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Thank you for inviting me to appear before this distinguished body to testify concerning possible alternatives to the current federal transfer taxes. I am testifying on my own behalf and do not speak for any other person, organization, or entity. My extensive writings in this area are noted in an Appendix at the end. A somewhat more formal comparison of (1) the accessions tax, (2) the income-inclusion approach, and (3) the deemed-realization-at-gift-or-bequest approach is found in Appendix A to the Task Force Report on Federal Transfer Taxes (item 2 of the Articles listed in the Appendix), of which I am a co-author. (However, my comments today differ in a few respects from the analysis in the Task Force Report.) More detailed discussions of the topics covered by this testimony are found in items 4, 5, and 16 of the Articles listed in the Appendix. (For some of my views on reforming the current system, see items 9 and 13 of the Articles listed in the Appendix.)

A. Possible Alternatives to the Current Transfer Taxes

There are five possible alternatives to the current estate, gift, and generation-skipping system:

(1) classic inheritance tax

(2) accessions tax

(3) income-inclusion approach

(4) deemed-realization-at-gift-or-bequest approach, and

(5) carryover-basis approach.

What these approaches have in common is the imposition of tax (sooner or later) by reason of a gratuitous transfer. The first two (inheritance tax and accessions tax) are transfer taxes. A transfer tax is a separate tax from the income tax, and a transfer tax can operate as a "second" tax on previously-taxed income of the transferor. The last two (deemed-realization and carryover-basis approaches) are designed to overturn the current rule, found in § 1014, that eliminates unrealized gains of a decedent permanently from the income tax. The motivation of either proposal is to eliminate an existing hole in the income tax. Since transfer taxes can exist simultaneously with an income tax, it is possible to combine either (1) or (2) above (or an estate tax) with either of (4) or (5).

Alternative (3) is more of a “fusion” approach: it imposes a tax on the gratuitous transfer itself (like a transfer tax) but “within” the income tax. Alternative (3) entails taxing a (non-charitable) gratuitous transfer to the transferee by including the transfer in the annual income tax base, without deduction by the transferor. Since the value of the transfer is taxed in full to the transferee, the transferor’s basis is irrelevant, and becomes an obsolete datum of tax history. Hence alternative (3) could not be comprehensively combined with alternatives (4) and (5), both of which play off of the transferor’s income tax basis.

A general theme of my testimony is that each “system” has an internal logic of its own, and caution should be used in transplanting features of one system into another system.

B. Inheritance Taxes and Carryover Basis Should Be Taken Off the Table

Alternatives (1) and (5) should be rejected. An inheritance tax is basically like an estate and gift tax, but with a more complicated rate and exemption structure. An inheritance tax distorts bequest choices by creating tax incentives in favor of certain classes of legatees. An inheritance tax also creates an incentive for the dispersion of wealth among legatees, but such an incentive isn’t especially needed in contemporary American legal practice and culture, which has generally abandoned primogeniture. Finally, it is hard to integrate a gift tax with an inheritance tax.

A carryover-basis rule under the income tax suffers from the following defects: (1) it attributes gain that accrued to one party to another party, (2) it creates inequities among legatees receiving equal-value bequests, (3) it requires keeping basis data for excessively long periods of time, (4) it is procedurally awkward in positing a basis-determination date that is different from the taxable event (realization by the legatee), and (5) it has, in its 1976 and 2010 incarnations, already proven to be so complex as to be unworkable.

C. Mitigating Valuation Problems

Alternatives (2), (3), and (4) share a common advantage over the current transfer tax system, which requires all relevant facts (including values) to be determined as of the date of transfer (usually, the decedent’s death). Valuation is a costly and fact-specific exercise that is best avoided where feasible. All of alternatives (2), (3), and (4) would involve valuation at the time of gratuitous transfer as a general rule, but allow for deferral of the taxable event (or even exclusion) in appropriate circumstances. For example, under the deemed-realization approach, the general rule would be that a gratuitous transfer of property would produce realized gain to the decedent (or donor) in an amount equal to the difference between the asset’s basis and its fair market value at the time of transfer. However, a transfer to one’s spouse would not be a realization event, and the transferor spouse's basis would carry over to the transferee spouse, which is an extension of current § 1041 of the income tax. Similarly, gain with respect to a principal personal residence could be covered by the exclusionary rule of current § 121.

