal payments from gross income outside of the four

404. Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883 (codified at I.R.C. § 139E).

405. I.R.C. § 139D(b).

406. I.R.C. § 139E.

407. I.R.C. § 139E(b)(2)(B).

408. For an example of such administrative rule, see I.R.S. Notice 2012-75, 2012-51 I.R.B. 715.

409. In reviewing the legislative history for these statutory examples, the authors have been unable to identify any express explanation or motivations for their passage.

410. I.R.C. § 139B.

411. *President Signs P. L. 110-245, the “Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008”*, SOC. SEC. LEG. BULL. (June 20, 2008), https://www.ssa.gov/legislation/legis_bulletin_061708.html [<https://perma.cc/AZ49-LMAL>].

412. I.R.C. § 139F.

413. See, e.g., *Stadnyk v. Comm’r, T.C.M. (CCH) 2008-289 (2008)*, *aff’d* 367 F. App’x 586 (6th Cir. 2010). *But see* I.R.S. Chief Couns. Advisory 201045023, 2010 WL 4535729 (Nov. 12, 2010) (finding payments to wrongfully incarcerated individuals excludible if for physical injury or physical sickness). See also Robert W. Wood, *Dollars and Sense: How a Recent Federal Law Makes Wrongful Conviction Compensation Tax-Free*, TEX. BAR J., July 2017, AT 432.

corners of the Internal Revenue Code. For example, the Domestic Volunteer Services Act of 1973 provides that payments under the Act will not be subject to tax.⁴¹⁴ Similarly, the National Historic Preservation Act provides that grants under the Act are not taxable income.⁴¹⁵ These examples undercut the justification for administrative action as Congress has demonstrated numerous times that it is willing to exclude certain otherwise-taxable benefits from gross income, whether within or without the Internal Revenue Code.

While Congress can create legislative exceptions to the broad reach of gross income, it can also cabin what it views as administrative overreach. For example, Congress took the opposite view of the IRS with respect to the exclusion of social security benefits.⁴¹⁶ As previously explained, the birth of the general welfare exclusion took place as the IRS decided on whether or not to exclude social security benefits from gross income.⁴¹⁷ While the IRS originally decided these payments did not belong in gross income, in 1983 Congress clarified that social security benefits would be at least partially taxable.⁴¹⁸

Ironically, the IRS's original rationale for not taxing social security benefits appears to have had nothing to do with the promotion of general welfare in spite of later relying on this authority as the foundation for its welfare benefit exclusion. Instead, the IRS appears to have characterized the benefits "as 'gratuities,' and since gifts or gratuities were not generally taxable, Social Security benefits were not taxable."⁴¹⁹ Although the IRS appears to have clung initially to that interpretation, the Social Security Administration itself believed that "most people would hold the view that the tax contributions created an 'earned right' to subsequent benefits."⁴²⁰

414. Domestic Volunteer Services Act of 1973, Pub. L. No. 93-113, 87 Stat. 394, 413.

415. 54 U.S.C. § 302901(b).

416. For a general discussion of the taxation of social security benefits, see PAUL S. DAVIES, CONG. RSCH. SERV., RL32552, SOCIAL SECURITY: TAXATION OF BENEFITS (2020). See also Martha A. McSteen, *Planning for the Taxation of Social Security Benefits*, 63 TAXES 3 (1985).

417. See *supra* notes 15–21 and accompanying text.

418. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65. A "social security benefit" is defined to include a "monthly benefit under title II of the Social Security Act . . ." I.R.C. § 86(d)(1).

419. Larry DeWitt, *Research Note #12: Taxation of Social Security Benefits*, SOC. SEC. ADMIN., (Feb. 2001), www.ssa.gov/history/taxationofbenefits.html [<https://perma.cc/5BGC-M9ZK>].

It is likely that Treasury took this view owing to the structure of the 1935 Act in which the taxing provisions and the benefit provisions were in separate Titles of the law. Because of this structure, one could argue that the taxes were just a form of revenue-raising, unrelated to the benefits. The benefits themselves could then be seen as a "gratuity" that the federal government paid to certain classes of citizens.

