A LITTLE OF THIS, A LITTLE OF THAT: POTENTIAL EFFECTS ON ENTREPRENEURSHIP OF THE McCAIN AND OBAMA TAX PROPOSALS

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Here is the truth about the future: We are living on borrowed money and borrowed time. These deficits hike interest rates, clobber exports, stunt investment, kill jobs, undermine growth, cheat our kids, and shrink our future.

. . . .

Let's tell the truth. [Reducing the deficit by two-thirds] must be done, it must be done. Mr. Reagan will raise taxes, and so will I. He won't tell you. I just did.¹

Domestically, our national debt and budget constrain us in ways that are going to be very far-reaching and long lasting. And I think whoever is elected in 2008 is going to be cleaning up the fiscal mess that was created as a consequence of the president's tax cuts.²

INTRODUCTION

My college baseball coach, a man of few, but usually purposeful, words, told our pitchers to “throw strikes, but don’t give them anything good to hit.” Those words resonate each time I en-

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counter a task that is much easier said than done and requires walking a fine line. Candidates for the U.S. presidency face such a challenge when they make policy proposals during their campaigns, especially in an area as complex and controversial as federal tax policy. They cannot avoid announcing their tax plans without being accused of ducking significant issues affecting all sorts of competing concerns and interested (often passionately self-interested) constituencies. At the same time, they can be sure that proposed changes to the Internal Revenue Code will be closely scrutinized and are likely to be criticized from at least some quarters, even if they are trying to be candid and do the right thing. Heading into a 2008 presidential election in which the winner will inherit an enormous federal deficit and a major league economic crisis, we have a well-known precedent on the price of a candidate's candor in talking about tax policy. The pledge to raise taxes made by Walter Mondale in his acceptance speech at the 1984 Democratic National Convention was a strike of truth, but it was a fat pitch that got knocked out of the park and effectively ended the game in the first inning. 3

Subsequent presidential candidates have been understandably reluctant to propose across-the-board tax increases. They also steer away from promoting major tax reforms that their target voters might see as raising taxes. 4 In addition, as anyone who watches


4. Cf. Len Burman et al., Tax Pol’y Ctr., An Updated Analysis of the 2008 Presidential Candidates’ Tax Plans: Revised August 15, 2008, at 3 (2008), http://www.taxpolicycenter.org/UploadedPDF/411749_updated_candidates.pdf (noting increasing demands on government revenue sources and observing: “Fundamental reform of our tax system is one way to resolve these problems, but . . . because reform creates both winners and losers, the leading presidential candidates have not addressed it seriously”); William G. Gale & Peter R. Orszag, An Economic Assessment of Tax
television knows, recent presidential candidates have been quick to charge their opponents, often in inflammatory terms, with planning to unfairly tax those much-needed segments of the electorate. In addition, they often seem disinclined to provide a lot of detail on their own proposals that might serve as good pitches for others to swing at.

Consequently, what we get in tax packages offered by presidential candidates in election years reminds me of another pithy phrase my old coach frequently used, in this case directed at the catcher calling the pitches: "A little of this, a little of that." In other words, mix it up a little—some fastballs, some curves, some sliders, and a few change-ups. Keep the batters off balance. Call different pitches depending on which hitters are up and how they vary in ability to hurt your chances to win. In the tax plans of the major party candidates in most years, and certainly in 2008, this translates into a mixed bag of some bold and well-disclosed measures with potentially broad implications, typically following traditional party lines. The candidates essentially say "here's my fastball, see if you can hit it" and, with a fair amount of detail, describe some specific provisions that serve targeted objectives, but often are modest in terms of the overall dollar magnitude of effect. Finally, they outline in general terms some ideas that seem well-conceived and promising but are in areas so complicated that supplying more detail prior to the election might yield too many opportunities for prolonged debate and have voters scratching their heads the way young ball-players do the first time they hear the Infield Fly Rule.5

Apart from the customary impediments to drawing concrete conclusions about the potential effects of a presidential candidate's tax proposals, projecting such effects on entrepreneurship in particular adds a special layer of difficulty because entrepreneurship means different things to different people. Many are prone to use the terms "entrepreneurship" and "small business" interchangeably. Others would argue that entrepreneurship connotes a spirit of

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Policy in the Bush Administration, 2001-2004, 45 B.C. L. REV. 1157, 1231 (2004) ("Broadening the base is always a difficult sell politically, because it creates losers.").

5. Those interested in exploring the details of the Infield Fly Rule, including the subjective judgments required of the umpires applying it, are encouraged to visit the definitional section of the Official Rules of Baseball. See Official Rules, MLB.com: Official info, http://mlb.mlb.com/mlb/official_info/official_rules/definition_terms_2.jsp (last visited May 15, 2009). It is a classic anti-abuse rule that can be quite helpful in introducing students in tax and other courses to provisions and doctrines designed to prevent circumvention of the spirit of statutes and regulations that are otherwise susceptible to manipulation by loophole-seekers.
creativity and quest for innovation that might often be manifested in small business settings, but is not unique to modest-sized enterprises and can indeed be found in very large for-profit and non-profit organizations as well. Moreover, even if the latter (and, in my opinion, superior) view triumphs, the definitional questions do not end there. The lexicon now includes not only traditional profit-seeking entrepreneurship, but also the use of the recently popularized phrase "social entrepreneurship," which describes the application of creativity and innovation to the solution of societal problems in circumstances in which success is measured in terms of positive impacts other than financial profits.6

Similarly, “small business” is susceptible to various meanings. Sometimes the “small” label is based on the number of employees. Even then one can find varying thresholds (for example, fewer than five hundred, fewer than one hundred, fewer than twenty) depending on the context.7 In other areas, categorization as “small” may be predicated on limited dollar amounts of capitalization, asset value, or annual revenues.8 With respect to recent research by economists in the area of effects of tax policy on small business and entrepreneurship, particularly with respect to tax rates, attention has been focused to a large extent on a definitional approach that more or less equates small business, entrepreneurship, and “self-employment,”9 treating as “entrepreneurs” individuals who have Schedule C sole proprietor income or Schedule E income from partnerships, S corporations, or rents and royalties.10

For purposes of this commentary, I will for the most part try to use a broad definition of entrepreneurship and explore potential effects of significant tax proposals announced by Senators John McCain and Barack Obama on innovation and creativity in entrepreneurial endeavors of any size. Part I will demonstrate that

