STANLEY SURREY, THE NEW DEAL, AND THE VIRTUES OF INCREMENTAL TAX REFORM

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I
INTRODUCTION

Shortly after his death, one of Stanley Surrey's colleagues likened his influence on tax policy "to that of Shakespeare in drama and Aristotle in philosophy." Indeed, Donald Lubick waxed almost lyrical in his praise. "To those who abhor the income tax, he was a bête noire; to those of us who knew him best, he was our King Arthur."[1] Other colleagues, like Erwin Griswold, were more straightforward. Surrey, he suggested, was simply "the greatest tax scholar of his generation."[2]

As a literary form, eulogies aren't known for careful praise or measured restraint. But Surrey's accolades have stood the test of time. A more recent and dispassionate observer, Duke University School of Law professor Lawrence Zelenak, has called Surrey "the greatest tax scholar in the history of the United States. Certainly in the history of the U.S. income tax."[3] And it's a defensible statement.

Surrey's most important contribution to tax policy: the concept of tax expenditures that he helped develop, advance, and institutionalize—has been enormously influential—if not, alas, a cure-all for everything that ails the federal tax system.[4] Surrey's role in helping build tax systems around the world has also won him a global reputation "as a supreme teacher and authority."[5]

These achievements are indisputable, and Surrey has earned a spot in the pantheon of 20th-century tax experts. But accolades, even well-deserved ones,

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1. Donald C. Lubick & Paul R. McDaniel, *Stanley Surrey Remembered*, TAX NOTES, Sept. 10, 1984, at 1083.

2. Erwin N. Griswold, *A True Public Servant*, 98 HARV. L. REV. 329, 331 (1984).

3. Robert Goulder, *Stanley S. Surrey—The Greatest U.S. Tax Scholar?*, FORBES (June 8, 2022), https://www.forbes.com/sites/taxnotes/2022/06/08/stanley-s-surrey—-the-greatest-us-tax-scholar/ [https://perma.cc/D5T9-7F98].

4. *See* STANLEY S. SURREY, A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY 16, 37–38, 51–57 (Lawrence A. Zelenak & Ajay K. Mehrota eds., 2022) [hereinafter SURREY MEMOIRS] (coming to much the same conclusion).

5. Lubick & McDaniel, *supra* note 1.

come at the end of a story; they don't tell us much about the struggles, failures, and flaws that brought our hero to his triumphs. It is all well and good to praise King Arthur, *er*, Stanley, for convening the knights of the Treasury to fight the special interests in defense of an unsullied tax base. But how did young Stanley arrive on the field of battle in the first place?

The answer can be found in the early years of Surrey's career. In particular, his training at Columbia Law School and his tenure in the New Deal Treasury helped shape many of his later ideas, commitments, and approaches to policymaking. Indeed, these early years are vital to understanding Surrey's achievements as a policymaker, academic, and conscience of the tax bar.[6]

Surrey had the good fortune to arrive at the Treasury during a period of intellectual ferment and policy innovation. From his perch in the department's tax policy division, he witnessed and helped shape a watershed in American fiscal history: the transformation of the individual income tax from a "class tax" to a "mass tax."[7]

Surrey's mentors and colleagues at Treasury were vital to shaping his later career. At least three of the department's top lawyers played important roles: Roswell Magill, Herman Oliphant, and Randolph Paul. So, too, did the department's tax economists; as Surrey later remarked, his early experience at Treasury imbued him with "high respect for the contributions an able tax economist could make."[8]

But to fully appreciate *how* these colleagues shaped Surrey's career, we need to situate him within the complex policy apparatus of the New Deal Treasury. Not so much in formal bureaucratic terms—title, division, or link on the chain of command—but his intellectual and political positioning.

During the Roosevelt years, the Treasury vied with Congress over tax policy. Still, within the administration, the department managed to keep firm control over the issue, defending its turf from would-be interlopers like Marriner Eccles of the Federal Reserve and Raymond Moley, who was technically from the State Department, but really a Brain Trust policy entrepreneur.[9] Treasury Secretary Henry Morgenthau, Jr. exploited his friendship with Roosevelt to keep these gatecrashers at bay.

The Treasury was itself divided, however, into two distinct camps when it came to tax policy. While not exactly rivals, these camps approached taxation with different priorities and sensibilities. The first group, associated with Herman

6. *See* Joseph J. Thorndike & Ajay K. Mehrotra, *"Who Speaks for Tax Equity and Tax Fairness?" The Emergence of the Organized Tax Bar and the Dilemmas of Professional Responsibility*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 203–205 (discussing Surrey's goals of repair and renovation for the tax system when he assumed the post of Assistant Secretary of the Treasury for Tax Policy).

7. *See* W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA ix–xii, *passim* (2016) (explaining the notion of fiscal watersheds, and the tax regimes they defined).

8. SURREY MEMOIRS, *supra* note 4, at 156.

9. *See* JOHN MORTON BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF CRISIS 1928–38, at 279–81, 300–13 (1st ed. 1959) (describing Eccles's attempted interference); *see id.* at 301–02 (describing Moley's interference).

Oliphant, displayed a preference for transformative, even disruptive, tax innovation. The second, led first by Roswell Magill and later by Randolph Paul, preferred more incremental reforms. The department's tax economists were part of this second group, giving the incrementalists a numerical advantage—albeit one that did not always prove decisive.

In describing these two groups of Treasury policymakers, it is important not to overdraw the distinction; both groups supported meaningful progressive tax reform. Each endorsed policies advanced by the other, if sometimes with muted enthusiasm. The distinction is important because it helps explain the changing agenda of New Deal tax reform.

The famous tax reforms of the mid-1930s, including the Wealth Tax Act of 1935 and the Undistributed Profits Tax of 1936, were achievements of the Oliphant group, borne of his penchant for disruptive reform. By contrast, the less famous but still headline-grabbing campaigns against tax avoidance by the rich—the first from 1933 through 1934 and the second in 1937—reflected Magill's preference for incremental improvements and base broadening reforms in particular.

Surrey ended up in Magill's group. That might seem predictable, especially in retrospect. Magill had been Surrey's instructor at Columbia Law School, providing him with his first introduction to tax law. He was also Surrey's first employer after graduation.

But it was Oliphant who gave Surrey his first job at Treasury in 1937. Oliphant was also more engaging and dynamic. And in 1937, Oliphant was riding high, basking in the glow of his recent legislative victories. It is easy to imagine that a young Surrey might have been impressed. Plus, Oliphant was not only one of Morgenthau's favorites, but one of Roosevelt's, too; working for him would bring access to the highest levels.[10]

But Magill was probably a more comfortable fit for Surrey. Magill trained Surrey in a methodical, logical, and thorough approach to the tax law. In the Magill model, tax reform usually involved improvements and refinements to existing levies—not a wholesale replacement or disruptive innovation. So when Magill, and most of the department's economists, drafted an agenda for tax reform, they generally thought in terms of incremental improvements. How could they make the tax system work better? What problems plagued the existing levies? How could those problems be fixed?

