IN DEFENSE OF TAX SHELTERS

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I. INTRODUCTION

Tax shelters do not have many defenders. The lawyers who have to defend them on behalf of a client tend to simply appeal to the court's duty not to engage in law-making. Often that will win the case, but it does not help with the policy question that centers on what the law-maker, rather than the court, ought to do. Ought he, for instance, to go after tax shelters with expansive anti-abuse rules? Ought he to treat all exclusively tax-motivated transactions as the

* I want to thank my commentator, Daniel Shaviro, and the participants in this symposium, most particularly Joseph Bankman, Brant Hellwig, Claire Hill, Michael Knoll, Larry Solan, and David Weisbach who helped me see a number of things more clearly, though it proved impossible here to deal with all of their concerns and reservations.
exploitation of a loophole that should be closed, if not through anti-abuse rules, then by more detailed legislation specifically banning the offending transaction? The prevailing answers to both questions I take to be "yes" and "yes." In this article I will argue for "no" and "no."

I may be overstating things a little, in part because I am no tax scholar and my reading of the literature is very limited. However, the most extended defense of aggressive tax planning I have found is the following tepid expression of support in a well-regarded (indeed, to my mind superb) book on financial planning:

Although the deadweight costs associated with time spent in tax planning may seem socially wasteful, the relevant question is how much waste would exist using alternative means to achieve the same social goals. In other words, how does the net benefit of the altered economic activity brought about by the tax system compare with the net benefits of the next best alternative? Obviously, if we could implement social policy through a mechanism that would result in zero waste, we would do so, but such a goal is not realistic.

Not exactly a ringing endorsement of zealous tax lawyering, nor something that will make the architect of ambitious tax shelters feel terribly good about the enterprise.

In this article I hope to do better than that, even though this may seem like an immodest objective for someone without any expertise in tax law. What I do however have is a broader-than-usual perspective on tax shelter-like activities in other, non-tax domains, consideration of which I think serves to make tax shelters appear in a somewhat different light. Let me give a small example. Suppose we tried to transpose the tax scholar’s strong desire to reduce deadweight loss, which he thinks should be the main underpinning of our tax policies, into the criminal law. We might then be led to focus on the fact that a great deal of what private citizens do to avoid becoming victims of crime does not actually serve to reduce crime but simply diverts it

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1 For a more refined assessment of the division of opinion, see Daniel N. Shaviro, Economic Substance, Corporate Tax Shelters, and the Compaq Case, 88 TAX NOTES 221 (July 10, 2000).

onto other, easier prey. That is a deadweight loss. And yet, does it seem at all appealing to deal with this deadweight loss by prohibiting people from taking precautions that seem to have that effect — by banning, for instance, the sale of sturdy doors and heavy-duty locks in the same way that we ban the sale of certain kinds of toilet flushes deemed too wasteful of water? If it does not seem appealing, should that not give us pause about analogous attempts to reduce deadweight loss through tax shelter regulation? Much here will turn on how significantly different the two realms, tax law and criminal law, really are. But it seems like an analogy worth thinking about in trying to figure out to what extent we should tolerate tax shelters.

But it is not the analogy to the criminal law that I intend to pursue in this article. It is a different, to my mind more interesting analogy that I intend to explore, the analogy to voting — or more precisely, the analogy between tax shelters and agenda manipulation. Here is how I plan to proceed. In Part II, I will offer a few useful reminders about the nature and source of agenda manipulation. In Parts III and IV, I will transplant some of the strongest arguments against tax shelters into the domain of voting and see what they look like from that new vantage point. I am hoping that the reader will come away from this exercise with some serious doubts about those traditional arguments. Finally in Part V, I will make the argument that there is no meaningful difference between the two domains and that if it is hard to quarrel with agenda manipulation — as will turn out to be the case — it is equally hard to quarrel with aggressive tax planning.

