LEAVING IT UP TO TREASURY: CONGRESSIONAL ABDICATION ON MAJOR POLICY ISSUES IN THE EARLY YEARS OF THE INCOME TAX

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I
INTRODUCTION: TWO APPROACHES TO THE MANAGEMENT OF TAX LAW DETAIL

Should Congress enact income tax provisions "as specific, detailed, and inclusive as possible,"[1] leaving few significant issues to be resolved by the Treasury Department in its income tax regulations? Or would it be better for Congress to enact a concise income tax statute—one featuring "generalized provisions which would furnish the basic structure for the income tax"—and rely on Treasury "to amplify the statute through Regulations with details to whatever depth is determined to be necessary for effective operation of the statute"?[2] At least since World War II, Congress has opted for a "specific, detailed, and inclusive as possible" Internal Revenue Code.[3]

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1. William L. Cary, *Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for a Moratorium and Reappraisal*, 60 COLUM. L. REV. 259, 259–60 (1960) (describing, but expressing disapproval of, the highly detailed approach).

2. Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS. 673, 703 (1969) (recommending "a gradual shift from a highly detailed statute to more generalized provisions").

3. Cary, *supra* note 1, at 259. Although commentators differ on the merits of the detailed approach, there is wide agreement—as a matter of description—that Congress has favored that approach. *See, e.g.*, Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 MIAMI L. REV. 1, 10 (1974) ("I want to go on to argue that the Code has far too many detailed provisions . . . ."); Walter J. Blum, *Simplification of the Federal Income Tax Law*, 10 TAX. L. REV. 239, 241 (1954) ("A rather common complaint is that the existing statutory law has become unduly heavy and uneven, with a disproportionate amount of space allotted to relatively unimportant matters."); Cary, *supra* note 1, at 261 ("As the Rococo succeeding the Baroque, [the 1954 Code] not only embraces, but carries to an extreme, the philosophy of elaboration and specificity."); Louis Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 478 (1945) ("The remarkably ingenuous income tax of 1913, containing but fourteen subsections, has gradually grown to the Herculean proportions of almost two hundred sections."); Bradford L. Ferguson et al., *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES—THE TAX MAG. 804, 806 (1989) ("One can deplore—and we emphatically do—the movement toward ever-increasing statutory detail."); Surrey, *supra* note 2, at

Commentators have differed, however, as to whether Congress has made the right choice. Writing in 1945, Louis Eisenstein defended "a highly articulated [Code] section [as] frequently the most appropriate means of importing as much predictability as possible into the tax system[,]" adding that "[b]revity may well be the worse evil."[4] On the other hand, over the decades a number of observers have made the normative case for Congress leaving to Treasury more of the development of tax details. Writing in 1960, William Cary argued,

> Increasingly involved in technical revision, Congress has had little time for considering matters of policy—the only responsibility it should even contemplate assuming. It is performing the role formerly left to the Internal Revenue Service, the Treasury, and the courts, and at the same time has no thorough understanding of what it is enacting.[5]

Nine years later, Stanley Surrey asked, "Which agency of government—the legislature, the administrators, the courts, or the tax advisors—is to develop the detail [of income tax law]?"[6] Answering his own question, he asserted that the Treasury Department "is in reality the agency best suited to provide the needed effective control over tax detail," and proposed "a gradual shift from a highly detailed statute to more generalized provisions which would furnish the basic structure for the income tax."[7] In the late 1980s, Stephanie Willbanks argued that, among other "significant advantages," legislative delegation to Treasury of responsibility for tax detail would enable Congress "to focus on the basic policy choices inherent in the Code" and to avoid "obscur[ing] such choices . . . in the details."[8]

The proponents of reform may be right. Before signing on to their agenda, however, it may be instructive to review the nation's experience—in the early years of the modern federal income tax—with a short and general income tax statute, and with congressional reliance on Treasury to resolve a number of basic questions of income tax design. As Eisenstein noted in his 1945 essay, the federal income tax was not always the complex, highly articulated statute that it is today: "The remarkably ingenuous income tax of 1913, containing but fourteen subsections, has gradually grown to the Herculean proportions of almost two hundred sections."[9]

The brevity of the 1913 income tax statute was not due to a legislative misapprehension that all the details required for a functional income tax regime could be expressed in a mere fifteen pages of the Statutes at Large.[10] Cordell Hull (D., Tenn.), the young member of the House Ways and Means Committee

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696 ("Undoubtedly our Code provisions, especially those since 1954, are following this involved, intricate pattern."); Stephanie J. Willbanks, *Simplifying the Internal Revenue Code Through Reallocation of Decisionmaking Responsibility*, 6 AM. J. TAX POL'Y, 257, 258 (1987) ("With few exceptions, Code sections have become lengthier and more complex and their language more impenetrable.").

4. Eisenstein, *supra* note 3, at 483.
5. Cary, *supra* note 1, at 260.
6. Surrey, *supra* note 2, at 702.
7. *Id.* at 703.
8. Willbanks, *supra* note 3, at 291.
9. Eisenstein, *supra* note 3, at 478.
10. *See* Revenue Act of 1913, Pub. L. No. 63-16, § II, 38 Stat. 114, 166–81 (1913).

who single-handedly prepared the first draft of the 1913 income tax statute, explained that he had chosen to draft a concise income tax bill in the expectation that Treasury would later fill in the details. "Instead of comprising 100 or more pages," Hull remarked, "this measure briefly but [sic] succinctly prescribes each essential rule . . . and leaves to be embraced in the regulations to be prescribed by the Secretary of the Treasury the manner and details of carrying out the provisions of the law."[11]

This article explains how, in the case of six basic issues of income-tax design, early income tax statutes failed to resolve the issues, thus requiring Treasury to decide what Congress had not. The issues, in the order discussed in this article, are: (1) the taxability—or not—of capital gains; (2) the deductibility—or not—of capital losses; (3) the transferee's basis in appreciated property received by gift or bequest; (4) the amount of the deduction in the case of a charitable contribution of appreciated property; (5) the taxability—or not—of the rental value of owner-occupied housing; and (6) whether the base of the income tax was to be tax-exclusive or tax-inclusive.

Treasury's track record on these issues was decidedly mixed. Treasury's resolutions of two of the six issues (the third and fourth) were simply wrong—violations basic income tax logic. Moreover, those two taxpayer-favorable errors have survived in the income tax to this day. Although Treasury was not flatly wrong on any of the other four issues, it made some highly questionable decisions even apart from the two clear errors.

The primary goal of this article is to shed some light on the interplay between Congress and Treasury in the development of the early modern income tax, by demonstrating that several of the important features of the early income tax—some of which remain in the federal income tax of the twenty-first century—were not, as one might easily suppose, the results of congressional decisions.[12] Rather, they were the results of decisions made by Treasury in the aftermath of congressional failure to address important issues.

The next six parts of this article describe the early development of the income tax in each of the six areas mentioned in the preceding paragraphs.

11. 50 CONG. REC. 499, 505 (1913).

12. For an example of an erroneous assumption of this sort by an otherwise very well-informed observer, see Gerard M. Brannon, *Tax Loopholes as Original Sin: Lessons from Tax History*, 31 VILL. L. REV. 1763, 1767 (1986). Brannon states that "Congress made the erroneous decision not to tax imputed rent," failing to note that (as explained *infra* text accompanying notes 85–102), in reality, Congress simply ignored the issue and Treasury made the decision.

II

THE TAXATION—OR NOT—OF CAPITAL GAINS

As of 1913, the practice in the income taxes of most other countries—including the especially influential income tax of the United Kingdom—was not to tax capital gains.[13] However, the language of the Ways and Means Committee's revenue bill, as drafted by Cordell Hull, was broad enough to include capital gains in the base of the income tax. The bill provided that a person's net income included (among other things) "gains, profits, and income derived from . . . sales or dealings in property, whether real or personal."[14]

Given the tension between the language of the bill and the practice of other countries of not taxing capital gains, several Congressmen asked Hull for clarification when he presented the income tax provisions of the bill to the House. In fact, the second question put to Hull, by James Robert Mann (R., Ill.), concerned the taxability of a profit realized on the sale of investment real estate.[15] Although Hull never answered that question—he said at the time he would get to it later, but he never did—he later responded to a similar hypothetical, posed by John Jacob Rogers (R., Mass.), involving stock:

> Mr. ROGERS. . . . Suppose the gentlemen or myself or anybody should invest in 100 shares of one security and in 100 shares of another security and one goes up and the other goes down. Under the act, unquestionably, other things being sufficiently high, he has to pay an income tax on the fortunate security.
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> Mr. HULL. Yes; if he is simply making a casual investment of that kind now and then, or here and there, I think he would report his gains for taxable purposes . . . .[16]

Thus, Hull indicated—albeit with surprising diffidence for the principal drafter of the bill on so fundamental a question—that capital gains were to be subject to the new tax; it is even possible to understand him as claiming that gain on publicly-traded stock is taxable on a mark-to-market basis if the taxpayer has not sold the asset, given that Rogers' question described the security as having gone up in value and did not describe the taxpayer as having sold the security.

A bit later, however, in response to another question from Mann, Hull suggested a very different rule: "[I]f a man bought some property, it may have been 10 years ago, for $10,000 and sells it for $20,000 now, he would return [i.e., report as income] the average annual increase for one year, which would be $1,000, as a part of his annual profits for this year."[17] In contrast with Hull's earlier

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13. The United Kingdom did not introduce a general tax on capital gains in its income tax until 1965. *See* HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 146 (3d ed. 2010). For an excellent survey of the state of thinking in the early twentieth century—among both tax experts and politicians in the United States and around the world—on the income tax treatment of capital gains, see Marjorie E. Kornhauser, *The Origins of Capital Gains Taxation: What's Law Got to Do with It?*, 39 SW. L.J. 869 (1985). Kornhauser also describes, in fascinating detail, the post-1913 controversies in the United States over the income taxation of capital gains, which were not put to rest until 1921.