Oliphant's approach to tax reform was altogether more disruptive. He viewed taxation as an instrument of wholesale social and economic change, a tool for solving big problems, like the distribution of wealth and the concentration of economic power. In this sense, Oliphant was part of a broader intellectual movement supporting the concept of "social taxation," which the editors of *The*

10. *See* BLUM, *supra* note 9, at xiv, *passim* (providing Morgenthau's opinion of Oliphant). *See id.* at 327–32 (showing how Oliphant's standing with FDR was most clearly evident during the 1937 drive to combat tax avoidance, when Oliphant helped enable Roosevelt's desire to publicly shame tax avoiders by name).

New Republic explained succinctly: "If consciously used as an instrument of policy, the taxing power is capable of a far more beneficial effect on the general life than it has ever before had."[11]

Liberal journalists, like those writing for *The Nation*, were eager to see Roosevelt embrace an activist tax agenda. Indeed, they thought the nation's future might depend on it. "Since a concrete policy of social taxation is by all odds the most important element of both reform and recovery, essential to the very survival of our economic system," they wrote in 1935, "we urge the Administration to lose no time in squaring off to this fundamental task."[12]

It would be unfair to dismiss Oliphant and his supporters as excitable amateurs. Still, it seems notable that neither he nor his most ardent ally in the disruptors camp, Robert H. Jackson, the General Counsel of the Bureau of Internal Revenue, had a background or much continuing interest in tax law.[13] Both appreciated the importance of taxation and the opportunities presented by tax reform, especially when viewing that reform through a broader social and political lens. But they were not tax professionals.

On the other hand, when Surrey joined the Treasury in 1937, he was already on his way to becoming a tax professional. Because of his training and temperament, Surrey was suited to the sort of tax reform that Magill and the department's economists were pursuing. Before 1937, that group had enjoyed only modest success in convincing FDR to embrace their agenda of incremental reform. But the political tide was about to turn against Oliphant and the advocates of social taxation.

The instrumentalists would eventually have a chance to implement their tax agenda. Since it arrived during the fiscal crisis of World War II, those incremental changes would prove transformative—and more durable than anything advanced by the champions of social taxation.

This article explores the early years of Surrey's career, examining his entry into the world of tax policy during the 1930s and his wartime service in the Treasury's Office of Legislative Counsel. Part II describes his early tax training at Columbia—perhaps the best place in the United States to begin a tax career in the early 1930s. Part III provides a general overview of New Deal tax policymaking, including a discussion of the Roosevelt Administration's internal debates over how to approach tax reform—through disruptive innovation or more incremental reform. Part IV describes Surrey's time at Treasury, emphasizing the policymaking models established by his mentors, Roswell Magill and Randolph Paul. Finally, Part V concludes with a summary of Surrey's "lessons learned" during his years at Treasury, including insights about the

11. *Tax Profits!*, NEW REPUBLIC, May 24, 1933, at 32.

12. *Mr. President, Begin to Tax!*, NATION, Mar. 6, 1935, at 264.

13. *See* Kirk J. Stark, *Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 174–75 (2000) (revealing that this characterization might be slightly unfair to Jackson, who did develop some genuine tax expertise during his stints at the BIR and in the Justice department. But he was destined for greater things).

contributions of economists, the influence of tax lobbyists, and the perils of using the tax system as a lever for social change.

II
SURREY AND TAX AT COLUMBIA

Columbia University may have been the best place to launch a tax career in the first half of the twentieth century.[14] Over the course of several decades, the university had provided an institutional home to tax experts in a range of disciplines, but especially in law and economics. Just as important, the university had deep roots in New York's state and city politics, helping elevate the visibility of its faculty in numerous public policy debates—and catapulting more than a few into important policy roles.

The roster of famous Columbia tax experts was already long by the time Surrey arrived at Columbia. It included economists like Edwin R.A. Seligman and Robert Murray Haig, both of whom were still active in the early 1930s—although Seligman's best years were behind him.[15] Both had also served in various high-profile advisory roles, including stints in New York City, Albany, and Washington, DC.

Meanwhile, a new cohort of Columbia tax economists was already on the way. This group included Carl Shoup (Ph.D., 1930), Louis Shere (Ph.D., 1932), C. Lowell Harris (Ph.D., 1940), and William Vickery (Ph.D., 1948).[16] All would be Surrey's colleagues at the Treasury Department in the 1930s and 1940s.

Among the Columbia legal scholars specializing in tax, the standout was Roswell Magill. Indeed, Magill was the *only* Columbia faculty member teaching a tax course when Surrey was at the law school. He introduced the tax course in 1924, and by some reports, it was one of the first tax courses taught at any law school in the nation.[17] His colleagues were not impressed by the innovation, especially amid the tax-cutting fervor that marked the 1920s. "Federal taxation wasn't considered worth teaching then," Magill recalled. "All of my friends told me, 'Why go into this? It's a dying subject. Taxes are going down.'"[18]

Columbia also hosted some of the nation's most famous legal realists—members of a jurisprudential school that emphasized the empirical study of law

14. *See* Ajay K. Mehrotra, *From Seligman to Shoup: The Early Columbia School of Taxation and Development* (Indiana Univ. Maurer Sch. of L., Research Paper No. 207, 2012) (providing more information on Columbia's role as an intellectual incubator for tax policy ideas during the early to mid-twentieth century, as well as a training ground for neophyte fiscal policymakers).

15. *See* Ajay K. Mehrotra, *Edwin R.A. Seligman and the Beginnings of the U.S. Income Tax* (Indiana Univ. Maurer Sch. of L., Research Paper No. 56, 2006) (detailing Seligman's long career and influence).

16. Graduation dates for these economists reflect the dates their Ph.Ds were awarded, not earlier degrees.

17. *Roswell Magill, Lawyer, 68, Dead*, N.Y. TIMES, Dec. 18, 1963, at 41, http://timesmachine.nytimes.com/timesmachine/1963/12/18/89992740.html [https://perma.cc/7MUC-VN8M] (last visited Jan. 12, 2023).

18. *Id.*

and legal institutions, examining how they operated in the real world, not how they existed in some a priori or theoretical sense.[19]

Surrey seemed to dislike Columbia's most famous realist, Karl Llewellyn, for his irritating classroom style, but he may have absorbed more of the realist worldview than his memoirs directly suggest. "Surrey's lifelong commitment to merging academic ideas with practical policymaking and his affinity for working with public finance economists suggests that he absorbed many of the lessons of realism," contend Zelenak and Mehrotra in the introduction to Surrey's book, and their suggestion seems plausible.[20]

Among the important realists teaching at Columbia in the 1920s was Herman Oliphant, Surrey's future boss at the Treasury Department.[21] But Oliphant had left Columbia in 1928, a year before Surrey arrived,[22] and it would take almost a decade for their paths to cross.