My source for the arguments against tax shelters — the arguments that I intend to transplant into the domain of voting — is an article by David Weisbach, *Ten Truths About Tax Shelters,* which strikes me as a kind of manifesto, a brilliant polemic that expresses in especially forceful terms the case against tax shelters.

**II. SOME REMINDERS ABOUT THE NATURE AND SOURCES OF AGENDA MANIPULATION**

Voting we all know is subject to manipulation. There are different forms of manipulation. The one most familiar to lawyers and most relevant for this article is agenda manipulation. The possibility for agenda manipulation is a direct implication of Arrow’s famous theorem on which the theory of social choice is founded.

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There is, mercifully, no need to lay out the full argument for, and meaning of, Arrow's theorem, but a slight review and adaptation of the argument behind it will be helpful to understanding what it is about voting that makes agenda manipulation so inevitable.

The core message of Arrow's theorem I take to be that there is an irresolvable tension between two very basic substantive desiderata of a voting mechanism: On the one hand, the Pareto principle, namely that if all voters prefer a certain alternative to another, then that alternative should be ranked ahead of the other; versus, on the other hand, a more esoteric-sounding principle, the Independence of Irrelevant Alternatives. The Independence of Irrelevant Alternatives asserts that in deciding which of two alternatives ought to be ranked more highly than the other we need only worry about the relationship of those two alternatives to each other, not their relationship to some third alternative. To use a well-worn example, in deciding whether to order steak or chicken for the group, we should not have to ask about their feelings about fish.

By adapting the original proof of Arrow's theorem to the very special case of two voters and three alternatives, we can quickly see how the tension between the Pareto principle and the Independence of Irrelevant Alternatives arises. Suppose Voter 1 prefers alternative A to alternative B, whereas Voter 2 feels the opposite (i.e., he would rank B ahead of A). Suppose further that Voter 2 would rank alternative B ahead of alternative C, whereas Voter 1 feels the opposite (i.e., he would rank C ahead of B). If we want the aggregation of their desires to be a collective enterprise, in other words, to take into account to some extent both of their desires, we might let Voter 1 prevail in the ranking of A and B and Voter 2 in the ranking of Band C. The overall ranking we then obtain is A, B, and C, in that order. The problem is that there is nothing in what I have said so far that would prevent it from being the case that both Voter 1 and Voter 2 prefer C to A. Thus if we adopt the A-B-C ranking we are violating the Pareto principle. If we want to restore coherence, something has to give. Assuming we do not want to relinquish transitivity or the collective nature of the decision-making process, or the Pareto principle, what is left? We could make it so that we override the wishes of one of the voters only in those cases in which

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4 I say this against the background of some very basic assumptions: that the voting mechanism be collective, not dictatorial; that it result in coherent, transitive rankings of all possibilities; and that it give us answers to the entire universe of ranking questions that might arise.
failing to do so would get us into a cycle. But that makes the decision about what to do about two alternatives dependent on the voters’ feelings about some third alternatives — in other words, it makes it dependent on an irrelevant alternative.

It is this feature of Pareto optimal voting systems that opens them up to agenda manipulation. Someone who wants to derail an outcome he finds undesirable has the opportunity of injecting some hitherto unconsidered alternative into the agenda and might thus suddenly cause the outcome to shift from the one he disliked to another one — not the one he injected, that would not be so strange — but one that was previously on the table but remained unchosen. Even once one understands the inevitability of this, its appearance cannot help but be startling. A much-loved example from the 2000 Olympics involved the rivalry between two figure skaters Nancy Kerrigan and Oksana Bayul. Bayul ended up winning the gold medal, Kerrigan the silver. Crucial to this outcome was the participation in the competition of a Chinese skater, but for whom Kerrigan would have won the gold and Bayul the silver — holding constant, that is, the performances of each skater.

