

THE INCOME TAX AND THE BURDEN OF PERFECTION

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The modern federal income tax and the *Northwestern University Law Review* have something rather peculiar in common. Both suffered false starts in the late nineteenth century, only to shortly thereafter be reconstituted and to emerge as significant legal institutions in the early twentieth century, and to continue as significant institutions on into the twenty-first.

Northwestern University School of Law's first law journal—then called the *Northwestern Law Review*—was published from 1893 through 1896 and had only a slightly longer life than the first modern income tax. The income tax was enacted in 1894,¹ and struck down as unconstitutional in 1895, having produced no revenue.² A law review—then called the *Illinois Law Review*—reemerged at Northwestern in 1906 and has continued since, although not always under the same name or the same type of management.³ The income tax reemerged on the political agenda after a similar ten-year interval, but took a bit longer to finally become established, since it required a constitutional amendment to ensure its permanency.⁴

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¹ Act of Aug. 27, 1894, ch. 349, §§ 27–36, 28 Stat. 509, 552–60.

² *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). The income tax ostensibly became effective on August 28, 1894 when President Cleveland allowed the entire Wilson Tariff Act to become law without his signature. In October 1894, the Secretary of the Treasury informed the Commissioner of Internal Revenue that Congress had not appropriated funds necessary to collect the tax, and that therefore no actions toward enforcing it should be taken. The first suits challenging the tax were filed by the end of December 1894, and the *Pollock* case itself was filed in January 1895. Also in January, Congress appropriated the funds under which the Bureau of Internal Revenue was organized, but in February Congress passed a joint resolution extending the deadline for the payment of the tax from March 1, the date originally set, to April 15. On April 8, 1895, the Supreme Court's first decision invalidating the tax was announced. IRS, DEP'T OF THE TREASURY, IRS HISTORICAL FACT BOOK: A CHRONOLOGY 1646–1992, at 71–72 (1993).

³ See generally Dawn Clark Netsch & Harold D. Shapiro, *100 Years and Counting*, 100 NW. U. L. REV. 1 (2006). The history of the enduring publication can be found at Nathan MacChesney, *An Old Tradition—The Same Review—But a New Name*, 47 NW. U. L. REV. iii (1952), and Kenneth F. Burgess, Julius J. Hoffman & Harold C. Havighurst, *Law Reviews and Legal Progress: Herein of Past Services and Future Responsibilities*, 51 NW. U. L. REV. 2 (1956).

⁴ In 1906, President Theodore Roosevelt began to urge that the income tax be reconsidered despite *Pollock*. ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER 186 (1993). In 1909, President Taft's message to Congress included the recommendation of an amendment to allow an income tax and a corporate excise tax based on income to be enacted without an amendment. 44 CONG.

The income tax, like the *Northwestern University Law Review*, was born in an era in which optimism about law and legal institutions prevailed. In the case of the income tax, support came both from those who held firm to nineteenth-century notions about the nature of law and legal institutions, and from those who saw promise in new and expanded roles for law and an administrative state through which it would operate. This curious mix—of faith in traditional legal institutions, including the capacity of legislators and courts to work together in refining and implementing statutory law, and in the possibility of innovation in public policy implemented through those institutions—produced the income tax as we know it.

The income tax as implemented in the United States remains one of the more remarkable institutions created in that era. The current income tax is arguably the most effective revenue-raising mechanism ever created. In fiscal year 2004, it (and the payroll taxes that rely on its conceptual and compliance foundations⁵) resulted in receipts of more than 1.9 trillion dollars,⁶ constituting just over sixteen percent of GDP.⁷ The income tax and the many public policies that are implemented through it now dominate the national political agenda.

Nevertheless, the income tax is at the moment—as it has been for much of its history—under serious challenge for its distortive burden on the

REC. 3344–45 (1909). The proposal for the Sixteenth Amendment probably could not have been enacted without the support of those in Congress who feared that Congress would simply reenact the income tax, despite the *Pollock* decision, and who supported the amendment because they believed that its chance of passage in the states was not good. They were proved wrong when ratification occurred in 1913. For other accounts of the political events leading up to the permanent enactment of the income tax, see JON D. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA* (1985), and STEVEN R. WIESMAN, *THE GREAT TAX WARS: LINCOLN TO WILSON—THE FIERCE BATTLES OVER MONEY AND POWER THAT TRANSFORMED THE NATION* (2001).

⁵ The income tax imposed under Subtitle A of Title 26 is legally a distinct imposition from the payroll taxes imposed by Subtitle C of Title 26. Although the tax bases are not entirely congruent, *see, e.g.*, *Rowan Cos. v. United States*, 452 U.S. 247, 250–63 (1981) (suggesting the sources of difference between the treatment of certain fringe benefits as “wages” for payroll tax purposes and “income” for income tax purpose), the payroll taxes all use as their starting points the concepts developed under the income tax, and use the same compliance devices—that is, direct payment of the taxes by the employer. No one except a benefited taxpayer or a lobbyist for an industry whose costs would be affected by a change would try to argue that, as a conceptual matter, there should be a difference between these tax bases.

⁶ IRS, DEP’T OF THE TREASURY, INTERNAL REVENUE GROSS COLLECTIONS, BY TYPE OF TAX, FISCAL YEARS 1960 TO 2004, <http://www.irs.gov/pub/irs-soi/04db07co.xls> (last visited Sept. 10, 2005). This total includes individual income, payroll, and corporate income taxes. It does not include the other taxes collected by the Internal Revenue Service, including excise taxes (\$54 billion) and estate and gift taxes (\$25 billion), *id.*, nor does it include customs collections, which totaled (including all duties, excises, and user fees) an additional \$24 billion in 2004, U.S. CUSTOMS AND BORDER PROTECTION PERFORMANCE AND ANNUAL REPORT—FISCAL YEAR 2004 81 (2004), http://www.cbp.gov/linkhandler/cgov/toolbox/publications/admin/cbp_annual.ctt/cbp_annual.pdf.

⁷ DAVID L. BRUMBAUGH ET AL., CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: OVERVIEW OF THE FEDERAL TAX SYSTEM 10 (2005), <http://www.usembassy.it/pdf/other/RL32808.pdf> (last visited Sept. 10, 2005).

economy, for its complexity, for its progressivity, and for its lack of progressivity.⁸ The President recently convened an advisory panel to suggest

⁸ These criticisms (and others) are summarized by the President's Advisory Commission on Tax Reform. PRESIDENT'S ADVISORY PANEL ON TAX REFORM, BENEFITS OF TAX REFORM (2005), http://taxreformpanel.gov/meetings/docs/fact_sheet_072005.doc.