Id.

420. *Id.* In spite of this view by the public, "the Treasury Department ruled that there was no such necessary connection and hence that Social Security benefits were not taxable." *Id.*

The legislative history and background behind the decision of Congress to tax social security benefits also appears to have had little, if anything, to do with the payments being made under a social benefit program for the promotion of general welfare.⁴²¹ Instead, one motivation appears to be that Congress was striving to place the taxation of social security benefits on equal footing with private pensions⁴²² and to generate additional revenues to maintain the solvency of the program. The legislative history appears to challenge the entire conceptual basis behind the IRS formulation of the general welfare exclusion doctrine.⁴²³

The taxation of unemployment benefits is another important example where the IRS proved to be much more generous than Congress intended. Although the IRS ruled on several occasions that unemployment compensation benefits are not taxable under the general welfare exclusion,⁴²⁴ Congress reversed the IRS's general welfare exclusion policy and subjected unemployment compensation to taxation in 1979.⁴²⁵

The legislative history on the decision to tax unemployment compensation benefits appears to have been primarily motivated by a need to raise revenue.⁴²⁶ A lesser motivation appears to have been a concern to eliminate the possibility that “the proportion of wages replaced by [unemployment compensation] benefits on an after-tax basis was large enough to erode a claimant’s work incentive.”⁴²⁷

However, under the American Rescue Plan of 2021, Congress temporarily partially reversed itself by providing that up to \$10,200 of unemployment compensation can be excluded from a taxpayer’s gross income subject to certain adjusted gross income thresholds.⁴²⁸ The Treasury Department noted waiving federal income taxes on unemployment compensation “will provide tax relief for Americans who lost their jobs and utilized unemployment benefits last year—allowing millions of workers to

421. Even the Social Security Administration’s Agency History struggles with why the benefits were excluded by the IRS from gross income, noting that the benefits appear to have received “special treatment . . . since most private pensions are partly taxable.” *Id.*

422. *Id.*; see also *Reports of the 1979 Advisory Council on Social Security*, SOC. SEC. BULL., Feb. 1980, at 3 (1980); *Appendix C of the 1983 Greenspan Commission on Social Security Reform*, SOC. SEC. ADMIN., www.ssa.gov/history/reports/gspan5.html [<https://perma.cc/T2GS-BF6Q>] (last visited Apr. 20, 2023).

423. There appears to be no legislative history that Congress has ever considered the general welfare exclusion to be a rationale for not taxing social security benefits.

424. See *supra* notes 22–24 and accompanying text.

425. I.R.C. § 85.

426. JULIE M. WHITTAKER, CONG. RSCH. SERV., RS21356, TAXATION OF UNEMPLOYMENT BENEFITS 4 (2015).

427. *Id.*

428. *IRS Will Recalculate Taxes on 2020 Unemployment Benefits and Start Issuing Refunds in May*, IRS (Apr. 8 2021), <https://www.irs.gov/newsroom/irs-will-recalculate-taxes-on-2020-unemployment-benefits-and-start-issuing-refunds-in-may> [<https://perma.cc/FAN3-Z2PJ>].

focus their benefits on covering essentials during the COVID-19 pandemic.”⁴²⁹

As this somewhat checkered history of Congress dealing with different sorts of general welfare benefits illustrates, it is critical that Congress provide statutory direction. Congress has already provided a possible statutory template based upon the language found in the Code sections dealing with exempting disaster benefits and tribal benefits from gross income. Congress should consider passing a statute that would provide a statutory framework with respect to the taxation of general welfare benefits in similar fashion. Without providing such direction, Congress risks the IRS creating exclusions in an ambiguous, arbitrary, or capricious manner that may not necessarily reflect congressional intent.

C. Codification of the General Welfare Doctrine.

Congress needs to provide clear and unambiguous direction with respect to the exclusion of general welfare benefits from gross income. Congress should consider enacting statutory provisions similar to the tax relief that it provided for tribal welfare benefits and disaster relief payments. It should then provide direction to the U.S. Treasury to promulgate regulations to ensure a consistent interpretation of the statutes.