8. See id. (discussing various benchmarks used for different purposes by the U.S. Small Business Administration, the Organization for Economic Cooperation and Development, the Internal Revenue Code, financial analysts, and policy makers).
both candidates are conscious of the need to speak to entrepreneurship and small business in their campaigns. Part II will address the overall tax climate that might occur if the most major components of the candidates' respective tax plans became law. Part III will discuss specific provisions with more direct, and in some cases expressly targeted, connections to entrepreneurship and innovation. Throughout Parts II and III, the focus will be primarily on the tax proposals made by the two candidates in their campaigns prior to the public awareness of the economic crisis that ensued when the financial predicaments of Lehman Brothers, Merrill Lynch, and AIG became front page news in mid-September 2008, as I think those proposals are illustrative of the candidates' views of what tax policy ought to be in some key areas. I will, however, note in the course of such discussion below some potential modifications or supplements to their respective tax plans that appeared in statements made between mid-September and the October 17, 2008, conference for which this Article was written. Finally, Part IV will offer a few suggestions on tax policy issues not featured in the public pronouncements by the candidates that might nevertheless be productive areas for the next presidential administration and Congress to consider.

I. ENTREPRENEURSHIP AND SMALL BUSINESS ON THE RADAR

The McCain "Jobs for America" economic plan includes a section entitled "Supporting Small Business" with a preamble proclaiming that: "Small businesses are the job engine of America, and John McCain will make it easier for them to grow and create more jobs." The text goes on to assert that:

Entrepreneurs are at the heart of American innovation, growth and prosperity. Entrepreneurs create the ultimate job security—a new, better opportunity if your current job goes away. Entrepreneurs should not be taxed into submission.... Small businesses are the heart of job growth; raising taxes on them hurts every worker.13


13. Id. at 13.
Small business and entrepreneurship hold a similarly prominent place in campaign literature on the Obama website, which has a "Support Small Business" subtitle in the economic plan portion of its "issues" link, and describes a capital gains relief proposal for "start-up and small businesses" as a means to "encourage innovation and job creation." In addition, this area of the Obama plan text states that: "Barack Obama . . . will support entrepreneurship and spur job growth by creating a national network of public-private business incubators. Business incubators facilitate the critical work of entrepreneurs in creating start-up companies."15

Both of the candidates' plans reflect the familiar tendency to equate small business and entrepreneurship. They are certainly not alone in the political world in that regard. For example, the website of the U.S. Senate Committee on Small Business and Entrepreneurship seems to have its core focus on initiatives designed to support small business, without prominent attention given to entrepreneurship in other organizational settings.16 However, a fair reading of the totality of their plans reveals that both Senator McCain and Senator Obama have broad perspectives and an understanding of the importance of entrepreneurship and innovation in all segments of American society. Both, for example, have made proposals, including tax proposals discussed below, that are expressly designed to spur creativity and the development of competitive technology. And Obama even went so far as to use the popular "LinkedIn" online networking tool to ask: "How can the next president help small business and entrepreneurs thrive?"17

Both McCain and Obama are obviously sensitive to the national interest in analyzing the effects of federal tax policy on entrepreneurship and small business that has picked up substantial momentum in recent years. As Donald Bruce wrote in a summary of the 2001 U.S. Small Business Administration Office of Advocacy conference "Tax Policy and Small Business: New Firm Formation, Growth and Survival":

15. Id.
The role of small business in the economy has re-emerged as an important consideration in the development of tax policy. This development is one part of a more general rise in attention devoted to "entrepreneurs" in the policy process. Among the various agencies and branches of the federal government, there is a growing recognition that the design of policy should reflect economic responses to entrepreneurial incentives.

For a long time, the vast majority of policy-oriented economic research focused on the economics of households and large businesses. This focus was partially due to the ready availability of useful data. In recent years, however, a growing empirical literature has focused on the economics of entrepreneurship, yielding both important insights and empirical underpinnings for small business proposals. Also, in recent years this research has started to consider the impact of tax policy on various aspects of entrepreneurship.18

Whether McCain and Obama are, in the context of the national economy overall, under-emphasizing or over-emphasizing the small business segment of entrepreneurship in their tax proposals is a matter open to a debate that began before they became their parties' presidential nominees. There is significant existing literature exploring and calling for further study of the effects of tax policy on small business and the propriety of using tax policy to facilitate the start up and growth of small enterprises.19 That scholarship explains that many proponents of tax subsidies for small businesses base their support of such measures on a desire to support small enterprises as "job engines" and breeding grounds for technological innovations.20 In addition, advocates of using modifications to federal tax law to assist small business argue that "diseconomies" caused by the disproportionate effect on small business of the complexity of Internal Revenue Code requirements, other aspects of regulatory law, and realities of access to capital have long been

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18. See Tax Policy and Small Business, supra note 9, at 1. This conference was supported by the Ewing Marion Kauffman Foundation.
19. See, e.g., Wilson, supra note 7, at 17 (Probing the relationships between perceptions of small business, lobbying, and tax policy, including: "Are the small business tax incentives in the Code economically justified?"). Conference Organizer Donald Bruce noted: "Finally, there is certainly room for more analysis of the fundamental question of whether or not small businesses should be tax-favored." Tax Policy and Small Business, supra note 9, at 7. He concluded, "[i]f they are the primary generators of innovation and employment growth and also help to ensure a competitive business environment, preferential tax policy may be warranted. More research is needed on these topics." Id.
20. See Wilson, supra note 7, at 30 nn.60-62.
tilted in favor of "big business." They argue that the enactment of provisions designed to subsidize the formation and operation of small businesses may be necessary and appropriate to "level the playing field."21

Others contend that the oft-extolled virtues of small business have been exaggerated and romanticized beyond economic reality, and that delivering special tax benefits to small enterprises may inappropriately conflict with free market principles.22 One team of noted economic observers, in calling for further research to more rigorously evaluate "the case for tax breaks for small business," has gone as far as saying that: "Policymakers often fall victim to blind allegiance to the American entrepreneur. . . . [S]mall businesses have achieved favored political status rivaled only by the Social Security program, the mortgage interest deduction, and schoolchildren."23