Most critics of the income tax invoke at least the general ideas, first, that the income tax distorts the choice between labor and leisure, by reducing the return to labor; and second, that the income tax distorts the choice between consumption and savings, by reducing the return to savings. Other critics point out the inability of the income tax (both as a practical and political matter) to properly include all income and to time the inclusion of income and offsets thereto results in different income streams being taxed at different rates, and therefore producing distortions as investors and entrepreneurs alike seek to maximize their after-tax returns.

Still others point out that under the current combination of corporate and income taxes, there are behavior-distorting disincentives to conduct economic activity through publicly traded corporations, to pay dividends of accumulated earnings out of corporations, and to finance corporate activity through equity. See generally DAVID BRADFORD, *UNTANGLING THE INCOME TAX* (1986).

Some scholarship has offered routes to minimize such distortions. E.g., David A. Weisbach, *An Efficiency Analysis of Line Drawing in the Tax Law*, 29 J. LEGAL STUD. 71 (2000). Those seeking to substitute other tax bases avoid many of these distortions by simply eliminating the need to make the distinction that produced the inefficiency, especially by allowing a deduction for all savings, or, its economic equivalent, an exemption for all returns to savings.

The complexity of the income tax is often noted, without any apparent sense of irony, by Congress, the only institution with competence to do anything about it. See, e.g., STAFF OF THE JOINT COMM. ON TAXATION, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 931 (Comm. Print 1984); STAFF OF THE JOINT COMM. ON TAXATION, 105TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1998, at 142 (Comm. Print 1998) ("The Committee shares the concern that complexity is a serious problem with the Federal tax system."). Congress's response has been little more than to command its own staff to investigate the possibility of simplification. See 26 U.S.C. § 8022 (2000) (prescribing the duty of the Joint Committee on Taxation, which is made up of members from both houses).

The most frequently cited critique of progressivity as manifested in the income tax is undoubtedly Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952). Even some who generally favor governmental redistribution have suggested that it should be done not within the income tax, but through a system of grants administered separately. E.g., Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905 (1987).

Others suggest that supporters of the income tax should be vigilant to make certain that it adheres to its conceptual foundations as a tax with far greater possibilities for progression than most other broad-based taxes. Marc Linder, *Eisenhower-Era Marxist-Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich*, 70 TUL. L. REV. 905 (1996); Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1 (1998).

It seems that the general public has in the past been far more willing to respond to this last critique, the lack of progressivity in practice, than to the others. According to the frequently repeated story, in 1969, then Secretary of the Treasury Joseph Barr reported that 155 people with adjusted gross incomes of more than \$200,000 had paid no tax. The first version of the alternative minimum tax—a clear attempt to strengthen the progressivity of the income tax by broadening the base in specific ways—was enacted in response. See, e.g., MICHAEL J. GRAETZ, *DECLINE AND FALL OF THE INCOME TAX* 113 (1997); JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 166 (1985); Susan Kalinka, *Highlights of the 2003 Jobs and Growth Tax Relief Reconciliation Act: Economic Stimulus or Long-Term Disaster?*, 64 LA. L. REV. 219 (2004); Robert Rebelein & Jerry Tempalski, *Who Pays the Individual AMT?* (Office of Tax Analysis, U.S. Dep't of the Treasury, OTA Paper No. 87, 2000), reprinted in *TAX NOTES TODAY*, July 13, 2000, 2000 TNT 135-33 (LEXIS) (citing outgoing

reforms. Although the President's charge to the panel included a direction that at least one proposal should "use the Federal income tax as the base for its recommended reforms,"⁹ there are many in Congress and elsewhere who are willing to let us believe they would rather just kill it off. Again in the 109th Congress, as in several recent Congresses, there is legislation that would simply repeal the income tax.¹⁰ Why, given the persistent attacks against it, has the federal income tax proven to be such a remarkably durable institution? And why, if it has been so successful and so durable, does it always seem so vulnerable?

Some of the reasons for the durability of the income tax are fairly obvious. The income tax, along with its companion payroll taxes, simply raises a lot of money with little pain, relative to other possible taxes. Pulling the plug on the most effective revenue-raising system in history—no matter what its flaws—would be a drastic act.¹¹ This fact contributes both to its durability and to its current lack of popularity.¹² It is an easy target of

Treasury Secretary Barr's statement that no 1967 federal income tax was paid in respect of 155 income tax returns with adjusted gross income of more than \$200,000), cited by Linda M. Beale, *Congress Fiddles While Middle America Burns: Amending the AMT (And Regular Tax)*, 6 FLA. TAX REV. 811, 844 (2004).

⁹ Exec. Order No. 13369, 70 Fed. Reg. 2323 (Jan. 7, 2005).

¹⁰ Fair Tax Act, H.R. 25, 109th Cong. (2005). Perhaps the current concern for the income tax is overstated—in 1956, the then-immediate past Commissioner of Internal Revenue T. Coleman Andrews was reported to advocate the complete repeal of the income tax as "discriminatory, confiscatory, and politically unsound." *Ex-Tax Chief Opposes Tax (Now He Tells Us)*, N.Y. TIMES, Feb. 19, 1956, at 20, quoted in Adrian W. DeWind, *Law and the Future: Federal Taxation*, 51 NW. U. L. REV. 227, 231 n.5 (1956).

¹¹ This is not the first place this observation has been made. Perhaps one of the more noteworthy places for the purposes of this Essay was in the Lawrence Woodward Lecture given by Boris Bittker in 1996:

I am inclined to believe that the income tax will be with us for some time to come. For either political party, its abolition in favor of a drastically different tax with comparable revenue-raising power would be a dangerous gamble. Such a sea-change would surely elicit a tidal wave of anger from those who would be worse off. . . . [P]oliticians will in the end prefer the devil they can see and denounce, rather than the unknown devil beyond the horizon.

Boris I. Bittker, *Federal Income Taxation—Then and Now*, 74 TAX NOTES 903, 908 (1997). Woodward, an economist, served behind the scenes in the development of the income tax as a member and as Chief of the Staff of the Joint Committee on Taxation for more than thirty years. Bittker is author of the most enduring works on the federal income tax, including a multivolume treatise now co-authored with Lawrence Lokken on the income tax generally and a treatise co-authored with James Eustice on corporate taxation.