The most common way in which a shrewd legislator will exploit the inevitable dependence of the irrelevant alternative of a Pareto optimal voting system would be the following: Assume there is a bill with majority support that the shrewd legislator wants to kill. The legislator searches for an amendment that will garner enough support to be attached to the bill, but which will have the end result of depriving the bill of its majority support. William Riker offers a telling example involving the proposal to remove the election of Senators from the state legislature to the population at large. While popular election is how we now do things, for a time an astute advocate of the old system, Senator Depew, managed to keep it in place through a clever bit of agenda manipulation. Senator Depew understood that among those supporting the popular election of Senators were many Southerners who were anxious to keep blacks from participating in those elections and who would rather do without popular elections than include blacks. He therefore proposed an amendment that would have ensured black participation, by putting the elections under federal supervision. By joining forces with many Northerners who liked the idea of federal supervision, Senator Depew

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had the amendment adopted, thus ensuring that the amended bill was defeated.

III. THE TAX SHELTER CRITIQUE APPLIED TO AGENDA
MANIPULATION

Let us turn then to the case against tax shelters and transpose that case into the context of voting manipulation. In Ten Truths About Tax Shelters, David Weisbach sets out the case against tax shelters in the form of ten propositions. Not all of them are equally weighed and I will focus on the five that strike me as the key components of his case. They are as follows:

1. There is no social benefit to tax planning.
2. The tax shelter problem cannot be resolved by references to a right to minimize taxes.
3. Antishelter rules can be analyzed as gaps in the tax base.
4. Disclosure is not enough.
5. Motive matters.

Now let me take these propositions up one by one, quoting extensively from Weisbach's piece to elaborate on what these statements mean and then viewing them from the vantage point of voting manipulation.

To repeat, the first of Weisbach's five propositions is stated as: "There is no social benefit to tax planning." What exactly does Weisbach mean by this? He writes:

[T]ax-planning, all tax planning, not just planning associated with traditional notions of shelters, produces nothing of value. Nothing is gained by finding new ways to turn ordinary income into capital gain, to push a gain offshore, or to generate losses. No new medicines are found, computer chips designed, or homeless housed. . . . [T]ax planning can be analogized to an externality. Those who tax plan impose costs on those who do not in the form of higher taxes. The person who engages in the tax planning does not take that external cost into account. . . . In considering how to structure the tax law, tax planning deserves little or no protection.  

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6 See Weisbach, supra note 3, at 222-25.
7 Id.
Further he quotes Daniel Shaviro's succinct formulation of this argument: Rewarding aggressive tax planning, Shaviro says, is a bit like making a tax break contingent of the taxpayer's doing twenty back somersaults.  

Were we to apply what Weisbach says regarding voting manipulation, we would say that voting manipulation produces neither medicines nor computer chips. It too seems like an externality in that one person wins at the expense of another whose losses he does not take into account. If we concretize the manipulation with the help of the familiar steak-chicken-fish example, the deadweight loss created by manipulation starts to seem especially evident. Suppose society faces a choice between chicken and steak and the reigning social welfare function would anoint steak the winner. Now the manipulator works hard, by expending a lot of resources, to produce fish that will henceforth be entered on the agenda. He does so with the sole purpose of getting chicken chosen instead of steak. That starts to seem like a ridiculously wasteful thing — producing an alternative he knows will not be chosen and does not hope to see chosen.

And yet, it seems hard, on reflection to consider all this to be of great importance. Why is it after all that we permit it to be the case that adding fish to the agenda will result in the social choice veering from steak to chicken? Presumably, because from the vantage point of a fish-containing agenda, chicken is the better choice. From the vantage point of this agenda, the presence of fish accomplishes something quite valuable: It keeps us from choosing the inferior alternative, steak. To be sure, if fish were not on the agenda, we would not view its absence as a loss, inasmuch as it is clear that fish would not be chosen over the winning alternative, steak. But that is not really relevant under the voting aggregation scheme we are employing, or for that matter, any voting aggregation scheme that respects the Pareto principle. After all, this is precisely why Arrow's theorem is so vexing — the fact that there is no persuasive way to decide which irrelevant alternative deserves inclusion in the agenda.