14. H.R. REP. NO. 63-5, at 393 (1913).

15. *See* 50 CONG. REC. 499, 506 (1913).

16. *Id.* at 513.

17. *Id.*

reply to Rogers, this suggested that there was no mark-to-market taxation of unrealized appreciation, although it is possible that Hull was thinking of real estate ("property") in his response to Mann, and that he envisioned a mark-to-market regime for marketable securities coexisting with realization-based taxation of real estate investment gains.

In addition to the confusion over the timing of taxation, Hull's answer to Mann suggested—rather bizarrely—that even upon realization, the only gain subject to tax would be the portion of the taxpayer's total gain allocated to the year of sale; apparently $9,000 of the $10,000 gain in Hull's hypothetical would never be taxed.

But this, too, was not to be Hull's last word on the subject. Mann tried again:

> Mr. MANN. . . . Suppose a man bought property many years ago which probably last year was worth as much as it is this year. He sells it this year. What are his profits? How does he arrive at what his profits are?
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> Mr. HULL. My judgment would be that as to an occasional purchase of real estate not by a dealer or one making the buying and selling a business this bill would only apply to profits on sales where the land was purchased and sold during the same year.
>
> Mr. MANN. I hope that statement will remain in the RECORD.[18]

That was the end of the capital gains discussion for that day. But on a later day of the House debate, James Washington Logue (D., Penn.) reported the results of conversations he had had with several members of the Ways and Means Committee:

> I have addressed myself to some of the members of the committee and asked whether it was contemplated . . . to tax the increment of a property sold during the year, although bought years ago. To illustrate, if a property was bought 30 years ago at $10,000 and it sells to-day at $100,000, is a tax . . . to be levied on the difference in value between what the property was worth 30 years ago and what it was sold at to-day? The answer to that question was that it is.[19]

Logue thought taxing his hypothetical taxpayer on a gain of $90,000 was a terrible result, and urged that the bill be amended to clearly state "that increment of real estate of many years is not the subject of taxation as profit of a particular year."[20] Although Hull was present (he spoke later, on the same page of the *Record*, on a different topic), neither he nor any other member of Ways and Means responded to Logue. What Logue reported he was told by several Ways and Means members flatly contradicted Hull's explanation to Mann on an earlier day of the House debate, but neither Hull nor anyone else pointed that out to Logue. Hull's silence in the face of Logue's representation of what he had been told by Committee members could reasonably be interpreted as his abandonment of the same-year limitation he had espoused in his reply to Mann.

It is conventional wisdom among scholars of the legislative process that the managers of a bill may purposely create ambiguity concerning the meaning of a controversial provision, if resolving the ambiguity—in either direction—would

18. *Id.*
19. 50 CONG. REC. 1182, 1262 (1913).
20. *Id.*

imperil passage of the bill. Drafters of legislation can intentionally "obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish."[21] If legislators on both sides of an issue optimistically anticipate that the relevant agency will issue regulations resolving the ambiguity as the legislators would prefer, the ambiguous bill may attract a legislative majority when a clearly drafted bill would not.[22]

Might Hull have intentionally produced confusion on the capital gains question in the hope that legislators on both sides of the issue would support ambiguous legislation? Almost certainly not. With pro-income tax Democratic majorities in both the House and the Senate, a pro-income tax Woodrow Wilson in the White House, and with the Sixteenth Amendment (authorizing an unapportioned federal income tax) having been ratified by the requisite three-quarters of the states in early February of 1913,[23] the momentum for the inclusion of an income tax in the revenue bill appeared unstoppable. The revenue bill passed the House in May by a lopsided vote of 281 to 139.[24] The September vote in the Senate was considerably closer—44 to 37, a margin two votes wider than the Democrats' Senate majority[25]—but there is no indication that the votes of any senators depended on the bill's treatment of capital gains. The Conference Committee's reconciliation of the House and Senate revenue bills passed the House by a vote of 254 to 103,[26] and the Senate by a vote of 36 to 17.[27] Again, there is no indication that any votes on the final version of the bill turned on the capital gains question. None of this is surprising, given (1) that in revenue terms the income tax was only a minor feature of the overall revenue bill, with the tariff

21. ABNER J. MIKVA & ERIK LANE, LEGISLATIVE PROCESS 779–80 (1997), *quoted in* Joseph A. Grundfest & A. C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 628 (2002).

22. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 666 (1992) ("Congress has adopted . . . the strategy of passing increasingly broad and amorphous enabling legislation that delegates controversial matters to administrative agencies."); Victoria Nourse & Jane S. Schachter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 596 (2002) (reporting results of the authors' interviews with staff members of the Senate Judiciary Committee; staffers explained that they used "deliberate ambiguity" in legislative drafting by "produc[ing] a willful lack of clarity . . . in the absence of consensus on a particular point in a bill"); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 432 (2002) ("Scholars of all stripes have long recognized that delegation to agencies is one way legislators 'solve' some of the choice problems inherent in the legislative process . . . . Slender majorities of both houses of Congress may favor legislation aimed at a new policy goal, but different subsets of those slender majorities may oppose some of the particulars in each potential approach to achieving that goal.").

23. *See Income Tax Ratified by Delaware's Vote: Similar Action by Wyoming and New Mexico Gives Two Over the Majority Needed*, N.Y. TIMES, Feb. 4, 1913, at 5.

24. *Pass Tariff Bill by 281 to 139: House Vote Viewed as a Mandate to Senate Not to Change Measure*, N.Y. TIMES, May 9, 1913, at 1.

25. *Senate Passes Tariff, 44 to 37: La Follette and Poindexter Vote For the Bill, Louisiana Democrats Against It*, N.Y. TIMES, Sept. 10, 1913, at 1.

26. *Tariff Bill Passes House, 254 to 103: Amendments to Cotton Future Tax May Force New Conference, Delaying Senate Action*, N.Y. TIMES, Oct. 1, 1913, at 1.

27. *Tariff Bill Passed; May Sign Today: Vote in the Senate 36 to 17 on the Adoption of the Conference Report*, N.Y. TIMES, Oct. 3, 1913, at 1.

of much greater revenue significance, and (2) that the taxation or non-taxation of capital gains was itself a minor issue within the income tax, compared with the taxation of labor income, business income, and income streams (such as interest and dividends) from investments.

In all likelihood, the Revenue Act of 1913 and its legislative history were unclear on the capital gains question because Cordell Hull was confused, not because he strategically employed ambiguity to enhance the legislative prospects of the income tax. With one highly speculative possible exception discussed in Part IV (concerning the rental value of owner-occupied housing), it is also unlikely that any of the other ambiguous provisions described in this article were instances of deliberate ambiguity adopted for strategic reasons. Rather, as Gerard Brannon has written, this and the other ambiguities were simply the products of "sloppy thinking about defining income at a time when it was the subject of only a minor tax."[28] Sloppy thinking was to be expected, Brannon explained, given that the "crucial background work had not been done, staff work was negligible and the political payoff was . . . not in conceptual elegance."[29]

Following the enactment of the income tax, the fate of capital gains taxation was in the hands of the Treasury Department. In writing the first income tax regulations following the enactment of the tax, Treasury paid no attention to Hull's suggestion of a same-year limitation, and provided that gains realized on sales of investment assets were taxable in full.[30] As Marjorie Kornhauser documents in her definitive article on the early history of capital gains taxation, from 1914 onward Treasury consistently interpreted the statutory definition of income as including capital gains, although Treasury did not get around to promulgating a clear regulatory statement of that interpretation until 1919.[31] Taxpayers challenged Treasury's interpretation, but in 1921 the Supreme Court upheld Treasury's position against a taxpayer challenge.[32]

The bottom line is that capital gains were included in the base of the early modern income tax not because Congress so decreed in 1913, but because Treasury interpreted a highly ambiguous statute as applying to capital gains. Treasury adopted this interpretation despite the presence in the *Congressional Record* of claims by the principal drafter of the income tax statute that it did not reach capital gains.

28. Brannon, *supra* note 12, at 1766.

29. *Id.* at 1765.

30. *See* T.D. 2090, 16 Treas. Dec. Int. Rev. 259, 267 (1914) (donee of investment asset taxed on gain upon a sale for more than the date-of-gift value of the asset); *id.* at 272–73 (gain taxed upon the sale of investment real estate).

31. *See* T.D. 2831, 21 Treas. Dec. Int. Rev. 170, 176 (1919); Kornhauser, *supra* note 13, at 875.

32. *See* Merchants' Loan & Tr. Co. v. Smietanka, 255 U.S. 509, 522 (1921).

III
THE DEDUCTIBILITY—OR NOT—OF CAPITAL LOSSES

If the 1913 Act was frustratingly vague as to the taxability of capital gains, it was frustratingly silent as to capital losses. Nothing in the Act even vaguely addressed the tax treatment of capital losses; all allowable deductions were expressed in a single paragraph of the Act, and nothing in the paragraph applied to non-business investment losses.[33] Because the Act provided that the definition of net income was "subject only to such exemptions and deductions as are hereinafter allowed,"[34] the implication of the failure to mention capital losses in the deductions paragraph was that capital losses were not deductible, whether or not capital gains were taxable.