¹² As recently as 1972, the federal income tax was ranked as "the worst" (when compared to state income, state sales, and local property taxes) by only nineteen percent of those polled. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES 2 (1979). For an attempt to assess the popularity of particular features commonly associated with the income tax, see Paul F. Harstad, *Interpreting Americans' Attitudes Toward Taxes*, 13 TAX NOTES 1083 (1981). For a historical survey of the meaning of the income tax in the popular imagination and the possible bases for its popularity, see Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119 (1994).

criticism, since it touches virtually the entire population, and almost always in an unpleasant, if not painful, way.

Nobody likes to pay taxes. But since not paying taxes at all is rarely a viable long-term option, most of us settle for hoping that we are asked to pay our share, and no more than our share. Herein lies another source of the durability of the income tax among taxes, and of the relative popularity it actually enjoyed for much of its history. There is a sense, even if this sense is politically contingent, that the income tax attempts to tax according to a predetermined notion of what a share of taxes should be. Even if one disagrees with current political assignment of tax shares, there is a better possibility that one is actually paying one's share than with the other tax instruments (real estate, sales, and excise taxes) now in use in the United States.

These tax shares are assigned under the notion that "income" is an adequate surrogate for ability to pay, and that "income" is a coherent concept. The effort that has been put into developing the concepts behind the income tax over the last century evidences an underlying belief that it might actually be possible to determine accurately what each person's share really should be. According to this underlying belief, if we work diligently enough, we can perfect the income tax statute so that it actually defines that share under unambiguous and determinative rules.

Of course, everyone knows that we have never actually been able to achieve a satisfactory degree of accuracy and determinacy in allocating tax shares under the income tax. Indeed, we have never been able to agree on exactly what the criteria for determining those shares should be. We haven't even ever been able to put into clear and binding statutory language much about those things we have been able to agree on. For instance, it is now a forbidding task to simply compute the tax rate that will apply to any particular taxpayer's next dollar of income, given the maze of special preferential rates and phase-outs of deductions and exemptions. Debates about even the most fundamental principles distinguishing income from return of capital or cancellation of indebtedness continue, largely without statutory direction.¹³ Finally, we have never had much reason to believe that income taxes are actually collected according to the terms of the statutes actually enacted. But there has been, at least until relatively recently, a sense that, with enough intellectual effort from its supporters and enough congressional will to concentrate on technical matters and avoid the pleas of special interests, the income tax can, and eventually will, be perfected.

The income tax in the United States has nevertheless always benefited from this sense that it is perfectible, ever evolving into a revenue-raising in-

¹³ E.g., Joseph M. Dodge, *Of Course Recoveries for Nonphysical Injuries Are Taxable!*, 106 TAX NOTES 986 (2005); Erik M. Jensen, *Further Thoughts on Recoveries for Nonphysical Injuries*, 106 TAX NOTES 985 (2005); Rob Wood, *Physical Sickness and the Section 104 Exclusion*, 106 TAX NOTES 121 (2005).

strument consistent with a conceptually coherent definition of income.¹⁴ It was perhaps the first tax ever born as a concept, not just as an administrative expedient aimed at raising revenue in the most politically congenial way possible.¹⁵ The income tax has also always been one under which, uniquely among taxes, the taxpayer's liability is supposed to be determined

¹⁴ This obsession with doctrinal evolution, if it is not unique to the United States, appears to have begun with the enactment of the income tax in the United States. The United States was a relatively late endorser of the income tax—there had been such a tax continually in effect in Britain since 1842, and its predecessors dated to 1798. But the British model clearly cared little for the conceptual niceties that uniquely and distinctly shaped the later U.S. tax. The “income” tax design that prevailed for most of the nineteenth century actually eschewed requiring a totaling of income and instead allowed reporting under the untotaled schedules (apparently in an effort to increase the popularity of the tax by decreasing the likelihood that the total wealth of taxpayers would be revealed). And the approach to deductions and offsets from income differed depending upon the schedule involved. See ARTHUR HOPE-JONES, *INCOME TAX IN THE NAPOLEONIC WARS* 20, 116–17 (1939). The British tax, for instance, cared nothing about the niceties of deductions, and little about ensuring that various sources of income were treated similarly. See, e.g., Margaret Lamb, *Defining “Profits” for British Income Tax Purposes: A Contextual Study of the Depreciation Cases, 1875–1897*, 29 *ACCT. HISTORIANS J.* 105 (2002). At just about the same time that writers began to support the income tax in the United States, the British system began to anticipate the need for proper accounting for costs, see, e.g., A. LAYMAN, *THE A.B.C. OF INCOME TAX RETURN MAKING* (1916), although progress toward a rationalized tax base was slow. What had led to the endorsement of the first British income taxes, if they were not presented with the same promise of rationality as the American income taxes? The debate regarding the reintroduction of the British income tax was not devoid of discussion in terms of what was then relatively sophisticated theoretical analysis, but there appears not to have been an attempt by its supporters to justify the tax on conceptual grounds. It appears to simply have been a tax that was believed likely to be successful as a revenue-raising mechanism, and one that, given the then-incomplete democratization of British politics, served multiple political purposes. See generally MARTIN DAUNTON, *TRUSTING LEVIATHAN: THE POLITICS OF TAXATION IN BRITAIN, 1799–1914*, at 78–90 (2001).

¹⁵ Certainly, by the late 1800s, few economists in the United States had done enough toward providing a conceptual framework for analyzing tariffs to require Congress to take any notice. See Richard C. Edwards, *Economic Sophistication in Nineteenth Century Congressional Tariff Debate*, 30 *J. ECON. HIST.* 802, 806 (1970). Perhaps the only other contender in this category is the single land tax advocated by Henry George, who was largely viewed by academic economists as a populist hack. Although this conceptual basis for taxation endures, see, e.g., OWEN CONNELLAN, *LAND VALUE TAXATION IN BRITAIN: EXPERIENCE AND OPPORTUNITIES* (2004), unlike the income tax, it has never been implemented as a permanent revenue source in the United States.

It appears that the value added tax that prevails in the European Union was favored for two reasons: first, its obvious superiority to the then-prevalent cascading excise taxes which it replaced, but which in many administrative aspects it resembled; and, second, the relative ease with which jurisdiction-to-tax issues can be resolved. See, e.g., David Bruce Spizer, Comment, *The Value Added Tax and Other Proposed Tax Reforms: A Critical Assessment*, 54 *TUL. L. REV.* 194 (1979). See generally John F. Due, *The Value-Added Tax*, 3 *W. ECON. J.* 165 (1965); William J. Turnier, *Designing an Efficient Value Added Tax*, 39 *TAX L. REV.* 435 (1984).

