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Edwin R.A. Seligman and the Beginnings of the U.S. Income Tax

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* The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.

-- John Maynard Keynes

**I. Introduction**

Over a century ago, a group of political economists led the campaign for a fundamental transformation in the American system of public finance. Responding to the social and political conditions of their times, those professional economists helped build a new fiscal state -- one that was concerned not only about raising revenue, but also about the equitable distribution of fiscal obligations. By replacing the 19th century national structure of regressive indirect taxes with direct and graduated taxes on income and other forms of wealth, the emerging fiscal polity helped shift the burden of financing a modern, industrial democracy onto those segments of early 20th century American society that had the greatest taxpaying ability, namely wealthy citizens in the North and Northeast. That move -- that transformation toward a more transparent and fairer system of taxation -- was a qualified achievement. Although it did not go as far as some progressive reformers had envisioned, the new fiscal polity laid the foundation for, and held out the promise of, a new, more progressive American tax regime.

Among the forces that helped forge the modern American fiscal state, none was perhaps more important than the intellectual movement supporting the direct and graduated taxation of income. For that transformation in American public finance was guided by a paradigm shift in the legal and economic theories that undergirded tax policy. By leading the theoretical movement for a permanent, progressive income tax, those theorists became the architects or visionaries of the modern American fiscal state.

One of the chief visionaries of the new fiscal order was Edwin R.A. Seligman, a professor of political economy at Columbia University and the son of one of New York's most affluent banking families. This article explores how Seligman and his like-minded colleagues were able to apply their social and political theories to the development of American tax laws and policies. More precisely, this article contends that this particular group of academics played a pivotal role in supplanting the "benefits theory" of taxation, and its concomitant vision of the state as a passive protector of private property, with a more equitable principle of taxation based on one's "faculty" or "ability to pay" -- a principle that promoted an active role for the positive state in the distribution of fiscal burdens.

Of course, Seligman and other Progressive Era economists like Richard T. Ely and Henry Carter Adams did not invent the faculty theory. Neither the benefits principle nor the faculty theory was created or destroyed in the early 20th century.1 Rather, American public finance theorists, building on the works of other thinkers, attempted to delineate those rationales in an effort to question what they believed to be the antiquated social theory supporting the benefits principle.

At the same time, it was not disembodied ideas that fostered this fundamental change in American taxation. Instead, those ideas were supported by pivotal figures and groups who emerged from a particular social background and institutional context that compelled them to seek progressive reform. Using Seligman as a prism for understanding the spirit of the times, this article explores Seligman's personal background, his ideas, and his influence on the development of American tax laws and policies.

Although much has changed since the progressive economists mounted their campaign, some alarming similarities seem to have reemerged. The turn of the 21st century has brought with it a new era of rising inequality; a new era that has placed into bold relief what some commentators see as the possibility of a New Gilded Age in the United States, complete with a new generation of robber barons, a renewed visibility of material opulence and excess, and a new set of political and corporate scandals.2

Amid those circumstances, a story about the intellectual foundations of the American income tax may provide some important, if humbling, lessons for our own time. Given the recent rise of inequality and the current rhetorical calls for tax reform, a tale chronicling the historical ideas and material conditions that gave birth to the current American income tax system should be seen as a modest reminder of the aims and circumstances that animated the theoretical support for a new system of taxation -- a reminder, that is, of the historical and institutional limits that constrain current policymakers.

Similarly, an intellectual history of the American income tax holds some sobering lessons both for those scholars who mistakenly assume, however implicitly, that the progressive income tax was originally meant to redistribute wealth and income in a dramatic way,3 and for those tax scholars who have recently suggested a return to benefits theory as a way to bolster our current tax system.4 This article thus attempts to tell the story of how one socially engaged and reform-minded academic helped lead a charge for a historic change in the American system of taxation -- a change that continues to resonate today.

**A. From Benefits to Faculty**

The paradigm shift in economic and legal theory guided by Seligman and his colleagues was not simply a rhetorical move. Rather, it was an attempt to foment a kind of scientific revolution in thinking about how the burdens and obligations of citizenship ought to be allocated. Triggered by this community of rising economic specialists, this tectonic shift, like most paradigm shifts, was not simply a new scientific discovery, nor an apolitical, wholly objective revision in describing modern social relations. Instead, it was "a special sort of change involving a certain sort of reconstruction of group commitments."5

The Progressive Era economists who brought the faculty theory to the fore were part of a new community of economic thinkers -- coming forward alongside the rise of the American research university -- seeking to change the constellation of beliefs, commitments, and values within their own emerging academic discipline. In the process, they were hoping to underwrite changes in tax policy that would help reallocate the fiscal burdens associated with modern, industrial capitalism.