And yet, in a rather astonishing colloquy on the House floor, Cordell Hull indicated that capital losses were "probably" deductible, at least against capital gains. The colloquy began with John Jacob Rogers (R., Mass.) expressing concern that, under his reading of the bill, it taxed capital gains but allowed no deduction for capital losses—not even as an offset to capital gains:

> If I understand the provision of paragraph B . . . correctly, it defines that income as including gains, profits, and incomes, among other things, from sales and dealings in property. Now suppose a man should buy 100 shares in one company and 100 shares in another company, and at the end of the fiscal year he should find one of that block had gone up 20 points and the other had gone down 20 points, do I understand he would have to pay on the profit he had made without receiving any benefit on the loss he had sustained?[35]

Hull first complained—amazingly enough—that it was unreasonable of Rogers to expect him to be able to answer a question on so esoteric a point: "Of course it is impossible to take up all the different and countless illustrations that any gentleman might suggest and dispose of them in short order."[36] When pressed by Rogers, however, Hull offered:

> [I]f he is simply making a casual investment of that kind now and then, or here and there, I think he would report his gains for taxable purposes, and probably would be allowed for his loss. It would not be a trade loss, but set off against the particular gain from the other stock transaction.[37]

Hull's response was remarkable both for its indication that he had never thought about the issue and was making it up on the spot, and for the absence of any indication of where in the language of the bill he found support for his "probably" conclusion.

When faced with the task of interpreting the new income tax legislation, Treasury had to choose between Hull's suggestion that capital losses were "probably" deductible against capital gains, and the contrary indication from the statutory language. In late January of 1914, as taxpayers were beginning to prepare their income tax returns for 1913, the *Wall Street Journal* reported that

33. *See* Revenue Act of 1913, Pub. L. No. 63-16, § II, 38 Stat. 114, 167 (1913).
34. *Id.*
35. 50 CONG. REC. 499, 513 (1913).
36. *Id.*
37. *Id.*

the informal word from Treasury was that investment losses could be deducted against investment gains.[38] By mid-year, however, Treasury had changed its mind. In a Decision issued in July of 1914, Treasury declared,

> Losses sustained by individuals or corporations from the sale of or dealings in personal or real property growing out of ownership or use of or an interest in such property will not be deductible at all unless they are an incident of, connected with, and grow out of the *business* of the individual or corporation sustaining the loss. . . .[39]

In reporting (somewhat belatedly) on the new ruling, the *Wall Street Journal* noted that deductions for investment losses had been allowed by Treasury on income tax returns for 1913.[40]

In sharpest contrast with the capital gains saga, however, Treasury's decision to permit no deductions for investment losses was soon relegated to the dustbin of history. In 1916, Congress provided for the deduction of investment losses against investment gains, but not against other types of income.[41] During the ensuing quarter century, Congress experimented with a variety of rules for the deductibility of capital losses, including, from 1921 to 1924, a bizarrely generous rule allowing unlimited deductibility of net capital losses against ordinary income taxed at high marginal rates, despite the fact that capital gains were taxed at a special low rate of 12.5%.[42] The Revenue Act of 1924 continued the deductibility of net capital losses against ordinary income, but eliminated the taxpayer-favorable rate asymmetry by providing that the tax savings from a net capital loss could not exceed 12.5% of the amount of the loss.[43] Only in 1942 did Congress finally settle on—and stick with—a treatment of capital losses resembling that of current law; the Revenue Act of 1942 permitted the deduction of a net capital loss against only $1,000 of ordinary income, and provided for a five-year carryforward of disallowed losses.[44]

IV

THE TRANSFEROR'S BASIS IN GRATUITOUSLY TRANSFERRED PROPERTY

If a taxpayer dies owning appreciated property, the appreciation permanently escapes income taxation. The taxpayer's death does not trigger taxation of the appreciation, and under Internal Revenue Code section 1014 the taxpayer's

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38. *See Net Income the Guide as to Personal Returns: Each Individual Must Determine for Himself Whether it is Necessary for Him to File Statement*, WALL ST. J., Jan. 30, 1914, at 2 ("Another puzzle . . . is how a speculator shall make return on his transactions . . . . The Treasury Department interpretation of the law is that it does not contemplate the consideration of each particular transaction as it arises, but the business of the year as a whole, taking into account only the net difference between the profits and the losses.").

39. T.D. 2005, 16 Treas. Dec. Int. Rev. 111, 111–12 (1914) (emphasis in original).

40. *New Income Tax Ruling: Order That No Deduction be Made for Depreciation in Stocks and Bonds*, WALL ST. J., Oct. 19, 1914, at 5.

41. *See* Revenue Act of 1916, Pub. L. No. 64-271, § 5(a), 39 Stat. 756, 759 (1916).

42. *See* Revenue Act of 1921, Pub. L. No. 67-98, § 206(b), 42 Stat. 227, 233 (1921) (12.5% maximum capital gains rate); *id.* § 214(a)(5) (deductibility of capital losses).

43. *See* Revenue Act of 1924, Pub. L. No. 68-176, § 208(c), 43 Stat. 253, 263 (1924).

44. *See* Revenue Act of 1942, Pub. L. No. 77-753, § 150, 56 Stat. 798, 843 (1942).

death increases the property's basis to its death-date value.[45] For many decades, the tax-free step-up in basis at death has been the *bête noire* of numerous tax policy experts. The great Stanley Surrey, for example, in 1976 described it as the "most serious defect in our federal income tax structure today."[46] And yet it persists.

Although the provision originated as a conceptual error at the dawn of the modern income tax, the mistake was not, strictly speaking, on the part of Congress. By now it will come as no surprise that Congress failed to address the issue in the 1913 income tax statute, and that Treasury stepped into the breach with regulations. Unfortunately, Treasury's regulations got it wrong.

In its original 1913 form, the income tax statute provided that the base of the tax included "the income from but not the value of property acquired by gift, bequest, devise, or descent."[47] In the case of a gift or bequest of appreciated stock, for example, two things were clear from the 1913 statute: that the transferee was not required to include in his income the value of the stock in the year in which he received it, and that the transferee was taxable in the years in which he received any post-transfer dividends on the stock. The statute did not, however, specify how a transferee was to calculate his gain or loss upon an eventual sale of the stock. Was his basis in the stock its value at the time of the gift or bequest, a carryover basis from the transferor, or something else?

In 1914 Treasury issued a ruling explaining that, if property acquired by gift was "subsequently sold at a price greater than the appraised value at the time the property was acquired by gift, the gain in value is held to be income and subject to tax under the provisions of the Federal income-tax law."[48] By 1918, there was a companion ruling providing that "[t]he appraised value at the time of the death of a testator is the basis for determining gain or profit upon sale subsequent to the death."[49]

In hindsight, it is impossible not to wonder how the drafters of the regulations and the rulings could have been—to be blunt—so foolish as to allow the avoidance of tax on capital gains by the simple expedient of transferring appreciated assets to family members in anticipation of sale, rather than simply selling the assets oneself. Given that the statutory language did not compel this result, why did Treasury give away nearly the entirety of the taxation of capital gains? One possible explanation is simple mistake. Errors—including some major ones—were inevitable in a project to develop, as quickly as possible, regulations and rulings covering the entirety of a new tax unfamiliar to the regulators.

45. *See* I.R.C. § 1014(a)(1) (2012).

46. *Hearings and Panel Discussions before the House Comm. on Ways and Means on the General Subject of Federal Estate and Gift Taxes*, 94th Cong. 499 (1976).

47. Revenue Act of 1913, Pub. L. No. 63-16, § II, 38 Stat. 114, 167 (1913).

48. T.D. 2090, 16 Treas. Dec. Int. Rev. 259, 267 (1914).

49. Supplement to Treasury Decisions T.D. 2690, 20 Treas. Dec. Int. Rev. 126, 133 (1918), Regulation No. 33 (Revised) Governing the Collection of the Income Tax Imposed by the Act of September 8, 1916, as Amended by the Act of October 3, 1917, at 11 (1918) [hereinafter Regulation No. 33 (Revised) Governing the Collection of the Income Tax].

Beyond mere error, there was the influence of the income tax of the United Kingdom—the foreign income tax most prominent in the minds of the drafters of the 1914 regulations—which did not tax capital gains at all.[50] As Marjorie Kornhauser recounts in her work on the early history of capital gains taxation under the federal income tax, from 1913 until 1921 Treasury's interpretation of the income tax as encompassing capital gains was controversial, and it was unclear whether Treasury's interpretation would withstand judicial challenge.[51] If total exemption of capital gains was thinkable because of the UK model, then basis rules allowing for widespread self-help exemption might have seemed unexceptionable. In addition, the trust law distinction between principal and income—under which capital gains are assigned to principal rather than income—may have influenced Treasury's misunderstanding of the role of basis in an income tax.[52] Finally, there was the statutory declaration that income did not include the value of property received by way of gift or bequest. For regulators not accustomed to the distinction between deferral and exclusion provisions, it would have been easy to overread the statute as implying a permanent exclusion rather than as merely being silent on the question of permanent exclusion versus deferral.

It did not take taxpayers long to notice and take advantage of the tax avoidance opportunities created by Treasury's regulations and rulings. The use of gifts to avoid capital gains taxes was not infrequently discussed in newspaper columns, especially in a long-running tax question-and-answer column in the *Wall Street Journal,* "Answers to Inquirers" (featuring the slogan, "Intelligent Inquiry is the Public's Great Safeguard"). In a column from 1920, an inquirer referred to several earlier columns discussing a donor's basis in gifted property:

> [I]t would seem that . . . by buying at 90, deciding to take profits at 115, it is only necessary to give the stock to your wife with instructions to sell, and the profit will all remain in the family. This seems to me to so easily permit evasion of the income tax law that there must be further explanation for it somewhere.[53]

The anonymous columnist replied that "[t]here is no further explanation. Under the Federal law, no taxable profit is realized when stock is given away, even though the wife immediately sells it at the market value and thus keeps the profit in the family."[54] The columnist did note, however, that legislation was pending—passed by the House, and under consideration by the Senate—under which "if the wife sells at 115 she will have to pay tax as if she had bought at 90."[55]

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50. The income tax of the United Kingdom did not include a general tax on capital gains until 1965. *See* AULT & ARNOLD, *supra* note 13, at 146.