While there was political support for a national sales tax earlier in the century, it seems never to have been backed up by anything other than pragmatism. See generally TaxHistory.org, Sales Taxation, <http://www.taxhistory.org/Civilization/Documents/Sales/sales.htm> (last visited Sept. 10, 2005). Although there are some who hold out hope for the American version of the sales tax, it is difficult to characterize very many analysts as conceptual supporters. See, e.g., JOHN F. DUE & JOHN L. MIKESSELL, *SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION* (2d ed. 1994); *SALES TAXATION: CRITICAL ISSUES IN POLICY AND ADMINISTRATION* (William F. Fox ed., 1992).

by the objective application of a set of well-defined rules. It, in contrast to most other existing taxes, holds out the promise of being administered under the rule of law. At least as the concept of income is articulated in legal doctrine,¹⁶ there should be no leap of faith, as there inevitably is under a property tax, that the value assigned by the assessor and subject to only limited legal challenge is an appropriate basis for assigning tax shares. Nor is there the cynical acceptance, as there is likely to be under a sales tax, that the design of the tax is simply arbitrary, inevitably subject to both the limitations of legal concept and of enforcement.

This promise of rationality has provided the basis for much of the strength of the income tax. The income tax in the United States has evolved, and for the most part has been administered, with a firm belief that one's tax liability can and should be determined by applying a politically determined rate against a base that can be ascertained under a determinate set of legal rules. In this respect it is different from most other taxes. There is in the income tax a notion that the tax base—*income*—can be objectively defined, that "all income from whatever source derived" will be included in the tax base, and that the tax base will therefore accurately reflect the taxpayer's ability to pay.

This older (and now largely outdated) image of the income tax as conceptually consistent, and its newer image as grounded heavily in the rule of law, are not unrelated. The income tax, relying as it does on a definition of "income," and built upon rules that rely heavily on liquidity as a measure of taxpaying ability, has always had an aura of legality and rationality about it. This high degree of rationality—manifested in the persistent belief that it is possible to talk about the income tax as if it had a logical structure—has been a sustaining virtue of the income tax. Even if a particular situation presents a novel question, taxpayers and their advisers have logical starting points from which to anticipate the government's response, and a vocabulary and logical framework to use to justify their position. Yet because this promise can never, as a practical matter, be fulfilled, it is also the source of the greatest challenge to the income tax. The urge to fulfill this promise and the reluctance to let pragmatic inconsistencies develop has contributed to the complexity of the rules defining the tax base.

The argument here is not that the aspects of the income tax that give it an aura of rationality and legality have always, or even primarily, controlled the shape and direction of the income tax. The influence of raw politics, from the most highly visible debates about rates, to the most arcane provi-

¹⁶ Much of the doctrine of the modern income tax attempts, not always with success, to suppress the problems associated with valuation. Only in rare instances does the income tax acknowledge that it may be inappropriate to treat all goods as being susceptible to a single "fair market" valuation. And, when the income tax does acknowledge this limitation, chances are the response is simply to exclude the value rather than attempt to include an imperfect value. *See, e.g.*, 26 U.S.C. § 132 (2000) (excluding qualified employee discounts from gross income).

sions relating to effective dates, has undoubtedly had more influence on both the provisions of the tax as recorded in the *Statutes at Large* and on the actual liabilities of individuals. But the ideal income tax has nevertheless persisted, both as a point of departure for critical analysis and as a goal for reform.

Why is the administration of the income tax so much more dominated by a drive to be conceptually consistent and to provide a highly articulated set of base-defining rules than other taxes and, perhaps, more than any other area of administrative law? Part of the answer is undoubtedly that there is simply a lot of money at stake, and when there is a lot of money at stake, taxpayers are willing to spend a good part of it in order to avoid paying the rest of it. Many taxpayers, along with their financial advisers (and, more recently, those seeking to package investments that are attractive to taxpayers), are involved in similar activities from year to year. They make investments and urge others to make investments, the return on which depends upon the way the investment will be treated under the income tax. This need for consistency and predictability justifies considerable investment by taxpayers and their advisers in efforts to encourage the government to develop rules that will define the tax liabilities, not just for the current year, but on into the future.

It is not clear, however, that these factors alone explain the aspiration toward rational perfection in the income tax, and the resulting volume of explication and analysis of the rules defining the income tax base. Urban real estate taxes also involve enormous sums, and one year's valuation will affect future liabilities, yet there is little evidence that these tax systems have developed anywhere near the doctrinal complexity involved in the income tax.

Two historically coincidental influences undoubtedly contributed to the peculiarly legal aspects of the income tax as implemented in the United States. First, the tax was not introduced into the United States until well into the era in which efforts were being made to render all law more "scientific." Although the nature of the power to tax had long been of conceptual interest to lawyers and legal analysts,¹⁷ there was relatively little conceptual interest in the actual determination of the tax base and the determination of liability before the introduction of the income tax. Several firm believers in this new scientific approach to law and legal doctrine, including Professor Joseph Beale¹⁸ at Harvard and his student Thomas Reed Powell, took the income tax seriously as a body of legal doctrine from its first permanent en-

¹⁷ See, e.g., THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS (1876); FRANCIS HILLIARD, THE LAW OF TAXATION (1875); ALFRED BILLINGS STREET, A DIGEST OF TAXATION IN THE STATES (1863). As grand as the aspirations of these treatise writers may have been, their work simply did not attempt to formulate the kind of conceptual foundation that those promoting and analyzing the income tax would use fifty years later.

¹⁸ The importance of Professor Beale is noted in ANN MUMFORD, TAXING CULTURE: TOWARDS A THEORY OF TAX COLLECTION LAW 14-15 (2002).

actment. Beale and others of a similar legal bent ensured that the income tax would be approached by its administrators as a coherent body of principles and precedent from which tax liabilities would be ascertained, rather than as simply an authorization to assign a tax liability based on the whim of the assessor with only a passing regard for the rules as enacted and previously interpreted.