While it is critical that Congress act, Treasury’s participation in the codification of the general welfare exclusion is just as important. If Congress’s past codification of the Indian general welfare exclusion and its partial codification of other parts of the general welfare exclusion provide any indication, codification is unlikely to resolve all ambiguity. But on its own, Treasury is unlikely to issue interpretive regulations—so far, it has not provided any regulations either for the Indian general welfare exclusion or for the exclusion of qualified disaster relief payments.⁴³⁰

Treasury regulations serve an important role in implementing high-level tax rules. Where Congress lacks sufficient familiarity with tax law to anticipate all of the issues that could arise, Treasury deals with those problems on a regular basis.⁴³¹ The Treasury Department is authorized by

429. *FACT SHEET: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. DEP’T TREASURY (Mar. 18, 2021), <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families> [<https://perma.cc/P6T9-7ATY>].

430. As of this writing, there are neither final, temporary, or proposed regulations under Sections 139 or 139E of the Code, which provide for the tax treatment of disaster relief payments and the Indian general welfare exclusion respectively.

431. *Cf.* James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 242 (2015) (arguing that, while Congress would have understood environmental issues when it enacted the Clean Air Act, it “would not have been expected to keep up to date on all of the subsequent scientific advances and accumulating knowledge concerning pollutants that threaten public health and what should be done about them”).

Congress to prescribe regulations interpreting the Internal Revenue Code.⁴³² Congress can expressly delegate to the Treasury the authority to prescribe regulations specifically interpreting or providing important detail with respect to a particular Code section. Congress, for example, delegated specific authority to the Treasury to prescribe regulations interpreting Section 132 dealing with fringe benefits⁴³³ and the deductibility of business interest expense.⁴³⁴

Even if Congress explicitly authorizes Treasury to issue regulations, though, there is no guarantee that Treasury will follow that mandate. It does not write regulations “for every statute that requires them.”⁴³⁵ In fact, it has so far failed to produce regulations for the parts of the general welfare exclusion that Congress has codified.

While that failure is legally permissible, it is unacceptable. Taxpayers need to understand their tax-paying obligations. Without a clear and authoritative statement of the general welfare exclusion—through a combination of statutory and regulatory provisions—their tax obligation hinges on ambiguous and impermanent IRS guidance. But it is not just taxpayers who need to understand the contours of the general welfare exclusion—state and local governments need guidance to determine whether they need to provide information to the IRS about payments they make to their residents.⁴³⁶

Going through the formal APA steps for issuing regulations will provide Treasury with a better sense of how it should implement the general welfare exclusion. The APA notice-and-comment rules require agencies to provide interested parties with an opportunity to comment on proposed regulations and to consider and respond to any significant comments received.⁴³⁷ This public input can help Treasury determine where the gaps in a congressionally drafted law lie and what needs the affected public will have.

432. I.R.C. § 7805 (“[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary . . .”).

433. In Section 132(o), “the Secretary shall prescribe such regulations as may be necessary to appropriate to carry out the purposes of this section.” I.R.C. § 132(o).

434. See, e.g., I.R.C. § 163(i)(5) (“[T]he Secretary shall prescribe such regulations as may be appropriate to carry out the purposes of this subsection and subsection (e)(5) . . .”); *Id.* § 385(c)(3) (“The Secretary is authorized to require such information as the Secretary determines to be necessary to carry out the provisions of this subsection.”). It is notable that the IRS has never issued regulations under Section 61 that *exclude* something from gross income; nonetheless, the IRS felt comfortable excluding payments from income in such-Treasury regulation guidance.

435. Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax’s Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 567 (2016).

436. In fact, this is how most of the IRS’s informal guidance around the general welfare doctrine has arisen. Recipients are not asking the IRS whether they have to include the amount in their gross income. Rather, state and local governments are asking whether they have to file information returns detailing the payments. See, e.g., I.R.S. Priv. Ltr. Rul. 2017-43-010 (July 28, 2017).

437. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015).