I have no problem revering the critical contributions to innovation, growth, and opportunities for prosperity in the United States made by individuals and small groups of entrepreneurs—from Benjamin Franklin and Thomas Jefferson forward—and believing our tax and other laws should provide ample and fair opportunities for creativity and ingenuity from the garage or basement to the major laboratory. However, I will not attempt herein to take sides in the debate as to the "optimum" level of encouragement through tax policy of small enterprise entrepreneurship.24 I will leave that to economists and other experts much more knowledgeable in macroeconomics. For the same reason I will not endeavor to quantify potential effects of tax provisions proposed by the candidates on the behavior of entrepreneurs. In view of the many difficult definitional questions noted above, as well as other challenges in collecting and interpreting data on a widespread scale, I will have to defer to the recent conclusion by prominent economists investigat-

21. See Bruce & Gurley-Calvez, supra note 10, at 69 (similarly identifying customary justifications for special tax breaks for small business but advocating additional study to better evaluate the strength of such arguments). See generally Wilson, supra note 7 (describing throughout arguments made by proponents of tax incentives for small business, but questioning the weight of such arguments and characterizing some of their underlying assumptions as myths).
22. See, e.g., Wilson, supra note 7, at 68-71.
23. Bruce & Gurley-Calvez, supra note 10, at 75.
24. See id. at 76 (citing a "lack of evidence on the socially optimal amount of entrepreneurship"); see also TAX POLICY AND SMALL BUSINESS, supra note 9, at 7 (Raising the question: "Is there a socially optimum amount of entrepreneurship in the economy?").
ing the effects of previous tax policies that "the existing body of research yields ambiguous results regarding likely entrepreneurial responses to tax policies."  

That said, what I will do below is describe various tax proposals made by Senators McCain and Obama that might, if enacted, significantly affect at least some aspects of entrepreneurship in the United States, explore some preliminary observations as to the propensity of those proposals to be good, bad, or neutral for different types of entrepreneurs, and offer a few suggestions on how the next president and Congress might improve certain areas of the Internal Revenue Code that have a rather direct impact on the ability of entrepreneurs to successfully exploit their ingenuity.

II. Mccain and Obama on Major Tax Revenue Generators

A. Federal Income Regular (Non-AMT) Tax Rates

As a consequence of the 2001 and 2003 tax cut legislation, the current regular federal income tax rates on the ordinary income of individuals, with applicability dependent on filing status and various brackets of income in a progressive rate structure, are 10%, 15%, 28%, 33%, and 35%. However, under sunset provisions in existing law, these rates are set to revert in 2011 to their prior levels of 15%, 36%, and 39.6%.  

The net capital gain of individuals (subject to certain exceptions) and their "qualified dividend income" are generally taxed at a 15% rate. With respect to federal corporate income tax, the basic progressive rate structure is currently 15%, 25%, 34%, and 35%, but with capped surtaxes at 3% and 5% for certain ranges of taxable income.

Senator McCain has proposed to repeal the sunset law and make permanent the pre-2011 individual ordinary income tax rates resulting from the 2001 and 2003 tax cuts, and to retain the general 15% rate on the capital gains and qualified dividends of individuals as well.  

In addition, he would reduce the maximum corporate in-

25. Bruce & Gurley-Calvez, supra note 10, at 76.


27. MccAIN ECONOMIC PLAN, supra note 12, at 6. On October 14, 2008, as part of his response to the financial crisis, Senator McCain proposed a two-year reduction of
come tax rate from 35% to 25%. Senator Obama has proposed to retain the 10%, 15%, 25%, and 28% ordinary income tax brackets for individuals with income at those levels, and generally apply the current rates on capital gains and dividends to those same individuals. As under the current law sunset scenario, the 36% and 39.6% rates would be reinstated for taxpayers in those brackets. According to an editorial by Obama economic advisors published in the Wall Street Journal on August 14, 2008, Obama proposes a 20% general tax rate on net capital gains and qualified dividends of married taxpayers with incomes over $250,000 ($200,000 for other taxpayers). He has proposed to eliminate "capital gains taxes on investments in small and start up firms" as discussed in Part III below. As for corporate income tax, while it appears that it would generally retain the existing rate structure, the Obama tax plan states that: "Barack Obama will repeal tax breaks and loopholes that reward corporations that retain their earnings overseas, and will use those savings to lower corporate tax rates for companies that expand or start operations in the United States."

Not surprisingly, the two campaigns have publicly sparred with each other about the main thrust of their tax plans, with substantial emphasis on the proposed tax rate structures summarized above. Senator McCain proclaimed: "Under Senator Obama’s tax plan, Americans of every background would see their taxes rise—seniors, parents, small-business owners, and just about everyone who has even a modest investment in the market." McCain campaign television ads that ran heavily during coverage of the Summer Olympic Games claimed that the Obama tax plan would impose "painful taxes," and asserted that "Obama’s new taxes could break your


30. See id. Senator Obama would also restore phase-outs of personal exemptions and itemized deductions for taxpayers at the $250,000 (married/joint) and $200,000 (others) adjusted gross income levels. Id.
family budget. A spokesman for the Obama campaign responded, in a statement echoed by Senator Obama himself in his acceptance speech at the Democratic National Convention, that: "Senator McCain will say or do anything to hide the truth: while Obama will cut taxes for the middle class, McCain will give a billion dollars in new tax breaks to America's eight largest corporations, while his plan provides no direct relief for more than 100 million American Families." Obama emphasized that under his tax plan only wealthy taxpayers would be seeing tax increases, as a consequence of his proposed reversal of the Bush tax cuts. His economic advisors argued:

Even as Barack Obama proposes fiscally responsible tax reform to strengthen our economy and restore the balance that has been lost in recent years, we hear the familiar protests and distortions from the guardians of the status quo.

The McCain plan would lead to deficits the likes of which we have never seen in this country. It would take money from the middle class and from future generations so that the wealthy can live better today.

Senator McCain did of course label Obama a tax raiser in his acceptance speech at the Republican National Convention, saying: "I will keep taxes low and cut them where I can. My opponent will raise them. . . . My tax cuts will create jobs; his tax increases will

35. See id.
36. For example, Senator Obama has been quoted as saying:
   I will raise CEO taxes. There is no doubt about it.
   
   If you are a CEO in this country, you will probably pay more taxes. They won't be prohibitively high. You're going to be paying roughly what you paid in the '90s, when CEOs were doing just fine.
   
   I want to eliminate the Bush tax cuts. And what I have said is, I will institute a middle-class tax cut. So, if you're making $75,000, if you're making $50,000 a year, you will see an extra $1,000 a year offsetting on your payroll tax.