A. Meeting Magill

Roswell Magill provided Surrey with his first instruction in tax law, but only after testing the young man's patience with a "dull and uninspiring" course on civil procedure.[23] Surrey managed to transcend the tedium and impress his instructor. And like many students, Surrey understood that taking multiple courses with a professor who likes you can be valuable. So young Stanley enrolled in Magill's pioneering Taxation course the next year. Once again, Surrey excelled. But with that, his formal tax training came to an end, since Columbia had nothing further to offer the budding tax specialist.[24]

After he graduated in 1932, however, Surrey became Magill's research assistant. In conjunction with the Columbia economists Robert Haig and Carl Shoup, Magill began studying the federal tax system for the Twentieth Century Fund, a New York City think tank making a major foray into tax policy.[25] "The project was the first of its kind," Surrey wrote, "since no one had yet attempted a coordinated structural analysis of the federal income tax that covered both theory and substantive rules, in statute and cases."[26]

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19. *See generally* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986) (providing a reasonable starting point for the vast literature on legal realism).

20. SURREY MEMOIRS, *supra* note 4, at 19.

21. Oliphant was a prolific author but he was no tax expert. His most famous contribution to the literature of legal realism was Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928).

22. *See* COLUMBIA UNIV., CATALOGUE 1928–1929, at 47 (1928); COLUMBIA UNIV., CATALOGUE 1929–1930, at 18–130, 234 (1929), https://hdl.handle.net/2027/nnc2.ark:/13960/t4xh0995m?urlappend=%3Bseq=57 [https://perma.cc/7NXP-QB7N] (listing Herman Oliphant as a professor in the years 1928-1929, but not 1929-1930, and Stanley Surrey as a student beginning in 1929–1930).

23. SURREY MEMOIRS, *supra* note 4, at 20.

24. SURREY MEMOIRS, *supra* note 4, at 94–95.

25. *See* Mehrotra, *supra* note 15 (providing more information on the Twentieth Century Fund study).

26. SURREY MEMOIRS, *supra* note 4, at 98.

Surrey's work for Magill that year proved to be a formative experience, as he noted in his memoirs. With little direct guidance from his mentor, he was left to make his own way through the material—which extended to include "almost the entire structure of the income tax." The work was demanding but rewarding. Indeed, Surrey's lack of practical experience with tax law proved to be an advantage, or at least a virtue.

> "I was forced to find the theoretical strands that held the structure together. As a result I had the rare opportunity early on to obtain a sense of that structure as a whole and to understand that the structure could be analyzed and dealt with in logical terms. A rational framework could be devised for the structure and in turn structural errors could be perceived. I saw the income tax not as a random body of rules and edicts but as an internally consistent framework."

This bottom-up approach would endow Surrey with a distinctive vision of the federal tax system: a view of how it *ought* to be in theory, not just how it *was* in practice. "All of my later work has been dominated by that approach," Surrey observed.[27]

In claiming to have a special vision of the tax system, Surrey managed to convey a distinctive sense of moral certitude, even superiority. Also, his attempt to impute rationality to a political institution like the tax system was unusual, at least for someone trained in a hotbed of legal realism. Surrey's special view of the tax system might well have turned him into an idealistic, even doctrinaire sort of tax reformer. His rationalist view of the tax law remained with him for the rest of his career.

Ultimately, Surrey's unique view of the tax system seemed to serve him more as a lodestar than a legislative program. His work in the trenches of the policy process eventually taught him the value of flexibility and compromise. As one of his colleagues would later remark: "Surrey, ever the pragmatist, stopped short of going the whole way."[28]

III

THE SHAPE OF NEW DEAL TAXATION

After his stint working for Magill, Surrey eventually found his way to the New Deal Treasury Department. Before joining him there, however, it's important to take a brief tour of that department and its activities during the 1930s.

New Deal tax policy is often remembered for the soak-the-rich rhetoric surrounding its enactment. "Our revenue laws have operated in many ways to the unfair advantage of the few," declared Franklin Roosevelt in a typical statement, "and they have done little to prevent an unjust concentration of wealth and economic power."[29]

27. *Id.* at 98–99.

28. Richard A. Musgrave, *Pathway to Tax Reform*, 98 HARV. L. REV. 335, 335 (1984).

29. Franklin D. Roosevelt, *Message to Congress on Tax Revision*, AM. PRESIDENCY PROJECT (June 19, 1935), https://www.presidency.ucsb.edu/documents/message-congress-tax-revision [https://perma.cc/67PC-PUEV].

Roosevelt's observation came during early consideration of the Revenue Act of 1935, sometimes called the Wealth Tax Act. The alternate title was apt, even if it wasn't official; the character of the act is well captured by one of its more notable provisions.

The 1935 act raised income tax rates on virtually all of the nation's wealthiest taxpayers. Furthermore, it established a new top bracket rate of seventy-five percent on income exceeding five million dollars a year, about ninety-nine million dollars in 2023 dollars.[30] The prior maximum bracket rate had been fifty-nine percent on income exceeding one million dollars. Exactly one taxpayer was believed to inhabit this new rarefied bracket: John D. Rockefeller Jr.[31]

The Wealth Tax Act was undoubtedly a high point of New Deal tax reform. But it was *not* representative of all New Deal tax reforms. Indeed, the New Deal played host to at least two distinct types of tax reform, each championed by a different group of experts in the Treasury Department.

The first group, whom we can call the disruptors, was led by the department's General Counsel, Herman Oliphant. They championed "social taxation": the deliberate use of progressive tax policy as an instrument of economic and political reform. The agenda of social taxation was typically dramatic, innovative, and politically controversial. The disruptors hoped to use tax policy to challenge anti-democratic concentrations of wealth and economic power among individuals and corporations.

The second group of Treasury tax reformers was the incrementalists. They shared many of the same goals as the disruptors, as you might expect from people working side by side in a New Deal agency and reporting to a single cabinet official. Like the disruptors, they supported progressive reforms to the federal tax system. More specifically, they supported heavier reliance on individual and corporate income taxes and less dependence on consumption levies of all kinds. But the incrementalists—who were led, at various times, by top department lawyers Roswell Magill and Randolph Paul—were usually focused on refining existing taxes rather than creating new ones. While they were not entirely opposed to fiscal innovation, they tended to favor improvement over replacement.

The division between disruptors and incrementalists played out among the Treasury's legal staff. Meanwhile, the department's cadre of tax economists aligned themselves with the incrementalists. Having developed a detailed program for comprehensive reform of the existing revenue structure in the summer of 1934, they were inclined to improve the current tax system rather than embark on untested ventures in tax innovation.

Franklin Roosevelt, however, had other ideas.

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30. *See* MEASURING WORTH, https://www.measuringworth.com [https://perma.cc/7QY8-UWQB] (last visited Feb. 28, 2023) (using the purchasing power calculator to calculate the inflation adjustment).