D. Review and Revision of IRS Policies, Rulings, and Pronouncements

While Congress needs to act, unless and until Congress provides statutory guidance and Treasury promulgates regulations, the IRS will need to provide interim guidance.⁴³⁸ The general welfare exclusion is, after all, nine decades old. It has been applied, albeit inconsistently, for much of that time. Presumably, the IRS will continue to allow taxpayers to exclude payments for the general welfare from the gross income. While the IRS's guidance does not carry the weight of law, at least it will provide some certainty for taxpayers and for state and local governments.

As it provides this guidance, the IRS should consider reviewing and re-assessing its application of the general welfare exclusion doctrine. The current formulation of the general welfare exclusion doctrine by the IRS has evolved and looks much different from the initial actions taken by the IRS.⁴³⁹ Currently, the IRS has set out the formulation of the general welfare exclusion doctrine on its website as an FAQ as follows:

Payments made under social benefit programs for promotion of general welfare are excludable from gross income under a concept known as the general welfare doctrine. This applies only to governmental payments out of a welfare fund based upon the recipient's need, and not as compensation for services.⁴⁴⁰

Equally comprehensive expositions are found in other explanations by the IRS.⁴⁴¹

438. See *Understanding IRS Guidance – A Brief Primer*, IRS (May 31, 2022), <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> [https://perma.cc/3C4Q-BSJD] (“In its role in administering the tax laws enacted by the Congress, the IRS must take the specifics of these laws and translate them into detailed regulations, rules and procedures.”); *IRS Guidance*, IRS (Mar. 14, 2023), <https://www.irs.gov/newsroom/irs-guidance> [https://perma.cc/WV5T-8E6Q] (stating that the IRS announces “all substantive rulings necessary to promote a uniform application of tax law”).

439. The IRS has issued with respect to the general welfare exclusion doctrine a wide variety of administrative rulings and guidelines including office decisions, revenue rulings, revenue procedures, notices, general counsel memorandums, technical advice memorandums, chief counsel advice, private letter rulings, FAQs, and information letters. For a discussion of the issuance and authoritative status of revenue rulings, see generally Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841 (1992). For a general discussion of the various administrative rulings, pronouncements and interpretations issued by the IRS, see Islame Hosny, *Interpretations by Treasury and the IRS: Authoritative Weight, Judicial Deference, and the Separation of Powers*, 72 RUTGERS U. L. REV. 281 (2020); Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239.

440. *ITG FAQ #6 Answer – What is the General Welfare Doctrine?*, IRS (June 14, 2022), <https://www.irs.gov/government-entities/indian-tribal-governments/itg-faq-6-answer-what-is-the-general-welfare-doctrine> [https://perma.cc/LQL2-2BVU].

441. See, e.g., I.R.S. Notice 2012-75, 2012-51 I.R.B. 715, 716 (“Whether a payment qualifies under the general welfare exclusion is determined under the federal income tax laws (including provisions not in the Internal Revenue Code), not under the laws of state, local, sovereign tribal, or foreign governments, or other federal laws.”).

Despite these efforts, the IRS should consider comprehensively reviewing and revising the general welfare exclusion doctrine. There is a discrete example for such a review in the area of tribal welfare benefits, where the IRS has undertaken such an analysis. Prior to passage of the Tribal General Welfare Exclusion Act of 2014,⁴⁴² the IRS began an extensive and comprehensive effort to consult with the various Tribes and tribal leaders about application of the general welfare exclusion doctrine to welfare benefits paid to tribal members.

In 2011, the IRS “invite[d] comments concerning the application of the general welfare exclusion to Indian tribal government programs”⁴⁴³ The IRS noted that “the purpose of the Notice was to being a specific consultation process with Tribes on how to find a solution that addressed their concerns and improved clarity and consistency of the tax law.”⁴⁴⁴

Although the results of the consultation were eventually mooted by the passage of the Tribal General Welfare Exclusion Act in 2014, the consultation and other efforts resulted in constructive engagement between the IRS and various Tribes. The IRS received sixty-five written comments from Tribes and tribal leaders and conducted consultation sessions with them.⁴⁴⁵ As part of this process, the IRS also committed itself to continuing consultations in the future with the Tribes.⁴⁴⁶ It is promised to provide additional written guidance on the issues raised.⁴⁴⁷

