

“WHO SPEAKS FOR TAX EQUITY AND TAX FAIRNESS?”

THE EMERGENCE OF THE ORGANIZED TAX BAR AND THE DILEMMAS OF PROFESSIONAL RESPONSIBILITY

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I

INTRODUCTION

In 1961, shortly after assuming his new post as Assistant Secretary of the Treasury for Tax Policy, legal scholar Stanley Surrey issued a challenge to his former colleagues in academia and legal practice. The tax system, he said, was urgently in need of both repair and renovation. Existing faults were obvious and future problems certain. The task ahead was clear. “A complex society such as ours, ever growing and changing, must necessarily expect and demand that its tax system also keep pace,” he said.¹

Politicians, however, were ill-equipped to confront these looming challenges. Public debate on tax reform was lively, but it was also suffused with motivated and biased reasoning. “Much of the material presented to the Congress and in the public print comes down to an attempt to score debating points,” Surrey complained. “There is a good deal of commotion, but it is all thrust and parry.”²

Compounding the problem, government expertise was in short supply. In recent years, the Treasury Department—traditionally the source for dispassionate fiscal analysis—had retreated from the field of serious tax research. That withdrawal had created a ripple effect in academia where Surrey detected

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1. Stanley S. Surrey, Assistant Sec’y of the Treas., Current Tax Problems (Aug. 6, 1961), in 15 BULL. 20, 22 (1961).

2. *Id.* at 23.

“a distinct lessening” in research on tax issues.³

In the face of this shortfall, Surrey encouraged his former colleagues in the tax trenches and academic ivory tower to assume the mantle of policy leadership. “[T]ax knowledge starts with the tax expert,” Surrey intoned with a technocrat’s faith in the value of expertise, “be he a legal or accounting practitioner, a research consultant in the business world, or an economist or law professor in the universities.”⁴ More specifically, Surrey challenged the organized tax bar to undertake some candid introspection. “[O]ur profession has constantly to be asking itself as tax lawyers—with a stake in the integrity of the tax system and with an integral role in the task of linking that system with our taxpayers—whether we are doing as much as we can to bring before the Congress and the public the needed objectivity and perspective,” he said.⁵ “How well do we fulfill the role that only we can play?”⁶

Surrey’s answer to that question must have unsettled his audience, which was gathered for a meeting of the American Bar Association’s Section of Taxation. To be sure, Surrey acknowledged, tax lawyers were active in the legislative process, engaging policy issues and offering guidance to Congress. But typically, tax lawyers entered the policy arena as client advocates rather than defenders of the tax system, more likely to plead for special provisions than to oppose them. They were, in other words, part of the problem, not the solution.⁷

Surrey expected more from the bar, and he urged the Tax Section to join the Treasury in active defense of the fisc. But he leavened his critique—and disappointment—with a certain amount of sympathy. “[P]erhaps we cannot do better,” he granted. “Perhaps the attorney-client relationship, be it considered in its strict legal framework or as an attitude of loyalty or moral obligation, effectively prevents a tax practitioner from speaking his own mind on current issues before the Congress and the public.”⁸

Surrey’s concession—his recognition that the attorney-client relationship imposed constraints on the civic role of the tax professional—underscored a long-running tension within the organized tax bar. The American Bar Association (ABA) did not establish its official Section of Taxation (Section) until 1939, but predecessor ABA divisions had been working on tax issues since 1906. These groups continued to struggle for more than half a century to define a workable public role for the profession collectively and tax lawyers individually. This struggle, moreover, had unfolded amidst a complex and rapidly changing environment, both for the legal profession and the American fiscal state.

3. *Id.* at 21.

4. *Id.* at 23.

5. *Id.* at 24.

6. *Id.* at 23.

7. *Id.* at 24.

8. *Id.*

The Section's record on this score was decidedly mixed. As Surrey acknowledged, the group had sometimes entered policy debates as champions of sound taxation.⁹ Other times, however, individual tax lawyers had served principally as client advocates, lobbying Congress for "special provisions" that granted favorable treatment to particular taxpayers or groups.¹⁰ Such special pleading was often high-profile—and effective.

Perhaps most often, Section leaders had opted for discretion over valor, choosing to neither indict nor defend proposals that undermined the tax system, its fairness, or its revenue productivity. In Surrey's view, this policy of considered silence was actually a modest achievement for the organized bar, given the importance of client responsibilities. "Perhaps the tax practitioner must restrict himself to the negative restraint of advising his clients against rushing to defend positions that cannot and should not be defended," he declared, "and certainly such a role would be useful."¹¹

Still, Surrey hoped for more. "[T]he search must continue for ways by which the tax practitioner can fulfill the responsibility, which society can rightfully place on him, to make his professional wisdom as fully available as possible in advancing the public interest in an improved tax system," he told his colleagues.¹²

This article tells the story of that search during the first six decades of the twentieth century, beginning with the early pre-history of the formal ABA Tax Section and continuing through the crucial decade and half that followed World War II. These years were crucial, but not because the tax bar managed, during this period, to resolve the fundamental tension between its civic and client responsibilities. Indeed, that tension is not susceptible to resolution, since it arises from fundamental elements of our modern legal and revenue systems. The tax bar inhabits, of necessity, the gray areas of the tax law—those regions of uncertainty and opportunity that make the income tax more flexible, more malleable, and arguably more fair than alternative systems with brighter lines and clearer responsibilities.

Although there is a significant scholarly literature on the history of the organized U.S. bar,¹³ there are relatively fewer studies of how American tax lawyers have struggled to find a unified voice, let alone histories that trace the professional dilemmas of U.S. tax lawyers. The writings that exist frequently use

9. Stanley S. Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1170–75 (1957).

10. *Id.* at 1146–47.

11. Surrey, *supra* note 1, at 24.

12. *Id.*

13. See, e.g., GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870–1970* (1970) (providing the institutional history of the origins and development of the Association of the Bar of the City of New York); EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* (1953) (providing the history of the origins and early decades of the American Bar Association); see also JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950).

anniversaries of the 1939 founding of the ABA Tax Section to celebrate the Section's role in furthering the aims of the tax law subfield.¹⁴ Moving beyond anniversary celebrations, other scholars have focused on how the organized tax bar helped facilitate the dominance of tax attorneys over other tax professionals, such as economists and accountants.¹⁵

By contrast, this article seeks to uncover the historical challenges faced by the tax bar's dual role as client advocate and defender of the fisc. It focuses on the formative years of the tax law subfield: the first half of the twentieth century when the fledgling field of tax law evolved from a fragmented and neglected subset of the American legal profession to become an organized voice for the growing group of elite lawyers specializing in tax law.

Indeed, these were the years when tax lawyers first emerged as a discrete subgroup within the broader American legal profession. Not coincidentally, they were also the first years in which tax lawyers tried to grapple with the moral and political complexities of their role in the new American fiscal state. The early decades of the twentieth century, in particular, were a transformative era for the U.S. legal profession. These years marked the tail end of what legal historian Robert W. Gordon has described as the shift from "liberal legal science" to "progressive legal science"—a shift in which elite corporate lawyers became key intermediaries between state and society.¹⁶ Within the emerging tax bar, elite corporate lawyers evolved at this time to become much more than mere courtroom representatives for big business. They did more than simply dispute tax controversies. They also became valued counselors helping construct tax-efficient commercial transactions and securing state-sponsored tax benefits for their large corporate clients.¹⁷

The first fifty years of the twentieth century were also transformative ones for American public finance. Old fiscal tools were disappearing and new ones taking their place. At the state level, a variety of general property taxes—long criticized by fiscal reformers for being arbitrary, overlapping, and unenforceable—were giving way to state-level income taxes and, by the 1930s, general sales taxes. In Washington, meanwhile, policymakers were trying to grapple with the growing inability of tariff duties to adequately fund the federal government. Like their state-level counterparts, national political leaders increasingly looked to income

14. See, e.g., Phillip L. Mann, *A Brief History of the Tax Section, 1939–2014*, 68 *TAX LAW.* 13 (2014) (commending the expanding size and influence of the Section); Harry K. Mansfield, *A Brief Unofficial History of the Tax Section—1939–1989*, 44 *TAX LAW.* 4 (1990) (celebrating the 75th anniversary of the Section and reflecting on its accomplishments); Robert N. Miller, *History of Section of Taxation*, 8 *BULL.* 12 (1954) (chronicling the early history of the Section).

15. See, e.g., Mindy Herzfeld, *How Lawyers Dominate: A History of the ABA Tax Section* (Geo. U. Law Ctr., Working Paper, 2017), <https://ssrn.com/abstract=3070433> [<https://perma.cc/GY5F-T6KP>].

16. Robert W. Gordon, *The American Legal Profession, 1870–2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920–)* 73, 87–98 (Michael Grossberg & Christopher Tomlins eds., 2008).

17. *Id.*

taxes as a long-term solution.

The confluence of these professional and governmental changes helped shape the emergence of the organized tax bar. Most fundamentally, the growing scope and complexity of American tax systems—at every level of government—created a demand for sophisticated professional guidance. At the same time, that same scope and complexity created ethical and political pitfalls for lawyers trying to advise their clients on their new fiscal responsibilities.

The inflection points in this history of professional development came, as they did for so many other aspects of American society, during the two world wars. In the First World War, the federal tax system grew from modest beginnings into a fiscal workhorse, raising the enormous revenue needed to prosecute a global war. By the end of the Second World War, the tax system had reached a level of complexity and sophistication that renders it recognizable as the direct ancestor of our current fiscal state. The tax system of 2018 is much different from the one of 1948, but the family resemblance is unmistakable. An understanding of the problems and tensions that tax lawyers faced in the early postwar decades helps illuminate how the same struggles are playing out today.

Surrey's comments on the civic responsibilities of the tax bar came as the legal profession was trying to take stock of its new role in the post-WWII fiscal state. His call to action (and introspection) coincided with the emergence of new opportunities for tax practitioners. But it also came amidst growing concerns about the moral status of aggressive tax avoidance—and the lawyers who made it possible. As Surrey and his colleagues pondered the future of their profession and its stewardship of the tax system, they stood self-consciously, if uneasily, on the precipice of both professional opportunity and civic responsibility.

Part II of this paper describes the earliest incarnations of an organized tax bar, including predecessors to the modern ABA Tax Section that appeared in the early years of the twentieth century. Initially, these ad hoc groups focused on issues of fiscal coordination, both among the states and between the states and the federal government. Part III considers the transformative impact of World War I, which prompted the ABA's committee on taxation to grapple with a host of new issues. A much-expanded income tax, implemented quickly between 1916 and 1918, remained a fixture of federal finance in the postwar decade. Although still small when measured by the number of taxpayers, it was clearly poised to become a central element of American public finance—and American political culture.

Part IV describes the evolution of the tax bar in the crucial decade of the 1930s, when activist tax policy emanating from the Treasury Department (and occasionally from the White House) helped put the spotlight on the moral status of tax avoidance. While most of this debate focused on individual taxpayers of some notoriety, the tax bar also found itself under attack for its role in facilitating creative tax avoidance.

Part V considers the first decade and a half of the postwar era, including efforts to ease some of the tax systems more redistributive elements, including the high marginal tax rates applied to both individual and corporate incomes. The war itself had provided a respite from most, but not all, arguments about tax avoidance. But the prosperous years of the 1950s ignited a boom market for legal services, with tax specialists marketing a variety of creative planning innovations. These renewed efforts at vigorous tax minimization helped revive political debate about the moral status of legal tax avoidance—and prompted some genuine introspection within the tax bar about the civic obligations of private-sector tax practitioners.

Part VI considers the challenge that Stanley Surrey posed to the tax section, first in 1957 and then again in 1961. From his lofty perch near the pinnacle of the tax policy establishment, Surrey raised difficult—and deeply uncomfortable—questions about the civic responsibilities of the private bar. He also offered a few tentative answers, but none that fully resolved the inherent tension between a tax lawyer's duties to both client and country. Part VII, the conclusion, considers the implication of Surrey's critique for modern tax practice.