51. Kornhauser, *supra* note 13.

52. *See* Calvin H. Johnson, *The Undertaxation of Holding Gains*, 85 TAX NOTES 807, 813 (1992) (explaining that, in the early years of the 1913 income tax, "'capital' was thought to refer to some tangible thing, whatever its value, rather than to a monetary account keeping track of what has been taxed.").

53. *Answers to Inquirers: "Intelligent Inquiry is the Public's Greatest Safeguard*," WALL ST. J., Sept. 11, 1920, at 2.

54. *Id.*

55. *Id.*

As indicated by "Answers to Inquirers," Congress gradually awakened from its slumber and realized that Treasury's interpretation of the income tax laws had effectuated something close to an administrative repeal of the taxation of capital gains. Urged by Treasury to quell the massive evasion of capital gains taxation, Congress considered legislative revisions. In September of 1921, the Senate Finance Committee heard testimony from economist Thomas S. Adams, Treasury's principal advisor on tax policy and administration. Adams told the Committee, "Perhaps the greatest abuse of the income tax in recent years has been through gifts" of appreciated property followed by a prompt sale by the donee.[56] Adams explained that this tax avoidance technique was permitted under existing law. Adams added that Treasury urged Congress to put an end to this evasion by enacting a carryover basis rule for inter vivos gifts, under which a donee's basis in gifted property would be the same as the donor's basis.[57]

The Finance Committee, and eventually Congress as a whole, followed this recommendation; the Revenue Act of 1921 provided for a carryover basis in the case of an inter vivos gift of appreciated property.[58] Strangely enough, far from also correcting Treasury's companion error with respect to the basis of appreciated property transferred at death, the 1921 Act provided—for the first time—a statutory foundation for the error, by declaring that the basis of property acquired from a decedent "shall be the fair market price or value of such property at the time of such acquisition."[59] Why did Congress correct one mistake, yet at the same time endorse essentially the same mistake in a slightly different context? The short answer is that Congress followed Adams' advice.

The Finance Committee—and, again, eventually Congress—readily accepted Treasury's advice to continue, and for the first time to specify in legislation, the rule that basis equaled date-of-death value in the case of property acquired from a decedent. Adams explained that permanent removal from the base of the income tax of appreciation in property held at death was acceptable, despite the unacceptability of the same treatment of appreciation in inter vivos gifts, "because the estate or inheritance tax has been imposed. That is the thought behind that."[60] Apparently satisfied with Adams' explanation, the Committee's members asked no further questions on that point.

The policy distinction Adams drew between gift basis rules and bequest basis rules depended on the fact that, in 1921, the federal estate tax existed but the federal gift tax did not. The estate tax had been introduced in 1916,[61] but the first gift tax was not enacted until 1924.[62] Adams' claimed reconciliation of Treasury's

56. *Internal Revenue Hearings on H.R. 8245 (Part I) before the Senate Committee on Finance*, 67th Cong. 24 (1921).

57. *Id.*

58. *See* Revenue Act of 1921, Pub. L. No. 67-98, § 202(a)(2), 42 Stat. 227, 229 (1921).

59. *See id.* § 202(a)(3).

60. *See Internal Revenue Hearings on H.R. 8245*, *supra* note 56, at 27.

61. *See* Revenue Act of 1916, Pub. L. No. 64-271, §§ 200–12, 39 Stat. 756, 777–80 (1916).

62. *See* Revenue Act of 1924, Pub. L. No. 68-176, §§ 319–24, 43 Stat. 253, 313–16 (1924).

basis proposals—that the existence of a transfer tax justifies a stepped-up income tax basis—does not fare well under scrutiny. The fundamental problem is that the income tax and estate tax are conceptually distinct taxes with conceptually distinct bases. Thus, it makes perfect sense for appreciation transferred at death to be subject to the income tax because it is gain, and for that same value to be subject to the estate tax because it is gratuitously transferred.[63] Moreover, there has never been a rule that both taxes cannot apply to the same value. Both in 1921 and today, if a taxpayer sells appreciated property during life and holds the (after-tax) sales proceeds until death, the income tax applies to the gain in the year of sale, *and* the estate tax applies to the sales proceeds still held at death. Adams offered no explanation as to why the application of both taxes was appropriate when the sale preceded death, but only one tax should apply when death preceded the sale.

But even accepting, for the sake of argument, the dubious notion that the imposition of an estate tax could substitute for the imposition of an income tax on appreciation, the 1921 Adams-Treasury support of stepped-up basis at death would still not have made sense in most cases because of the high exemption and low rates of the estate tax in 1921.[64] In many cases, the basis step-up eliminated a potential capital gains tax with respect to property not subject to the estate tax at all (because of the estate tax exemption), or subject to the estate tax at a rate far below the capital gains tax rate. In short, although Adams was undeniably a giant in the early development of the federal income tax,[65] this was not his finest moment.

There is a much later coda to the story. To the surprise of many observers, in 1976 Congress replaced the step-up in basis at death with a carryover basis regime.[66] An intense lobbying effort against the new provision—led by bankers, accountants, and lawyers on behalf of their wealthy clients—resulted in the restoration of the basis step-up at death in 1980.[67]

V
THE DEDUCTION FOR UNREALIZED APPRECIATION IN PROPERTY DONATED TO CHARITY

The 1913 income tax did not include a deduction for charitable contributions. The story of Congress's oversight and Treasury's mistake, in the case of charitable contributions of appreciated property, begins in 1917. The 1917 charitable deduction originated not with one of the tax-writing committees, but

63. Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 364 (1993).

64. *See* Revenue Act of 1918, Pub. L. No. 65-254, §§ 401, 403(a)(4), 40 Stat. 1057, 1096–98 (1919).

65. For a review of Adams's career and the extent of his influence, see Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1028–33 (1997).

66. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1023, 90 Stat. 1520, 1872–77 (1976).

67. *See* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 401(a)–(b), 94 Stat. 229, 299 (1980). For a detailed description and critique of the lobbying efforts, see Howard J. Hoffman, *The Role of the Tax Bar in the Tax Legislative Process*, 37 TAX L. REV. 413, 415 (1982).

with a Senate floor proposal by Senator Henry F. Hollis (D., N.H.). Hollis was concerned that, in the absence of a charitable deduction, the sudden introduction of high marginal tax rates—as high as 67% under the 1917 Act[68]—would result in a catastrophic decline in philanthropy.[69]

The new provision allowed a deduction for "[c]ontributions or gifts actually made within the year," but said nothing about the method for determining the amount of a deduction.[70] The only reference to an amount was in the ceiling on the deduction, which was set at "fifteen per centum of the taxpayer's taxable net income." The enactment of the charitable deduction is a striking illustration of the seat-of-the-pants character of much early federal income tax legislation. It is remarkable both that one of the most important and enduring personal deductions in the income tax originated not with the Treasury Department or a tax-writing committee, but with the suggestion of a single senator. It is also remarkable that the provision gave no guidance on a question as obvious and inescapable as the amount of a deduction in the case of an in-kind contribution.

It did not take long, however, for Treasury to fill the gap in the legislation. In 1918, the Department issued regulations stating that "[w]here the gift is other than money, the basis for calculation of the amount of the gift shall be the fair market value of the property the subject of the gift at the time of the gift."[71] Perhaps this rule was—and is—consistent with lay intuition. But as a matter of tax logic, it is simply wrong. If a taxpayer donates to charity appreciated property which she bought for $200 and which is now worth $1,000, the logically correct deduction amount is only $200. Because of the nontaxability of unrealized appreciation,[72] the tax system has never treated the taxpayer as having possessed the $800 of gain in the property. It makes no sense, then, for the tax system to treat the taxpayer as having given away that which the tax system has never treated the taxpayer as possessing.[73] Because the taxpayer has been previously taxed only on her $200 basis in the property—the $200 she paid for the property with after-tax dollars—the tax system logically should treat her as giving away only $200 when she makes her charitable donation.

There is no indication in the historical record of the thought processes of the authors of the 1918 regulations, but it seems the rule allowing a deduction for

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68. *See* War Revenue Act of 1917, Pub. L. No. 65-50, tit. I, §§ 1, 2, 40 Stat. 300, 300–01 (1917) (imposing a normal tax of 2% and surtax at rates as high as 50%, in addition to the normal tax and surtax already imposed by previous legislation).

69. *See* 55 CONG. REC. 6714, 6728 (1917).

70. *See* War Revenue Act of 1917 § 1201(2).

71. Supplement to Treasury Decision T.D. 2690, 20 Treas. Dec. Int. Rev. 128, 137, Regulations No. 33 (Revised) Governing the Collection of the Income Tax (1918).

72. *See* I.R.C. § 1001(a) (treating the "sale or other disposition of property" as a realization event, and implying that, in the absence of a "sale or other disposition," gains and losses are unrealized and thus not taken into account by the tax system).