Weisbach's second proposition states: "The tax shelter problem cannot be resolved by references to a right to minimize taxes, to the scope of legitimate tax planning, or to various definitions of shelters."  

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* See Shaviro, supra note 1, at 223; Weisbach, supra note 3, at 222 (discussing Shaviro's back-flip analogy).
* See Weisbach, supra note 3, at 220–22.
More elaborately put:

[T]he right to alter behavior to minimize taxes is not a basic principle of moral philosophy. Tax planning does not, for example, rank with the freedom of thought, speech, association, religion or other principles supported by moral philosophers. . . . [N]o moral or philosophical basis for the right to tax plan has yet been articulated. There is no constitutional right [involved here either. Nor is there a] statutory right. There is, in short, no basis for a right to tax plan other than statements made up out of thin air by a few judges . . . Congress can limit or expand the scope of the right to tax plan with the stroke of a pen. If it is desirable to restrict tax planning, it should be restricted notwithstanding that doing so would reduce the scope of allowable tax planning permitted under current law.  

Clearly this argument has no force in the voting context. As to voting, at least on important matters, there is no question about its being a basic right, anchored in morality, constitution, and statute.

Weisbach’s third proposition states: “Antishelter rules can be analyzed as gaps in the tax base.”  

To-wit:

Shelters can be viewed as omissions from the tax base . . . [They] are fundamentally like any other omission from the tax base, such as the failure to tax fringe benefits, imputed rent, unrealized appreciation, or much income from oil and gas exploration . . . . One may protest that shelters are different because in many shelters money merely goes around in a circle (or moves to where it was going anyway through a more complicated route). Shelters of this sort can be implemented indefinitely and involve no economic costs or distortions . . . . But virtually all shelters have hidden costs, such as the costs of discovery, design, and implementation. These are not really any different than the costs of receiving fringe benefits when cash is preferable, or living in owner-occupied housing when rental housing is more desirable. 

10 See id. at 221–22.
11 See id. at 231–41.
12 Id. at 232–33.
Another way of stating this point would be say that antishelter rules are directed at loopholes in the law. Now let us ask whether the voting manipulator can similarly be thought to be exploiting a loophole in the voting rules? Not really, since all decent voting rules are going to be plagued by possibilities of agenda manipulation, inasmuch as they are bound to violate the Independence of Irrelevant Alternatives.

Weisbach's fourth proposition states: "Disclosure is not enough." The reason being that:

[To the extent that disclosure proposals have any bite,] they are about making it easier to change substantive law. But if disclosure is about making changes to substantive law, we need to compare this approach, disclosure of shelters followed by repeated amendments to the law to shut them down, to other approaches to shelters, such as significantly increasing the strength of antitax avoidance doctrines. I, for one, do not think making repeated amendments to complicated rules is the better approach.

In his book, *The Art of Political Manipulation*, William Riker discusses at length a famous experiment by Charles Plott and Michael Levine in which they manipulated, largely through agenda control, a flying club they belonged to into adopting precisely the fleet of airplanes they desired. They were criticized for what they had done, which led Riker to observe that the only thing for which they could be criticized is not being open about what they were up to with their fellow club members, a wrong they had amply cured by publishing the paper and thus making everyone aware of the possibility of agenda control.