37. Furman & Goolsbee, supra note 31.
eliminate them.\textsuperscript{38} Thus, the 2008 presidential campaign really has been something of a replay of 1984, when Ronald Reagan tagged Walter Mondale as a tax raiser, and Mondale tried (unsuccessfully) to explain that his intent to raise taxes was also meant to reach only the wealthiest. In fact, Mondale quipped about Reagan's early 1980s tax program: "What happened was, he gave each of his rich friends enough tax relief to buy a Rolls Royce—and then he asked your family to pay for the hub caps."\textsuperscript{39} Replay of the 1980s ideological differences on economic and tax policy between the major parties and candidates was also quite evident when, in his acceptance speech in Denver, Senator Obama said of Senator McCain: "[f]or over two decades, he's subscribed to that old, discredited Republican philosophy—give more and more to those with the most and hope that prosperity trickles down to everyone else."\textsuperscript{40}

Basic ideological differences regarding tax policy were ultimately brought center stage in the October 15, 2008, debate via "Joe the Plumber."\textsuperscript{41} On October 12th, in the course of a rather extended exchange at a campaign stop in Ohio, Senator Obama responded to a question by one Samuel Joseph Wurzelbacher, also known as "Joe the Plumber." Wurzelbacher suggested that he might be buying a plumbing business that makes more than $250,000 a year and wanted to know if Obama would raise his taxes.\textsuperscript{42} Obama answered, "I think when you spread the wealth around, it's good for everybody."\textsuperscript{43} While a more complete rundown of the October 12th exchange reveals quite a bit of reasoned explanation by Senator Obama regarding fairness and opportunity creation through a progressive tax system—\textsuperscript{44}—a system that of course, we have had in varying forms in the United States throughout the history of our income tax—\textsuperscript{45}—Senator McCain promptly seized on that particular sentence and used it in campaign speeches

\textsuperscript{39} Mondale Acceptance Speech, \textit{supra} note 1.
\textsuperscript{42} \textit{Id}.
\textsuperscript{43} \textit{Id}.
\textsuperscript{44} \textit{See id}.
and the October 15th debate. While portraying his own tax plan as an engine for economic growth, he described Senator Obama's as an unconscionable, confiscatory "redistribution of wealth."46

So, we have familiar big business versus small business, wealthy versus middle or lower financial class, flat tax versus progressive rates overtones in the two candidates' tax proposals and their characterizations of each other's tax plans. Predicting whether the differing tax rates policies of McCain and Obama are likely to help or hurt entrepreneurs may correspondingly necessitate addressing that question separately with respect to entrepreneurs of varying preexisting financial means and employment settings. Under the McCain approach to income tax rates, with its favorable treatment of dividend income and capital gains, certainly the wealthiest of American taxpayers would have more disposable income available to invest in business enterprises, and many large corporations would have less of a tax burden to deal with in pursuing their commercial activities. This could include increased access to venture capital for startups.47 Whether lowering the tax burden on wealthy individuals and corporations will spur growth that will in the long term better the economy and improve the business prospects for a wider net of entrepreneurs and innovators is debatable. While there is some evidence supporting that notion, there is also the distinct possibility that, when push comes to shove, lower taxes would not in reality foster corresponding spending cuts. The already large deficit would thus further balloon; interest rates would increase; and the economy overall would worsen. Moreover, because the lower taxes would result significantly from favorable treatment of dividends paid by publicly traded companies and capital gains, an increase in inefficient "tax sheltering" activity could

46. See William Beach et al., Heritage Found., The Obama and McCain Tax Plans: How Do They Compare? 11 (2008), http://www.heritage.org/Research/taxes/upload/CDA_08-09.pdf ("Senator McCain's Plan is substantially better at spurring economic growth than Senator Obama's. This is not surprising, since Senator McCain focuses on economic growth and job creation while Senator Obama focuses on the redistribution of income.").

47. Cf. Bruce & Curley-Galvez, supra note 10, at 88 (commenting on previous tax study group proposals to eliminate tax on domestic dividends and tax only twenty-five percent of capital gains on sales of U.S. stock). "This reduction in the taxation of capital income could feasibly result in a surge in the supply of venture capital for new firm formations, while simultaneously increasing the value of investment portfolios that might be used to privately fund new businesses." Id.
ensue, and small business and entrepreneurship might be particularly disadvantaged. 48

As for the Obama package on tax rates, which, along with several other aspects of his tax plan, targets relief at middle and lower income taxpayers, 49 there is some support for the conclusion that more individuals in those groups would be able to start, sustain, or invest in entrepreneurial ventures. 50 Whether the overall rates approach in the Obama plan would facilitate sustained growth of those enterprises, though, is open to question. In terms of corporate entrepreneurship, the higher corporate income tax rates would, by themselves, leave less after tax income for corporate entrepreneurial activity than under the McCain rates. However, other aspects of the Obama proposals discussed below might mitigate that effect for corporations engaging in significant research and development or taking steps to keep more of their workforce in the United States. As for the much higher rates (than under the McCain proposals) that Obama would impose on upper bracket individuals on ordinary income and capital gain generally, many would argue that those taxpayers will have less inclination to invest in risky technology or other entrepreneurial activities because the government's "cut" gives them less incentive to seek to make more profits. Perhaps—but the Obama rates are hardly as harsh as the rates in England that some forty years ago inspired Beatle George Harrison to have the "Taxman" proclaim: "Let me tell you how it will be, there's one for you, nineteen for me." 51 Again, economists can debate the averages and tendencies based on studies of years of tax returns and other indicators. I will just say that entrepreneurship and innovation are often based on new ideas and intriguing

48. See Burman et al., supra note 4, at 4, 20-21; Gale & Orszag, supra note 4, at 1167-86, 1192-1208; see also William J. Baumol, Robert E. Litan & Carl J. Schramm, Good Capitalism, Bad Capitalism, and the Economics of Growth and Prosperity 37 (2007) (referring to the role tax cuts have been "alleged to play" in stimulating growth in economic capacity and describing the role of tax cuts in that context as "controversial").

49. Apart from the major components and special provisions with more direct connections to entrepreneurship discussed herein, Senator Obama has also proposed such provisions aimed at lower bracket taxpayers as: a "Making Work Pay" refundable tax credit for wage earners and the self-employed; an up to $800 refundable credit for ten percent of mortgage interest paid by taxpayers who do not itemize deductions; liberalization of the earned income and child and dependent care tax credits; and an exemption from federal income tax for seniors earning certain types of income aggregating less than $50,000. Barack Obama's Comprehensive Tax Plan, supra note 32, at 2.