31. MARK H. LEFF, THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933–1939, at 144–45 (1984).

A. The Ebb And Flow of Reform

New Deal tax reform did not unfold in a straight line. The two rival camps took turns advancing their agenda, with the incrementalists going first. Magill played a formative role in shaping the Revenue Act of 1934, which arose as a response to the tax avoidance revelations of the 1933 Pecora investigation of Wall Street. Named for Ferdinand Pecora, chief counsel of the Senate Banking Committee, the investigation had uncovered some distasteful but entirely legal tax avoidance by some of Wall Street's most famous bankers.[32]

The resulting outrage sparked a campaign to eliminate certain preferences and privileges in the tax law, including the deductibility of partnership losses. These deductions had allowed some Wall Street titans, including J.P. Morgan, Jr., to avoid paying income taxes entirely during the darkest days of the Great Depression. Morgan quickly pointed out that he paid nothing because he earned nothing during those terrible years, but populist critics were unmoved; lawmakers plowed ahead with their plan to limit loss deductions.[33]

Magill arrived at Treasury as Congress was beginning work on the 1934 revenue bill. Liberals were skeptical of his appointment, complaining that he was unlikely to champion progressive tax reform on an adequate scale. Magill was a Republican, after all, having served as a top assistant to Treasury Secretary Andrew Mellon during the tax-cutting heyday of the 1920s.[34] But Magill's first allegiance was to the tax system, not his party—something he would prove during his service as a New Deal tax official. Magill, moreover, quickly earned Morgenthau's trust thanks to a shared sort of temperamental conservatism that transcended policy differences.

Magill led the administration's effort to head off dubious reforms sparked by the Pecora investigation, including unreasonable limits on actual economic losses. As eventually passed by Congress and signed into law, the Revenue Act of 1934 tightened up on some tax minimization devices popular with wealthy taxpayers, including the use of personal holding companies. It also revised the treatment of capital gains and losses, making the law less generous to taxpayers.[35]

But Magill managed to dissuade lawmakers from adopting draconian loss limits. They still, however, imposed enough to dismay tax experts. In 1937, a Treasury official offered a scathing indictment of the changes enacted three years earlier. "The widespread sense of injustice flowing out of this treatment impairs cooperation between taxpayers and the government in the administration of the

32. Joseph Thorndike, *Historical Perspective: Pecora Hearings Spark Tax Morality, Tax Reform Debate*, TAX NOTES, Nov. 12, 2003, at 688.

33. *Id.*

34. JOSEPH J. THORNDIKE, THEIR FAIR SHARE: TAXING THE RICH IN THE AGE OF FDR 101–02 (2013).

35. Roy Blakey, *The Revenue Act of 1934*, 24 AM. ECON. REV. 450, 454–455 (1934), https://www.jstor.org/stable/1806570 [https://perma.cc/28L8-KR4Y].

income tax," he wrote. "In the minds of many, the present treatment is so patently unjust as to be repugnant to all sense of fair play."[36]

Even as he worked with Congress to shape a decent tax bill, Magill was also supervising a staff of new Treasury economists assembled in 1934 to develop a comprehensive plan for tax reform. Both Magill and Secretary Morgenthau were determined to expand Treasury's administrative capacity, specifically its ability to generate tax proposals. "The Republican Administrations of the 1920s had not recruited a staff of experts with the qualifications Morgenthau considered necessary for studying tax questions," noted Morgenthau's biographer, John Morton Blum.[37]

Treasury's experts spent the summer of 1934 preparing a series of tax studies, known collectively as the Viner Studies, after University of Chicago economist Jacob Viner. These studies outlined an agenda for comprehensive but fundamentally incremental reform. The Viner Studies did not propose the wholesale replacement of any major revenue device nor recommend dramatic fiscal innovations, like a national sales tax. Instead, the studies outlined a range of important but incremental improvements to existing levies.[38]

To be clear, incremental does not mean minor or unimportant. Even small increments can be important, like the last step off a high dive board. Some of the changes suggested in the Viner reports implied fundamental changes to the federal tax system—and American governance more generally.

For instance, the Treasury economists endorsed an incremental replacement of excise tax revenue with money from an expanded income tax, arguing that such a shift would allow for greater progressive equity while also increasing the tax system's capacity to generate revenue. Specifically, the Viner group proposed lowering income tax exemptions to increase the number of Americans paying the individual levy. At the same time, they endorsed an increase in rates. Enacted together, these changes would raise enough money to pay for a rollback in regressive excise taxes, including levies on consumer necessities.[39] Such changes would have transformed the American fiscal regime.

Meanwhile, the economists of the Viner group were notably cautious about any effort to use the tax system as an instrument of social or economic reform, which often went by the shorthand description of social taxation. Lawmakers, of course, had long used taxes for non-fiscal purposes: tariffs to regulate trade, for

36. Joseph Thorndike, *Timelines in Tax History: Moralistic Tax Policy in The 1930s*, FORBES (Sept. 6, 2022, 5:19 PM), https://www.forbes.com/sites/taxnotes/2022/09/06/timelines-in-tax-history-moralistic-tax-policy-in-the-1930s/?sh=91fd0861fc69 [https://perma.cc/M33S-X2T2], citing Box 63; Tax Reform Programs and Studies; Records of the Office of Tax Analysis/Division of Tax Research; General Records of the Department of the Treasury, Record Group 56; National Archives, College Park, MD available at https://web.archive.org/web/20101223181015/http://taxhistory.org/Civilization/Documents/Surveys/hst23731/23731-2.htm [https://perma.cc/QD83-7XKC].

37. BLUM, *supra* note 9, at 298.

38. *See* THORNDIKE, *supra* note 34, at 105–30 (offering a detailed discussion of the Viner Studies and their contents).

39. *Id.* at 113–19, 123–29.

instance, and sumptuary or sin taxes to curb alcohol and tobacco consumption. These non-fiscal uses for taxation were well established and broadly accepted, both by the public and by economists. But the Viner group regarded anything more ambitious or innovative as unwise, including efforts to regulate the business cycle by varying the tax level. This sort of proto-Keynesianism was a popular topic in progressive policy circles of the early to mid-1930s, but the Treasury economists were unconvinced of its wisdom or efficacy.[40]

"The tax system, so the argument runs, may be employed to eliminate business cycles," wrote Carl Shoup, one of the Viner economists. "[O]r at least to lessen their severity, by penalizing 'over-saving' and encouraging consumption, by checking speculation, by favoring certain geographical or social classes at the expense of others, by encouraging business initiative, by discouraging 'unwise' business expansion, and so on."[41] Such goals were tempting targets for tax innovation. But creativity was fraught with peril. "There is a heavy burden of proof to be borne by those who would attempt to use the tax system to influence decidedly the major economic currents of the country," Shoup concluded.[42]

The Viner group understood that their vision for comprehensive tax reform—rooted in proposals to increase the number of people paying income taxes and to raise the rates at which those taxes were levied—would be politically unpopular. But they were undeterred. "This revision should be within the bounds of political expediency but there should be no shrinking from a courageous tax policy for the maintenance of STRONG public credit even in the face of contemporary unpopularity," they declared.[43] "Such taxes as these are not popular and never will be popular, but real statesmen must face realities and, if necessary leave popular acclaim to history."[44]

The economists may have sought courage, but Franklin Roosevelt—already contemplating his 1936 reelection campaign—was disinclined to antagonize voters. Thus, the Viner studies disappeared from public discussion almost as soon as Treasury completed them in the fall of 1934. Shortly after that, Magill decided to leave the Treasury, returning to Columbia to resume his teaching. Morgenthau announced that the legislative tax program would continue "under the direction of Robert H. Jackson, Assistant General Counsel, and Herman Oliphant, General Counsel of the Treasury Department."[45]

40. *Id.* at 111–13.