By and large, Plott and Levine acted in an exemplary fashion, conforming, so I believe, to the most demanding and restrictive moral standard. One of the earliest scholars to recognize that agendas, voting methods, and so on could always be manipulated to the advantage of one or another

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13 See id. at 225–30.
14 Id. at 229.
participant was the Reverend Charles L. Dodgson, otherwise known as Lewis Carroll. Remarking that strategic behavior makes an election more a game of skill than a real test of the wishes of electors, his solution was not to condemn manipulation but rather to provide, that all should know the rules by which this game may be won. It seems to me that Plott and Levine, by studying agendas, by generalizing from their experience in the flying club, and by publishing their discoveries so that all should know, acted exactly in accord with Dodgson’s precept. Had they manipulated the decision and kept the knowledge to themselves, they would have satisfied conventional morality by doing the same as ordinary men. But they went further, much further. They revealed their action, studied how it was done, and showed other people how to do it, thereby offering a secret and a skill to all mankind, even though it might have been privately advantageous to keep it to themselves. Their actions ought not to be condemned but rather mightily praised.¹⁶

In short, at least in the voting manipulation context, disclosure may be really the only thing that can be fairly asked of the manipulator.

Weisbach’s fifth proposition asserts: “Motive matters.”¹⁷ What Weisbach means is this:

The complaint about using anti-abuse doctrines to attack shelters . . . is that they inappropriately base tax results on intent or motive. Two taxpayers that engage in the identical transaction can be taxed differently depending on what goes on in their heads. The taxpayer with dirty tax avoidance thoughts will get caught by an anti-avoidance rule but the taxpayer with clean thoughts will not . . . [But what is wrong with that?] The definition of various crimes, including serious crimes such as murder or rape, depend on the mental state of the defendant . . . It is not true that the law generally looks only to action and not mental states . . . If one wants to think of this in horizontal equity terms, the two cases are not

¹⁶ RIKER, supra note 15.
¹⁷ See Weisbach, supra note 3, at 251–53.
similar because they have different amounts of economic distortion.\textsuperscript{18}

In the voting context, the motive seems entirely beside the point. Of course the alternative is injected to obtain a better outcome from the manipulator's point of view, but the outcome cannot be described as in any way wrong on account of that motive.

Nor, as it turns out, are mental states quite as relevant to criminal law as Weisbach suggests. But one has to look at the right kinds of cases. Obviously mental states are relevant to the definition of murder and rape, but the kinds of cases that parallel voting and tax manipulation are of a very special sort. In these cases there has been a long-standing, vexing, and lively debate about the relevance of mental states. They are the cases that go by the name of \textit{actio libera in causa} and concern defendants who deliberately drink themselves into a heavily intoxicated state so as to avoid responsibility for their actions; or who provoke an enemy, so that they can then kill him in self-defense; or who create a situation of necessity or duress, in which they are then able to do all kinds of things that otherwise would be crimes; or who commit euthanasia in such a way that the victim commits the last death-causing act, so that they can escape homicide liability by reason of a lack of proximate causation — cases, as some have tried to characterize them, in which the defendant has created the conditions of his own defense. Some have indeed suggested that all of these defenses should be unavailable if the particular structure of the defendant's activities is due to his desire to create the conditions of his own defense, but many others have thought that to be an absurd suggestion, largely on grounds that parallel those often offered in tax law. For instance, if we adopted a categorical rule of this sort, we would have to find liability in the following kind of case: Defendant goes into a store, buys something he wishes to destroy, and does so. The only reason his destruction of that object is not a crime is that he created the condition of his own defense — to-wit, his ownership of the object. It has turned out to be devilishly difficult to formulate criteria that distinguish this kind of case from those in which the contrivance does not seem to deserve protection. It has become clear to most however that motive in this case, or mental state really, will not do the trick.\textsuperscript{19}

\textsuperscript{18} \textit{Id.} at 251–52.

\textsuperscript{19} On the \textit{actio libera in causa}, see JOACHIM HRUSCHKA, STRAFRECHT NACH LOGISCH-ANALYTISCHER METHODE (1983) (Ger.); Paul H. Robinson, \textit{Causing the
But what really does voting manipulation have to do with tax shelters? Why should we care that the arguments against tax shelters do not carry over to agenda manipulation? I will make the connection in two different ways.

