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Anger, Irony, and the Formal Rationality of Professionalism

AJAY K. MEHROTRA

One of the challenges in writing about the history of American law and political economy is determining the proper amount of historical context necessary to make sense of past institutional and organizational change. Where to begin and end a historical narrative and how much to include about the broader social, cultural, political, and economic conditions of a particular place and time are, of course, questions that accompany any attempt to reconstruct the past. How one addresses these issues invariably shapes the motives and intentions that can be ascribed to historical figures. In their eloquent and thoughtful comments, Christopher Capozzola and Michael Bernstein have urged me to think more carefully about these issues, about where my story begins and ends, about the broader social, political, and material circumstances that animated World War I state-building, and about the seemingly apolitical ideas and actions of the Treasury lawyers who are the center of “Lawyers, Guns, and Public Moneys.”

Both commentators seem to agree with my primary thesis that a group of elite Treasury lawyers played a pivotal role in building the administrative capacity of a new fiscal polity that simultaneously advanced the positive rights of American new liberalism and circumscribed the possibility of radical changes to the structure of postwar U.S. political economy. Yet each commentator questions whether I have overlooked larger historical circumstances and processes, and whether this omission has led me to overstate the contributions and achievements of these bureaucratic legal professionals. Capozzola vividly recounts the sweeping anger and discontent—what he aptly refers to as the “hell-raising”—that existed at the turn of the century, and especially during the wartime calls for self-sacrifice and civic obligation. In doing so, Capozzola questions the pervasiveness and durability of the public trust created by the wartime Treasury lawyers.¹

1. Christopher Capozzola, “Raising Revenue and Raising Hell,” (in this volume).

Similarly, Bernstein draws attention to the potential “ironies” that he sees shrouded in my account of lawyers as moderating influences. He highlights “the machinations of power, self-aggrandizement, or political manipulation” that he contends are embedded in “the formal rationality of professionalism.”²

I am extremely grateful for these trenchant comments. These critiques identify areas in need of clarification, but I do not believe they undermine my main argument about how a representative group of elite legal professionals helped create a distinctively juridical fiscal state during the First World War. I offer this brief response not only to thank the commentators for their careful reading of my work but also to elaborate on my research findings and continue the scholarly discussion about the historical relationship between taxation, professionalism, and American state-formation.

Hell-Raising Anger and Fiscal State-Building

The turn of the century was, as Capozzola colorfully describes it, a unique moment of social and political turmoil—a moment when “hell-raising pushed an income tax through Congress,” not once but twice. The World War I Treasury Department harnessed this hell-raising anger, particularly the rage aimed at war profiteering, to raise a tremendous amount of revenue and build a nascent fiscal state. In the process, federal officials also helped reconfigure the relationship between citizens and their state. Although Capozzola concurs with much of my narrative, he implicitly asks several important questions about the wider social context in which the Treasury lawyers operated. In a subtle and insightful criticism, he notes that fiscal citizenship during the war entailed “not only citizens’ duty to pay taxes, but also the authority to help collect them.” Focusing on war bonds, and drawing from his excellent book on World War I, Capozzola chronicles the many ways in which ordinary Americans tapped a prewar political culture of civic voluntarism to coerce and intimidate fellow citizens into purchasing war bonds. This form of “popular revenue collection,” Capozzola writes, “was one of the modes of governance that the administrative state sought to displace.”³

If “Lawyers, Guns, and Public Moneys” neglects the salience of civic voluntarism to the collection of wartime *tax* revenues, it is mainly because

2. Michael Bernstein, “Tocqueville v. Weber” (in this volume, 237, 240).

3. Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008); Capozzola, “Raising Revenue,” 227, 230, 231.

taxes entailed a different kind of political obligation and legal duty. Unlike bonds, taxes relied on a unique type of “quasi-voluntary compliance” that went beyond the consumer choices of individuals and had the express backing of the state’s monopoly of physical force.⁴ Still, Treasury lawyers did not hesitate in trying to mobilize private citizens in their efforts to inculcate a taxpaying culture. Daniel C. Roper elicited the assistance of the American clergy and the fledgling advertising industry in highlighting “The Glory of Paying the Income Tax.” He also informed journalists that they had a professional obligation to remind the public that “the man who pays his Liberty tax in full, without question or murmur, is no less a patriot than the man who invests in the Liberty bond or volunteers his services for military duty.”⁵

Capozzola is certainly correct that the administrative state sought to supplant this type of civic voluntarism with a more rational and routinized mode of governance. That was clear when District Court Judge Louis FitzHenry overturned Pape’s conviction under the Espionage Act for not purchasing a Liberty bond, as Capozzola points out. It was even more evident when Daniel Roper reprimanded private citizens who sought to benefit from turning in potential tax evaders. It was perhaps most obvious when Congress enacted, and the Bureau of Internal Revenue enforced, harsh legal penalties and fines that accompanied the delinquent or nonpayment of wartime taxes.⁶