41. *Id.* at 112.

42. *Id.*

43. Roy Blakey, Federal Income Taxes: Certain Phases (1934), Box 63; Tax Reform Programs and Studies; Records of the Office of Tax Analysis/Division of Tax Research; General Records of the Department of the Treasury, Record Group 56; National Archives, College Park, MD., available at https://web.archive.org/web/20220526023743/http://www.taxhistory.org/Civilization/Documents/Surveys/hst23737/23737-1.htm [https://perma.cc/UVP6-D9FP].

44. *Id.*

45. *Magill Quits Treasury*, N.Y. TIMES, Nov. 13, 1934, at 2.

The change in leadership was significant. With Magill, the incrementalist, on the way out, Oliphant and Jackson were ready to step in with more dramatic, reformist plans for social taxation. On December 11, 1934, they delivered a memo outlining a range of new taxes to Roosevelt.[46] Framed as revenue raisers, they were also clearly designed to address social and economic problems.

For instance, Oliphant proposed a new inheritance tax to supplement the existing estate levy. "Swiftly graduated rates would do much to retard inheritance of large sums," he wrote.[47] The memo proposed a new intercorporate dividend tax that would function as an anti-monopoly device and serve as "an effective element in a program for the breaking up of some of the larger business units that dominate our economic life."[48] And Oliphant urged Roosevelt to consider a tax on undistributed corporate profits, noting that the existence of large surpluses in corporate coffers was "a major factor in the domination of American business by a relatively small group."[49]

These proposals involved exactly the sort of tax innovation that the Viner economists viewed so cautiously. To be clear, most of the incrementalists, including Magill, would eventually line up in support of these ideas when several made their way into legislation advanced by the White House. But these were ideas borne of a fundamentally different mindset than the one Magill and his fellow incrementalists brought to tax policymaking.

Several years later, these ideas would induce Magill to abandon the New Deal and return to his Republican roots.

The revenue acts of 1935 and 1936 both featured key elements of the social taxation program. These included redistributive income and estate taxes on individuals, with new, significantly higher rates. The 1936 law also revised corporate taxation to discourage bigness in private enterprise, specifically through the introduction of an undistributed profits tax (UPT) that proved deeply unpopular among business leaders. Indeed, the most famous landmarks of 1930s tax reform–the the ones most closely associated with the New Deal–were products of this social tax agenda.

But the heyday of social taxation was over by 1937 when a resurgent Great Depression slowed FDR's drive for sweeping economic reform. With the new Roosevelt Recession sapping the administration's support on Capitol Hill, Treasury officials began looking for less contentious tax proposals.[50] Not coincidentally, Morgenthau turned again to his favorite incrementalist, Roswell Magill, who rejoined the Treasury, this time as undersecretary.

46. HERMAN OLIPHANT, *Tax Program*, *in* 2 MORGENTHAU DIARIES 275–86 (1934).

47. *Id*. at 280.

48. *Id*. at 280.

49. *Id.* at 282.

50. *See generally* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (2011) (discussing how this moderate shift in New Deal tax policy was part of a broader shift in the New Deal economic agenda from dramatic to more restrained types of economic reform).

During this second stint as Morgenthau's tax advisor, Magill would find himself with a familiar assistant—as Stanley Surrey rediscovered his forgotten interest in tax law.

IV

SURREY AT THE TREASURY

After law school, Surrey spent roughly five years a New Deal labor lawyer, landing at the National Labor Relations Board as a staff attorney. In the spring of 1937, however, he received a summons to appear before Herman Oliphant at the Treasury. Oliphant, still serving as Treasury General Counsel, and fresh off his legislative victories in the revenue acts of 1935 and 1936, asked if Surrey would consider a temporary assignment reviewing procedures at the Board of Tax Appeals (BTA).[51]

The BTA was the venue of first resort for taxpayers challenging a deficiency asserted by the Bureau of Internal Revenue (BIR). The board was not a court, at least not initially. Created by Congress in 1924, it was an independent administrative body, physically housed in the same building as the BIR but independent of the tax agency and the Treasury Department.[52]

Why had Oliphant reached out to Surrey? The two were strangers to one another, although their paths had nearly crossed at Columbia, where Oliphant was a member of the law school faculty until 1928.[53] Surrey suggested that a Columbia graduate named George Jaffin might have made the connection, but he couldn't recall having actually met the man.[54]

Magill was the likely link, despite Surrey's insistence that his former professor had played no role in Oliphant's initial call.[55] Magill had taken his new position as undersecretary of the Treasury in January, just a few months before Oliphant had sent for Surrey. Moreover, Magill was personally involved in trying to speed the BTA's notoriously slow operations. The *New York Times* reported in May that BTA chair Eugene Black had consulted with both Magill and Oliphant about how to clear a backlog of some 8,644 cases. The government had about $500 million at stake, with some cases worth more than $1 million. The *Times* also reported that Magill had personally conducted a study of tax collection in New York, with similar studies planned for other regions. Clearly, the undersecretary was actively involved in the BTA project, along with Oliphant. It seems likely that he may have made the connection with Surrey.[56]

51. SURREY MEMOIRS, *supra* note 4**Error! Bookmark not defined.**, at 20.

52. *See* HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS, PART II 53 (2nd ed. 2014) (discussing the history of the BTA).

53. *See* CATALOGUE 1928–1929, *supra* note 22, at 47; CATALOGUE 1929–1930, *supra* note 22, at 43 (listing Oliphant among the Officers of Instruction in the 1928–1929 session and not the 1929–1930 session).

54. SURREY MEMOIRS, *supra* note 4, at 20.

55. *Id.*

56. *Steps Taken to Cut Tax Appeal Cases*, N.Y. TIMES, May 12, 1937, at 11.