In all three systems, difficult valuation problems (as with closely-held business interests) could be postponed, though "tailored" deferred-realization rules, as are common under the income tax.

D. Transfer Tax Features Do Not Necessarily "Transfer" to the Income Tax

None of alternatives (3), (4), and (5), which are all located within the income tax, should incorporate transfer tax features unless there is a compelling reason to do so. These approaches all have internal-to-income-tax rationales. In contrast, the transfer taxes, with high rates and large exemptions, serve the external-to-tax purpose of curbing undue accumulations of wealth. Hence, there should be no "minimum" stepped-up basis within the income tax designed to serve as an income-tax proxy for a lifetime transfer tax exemption. Similarly, it should not be simply assumed that an unlimited marital exemption is warranted. In terms of system design, each alternative should be approached with a view to internal consistency with the aims, norms, and principles that govern that system.

E. Comparing the Accessions Tax with the Income-Inclusion Approach

I wish now to focus on the income-inclusion approach, with particular attention to comparing it with an accessions tax. These two approaches might appear to be virtually identical, except for the rate and exemption structure, but it turns out that there could be significant differences.

1. The value of a transferee-oriented approach

Instead of the current transfer taxes, which can be perceived as a penalty on a decedent's success in the market economy, a transferee-oriented tax is can be sold as a tax on "unearned windfalls" of transferees. Furthermore, a tax that bears explicitly on transferees can be perceived as compatible with the goal of equality of opportunity.

Although carry-over basis is a transferee-oriented approach, it operates erratically and capriciously in terms of trying to achieve any non-tax goals, because the built-in gain bears no systematic correlation with the value of what is received. The deemed-realization approach is not transferee-oriented at all. The inheritance tax only considers the mostly-irrelevant factor of closeness of relationship. That leaves the income-inclusion and accessions-tax approaches, which both explicitly impose taxes on transferees.

Under a transferee approach, the amount subject to tax is net of transaction costs, such as debts, funeral costs, administration expenses, and costs of obtaining gratuitous receipts. Since the tax is imposed on the transferee with respect to the net amount received, the transferee tax is not itself subtracted from the tax base. In this respect, all gratuitous receipts are treated equally, whether in the form of gifts or otherwise.

2. Rate and exemption structure

The main difference between the accessions tax and the income-inclusion approach is the rate and exemption structure. An accessions tax would look like the present system because there would be a cumulative lifetime tax base consisting only of gratuitous receipts, a substantial lifetime exemption, and a potentially high rate on accessions above the exemption. These features are appropriate to carry out the principal purpose of such a tax, namely, to curb undue accumulations of unearned wealth by a given individual. The accessions tax is conceived of separately from the income tax, which is a tax on the acquisition of wealth by whatever means, with an aim to generate substantial revenue without undue economic distortion. The income tax is an annual tax that, ideally, does not discriminate according to source or use. The annual "exclusion" under an income tax is basically a set of allowances that eliminate subsistence income from the tax base. Under the income-inclusion approach, gratuitous receipts of low-income persons would be shielded from tax by these subsistence allowances.

3. The exclusion for support and its penumbra

Under both the accessions tax and the income tax, support received in kind is inherently excluded on the ground that it is not a true wealth transfer. Support in-kind basically involves one person spending money in a way that benefits another. Even support in cash can be excluded on the theory that its purpose is consumption spending of the donee, rather than one aimed to effectuate a true wealth transfer.

If support is excluded, both the accessions tax and the income-inclusion approach would be required to draw the line between support (which is not taxed) and gratuitous receipts (which would be taxed). This problem already exists under the existing gift tax, and it is probably fair to say that the annual gift tax exclusion is best rationalized as a mechanism for managing this difficult borderline area. The fact that the exclusion is an annual one (and on a per-donee basis) has the effect of expanding the category of support. This same general approach could be adopted for both the accessions tax and the income tax.

The annual exclusion concept should nevertheless be re-designed to conform to the transferee orientation of the accessions tax and the income-inclusion approach. For starters, there should be a single fixed-amount annual exclusion of a transferee for all includible gratuitous receipts during the year from all *living* transferors. Perhaps only transfers from persons who plausibly owe a support obligation to the transferee should be eligible. The exclusion should be designed to exclude donor-financed donee consumption (within reason) from being a taxable gratuitous receipt.