73. *See, e.g.*, MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 215 (13th ed. 2015) ("If the tax system has never treated the taxpayer as having received [the appreciation in an asset donated to charity], it cannot logically treat the taxpayer as losing (or donating) the appreciation.").

unrealized appreciation may have been nothing more than a careless or naive conceptual error. Others were not so careless or naive. In 1919, in the "Answers to Inquirers" column of the *Wall Street Journal*, a reader asked about the seemingly too-good-to-be-true results produced by a deduction for unrealized appreciation.[74] The columnist replied that the too-good-to-be-true result "seems to be technically in accordance with the rulings although we doubt very much that it is in accordance with the law" as enacted by Congress. The columnist explained:

> The fly in the ointment is that while B did not actually realize a profit of $16,000 on the stock he gave away, he did, in effect, get the benefit of realization by being allowed to deduct the appreciation in value from his income without having been required to account for that appreciation as income. It would appear that in a case of this kind the cost of the stock and not its market value should properly be the deductible item.[75]

What was beyond the ken of Treasury was obvious to an anonymous journalist.

Tax professionals were also taken aback by the too-good-to-be-true regulatory interpretation. In 1919, the Boston law firm of Ropes, Gray, Boyden and Perkins sent a telegraphic inquiry to the Bureau of Internal Revenue. Noting that the regulations permitted a deduction equal to the value of property given to charity, the firm—with evident incredulity—inquired, "Does this mean donor can deduct market value of gift of securities without being treated as having realized as taxable income the difference between such market value and cost of securities to him? Please wire reply our expense."[76] The Bureau promptly wired back that a taxpayer "entitled to claim deduction for value of gift . . . is not required to report as a profit the excess in value of the property donated over its cost."[77]

Subject to a few later statutory limitations,[78] unrealized appreciation in property donated to charity remains deductible today.[79] Although the current deduction for unrealized appreciation is traceable to Congress's inattention in 1917 and Treasury's mistake in 1918, the deduction endured two low points in the intervening century. In 1920, the Bureau of Internal Revenue concluded that the 1918 regulations were wrong not to limit the deduction to the taxpayer's basis in

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74. *See Answers to Inquirers: "Intelligent Inquiry is the Public's Greatest Safeguard,"* WALL ST. J., July 17, 1919, at 2.

75. *Id.*

76. *See* Letter signed by J.H. Callan, Assistant to the Commissioner, by N.T. Johnson, Chief of Section to Ropes, Gray, Boyden and Perkins (Aug. 14, 1919), *in* THE CORPORATION TRUST COMPANY'S 1913-1919 INCOME TAX SERVICE, ¶ 3550 (1919).

77. *Id.*

78. *See generally* I.R.C. § 170(e) (allowing a deduction for unrealized appreciation only if the appreciation would have been taxed as long-term capital gain if the taxpayer had sold the donated property).

79. Treas. Reg. § 1.170A-1(c)(1) ("If a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution . . . .").

the donated property,[80] and Treasury revised the regulations accordingly.[81] Without any change in the statute, Treasury re-reversed its position in 1923, issuing a revised regulation reinstating the rule of the original regulation of 1918.[82]

Much later, in 1986, Congress sharply curtailed the deduction for unrealized appreciation by not allowing the deduction for purposes of the alternative minimum tax (AMT).[83] In 1993, however, Congress responded to an intense lobbying campaign by affected charities—especially art museums—by completely and permanently repealing the 1986 Act's AMT treatment of unrealized appreciation in donated property.[84]

VI
THE RENTAL VALUE OF OWNER-OCCUPIED HOUSING

In an income tax that hewed closely to an economic conception of income, a homeowner would include in her taxable income the net rental value of her home—that is, the gross amount for which she could have rented her home to a tenant, reduced by expenses for repairs, maintenance, depreciation, property taxes, and mortgage interest.[85] As Cordell Hull set to work drafting the federal income tax statute in 1913, a number of existing income taxes (foreign and state) included this form of imputed income—the net rental value of owner-occupied housing—in the tax base. The 1911 Wisconsin income tax, for example, featured, as the first item in its list of income inclusions, "All rent of real estate, including the estimated rental value of residence property occupied by the owner thereof."[86] Hull would also have known, from his familiarity with Edwin R. A. Seligman's monumental 1911 treatise on income taxation, that under the income tax of the United Kingdom, "If a person occupies his own house, the net annual [rental] value is still considered as income."[87]

80. *See* L.O. 979, 2 C.B. 148 (1920).

81. *See* T.D. 2998, 2 C.B. 151–52 (1920).

82. *See* T.D. 3490, II-1 C.B. 118 (1923). *See also* L.O. 1118, II-2 C.B. 148–51 (1923) (attempting to provide a plausible rationale for the 1923 regulatory revision). In fairness to the drafters of the 1923 regulation, however, it should be noted that the allowance of a deduction for unrealized appreciation was a smaller violation of tax logic in 1923 than it had been in 1918. The violation of tax logic lies in allowing a deduction for unrealized appreciation without imposing tax on the appreciation. In 1918 the federal income tax did not feature a capital gains rate preference, so the avoided tax would have been imposed at ordinary income rates as high as 77%. In 1921, however, Congress introduced a maximum tax rate of 12.5% for capital gains. Under this new regime, the capital gains tax avoided by the 1923 regulation would have been imposed at a rate no higher than 12.5%. *See* Revenue Act of 1921, Pub. L. No. 67-98, § 206(b), 42 Stat. 227, 233 (1921).

83. *See* Tax Reform Act of 1986, Pub. L. No. 99-51, § 701, 100 Stat. 2085, 2335 (1986).

84. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13171(a), 107 Stat. 312, 454 (1993).

85. *See, e.g.*, CHIRELSTEIN & ZELENAK, *supra* note 73, at 28–30.

86. Wis. Income Tax Law, Wis. Gen. Laws 1911, tit. XIII, ch. 48a, § 2(a).

87. EDWIN R. A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 212 (1911).

Despite these precedents, the 1913 income tax statute, as drafted by Hull and as eventually enacted by Congress, made no mention of imputed income from homeownership. The Act defined "net income" as including

> gains, profits, and income derived from . . . dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or person property, also from . . . rent . . . or gains or profits and income derived from any source whatever.[88]

There was no specific statutory mention—by way of either inclusion or exclusion—of the rental value of owner-occupied housing. There were, however, no fewer than three parts of the statutory definition of net income which might have been construed to encompass imputed rental value.

First, "growing out of the ownership or use of . . . real . . . property" fit imputed rental value quite neatly. Or did it? In the context of the convoluted sentence in which it appeared, the "growing out of" phrase seemed to be limited by the "dealings in property" language. It could have been argued, then, that merely occupying a residence one owned—without engaging in a transaction with any other party—did not involve any *dealing* in property.

Second, the specific statutory mention of "rent" could have been interpreted to include imputed rent. Again, however, there was a contrary argument. When the Wisconsin state legislature had introduced its income tax in 1911—just two years before the federal legislation—it had not assumed that a general mention of rent would include imputed rent; instead, it specifically provided that taxable rent included "the estimated rental value of residence property occupied by the owner thereof."[89]

Finally, there was the statute's sweeping inclusion within "net income" of "gains and profits and income derived from any source whatever"—language of immense elasticity capable of encompassing not only imputed income from owner-occupied housing, but also imputed income from other taxpayer-owned consumer durables and from taxpayer-performed services. But that was precisely the problem with locating the inclusion in the statutory mention of "income derived from any source whatever"—it provided no obvious basis for drawing a line between the imputed rental value of residences, for the taxation of which there was both scholarly support and precedent in other income taxes, and other types of imputed income, for the taxation of which there was neither scholarly support nor precedent.

In short, the 1913 Act's statutory language provided no clear answer to the question of whether imputed rental value was within the definition of net income. The legislative history was no more helpful than the statutory language. In sharp contrast with the repeated questioning of Cordell Hull during the House floor debates on the income tax treatment of gains on the sale of investment assets,[90] Hull went unquestioned on the taxation or non-taxation of imputed rental value.

88. Revenue Act of 1913, Pub. L. No. 63-16, § II.B, 38 Stat. 114, 167 (1913).

89. Wis. Income Tax Law, Wis. Gen. Laws 1911, tit. XIII, ch. 48a, § 2(a).

90. That questioning, and Hull's inconsistent answers, are described in text accompanying *supra* notes 15–20.

The absence of questions could be interpreted as evidence that the representatives assumed the definition of net income did not encompass imputed rental value; surely some legislators would have objected if they thought the bill proposed to tax imputed rent, and others would have asked about the mechanics of estimating rental value. Still, the mere absence of discussion leaves something to be desired as definitive legislative history.

There is, however, one relevant passage in the Senate floor debate on the income tax. In complaining that it was unfair for the bill to allow a homeowner to deduct mortgage interest but not to allow a home renter to deduct rent, Senator George Sutherland (R., Utah) made an argument which relied on an unstated assumption that imputed rental value was not taxable.[91] As the debate on the issue was very brief, and as neither Sutherland nor any other senator ever identified the unstated assumption, Sutherland's argument would also have been a very slender reed on which to base an interpretation of the statutory definition of net income as not including imputed income from homeownership.

There is no indication of Cordell Hull's own view on this issue. If so, his failure to form or express a view would have paralleled his failure—as revealed in the floor debates—to think in any serious way about the taxation or non-taxation of gain on the sale of investment assets (as discussed in Part III). It is possible that Hull favored the taxation of imputed rental value and that he intentionally left the issue unaddressed in his draft of the income tax bill not because he thought that Congress would enact a provision clearly taxing rental value, but because he believed that Treasury might well interpret an ambiguous provision as reaching such value. There is nothing in the historical record, however, that indicates Hull was thinking along those lines.