In any case, Surrey agreed to the temporary assignment at Treasury, where he developed recommendations to relieve the board's backlog. "I concluded that the hearings of the Board were too centralized in Washington, with only a few scattered appearances of a Member in other cities," he recalled. "My recommendation to alter this was a regularly announced and orderly schedule of hearings throughout the country, so that lawyers outside of Washington would not have to travel there and would know when and where their cases would be heard."[57]

Surrey's calendar change proved successful. His proposals to speed tax collections at the Bureau of Internal Revenue (BIR), by contrast, went nowhere.[58] As Surrey would realize in the years ahead, the agency was often hostile to change of any sort. "Its weakness lay in the lethargy and conservativism of thought and operation, and both an unwillingness to change and a difficulty in achieving change itself," he wrote..[59]

After finishing his BTA project, Surrey remained at Treasury to work on a second short-term project led by Roger Traynor, a law professor at the University of California, Berkeley. Broadly charged with improving the administration of the tax system, Traynor enlisted Surrey's help on various projects, including one on the statute of limitations in tax cases and another that helped establish the private letter rulings policy at the BIR. These projects, in turn, led Surrey to a permanent position at the Treasury, where he joined the newly established Office of Legislative Counsel.

In his new role as undersecretary, Magill had created the Office of Legislative Counsel "to strengthen the consideration of tax policy and legislative issues in the Treasury," Surrey explained.[60] The office would provide an administrative home for the department's tax lawyers, working alongside the new Division of Tax Research, which would house the department's economists. Together, these two offices would strengthen the Treasury's hand when developing tax proposals and negotiating with Congress. As an aside, lawmakers had developed their own administrative capacity for tax analysis at the Joint Committee of Internal Revenue Taxation, established in 1926.[61]

Surrey reported that Magill's effort to reorganize and expand the Treasury's administrative capacity had resulted from dismay about earlier New Deal tax initiatives. In particular, Magill disapproved of the Treasury's tendency to rely on amateurs to develop its policy proposals, resulting in something of "a haphazard affair."[62] For instance, the undistributed profits tax (UPT) had been championed

57. SURREY MEMOIRS, *supra* note 4, at 24.

58. *Id.*

59. *See id.* at 186 (discussing the BIR's tendency to oppose change).

60. *Id.* at 143.

61. *Id.*; *see* George K. Yin, *How Codification of the Tax Statutes and the Emergence of the Staff of the Joint Committee on Taxation Helped Change the Nature of the Legislative Process*, 71 TAX L. REV. 723, 725 (2019) (discussing the origins of the JCIRT).

62. SURREY MEMOIRS, *supra* note 4, at 143.

by Oliphant, "a former professor with no tax background."[63] This characterization was broadly defensible, although the UPT had a long history predating Oliphant's embrace in his 1934 memo to Roosevelt.[64]

More surprising, however, was Magill's reported unhappiness with the Revenue Act of 1937. This law, which focused on eliminating avenues of tax avoidance and evasion, was apparently unsatisfactory to Magill because it was "participated in by a number of Washington attorneys, many without tax experience, hastily called upon to assist on various aspects of the Treasury proposals."[65]

Surrey's description of the 1937 act and its development might be fair if used to describe the measure once it moved to Capitol Hill. But the 1937 act originated in the Treasury with a study of tax avoidance conducted by Magill himself. Indeed, that study was one of Magill's first projects at the Treasury when he returned as undersecretary.[66]

Seeking to curb tax avoidance by the nation's most fortunate few, Magill and Oliphant had worked together on a pair of memos outlining tax avoidance techniques popular among the rich and famous. At Roosevelt's request, these memos identified certain taxpayers by name, largely for illustrative purposes. FDR was eager to release these names publicly, too, but he was talked out of it by Magill, among others; however, Congress would later insist on hearing the names during public testimony anyway.[67]

The 1937 anti-loophole campaign was a classic in Magill-style incrementalism. He may not have liked FDR's moral grandstanding around tax avoidance, but he certainly had no sympathy for aggressive tax avoidance, the taxpayers who engaged in it, or the members of the tax bar who enabled it.[68] If he was reluctant to call out tax avoiders by name, he was still outraged by what Roosevelt called "moral fraud": "a legal though highly immoral avoidance of the intent of the law."[69] Magill was also angry about failures of the law itself—outsize percentage

63. *Id*. at 35.

64. For a history of the UPT as enacted in 1936, as well as background on its intellectual development prior to that moment, see STEVEN A. BANK, FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT 155–86 (2010).

65. SURREY MEMOIRS, *supra* note 4, at 35.

66. *See* BLUM, *supra* note 9, at 323–37 (discussing the 1937 anti-loophole campaign and Magill's role in it); *see also* Joseph J. Thorndike, *Civilization at a Discount: The Morality of Tax Avoidance*, TAX NOTES, Apr. 2002, at 140, 141–42.

67. On the 1937 anti-loophole campaign, Magill's role in it and the debate over naming particular tax avoiders publicly, see JOHN MORTON BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF CRISIS, 1928–1938, at 323–37 (1959).

68. *See 7 Named as Using Devices to Reduce Big Income Taxes*, N.Y. TIMES, June 19, 1937, at 1, https://timesmachine.nytimes.com/timesmachine/1937/06/19/94392964.html?pageNumber=1 [https://perma.cc/2CMN-4WQX] (noting that the "Treasury Department named to Congressional investigations" seven men who took action to "avoid or reduce their income taxes."); *see also Morgenthau Hits Tax Ethics As Like Trade Code in 90s*, N.Y. TIMES, Jun. 18, 1937, at 1, https://timesmachine.nytimes.com/timesmachine/1937/06/18/94392284.html?pageNumber=1 [https://perma.cc/3XAM-SMTX] (last visited Feb. 24, 2023) (describing Magill's testimony).

69. Franklin D. Roosevelt, *Message to Congress on Tax Evasion Prevention*, AM. PRESIDENCY

depletion allowances for oil and mineral companies, for instance, or the advantageous treatment of marital income in community property states, which came at the expense of taxpayers in every state without community property laws. These problems got less attention that the sketchy avoidance techniques making headlines in 1937—scams involving artificial loss and interest deductions, for instance, or the incorporation of personal yachts as business enterprises. But to Magill, they were still serious threats to the integrity of the tax system, and they featured prominently in his original memo on tax avoidance. Both kinds of problems, moreover, made their way into Roosevelt's eventual message to Congress.[70]

It seems hard to square Magill's role in shaping FDR's 1937 tax message with Surrey's suggestion that Magill was unhappy with the law's development within the Roosevelt administration. Perhaps Roosevelt's campaign to name-and-shame left Magill scarred. Or maybe Surrey was wrong. The legislative effort to shore up the tax base seems wholly consistent with Magill's incremental approach to tax reform. It took the income tax as a starting point and tried to make it better. It prioritized progressive reform but didn't dabble in tax innovation.

Indeed, the 1937 Act marked a return to the style of tax reform that Magill had championed during his first stint at the Treasury. The course of New Deal tax reform began with incremental progress in the 1934 Revenue Act, as Congress responded to the Pecora investigation by tightening up on tax avoidance. It then shifted to more disruptive forms of tax reform during 1935 and 1936, when Oliphant led the charge for social taxation with the Wealth Tax Act and the undistributed profits tax. Finally, with Magill's return in 1937, New Deal tax reform shifted back to the incremental approach, returning to a focus on loophole closing.