4. Gratuitous accessions are income under a personal income tax

The rationale of the income inclusion approach is that gratuitous receipts really are "income" under a personal income tax. The exclusion of current law is an historical anachronism based on trust accounting rules and the concept that income is distinct from "original endowment." But there are different concepts of income that serves different purposes, both tax and non-tax. For example, there's "national income" (GDP). A VAT of a certain type would be a tax on national income. Transfers are ignored under a tax on national income. In contrast, a tax on *personal* income is a tax on an individual's net accessions to wealth "from whatever source derived." (If that phrase sounds familiar, it is because it is found both in the 16th Amendment to the Constitution and the § 61(a) definition of catch-all income.) If § 102(a) were repealed, gratuitous receipts would then become non-excluded gross income.

A personal income tax is founded on the concept of the ability to pay of an individual taxpayer relative to that of others. Gratuitous receipts constitute an increase in the recipient's ability-to-pay tax base to the same extent as wages, lottery winnings, or any other accession to wealth. There is no reason why a gratuitous transfer should bear a lighter tax than wages paid for a personal service (such as a home repair): in both cases, the transferee has income and the transferor has a non-deductible expense.

Including gratuitous receipts in income, which is an annual tax, implies that there are no lifetime exclusions or special rates. However, as with the existing income tax, there *could* be special rates (as with net capital gains) or an income-averaging rule (or maximum rate) to mitigate the "bunching effect." Similarly, some kind of lifetime exclusion *could* be incorporated into the system, although such a feature would be inconsistent with the nature of an income tax. A lifetime exemption would require the keeping of records over time, and this would be the only feature of an income-inclusion approach that would create a new record-keeping obligation. (In contrast, an annual exclusion – conceived as a way of defining "support" – is not inconsistent with an income tax.)

An accessions tax, being keyed to a cumulative lifetime tax base (and lifetime exemption) mandates the long-term record-keeping obligations.

An income-inclusion approach without a large cumulative lifetime exclusion has the potential (even with an annual exclusion) to raise a lot more tax revenue than the existing system, even though the highest income tax rates are lower than the highest estate tax rates. The incremental revenue yield could be used to lower rates generally, or for any other purpose.

5. Deferred-realization rules

As mentioned earlier, deferred realization rules are common in the income tax, and can be deployed specially in the income-inclusion scheme for gratuitous-receipts. Likely candidates for deferred realization are non-liquid assets, hard-to-value assets, and tax-favored assets. Assets that are likely to depreciate in value should not be eligible for any deferred-realization rule.

Deferred realization allows avoidance of valuation until the asset is disposed of in a market transaction or ceases to meet any applicable "qualified use" requirement.

An asset that has not yet been included in income would have a zero basis. An asset that has been included in income takes a basis equal to the amount included.

Even where deferred realization is not allowed, modest valuation errors would be tolerable, because the erroneous amount included, memorialized as the asset's new basis, is automatically "corrected" upon subsequent realization. This correction does not occur under an accessions tax, where the value at the time of the accession is fixed.

The income-inclusion system has the big advantage of wiping out the "historical" basis of the asset in the hands of the transferor.

An accessions tax could also have deferral rules, but they would presumably not be modeled on the realization principle of the income tax, but would instead be confined to tax-favored assets and transactions, such as bequests of interests in closely-held business. Since an accessions tax is a transfer tax, valuation thereunder (whenever it occurs) is "final," as under the current estate tax.

The operation of an accessions tax produces no necessary consequences under an income tax, which is a separate tax. For example, it would be hard to justify a step-up in basis of an asset that is "subject to" the accessions tax but avoids tax on account of the lifetime exemption. Indeed, a basis step-up for a taxed accession would undermine the very purpose of the accessions tax: the accessions tax would be partially offset by a reduction in the future income tax of the same person.

6. Hybrid transfers

A problem under the current system is the necessary reliance on actuarial tables to value future interests. A related problem is created by the need to design timing rules for "hybrid" (retained-interest-or-power) inter vivos transfers. Actuarial tables are not only inaccurate in individual cases, but can be "gamed" by such devices as GRATs and private annuities.