With no conclusive interpretive guidance from either the statutory language or the legislative history, it was up to the Treasury Department to decide whether the base of the new income tax included imputed rental value. On November 9, 1913, the *Washington Post* reported that lawyers were

> already asking whether an individual whose income from invested capital, and other sources, makes him liable to the income tax, can make himself exempt by taking part of his invested capital to buy a home, thereby saving rental and reducing his income so that he does not receive more than $3,000 exempted income.[92]

The next day, the *Post* divulged that Treasury had received "a number of inquiries" as to whether homeowners were taxable on the imputed rental value of their homes, and that the Department's anticipated income tax regulations would likely require homeowners to "list the rent they save as income and pay the normal assessment of 1 per cent upon it."[93]

91. *See* 50 CONG. REC. 3827, 3848 (1913).

92. *Puzzled by Incomes: Treasury Officials Working on Tax Collection Rules*, WASH. POST, Nov. 9, 1913, at 11.

93. *Home Owners, Under New Income Tax, May Have to Pay Rent to Themselves*, WASH. POST, Nov. 10, 1913, at 2.

Two months later, in early January of 1914, Treasury issued comprehensive regulations under the new income tax, including regulations defining income.[94] However, the regulatory definition of "gross income" did little more than restate the statute, and failed to resolve the tax status of imputed rental value.[95] On the same day it issued the regulations, Treasury (through its Internal Revenue Bureau) also issued the first Form 1040. Instruction 10 of Form 1040 advised taxpayers, "In case an individual owns his own residence he cannot deduct the estimated value of his rent, neither shall he be required to include such estimated rental value of his home as income."[96] Treasury did not explain why it took this position only on the Form 1040 instructions—which had no legal status—rather than in a regulation with the force of law. Perhaps expressing the non-taxability of imputed rental value only in the Form 1040 instructions was a compromise between some tax administrators who believed the statutory definition of income encompassed imputed rental value, and other tax administrators who wanted to avoid the public resistance and valuation difficulties that an attempt to tax rental value might have produced.

Some early academic commentators were highly critical of the non-taxation of rental value resulting from the failure of Congress to address the issue and Treasury's informal pro-taxpayer resolution. Harvard economist Charles J. Bullock, for example, writing in 1914, described the failure to tax imputed rental value as "wrong in theory, and . . . contrary to the practice of well-considered income taxes."[97] For neither the first nor the last time, the criticisms of academics failed to move Congress, Treasury, or public opinion.

Reformers' hopes for inclusion of imputed rental value in the base of the federal income tax were dealt a blow in 1917, when the Wisconsin legislature repealed the inclusion of imputed rental value in the base of the Wisconsin income tax.[98] In so doing, the Wisconsin legislature followed the advice of the Wisconsin Tax Commission, which had concluded in its 1916 report that the determination of rental value involved "great difficulty," and that the revenue produced by the inclusion was "negligible."[99] After 1917, any advocate of the inclusion of imputed rental value in the base of the federal income tax would have been faced with the argument that Wisconsin had conducted an experiment—under American conditions—with the taxation of imputed rental value, and that the experiment had ended in failure. Wisconsin's 1917 repeal may well have

94. *See generally* OFFICE OF COMM'R OF INTERNAL REVENUE: REGULATIONS NO. 33, LAW AND REGULATIONS RELATIVE TO THE TAX ON INCOME OF INDIVIDUALS, CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS, AND INSURANCE COMPANIES (1914).

95. *See id.* art. 4 ("Gross income . . . is held to include all income, gains, and profits arising or accruing from all sources whatever . . . .").

96. Internal Revenue Bureau, Income Tax Form 1040: Return of Annual Net Income of Individuals 4 (1913).

97. Charles J. Bullock, *The Federal Income Tax*, 8 PROC. OF THE ANN. CONF. ON TAX'N UNDER THE AUSPICES OF THE NAT'L TAX ASS'N 264, 275 (1914).

98. *See* 1917 Wis. Act 374.

99. EIGHTH BIENNIAL REP. OF THE WIS. TAX COMM'N TO THE GOVERNOR AND LEGISLATURE, 46–47 (1916).

killed any remaining reformers' hopes for the federal income taxation of imputed rental value. Over the next hundred years, the occasional commentator has continued to make the case for the taxation of imputed rental value.[100] Despite that advocacy, Congress has never shown any interest in reversing the exclusion of imputed rental value from the base of the income tax.

It is tempting to identify Treasury's interpretation of the ambiguous 1913 statute as a but-for cause of the failure of today's income tax to reach imputed rental value, in the same way that the effects of Treasury's early mistakes with respect to gratuitously transferred appreciated property—in the case of both charitable and non-charitable transfers—are evident in the federal income tax of the twenty-first century. There is good reason to question, however, whether Congress would have acquiesced—not just initially, but for more than a century—in an early Treasury interpretation including imputed rental value in the tax base. The international trend has been decidedly away from the income taxation of imputed rental value. Although income taxation of imputed rents was the international norm in 1913, such taxation has since become the exception. According to a 2011 OECD working paper, in the twenty-first century, "Imputed rental income on principal homes is not subject to income tax, except in a few countries—Iceland, Luxembourg, the Netherlands, Slovenia and Switzerland."[101] In their indispensable treatise on comparative income taxation, Hugh J. Ault and Brian J. Arnold tell a similar story, noting that in a number of countries—including France, Germany, Australia, and the United Kingdom—"the taxation of imputed housing income was attempted but then dropped because of difficulties in applying the tax on a realistic basis."[102] Perhaps the 1914 Treasury saved the United States the trouble of enduring an unsuccessful experiment with the taxation of imputed rental value. We will never know.

VII
THE DEDUCTIBILITY OF FEDERAL INCOME TAX

A tax base is said to be tax-exclusive if the amount paid as tax is not included in the base to which the tax rate (or rates) applies, and is said to be tax-inclusive if the amount paid as tax is included in the base. A retail sales tax is a familiar example of a tax-exclusive base. Today's federal income tax is a familiar example of a tax-inclusive base.[103] The income tax base would be tax-exclusive, however, if a taxpayer were allowed to deduct her federal income tax liability in determining her taxable income.

100. For a recent example, see Bruce Bartlett, *Taxing Homeowners as If They Were Landlords*, N.Y. TIMES (Sept. 3, 2013), http://economix.blogs.nytimes.com/2013/09/03/taxing-homeowners-as-if-they-were-landlords/?_r=0 [https://perma.cc/6EUM-BBN8] (acknowledging political implausibility of the reform, but arguing it is "still worth thinking about.").

101. Dan Andrews et al., *Housing Markets and Structural Policies in OECD Countries* 39 (Org. Econ. Co-operation & Dev., OECD Econ. Dep't Working Paper No. 836, 2011).

102. AULT & ARNOLD, *supra* note 13, at 215.

103. *See* I.R.C. § 275(a)(1) (providing federal income taxes are not deductible).

The difference between the two types of tax bases is a mere difference in form rather than of substance, as long as legislators make appropriate tax rate adjustments on account of their choice of a tax-exclusive or tax-inclusive base. If, for example, Congress wants a taxpayer to pay $20 tax on $100 of pre-tax income, it can express that as either a 20% tax on $100 of income, or as a 25% tax on $80 of after-tax income. In the case of an income tax, a tax-inclusive base is computationally simpler, because it avoids the recursivity problem of a tax-exclusive income tax, under which the tax base depends on the amount of the tax and the amount of the tax depends on the tax base. Surprisingly, however, the federal income tax has not always been tax-inclusive.

The 1913 income tax provided for the deductibility of "all national, State, county, school, and municipal taxes paid within the year, not including those assessed against local benefits."[104] Although the statutory language did not specifically address the deductibility of the federal income tax against itself, nothing in the sweeping language ("all national . . . taxes paid within the year")[105] suggested the exclusion of federal income taxes from the general rule of deductibility. The 1913 Congress gave no thought—one way or the other—to the specific question of the tax-inclusive or tax-exclusive character of the income tax; in 1917, Senator M. Hoke Smith (D., Ga.), who had been not only a senator but also a member of the Senate Finance Committee in 1913, claimed that "[n]obody contemplated such a deduction [for federal income taxes paid] under the existing law when it was framed" in 1913.[106] Smith continued, "We did not think of deducting from net income the income tax on net income."[107] Nevertheless, a literal reading of the 1913 Act supported the deduction.

The 1913 Act did not provide for any current payments of income tax; rather, the tax on 1913 income (for example) was not due and payable until 1914.[108] Thus, if income tax paid was deductible in computing the base of the income tax, it was deductible subject to a one-year delay; income tax paid in 1914 with respect to 1913 income would be deductible in 1914. The one-year delay avoided the recursivity problem that would have existed under a tax-exclusive current-payment income tax.

The low rates of the 1913 income tax meant that little was at stake in the difference between a tax-inclusive and a tax-exclusive base, even if Congress did not impose a higher nominal rate in connection with a tax-exclusive base. The progressive rates of the "additional tax" did not apply to income below $20,000 (more than $490,000 in 2017 dollars[109]), so for the vast majority of the income-

104. Revenue Act of 1913, Pub. L. No. 63-16, § II.B, 38 Stat. 114, 167 (1913).

105. *Id.*

106. 55 CONG. REC. 6310, 6319 (1917).

107. *Id.*

108. *See* § II.A, 38 Stat., at 166 (providing "[t]hat there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources *in the preceding calendar year* . . . a tax of 1 per centum upon such income.") (emphasis added); *id.* (to the same effect for purposes of the progressive "additional tax" imposed at rates ranging from 1–6%).