II

THE EARLY ORIGINS AND DEVELOPMENT OF ABA TAX ORGANIZATIONS

Nearly six decades before Surrey described the challenges of the tax legislative process, American lawyers faced similar professional dilemmas about the tension between their public and private roles. Before the permanent national income tax was established in 1913, many prominent business lawyers were struggling with subnational tax issues, especially the inconsistent and often overlapping application of state and local property taxes. These lawyers also had to face the moral and professional challenges of whether their role was to help private clients limit their tax obligations or whether they had a civic duty to improve the existing tax system by making property tax laws more rational, coherent, and uniform. This tension coincided with dramatic changes to the national economy that were having profound effects on the existing tax regime and the practice of law.

Although the ABA reluctantly provided avenues to address the discrepancies in state and local taxes, the topic of subnational tax reform became too cumbersome, too time-consuming, and perhaps most important, too political for the ABA. As a result, the tax bar remained a fragmented and disorganized subfield of the profession—at least until the enactment of the Sixteenth Amendment and the onset of World War I forever altered the fiscal landscape. The pre-history of the formally organized tax bar was, thus, marked by a deep ambivalence that has continued to trouble the professional subfield of tax law.

A. Pre-history of the Organized Tax Bar

Throughout the late nineteenth century, the increasing acceleration of interstate commerce, led mainly by the railroads, disrupted the taxing sovereignty of many state and local governments.¹⁸ The general property tax, which provided the main source of funding for most state and local governments at the time, formally applied to all property within a taxing jurisdiction—real and personal property, as well as tangible and intangible.¹⁹ As the existence and ownership of real property stretched across local and state boundaries, however, there was great uncertainty about which jurisdiction had taxing authority. A company or individual located in one jurisdiction could own property and conduct business across many taxing jurisdictions. Although real property could be assessed and taxed where it was situated, the growing importance of intangible personal property, namely corporate stocks and bonds, only exacerbated the chaos and confusion.²⁰

As government tax officials struggled to make sense of conflicting and overlapping tax authority, business lawyers both lamented the confusion and exploited it for their clients' financial interests. New York business lawyer Theodore C. Sutro was a frequent critic of the existing subnational tax regime. "Double and multiple taxation are a fact and a crying evil in our American systems of taxation," Sutro announced at a 1908 gathering of tax experts. To mitigate against multiple taxation, Sutro called upon government officials to consider "agreements or comity between the States."²¹ At the same time, business leaders and their legal representatives did not hesitate in turning to local and state political machines to extract favors, such as under-assessments of property and other forms of intentional neglect, in exchange for campaign contributions.²²

The problem of "double and multiple taxation" coincided with dramatic changes in the American economy and legal profession. In the decades that straddled the turn of the twentieth century, the social and political dislocations

18. See generally Cortlandt Parker, President of the Ass'n, Address of Cortlandt Paker (1884), in 7 ANN. REP. A.B.A. 147 (1884) (communicating noteworthy changes in statutory law among the states at the American Bar Association's annual meeting).

19. See John Joseph Wallis, *A History of the Property Tax in America*, in PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE 123, 138 (Wallace E. Oates ed., 2001) (discussing the universality provision, which required that all forms of wealth be taxed).

20. See GLENN W. FISHER, THE WORST TAX?: A HISTORY OF THE PROPERTY TAX IN AMERICA 83–93 (1996); JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 43 (2002).

21. Theodore Sutro, *Double and Multiple Taxation*, in 2 STATE AND LOCAL TAXATION, SECOND INTERNATIONAL CONFERENCE 547, 554 (1908).

22. R. RUDY HIGGENS-EVENSON, THE PRICE OF PROGRESS: PUBLIC SERVICES, TAXATION, AND THE AMERICAN CORPORATE STATE, 1877 TO 1929, at 44–51(2003); C. K. YEARLEY, THE MONEY MACHINES: THE BREAKDOWN AND REFORM OF GOVERNMENTAL AND PARTY FINANCE IN THE NORTH, 1860–1920, at 114 (1970).

wrought by the excesses of free-market “proprietary capitalism” soon led to what historian Martin J. Sklar has referred to as “the corporate reconstruction of American capitalism.” The consolidation of large-scale industrial corporations created new relationships between state and society. As the public sector became more reliant upon private business, it sought to regulate these large industrial firms. In short, the rise of big business during this period precipitated the subsequent emergence of the modern administrative and regulatory state.²³

Lawyers, invariably, found themselves at the center of these new relationships. They were often mediators between big business and the rising regulatory, administrative, fiscal state. In earlier periods, elite lawyers often identified themselves almost exclusively as zealous trial advocates for their clients’ legal interests, mainly the enforcement of property and contract rights. They spent most of their time helping clients resolve disputes in court, including tax controversies. But by the early twentieth century, elite American lawyers were moving beyond common-law courts into corporate boardrooms, using their professional networks and technical expertise as transactional engineers to broker big deals and execute complex commercial transactions.²⁴ The tax bar in many ways would come to mirror this broader transformation in the profession. This shift took place only gradually as the enactment of new federal income tax laws and the dramatic increase in WWI progressive tax rates added layers of legal complexity and raised the stakes of tax work, thus pushing the subfield to galvanize its organizational efforts.

Indeed, before WWI catapulted the federal income tax onto the agenda of most prominent lawyers, the tax bar struggled to find a unified voice. The lack of comity within state and local taxation apparently was not enough of a compelling rationale to unify business lawyers. Despite numerous attempts by advocates such as Theodore Sutro, the ABA was reluctant to create a separate tax section. Yet the need for some sort of response was obvious, and in the early 1900s, the ABA referred tax law issues to three separate ABA committees: the Committee for Uniform State Laws, the Committee on Commercial Law, and the Committee on Jurisprudence and Law Reform.²⁵ None of these three committees was eager to take on the task of studying the lack of comity in subnational tax laws, let alone harmonizing the vast array of conflicting state and local tax laws. In fact, it was not until 1906 that the ABA created a special Standing Committee on Taxation, led by Sutro. Even then, this committee survived for less than a decade, with limited results.

23. See generally NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904* (1985); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS* (1988).

24. See generally Gordon, *supra* note 16.

25. References to the work of these committees appear in the A.B.A.’s Annual Reports between 1902 and 1906.

The early attempts at creating a unified tax bar floundered mainly because ABA leaders could not agree on how to deploy the Association's scarce resources to assist lawyers struggling with conflicting and overlapping state and local tax laws. For some ABA leaders, even the fundamental project of empirically documenting double and multiple taxation was too onerous and time-consuming. The work of academics such as Carl Phlen demonstrated that verifying the variation in state and local tax laws and the lack of comity was a tremendous undertaking.²⁶ Other ABA leaders believed the Association should focus its time and energy on more concrete and urgent projects, such as harmonizing state property laws or developing a national commercial code. These lawyers were happy to leave tax issues to other civic organizations such as the National Tax Association (NTA), which was quickly filling the void left by the ABA.²⁷

Still others thought that taxation, as a branch of political economy, was too controversial a topic for the ABA. From the start, the ABA was created to be the leading voice for American lawyers everywhere. Its strength came from having a unified voice for all sectors of the profession, from big city elite corporate attorneys to rural solo practitioners.²⁸ Thus, many ABA members were loath to take positions on politically controversial topics that could potentially divide the Association. Initially, taxation was one such topic. "I do not like the effort that I see to discuss questions of political economy," proclaimed Henry Ingersoll of Tennessee at a 1907 ABA meeting, "and all other subjects which are not included within the purposes of the organization [like] Taxation!"²⁹ For ABA leaders like Ingersoll, there was a clear divide between law and politics, and taxation was evidently on the side of politics.

Indeed, for many traditional American lawyers, taxation was one of the critical topics that divided the "science" of law from the raw power of politics. As historian Morton Horwitz has shown, one of the central tenets of the "classical legal thought" that dominated turn-of-the-twentieth century American jurisprudence was a commitment to a "neutral, non-distributive state."³⁰ Lawyers

26. See generally DEP'T OF COMMERCE AND LABOR, SPECIAL REPORTS OF THE CENSUS OFFICE, WEALTH, DEBT, AND TAXATION (1907). Carl Plehn authored Part III of the overall report, which was considered "the most comprehensive yet attempted and that it will be the most useful to all interested in the subject of taxation." See *id.* at xi.

27. Compare Ajay K. Mehrotra & Joseph J. Thorndike, *From Programmatic Reform to Social Science Research: The National Tax Association and the Promise and Perils of Disciplinary Encounters*, 45 LAW & SOC'Y REV. 593, 602 (2011) (discussing the NTA's criticism of the American Bar Association's National Conference of Commissioners on Uniform State Law), with Comm. on Taxation, *Report of the Committee on Taxation*, 31 ANN. REP. A.B.A. 540, 541 (1908) (reporting on the progress other associations in the area of uniform taxation, including the NTA).

28. See generally ALBERT P. BLAUSTEIN ET AL., THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION (1954); SUNDERLAND, *supra* note 13.

29. Henry Ingersoll, *Transactions of the Twenty-Eighth Annual Meeting of the American Bar Association, Held at Narragansett Pier, Rhode Island*, 28 ANN. REP. A.B.A. 3, 127 (1905).

30. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 5 (1992); see ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913, at 6 (1993).

reared in this legal orthodoxy—those who grew up with the treatises of Thomas M. Cooley and the U.S. Supreme Court’s decision to strike down the 1894 income tax—believed that legal science could not tame tax law. By definition, taxation implicated the potentially redistributive powers of government. Such redistribution pitted one class against another and thus was not a legitimate area of scientific legal study or action. Henry Ingersoll’s rebuke to ABA leaders for even discussing topics like taxation thus exemplified the reigning legal orthodoxy.

B. The First ABA Tax Entity

Despite the ABA’s initial hesitation in providing a formal channel for tax issues, by 1906 the Association created a special Standing Committee on Taxation.³¹ Like the entities before it, this new panel suffered from a variety of familiar problems, including a lack of focus and resources.³² In its first official report, its members stressed the need for the fledgling tax bar to take an active professional role in bringing comity to state-level tax laws. State and local governments across the country, the report claimed, were focused mainly on maximizing their own tax revenues to the detriment of large businesses and neighboring tax authorities. These governmental units were imposing taxes on properties and at rates that frequently conflicted with adjacent jurisdictions. The lack of comity was a perennial issue. But it had taken on a new urgency, the committee claimed, because the lack of uniformity was encouraging widespread tax evasion. The property tax laws “remain on the statute books rather as incentives to evasion and fraud in the dealings of the citizens with the state than as a means of raising a revenue for public purposes.”³³ Concerned about how disparities in state tax laws were undermining confidence in the rule of law, the committee had hoped to secure ABA resources to catalogue the many existing state property tax law discrepancies and then convene a national conference of state delegates to rectify the lack of uniformity. The committee, in sum, seemed moved by its civic duty to improve the tax system in the name of the public good.

Yet just as earlier attempts to study and improve the existing tax system fell on deaf ears, so too did the requests issued by the new Standing Committee in 1907.³⁴ Although there was some collaboration between the ABA and the NTA,

31. See *Report of the Committee Appointed at the Meeting to Report Upon the Advisability of Amending the Constitution by Providing for a Standing Committee on Taxation*, 28 ANN. REP. A.B.A. 529, 529–30 (1905).

32. The inaugural members consisted of: Theodore Sutro (NYC, NY), Jacob Klien (St. Louis, MO), Frederick N. Judson (St. Louis, MO), Amasa M. Eaton (Providence, RI), Fabius H. Busbee (Raleigh NC), and Albert W. Biggs (Memphis, TN). Although the committee’s implicit goal was to remedy the problems of “double and multiple taxation,” there was no clear mandate beyond the general directive of taking “some active steps looking to remedial legislation in regard to obtaining some uniformity among the various states.” *Id.* at 530. Over time, this vague task would undermine the committee’s stability.