Hindsight is better than estimates and guesses. Under both the accessions tax and income-inclusion system, the taxable event is generally the receiving of an outright transfer or (as will be explained below) of a trust distribution. The gratuitous receipt of a present or future interest in property (or the vesting of any such interest) would generally not be considered to be an accession or income-realization event. There is no norm that commands that tax law must slavishly follow property law all of the time. The income tax has never been burdened by property-law concepts.

7. Life insurance

The receipt of life insurance proceeds would be taxable as a gratuitous receipt regardless of who held the incidents of ownership and regardless of the owner's income tax basis in the policy. If the beneficiary was also the owner, the receipt of the proceeds would result in investment gain or loss, as opposed to being gratuitous-receipt income.

The same analysis would apply under the accessions tax.

8. Spousal transfers

A major design issue is that of inter-spousal transfers. Inter-spousal *gifts* would be ignored (exempted) under both approaches, but death-triggered transfers might be viewed differently. Since inter vivos inter-spousal transfers would be ignored, transfers *to* either spouse from any third party should be attributed 50-50 to each spouse.

Under an accessions tax, each spouse would be considered a separate taxpayer, because the purpose of the accessions tax is to curb undue concentrations of unearned wealth. Thus, a person should not be allowed to accumulate twice as much unearned wealth simply by reason of having been married, or three times as much unearned wealth by reason of having been married twice. Likewise, a widow or widower should not be favored relative, say, to a person who receives accessions from two ancestors. It follows that there should not, in principle, be an unlimited inter-spousal exclusion over and above the lifetime exemption, because it is the lifetime exemption that is supposed to operate as the baseline for ascertaining what is an "undue" accumulation of unearned wealth by a given individual.

Wealth acquired by earnings avoids the accessions tax. Stated differently, asserting control over one's own wealth is not an accession. A common legal and cultural norm is to view marriage as a kind of economic partnership. Accordingly, it is not unreasonable to stipulate that accessions from the deceased spouse, not to exceed half of the value of the deceased spouse's estate (or half of the combined estates), are really "earned" wealth that is already equitably owned by the surviving spouse (and not really an accession at all). Most current estate plans involving the wealthy do not give the surviving spouse fee ownership of the entire marital estate, but rather create interests in individuals other than the surviving spouse. If this pattern continues under an accessions tax, it is unlikely that the limitation on the marital exclusion will be exceeded. Moreover, the surviving spouse still has her own lifetime exclusion. Thus, it is quite unlikely that the surviving spouse will receive accessions from the decedent that exceed both the marital exclusion and the surviving spouse's own exclusion. Accessions by third parties from the deceased spouse will be scattered among such persons' separate accessions tax bases and lifetime exclusions. Even if the surviving spouse actually pays accessions tax, there is no necessary estate planning disaster, because the surviving spouse can control both the timing and the existence of accessions tax at the next generation, because the surviving spouse would be able to control the disposition of virtually everything that appears in her accessions tax base.

Under the accessions tax, there would be no terminable interest rule to impede qualification for the spousal exclusion, since the accession occurs upon the actual receipt of money or property, not upon the acquisition of a future interest.

Under the income tax, a married couple is treated as a single taxable unit for many purposes, one of which is that inter vivos inter-spousal transfers are ignored, and another of which is that there is a common basis in spousal assets, regardless of the form of ownership or the mode of disposition. This income tax taxable unit can be treated as continuing beyond the death of the first spouse to the extent that the surviving spouse ends up with the marital estate. It follows that amounts that were previously subject to income tax prior to, or during, marriage would not be taxed again to the surviving spouse simply by reason of the death of the deceased spouse, and unrealized gains and losses would continue in their unrealized state. Thus, the survivor should, in principle, (1) obtain an exemption for all cash received from the deceased spouse, (2) obtain sole ownership of marital assets in kind without a deemed-realization event, and (3) inherit the couple's common basis (without adjustments). These results are wholly consistent with current § 1041. Again, there would be no qualification rules.

9. Treatment of trusts and beneficiaries

The accessions tax and income-inclusion approaches differ slightly in the case of trusts. The accessions tax is potentially simpler: the trust is not a taxpayer under the accessions tax, and distributions (whether out of income or corpus) are accessions of the distributees in full. This approach allows for deferral, but deferral is revenue neutral (assuming a flat rate with no exemptions) if the tax base increases at a rate no less than the discount rate. If anything, the tax-avoidance concern would be with attempts to accelerate accessions (say, by a sale of a remainder interest) at a time when the value of such interest is low relative to its likely future yield.