Although Capozzola and I agree on the seismic shift in statecraft that occurred during the Great War, I suppose we hold different interpretations of the postwar fiscal and administrative polity envisioned by Treasury lawyers. Woodrow Wilson may have believed that effective democratic governments could “operate without the exercise of force,” and that such

4. Scholars have generally referred to the quasi-voluntary compliance of tax payments mainly because of the coercive power of the state to enforce the collection of tax payments (Margaret Levi, *Of Rule and Revenue* [Berkeley: University of California Press, 1989]).

5. “An Urgent Duty And A Glorious Privilege,” *The Literary Digest*, January 12, 1918, 32; Daniel C. Roper, *Fifty Years of Public Life* (Durham, N.C.: Duke University Press, 1941), 180; Daniel Roper, “The War Revenue Act and the Taxpayer,” Dec. 13, 1917, 5, Box 27: “Addresses” in Daniel C. Roper Papers, Rare Book, Manuscript & Special Collections Library, Duke University, Durham, N.C. As part of its “Campaign for Education,” the Bureau of Internal Revenue mobilized a variety of private industries and voluntary associations including “speakers of the Four Minute Men organization,” who addressed “chambers of commerce, theaters, moving-picture houses,” and other public places (U.S. Treasury Department, *Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year 1918* [1919], 963–65).

6. Roper, *Fifty Years*, 176; U.S. Treasury Department, *Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year 1918* (1919), 944–45.

force “is latent because it is understood to be omnipotent.”⁷ I do not think that the legal bureaucrats in the Treasury Department imagined a postwar revenue system “that was substantially insulated from public scrutiny and the raising of hell,” as Capozzola suggests. Russell C. Leffingwell certainly did not. In his rebuke of Roper’s suggestion to return to more “convenient” sources of revenue after the war, Leffingwell emphasized how “good democratic doctrine” required “that a direct tax, such as the income tax, which inevitably involves a certain amount of inconvenience to the taxpayer, is to be preferred to the indirect tax which involves none at all.”⁸ Although Michael Bernstein would rightly have us question the political and ideological motives behind Leffingwell’s support for direct taxes, the sentiment of Leffingwell’s remarks suggests that he favored raising (some) hell while raising revenue.

Capozzola also raises significant and perceptive questions about periodization and the ultimate achievements of the wartime fiscal state. More specifically, he believes I go too far in claiming that the lawyers instilled a pervasive and resilient sense of public trust in the federal government. Pointing to the Nye Commission’s investigation of the wartime munitions industry, Capozzola suggests that public confidence in the state became much more tenuous by the 1930s.⁹ The Treasury lawyers, however, did not seek to legitimate all federal power. Indeed, in the process of policing the jurisdictional boundaries of their department and agencies, they were most concerned about the relationship between citizens and the U.S. Treasury, not all other aspects of government. Given the growing size and scope of federal power, citizens could differentiate between government institutions, having faith in some (Treasury) and not others (Congress). Still, Capozzola’s larger point seems to be that if one follows the narrative thread into the interwar years, one will likely find a much less sanguine picture of the Treasury lawyers’ successes in building public trust. This may be

7. Woodrow Wilson, *The State: Elements of Historical and Practical Politics* (Boston: D.C. Heath, 1898), 572–73 (quoted in Capozzola, “Raising Revenue”).

8. Leffingwell to Roper, Oct. 20, 1919, NARA Excess Profits Tax Folder. Likewise, Arthur Ballantine directed opponents of the excess-profits tax to focus their energies on repealing the levy through democratically elected lawmakers rather than through the courts. Ballantine, “Some Constitutional Aspects of the Excess Profits Tax,” *Yale Law Journal* 29 (6) (1919): 625–42, 635, 642.

9. Incidentally, congressional probes like the Nye Commission, and the Pecora Investigation that preceded it, also highlighted the alleged machinations of bankers and industrialists, and hence gave New Dealers ample, if exaggerated, justifications for bolstering the powers of the regulatory, administrative state. See, William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932–1940* (1963), 59, 9; David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–2002* (2005), 156–57.

true.¹⁰ The onset of the Great Depression and the Hoover administration's feeble response shattered public confidence in government and in the business community.