33. Comm. on Taxation, *Report of the Committee on Taxation*, 30 ANN. REP. A.B.A. 670, 671 (1907).

34. Although the ABA did grant the committee \$200 in response to its requests, committee leaders reported that the sum was not “sufficient even to warrant our commencing the proposed work.” Comm. on Taxation, *Report of the Committee on Taxation*, 31 ANN. REP. A.B.A. 540, 540 (1908).

which at the time comprised an interdisciplinary mix of lawyers, economists, and state and local tax officials, no unified voice represented the subfield of tax law or the tax bar. The ABA seemed satisfied that organizations such as the NTA were helping to unify tax expertise, even if they were not advancing the interests of tax lawyers per se.

After the Sixteenth Amendment was ratified in 1913 and the first peacetime federal income tax was adopted, the Standing Committee did issue a report—its last—criticizing the new national income tax law. The report, presented at the 1914 meeting, summarized how the general arrangement of the tax law was haphazard, difficult to reference, and filled with ambiguous terms. It even provided a long list of recommendations to remedy these defects.³⁵ Tax experts outside of the law hailed the report not only for its comprehensive breadth and depth, but perhaps more importantly for its political neutrality. One publication reported that “while [the report] indulges in many and detailed criticisms of the existing law, these, in the main, must be regarded as uncontroversial from a political or economic point of view, and as looking merely toward an improvement of the law from a formal and technical standpoint.”³⁶

Despite these accolades, ABA leaders did not believe that the Standing Committee served an important function. The lack of comity among state property tax laws remained a vexing issue to be sure, but it was a topic that other organizations, such as the NTA, were better equipped to handle. A new national income tax may have drawn greater attention to tax law issues, especially if the technical administration of the new law was lacking. Nonetheless, given that the initial income tax rates were relatively low and affected only a small fraction of wealthy Americans, the organized bar had little impetus to devote scarce resources to this potentially emerging subfield. In short, there were not enough good reasons to continue to support the ABA Standing Committee on Taxation, and as a result it was disbanded soon after filing its 1914 report.

III

WORLD WAR I, THE 1920S, AND THE NASCENT TAX BAR

Taxation may have suffered from the ABA’s benign neglect in the first decades of the twentieth century, but there were other institutions and broader forces that would come to shape the emergence of a federal tax bar. During WWI, the national government itself would play a major role in unifying elite corporate lawyers into a new and developing tax law subfield. These corporate lawyers turned wartime statesmen and government bureaucrats would become leading

35. See generally Comm. on Taxation, *Report of the Committee on Taxation*, 37 ANN. REP. A.B.A. 533 (1914) (discussing various aspects of the law, including its provisions on deductions, returns, and penalties).

36. *American Bar Association Committee Reports*, 18 LAW NOTES 145, 147 (1914); see also Roy G. Blakey, *Amending the Federal Income Tax*, 58 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 41 (1915) (concluding that the law had various technical flaws but that it was “sound in its fundamental principles”).

tax attorneys after the conflict. As a result of their wartime government service and their new private roles, these newly minted tax lawyers viewed their professional role with a mix of patriotic pride and private consternation. As the intellectual predecessors of Stanley Surrey, they understood that they stood at the intersection of lucrative professional opportunities and enduring civic responsibilities.

A. The WWI Fiscal Revolution

Although the adoption of the 1913 federal income tax launched the need for greater attention to tax law, at least at the national level, the professional practice of federal tax law remained rather stillborn. All that began to change with the onset of WWI. Indeed, the Great War was a watershed event for the modern American fiscal state. Before the war, the early federal income tax raised little revenue and touched only a small fraction of wealthy Americans, roughly 2% of the labor force.³⁷ By the end of the conflict, taxes on personal income and business profits eclipsed all other forms of taxation. Marginal individual income tax rates skyrocketed from a pre-tax height of 7% to a top figure of 77%, and the percentage of the labor force filing income taxes climbed to nearly 20%. Innovative new business levies, including an excess profits and war profits tax, added an unprecedented layer of complexity to the enforcement and collection of national taxes and further enhanced tax revenues. As a result, by 1919, income and profits taxes accounted for roughly half of all federal revenues. Although exemption levels decreased during the conflict, the wartime tax system retained a distinctive “soak-the-rich” characteristic. And soak the rich it did—the effective tax rate of the nation’s wealthiest 1% of households soared from about 3% in 1916 to 15% within two years.³⁸ In short, the development of the wartime tax regime, as historian David M. Kennedy has noted, “occasioned a fiscal revolution in the United States.”³⁹

Surprisingly, the WWI fiscal revolution did not alter the ABA’s ambivalence towards the nascent tax bar. After all, the Standing Committee on Taxation,

37. See JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 78 (1985).

38. W. Elliot Brownlee, *Historical Perspectives on U.S. Tax Policy Toward the Rich*, in *DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH* 45 (Joel B. Slemrod ed., 2000); John Joseph Wallis, *Table Ea758-772 - Federal income tax rates, by income group—average rates: 1913–1970*, *HISTORICAL STATISTICS OF THE UNITED STATES: MILLENNIAL EDITION ONLINE*, <http://hsus.cambridge.org/HSUSWeb/toc/tableToc.do?id=Ea758-772> [<https://perma.cc/AKJ7-5X27>] (last visited Apr. 1, 2018).

39. DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 112 (1980); see also THOMAS J. KNOCK, *TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER* (1992) (history of Woodrow Wilson’s views on diplomacy and his attempts to create a new world order); Anne L. Alstott & Ben Novick, *War, Taxes, and Income Redistribution in the Twenties: The 1924 Veterans’ Bonus and the Defeat of the Mellon Plan*, 59 *TAX L. REV.* 373, 380–92 (2006) (providing the history of 1920s tax policy and the pivotal role of social movements in limiting the retrenchment of progressive taxation).

which had been created in 1906 after much hesitation and hand-wringing, was disbanded in 1916, just as the war was intensifying in Europe. In fact, there was no official ABA tax entity until 1923, when the Association created a Special Committee on Internal Revenue Law and its Means of Collection.

While the ABA may have been neglecting taxation as a key topic, broader social and geo-political forces were shaping the emergence of a tax bar. The Great War's fiscal revolution necessitated a tremendous influx of administrative personnel into Washington. As historian Robert C. Cuff has noted, "[a]n administrative army marched into Washington before a military force sailed overseas."⁴⁰ Among the lieutenants and foot soldiers in this administrative army were numerous elite corporate lawyers who joined the U.S. Treasury Department and the Bureau of Internal Revenue (BIR) to help build the legal infrastructure for the wartime fiscal state. Their ranks included, among others, Russell C. Leffingwell, Undersecretary of the Treasury, Daniel C. Roper, the Commissioner of Internal Revenue, and Arthur B. Ballantine, Solicitor of Internal Revenue. These well-trained and powerful tax practitioners not only recruited their protégés and others into the wartime fiscal state; they also went on to form the foundation of the fledgling postwar federal tax bar.⁴¹

The sheer volume and complexity of the wartime income and profits levies required the increasing services of professional tax experts, especially lawyers. Nowhere was this more apparent than within the BIR—the unit within the U.S. Treasury Department that was charged with interpreting, assessing, and collecting the new taxes, including the highly complex and untried excess-profits tax. Under Roper's leadership, the BIR grew enormously. Between 1913 and 1920, the number of BIR personnel increased roughly four-fold, from about 4,000 to roughly 16,000 employees.⁴² Although it is difficult to discern how many of these new employees were legal professionals, there is no doubt that Roper and the other leading Treasury lawyers recognized the need for more lawyers within the government.

To fill their staff with lawyers, the Treasury officials turned to their professional networks and recruited young attorneys in a variety of ways. Given his past experiences shuttling between the public and private sectors, Roper understood that public sector knowledge and training could translate into future private benefits. Government work could lead subsequently to private riches. As leading postwar tax lawyers E. Barrett Prettyman, Sr. and Albert L. Hopkins later recalled, Roper recruited young lawyers, including Washington's first "lady lawyers," with appeals to patriotic duty and remarks about how "this tax business

40. ROBERT D. CUFF, *THE WAR INDUSTRIES BOARD: BUSINESS-GOVERNMENT RELATIONS DURING WORLD WAR I*, at 1 (1973).

41. AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929*, at 293-348 (2013).

42. ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX 540* (1940); W. ELLIOT BROWNLEE, *FEDERAL INCOME TAXATION: A SHORT HISTORY* 56 (2d ed. 2014).

is likely to develop into quite a thing for lawyers.”⁴³ Thus, from the start, the national tax bar reflected a mix of public and private motives. Young attorneys may have taken to tax during the war to help the Wilson Administration make the world “safe for democracy,” but they did not appear to lose sight of how they would be able to capitalize on their patriotic service soon after the war.

The new generation of state-building, national tax lawyers who came of age during World War I was unique. They were unlike previous or subsequent cohorts of progressive law reformers, who would similarly struggle with the dilemmas of professional responsibility. Their predecessors, the first generation of Progressive law reformers, began their careers at the turn of the century primarily as business lawyers. But, over time, this generation created and staffed public-interest organizations outside of their private practice, such as administrative and investigative commissions, to fulfill their social reform desires and ambitions.⁴⁴ By contrast, the wartime Treasury lawyers worked with and for the state during a pivotal moment in the development of American tax law and policy. The senior Treasury lawyers, like Leffingwell and Ballantine, came from prestigious northeast corporate law practices, but the war experience seemed to transform these individuals. Before their government service, they were highly talented, if somewhat cautious, corporate lawyers. Afterwards, they returned to the private sector as income tax advocates and leaders of the new federal tax bar, willing to convince their legal brethren that the progressive income tax was here to stay.⁴⁵

The war experience similarly shaped the junior tax soldiers in the Treasury Department’s administrative army. Because they began their careers in the public sector as Treasury clerks or BIR lawyers, these attorneys may have been infused during an early and formative period of their professionalization with a greater sense of the public good. Unlike a subsequent generation of post-World War II, socially minded lawyers who began their careers working in civil society for public-interest organizations, the WWI government tax lawyers appeared to have a greater faith and confidence in the public sector, perhaps because they grew up alongside the modern American fiscal state. It is no coincidence that, after the war, many of the WWI government lawyers became instrumental in working with the newly created Joint Committee on Internal Revenue Taxation.⁴⁶ In this sense, these key leaders of the newly emerging tax bar were lawyer-statesman, or at least lawyer-bureaucrats, well before they were private tax lawyers. This unique chronology of professionalization may have played some part in the willingness of these lawyers, both senior and junior, to push for

43. MEHROTRA, *supra* note 41, at 312.

44. Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 267–68 (1990).

45. MEHROTRA, *supra* note 41, at 408.

46. See generally George K. Yin, *James Couzens, Andrew Mellon, 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, 854–78 (2013).

reforming and retaining the income tax after the war—a position that may have been against the interests of their corporate clients.

B. The 1920s

After the war, the dramatic shift in national politics and policymaking led to numerous calls to dismantle the wartime tax state. The Republican politicians who swept into office in 1920 did so with a platform of retrenchment. Their goal was to return the American economy and society to, as President Harding put it, “normalcy.” Under the key leadership of the new Treasury Secretary Andrew Mellon, Republican leaders gradually began to undo the wartime “soak-the-rich” tax regime. They slashed top marginal income tax rates from a wartime high of 77% to 25% by the end of the decade. They abolished the complex and detested excess and war profits taxes. And, as a result, effective tax rates on the wealthiest American households declined from a 1920 high of 22% to roughly 9% by 1930.⁴⁷

Despite these changes, the federal tax regime did not return to pre-war levels. The conflict had forever altered the fiscal landscape. Although rates declined and some of the most complex levies were eliminated, federal income taxation had become embedded in the national legal system. In the process, it also became “quite a thing for lawyers” just as Roper had anticipated. The elite law firms in New York and Washington, D.C. quickly realized the importance of tax work to their practice. As Robert Swaine, the historian of the Cravath & Henderson firm noted, after the war “tax work had taken on importance as a specialty requiring constant attention.”⁴⁸ With such constant attention came greater revenue. For the Washington, D.C. firm of Covington, nearly half of the firm’s fees came from tax work during the post-WWI decade.⁴⁹

The growing specialization of a national tax practice signaled the arrival of tax law as a significant subfield. Moreover, taxation was influencing many other areas of law—not only business law but tertiary areas of the profession as well. “With the increasing intrusion of federal tax questions into the practice of almost every member of the bar, that unusual institution commonly miscalled ‘The Treasury Bar’ has come to have a growing significance to the members of the profession generally,” wrote the tax expert George M. Morris in the newly created *National Income Tax* magazine in 1923.⁵⁰

C. Reviving the ABA’s Tax Group

Unsurprisingly, as tax law became more prominent and more lucrative, the ABA took notice. In 1921, the Association created the “Special Committee on

47. MEHROTRA, *supra* note 41, at 351.

48. ROBERT T. SWAINE, 2 *THE CRAVATH FIRM AND ITS PREDECESSORS* 248 (1948). In addition to being the firm’s in-house historian, Swaine was also a partner at the firm.