50. See Bruce & Curley-Galvez, supra note 10, at 85-86.

51. The Beatles, Taxman, on Revolver (Capitol Records 1966).
opportunities, and it seems likely that many entrepreneurs with good ideas and viable opportunities will persevere in seeking to commercialize their inventions and find backers willing to share resulting profits with the government at the rates Obama proposes.52

B. The Alternative Minimum Tax

Nobody seriously defends the current state of the Alternative Minimum Tax (AMT) on principle.53 It was questionable from its inception. Why complicate the federal tax system by forcing taxpayers to keep a second set of tax books to curb excessive use of preferences in the "regular" tax when placing limits on those preferences in the regular tax law would be a more direct approach? Combine that dubious beginning with miscalculations or neglect resulting in millions of taxpayers getting dragged into AMT liability merely by reason of personal exemptions and state and local taxes, and you have a widely publicized embarrassment. Yet, having grown accustomed to the revenues produced by this superfluous tax regime, Congress has been reluctant to jettison the whole thing, and instead has used "patches" to try to quell the public outcry as more and more unsuspecting taxpayers fall into its snare.54

Somewhat astonishingly, Senator McCain has included as part of his plan to address the AMT a proposed third federal income tax regime. In addition to increasing AMT exemptions and nonrefundable credits against the AMT for individuals, he would allow taxpayers to elect "an optional alternative tax system" in lieu of the AMT.55 This, of course, means that taxpayers would be pounding out three different computations before establishing their tax liability. The Tax Policy Center has properly criticized this unduly complex approach to the AMT problem and questioned the purported revenue-neutral effect it would have.56

52. Cf. Jeffrey M. Lipshaw, Why the Law of Entrepreneurship Barely Matters, 31 W. NEW ENG. L. REV. ___ (2009). In this piece, Lipshaw, a copanelist in the conference for which this Article has been written, offers thought-provoking observations regarding the mindset of entrepreneurs.

53. See Tax Topics—Topic 556 Alternative Minimum Tax, http://www.irs.gov/taxtopics/tc556.html (last visited May 15, 2009) ("The tax laws provide benefits for certain kinds of income and allow special deductions and credits for certain kinds of expenses. The alternative minimum tax (AMT) attempts to ensure that anyone who benefits from these tax advantages pays at least a minimum amount of tax.").

54. BURMAN ET AL., supra note 4, at 3.

55. Id. at 4.

56. See id.; see also CITIZENS FOR TAX JUSTICE, THE TAX PROPOSALS OF PRESIDENTIAL CANDIDATES JOHN MCCAIN AND BARACK OBAMA 8-9 (2008), available at
Senator Obama has also refrained from calling for repeal of the AMT. Instead, following a "fiscally responsible" approach to the AMT quagmire, it appears he would continue the "patch" approach of increasing exemptions to keep pace with inflation and allow taxpayers to claim personal tax credits to reduce their AMT liability.\textsuperscript{57} The "fiscally responsible" aspect presumably means he would like to do more, but the overall tax system cannot yet afford it.

Complexity in the tax system has been cited as a significant impediment for small business and entrepreneurship.\textsuperscript{58} Unfortunately, neither McCain nor Obama is proposing to take much of a step to ease the compliance burdens imposed by the invidious AMT. To predict which of the two candidates offers the best hope of eventually getting rid of the AMT problem may be tantamount to asking which of the two has the best prospects for getting the federal deficit under control so that the government could tolerate the loss of revenue inherent in reforming this second-set-of-taxbooks morass out of the Internal Revenue Code.

C. The Estate Tax

Both candidates have addressed the high-profile federal estate tax—or, as some like to call it, the "death tax."\textsuperscript{59} Of course it is not really a tax penalty for dying. It is a tax for having a substantial amount of wealth in your portfolio when you die, much of which may be in the form of appreciation in asset values that will escape income tax because of the § 1014 "step up" to fair market value on death.\textsuperscript{60} Under the McCain plan, the estate tax would have a $5 million exemption amount and a fifteen percent tax rate.\textsuperscript{61} Obama proposes a $3.5 million exemption amount and a forty-five percent rate.\textsuperscript{62}

\textsuperscript{57} See Burman et al., \textit{supra} note 4, at 13.

\textsuperscript{58} See, e.g., Wilson, \textit{supra} note 7, at 30. \textit{But cf.} Bruce & Curley-Galvez, \textit{supra} note 10, at 76 (acknowledging that reasoning, but also noting that complex provisions in the Internal Revenue Code often tend to lower tax burdens on entrepreneurs). Bruce and Curley-Galvez conclude that "[t]he net impact of complexity on entrepreneurial activity is therefore unknown." \textit{Id.}


\textsuperscript{60} See id. § 1014.

\textsuperscript{61} Burman et al., \textit{supra} note 4, at 10. Discrepancies in reported numbers—for example the report by Citizens for Tax Justice claiming that the exemption is $10 million—are due to the combined amount for a married couple. \textit{See} Citizens for Tax Justice, \textit{supra} note 56, at 13-15.

\textsuperscript{62} Burman et al., \textit{supra} note 4, at 14.
The Tax Policy Center has observed that the effects of the estate tax on working and saving are “ambiguous” and that “economists are sharply divided on how the estate tax affects economic behavior.”

So, it is difficult to make any meaningful prediction as to whether having the government take a smaller piece of transfer tax on the death of people with taxable estates is likely to significantly encourage or discourage entrepreneurial activity. About all that can be said with confidence is that under the McCain proposal a smaller number of wealthy Americans would have to deal with the estate tax than under the Obama proposal, and the associated tax bite would be much less. Some of those wealthy taxpayers might see a smaller “death tax” as leaving more room to invest in emerging and sometimes risky ideas and businesses. Others may conclude that they will have less need to seek to accumulate additional wealth by engaging in risky but potentially lucrative ventures. Under both the McCain and Obama plans, the vast majority of Americans would not face the estate tax at all, though many might aspire to engage in entrepreneurial endeavors that would result in wealth accumulation and make the estate tax more of a factor in their subsequent investment decisions.