For Seligman, the benefits principle and the ability to pay were contending principles with radically different underlying social and political theories. The benefits doctrine stood for the antiquated proposition that taxation was justified as a price paid for the goods and services provided by government in exchange for tax payments. Citizens, in essence, traded tax payments solely for the benefits they received from the state.

By contrast, the notion of faculty or ability to pay required that each citizen contribute to the common welfare of the state based on his taxpaying capacity. Although accurately measuring a citizen's capacity to pay taxes was a controversial issue that remained elusive -- then and now6 -- Seligman and the other progressive economists resolutely believed that their primary, pragmatic goal in advancing the income tax agenda was to demonstrate the social and political limitations inherent in the benefits principle.

That is not to say that they thought the benefits principle had no place in discussions about tax policy. Their goal was to make more explicit the implicit politics that underpinned the dueling tax notions, and in the process they sought to build social and political support for their ideas. Like other progressive reformers, the public finance economists thus used the language of ethical duties and the idiom of social solidarity "less to clarify a political philosophy than to build a political constituency."7

In facilitating that theoretical shift in tax policy, those thinkers were responding to a number of social and intellectual forces. The growing concentration of wealth and corporate power, the cycle of economic crisis, and the resulting tension between social movements for reform and the conservative reactions they elicited, all exerted pressure on the development of academic ideas during the Gilded Age and Progressive Era. Likewise, the increasing prevalence of intangible wealth in the form of stocks and bonds and the institutionalization of relatively new economic ideas about measuring value as a function of an individual's marginal utility combined with material forces to provide reform-minded economists with rationales for promoting a progressive income tax. Led by Seligman, those economists were at the forefront of the battle not only to dismantle the orthodox theories of laissez faire, but also to promote the adoption of new, more effective, and equitable forms of taxation.8

**B. The American 'New School' of Political Economy**

Seligman and the other economists who led the campaign for an income tax at the turn of the 20th century were part of a larger cohort of academic social scientists. While that first generation of professionally trained academics did not agree on many issues, many of them were seeking to dismantle the orthodox theories of laissez faire that dominated classical and neoclassical visions of law and political economy. Reacting to the forces of modernity that had eroded notions of self-reliant individualism, that rising class of professionals sought to demonstrate, through their writings and teachings, the mutual interdependence of modern social relations.

With the establishment of the American Economic Association (AEA) in 1895, the economists were among the first group of social scientists to sever their ties to the general antebellum field of moral philosophy and place their discipline on a new, professional standing. And like the other professional social scientists of their generation, those young economists believed their economic expertise could place their ideas and policies above the fray of everyday politics. Although their vision of "science" often varied from the views of other academics, the new generation of economists implicitly claimed that their "objective," apolitical knowledge legitimated their pronouncements.9

From the beginning, the young generation of economists who founded the AEA sought to use their training to address the social concerns of the day. Calling themselves the "new school" of American political economy, many of those maverick intellectuals challenged the reigning system of economic thought.10 Eschewing timeless universalisms, those academics resolutely believed that economic relations were embedded in a larger social and institutional matrix -- a matrix that was often constituted by law and legal processes.

They had much in common, from their upbringing and responses to the harsh material realities of their times to their professional training. Although seeds of that institutionalist strand of American economic thought would not fully blossom until the 1920s and early '30s alongside American legal realism, many of the leading "new school" economists were eager to use the law to exercise the "ethical agency" of state power.11 Many of those ethical or proto-institutionalist economists were indeed part of what legal historians have identified as the "First Great Law and Economics Movement."12

Among that first generation of professionally trained economists were several who were interested in public finance. Occupying influential teaching posts throughout the country, academics such as Adams, Ely, and Seligman dedicated much of their careers to the empirical and theoretical study of taxation. While Adams and Ely began their careers writing about public finance issues, they both moved on to other pursuits. By contrast, Seligman devoted his entire career to the study of public finance. In becoming the leading tax expert of his times, Seligman's work spanned "the entire arc of tax reform theory."13

**II. Seligman: The Dean of American Taxation**

At first, it may appear ironic that the leading American intellectual on taxation at the turn of the 20th century would come from one of the most affluent families in New York City. Why would the scion of a prominent banking family -- one that built a financial empire catering to wealthy individuals and emerging corporations -- be interested in issues of public finance? Part of the answer rests with the early influence Seligman's family had on the young man's development. But Seligman's decision to become a scholar also rests with his individual intellectual passion, his desire to forsake wealth for wisdom. At a relatively early age, Seligman turned his back on family expectations and pursued his own interests in the life of the mind. Nonetheless, his family's focus on education and civic responsibility remained with Seligman throughout his life.