Perhaps this fact of timing alone would have rendered the income tax more reliant on legal concepts and their evolution through an interplay of legislation, regulatory interpretation, and judicial doctrine than earlier tax instruments had ever been. Although demand had always existed for tax guides for both the practitioner and the layman, the number of pages produced to educate the public immediately after the enactment of the early income taxes suggests that publishers anticipated an essentially insatiable demand for technical information about the income tax.¹⁹

The enhanced legalization of the income tax was virtually assured by the fact that, in its earliest days, issues about the definition of income were, in fact, issues of constitutional law. Since the Sixteenth Amendment had authorized a tax on “income,” only “income” could be taxed.²⁰ The federal courts, and in the earliest days the Supreme Court, were naturally expected to be the arbiters of what was and what was not “income.” The recalibration of the Supreme Court in accepting the income tax made certain that lawyers and a legal approach dominated the discussion.²¹ From the earliest

¹⁹ Less than six months after its enactment in 1894, a treatise of more than 500 pages was published. ROGER FOSTER & EVERETT V. ABBOT, *A TREATISE ON THE FEDERAL INCOME TAX UNDER THE ACT OF 1894* (1895). The *Making of Modern Law* series includes at least six titles devoted to explaining the 1894 income tax, a tax that the federal government showed only the slightest interest in actually collecting. The same source includes at least twelve titles published in 1913 regarding the 1913 Act. Indeed, the same collection includes at least six titles analyzing the 1862 federal internal taxes.

²⁰ The statement in the text is slightly oversimplified. Under the Constitution, Congress has the power to tax anything but exports; but if it imposes excises, the rate must be uniform, and if it imposes direct taxes, collections must be apportioned by population. U.S. CONST. art. I, §§ 2, 9.

²¹ In its earliest decisions after the 1913 tax, the Supreme Court gave Congress a relatively wide berth in implementing the income tax. When it upheld the 1913 income tax against various constitutional challenges in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1915), and *Tyee Realty Co. v. Anderson*, 240 U.S. 115 (1915), the Court gave no indication that it would find constitutional content in the Sixteenth Amendment’s use of the term “income” in ways that might interfere with Congress’s discretion in defining a tax base. Similarly, in *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916), the Court indicated little interest in interfering with Congress’s definition of “income” despite complaints from the mining industry that the depletion allowed (five percent of income) inadequately reflected its costs and rendered the tax a tax on gross income, not the tax on net income contemplated by the Sixteenth Amendment. Through most of this litigation, however, the Court did little to discourage taxpayers from bringing their suits or from continuing to argue against the government’s interpretation of the statute.

But the Court did not simply let the Collector and Congress have free reign. In one of the earlier Supreme Court cases involving the income tax, *Towne v. Eisner*, 245 U.S. 418 (1918), it read Congress’s language to include a more narrow tax base than Congress intended. This decision was followed by a series of congressional actions and court decisions regarding the taxability of stock dividends that ultimately led to *Eisner v. Macomber*, 252 U.S. 189 (1920), in which the Court held that a tax on undistributed earnings with respect to which a stock dividend was declared could not be imposed consistent

days of the income tax in the United States, those who were charged with its enforcement have felt the need to justify the positions they take regarding the definition of “income” within the meaning of the Sixteenth Amendment, and to present those justifications, not just to the public, but to the federal courts as well. Only slowly over the course of the twentieth century did the federal courts abandon the idea that the definition of income was a matter of constitutional law about which they should be diligent, lest Congress overreach.

This aura of rationality was further enhanced by a second set of influences. Economists in the late nineteenth century saw in the income tax a refreshingly rational and coherent set of criteria for imposing tax burdens.²² Tariffs and excise taxes, the principal taxes used by the federal government, were arbitrary; their burden fell on the population inequitably, and they were economically distorting. Property taxes, on which the states relied, were worse because the tax base was arbitrarily determined and almost certainly incomplete. Income taxes could be devised that reached far more

with the Sixteenth Amendment, since the constitutional meaning of “income” requires that there be some “realization.”

The only other area in which the Court actively constrained Congress on constitutional grounds was in answering questions regarding the inclusion of state and federal government activity in the federal income tax base. *See, e.g.*, *Evans v. Gore*, 253 U.S. 245 (1920) (involving the reduction of compensation of federal judges), *overruled by United States v. Hatter*, 532 U.S. 557 (2001). But in the earliest years of the income tax, Congress never acted in ways that squarely raised the question, acting instead on the assumption that the holdings of the Court in *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871) (holding that the federal government could not impose an income tax on state employees), and *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 584–86, *modified on reh'g*, 158 U.S. 601, 618 (1895), remained good law. Only in 1982 did Congress act in a way that squarely raised the issue under the Sixteenth Amendment. *See South Carolina v. Baker*, 485 U.S. 505 (1988) (holding that Congress could tax bonds issued by states, but not entirely rejecting the possibility that an intergovernmental immunity of some more limited sort exists).

With its threat to claim the last word on the meaning of “income,” the Court nevertheless played a significant role in the development of income tax doctrine. The year 1937 was the first after 1913 in which the Supreme Court was not asked to address the constitutionality of the income tax in a way sufficiently serious to require that its opinion include reference to the Constitution. Nor was this activity a surprise; since the enactment of the corporate income tax in 1909, the Court had similarly entertained arguments regarding the permissibility, given the constitutional limitations on Congress’s ability to tax, of various aspects of its base. In *Flint v. Stone-Tracy Co.*, 220 U.S. 107 (1911), and *Stratton's Independence, Ltd. v. Howbert*, 231 U.S. 399 (1913), the Court upheld the 1909 corporate tax, despite its use of income as a measure of the tax base, and thus held that not all provisions that might be included in an income tax need be viewed as an income tax. But in *McCoach v. Minehill Co.*, 228 U.S. 295 (1913), and *Zonne v. Minneapolis Syndicate*, 220 U.S. 187 (1911), the Court found that certain businesses did not amount to “businesses” and thus indicated its unwillingness to defer to the collector about the proper scope of activities covered by the tax, especially when the position urged by the government brought the tax closer to renewed constitutional challenge.

²² For leading critiques of the then-current state of affairs, see HENRY CARTER ADAMS, *THE SCIENCE OF FINANCE* (1909); RICHARD T. ELY, *TAXATION IN AMERICAN STATES AND CITIES* (1888); EDWIN R.A. SELIGMAN, *ESSAYS IN TAXATION* (1895). Much of this criticism was based on the total lack of theory justifying the existing tax instruments. *See Ferdinand P. Schoettle, The National Tax Association Tries and Abandons Tax Reform—1907–1930*, 32 NAT’L TAX J. 429, 430 (1979).

broadly into taxpaying ability. The work of the early marginalist economists and those who applied their conclusions in support of the income tax made their own contribution to support the appearance of rationality of the income tax. The income tax was a tax that could reach all wealth, and, because it could reach all wealth, it made sense to make it strongly progressive. Spendable wealth in the form of income had a diminishing marginal utility, and thus those with more would suffer less from the imposition of a dollar's liability.²³

In sum, these economists believed that it was important to adopt tax instruments better suited to the modern economy and, perhaps, more palatable to the public than the existing patchwork of state property taxes and federal tariffs and excises. The income tax was recommended by these economists and experts in public finance as a means to avoid the gaps in state property taxes and the injustices created by them, and the arbitrary ways in which the incidence and overall impact of the tariffs were felt. Even in more recent times, as new generations of academic economists have criticized the income tax, much of the criticism has been motivated by an urge to implement a more perfect version of the income tax envisioned by those who came before. These arguments all contributed to an understanding of the legitimacy of the income tax that depended upon its rationality and its consistency.