D. Broadening the Tax Base by Eliminating Subsidies, Closing Loopholes, and Addressing Noncompliance

Both major party candidates have proposed closing some loopholes and abuses and thereby extending the reach of the federal income tax. McCain would repeal the domestic production activities deduction and eliminate several tax subsidies for oil companies, and he purports to have other plans to broaden the corporate tax base. Senator Obama would similarly seek to close loopholes for oil and gas companies, but, in addition, he would subject such companies to a windfall profits tax. In the area of partnership taxation, he would take up the recent focus on “carried interests” and tax them as ordinary income, and he would treat as corporations for tax purposes publicly traded financial partnerships that currently qualify for an exception to such treatment under § 7704. The Obama proposals also include tightening up the § 162(m) limitation on the deduction of compensation of executives by publicly traded

63. Id. at 20, 27.
64. See id. at 11.
65. See Burman et al., supra note 4, at 11, 16; Obama Economic Plan, supra note 14.
corporations. Other Obama base-broadening measures include monitoring and possibly imposing sanctions against countries that do not share tax information returns with the United States, eliminating deductions for U.S. companies that move jobs overseas (while providing tax credits to businesses keeping jobs in the United States), requiring information reporting regarding basis in capital assets, and codifying the "economic substance" doctrine.

On the whole, it would appear that such base-broadening measures would generate some net benefits to entrepreneurship in the United States, especially with respect to small businesses, though it would be extremely difficult to attempt any meaningful projection of the magnitude of that beneficial effect. The Obama "carried interest" proposal, however, might be counterproductive to at least some entrepreneurial endeavors. It seems likely to artificially overstate the compensatory element of arrangements in which a service provider receives a percentage interest in the profits of an entity classified as a partnership for tax purposes that is higher than such service provider's percentage interest in capital contributed to the entity. While the carried interest debate may have at its core legitimate concern about abuses in very large financial partnerships where the compensatory element may arguably be understated, many small startup businesses may need the flexibility of rewarding with a "profits interest" those creative and hardworking individuals who lack significant capital at the outset of the venture. If the entity's profits include some capital gain, it is not necessarily fair to say that one hundred percent of the disproportionate profits interest of the service provider is the product of his labor. Taxing it as if it were may be unduly harsh, as compared to taxing as ordinary compensation income only the portion that in fact is "reasonable compensation," even if that may sometimes be difficult to determine.

III. Some Tax Proposals with Direct Connections to Entrepreneurship and Innovation

A. Incentives for Research and Development

Senator McCain has proposed a permanent "research and experimentation" credit at a rate of ten percent of wages spent on research and development (R&D). Senator Obama advocates
making permanent the prior R&D credit (twenty percent of qualificying R&D expenditures over a base amount of expenditures).\textsuperscript{70} Both candidates appreciate the need for competitive technology and both R&D credit proposals are supportive of innovation. At this juncture it does not appear that the net results in terms of tax revenue loss from the two varying approaches to extension of the credit would be particularly significant.

B. Incentives for Investment in Small and Emerging Businesses

The McCain campaign website lists as tax-related support for small and emerging businesses the McCain proposals on income tax rates and the estate tax, the above-described R&D credit, and proposals to allow first-year expensing of equipment and technology.\textsuperscript{71} The Obama plan features as tax incentives directed at small business and innovation its R&D credit proposal, elimination of capital gains taxes relating to startup companies and small businesses, providing tax credits to workers, and reducing the burden of the "double tax" aspect of payroll taxes imposed on the self-employed.\textsuperscript{72}

It is possible that an increase in "full expensing" along the lines of the McCain proposal could promote new investment in equipment and technology, though it might just influence the timing rather than the overall amount of such investments.\textsuperscript{73} As for the Obama proposals, the tax credit to workers is rather modest, but the special treatment of capital gains relating to startup companies and small businesses and possible reduction in payroll taxes on the self-employed could have significant positive effects on entrepreneurial activity. However, a meaningful assessment of likely effects is impossible without more detail.

C. Subsidies for Health Insurance

Given the unconscionable reality that some forty-five million individuals in the United States are currently uninsured,\textsuperscript{74} providing

\textsuperscript{70} Barack Obama's Comprehensive Tax Plan, supra note 32, at 4; Burman et al., supra note 4, at 26.

\textsuperscript{71} See McCain Economic Plan, supra note 12, at 6-7.

\textsuperscript{72} See Obama Economic Plan, supra note 14.

\textsuperscript{73} This subject is a matter of ongoing study. See Bruce & Curley-Galvez, supra note 10, at 87.

opportunities for all Americans to obtain affordable health insurance is a stated goal of both candidates. They are also aware that this is a traditionally sticky issue for small business and one on which they would have to expect strong protest on any proposal to mandate employer contributions.\textsuperscript{75}

McCain advocates a competitive and patient-choice system of portable health insurance coverage, including as a key component of his plan a direct refundable annual tax credit of $2500 for individuals and $5000 for families (with any amounts saved by purchasing less expensive health insurance eligible for deposit into personal “Health Savings Accounts”).\textsuperscript{76} The McCain “credit” would replace the current exclusion from taxable gross income for employer-paid premiums from employee income. Obama proposes a national system modeled on the health care plan available to members of Congress.\textsuperscript{77} His plan includes, among other things, guaranteed eligibility, subsidies for groups in need of financial assistance, and the creation of a “National Health Insurance Exchange” to act as a watchdog over quality and efficiency standards for private insurance plans. Under the Obama plan, employers who do not otherwise make meaningful contributions to the cost of health insurance coverage for their employees would be required to make a percentage of payroll contribution to the national program. Small businesses, however, would be exempt from that mandatory contribution and would receive a tax credit (ranging up to fifty percent of premiums paid) to reduce small business healthcare costs.\textsuperscript{78}

An article published in the \textit{New England Journal of Medicine} comparing the two plans suggests that neither is close to a perfect solution, but that the Obama plan seems more likely to increase access, albeit with significant potential flaws, including issues of controlling costs. The article questions, however, whether the Obama campaign’s assumption that the elimination of Bush tax

\textsuperscript{75} For a detailed exposition of the strength of the opposition of small business to previous plans that mandated employer contribution components, see Wilson, \textit{supra} note 7.

\textsuperscript{76} \textsc{Burman et al.}, \textit{supra} note 4, at 50; \textsc{McCain Economic Plan}, \textit{supra} note 12, at 12.

\textsuperscript{77} \textsc{Burman et al.}, \textit{supra} note 4, at 52-53.