First, let us start with a "bridge example" — in other words, a case that could, without much effort, be viewed as an instance of voting manipulation or as a case of tax sheltering. The case is highly artificial, but for that very reason will help make the connection more transparent than a more realistic case would. Thereafter, however, I will in fact turn to a more realistic case for what additional light it can shed on the matter.

Let us suppose we have a tax system that sought to base tax liability on utility, not income. Practical considerations aside, it seems such a system would be particularly impervious to exploitation by tax planners. In fact, however, as Kenneth Arrow noted in his original monograph, a system that ranks states of affairs in accordance with the utility derived by its various participants, violates the independence of irrelevant alternatives. And hence, we may conclude, opens up possibilities of manipulation.

One way of seeing the dependence on irrelevant alternatives is to focus on Arrow's specific example of a utility measure. It is one due to Goodman and Markowitz, it works as follows: We are to assume that a just noticeable difference in the amount of a commodity marks the basic utility unit perceived equally by all. The problem is that as a new commodity is introduced, new discrimination levels will appear. Two things which previously were indiscriminable may become discriminable by reference to the new commodity. In short, someone who wanted to manipulate the outcome of such a social choice regime could do so by introducing additional commodities. This is the voting manipulation perspective on such a maneuver. But one could also think of the introduction of such a commodity as a kind of tax shelter, since its purpose is to alter the utility assessment in a way that will lessen the amount of utility he is judged to possess and the tax liability

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*Leo A. Goodman & Harry Markowitz, Social Welfare Functions Based on Individual Rankings, 58 Am. J. Soc. 257–62 (1952).*
that could consequently be imposed on him. Spending resources on
the introduction of such a commodity might, in Weisbach’s terms, be
quite wasteful. The commodity need not be anything anyone values
much, at least not compared to the resources expended in creating it.
Nonetheless it would be hard to object to its creation. This after all is
just a special case of the earlier example of fish being introduced for
the sole purpose of shifting the social choice away from steak and
toward chicken.

Put more abstractly, we may describe the connection between
voting manipulation and tax planning as thus: The taxing authority
has decided on the relevant features of the taxpayer’s position for
assessing his tax liability. These features are aggregated by some
method. Relative tax liabilities could be ranked according to each of
these features. Aggregation then achieves the final ranking. And
such aggregation of course is subject to all the usual aggregation
properties, namely the manipulation of the outcome by injecting
“irrelevant” alternatives.

Admittedly, the introduction of an extra commodity to alter the
assignment of utilities looks nothing like a typical bit of tax planning.
Probably the most straightforward and illuminating examples of a
genuine tax shelter that can also easily be thought of in voting terms
arise in the realm of attribution: however, it will naturally require a
little bit more effort to see this than my “bridge example.” To tax we
first need to find the person or entity to which the taxable income and
its various determinants should be attributed. Reduced to its bare
essence, such attributions are made by finding the taxpayer “closest,”
in some suitable sense of closeness, to a certain income stream. Such
a closeness judgment arguably is made, for instance, when a court
decides — as in Lucas v. Earl\(^{21}\) — that income earned by one person
and then reassigned to another, without quid pro quo, is closer to the
first person than the second and therefore taxable to him. Closeness
judgments of course can easily be conceived of as rankings among the
candidate taxpayers. The winner in this ranking — i.e. the closest
taxpayer — corresponds to the “collective choice” in the usual set-up,
the taxpayers themselves correspond to the alternatives to be chosen
amongst, and the various criteria being used and aggregated for such a
judgment, correspond to the individual voters. Viewed in this way, it
should be possible — inevitable, really — to introduce other
taxpayers in such a way as to switch liability from the first of our

original taxpayers to the second, but not to the taxpayer being introduced for strategic purposes. In other words, the two original taxpayers are the chicken and the steak, and the strategically introduced taxpayer is the fish. What would be an example of such a fish? Consider the arch-typical attribution "trick" of transferring income by transferring the asset that generates the income — i.e., the bond, the copyright, or the money that can be lent out. In Holmes' unjustly maligned metaphor, this represents a transfer of the fruit-bearing tree, rather than a transfer of merely the fruit. The tree can here be thought of as the third party that is being introduced so as to cause a ranking switch among the two other taxpayers.