49. Herzfeld, *supra* note 15, at 31.

50. George Maurice Morris, *Income Tax Practice of Lawyers*, 1 *NAT’L INCOME TAX MAG.* 15, 15 (1923).

Internal Revenue and its Means of Collection,” a successor to the ABA tax group that had been disbanded in 1916. Like most other organized bar associations, this new entity focused primarily on standards of practice and the process of self-regulation.⁵¹ The tensions between client representation and civic duty did not appear to be on the committee’s agenda. The stated goal of the new committee was “to obtain a modification of some of the rules and regulations of the Treasury Department, the Internal Revenue Bureau, in regard to the status of attorneys.” As Mindy Herzfeld has shown, the key contribution of the ABA tax committees during this historical period was their ability to help lawyers distinguish their status and contributions from other professions, especially accountants.⁵²

The national tax bar was developing its independent power and prestige at a time when the Mellon Treasury Department was pushing for a more “scientific” approach to tax reform. Led by Treasury lawyer Russell Leffingwell, who was among the key figures providing critical continuity between the wartime Democratic regime and the postwar Republicans, this new tax reform plan focused on lowering marginal tax rates to save the income tax rather than abolish it.⁵³ Leffingwell, the former Cravath partner, may have been a late convert to direct and progressive taxation, but after the war he and his lieutenants convinced Mellon that an effective tax system could be committed to both progressive taxation and corporate capitalism. “The purpose of taxation is to raise money,” explained Mellon’s Treasury Department, “not only in the year in which it is assessed, but to leave the source from which the revenue is to be derived permanently unharmed, so that in the next year and in the years following, similar taxes will produce adequate revenue from this source.”⁵⁴

Like their Treasury Department counterparts, tax lawyers in private practice believed they could reconcile their pursuit of profits with a principled position on tax reform and administration. As tax lawyer Gilmer Korner explained in 1925: “The field is a large one and is of vital importance to our civic and business life. The lawyer who enters that field will have his rewards. The practice is remunerative, it is absorbingly interesting and last, but by no means least, there is the satisfaction of contributing professionally to a greatly desired aim—namely, wiser tax laws wisely administered.”⁵⁵

While individual private lawyers may have believed naively that they could simultaneously represent their private clients and provide general counsel to the tax system, leaders of the ABA tax committee were more anxious. Like their predecessors decades earlier, the new generation of bar leaders sought to avoid

51. TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 16 (U. Chi. Press 1987).

52. Herzfeld, *supra* note 15, at 36.

53. M. Susan Murnane, *Selling Scientific Taxation: The Treasury Department’s Campaign for Tax Reform in the 1920s*, 29 *LAW & SOC. INQUIRY* 826–28 (2004); Lawrence L. Murray, *Bureaucracy and Bipartisanship in Taxation: The Mellon Plan Revisited*, 52 *BUS. HIST. REV.* 200–25 (1978).

54. Murnane, *supra* note 53, at 841–42.

55. J. Gilmer Korner, *The United States Board of Tax Appeals*, 11 *A.B.A. J.* 642, 644 (1925).

the politics of taxation. In the 1920s, the ABA tax group specifically declined “to take up legislative matters; legislative matters were perceived as being within the province of the Association at large.”⁵⁶ As George Morris explained:

We have carefully avoided getting into questions of political or economic policy with regards to federal tax legislation, feeling, I think correctly, that there would be a great difference of opinion among the members of the Bar and of this Association in accordance with their political affiliations and in accordance with their economic ideas. Therefore we have confined ourselves to these subjects in which the ordinary citizen is but little interested, namely, matters of procedure and administration, but which vitally affect the practical application of the tax laws.⁵⁷

Once again the ABA was reluctant to address any topic that might be perceived as controversial. Just as leaders decades earlier attempted to police the line between law and politics, so too did their successors in the 1920s. Taxation, in short, remained a topic to be avoided.

IV

NEW DEAL ATTACKS ON THE TAX BAR

The 1930s opened a new chapter in federal taxation. The sweeping cuts of the 1920s were replaced by a long series of tax increases. Contrary to the popular memory of the New Deal era, some of these hikes targeted the nation’s most vulnerable taxpayers; through at least the middle of the 1930s, regressive excise taxes on consumer goods—especially “sin taxes” on alcohol and tobacco—funded a large share of Franklin Roosevelt’s expensive New Deal. In addition, one of the most important fiscal innovations of the Roosevelt era—the payroll tax used to fund Social Security—was distinctly, and deliberately, regressive.⁵⁸ The New Deal, however, also featured a series of “soak-the-rich” tax hikes designed to balance the scales of fiscal justice. Some historians have dismissed these targeted increases as merely “symbolic,” used to distract voters—and liberal intellectuals—from the more regressive elements of the New Deal tax regime. But in fact, while certainly symbolic, these high-end taxes were also vitally important, at least to many ardent New Dealers, especially a cohort of New Deal lawyers working in the Treasury Department.⁵⁹ In their view, heavy, progressive taxes on the nation’s most fortunate few were the best way to compensate for the regressive excise taxes that most tax experts considered a

56. Am. Bar Ass’n, Report of the Forty-Fifth Annual Meeting of the American Bar Association (Aug. 10–12, 1922).

57. William P. MacCracken, Jr., *Proceedings of the Fiftieth Annual Meeting of the American Bar Association Held at Buffalo, New York*, 50 ANN. REP. A.B.A. 27, 86–87 (1927).

58. On the generally regressive nature of New Deal taxation, at least during the early stages of the Roosevelt’s presidency, see MARK H. LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933–1939* (1984). On Social Security, see Mark H. Leff, *Taxing the “Forgotten Man”: The Politics of Social Security Finance in the New Deal*, 70 J. AM. HIST. 359 (1983).

59. On New Deal Treasury lawyers, see Joseph J. Thorndike, “*The Unfair Advantage of the Few*”: *The New Deal Origins of “Soak the Rich” Taxation*, in *THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE* 29, 29–47 (Isaac William Martin et al. eds., 2009).

fiscal necessity.⁶⁰

Soaking-the-rich had obvious virtues for liberals of the 1930s, both politically and economically. But as tax rates increased, so did the incentive to find ways around those rates, either through tax evasion or tax avoidance. The former, clearly illegal, was principally a problem of tax administration, and the Bureau of Internal Revenue was generally diligent about tracking down the lawbreakers. But tax avoidance was something else—a process of tax minimization that often exploited gray areas of the tax law. Sometimes administrative or regulatory action could restrain this sort of avoidance. But other aspects of tax avoidance required legislative changes to the underlying law.

The New Deal did not neglect these legislative solutions. Indeed, Franklin Roosevelt made tax avoidance a leitmotif of his fiscal rhetoric. He got off to a slow start, however, choosing to simply cheer from the sidelines when Ferdinand Pecora, chief counsel for the Senate Committee on Banking and Currency, publicly exposed widespread tax minimization among Wall Street's most famous bankers. Similarly, FDR confined himself to a supporting role in 1934 when Congress began a sweeping anti-avoidance investigation.⁶¹ The following year, however, Roosevelt made progressive taxation a centerpiece of his emerging re-election campaign, and he vigorously championed the sharply redistributive Revenue Act of 1935. "Our revenue laws have operated in many ways to the unfair advantage of the few," he declared in a message to Congress, "and they have done little to prevent an unjust concentration of wealth and economic power."⁶²

The 1935 tax law raised rates substantially on wealthy Americans; according to estimates by historian W. Elliot Brownlee, effective rates on the top 1% jumped from 11.3% in 1935 to 16.4% in 1936.⁶³ At the same time, the law was clearly symbolic, even going so far as to create a new top bracket (applicable only to annual income over \$5 million) that applied to just a single person, John D. Rockefeller, Jr.⁶⁴

60. On New Dealers' genuine, as opposed to simply instrumental, support for high-end tax increases, see JOSEPH J. THORNDIKE, *THEIR FAIR SHARE: TAXING THE RICH IN THE AGE OF FDR* (2013). On the broader fiscal conservatism of the New Deal, including a distaste for red ink, see Julian E. Zelizer, *The Forgotten Legacy of the New Deal: Fiscal Conservatism and the Roosevelt Administration, 1933–1938*, 30 *PRESIDENTIAL STUD.* Q. 331 (2000).

61. *Hearings Before the S. Comm. On Banking and Currency on S. Res. 84 and S. Res. 86*, 73rd Cong. 2319–25 (1933). On the tax elements of the Pecora hearings, see Joseph J. Thorndike, *Historical Perspective: Pecora Hearings Spark Tax Morality, Tax Reform Debate*, 101 *TAX NOTES* 688 (2003). On the 1934 act, see Dana Latham, *Taxation of Capital Gains, Tax Avoidance and Other Problems Under the Revenue Act of 1934*, 23 *CAL. L. REV.* 30 (1934).

62. Franklin D. Roosevelt, *Message to Congress on Tax Revision*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=15088> [<https://perma.cc/W9EZ-28RG>] (last visited Feb. 24, 2018).

63. Brownlee, *supra* note 38, at 51.

64. LEFF, *supra* note 58, at 142, 145.

But again, left to themselves, high rates—like the 79% applied to Rockefeller—tended to encourage ever more vigorous efforts at avoidance. New Deal officials believed that high rates, though vital, required equally robust efforts to curb avoidance, especially since many of the nation’s richest taxpayers were using expert legal assistance to devise avoidance techniques that violated the spirit, if not the letter, of the revenue laws.