\textsuperscript{78} \textit{See id.} at 16.
cuts for families making over $250,000 a year is valid. Fittingly, the author concludes that:

The McCain and Obama health plans are best viewed as sketches rather than finished portraits, with many important details yet to be revealed. Still, the 2008 presidential election clearly offers voters dramatically different alternatives. The candidates’ opposing visions of health care reform reflect fundamentally different assumptions about the virtues and vices of markets and government. With the debate over how to reform U.S. health care far from settled, whoever wins the presidency can expect fierce opposition to any attempt at comprehensive reform.

D. Some Other Proposals of Note

There are many other components of the McCain and Obama tax plans that can, of course, have some affect on the ability or propensity of various types of taxpayers to start, continue, or grow entrepreneurial ventures. I’ll note just a couple of those. Senator McCain, for example, proposes to facilitate innovation by banning internet taxes and new cell phone taxes, but at this juncture little is known as to how exactly this would play out, especially when the interests of various states in laying claim to a right to impose such taxes are fully considered. Senator Obama advocates creation of new incentives for first-time farmers and a new “American Opportunity Tax Credit” that would provide qualifying individuals who pledge to perform one hundred hours of community service upon completion of their education with assistance with tuition and other educational expenses. In addition, in October, as part of his suggested responses to the financial crisis, Senator Obama proposed to spur job creation by giving employers a $3000 tax credit for each new employee hired during 2009 or 2010. Each of these measures

80. Id. at 781-84.
81. MCCAIN ECONOMIC PLAN, supra note 12, at 13.
82. BURMAN ET AL., supra note 4, at 14, 16; see also BARACK OBAMA’S COMPREHENSIVE TAX PLAN, supra note 32, at 2.
83. See Jackie Calmes & Jeff Zeleney, Obama Details Plans to Aid Victims of Fiscal Crisis, N.Y. TIMES, Oct. 14, 2008, at A1. Obama’s other notable tax change proposals include allowing penalty-free early withdrawals of up to fifteen percent (but not exceeding $10,000) from IRAs and 401(k)s and eliminating income tax on unemployment benefits. Id. Senator McCain announced a package of tax proposals the following day that included a two-year suspension of taxes on unemployment benefits; applying the lowest (ten percent) income tax rate to up to $50,000 of withdrawals from tax-preferred retirement accounts for 2008 and 2009; waiving forced liquidations/with-
could obviously aid entrepreneurs or aspiring entrepreneurs in varying segments of the U.S. economy.

IV. A FEW OTHER PROVISIONS THAT THE NEXT PRESIDENT AND CONGRESS MIGHT ADDRESS

A. Eliminate Undue Influence of Type of Entity on Payroll Taxes

The determination of whether a business owner who works at his business is subject to employment taxes has become unduly driven by the type-of-state-law business organization through which the business is conducted. Rules regarding "general" versus "limited" partners have become anachronistic as state statutes have been amended to allow limited partners to take a quite active role in the limited partnership's business without becoming personally liable for the entity's obligations.\(^{84}\) Conversely, not all partners in a general or limited liability partnership are providing significant services for the partnership, nor are all members of a limited liability company—whether member managed or manager managed—doing so. The Social Security and Medicare taxes were meant to be applied to labor-based earnings.\(^{85}\) A substantial amount of choice-of-entity anxiety and planning time and effort is spent on ways to reduce payroll taxes—such as, for example, electing Subchapter S status and then paying owner-employees what are perceived to be the lowest defensible salaries.

It would both simplify the payroll tax system and promote equity to make the determination of the payroll tax base a matter in which type-of-state-law business organization is a neutral factor, and the issue is simply applying those taxes to earnings that are truly compensation for services, regardless of entity form. It is true that this means having to deal with "reasonable compensation" inquiries to separate compensatory accretions to wealth for the taxpayer's own services from other profits, but that is nothing new.

drawals of IRAs and 401(k)s at age 70.5; increasing the amount of capital losses that can offset ordinary income from $3000 to $15,000 for 2008 and 2009; and reducing the long-term capital gains rate to 7.5% for 2009 and 2010. See John McCain's Pension and Family Security Plan—Standard Newswire, http://www.standardnewswire.com/index.php?module=releases&task=view&releaseID=3477 (last visited May 15, 2009); see also supra note 27.

84. See, e.g., UNIF. LTD. P'SHIP ACT § 303, 6A U.L.A. 418 (2008) ("A limited partner is not personally liable ... for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.").

There is ample, and not particularly complex, tax law to guide that inquiry, which, by the way, also seems to me to be the theoretically correct approach to resolving the "carried interest" debate as well.\footnote{For more information on carried interests, see Howard E. Abrams, Taxation of Carried Interests, Tax Notes, July 16, 2007, http://www.carriedinterest.org (follow "Taxation of Carried Interests" hyperlink).} Given the widespread recognition that small businesses in particular suffer from compliance costs in dealing with complexities of the tax law, simplification of the payroll tax system through elimination of special rules turning on entity form may be a worthwhile pursuit.

B. Eliminate Subchapter S

Given the close association between the S corporation and small business it might sound awfully radical to suggest that the next president and Congress explore the possibility of eliminating Subchapter S from the Internal Revenue Code. However, I am certainly not the first to suggest that the S corporation tax classification may have outlived its usefulness and that its continuation perpetuates unnecessary complexity in the Internal Revenue Code.\footnote{See, e.g., Walter D. Schwidetzky, Is It Time to Give the S Corporation a Proper Burial?, 15 Va. Tax Rev. 591 (1996).} Having spent a substantial amount of time in practice and in teaching on choice-of-entity analysis, I am increasingly convinced that closely held businesses could do quite nicely if the tax classification choices were C corporation or partnership for business entities with two or more owners, and C corporation or "disregarded entity" for one-owner business entities.\footnote{Treas. Reg. § 301.7701-3(a) (2008) (providing elective classification rules for entities not mandated to have "corporation" status for federal tax purposes).} In this regard, I would also advocate amending the Code so that even entities formed as state law corporations would have this choice (perhaps conditioned on having one hundred or fewer owners and/or an absence of public trading of ownership interests).