Yet, even then, Treasury officials continued to argue that when it came to the public fury over war profiteering, the state could not sit idly by. During the early 1930s when Congress was reviewing general wartime policies, just as many parts of the world were lurching toward a second global conflict, former World War I Treasury lawyer Arthur A. Ballantine reiterated the importance of imposing confiscatory profits taxes to maintain wartime public trust. As Undersecretary of Treasury in the Hoover administration, Ballantine contended that "any plan of war revenue legislation should include a war profits tax designed to bring into Treasury, so far as practical, the entire amount of profits due to war."¹¹ Ordinary Americans may have found little solace in Ballantine's words, as the Great Depression deepened and the Hoover administration remained ineffective, but the former World War I Treasury lawyer's remarks revealed the residual hell-raising anger that resonated among some policymakers.

Historical Irony and Weberian Ambivalence

The periodization of "Lawyers, Guns, and Public Moneys" is also an important concern for Michael Bernstein. Whereas Capozzola questions where the story ends, Bernstein wonders where it should properly begin. He agrees that lawyers, like nearly all modern (middle-class) professionals, played a central role in building "the foundations of the twentieth-century American state" and the "Pax Americana" of the "American Century." But he acutely reminds us of the preexisting "unique array of material, economic, technological, and resource-based circumstances" that "privileged the United States in altogether novel ways," and that "would have made any professional elite look good." Bernstein is surely correct that a broader comparative analysis of lawyers and state-building would reveal the underlying "crucial components of the growth of American power."¹² In a larger

10. And it is one reason why "Lawyers, Guns, and Public Moneys" only claims that "the lawyers helped build the trust between citizens and government that was essential to the success of a liberal democracy *engaged in global war*" (emphasis added).

11. Arthur A. Ballantine, "War Policies in Taxation, Statement Before the War Policies Commission," May 20, 1931, Record Group 56—General Records of the Office of the Secretary of the Treasury, Box 187, Folder "Tax—Excess Profits & War Profits, 1923–32" National Archives and Record Administration II, College Park, Md.

12. "Lawyer, Guns, and Public Moneys" includes only a brief glimpse at the comparative financing of World War I. But Christopher Capozzola's comment provides a useful brief bibliography of important sources. See, Capozzola, "Raising Hell," 228n2.

book project, of which “Lawyers, Guns, and Public Monies” is a part, I explore some of the fundamental prerequisites of U.S. economic and political development, including how the rise of managerial corporate capitalism led to seminal changes in economic organizations and institutions, and how these changes provided lawmakers with new opportunities, or “tax handles,” to elaborate the development of an effective fiscal state.¹³

Nonetheless, a dominant focus on the material aspects of American development, on the conventional measures of economic growth that have been at the center of decades of U.S. macroeconomic history, may not adequately uncover the “complicated process of historical change” that Bernstein elsewhere in his comments has asked us to consider. Purely material accounts can seem overly deterministic. Without greater attention to the political, intellectual, and social factors that accompany material changes, one can lose sight of the uncertainty, irony, and contingency of past events. As W. Elliot Brownlee has suggested, “no complex of economic factors, narrowly defined, can explain the centralization of government, the shifts in government functions, and changes in the structure of public finance. Explanation of the transitions must rest more heavily on an understanding of fundamental shifts in civic values, bound up in the workings of politics and political institutions, within the context of externally driven social crises.”¹⁴

To be sure, Bernstein is neither an advocate, nor a practitioner, of a singular, economic explanation of historical change, as his recent outstanding work on the economics profession and the twentieth-century American state shows.¹⁵ To the contrary, Bernstein has urged me to have a “more resolute appreciation of the ironies” of my historical narrative, to focus on the political and ideological aspects of the deployment of expertise, and to consider how the formal rationality of professionalism can do as much to expand the means of expert knowledge as it can to curtail the acceptable social dialogue about the ends of public policy.¹⁶ This is a highly cogent critique, and one that suggests I should

13. Portions of this theme are explored in Ajay K. Mehrotra, “American Economic Development, Managerial Corporate Capitalism, and the Institutional Foundations of the Modern Income Tax,” *Law & Contemporary Problems* (forthcoming in 2010).

14. W. Elliot Brownlee, “The Public Sector,” in *The Cambridge Economic History of the United States, Volume III: The Twentieth Century*, ed. Stanley L. Engerman and Robert E. Gallman (Cambridge: Cambridge University Press, 2000), 1017.

15. Michael Bernstein, *A Perilous Progress: Economists and Public Purpose in Twentieth-Century America* (Princeton, N.J.: Princeton University Press, 2001), see, especially, chap. 1.

16. Elsewhere, I have examined how late nineteenth-century political economists interested in tax reform, and in furthering the “professionalism” of economics, belittled the “amateur” advocacy of more radical reformers and quashed a fledgling affinity between social gospel ministers and Henry George’s single-tax (Ajay K. Mehrotra, “Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual

clarify the many ways in which “Lawyers, Guns, and Moneys” does, indeed, attend to the complex, contradictory, and contingent aspects of legal professionalism and state-building. From the use of their political power to assist friends and colleagues, to their recruitment of young lawyers with the promises of postwar riches, to their formation of policies that would help the corporate clients they served before, and would serve again after, the war, the Treasury lawyers did not lose sight of their pecuniary interests. And, therefore, they did not always act as apolitical or nonideological Tocquevillian moderators.