Tax avoidance among the rich—and the elite lawyers who made it possible—grabbed the spotlight of national attention in 1937. Fresh off his resounding re-election victory in 1936, Roosevelt began a very public, highly controversial campaign to shut down the “clever little schemes” being used by many rich Americans to avoid paying “their fair share.”⁶⁵

“A condition has been developing during the past few months so serious to the Nation that the Congress and the people are entitled to information about it,” Roosevelt told Congress in a special message.⁶⁶ The Treasury had delivered to the White House an alarming report, revealing “efforts at avoidance and evasion of tax liability, so widespread and so amazing both in their boldness and their ingenuity, that further action without delay seems imperative.”⁶⁷

In his remarks, Roosevelt deliberately blurred the distinction between legal tax avoidance and illegal tax evasion, tarring them both with the same brush of moral indignation. “Methods of escape or intended escape from tax liability are many,” he said.⁶⁸ “Some are instances of avoidance which appear to have the color of legality; others are on the borderline of legality; others are plainly contrary even to the letter of the law.”⁶⁹ All, however, ran counter to “the spirit of the law.”⁷⁰ Or as he continued:

All are alike in that they represent a determined effort on the part of those who use them to dodge the payment of taxes which Congress based on ability to pay. All are alike in that failure to pay results in shifting the tax load to the shoulders of others less able to pay, and in mulcting the Treasury of the Government’s just due.⁷¹

These were strong words—and they got stronger near the end of the message. “In this immediate problem the decency of American morals is involved,” Roosevelt declared.⁷² “The example of successful tax dodging by a minority of very rich individuals breeds efforts by other people to dodge other laws as well as tax laws.”⁷³

65. Franklin D. Roosevelt, *Message to Congress on Tax Evasion Prevention*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=15413> [<https://perma.cc/T79H-X68M>] (last visited Feb. 24, 2018).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

Roosevelt focused most of his indignation on the taxpayers engaged in aggressive tax minimization. Indeed, he and his allies were eager to name some of the more egregious avoiders, and they eventually managed to publicly shame many of them, despite the misgiving of Treasury employees who later resigned in protest.⁷⁴ But the President saved a large dose of opprobrium for the lawyers who aided taxpayers in devising avoidance techniques. “It is also a matter of deep regret,” he declared, “to know that lawyers of high standing at the Bar not only have advised and are advising their clients to utilize tax avoidance devices, but are actively using these devices in their own personal affairs. We hear too often from lawyers, as well as from their clients, the sentiment ‘It is all right to do it if you can get away with it.’”⁷⁵

Treasury Secretary Henry Morgenthau echoed this sentiment when presenting the President’s ideas to congressional investigators. “[W]e have developed in this country a group of ingenious lawyers and accountants who make their living by showing to people who can afford to employ them ways by which they may pay the least possible taxes,” Morgenthau said.⁷⁶ “We have now a bar of registered attorneys and tax accountants numbering approximately 45,000. Against them are pitted some 2,800 field agents actively engaged in tax investigations for the Government. The contest is, of course, unequal.”⁷⁷

“This may be a legitimate business,” the Secretary acknowledged grudgingly, but it came at a steep cost—both to the legal profession and to the nation. “The ordinary accepted standard by which many wealthy taxpayers judge the efficiency of the tax attorney is the amount of that he can save in taxes,” Morgenthau said.⁷⁸ “The most ingenious attorney, therefore, becomes the most successful and the most sought after.”⁷⁹ That success, in turn, eroded the tax lawyer’s sense of civic responsibility. “He feels that his sole duty is toward his client. If he is honest, he will not condone perjury, but he feels little moral or social responsibility to the government.”⁸⁰

Morgenthau—whose background was in agriculture, not law—was unimpressed by the bar’s ethical standards. Too often, he suggested, the successful tax lawyer put private gain over public service. “If he can invent a new scheme for circumventing the intent of the tax laws, which will be upheld by the courts, he is well within the ethics of his profession,” Morgenthau testified, “regardless of the unfortunate effect that such a scheme will have upon the

74. Wash. Bureau, *Two Treasury Lawyers Disagree with New Deal, Resign Over Issue of Fair Play to Individuals Cited in Congressional Tax-Loophole Inquiry*, WALL ST. J., Sept. 17, 1937, at A4.

75. Roosevelt, *supra* note 65.

76. *Hearings Before the Joint Committee on Tax Evasion and Avoidance Pursuant to Public Res. No. 40, to Create a Joint Congressional Committee on Tax Evasion and Avoidance*, 75th Cong. 9 (1937) (statement of Henry Morgenthau, Secretary of the Treasury).

77. *Id.* at 10.

78. *Id.* at 9.

79. *Id.*

80. *Id.* at 9–10.

general application of such laws.”⁸¹

Morgenthau’s indignation—which simmered while Roosevelt’s tended to boil—extended to the ingratitude of the tax bar. Many of the nation’s most successful tax lawyers had received their early training while in government service. But “[t]he fees of the tax lawyer exceed by thousands of percent the pay of his opponent employed by the Government,” the Secretary observed.⁸² Enticed by the lure of a more lucrative private practice, public employees left public service for greener pastures. “The Government then becomes a training school for many of its opponents,” Morgenthau said.⁸³

This was not Morgenthau’s only shot across the bow of the nation’s legal community—nor was he alone among New Deal officials in complaining about the ethics of the burgeoning tax bar. In the same set of hearings, Senator Robert LaFollette called out “smart tax lawyers,” while IRS Commissioner Guy Helvering referred derisively to “quack tax avoidance experts.”⁸⁴ Lawyers were a popular punching bag for many Roosevelt Administration tax officials.

Meanwhile, many elite tax lawyers tried to defend themselves and their profession. Of the most prominent—who eventually became a key Treasury official during World War II—was Randolph Paul. Creative tax avoidance was certainly common, Paul acknowledged: “Taxpayers and their counsel have not been found wanting in mental fertility and subtlety,” he noted wryly.⁸⁵ Indeed, both groups understood that:

[D]istinctions in tax law, as in other fields of modern law, are distinctions of degree; that taxing statutes place cases on one side or the other of an arbitrary mathematical line; that taxpayers may go intentionally as close to this line as they can, if they do not pass it. The line may shift, and the taxpayer may, to his sorrow, misconceive its exact position, in which case he must pay the penalty. But the line is “hazy,” and there is a fair gamble where the tax structure is complicated, where the question is one of degree upon which “reasonable men may differ widely as to the place where the line should fall,” and where this difference of opinion is one of feelings rather than processes of articulate reason. Sometimes one wins, and sometimes one loses. The game is, in the opinion of many taxpayers, worth the candle.⁸⁶

But Paul resisted any suggestion that tax lawyers were behaving badly in this game. “It must be remembered that a lawyer, when he is consulted, must render his best opinion upon the question he is asked, even if that opinion should be that the law has a loophole,” Paul wrote in defense of his profession.⁸⁷ “He need not sell loopholes, but he must say that one exists if he thinks it does. But more important than this consideration is the fact that many lawyers of high standing

81. *Id.* at 10.

82. *Id.*

83. *Id.*

84. Randolph E. Paul, *The Background of the Revenue Act of 1937*, 5 U. CHI. L. REV. 41, 44 n.26 (1937) (quoting Comm’r Helvering).

85. *Id.*

86. *Id.* at 45.

87. *Id.* at 44 n.26.

have been for years advising against most of the devices enumerated in Secretary Morgenthau's letter."⁸⁸ If Congress was in the market for scapegoats, Paul suggested, they should look elsewhere. "The salesmen of these devices have been laymen and institutions who hoped to profit in one way or another from the suggestions given. Many tax lawyers are wholly occupied with the problem of telling their clients what a complicated revenue act means, and representing taxpayers in genuine contests in particular cases."⁸⁹

Some voices in the popular press came to the defense of the bar, too. *The Washington Post* editorial page, for instance, chastised Roosevelt and his advisers for blurring the line between avoidance and evasion. "It would encourage clearer thinking and more intelligent handling of the problems of the tax collector if a sharp distinction were drawn between fraudulent evasion of taxes and avoidance of payment by legal methods," the editors wrote.⁹⁰ Faced with complicated and ever-changing laws, Americans necessarily sought help from skilled tax advisers. These advisers, in turn, "naturally take advantage of every opportunity which the law seemingly permits to avoid or reduce payment. There is nothing morally reprehensible in doing so; the system, not the individual, is to be blamed for any resultant loss of revenue."⁹¹

But at least one of Paul's colleagues at the pinnacle of the tax bar was less sympathetic to his profession. Roswell Magill, who served several stints in the Roosevelt Treasury despite his generally Republican and conservative sympathies, was not especially impressed by his colleagues' standards. "Americans are an ingenious race," he wrote in 1938, "and apparently the same ingenuity which among engineers finds its outlet in mechanical inventions, among lawyers takes shape in a trust revocable after notice of a year and a day; in a personal holding company organized under the laws of Newfoundland or the Bahamas; or in a tax sale by an individual to a trust which he has created and of which he is a trustee."⁹²

Magill did not believe that Americans endorsed the cynical view attributed to famed financier J.P. Morgan: "If the Government doesn't know enough to collect its taxes, a man is a fool to pay them."⁹³ But Magill acknowledged that some portion of the public *did* embrace that sentiment—including some members of the bar. "[S]o long as that view is current among a considerable minority and a minority to which a considerable part of the community looks for guidance, the Government must necessarily make its statutes sufficiently knowledgeable to meet the minority on its own ground," he wrote.⁹⁴

88. *Id.*

89. *Id.*

90. *A Drive Against Tax Evaders*, WASH. POST, May 30, 1937, at B6.

91. *Id.*

92. Roswell Magill, *Federal Taxation—1938*, 24 A.B.A. J. 191, 193 (1938).

93. Paul, *supra* note 84, at 47 n.48 (quoting J.P. Morgan).

94. Magill, *supra* note 92.

In August, Congress acted on Roosevelt's request, passing the Revenue Act of 1937 and shutting down some of the "clever little schemes" then in use.⁹⁵ Notably, the president and his family members were also accused of tax avoidance during debate over the bill, but the charges gained no traction.⁹⁶ Yet the bill did not curb the process of scheme-creation. For all the public shaming that Roosevelt and Morgenthau directed at the bar, the law did not significantly impinge on the activity of practicing tax lawyers, wrote George F. James, Jr. in the *American Bar Association Journal*. "All in all, it is not a major legislative achievement, but it is a thoroughly workmanlike Act," he wrote. "[I]t is another biennial effort by the United States Treasury experts to out-think private tax counsel."⁹⁷

V

THE POSTWAR DECADE

World War II was a watershed in twentieth century U.S. fiscal history. The war transformed the federal revenue system and especially its centerpiece, the individual income tax. Long focused narrowly on the nation's economic elite, the income tax became a broad-based levy paid by almost every working American. "The income tax became a vital fiscal weapon," wrote Stanley Surrey and William Warren in *Federal Income Taxation: Cases and Materials*. "Almost overnight it changed its morning coat for overalls."⁹⁸

In addition to its economic centrality, the income tax assumed center stage in wartime definitions of American citizenship.⁹⁹ Defended as an instrument of shared economic sacrifice, it was cast by its defenders as the fiscal counterpart to mortal sacrifice on the battlefield.¹⁰⁰ But even in the midst of this rhetoric, tax avoidance never quite disappeared from the landscape of American fiscal politics. Most notably, Franklin Roosevelt vetoed the Revenue Act of 1943 on the grounds that it raised too little money and created too many "special provisions" for lucky taxpayers. "[I]t is not a tax bill but a tax relief bill providing relief not for the needy but for the greedy," Roosevelt declared in his veto message. Congress, unimpressed, voted to override the president.¹⁰¹

95. On the provisions of the law, see Roy G. Blakey & Gladys Blakey, *The Revenue Act of 1937*, 27 AM. ECON. REV. 698 (1937).

96. Joseph J. Thorndike, *Who You Callin' a Tax Cheat?*, 123 TAX NOTES 623, 624 (2009).

97. George F. James, *The Loophole-Closing Revenue Act of 1937*, 23 A.B.A. J. 759, 763 (1937).

98. STANLEY S. SURREY & WILLIAM C. WARREN, *FEDERAL INCOME TAXATION, CASES AND MATERIALS* 15 (1953).

99. On the role of taxation in notions of fiscal citizenship during each of the world wars, see MEHROTRA, *supra* note 41; JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* (2011).

100. See STEVEN A. BANK ET AL., *WAR AND TAXES* 98 (2008); Mark H. Leff, *The Politics of Sacrifice on the American Home Front in World War II*, 77 J. AM. HIST. 1296, 1308 (1991). For more on fiscal citizenship, see generally LAWRENCE ZELENAK, *LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX* (2013).