Not all of these economists always agreed on all of these premises, and many of them seem to have hedged their arguments for the political situation at hand. Some of them may have been merely trying to put a more acceptable and legitimizing gloss on what would otherwise appear a crude but powerful instrument of class conflict, but in so doing they outlined the limits of the shape that instrument could take. Several, from the earliest debates on, preferred an "income" tax that included only income actually spent, or value consumed.²⁴ Nevertheless, all such justifications ultimately led to the conclusion that the broader the base of the income tax, the more in keeping with its underlying justification the tax would be. Only if all income is included in the tax base can we even begin to think that we are taking the income that means the least. If significant sources of income are not included because the concept of income is not adequately developed, the rationales for the income tax and for its progressivity are undercut.

Should these economists, who were probably eventually horrified by what the lawyers who succeeded them as the primary advocates for the income tax eventually did to its administration, be blamed for the current state

²³ See generally Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1002–09 (1990); Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793 (2005).

²⁴ See DAVID F. BRADFORD ET AL., U.S. DEP'T OF THE TREASURY, BLUEPRINTS FOR BASIC TAX REFORM (2nd ed. 1984); NICHOLAS KALDOR, AN EXPENDITURE TAX (1955).

of the tax? Probably they should be, for at least a healthy share of the problem. They were too eager to promote the tax to forgo attempts to explain its practical features in terms of the justifications that they had offered for it.²⁵ Rarely did they concede, at least with respect to the personal income tax, to practical compromises that were inconsistent with the underlying justifications involving base-broadening and progressivity. Instead they continued to push for more conceptual consistency. In 1921, Seligman, in a foreword to a series of lectures aimed at amplifying the concept of income, wrote:

Inasmuch as fiscal science is still a youthful discipline in America and in view of the comparative insignificance of the income tax in the public finance of foreign countries, the economists have not yet addressed themselves, with complete success in achieving unanimity of results, to many of the problems which must guide the legislator. . . .

At the very outset we are confronted by the question what income really means.²⁶

Seligman outlined the then-leading challenges in defining income, challenges which remain unresolved even now: the meaning of realization and the problems relating to allowances for cost recovery. The lectures given by Robert Haig and Thomas S. Adams were devoted to furthering a coherent concept of income.²⁷ By promising too much in their effort to le-

²⁵ Nowhere is this urge to rationalize and justify more evident than in a pair of articles written regarding the taxability of stock dividends in the cases leading up to and including *Eisner v. Macomber*. See *supra* note 21 and accompanying text. Edwin Seligman—perhaps worried that the political basis for the income tax would be threatened if the opposite result were reached—wrote that simple stock dividends should not be taxed. He felt obliged, however, to write twenty pages outlining the logical justification for this conclusion. Edwin R.A. Seligman, *Are Stock Dividends Income?*, 9 AM. ECON. REV. 517 (1919). After the Court's opinion, an equally abstract critique of the position was published in the *Columbia Law Review* by his son, a lawyer at Sullivan and Cromwell. See Eustace Seligman, *The Implications and Effects of the Stock Dividend Decision*, 21 COLUM. L. REV. 314 (1921); see also, e.g., Thomas Reed Powell, *Constitutional Law in 1917–1918 I*, 13 AM. POL. SCI. REV. 47, 71 (1919); Thomas Reed Powell, *Constitutional Law in 1919–1920 II*, 19 MICH. L. REV. 117, 117–120 (1920); Thomas Reed Powell, *The Supreme Court's Adjudication of Constitutional Issues in 1921–1922 III*, 21 MICH. L. REV. 290, 293–96 (1923).

²⁶ Edwin R.A. Seligman, *Introduction to THE FEDERAL INCOME TAX: A SERIES OF LECTURES DELIVERED AT COLUMBIA UNIVERSITY IN DECEMBER, 1920*, at vii–viii (Robert M. Haig ed., 1921) [hereinafter *THE FEDERAL INCOME TAX*].

²⁷ *Id.* To his credit, Seligman saw the difficulty of reconciling these concepts with the constitutional and legalistic approach the Supreme Court had only recently indicated it would take:

It is questionable whether the legitimate desire to give a fixed constitutional interpretation of a complicated statute like the income tax law is not resulting in a regrettable tying of the hands of the legislator and an undue curtailment of legislative discretion, with the result of raising many new problems in the place of the single problem which the courts endeavor to settle. We are already now beginning to suffer from a complexity which is more or less foreign to the system in England or other countries.

Id. at ix. Seligman made this statement in 1921, when the statute was still only 109 pages long! (This count is based on a 1941 reprint in the Author's possession.)

gitimize the income tax, they ensured that the tax would fall short as actually implemented.

As early as 1921, less than eight years after the first permanent enactment of the income tax and three years after the income tax emerged as a substantial revenue source, revision was undertaken in the name of “simplification.”²⁸ The public campaigns promoting the resulting reforms were presented to the public as a more sophisticated, “scientific taxation,” taking into account the understanding of modern economics regarding the effects of taxation on economic activity. Even at this early date, the debate about the ideal income tax turned from invoking the ideal in connection with legitimate progressivity, to concerns about the effect that an incomplete tax base might have on taxpayer behavior. In his widely distributed book on the income tax, *Taxation: The People’s Business*, Andrew Mellon decried the exemption for municipal bonds because of its impact on the investment behavior of wealthy individuals.²⁹ This approach to critiquing the income tax would prove to further the articulation of the ideal.

Meanwhile, the vehicles for the dissemination of information about the income tax proliferated. Several organizations, linking economists with bureaucrats and lawyers, emerged to further a vision of the income tax.³⁰ Coincident with, and sometimes in connection with, this professionalization of the income tax, new reporting services and journals were founded.³¹ In many of these efforts, the economist and the lawyer joined forces in describing the income tax and promoting it as conceptually coherent.