Again, it would be a mistake to overdraw these distinctions. In particular, champions of the undistributed profits tax often defended it as a tool to thwart tax avoidance; by preventing companies from hoarding cash, they were forcing profits into the hands of shareholders, who would then be required to pay individual income tax on their distributed share of the profits. Without such a tax, companies could shield those profits from a second level of taxation simply by refusing to distribute them.

Still, the undistributed profits tax was more disruptive than the 1934 or 1937 laws. Indeed, the revenue laws passed in 1935 and 1936 fundamentally differed from anything that came before or after, at least in political terms; they were designed with grand goals of economic reform in mind.

PROJECT (June 1, 1937), https://www.presidency.ucsb.edu/documents/message-congress-tax-evasion-prevention [https://perma.cc/4V3X-A36K] (the message was inspired by the text of Magill's memo on tax avoidance, which carried Morgenthau's name when it was made public as part of FDR's tax message to Congress).

70. *Id.*

A. Magill Departs

In 1939, Magill returned to Columbia. In leaving, he had nothing but kind words for the New Deal, but news reports suggested he was unhappy. Apparently, Magill disliked having to defend the undistributed profits tax. The long, bitter, and ultimately futile defense of that levy had left him eager to depart the administration.[71]

Magill was also growing more conservative, Surrey noted in his memoir. Just a few months after leaving his post as undersecretary, Magill gave a speech critical of the corporate income tax, calling it complex and burdensome. In subsequent years, he extended his complaints to a wide range of fiscal issues and eventually aligned himself with GOP critics of the Roosevelt administration. During World War II, Magill opposed high rates on corporations and wealthy taxpayers, even as Roosevelt made these a centerpiece of wartime finance. Magill also endorsed a national sales taxes, which had drawn bitter opposition from both Roosevelt and Magill's former colleagues at Treasury.[72]

Magill's conservative drift grew even more apparent as the war drew to a close. In 1945, he helped write "A Tax Program for a Solvent America," the Tax Foundation's program for postwar fiscal reform, which called for a fifty percent reduction in federal taxes. In 1949, he was named president of the Tax Foundation, having served on its board since 1942, and the job gave him a platform to call regularly to cut taxes and spending. In general, Magill believed it was urgent to unwind wartime taxation. "We cannot expect to go on indefinitely applying the highest peacetime tax rates we have known to the highest national income we have ever known," he declared.[73]

Eventually, Magill even abandoned some of the base-broadening convictions that had marked his years as a Treasury official in the 1930s. While acknowledging that tax preferences were bad in theory, he suggested they might be necessary in practice. "The trouble is that, so long as high surtax rates persist, special provisions are essential to give the tax law reasonably fair application," he wrote in 1960.[74]

The Roswell Magill of 1960 would have been almost unrecognizable from the Roswell Magill of 1934.

71. Frank R. Kent, *The Great Game of Politics: Another Undersecretary Goes By*, *WALL STREET J.*, Dec. 26, 1939, at 4.

72. *See generally* Joseph Thorndike, *Profiles in Tax History: Roswell Magill*, TAX NOTES, Feb. 2008, at 657, https://www.taxnotes.com/tax-notes-federal/personnel-people-biographies/profiles-tax-history-roswell-magill/2008/02/04/qbrc?highlight=thorndike%20roswell%20magill [https://perma.cc/GX2K-M4D4] (discussing Magill's post-Treasury career).

73. *Id.* at 660.

74. Roswell Magill, *High Taxes and Growth*, *WALL STREET J.*, July 5, 1960.

B. Randolph Paul Arrives

Magill's replacement as undersecretary of the Treasury was John Hanes, whom Surrey described as "distinctly conservative."[75] Hanes was himself succeeded in short order by John Bell and a new assistant secretary, John Sullivan, who assumed responsibility for tax policy. None of these officials made much of an impact on tax policy formulation—or Surrey, judging by his memoirs. The important personnel change would not come until late 1941 when Morgenthau hired Randolph E. Paul as his special assistant for tax policy. Paul became Treasury General Counsel in August 1942 and assumed formal supervision of the department's tax policy process.[76]

Paul would become the second of Surrey's key mentors at Treasury. Like Magill, Paul's approach to tax policy was incrementalist. His commitment to progressive tax reform was more profound than Magill's, to be sure, and he never lost sight of broad goals: revenue adequacy, fairness, and economic efficiency. But Paul's idealism was tempered by a pragmatism rooted in his private practice as a tax lawyer.

Paul's experience in practice didn't make him a soft touch for lawyers seeking favors on behalf of their clients. Far from it. "He was impatient with those tax practitioners who constantly sought devices to reduce the taxes of their wealthy clients."[77] But he was sensitive to genuine inequities in the law. As a result, Paul would fight efforts to slip unreasonable preferences into pending legislation while also adding relief provisions to that same bill when he considered them necessary and equitable. For Paul, the essence of good policy lay in details, not in abstractions.

Surrey summarized this balanced approach nicely. "Paul had his ambitions, which were concentrated on producing a major revenue act in 1942 that would cover a wide variety of corrective structural measures."[78] Paul sought to accomplish many things in this bill, "both affording relief from certain tax hardships or other situations where the tax system operated unfairly and also closing loopholes."[79]

Paul's approach to tax policy, in other words, was something of a blend, combining qualities from both his predecessors in the Treasury. He brought to his role as a tax policymaker a sizable dose of progressive idealism, much like Oliphant. But he leavened his ideals with a practitioner's turn of mind and methodical approach to the law and its reform—one that made room for the law

75. SURREY MEMOIRS, supra note 4, at 152–53.

76. SURREY MEMOIRS, *supra* note 4, at 187; Joseph Thorndike, *Profiles in Tax History: Randolph E. Paul*, TAX NOTES, Oct. 2004, at 529, 529, https://www.taxnotes.com/tax-notes-federal/tax-history/historical-perspective-profiles-tax-history-randolph-e-paul/2004/10/25/prqy?highlight=thorndike%20randolph%20paul [https://perma.cc/AFV5-63NC].

77. SURREY MEMOIRS, *supra* note 4, at 50.

78. *Id.* at 164.

79. *Id.* at 51.

as it operated in the real world, not just as it might be made to operate in the service of abstract goals.

Paul, in other words, was something of a realist.

Surrey's appreciation for this blended approach is evident throughout the memoirs. It also seems consistent with Surrey's later career, which was marked by a willingness to sacrifice theoretical purity, and often simplicity, for the sake of equity, clarity, and sometimes even expediency.