109. *See* CPI Inflation Calculator, BUREAU OF LAB. STAT., www.bls.gov/data/inflation_

taxpaying population the tax was imposed at the flat rate of 1%. Imagine a taxpayer with income of $10,000 in each of the first two years of the income tax. He would pay $100 tax in the second year on account of his first year's income. In the third year he would pay tax on his second year's income—a tax of $100 if the year-one income tax was not deductible, or a tax of $99 if the year-one income tax was deductible. Only for those few taxpayers with incomes above $20,000 was more than a dollar or two at stake in the difference between a tax-inclusive and a tax-exclusive income tax, and even for a taxpayer in the top bracket of 7%—taking into account both the normal tax and the additional tax—the stakes were quite modest.[110]

With the one-year delay in the deduction obviating the recursivity problem, and with the low rates of the tax making the issue of deductibility of little revenue significance, conditions were as favorable as possible for a tax-exclusive income tax. Even so, early observers had their doubts. On January 31, 1914, the "Answers to Inquirers" column of the *Wall Street Journal* featured a question about the deductibility of federal income taxes:

> Under the income tax law the taxpayer is allowed to deduct from his income, before determining the amount on which the tax is laid, certain taxes paid within the year, including national taxes. Accordingly would a taxpayer, in figuring his income for the calendar year 1914, be allowed to deduct from the same the amount of tax paid under the income tax law on his income for the year 1913?[111]

The anonymous *Journal* columnist replied that, although the language of the statute supported the deduction, the policy foundations for the deduction were so shaky that perhaps the literal language should be disregarded:

> This question will not come up until returns are made for March 1, 1915. In the meantime the Treasury Department can rule either way, so it seems best not to anticipate it so far in advance. It is true that the law allows as a deduction "all national taxes." But to allow a taxpayer to deduct from his income what he has paid as income tax, would be to the Government like feeding a dog a piece cut from his own tail.[112]

Early in 1915—in time for use in preparing returns for 1914—the Treasury Department issued a taxpayer-favorable interpretation of the statute. According to the Treasury's new regulation:

> For the purpose of claiming as allowable deductions the amount paid to the collector and the amounts withheld at the source on account of the income tax, it is held that amounts of both classes are paid, within the meaning of the law, in the year in which assessment is made and the tax paid to the collector of internal revenue.[113]

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calculator.htm (last visited Nov. 6, 2017) (employed to calculate inflation adjustment).

110. The 7% top rate applied only to income above $500,000 (more than $12 million in 2017 dollars). If a taxpayer had income of $1 million in each of the first two years of the income tax, and if (counterfactually) all the taxpayer's income was taxed at 7% in both years, the tax-inclusive tax in the second year would be $70,000, whereas the tax-exclusive tax in the second year would be $65,100 (7% of $930,000).

111. *Answers to Inquirers: "Intelligent Inquiry is the Public's Greatest Safeguard,"* WALL ST. J., Jan. 31, 1914, at 2.

112. *See id.*

113. T.D. 2135, 17 Treas. Dec. Int. Rev. 39, 43 (1915).

Thus, 1913 income taxes paid in 1914 could indeed be deducted in computing income subject to tax for 1914.

And so the issue seemed to be settled; the federal income tax was tax-exclusive—subject to a one-year's delay in the claiming of the deduction for federal income taxes paid. But then the Great War began. Following the United States' entry into World War I in April of 1917, Congress—at the urging of the Wilson Administration—set to work on tax legislation to help finance the war effort. The War Revenue Act of 1917 increased the rate of the normal tax to 4% and increased the top rate of the additional tax to 63%, for a top combined marginal rate of 67%—compared with a top combined rate of just 15% under 1916 legislation.[114]

With the dramatic increase in income tax rates, Congress was moved to reconsider—really to consider for the first time, because Congress had not focused on the question in 1913—whether the base of the income tax should be tax-exclusive or tax-inclusive. At a tax rate of 67%, the revenue difference between the two approaches was enormous. If a taxpayer had $1 million of pre-tax income in each of two consecutive years and faced an income tax rate of 67% in each year,[115] the second year tax-inclusive (no deduction) tax liability would be $670,000. By contrast, the second-year tax liability would be only $221,100 (67% of $330,000) if the year-one tax paid in year two was deductible against the income of year two. Indeed, the only way for Congress to have imposed a tax-exclusive tax of more than $330,000 on the taxpayer's year-two income would have been to legislate a rate above 100%—a 203% rate would have been required to impose a tax of $670,000.

Although a switch to a tax-inclusive base might seem imperative in such a situation, the bill proposed by the House Ways and Means Committee—featuring a top rate of 50%—did not include any change to the rule of income tax deductibility.[116] The omission was soon corrected, however, by the Senate Finance Committee, which reported out a bill specifically providing for the non-deductibility of federal income taxes.[117] The Committee's report explained the rationale for the change:

> The amount of these taxes payable during the fiscal year 1918 . . . will be about $1,400,000,000. If in computing the net taxable income of the year 1918 this amount be deducted the revenues of the Government would be reduced for the fiscal year 1919 to such an extent as to require a considerable increase in the rate of the income tax and

114. *See* War Revenue Act of 1917, Pub. L. No. 65-50, § 1, 40 Stat. 300, 300–01 (1917) (imposing a "like normal tax" of 2% in addition to the 2% normal tax imposed by 1916 legislation); *id.* § 2, 40 Stat. 300, 301 (imposing additional tax at rates of up to 50%, in addition to the additional tax imposed at rates of up to 13% by 1916 legislation). For the 1916 legislation upon which the 1917 legislation built, see Revenue Act of 1916, Pub. L. No. 64-271, § 1, 39 Stat. 756, 756–57 (1916) (imposing a 2% normal tax and an additional tax with a top rate of 13%).

115. Of course, under the 1917 Act no taxpayer would have faced a tax rate of 67% with respect to all of his income. The 67% rate could apply to the last $1 million of income of a very wealthy taxpayer.

116. *See* H.R. REP. NO. 65-45, at 2–3 (1917) (increasing tax rates without making any change in the rule of deductibility).

117. *See* S. REP. NO. 65-103, at 20 (1917).

possibly in the war-profits tax.[118]

Although the Finance Committee's proposal triggered withering criticism from a few sources—the *Washington Times* editorialized, "if the United States Government should decide to put A TAX ON TAXES it would seem that the maximum of illogical taxation had been reached,"[119] and Senator Porter J. McCumber (R., N.D.) similarly objected to "a tax upon a tax"[120]—the proposal sailed through Congress with little opposition as part of the War Revenue Act of 1917.[121] The most interesting aspect of the Senate debate was the surprise expressed by some senators that a deduction for federal income tax was permitted under existing law. M. Hoke Smith, for example, observed, "It seems to be true that under the language of the old income-tax law this deduction has sometimes been made, but it was a great surprise, I think, to the [Finance] committee that it could be made."[122] Similarly, when McCumber confirmed to Senator Henry F. Hollis (D., N.H.) that under current law federal income tax was deductible, and that some taxpayers actually claimed the deduction, Hollis responded, "Some people have been thrifty enough to do that, the Senator states. I did not know that anyone ever did it."[123]

In one respect, this story differs from the five preceding in that the relevant language in the 1913 Act was not really ambiguous. Taking the statutory language literally, a provision allowing a deduction for "all national taxes . . . paid within the year" was a declaration that the income tax was tax-exclusive. Despite the literal language, however, the comments of Senators Smith and Hollis make clear that this was another basic income tax design issue to which Congress had given no thought whatsoever in 1913. As with the five other issues, the result was that Treasury had to decide what Congress had not. Unlike most of the other issues, however, what Treasury decided here has had no enduring impact on the design of the federal income tax.

VIII

EVALUATING TREASURY'S PERFORMANCE: OF MISTAKES (OR NOT) AND ENDURING IMPACTS (OR NOT)

How did Treasury perform when congressional neglect of important issues of income tax-design forced it to step into the breach? Treasury's early record was decidedly mixed—which is not to say that Congress would necessarily have done any better if it had resolved the issues itself. On two of the six issues examined, it is fair to say that Treasury committed clear error. The tax-free basis step-up for gratuitously transferred appreciated property violates basic income tax logic, and

118. *Id*.

119. Editorial, *Common Sense—Even in Taxation: To Make a Man Pay Tax ON HIS TAXES Is Not Logical*, WASH. TIMES, July 13, 1917, at 18 (emphasis in original).

120. 55 CONG. REC. 6310, 6318 (1917).

121. *See* War Revenue Act of 1917, Pub. L. No. 65-50, § 1201(1), 40 Stat. 300, 330 (1917).

122. 55 CONG. REC. at 6319.

123. *Id*. at 6318.

was not compelled by the language of the statute. The same is true of the charitable deduction for unrealized appreciation in donated property.

As to the remaining four issues, Treasury's positions were at least defensible in terms of statutory language, policy considerations, or both. Despite Cordell Hull's waffling in the 1913 House debate on the taxation of capital gains, and despite the exclusion of capital gains from the base of the UK income tax, Treasury's decision to include capital gains in the tax base was supported both by the broad statutory definition of income and by policy considerations. The decision to allow no deductions whatsoever for capital losses—not even as an offset to capital gains—is difficult or impossible to justify in policy terms, but was almost compelled by the language of the 1913 statute. Although a Treasury decision to tax the rental value of owner-occupied housing would not have been unreasonable—in terms of both policy considerations and the broad statutory language—Treasury's decision to the contrary was also defensible. Treasury could reasonably have concluded that, given concerns about administrability and public acceptance, it should interpret the income tax to reach imputed rental value only in the presence of a clear and explicit statutory statement to that effect. Finally, Treasury's decision to allow a deduction for federal income taxes paid did not violate any tenets of basic tax logic—there is nothing inherently wrong with a tax-exclusive income tax—and was almost compelled by the statutory language.