If deferral is deemed to be a problem, a more complicated approach – that might be suitable for large trusts - would be to impose a withholding tax on the trust when receiving the funding gift or bequest. Thereafter, a distribution of income or corpus would be a taxable accession to the distributee, but the distributee would receive a (refundable) credit, without interest, against accessions tax for her appropriate share of the earlier withholding tax.

Under the income tax, a trust is currently treated as a taxpayer. Therefore, the receipt by the trust of funding gifts and bequests would be treated as current income of the trust. Otherwise, a gratuitous transfer to a trust would be treated more favorably than an equivalent transfer to an individual. Whatever deferred-realization rules that are available to individuals would be available to trusts as well. Thereafter the rules of Subchapter J would operate as they do at present to allocate post-transfer income and gains of the trust to the beneficiaries or the trust. (The trust would not itself be viewed as if it were a donor. That is, distributions would be deductible by the trust to the extent included by distributees. In the absence of a distribution deduction, trust transfers would be treated worse than transfers to individuals.)

10. The effect of powers

Under the current system, possession of a general power of appointment results in a person being treated as the owner of property and the income therefrom. If this concept were carried over to the accessions tax and an income-inclusion system, it would result in taxing the same gratuitous receipt to two taxpayers: the holder of the power would be deemed to have received the distribution, and then the actual distributee would be deemed to receive a gift from the holder of the general power. This result seems unnecessarily harsh. At the same time, general powers should not be allowed to be used as artificial devices to attribute gratuitous receipts from a high bracket distributee to a low bracket power holder. Accordingly, general powers of appointment should be ignored under both the accessions tax and the income-inclusion system, and the receipt should be attributed only to the person who actually receives it.

A related issue is that of grantor trusts. Under the accessions tax, the grantor trust rules would attribute income to the grantor, but any distribution to a person other than the grantor would be an includible accession. This result would somewhat inhibit the use of "defective grantor trusts."

Under the income-inclusion approach, the grantor-trust rules, unless modified, would result in double taxation of distributions to third parties: the income would be taxed to the donor, and the distributee would include the distribution as a gift from the donor. One option is to allow this result to occur in all cases in which the trust or its income is deemed to be owned by the grantor under current law, in which case the distributee might (or might not) avoid tax (in whole or in part) under the annual exclusion. Apart from the annual exclusion, it cannot be the case under an income-inclusion system that a distribution is wholly excluded by a distributee simply because the income represented by the distribution is taxed to the grantor. To avoid such a back-handed generic (as opposed to annual) gift exclusion, the remaining option would be to limit the double taxation result only to revocable trusts, provided that the creation of any irrevocable trust would result in an income inclusion by the trust, followed by application of the Subchapter J rules (rather than grantor-trust rules).

F. Conclusion

The foregoing is an overview of the obvious issues. Other issues would need to be worked out.

The general conclusion is that income-inclusion system and the accessions tax are superior to the other alternatives as possible replacements for the current transfer taxes. (If Congress decides that no "replacement" is desirable, it should at least eliminate the hole in the income tax created by § 1014.) Both the accessions tax and the income-inclusion system offer numerous advantages relative to the existing system. The income tax alternative seems better than the accessions tax by being able to raise the most revenue with the least administrative effort and minimal changes in existing law.

In any event, any replacement system should be constructed from the ground up, as opposed to being a grafting of existing transfer tax features onto some new, but barely visible, root stock.

APPENDIX – Writings of Joseph M. Dodge on the Federal Transfer Taxes and Alternatives Thereto

I. Articles (in reverse chronological order)

1. *Debunking the Basis Myth under the Income Tax* (with Jay Soled, Rutgers University), 81 Ind. L. J. 539 (2006) (61 pp.)

2. *Alternatives to the Current Federal Wealth Transfer Tax System* (with Joseph Kartiganer and Sherwin Kamin), *published as* Appendix A to Task Force on Federal Wealth Transfer Taxes, Report on Reform of Federal Wealth Transfer Taxes, 58 The Tax Lawyer 93, 279-312 (2004).