The Treasury lawyers’ political and ideological “bias” was perhaps most evident in Leffingwell’s privileging of the war-profits tax over the excess-profits tax. Although he attempted to mediate the contending claims of populists and conservatives, the former Cravath partner, unsurprisingly, retained a self-serving faith in corporate capitalism as the motor of U.S. economic prosperity. He never forgot from which side of these debates he had emerged and would one day return. Thus, in the process of using his legal expertise to support a war-profits tax—a levy that raised significant revenue but by definition could be dismantled after the conflict—Leffingwell reoriented the demands of activist social groups like the Farmers’ National Committee and populist lawmakers like Claude Kitchin, who envisioned a radically different postwar fiscal order. The Treasury lawyers, moreover, forged inconsistent policies that inadvertently unleashed broader forces, and ultimately undermined the seemingly egalitarian goals of exacting shared wartime sacrifices. From all this, it is inaccurate, I think, to see “Lawyers, Guns, and Public Moneys” as an outmoded, “Whiggish” narrative of linear progress, or as a story celebrating unambiguously how a group of elite professionals came to the rescue of a nation-state in crisis. Rather, “Lawyers, Guns, and Public Moneys” is, I believe, a classic Weberian tale about the ambivalent aspects of modern Western rationality, about how the application of professional reason and expertise can advance the means toward material well-being, while simultaneously circumscribing the spectrum of acceptable social policy.¹⁷

Still, Bernstein may be correct that I have amplified the accomplishments of my historical figures. After working in the official and personal

Foundations of the U.S. Income Tax,” *UCLA Law Review* 52 [August 2005]: 1793–1866; Mehrotra, “‘Render Unto Caesar . . .’ Religion/Ethics, Expertise, and the Historical Underpinnings of the Modern American Tax System,” *Loyola University Chicago Law Review* 40 [Winter 2009]: 321–67).

17. Max Weber, “Bureaucracy,” in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 196–244; see also Rogers Brubaker, *The Limits of Rationality: An Essay on the Moral and Social Thought of Max Weber* (1984), 35–43.

papers of these lawyers, perhaps I have been afflicted with an academic version of the Stockholm syndrome. But if I have accentuated the positive aspects of the mobilization of legal expertise in state-building, I have done so for two primary reasons. First, because the existing historiography has too frequently concentrated on the limits and pathologies of the modern American state, especially in the realm of fiscal policy, one of the aims of my essay and the larger project is to provide a counterbalance to the conventional narrative of declension—a narrative that tends to depict turn of the century tax reform and state-building as at best a missed opportunity, and at worst a sophisticated form of conservatism and further evidence of the liberal state's hollow rhetoric of social justice.¹⁸

Second, one of the central objectives of my essay was not to valorize the Treasury lawyers but to cast them as representative of a new breed of legal professionals who made a distinctive contribution to the American state-building project. They were among the first classes of Langdellian-educated lawyers; the vanguard of progressive legal science; the pioneers of the large, multispecialist law office. Perhaps most importantly, they were the forerunners of the Washington Lawyers. As members of this new class of elite legal professionals, the Treasury lawyers were imbued with a sense of civic responsibility and public service that led them to traverse back and forth between the private and public sectors. Although they never lost sight of their own economic interests and those they served, these new legal bureaucrats did, in fact, build a robust fiscal state amid a political culture that remained skeptical of concentrated and centralized public power. Populist leaders may have seen them as taming more radical calls for change, but they saw themselves as realizing the social justice ideals of the moderate administrative state.

If “Lawyers, Guns, and Public Moneys” is able to persuade readers to consider the achievements and the limits of early twentieth-century fiscal state-building, part of the reason will surely be the careful reading and comments provided by Capozzola and Bernstein. These two scholars have not only kindly encouraged me to think more carefully about anger, irony, and the formal rationality of professionalism but in the process they have also adroitly noted just why such a historical account of U.S. state-building, professionalism, and fiscal citizenship may have particular resonance for our own times.

18. See, for example, Robert Stanley, *Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861–1913* (New York: Oxford University Press, 1993); Morton Horwitz, *The Transformation of American Law, 1870–1960* (New York: Oxford University Press, 1992), 19–27.

Editors' Introduction

The expansion of *Law and History Review* provides the necessary pages to review sixty-five to seventy books per year. In addition, we are now able to review more non-English language books and occasionally offer multiple reviews of a monograph or important edited collection. Finally, we plan to commission longer field review essays.

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