101. Franklin D. Roosevelt, *Veto of a Revenue Bill*, THE AMERICAN PRESIDENCY PROJECT,

As the war drew to a close, lawmakers continued their efforts to soften some of the tax system's sharper redistributive edges, especially its high rates on personal and corporate income; at its wartime peak, the top rate on individual income had reached 94%,¹⁰² and the corporate excess profits peaked at 95%.¹⁰³ The modest tax relief of 1943 was followed, in 1945, by a sweeping tax cut totaling \$5.9 billion, or roughly 13% of total federal revenue. This legislation—the second largest tax cut in American history measured as a share of gross domestic product (GDP)¹⁰⁴—featured outright repeal of the corporate excess profits tax enacted during the wartime emergency. It also reduced regular income tax rates for both individuals and corporations. Congress decided to leave most excise taxes at or near their wartime peaks but agreed to postpone a scheduled increase in the Social Security payroll tax.¹⁰⁵

Though large, the 1945 tax cut did not resolve fundamental questions about the shape of America's postwar tax regime. In particular, it failed to address pressing questions about the nature and scope of corporate taxation.¹⁰⁶ As Carl Shoup, a leading tax economist and Treasury official in the Roosevelt Administration, noted at the time: "The Revenue Act of 1945 makes no advance toward solving the problem of corporate taxation, high-bracket incomes, and other issues of equity."¹⁰⁷ At the same time, however, it depleted the fiscal slack that might be necessary to address those issues at a later date. Future reforms "will have to be made chiefly by putting on some one taxpayer what is taken off another, rather than by simply taking off taxes from someone," Shoup wrote. That sort of trade-off would make any sort of tax reform much more difficult.¹⁰⁸

The changing political dynamics surrounding tax avoidance also complicated the prospects for reform. In a recent article that surveys tax planning advertisements in the postwar period, legal historian Steven Bank found a sea change in the moral status of avoidance. The rising respectability of avoidance was partly an economic phenomenon, he concluded, driven by the combination of high rates and an expanded tax base. In addition, however, Bank detected a

<http://www.presidency.ucsb.edu/ws/?pid=16490> [<https://perma.cc/56BT-DMK4>] (last visited Feb. 24, 2018); see also Joseph J. Thorndike, *Wartime Tax Legislation and the Politics of Policymaking*, 93 TAX NOTES 588, 591 (2001) (providing details on Roosevelt's veto of the Revenue Act of 1943).

102. *Historical Highest Marginal Income Tax Rates*, TAX POLICY CENTER (Mar. 22, 2017), <http://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates> [<https://perma.cc/37CJ-4H65>].

103. John Hakken, *Excess profits tax*, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 123 (Joseph J. Cordes et al. eds., 1999).

104. COMM. FOR A RESPONSIBLE FED. BUDGET, IS PRESIDENT TRUMP'S TAX CUT THE LARGEST IN HISTORY YET? (Oct. 25, 2017), <http://www.crfb.org/blogs/president-trumps-tax-cut-largest-history-yet> [<https://perma.cc/Y82Z-725Q>].

105. Joseph J. Thorndike, *Out of (Re)alignment: Taxes and the Election of 1946*, 12 TAX NOTES 1095, 1095 (2006).

106. On postwar debates over taxing corporations, see STEVEN A. BANK, FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT (2010).

107. Carl S. Shoup, *The Revenue Act of 1945*, 60 POL. SCI. Q. 481, 486 (1945).

108. *Id.* at 487.

backlash against the moralistic arguments used to defend high rates not just during World War II, but throughout the Great Depression as well.¹⁰⁹

The ABA and its Tax Section were keenly aware of these changes, as well as the need for basic tax reform. And in fact, since the Section's creation in 1939, it had developed a series of discrete proposals for changes to the tax law, most of them relatively technical and only a few touching directly on broader issues of fairness and economic efficiency.¹¹⁰ Indeed, the Section tended to shrink from such issues, wary of their political nature.

A case in point arose in 1948 and 1949, when the Section considered, and then rejected, a proposal to allow individual taxpayers to shelter earned income in a tax-free savings account.¹¹¹ Intended to bolster retirement saving by the self-employed, the plan captured the Section's interest but not its endorsement. A Section committee voted first to support the idea and later, after heated debate, to table it.¹¹² Section leaders, meanwhile, stressed the need to consider "the extent to which any plan proposed by the Committee involves economic and social considerations and a shifting of the burden of income tax from some groups to other groups."¹¹³ The Committee took the hint, ultimately concluding that the proposal "discriminates in favor of persons who are in a position to set aside a part of their earnings, and also because its operation probably would not be of substantial benefit to persons earning less than \$10,000."¹¹⁴

The Section's rationale for rejecting the savings account proposal was not unreasonable, nor was it inconsistent with redistributive concerns. But the marching orders given to the Section's "Committee on Earned Income" clearly indicated a broader unease regarding issues with high political salience, including wealth redistribution or vertical equity concerns. Still, the fact that Section leaders took up the plan in the first place revealed genuine, if not sufficient, interest in having the Section engage broader issues of taxation and fiscal reform.

By 1950, talk of fundamental tax reform was gathering steam in Washington, and the Tax Section developed an array of proposals designed to address various problems, both large and small. Most of these fell within the section's comfort zone, being largely technical in nature. More important, however, the Tax Section was cooperating with the American Law Institute (ALI) in pursuing the ALI's new Tax Project. The staff director for this project was none other than Stanley Surrey, who described for Section members what the ALI was trying to

109. Steven A. Bank, *When Did Tax Avoidance Become Respectable?* (UCLA School of Law, Research Paper No. 17-15, 2017), <https://ssrn.com/abstract=3014985> [<https://perma.cc/RJ8B-WP9F>].

110. Am. Bar Ass'n Section of Taxation, *Tax Revision*, 3 BULL. 3, 5 (1950).

111. See Harry Silverson, *Earned Income and Ability to Pay*, 3 TAXL. REV. 299, 315 (1948).

112. Harry Silverson, *Taxation and the Self-Employed: A Study in Retrogression*, 41 A.B.A. J. 50, 50 (1955).

113. Am. Bar Ass'n Section of Taxation, 2 BULL. 1, 7 (1948).

114. Am. Bar Ass'n Section of Taxation, *Mid-Year Meeting of Council and Committee Chairmen*, 2 BULL. 4, 6 (1949).

accomplish.¹¹⁵ “The Project looks considerably beyond mere codification of the present law and mere restatement of present income tax rules,” he wrote, quoting from the ALI’s own statement of goals. “At the same time, the Project is not designed to produce a fully developed ‘model income tax.’ Such a model would require exploration and decision respecting many political, fiscal, economic and social problems—e.g., rates, exemptions, capital gains, tax-exempt securities, function of the corporation tax, percentage depletion, etc.”¹¹⁶

This statement attempted to define a sustainable public role for the organized tax bar, albeit one that the ALI, not the Tax Section, would mediate. Surrey and his colleagues on the Tax Project were trying mightily to dodge the pitfalls of politicized fiscal debate without retreating entirely into the arcana of the tax law. Tax professionals had no special competency when it came to fundamental questions of economic fairness and social equity, they suggested, but tax lawyers did have something to contribute to the actual functioning of the tax law. “The ground to be covered by the Project thus extends considerably beyond the areas of codification and restatement, but it does not reach into the areas of political and fiscal policy,” the group declared. “In this broad middle ground fall most of the tax provisions, the proper development of which is vital to a desirable tax structure.”¹¹⁷

Of course, the middle ground was not entirely devoid of political influence and activity. The ALI, for instance, might try to dodge fundamental, threshold questions about the advisability and nature of corporate taxation or the proper treatment of capital gains and losses. But the group still engaged numerous aspects of both issues, often with important consequences for taxpayers. Still, by avoiding the most commonly politicized issues of tax policy debate, the ALI—and its partners in the Tax Section—were able to define a useful and still active public role for tax professionals.

A. Offering Advice to Lawmakers

In 1950, the congressional Joint Committee on Internal Revenue Taxation invited the Tax Section to offer suggestions for the new excess profit tax then in development. The Section responded quickly, if awkwardly. With no time to develop formal recommendations through its normal procedures—which required votes by the Section council as well as the broader ABA Board of Governors—Section leaders instead provided “an informal statement of views.” This procedural irregularity, justified by the national emergency of the Korean War (which had started in June 1950) represented a new modality for Tax Section civic engagement. The resulting recommendations, while consistent with past versions of the excess profits tax, were nonetheless deeply political, since they touched hot-button issues like how lawmakers might distinguish “excess” and

115. Stanley S. Surrey, *American Law Institute Income Tax Project*, 3 BULL. 3, 13 (1950).

116. *Id.*

117. *Id.*

normal profits.¹¹⁸

More broadly, the war refocused Section members on the bar's civic engagement. "Last June we were proceeding rather blithely and perhaps a little irresponsibly down a road of tax reduction, including the introduction of a bit of special privilege here and there," wrote Harvard Law School Dean Erwin Griswold in the December 1950 issue of the *ABA Journal*.¹¹⁹ Now lawmakers were struggling to return the tax system to a wartime footing. "It is an enormous task to collect fifty billion dollars a year from any economy, far more intricate and complicated than is realized by laymen, and even legislators, generally," he continued. "We are very fortunate indeed that we have the machinery and the experience, and a well-trained group of tax practitioners to assist in doing the job."¹²⁰

The following year, members of Congress also sought the Section's assistance during its high-profile investigation of the Bureau of Internal Revenue. Adrian DeWind, chief counsel of the Subcommittee on Administration of the Internal Revenue laws of the House Committee on Ways and Means, specifically asked for guidance on what his panel should be investigating. The Tax Section agreed to help, soliciting ideas from its members but also acknowledging the complexities of offering that sort of assistance. "Care will be exercised to avoid any violation of confidential relationships or possible embarrassment to the persons who supply such information," the Section noted in its newsletter.¹²¹

In 1952, the ABA House of Delegates endorsed a proposed constitutional amendment that would have capped income tax rates at 25%, except during wartime, and barred the imposition of gift and estate taxes entirely.¹²² The Tax Section does not seem to have added its own imprimatur to the proposal, although the Section's newsletter acknowledged the "able presentations" of two ABA leaders who urged the Section to sign on. In that presentation, as well as a subsequent article in the *ABA Journal*, these same ABA leaders emphasized the amendment's importance to the survival of modern capitalism—and took pains

118. In previous experiments with excess profits taxes, this debate had turned on the appropriate point of comparison for wartime profits. Specifically, the issue was whether to (1) allow a "normal" rate of return on invested capital, taxing everything above that level or (2) to compare wartime profits to an average of pre-war profits. The most generous solution was to give corporations a choice, and that's what the Tax Section informally recommended. See Am. Bar Ass'n Section of Taxation, *Excess Profits Taxes*, 4 BULL. 19, 21 (1950).

119. Erwin N. Griswold, *The Blessings of Taxation: Recent Trends in the Law of Federal Taxation*, 36 A.B.A. J. 999, 999 (1950).