²⁸ See generally M. Susan Murnane, *Selling Scientific Taxation: The Treasury Department’s Campaign for Tax Reform in the 1920s*, 29 LAW & SOC. INQUIRY 819, 831 (2004). The revision efforts were prompted politically by the need to mediate the conflict between those seeking to reduce rates and those who sought to continue a highly progressive income tax as an instrument of social policy.

²⁹ ANDREW W. MELLON, *TAXATION: THE PEOPLE’S BUSINESS* (1924). Mellon states:

Before the imposition of high [income] taxes, municipal and state bonds had a wide market. They were well regarded by the investor and found their way into trust funds and into the strong boxes of the conservative investors no longer in active business. Men of initiative and activity did not acquire these securities. Their wealth, therefore, was left free to be devoted to productive business.

Id. at 171–72. If the exemption can be removed, “[t]he men capable of business success will get out of their dead investments and put their brains and money to work.” *Id.* at 172. The principal purpose of Mellon’s book was to encourage the adoption of a constitutional amendment undoing the holding of the *Pollock* case that the income tax on municipal bond interest was an unconstitutional federal tax on the states.

³⁰ ROY G. BLAKEY & GLADYS C. BLAKEY, *NAT’L TAX ASS’N, DIGEST AND INDEX, 1907–1925* (1927); Schoettle, *supra* note 22.

³¹ As promptly as 1919, the National Bank of Commerce in New York (known as Morgan Guaranty Trust Company since 1959) began publishing texts and explanations of the income tax acts. See e.g. *NAT’L BANK OF COMMERCE IN NEW YORK, THE FEDERAL REVENUE ACT OF 1918: COMPLETE TEXT WITH REFERENCE NOTES, TABLES AND INDEX* (1919). The magazine now known as *Taxes* was begun by the forerunner of Commerce Clearing House as *National Income Tax Magazine* in 1923, and has been published continuously, now under the name *Taxes*, ever since.

These efforts at perfecting a rational approach to the income tax base reached an early high point in the work of Georg von Schanz, translated and expanded by Robert Haig,³² and popularized by Henry Simons.³³ Contrary to popular belief, the works of Haig and Simons were not the only early attempts to define income as a coherent abstraction; they were merely the most successful at creating an abstract conception that could be understood by those charged with enforcing the law and by those whose lawyerly efforts on behalf of clients would define the evolution of the law.³⁴ At least one author has suggested that Simons was in fact not driven by an attempt to establish deductive principles for taxation, and was in fact engaged in a pragmatic project intended to counter the more abstract efforts of others who had previously engaged in similar work.³⁵ But his goal nevertheless was to provide a coherent approach to the income tax, and his was the approach that took hold within the legal academic community for the next half-century and more.

The (increasingly futile) quest to implement the ideal in the income tax seems to have become an academic obsession sometime in the late 1960s. The literature proceeded in two veins. One followed the traditional call for a more perfect tax base, a “comprehensive tax base,”³⁶ on the then-familiar grounds of fairness and consistency with the justification for progressivity. The other focused, only a bit more practically, on identifying those aspects of the income tax that were inconsistent with that ideal, so that they could be separately debated³⁷ through the introduction of the concept of the tax

³² Robert Haig, *The Concept of Income—Economic and Legal Aspects*, in THE FEDERAL INCOME TAX, *supra* note 26, at 1. The Schanz work most commonly cited is Georg von Schanz, *Der Einkommensbegriff und die Einkommensteuergesetze*, 13 FINANZ-ARCHIV 1 (1896).

³³ HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM IN FISCAL POLICY (1938).

³⁴ See, e.g., IRVING FISHER, INCOME IN THEORY AND INCOME TAXATION IN PRACTICE (n.p., 1937); WILLIAM S. VICKREY, AGENDA FOR PROGRESSIVE TAXATION (1947).

³⁵ WITTE, *supra* note 8, at 50.

³⁶ Boris I. Bittker, *A “Comprehensive Tax Base” as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967). Bittker stated that a comprehensive tax base (“CTB”) “will, and should, remain miles away” and saw “no automatic advantage in moving a few feet in its direction.” *Id.* at 983. Pro-CTB responses to Bittker’s article include R.A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44 (1967); Joseph A. Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63 (1967); Charles O. Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA’s CSTR*, 81 HARV. L. REV. 1016 (1968).

³⁷ STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973); STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985); Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244 (1969); Paul R. McDaniel & Stanley S. Surrey, *Tax Expenditures: How to Identify Them; How to Control Them*, 15 TAX NOTES 595 (1982); Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970); Stanley S. Surrey, *Government Assistance: The Choice Between Direct Programs and Tax Expenditures*, 8 TAX NOTES 507 (1979); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705

expenditure budget. The tax expenditure budget is simple in concept—a listing of those provisions of the income tax that either deviate substantially from a normative concept of income, or could just as well be viewed as subsidies that could be administered through direct expenditures, or both. The problem, of course, is that there is not—and probably cannot be—an ideal concept of an income tax that is worth using as a starting point. There are simply too many compromises that must be made in translating any concept into a workable tax base, and too much room for arguing about which are expedients necessary to make the tax administrable and which are the result of a perceived need to respond to political pressure to lower tax burdens.

Since these early efforts of legal and economic academics, the elite tax bar has seen its interest in preserving the notion of an ideal income tax and the evolution of legal rules in defining it in the administration of the income tax. Several generations of tax lawyers have benefited from the space the administration of the income tax has provided them in plying their trade. The successful tax lobbyist has not only had a firm grip on the political realities of the position he has promoted, but also has been able to articulate the rationales supporting these positions with the rhetoric of the ideal tax.

The curse of the ideal in the income tax has been long acknowledged. As early as 1943, Roswell Magill, then a professor of law at Columbia, summarized the situation:

It will not be news to the taxpayers of the country to be told that the federal tax laws lack simplicity. Their complication, turgidity, and Alice-in-Wonderland phraseology have been parodied by every cartoonist in America. The reason for the complication is not the stupidity of Congressmen, but rather their

(1970); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C. L. REV. 225 (1979); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Legislative Process*, in *THE ECONOMICS OF TAXATION* 123 (H. Aron & M. Boskin eds., 1980); Alan L. Feld, *Pathways to Tax Reform: The Concept of Tax Expenditures*, 88 HARV. L. REV. 1047 (1975) (book review). Such a listing was first included in DEP'T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1968 (1969). The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 308, 88 Stat. 297, 313 (codified as amended at 2 U.S.C. § 639 (2000)), requires separate budget reports of tax expenditures.