3. *Inflated Tax Basis and the Quarter-Trillion Dollar Revenue Question*, 106 Tax Notes 453 (Jan. 24, 2005) (with Jay Soled), reported in (*inter alia*) David Cay Johnson, "Overstating of Assets Is Seen To Cost U.S. Billions of Dollars," New York Times (Jan. 24, 2005), p. C-2, and Albert B. Crenshaw, "First, Go After The Tax Cheats," The Washington Post (Sunday, Jan. 30, 2005), p. F-1.

4. *Comparing a Reformed Estate Tax with an Accessions Tax and an Income-Inclusion System, and Abandoning the Generation-Skipping Tax*, 56 S.M.U. Law Rev. 551 (2003) (49pp)

5. *Why a Deemed-Realization Rule for Gratuitous Transfers Is Superior to Carryover Basis and Avoids Most of the Problems of the Present Estate and Gift Tax*, 54 Tax L. Rev. 421 (2001) (132pp)

6. *What's Wrong with Carryover Basis, Especially the Carryover Basis Provisions of H.R. 8*, 91 Tax Notes 961 (May 7, 2001)

7. *Simplifying Models for the Income Taxation of Trusts and Estates*, 14 Am. J. Tax Policy 127 (1997) (127pp), and *A Pass-Through Replacement to Subchapter J - Putting It in Perspective*, 14 Am. J. Tax Policy 267 (1997) (14 pp)

8. *Lifting the Shroud over Estate of Hubert: The Logic of the Income and Estate Tax Treatment of Estate Administration Expenses*, 3 Fla. Tax Rev. 647 (1998) (30pp), and *How the Treasury Should Solve the Estate of Hubert Problem*, 78 Tax Notes 1715 (March 30, 1998)

9. *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N. Car. L. Rev. 1729 (1998) (30pp).

10. *Taxation of Gratuitous Transfers under a Consumption Tax*, 51 Tax Law Rev. 529 (1996) (70pp)

11. *Further Thoughts on Realizing Gains and Losses at Death*, 47 Vand. L. Rev. 1827 (1994) (34pp), *excerpts reprinted in* P. Caron et al., Federal Wealth Transfer Tax Anthology 373-80 (1997).

12. *Rethinking Section 2036(c)*, 49 Tax Notes 199 (Oct. 8, 1990) (12pp)

13. *Redoing the Federal Estate and Gift Taxes Along Easy-to-Value Lines*, 43 Tax Law Review 241 (1988) (151pp), *excerpts reprinted in* P. Caron et al., Federal Wealth Transfer Tax Anthology 192-96, 246-47, 284-88, and 373-80 (1997).

14. *The Taxation of Wealth and Wealth Transfers: Where Do We Go After ERTA?*, 34 Rutgers L. Rev. 738 (1982) (38pp)

15. *Retentions, Receipts, Transfers, and Accumulations of Income and Income Rights: Thoughts on the Post-Byrum Role of Federal Estate Tax Sections 2036, 2037, 2039, and 2043*, 58 Texas L. Rev. l (1979) (89pp)

16. *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 Harv. L. Rev. 1177 (1978) (34pp), excerpts reprinted in P. Oliver and F. Peel, Jr., Tax Policy Readings and Materials 428-435 (1976)

17. *Generation-Skipping Transfers After the Tax Reform Act of 1976*, 125 U. Pa. L. Rev. 1265 (1977) (43pp), *reprinted in* April, 1978, Monthly Digest of Tax Arts., p. 16

18. *Substantial Ownership and Substance vs. Form: Proposals for Unification of Federal Estate and Gift Taxes and for Taxation of Generation-Skipping Transfers*, 1976 U. Ill. L. F. 657 (1976) (60pp)

II. Monographs and Casebooks

1. Transfers with Retained Interests and Powers, 50-5th T.M. (1986) (revised edition 1992) (Tax Management Portfolio), and Transfers Taking Effect at Death, 256 T.M. (1972) (predecessor Tax Management Portfolio)

2. Wills, Trusts, And Estate Planning (1988) (West)

3. Federal Taxation Of Estates, Trusts, And Gifts (1981) (West), with Teacher's Manual (1981), and Supplement (1982)