120. *Id.*

121. Am. Bar Ass'n Section of Taxation, *May Meeting of Council and Committee Chairmen*, 4 BULL. 7, 8 (1951).

122. For more on this proposed amendment and the broader campaign to undermine the income tax, see Isaac William Martin, *Redistributing toward the Rich: Strategic Policy Crafting in the Campaign to Repeal the Sixteenth Amendment, 1938–1958*, 116 AM. J. SOC. 1 (2010). For contemporaneous comments by a leader of the legal tax community, see Erwin N. Griswold, *Can We Limit Taxes to 25 Percent*, ATLANTIC MONTHLY (Aug. 1952), <https://www.theatlantic.com/past/docs/unbound/flashbks/taxes/griswolf.htm> [<https://perma.cc/TNS3-NQAB>]. This article served as a foil for Dresser's piece.

to note Karl Marx's support for an income tax. "We have been following the Marxian tax doctrine," complained Robert Dresser, one of the leading ABA champions of the amendment.¹²³

The amendment debate revealed a disjunction between the sometimes politicized role of the broader ABA and the self-consciously technocratic focus of the Tax Section.¹²⁴ In the same issue of the *ABA Journal* featuring Dresser's attack on the income tax, George D. Webster offered a laudatory retrospective of the tax section's first fourteen years, emphasizing its technocratic contributions to political debate. "Since its organization it successfully has sponsored certain legislation and recommendation relating to federal taxation," he wrote of the Section.¹²⁵ "The legislation it has sponsored has been largely technical rather than of a substantive nature; and, as an organization it has repeatedly refused to support legislation in the nature of special pleading."¹²⁶

Webster drew special attention to the comments of House Ways and Means Chair Daniel Reed (R-N.Y.) who specifically praised the Tax Section for its emphasis on civic, as well as professional, obligations. "These distinguished lawyers have devoted themselves unselfishly to this task [of tax reform]," Reed said, "not in the interest of their clients but in the general public interest of making our tax laws equitable in their application and better in their administration."¹²⁷

Reed's praise served to underscore the tension between client and civic responsibilities. Webster, too, acknowledged the "dual capacity in which a lawyer in private practice sometimes serves in sponsoring legislation—as a member of the Tax Section and as an advocate for his client." But most lawyers knew how to thread the needle, Webster said "[t]he resolution of these interests, where conflicting, by Tax Section members has been, in the main, completely effected."¹²⁸ Webster went on to summarize the Section's recent legislative accomplishments, concluding in sweeping fashion that the Section had become "the outstanding private group continuously devoted to the improvement of the revenue laws."¹²⁹

Other leaders of the tax bar also expected the Section to play a vital role in defending the tax system from its often-voluble enemies. "As tax lawyers, whether for the Government or for private clients we have a great responsibility

123. Robert B. Dresser, *The Case for the Income Tax Amendment: A Reply to Dean Griswold*, 39 A.B.A. J. 25, 26 (1953).

124. See Am. Bar Ass'n Section of Taxation, *The Chicago Meeting*, 5 BULL. 2, 15 (1952).

125. George D. Webster, *The Section of Taxation: The People's Tax Attorney*, 39 A.B.A. J. 29, 29 (1953).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Webster also insisted that every attorney in government employ faced a similar tension, since such a lawyer owed "an advocate's duty to his client, the United States, and also a duty, as a public servant and as a member of the legal profession, to make good law." *Id.*

in the difficult days to come,” wrote Erwin Griswold at the start of the Korean War.¹³⁰ The key to meeting that responsibility was a recognition that taxation was a vital tool of modern society. “Taxes are not a necessary evil,” he insisted, “They are, in times like these, a downright blessing.”¹³¹

An appreciation for the social value of taxation—even high taxation—would not conflict with a tax lawyer’s responsibility to paying clients, Griswold insisted.¹³² “I do not for a moment mean that the tax lawyers should not work for his client, help him minimize his taxes, and fight hard for him when necessary,” he wrote.¹³³ “That is all part of our adversary system, which I believe to be in general a good system. Many tax questions are necessarily complex, and they are likely to be worked out best when there is an able practitioner making the best possible presentation on each side.”¹³⁴

But tax lawyers could not let client responsibilities blind them to broader civic obligations. “They should sell their services to their clients—I hope they do,” Griswold wrote, “but not their souls.”¹³⁵ The Tax Section, in particular, had an obligation to protect the integrity of the tax system and work for its improvement. “We are rather quick to move to action when there is some portion of the law which affects some particular group of taxpayers,” he pointedly suggested.¹³⁶ “But we ought to be equally quick to act in the public interest.”¹³⁷

Griswold moved beyond this implied criticism to offer a more direct complaint about the Section’s public behavior. After praising the group’s past efforts to improve the tax system, he took pains to identify its failures. “In times when taxes must be high, it is most important that they should be fair and nondiscriminatory, that they should not be full of loopholes and special privileges,” he wrote.¹³⁸ “Yet right now, in the midst of a real shooting war, we are apparently about to enact a new tax law which contains some gross, almost crude, inequities. Where has the voice of the Tax Section been on these matters?”¹³⁹ He continued with a specific set of indictments:

What about family partnerships and stock options? Is there really any decent justification for the handouts which are reportedly about to be given to a special few taxpayers on these matters? What about the gross inequities of the law in favor of the oil and gas interests? Is there any justification for adding to that discrimination now by the so-called “in oil” provision of the present bill? Where

130. Griswold, *supra* note 119, at 1002.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

was the voice of the Tax Section on that matter?¹⁴⁰

This litany of complaints was specific to the pending issues of 1950. But it implied a broader criticism of the Tax Section civic role. And Griswold was not the only one voicing such complaints in the years after World War II.

VI

THE 1960S AND BEYOND

When Stanley Surrey stepped to the lectern at the Tax Section's 1961 annual meeting and delivered the speech described in the first section of this article, he stood near the pinnacle of the tax policy establishment. From that vantage, he surveyed a federal tax system that looked remarkably like the one Griswold observed more than a decade earlier. The 1950s had brought meaningful reform to some parts of the law, and the 1954 overhaul, in particular, was broad-ranging, if not exactly fundamental. But in broad strokes, the tax system of 1961 looked a lot like the tax system of 1950.¹⁴¹

Which made tax reform all the more urgent, Surrey told his friends and colleagues in the Section. High rates were chief among the lingering characteristics of the emergency tax regime established during World War II and reaffirmed during the Korean War.¹⁴² While Americans were dying on foreign battlefields, such rates had been defensible as a form of shared sacrifice. But once peace returned, those rates lost some of their elevated moral status. Even more important, Surrey pointed out, those rates had encouraged a proliferation of "special preferences and treatments."¹⁴³ (A phrase which Surrey preferred to the popular terminology of "loopholes" and that was distinct from his more famous concept of tax expenditures.)¹⁴⁴ These preferences, both by design and effect, served to make high statutory rates less onerous for postwar taxpayers.

Taken together, high rates and special provisions had compromised the vitality of the American economy and distorted economic decision-making. "Any tax system will necessarily have its effect on our business and social structure in the large," he said.¹⁴⁵ "But the present tax system, again because of its many preferences and consequent complexities, seems to have an undue and

140. *Id.*

141. Stanley S. Surrey, Assistant Sec'y of the Treas., Remarks Before the Section of Taxation of the ABA at its Annual Meeting in St. Louis, Missouri (Aug. 6, 1961), in 15 BULL. 20, 20–22. For more general descriptions of tax policy in the postwar years, see BANK ET AL., *supra* note 100, ch. 5; W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY ch. 3 (2d ed. 2004); WITTE, *supra* note 37, ch. 7.

142. Surrey, *supra* note 141, at 21.

143. *Id.*

144. For Surrey's most complete explication of the concept of tax expenditures, see STANLEY S. SURREY, PATHWAYS TO TAX REFORM; THE CONCEPT OF TAX EXPENDITURES (1973). "The use of the appellation 'loophole' is a matter of viewpoint," Surrey wrote. "What is a 'tax loophole' to a CIO or an ADA meeting is merely 'relief from special hardship or intolerable rates' to an American Bankers Association or NAM [National Association of Manufacturers] meeting-and vice versa." *See id.* at 1148.

145. Surrey, *supra* note 1, at 21.

inappropriate effect in shaping our society in many of its daily routines.”¹⁴⁶

The Kennedy administration was already moving to deal with some of the more egregious distortions, Surrey noted. These included preferences associated with the foreign source income of U.S. firms, business expense accounts, dividend and interest reporting, preferential rates on sales of depreciable property, and the special benefits showered on business organizations operated on a mutual basis, including cooperatives, savings institutions, and some insurance companies.¹⁴⁷

Surrey predicted, however, that even more fundamental change was imminent. The administration was developing a program that would “center on a reconsideration of the income tax base with the viewpoint of determining the extent to which it can appropriately be broadened, and a re-examination of all brackets of the rate structure to see whether the rates can be lowered as a concomitant readjustment.”¹⁴⁸

Even this larger program, however, would be only a portion of the broader task facing fiscal policymakers. Tax reform, Surrey insisted, was a continual process—a journey, not a destination.

A complex society such as ours, ever growing and changing, must necessarily expect and demand that its tax system also keep pace. The changes now under consideration merely mark the insights of today, based on the research of the past. Those insights tell us only what we need today and parenthetically tell us that the needs are overdue. But what of the tax system of the years ahead?¹⁴⁹

Tax lawyers, Surrey believed, had a special responsibility to help answer this question, and the organized bar was the most obvious and appropriate vehicle for their work.

Experts in other fields—be they scientists, architects, or business leaders—necessarily took the long view, Surrey pointed out. But what about tax experts? “What can they say?” he asked. “[C]an they speak at all? Is the crystal ball far cloudier in the field of taxation? Is there even a crystal ball of taxation at all, or must we be content in taxation to forget the future and only try to make sure that we recognize when the present is becoming outmoded?”¹⁵⁰

In fact, Surrey believed that such foresight was entirely possible, and he challenged lawyers to help lead the nation into its fiscal future. Legal tax experts must educate both Congress and the general public. “Legislative change in turn means knowledge about the tax system that is communicated to and understood by at least the business and professional groups in our society, and as far as possible by the public at large,” he said. “For the Congress in the end must depend upon the existence of that general understanding if a change is to have

146. *Id.*

147. *Id.* at 22.

148. *Id.*

149. *Id.* at 22–23.

150. *Id.* at 23.

the degree of acceptability that will enable it to be made at the legislative level.”¹⁵¹ Of course, political discussion about tax reform was common and often vigorous. But there was altogether too much debate, and not enough transmission of knowledge. “What we lack is a sense of realism and an effort to achieve perspective,” he said.¹⁵²

Tax lawyers could help fill that gap in public discourse, Surrey insisted, but too often they confined their role to narrowly focused client advocacy. Most tax lawyers abstained from any sort of disinterested yet vigorous participation in the fiscal policy process. And that was a shame, since it hampered not just general tax reform, but even narrower revisions of the revenue laws.

Surrey offered an example to bolster his case. “Wouldn’t we all have regarded it as helpful and meaningful if even a few tax practitioners had said publicly what we all know—and indeed what was said by the one practitioner who appeared on his own behalf—that the expense account situation had become intolerable?”¹⁵³ Surrey hectored his audience. And even when tax lawyers chose to acknowledge abuses of the tax law, their remedies usually focused on tougher enforcement rather than legislative revision. Again, he offered several examples:

Generally, the suggestions come down to more and more administration—without anyone stopping to think about what happens to tax enforcement generally when all of the revenue agents are busy in trying to apply section 482 to tax haven corporations, in pursuing the mass non-reporting of dividends and interest, and in auditing expense accounts to determine what are legitimate business expenses—a phrase the speakers never bother to analyze in the context of entertainment expenses. Nor does anyone suggest just how revenue agents, given their average skills, are supposed to arrive intelligently at arm’s length prices for all of the countless goods exported and imported through foreign subsidiaries.¹⁵⁴

Such problems cried out for a legislative fix, not simply better administration. More to the point, tax lawyers were well-situated to take the lead in arguing for that sort of reform. To repeat his crucial challenge quoted in the first section of this paper:

[O]ur profession has constantly to be asking itself as tax lawyers—with a stake in the integrity of the tax system and with an integral role in the task of linking that system with our taxpayers—whether we are doing as much as we can to bring before the Congress and the public the needed objectivity and perspective.¹⁵⁵

Surrey’s call to action may have been stirring, at least for certain kind of wonkish tax lawyer, but it was not uncomplicated. In particular, as noted earlier, it ran headlong into the attorney-client relationship. Tax lawyers had obligations to both the fisc and to their clients; when the interests of the latter clashed with

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 24.

155. *Id.* Similar appeals to the tax bar have been made by many other tax lawyers, including over the important topic of tax simplification. See, e.g., Sidney I. Roberts et al., *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325, 368 (1972).

the needs of the former, tax lawyers were caught in the middle.