For consideration of Surrey's role in the invention of the concept of a tax expenditure budget (perhaps more dubious than most think) and in the promotion of it within the United States (for which Surrey clearly deserves credit), see Jonathan Barry Forman, *Origins of the Tax Expenditure Budget*, 30 TAX NOTES 537, 538 (1986). It appears that the legwork for implementing the concept was done by Gabriel G. Rudney in 1967 while working at the Brookings Institution. *Id.* But see Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 TAX NOTES 1661 (1992) (pointing out the impossibility inherent in the concept); Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187 (2004) (arguing for a more open-ended approach in which the tax expenditure budget remains as a useful point of departure); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004) (urging that the questions ordinarily subsumed in the tax expenditure debate be considered as matters of institutional design in which the primary concern is the suitability of the delivery method for the government action involved).

overwhelming desire at once to be just even in the smallest, least usual case and to be astute in fitting a specific plug into every loophole that ingenious attorneys and accountants may have discovered.³⁸

Given that its supporters have usually rested their case on the superiority of the concept of income as a tax base, and encouraged the development of the tax consistent with this concept, it is inevitable that in practice the tax would fall short. The continuing efforts to revise, reform, and perfect it have only resulted in relatively small improvements, the benefits of which have been trivial. The income tax has become so unwieldy because, from the very beginning, too much has been expected of it.

The efforts to create the appearance of rationality that sustained the income tax in the early years of the twentieth century became by the end of the twentieth century the source of many of its ills.³⁹ The amount of intellectual effort that has gone into the administration of the income tax probably far exceeds that justified by the revenue generated.⁴⁰ Not all of this

³⁸ ROSWELL MAGILL, *THE IMPACT OF FEDERAL TAXES* 12 (1943). Magill noted that neither the excise taxes, nor the British income taxes seemed to involve such enforcement complications—but he attributed the problem not just to the relatively high aspirations for the income tax, but also to the lack of a dedicated and expert bureaucracy devoted to the collection of the tax. *Id.* at 13–15.

³⁹ Efforts to perfect the tax—to fulfill its promise as broad-based and therefore effectively progressive—seem only to add words and increase complexity. The President’s Advisory Panel on Tax Reform reports that the total number of words in the Code and regulations under the income tax has gone from under one million in 1940 to almost ten million in 2000. PRESIDENT’S ADVISORY PANEL ON TAX REFORM, *COMPLEXITY AND INSTABILITY: STAFF PRESENTATION 2* (2005), http://www.taxreformpanel.gov/meetings/docs/complexity_stability.ppt.

⁴⁰ The federal income tax generates less than three times the total revenue of state sales taxes and state property taxes combined. State sales taxes totaled \$200.63 billion (not including motor fuel and alcohol), and state property taxes totaled \$239.67 billion in 1999. ROBERT TANNENWALD & NICHOLAS TURNER, FED’L RESERVE BANK OF BOSTON, *INTERSTATE FISCAL DISPARITY IN STATE FISCAL YEAR 1999*, at 23 (2001). But the output of the lawyers and other professionals engaged in supporting its administration seems by most measures to be far greater. Perhaps an approximation of this disparity can be seen in the number of articles published in the *Tax Law Review*, a peer-reviewed law review published by New York University. (This measure is undoubtedly skewed to the extent that it focuses on the legal literature, and not on the accounting and practitioner literature more generally. This does not seem inappropriate given the proposition being tested, that is, the amount of intellectual effort devoted to the evolution of the conceptual base for the tax.) In the numbers of that journal available on Lexis-Nexis (from Summer 1982 through Fall 2004), almost 80% of the articles and comments published were devoted to a conceptual problem within the income tax, while only 15% touched at least in significant part on other tax bases and 5% touched on procedural issues independent of any particular tax base. (That 15% drops below 10% if one does not count articles that were solicited to be part of a colloquium centered upon a non-income-tax topic, of which there were three, on wealth taxes, wealth transfer taxes, and electronic commerce, in the time period in question.) These rough numbers may be slightly misleading as a measure of the overconceptualization of the income tax compared to other taxes in at least three respects. First, the federal income tax system provides the starting point for every state income tax; state personal income taxes totaled \$189.31 billion in 1999. Second, if it is true that the income tax base is more susceptible to legitimate manipulation by professionals, then the size of the potential tax base is not as well reflected in actual income tax receipts as the size of the potential sales and property tax bases. Third, the lack of uniformity in sales tax and property tax bases among the states renders the scale at which professional analysis of state taxes can be undertaken very different.

effort has been wasted. Some of this effort has probably contributed to the rationalization of the financial lives of individual taxpayers who, without the income tax, would be less likely to understand their own financial circumstances. The withholding system may still provide taxpayers with an opportunity to save.⁴¹ Some small businesses may also benefit from the discipline forced upon them as a result of the income tax to keep records and tally their financial progress. But it seems highly unlikely that, under current law, these contributions outweigh the burdens.

Does all of this mean that the income tax should be abandoned? No. The solution lies not in throwing out the instrument, but instead in admitting that, although the income tax can be administered more rationally than other taxes, it simply is not worth the cost of striving for perfection. The gap between the concept of income—so heavily relied upon to justify the tax—and the realities of the actual tax instrument we have developed has always been there. Practical observers have always urged others to simply calm down and accept the disparity between concept and reality.⁴²

⁴¹ Summarizing a poll his organization had just conducted regarding retirement savings, Dallas Salisbury reported that “[i]ndividuals want to be empowered, but they also understand themselves: ‘Take the money out before I see it, or I’m likely to spend it’ Like tax withholding, many people believe that what they must save is best accumulated by mandate” *Workers Content to Have Employers Handle Their Pensions, Poll Finds*, TAX NOTES TODAY, June 15, 1992, 92 TNT 123-53 (LEXIS).

⁴² Among the more cogent such statements:

The reason after all that the income tax has survived as a vigorous instrument of taxing and fiscal policy is its ability to adapt itself to new and changing conditions. The most that can be briefly said about the legal concept of income for Federal tax purposes is that neither the tax law itself nor the interpretation placed on it by the courts really define income, but merely arbitrarily set up certain rules as to what should be included and what should be excluded, what deductions should be allowed and what deductions should be disregarded, and that these rules have no logical coherence but frequently are made to fit particular needs of the tax system. As long as these rules are felt by the man in the street to be equitable rules . . . , he will not be too greatly concerned with any theoretical justification

Thomas N. Tarleau, *The Concept of Income for Federal Tax Purposes*, 20 TENN. L. REV. 568, 583–84 (1949).