Many tax advisors recommend S corporation status to the owners of small startup companies either because of the payroll tax advantages that I have argued should be eliminated by changing to a type-of-entity-neutral approach, or because they are familiar with how S corporations work and are intimidated by the long-standing reputation of partnership tax as exceedingly complex.\footnote{See, e.g., Schwidetzky, supra note 87, at 596-611 (discussing the tax advantages and disadvantages of S corporations and partnerships).} Although
other considerations, such as planning ahead for tax-deferred reorganizations with other corporations, sometimes come into play, payroll tax planning and habit seem to be at the forefront of S corporation recommendations. Yet, focusing on entities with two or more owners in particular, partnership tax classification has many areas of potential superiority over S corporation taxation. These include a much more principled system of dealing with built-in gains and losses on property contributed by owners or revalued in connection with ownership restructuring; mechanisms to keep outside basis and inside basis in sync; more pure "pass through" effects through the allocation of the entity's liabilities among the owners and inclusion of their respective shares in their bases in their ownership interests; the ability to have multiple classes of distribution rights (often a useful tool in non-abusive business deals among the owners); user-friendly opportunities for tax-deferred contributions and distributions of property to facilitate business formations and business divorces; and fewer constraints, and thus a decreased need for detailed rules, on who can be owners.

Repealing Subchapter S would, of course, necessitate the development of transition rules and perhaps a mechanism to allow qualifying corporations to have a window of opportunity to elect to convert to partnership tax status (or disregarded entity status for one-owner corporations) in a tax-deferred manner. On balance, though, there might be significant gains in substantive complexity, as well as in administration and enforcement costs.

C. Less Generous Settlement Offers for Large Abusive Tax Shelters

It sometimes appears that underreporting by individuals or small businesses is riskier than major tax abuse by large corporations. The potential for expensive and protracted litigation in huge corporate tax shelter schemes challenged by the government, coupled with the large immediate influx of revenue available upon resolution of such controversies, have recently pushed the IRS to coordinated settlement offers. These enable taxpayers to avoid penalties and even keep some portion of the desired tax benefits that the Service concluded were not legitimate. Such is the case, for example, with the summer 2008 LILO/SILO settlement offer that came after the Service prevailed in several litigated cases. An-

90. See, e.g., BB&T Corp. v. United States, 523 F.3d 461 (4th Cir. 2008); AWG Leasing Trust v. United States, 2008 WL 2230744 (N.D. Ohio 2008). For a brief discus-
nounced as "not universal," the offer was extended by invitation letter to approximately forty-five major corporations. The offer provides that if certain conditions are satisfied, the taxpayer can essentially keep twenty percent of the tax benefits it sought and, moreover, pay no underreporting penalties.91 We do not see similarly generous settlement offers for individuals who miscalculate their earned income credit or small businesses that claim more deductions than they should. I was taught that two wrongs do not make a right. So, I am not proposing that the next president and Congress mandate settlement offers with tax penalty amnesty and partial allowance of questionable tax benefits for all taxpayers. Instead, I am suggesting that they look into curtailing those types of settlements for the big abusers who seem to be getting them in a "safety in big numbers" way that may encourage large taxpayers to think "why not take a shot at this?" Entrepreneurs of more modest means and less aggressive tax strategies certainly must see a double standard in these settlement offers to pursuers of megashelters.

D. Clarify IRC Section 761(f) for Husband and Wife Businesses

Even a clear effort to simplify tax reporting can get complicated. Tax legislation in 2007 added a Code provision to spare spouses filing joint returns the chore of preparing, or incurring the cost of having a tax professional prepare, a partnership tax return for "qualified joint ventures" where husband and wife are the only owners of a business they both actively carry on, provided they report their shares of the business's income on Schedule Cs. The IRS has unfortunately interpreted section 761(f) to be unavailable where the spouses own and operate the business in the "name of a state law entity (including a general or limited partnership or limited liability company)."92

The Service's conclusion that "state law entities" are ineligible for 761(f) relief lacks clear support on the face of the statute or in its legislative history. Moreover, it seems odd given that one would think a business venture that is co-owned and managed by a hus-

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band and wife and carried on for profit is likely a "general partnership" for state law purposes. This leads one to wonder how any, or at least any significant number, of arrangements meeting the 761(f) "qualified joint venture" definition could avoid the IRS's purported exclusion of "general partnerships" from eligibility to make a 761(f) election. Moreover, before a husband-wife co-ownership would have to worry about being a partnership for federal income tax purposes, it would presumably have to be an "entity" under tax classification regulations that, while saying that issue is a matter of federal tax law, as a practical matter necessitates weighing the same types of factors as are involved in determining when there is a "partnership" for state law purposes. The narrow reading of section 761(f) that is posted on the IRS website is arguably so narrow as to render the provision meaningless. It seems an unnecessary restriction of a legislative simplification measure that was designed to give some reporting burden relief to husband-wife businesses without any loss of tax revenue. While certainly not a big ticket item, many marital unit entrepreneurs would surely appreciate the IRS or Congress taking another look at the letter and spirit of section 761(f).

CONCLUSION

There are certainly many aspects of both the McCain and Obama tax plans that have potential to contribute positively to the common goal of stimulating an increase in entrepreneurial activity in the United States. These include many proposals that might, in conjunction with elements of the two candidates' economic proposals (apart from tax provisions) significantly encourage both small business and much larger organizations to pursue experimentation and innovation and to develop socially beneficial new technologies. It is virtually impossible to conclude which of the two tax plans would offer the largest "net" stimulus to U.S. entrepreneurship. As with most efforts to update and improve the Internal Revenue Code in recent decades, the tax plans really do have "a little of this, a little of that." I do think it is fair to observe that the McCain tax plan puts more emphasis on the assumption that lowering the tax burden on wealthy individuals and corporations will "trickle down" to entrepreneurs or would-be entrepreneurs in lower tax brackets.

94. I.R.C. § 761(f).
The Obama tax plan focuses on reducing the tax burden for taxpayers in the middle and lower classes of the financial spectrum, which might provide many individuals in those brackets with greater opportunities to start or sustain their own entrepreneurial ventures or to invest in those of others. On balance, the Obama plan seems, at least at first blush, somewhat more friendly to small business than the McCain plan.

Of course, as I am writing this for discussion at a conference that will occur approximately three weeks before Election Day 2008, variables include what happens to the economy in the short term, what Congress will look like, and how details of many of the tax proposals only generally described by the candidates in their campaigns will be filled in. Thus, the best I can truthfully do on the question of which of the two tax plans would be best for entrepreneurship in the United States is to cite a third and final saying of my college baseball coach, who frequently reminded us that the thing about baseball—a game that legendary Baltimore Orioles manager Earl Weaver liked to emphasize is played without a clock—is that "you never know" what is ultimately going to happen.