The IRS should consider such a process for the general welfare doctrine. This could be done through a similar consultation as was described above that would solicit comments not only from federal administrators of general welfare benefit programs, but also from state and municipal administrators of programs not enacted or administered at the federal level. In fact, many of the inquiries to the IRS about the general welfare exclusion were initiated by an inquiry from a state or municipal agency. These state and municipal administrators were concerned about whether their agency had any reporting or withholding obligations with respect to the payment of certain welfare benefits.⁴⁴⁸

The consultation process should address other aspects and complexities of the general welfare exclusion doctrine. Issues that still need to be thoroughly analyzed and assessed would include whether the exclusion

442. Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883 (codified at I.R.C. § 139E).

443. I.R.S. Notice 2011-94, 2011-49 I.R.B. 834, 834.

444. See Ingram Testimony, *supra* note 69, at 4.

445. *Id.*

446. *Id.*

447. *Id.*

448. See, e.g., I.R.S. Priv. Ltr. Rul. 2010-01-013 (Jan. 8, 2010) (state political subdivisions inquiring whether certain welfare payments were “subject to federal income tax withholding”).

should consider only needs-based benefits, and what that analysis or test would look like. The IRS should also consider whether the form of the payment could be dispositive. For example, would it make any difference for an exclusion if the benefits were paid in cash, in kind, or through a tax credit or rebate.

Another possibility would be for the IRS to consider developing different tests based on the type or amount of the benefit. For example, subsistence type benefits such as food assistance might require no threshold to be excluded from gross income. Non-subsistence type of benefits could be considered to require more scrutiny. In addition, the IRS might consider a cap on the total amounts of general welfare benefits eligible for exclusion.

CONCLUSION

Over the past ninety years, the IRS created, developed, and expanded its general welfare exclusion doctrine to exclude tens of millions of dollars of otherwise-taxable income. Through the general welfare exclusion, the IRS has exercised its discretionary administrative authority to decline to tax an extraordinary wide variety of payments to taxpayers. The IRS appears to have society's best interest in mind, both in creating and expanding the general welfare exclusion. Moreover, few would argue for the taxation of subsistence benefits. Nonetheless, the IRS has applied the general welfare exclusion simplistically and in an ad hoc manner to exclude an ever-growing list of governmental payments to taxpayers such as, among others, payments made under witness protection programs or payments used to rehabilitate historical housing.

The IRS has resolutely clung to the doctrine in spite of expressly recognizing in its various rulings that these payments are gross income. Inexplicably, the IRS has also never attempted to measure the effect of the exclusion on federal revenue. In defense of its paradoxical decision-making, the IRS relies upon early vacuous administrative rulings and decisions completely lacking any statutory authority or direction. Unfortunately, the doctrine continues to be expanded and interpreted in an often arbitrary and inconsistent manner, extending at times to exclude from gross income benefits with only the most tenuous connection to relieving poverty.

The answer is clearly not to subject low-income recipients to taxation because a subsistence benefit is gross income. Given the general welfare exclusion's continued growth and expansion by the IRS, however, it is important that Congress assert its authority to define and create the statutory parameters for the exclusion.

Congress has arguably acquiesced to the exclusion given the exclusion's lengthy history. But even if it acquiesced, it has not given up the ability to

legislate parameters for the general welfare exclusion. In several instances Congress has acted on a piecemeal basis to either codify portions of the doctrine or to completely reverse the IRS's position on benefits such as social security benefits and unemployment compensation.

The best path forward would for Congress to codify in tax law the general welfare doctrine. These statutory provisions could be modeled on Congress's previous actions to exclude from gross income such as tribal welfare benefits and natural disaster payments. In the absence of congressional action, the U.S. Treasury should consider promulgating regulations subject to review through the Administrative Procedure Act that can provide a principled path. As the IRS considers the future of the doctrine, it should consider a thorough and thoughtful review of its administrative rulings in order to create a more consistent and fair approach to the taxation of general welfare benefits.