The record is also decidedly mixed as to the long-run significance of Treasury's early decisions. It is quite possible that the federal income tax reaches capital gains today only because of Treasury's interpretation of the 1913 statute. Of course, Congress might have gotten there eventually. The UK's adoption of capital gains taxation in 1965[124] suggests such a possibility, though the UK might never have done so but for the American precedent. The complete non-deductibility of capital losses had no long-term effect: Congress corrected the error (more its own mistake than that of Treasury) in 1916, and has never returned to the 1913 approach. The tax-free basis step-up at death remains in the income tax to this day and is directly traceable to Congress's inattention and Treasury's error at the dawn of the income tax. Treasury's companion error with respect to inter vivos gifts, however, lasted only until 1921; that mistake was too costly to the fisc for Congress to leave uncorrected for long. Like the basis step-up at death, the charitable deduction for unrealized appreciation has endured to this day and is traceable to Treasury's early mistake.

Given the movement of the rest of the world away from the taxation of imputed rental value, it seems likely that Congress would eventually have abandoned such taxation, had Treasury interpreted the 1913 income tax as reaching the rental value of owner-occupied housing. If so, then Treasury's early interpretation was not a but-for cause of today's exclusion. On the other hand, it is possible that the near-abandonment of rental value taxation by the rest of the

124. *See* AULT & ARNOLD, *supra* note 13, at 154–56.

world was significantly influenced by the American example. Finally, Treasury's interpretation of the 1913 statute as providing for a tax-exclusive base has had no long-run effect; Congress adopted a tax-inclusive base in 1917 and has never looked back.

IX
CONCLUSION: THE DEMISE OF THE HIGH-DELEGATION MODEL OF TAX LEGISLATION

Although Cordell Hull did not say so in 1913, circumstances compelled his drafting of a brief income tax statute, "leav[ing] to be embraced in the regulations to be prepared by the Secretary of the Treasury the manner and details of carrying out the provisions of the law."[125] Given the need to draft an entire income tax regime from scratch, and the lack of a legislative drafting staff dedicated to assisting Ways and Means Committee members in their bill-drafting efforts, a highly detailed income tax statute would not have been an achievable goal. And even if Congress could somehow have made the heroic efforts that would have been required to draft a detailed statute, the game might not have been worth the candle for an income tax designed to apply to a tiny minority of Americans,[126] to impose a tax at the rate of only 1% on most of those to whom the tax applied, and to tax no income at a rate higher than 7%. In its first full year of operation (1914), the individual income tax raised a mere $41 million in revenue,[127] accounting for less than 6% of total federal receipts for the year.[128] The very modest revenue significance of the new income tax gave Hull, and the tax-writing committees more generally, an additional reason to leave many of the details of the new tax to Treasury.

The conditions resulting in extensive delegation to Treasury did not last long. World War I greatly increased the revenue significance of the income tax. With the sharp decrease in exemption levels and the dramatic increase in marginal tax rates—both in response to World War I revenue needs—individual income tax revenue rose to $1.128 billion in 1918.[129] That was 2,750% of 1914 individual income tax revenue, and 30.9% of total 1918 federal receipts of $3.645 billion.[130]

At the same time the income tax was becoming a major revenue source, the Ways and Means Committee sought help in fulfilling its legislative drafting

125. *See* 50 CONG. REC. 499, 505 (1913).

126. In 1914, for example, when the population of the United States was about ninety-nine million, taxpayers filed 357,515 individual income tax returns. David Paris & Cecilia Hilgert, *70th Year of Individual Income and Tax Statistics*, 1913–1982, 3(3) SOI Bulletin 1, 1 (1984).

127. *Id.*

128. *See* U.S. DEP'T OF COM.: BUREAU OF THE CENSUS, HIST. STAT. OF THE U.S.: COLONIAL TIMES TO 1970 (PART 2) 1106, Series Y 352 (Bicentennial Ed., 1975) (showing federal government receipts in 1914 totaling approximately $725,000,000). The largest sources of federal revenue in 1914 were customs duties and excise taxes on alcohol and tobacco.

129. *See* Paris & Hilgert, *supra* note 126, at 10, tbl.1.

130. *See* Bureau of the Census, *supra* note 128, 1106, Series Y 352.

responsibilities. In 1918, Ways and Means took the initiative in creating an ongoing source of legislative drafting assistance. In its report accompanying the bill that became the Revenue Act of 1918, Ways and Means explained that the bill provided for "the creation of a legislative drafting service," to be available to "aid in the drafting of public bills on the request of any committee of either House."[131] The Committee urged that

> the establishment of such a service . . . will prove of great value in the framing of bills, particularly at this time, when the complexity and wide scope of war legislation . . . render it imperative that all acts of Congress be drawn with the greatest possible clearness and precision.[132]

The Revenue Act of 1918 created the Legislative Drafting Service ("LDS"), just as Ways and Means had proposed.[133] In 1924 Congress transformed the LDS into the House and Senate Offices of Legislative Counsel, which have existed ever since.[134]

Although the services of the LDS and its successors were available to any committee with respect to any sort of legislation, it was surely no accident that the LDS was the brainchild of the Ways and Means Committee. Nor was it accidental that the Committee hit on the idea after five years of struggling with the drafting of income tax provisions without the assistance of a full-time drafting staff—and just as the new income tax was becoming a crucial source of federal revenue.

After a few years of sharing a general-purpose drafting service with the rest of Congress—a service with no particular expertise in the drafting or substance of income tax laws—in 1926 the tax-writing Committees decided that they needed their own professional staff to assist the members with, among other things, both the substance and the manner of expression of new tax legislation. And so the Revenue Act of 1926 created a new Joint Committee on Internal Revenue Taxation, to be populated by five members each from Ways and Means and from Finance,[135] and to be assisted by "such experts as [the Joint Committee] deems advisable."[136] George Yin has described the circumstances of the creation of the Joint Committee ("JCT") in fascinating detail.[137] Yin notes that "the main consequence of the 1926 legislation was to authorize the JCT's staff to carry out the legislative support functions."[138]

Yin also notes that, just as a tax-writing Committee had led the way in 1918 in the creation of a general-purpose legislative drafting service, in 1926 the tax-writing Committees led the way in the creation of a subject-specific professional

131. H.R. REP. NO. 65-767, at 39 (1918).

132. *Id.*

133. *See* Revenue Act of 1918, Pub. L. No. 65-254, § 1303, 40 Stat. 1054, 1141–42 (1919).

134. *See* Revenue Act of 1924, Pub. L. No. 68-176, § 1101, 43 Stat. 253, 353 (1924).

135. *See* Revenue Act of 1926, Pub. L. No. 69-20, § 1203(a), 44 Stat. 9, 127 (1926).

136. *See id*. §1203(e).

137. *See* George K. Yin et al., *The "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 787–879 (2013).

138. *Id.* at 852 (emphasis removed).

staff. Although professional staffs assisting committees in their law-making functions are now the norm throughout Congress, Yin explains that "[t]his idea was quite novel at the time."[139]

And so, by the mid-1920s, the conditions of tax legislative drafting were radically different from those of 1913. Congress was less inclined to leave major questions of income-tax design to Treasury now that the tax had greatly increased in economic significance. No longer faced with the daunting task of writing an entire income tax statute from scratch, Congress could gradually reclaim the decision-making authority it had originally delegated to Congress—as it did, for example, in 1916 with respect to capital losses, in 1917 with respect to the deductibility of federal income tax, and in 1921 with respect to a transferor's basis in property acquired by gift or bequest.[140] And Congress could rely on its own staff of professional drafters of tax legislation, rather than expecting Cordell Hull or some beleaguered successor to carry the burden alone.

Not surprisingly under these new conditions, federal income tax legislation grew steadily longer and more detailed over the decades. As Louis Eisenstein observed in 1945, the too-succinct income tax of 1913 had grown to "Herculean proportions."[141] And, of course, the elaboration of statutory detail continued to increase in the postwar era. The individual and corporate income tax provisions, and the general administrative provisions, of the Internal Revenue Code of 1939 occupied fewer than 160 pages of the Statutes at Large.[142] The corresponding portions of the Internal Revenue Code of 1954 occupied more than 560 pages.[143]

And so, whatever the merits of the calls of Cary, Surrey, Willbanks, and others for a return to something resembling the 1913 division of income tax design duties between Congress and Treasury, a review of the historical record suggests that Congress adopted the high-delegation approach in 1913 because that was the only practical approach at the time, and because the new tax was of little revenue significance. As conditions changed, and it became feasible for Congress to shoulder a greater share of tax design responsibilities, Congress chose to do so.

To be sure, Treasury's mixed record under the early high-delegation model is not a reason for rejecting the model. Although the early Treasury made some serious mistakes, the income tax expertise within Treasury today is many orders of magnitude greater than the expertise of the Treasury Department of a century ago. The shaky early experience with the high-delegation model in no way establishes that the model could not work today. The question may never be put to the test, however, given that Congress abandoned the high-delegation model

139. *See id.* at 864.

140. See text accompanying *supra* notes 41(capital losses), 56–58 (transferee's basis), and 115–123 (federal income tax).

141. Eisenstein, *supra* note 3, at 478.

142. *See* I.R.C. §§ 1–117 (1939) (individual and corporate income tax, and "additional income taxes"); *id.* §§ 435–73 (general administrative provisions).

143. *See* I.R.C. §§ 4–372 (1954) (income tax provisions); *id.* §§ 731–923 (procedure and administration).

as soon as it could and has never looked back.