Richard Musgrave, in eulogizing Surrey, called him "ever the pragmatist," noting his willingness to deviate from theoretical ideals when time and circumstance demanded.[80] More importantly, Surrey absorbed Paul's understanding that tax reform was a game of messy details as well as high ideals. As Musgrave said: "Economists working with him learned to understand that tax measures must be formulated not only as general propositions, but also as provisions that allow for the vagaries of institutional structures and the technical problems that arise in the process of implementation."[81]

C. Surrey at War

During his time in the Office of Legislative Counsel, Surrey worked on a wide range of issues, many of them quite technical. But other issues were quite sweeping in the changes they wrought on the American state and society. World War II triggered a regime change in American fiscal history, as policymakers transformed the income tax from a relatively narrow levy on the rich to a broad-based tax paid by almost every working American.[82]

In crafting this new tax regime, policymakers did not start from scratch: they expanded an existing revenue tool to accomplish a larger task. This expansion was not a trivial task, of course. Among other things, it involved a wholesale reconstruction of the collection apparatus for the individual income tax, including a system of payroll withholding that the IRS was deeply resistant to adopting.[83]

The Treasury, however, did not need to invent the wartime income tax out of whole cloth. Much of the legwork had been done over the previous decade, first as part of the Viner Studies in 1934 and later in another round of Tax Revision Studies completed by the Treasury in 1937.[84] This intellectual spadework, conducted by the department's incrementalists under the direction of Magill, provided the blueprint for wartime tax reforms under the direction of Paul.

Surrey helped implement these changes throughout the war while fending off a new generation of tax innovations that the Treasury continued to resist, like a national sales tax. The Treasury tax staff under Paul, featuring Stanley Surrey as its Tax Legislative Counsel, remained convinced that individual and corporate income taxes were the most appropriate foundation for federal finance, even

80. Musgrave, *supra* note 28, at 335.

81. *Id.* at 337.

82. *See* THORNDIKE, *supra* note 34, at ch. 9 (describing this transformation).

83. *Id.*

84. *Id.* at ch. 8.

during wartime. Theirs was a program of incremental change that worked transformative changes over time.

V

CONCLUSION

During his years in the Office of Legislative Counsel, Surrey worked on a wide range of policy issues, from an excess profits tax to the treatment of marital income in community property states to payroll withholding for the individual income tax. The details of this work gave Surrey a broad exposure to key issues in the working of the federal tax system. Almost certainly, however, anything Surrey learned about specific tax issues pales in comparison to the lessons he distilled about the tax policy process.

Three lessons, in particular, stand out in his memoirs.

First, Surrey learned to respect the contributions of economists. "I gained from this experience a high respect for the contributions an able tax economist could make and also some background for judging which economists could lead a lawyer down some intellectually dazzling but impractical path," he wrote later.[85]

The economists also reinforced Surrey's commitment to ideals of horizontal equity. "Most of the Treasury economists of this period had liberal leaning fiscal views, a strong preference for a progressive income tax, and a strong regard for 'tax equity,' for treating people with equal incomes equally in the tax laws." Surrey seems to have taken this lesson to heart, with real implications for his career, including his focus on tax expenditures. "This stress on tax equity led naturally to a distaste for tax preferences and 'loopholes,'" he wrote.[86]

Second, Surrey learned much about the private sector and the tax bar. Writing of tax lawyers lobbying for legislation, he noted:

> "One learned to sort them out—who was really knowledgeable; who could be trusted to be both objective in a presentation of the facts and discussion and yet be candid about pushing for a conclusion helpful to the interests being represented; who could perceive the Government's doubts and problems and, respecting them, seek to resolve them; and who were of the opposite type and relied instead on wielding levers of power and influence."[87]

Surrey clearly spent a lot of time talking with practitioners, and his memoirs betray a certain sympathy for them, at least when they were playing fair. But he also came to appreciate just how much these lawyers were coming to influence the creation of tax law, especially as relations between Congress and the Roosevelt administration continued to deteriorate. Increasingly, the Treasury found itself isolated in its efforts to protect the fisc, battling not just lobbyists and their clients but the lawmakers who listened to them.[88] "The Treasury became only one of the forces contending for Congressional decisions, with the other

85. SURREY MEMOIRS, *supra* note 4, at 44.

86. *Id.*

87. *Id.* at 67.

88. *Id.* at 78.

forces being the tax bar representing their clients and trade associations acting for their members."[89]

It was an increasingly lonely battle for the Treasury, but a vital one. As Surrey noted, "conscientious work in the Treasury pushes a person very hard in the direction of tax equity, for one quickly perceives the responsibility that rests upon the Treasury to safeguard the fairness of the tax system."[90]

The third and perhaps most enduring lesson concerned the perils of social taxation. "In this period the tax law was slowly but increasingly being used to meet social problems that were not tax oriented but instead lay outside a proper technical structure for an income tax," Surrey wrote.[91] Some departures from the ideal structure of the tax law were endorsed by Treasury, Surrey conceded, others were sought by the tax bar and granted by lawmakers. But almost all were unwise. "What we did not realize was that gradually there was being developed two strands of statutory tax law," he wrote. "One strand represented the constant shaping of a proper technical structure necessary to an income tax based on an accepted definition of 'income.' The second strand involved using the income tax either to achieve desirable social goals or to provide incentives for activities that the Treasury or Congress decided should obtain government financial assistance through tax reduction." [92]

The tax system could not easily serve two masters. The social use of taxation would necessarily compromise the more fundamental use of taxation to raise revenue and straightforwardly pay for governance. The social use of taxation became corrosive, Surrey suggested, especially as it grew larger. "Today we find it responsible for the numerous and costly 'tax expenditures' present in the tax system," he wrote. "But in that period and later the difference between the two strands and the problem thereby created were not perceived by the Treasury."[93]

Apparently, Surrey's third lesson about social taxation took some time to sink in. But it would prove central to his later career, even foundational to his intellectual legacy. In their introduction to Surrey's memoirs, Zelenak and Mehrotra suggest that "the two ideas most closely associated with Surrey the tax theorist are the overriding importance of horizontal equity in the imposition of tax burdens, and the concept of tax expenditures as hidden subsidies embedded in the income tax."[94]

Both of these ideas clearly had roots in Surrey's experience as a young Treasury lawyer. Few careers spring from a single source. But Surrey had the

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89. *Id.*

90. *Id.* at 44. *See also* Thorndike & Mehrotra, *supra* note 6, at 233–37 (discussing the role of the Treasury on defending the integrity of the tax system—and the bar's increasing unwillingness to assume a similar responsibility).

91. SURREY MEMOIRS, *supra* note 4, at 201.

92. *Id. at 202.*

93. *Id.*

94. *Id.* at xxxv.

great fortune to stumble upon a wellspring of sophisticated, professional, and interdisciplinary tax expertise at the very start of his professional journey.

Yet it was not the expertise of disruptive reformers like Oliphant, who sought to reconstruct the American state and society with new and innovative fiscal tools, that gave Surrey the grounding he needed for his later career. Rather, it was the expertise of incrementalists like Magill and Paul—tax professionals who understood that existing revenue tools, when adapted and expanded for new realities, could be just as transformative as new ones.