V. AND NOW WHAT?

Where does all of that leave tax policy? Let us consider in light of my voting analogy the frequent recommendation that some kind of economic substance test should be used to strike down at least the most egregious tax maneuvers. Some people would view certain versions of the tax assignment trick I just described as falling into this category: Namely the version in which a father, say, who used to give his son $10,000 a year, instead gives his son $100,000, immediately borrows it back, proceeds to pay interest of 10% ($10,000), and then claims the $10,000 as a deduction.

An economic substance test applied to this transaction would seem to have three effects. First, it will invalidate the transaction. Second, it will discourage taxpayers from undertaking it. Third, it will induce at least some taxpayers to do the same transaction in a more roundabout way — say, by having the father give $100,000 to his son, simultaneously borrowing that amount from a bank, and paying the bank $10,000 a year. The son meanwhile puts the $100,000 into a bank account from which he reaps $10,000 in interest. An economic substance test would have great trouble getting at this restructuring. Of course that does not mean that the economic substance test is without effect. Restructuring is likely to be costly. As Daniel Shaviro points out, under an economic substance approach,

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22 The point of such a shift, of course, will be to move liability from someone in a high-tax bracket to someone in a lower one.

23 Yes, of course the asset is not really a taxpayer, but that is a minor cosmetic blemish of this example, remediable if one cares to, by turning it into a trust, for example.

24 There are the bank's administrative costs, for one.
restructuring cost becomes the tax law’s real sanction against tax
shelters, as well as a measure of the associated deadweight loss.\(^{25}\)
Including the bank in the restructured transaction is the equivalent of
what Shaviro describes as asking the taxpayer to perform twenty back
summersaults to qualify for his $10,000 deduction. By administering
the economic substance test in a very aggressive way, one can set the
number of required summersaults, very high indeed, resulting in high
deterrence and low deadweight loss.

How does such an approach look from the voting perspective?
Let us revisit the maneuver by which Senator Depew managed to
delay a proposed law for the popular election of Senators, even
though the proposed bill enjoyed majority support. Senator Depew
proposed an amendment to the bill that he knew also had majority
support, but would ultimately result in a new bill that no longer had
majority support. No doubt some people felt that he was subverting
the real wishes of the legislature by a clever maneuver. They would
be tempted by an analogue of the economic substance approach to
disqualify the amendment. As in the tax case, of course, that might
not end the matter, since Senator Depew might be able to come up
with more roundabout maneuvers that would be harder to strike
down as frustrations of the real wishes of the legislature. Still, it
makes Senator Depew’s job much harder and perhaps impossible.

The problem, of course, is that people are dead wrong in
suggesting that Senator Depew is subverting the real will of the
legislature. The outcome he manages to obtain by his maneuvers has
as much of a claim to being considered the legislature’s real will as the
outcome he is trying to avert. That, as I have reminded the reader, is
the lesson of Arrow.

The same problem plagues attempts to apply the economic
substance test in tax law. On closer examination, it simply is no
longer clear why a straightforward payment of $10,000 by the father
to his son is a more “real” characterization of what he is doing than
the more complicated maneuver the taxpayer contrived. One could
after all “see” the original transaction as being a somewhat elliptical
way of giving $100,000, taking it back, and paying $10,000 of interest
on it. The rigmarole of going through with the gift and then having it
lent back simply makes the true but hidden character of the original
transaction more transparent, or so one might argue. The contrived
transaction has as much of a claim to being the economic substance of

\(^{25}\) See Shaviro, supra note 1.