Surrey did not dwell on this tension in his 1961 speech, but four years earlier, he had published an article in the *Harvard Law Review* that focused more intently on the quandary of the civic-minded tax lawyer. In “The Congress and the Tax Lobbyist: How Special Tax Provisions Get Enacted,” Surrey tried to explain the proliferation of “special tax provisions” in the years after World War II.¹⁵⁶ He considered the issue from several angles but returned time and again to a central problem: special provisions had many champions, including well-heeled lobbyists and deep-pocketed congressional constituents.¹⁵⁷ But the tax system had few vigorous defenders. “The question, ‘Who speaks for tax equity and tax fairness?’ is answered today largely in terms of only the Treasury Department,” he wrote. “If that department fails to respond, then tax fairness has no champion before the Congress.”¹⁵⁸

In theory, Surrey pointed out, the tax bar might assist the Treasury in this thankless task, given tax lawyers’ collective stake in the tax system. In practice, however, the bar was often complicit in the creation of special tax provisions.¹⁵⁹ “[F]or a good many years the vocal tax bar not only withheld any aid but very often conducted itself as an ally of the special pressure groups,” he wrote. “Many a lawyer representing a client seeking a special provision could without much difficulty obtain American Bar Association or local-bar-association endorsement for his proposal.”¹⁶⁰ In fact, many lawmakers had become suspicious of any proposal bearing the ABA’s imprimatur, he said.¹⁶¹

Still, things seemed to be changing for the better. “The Council and the committees of the Tax Section of the American Bar Association are becoming far more appreciative of the public interest,” Surrey wrote.¹⁶² “The signs of a growing maturity in the Tax Section on these matters are constantly increasing.”¹⁶³ But most of this maturity came in the form of silence. “[S]o far this change in attitude has been negative and limited to self-restraint and refusal to join with the proponents of special tax provisions,” Surrey maintained.¹⁶⁴ “The Tax Section is becoming less and less a protagonist against the Treasury Department, especially on the more extreme proposals, but it has not yet become a vocal ally of the Treasury in defending the integrity of the tax system before the tax committees.”¹⁶⁵

156. See Surrey, *supra* note 9.

157. *Id.* at 1152–53.

158. *Id.* at 1164.

159. *Id.* at 1170.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1170–71.

Once in a while, Surrey acknowledged, the bar took a more active role in defending the tax system. In 1954, for instance, as Congress was reconsidering key elements of the corporate income tax, the bar had broken with its implicit policy of careful silence and argued against several proposed changes. “For perhaps the first time we find bar associations going before Congress and pointing out that proposed legislation will open up unjustified tax loopholes,” he wrote.¹⁶⁶ But that sort of active intervention in the legislative process was still the exception, not the rule.

The bar’s timidity had several explanations, Surrey wrote. One was bureaucracy: The Tax Section could only take a public position after a series of votes by annual meetings held in different parts of the country. Even more problematic, any such position had also to be approved by the broader ABA House of Delegates. “A body that has regularly approved a proposed constitutional amendment to limit income-tax rates to twenty-five per cent is not likely to understand the problems of special tax provisions,” Surrey noted dryly.¹⁶⁷

Ultimately, however, bureaucratic hurdles were minor compared to the constraints imposed by the attorney-client relationship. Some of these constraints were informal, almost instinctive. Lawyers had a natural tendency to take a client’s-eye view of tax policy. “They can readily perceive the adverse effect of the tax laws upon a particular client or transaction. They can then phrase the legislative solution they think necessary to remove the claimed tax obstacle or burden,” he observed in a comment reminiscent of Griswold’s complaint from 1950.¹⁶⁸ “But they are usually quite incapable of standing off from the problem and their proposed solution and viewing both from the perspective of the general public interest.”¹⁶⁹

This myopia was a function of inexperience, not poor judgment or dubious morals. Most tax lawyers were inclined to oppose special tax provisions, Surrey wrote, partly out of a legitimate fear that Congress would turn a wrathful eye on those who exploited them. “[Tax lawyers] know that in the long run the pendulum may swing and that a ‘loophole’ may be closed with a vigor that pushes the cure too far,” he suggested. “Even when their legal business requires them to lobby directly for a special tax favor for their clients, I doubt that most lawyers relish the task.”¹⁷⁰

Still, the client-centered perspective was hard to transcend. “Lawyers as a profession are deeply conscious of a duty of loyalty to their clients,” Surrey wrote.¹⁷¹ “In his day-to-day relations with other lawyers and with the business

166. *Id.* at 1171.

167. *Id.* at 1171–72.

168. *Id.* at 1172.

169. *Id.*

170. *Id.* at 1173.

171. *Id.*

world a lawyer does not act contrary to his clients' interests. These attitudes of loyalty and protection are ingrained in the profession; their roots lie deep in the past."¹⁷²

Reconciling client interests with public responsibilities was especially difficult when issues of broad public policy impinged on a client's particular tax situation. But it was hard whenever a client sought legislative changes that ran counter to the canons of sound taxation, which Surrey typically defined in terms of comprehensive base-broadening and reasonable rate reduction. In such cases, the tax lawyer's responsibilities were unclear. Did a lawyer's commitment to the public good ever transcend her duties to a client? Or were the latter always paramount?

"Must a lawyer seeking a legislative change believe the change to be in the public interest?" Surrey asked. "And if he does not, should he still represent his client before the legislature?"¹⁷³ In practice, Surrey pointed out, different lawyers answered this question in different ways. Some were fearless and outspoken defenders of the public interest; Surrey cited Randolph Paul, an early leader of the private tax bar and a highly influential tax official in the Roosevelt Administration, as a case in point.¹⁷⁴ Other practitioners chose to thread the needle, opting for a policy of considered silence in the face of dubious proposals. And a few, unconcerned with abstract threats to the integrity of the tax system, were willing to argue for almost anything, acting "as legislative advocates, with varying degrees of belief in the proposals they present and with stress on the view that a person is entitled to have his case presented to the legislature just as he is entitled to his day in court."¹⁷⁵

Ultimately, Surrey's 1957 article did a fine job of posing questions about the tension between civic and client responsibilities, but he never offered any definitive answer regarding the public role of the private bar. Indeed, he ended with the same sort of uneasy conclusion that he used four years later in his speech to the Tax Section. "Given these problems," he offered meekly, "it is hard to say whether the tax bar can take a position of leadership in this area."¹⁷⁶

The best hope for bar activism, Surrey offered, lay in relatively technical analysis of discrete tax policy issues, especially when that activism was conducted through intermediary organizations like the ALI.¹⁷⁷ The ALI Tax Project, which Surrey had helped lead, sponsored important work on corporate tax reform during the run-up to the 1954 recodification and reform legislation, he said. "The most significant consequence of the Institute's Tax Project," Surrey wrote, "is the demonstration that lawyers working under procedures such as those of the

172. *Id.*

173. *Id.* at 1174.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

Institute can on most technical tax matters develop constructive proposals which balance fairly the interests of the ‘Government’ and the ‘taxpayer.’”¹⁷⁸

Surrey, in other words, returned to his rather modest conception of how tax lawyers might engage public issues without compromising client responsibilities. His prescription, meek as it was, at least suggested a way forward. In that sense, it stood in notable contrast to more ambitious, idealistic calls for public action, like the one offered by Griswold in 1950. Technical research conducted through ancillary organizations might not give the tax bar a high profile public role—especially since it tended to sidestep politically contentious issues, like the redistributive impact of progressive tax rates. Such topics tended to dominate public debate over federal taxation, but they were a dangerous minefield for tax practitioners who made a living by representing heavily taxed clients. Surrey’s emphasis on technical research promised to give legal experts a valuable role in the policy process while sparing them the public scrutiny—and client complaints—that were likely to attend any engagement with more high-profile, highly politicized tax issues.

VII

CONCLUSION

In December 2017, as Congress was nearing the end of its legislative rush to enact a sweeping tax reform bill, the ABA sent a letter to key lawmakers weighing in on one of the law’s provisions: tax relief for passthrough entities. Congress was poised to limit the new tax break in such a way that law firms would generally be excluded from its benefits. The ABA asked Congress to reconsider, arguing that “all pass-through businesses should be treated equally, irrespective of their lines of business.”¹⁷⁹

The passthrough provision had been controversial throughout the process of drafting a tax reform bill, with many tax experts questioning its wisdom. As a result, the ABA’s decision to get in on the action, as it were, struck some of these experts as unseemly. New York University law professor Lily Batchelder was especially unhappy, and she took to Twitter to vent her frustration. “This is really disappointing,” she wrote. “ABA pushes to expand the already terrible pass-through loophole created by GOP tax plans. It’s not ‘discriminatory’ to tax labor income at labor income tax rates. A case study in ABA representing lawyers as an industry, not good law.”¹⁸⁰

Batchelder’s complaint focused on the ABA’s pursuit of lawyer’s self-interest, but it underscored the persistent tension described in this article regarding the civic responsibilities of the organized bar. Did the ABA deserve Batchelder’s criticism simply because it placed its members’ self-interest above

178. *Id.* at 1174–75.

179. Joseph J. Thorndike, *Tax History: Can Tax Lawyers Serve Both Clients and the Public Interest?*, 158 TAX NOTES 580, 580 (2018).

180. *Id.*

abstract notions of good tax policy (assuming, for the sake of argument, that the passthrough provision was bad policy)? Was it reasonable to hold the ABA to some higher standard than those used to evaluate trade associations, for instance? Did the organized bar, in other words, have a civic responsibility that trumped self-interest?

That is the kind of question that has bedeviled members of the ABA, and especially its Tax Section, since the latter first took shape more than a 100 years ago. The Tax Section (and its predecessors) has been constantly drawn toward some sort of meaningful civic role, but its participation in major arguments about tax policy and reform has been constrained by a variety of factors, including self-interest but even more often, the need to safeguard client interests.

The Tax Section has often opted for a cautious sort of engagement with public policy debates, although many of its members have played more vigorous roles, especially but not exclusively on behalf of paying clients. The Section's collective caution, when viewed against its members' less constrained engagement, has left the Section vulnerable to both internal and external criticism. Among the latter, FDR's 1937 attack on the tax bar—if not the ABA in particular—was the most high-profile attack. But internal critics have been almost as hard on the organized bar, if far less inclined to the sort of moralizing that Roosevelt preferred.

Internal criticism seemed to peak in the years after World War II, driven by several factors, including a rise in tax avoidance and tax planning, a decline in the moral opprobrium attached to such efforts, and a real and pressing need for serious tax reform. As lawmakers dithered on that last item, the need for guidance from the bar seemed to grow, at least in the eyes of prominent tax lawyers like Griswold and Surrey.

This article focused heavily on Surrey's assessment of the bar and its civic role because he posed the difficult questions with admirable clarity. Just as important, he resisted easy, hortatory answers, like those offered up by Griswold in 1950. Surrey's answer to his central query—who stands for tax equity and tax fairness?—certainly implied a more active role for the ABA and its Tax Section, perhaps a form of stewardship.

But Surrey did not urge his colleagues to wholly abandon the cautious approach that shaped the first sixty years of ABA tax efforts. Surrey understood that the tension between the tax bar's civic and client responsibilities was not easily resolved—or even susceptible to final resolution at all. The disparate duties of a tax lawyer must necessarily, if occasionally, create difficult situations for tax practitioners, especially when they are operating collectively.

Surrey's solution, such as it was, involved further mediation of the bar's collective role, with organizations distinct from the ABA—like the ALI—taking a more active role in policy formulation. While somewhat tepid, this solution had the signal virtue of actually working. It may have relegated the tax bar to the fringes of public debate, but it offered civic-minded tax lawyers a point of entry when it came to reworking the details of tax law—what Surrey called the “broad

middle ground” of reform that proved so “vital to a desirable tax structure.”¹⁸¹

Surrey’s solution was distinctly technocratic, reflecting his abiding faith in the value of expertise. It may also have elided the extent to which technocratic solution can obscure highly politicized agendas. It also served to exclude non-experts from a vital aspect of modern democratic governance. As sociologist Isaac William Martin observed recently in the *New York Times*, “tax policy is too important to be left to the experts alone.”¹⁸² But in that sense, Surrey’s solution was fully consistent with the thrust of the postwar tax policy process, which privileged the role of experts from various fields, including law, economics, and accounting.

Ultimately, Surrey may be right about the best way for tax lawyers to engage the policy process. But one thing is certain: no solution, no matter how technocratic, will ever fully insulate the tax bar from the politics of tax policymaking.

181. See Surrey, *supra* note 115.

182. Isaac Martin, *How Republicans Learned to Sell Tax Cuts for the Rich*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/opinion/republicans-tax-cuts-rich.html> [https://perma.cc/Z9YP-NHDU].