**A. The Early Years**

Edwin Robert Anderson Seligman was born in New York City in 1861 into a prominent German-Jewish family. Since young Edwin arrived soon after the start of the Civil War, his parents demonstrated their patriotism by bestowing their youngest of nine children with a middle name honoring the defender of Fort Sumter. Seligman's father Joseph, who immigrated to the U.S. from Bavaria in 1837, was a self-made businessman and financier who along with his brothers founded the house of J. & W. Seligman, a merchant banking firm that would one day rival the likes of J.P. Morgan.

The first generation of Seligmans combined their business interests with a sense of civic responsibility. During the Civil War, the Seligmans, who were staunch opponents of slavery, entered into supply contracts with the Union Army and used their European contacts to help underwrite the U.S. Treasury's war debts. Although Joseph Seligman would turn down the opportunity in 1873 to become President Grant's secretary of the Treasury, he played a prominent role in government finance and railroad development throughout the late 19th century -- something that would not escape the notice of the Seligman children, especially Edwin.14

The Seligman family was active in New York City's social and political circles, and young "Ed" (as he was called by his close friends and family) no doubt learned the importance of civic participation through the many activities in which his family was engaged. The elder Seligman, a Republican who advised government officials of both parties, served on the New York Board of Education, the Manhattan Railway Company, and several municipal reform committees.

The Seligmans were also active in New York's Jewish community and the city's general civic life. As a leading member of Temple Emanu-El, Joseph Seligman helped organize, and headed, the German Hebrew Orphan Asylum. He also became an organizer and major supporter of Felix Adler's Society for Ethical Culture, generously providing financial assistance and becoming president of the society in 1877. With Adler's leadership, the society pioneered progressive reforms in the area of education, housing, and healthcare. Adler was a frequent visitor to the Seligman home, and he and his ethical society had an important influence on Edwin, who would one day also become president of the society.15 Also, the Seligman family played a vital role in helping secure an academic chair in Political and Social Ethics for Adler at Columbia University.16

Edwin Seligman, like many of the other political economists of his generation, came from a religious family background. Just as evangelical Protestantism molded Adams, Ely, and other young members of the new school of political economy, Seligman is often described as coming from a tradition of "Jewish liberal humanism" or a "moral orientation of reformed Judaism" that, some scholars have suggested, explains his desire to use state powers to address social ills.17

Yet it is equally likely that Edwin Seligman at an early age turned his back on the Jewish faith just as he did the family business. As a teenager, Seligman witnessed first-hand the discrimination of American anti-Semitism when in the spring of 1877, his family was denied entry to the Grand Union Hotel in Saratoga, N.Y., because of their faith. As his father was by then a well-known banker and philanthropist, the indignity of the event rocked Jewish circles and may have caused Edwin to think more carefully about assimilating into mainstream American culture. Indeed, Edwin's son, Eustace, decades later reflected that his father had relatively early in his life "broken with Judaism psychologically, intellectually and every other way."18

While it is unclear what role his religious faith may have played in the development of Seligman's early thinking, there is little doubt that his father's work ethic and emphasis on education were transmitted to his children. Like his brothers and sisters, Edwin was from a very early age educated at home, tutored by Horatio Alger Jr., who corresponded with Seligman throughout his life. With a steady dose of instruction in foreign languages, politics, and history, Edwin worked diligently and excelled at his studies from an early age. Through his family's continuous travels abroad, he became particularly proficient in several languages, including German, French, Italian, Spanish, and Russian. At the age of 11, he began his formal education by attending the Columbia Grammar School in the Upper West Side of Manhattan.19

**B. From New York to Berlin and Back**

After attending Columbia Grammar School, Seligman matriculated at the tender age of 14 at Columbia College in 1875. During the 1870s, Columbia was fast developing a strong reputation in the emerging social sciences. Building on the scholarship and institution-building efforts of the German émigré Francis Lieber, the social science faculty focused on the importance of using history and law to understand social institutions. During his undergraduate years at Columbia, Seligman came under the influence of John W. Burgess and the young Richmond Mayo-Smith, two American political economists trained in Germany. From them, Seligman developed a greater interest in politics, history, and law.20

Singled out by his teachers as a promising young scholar, Seligman took their advice and headed off to Europe after his undergraduate education to attend classes in Berlin, Heidelberg, and Paris. Spending most of his time in Germany, Seligman, like the other members of the "new school," became a great admirer of scholars of the German Historical School of Economics. He not only attended classes with Karl Knies, Gustav Schmoller, and Adolph Wagner, he also corresponded with his teachers long after his days as a student. Like many of his peers, Seligman's training in Germany would have a profound effect on his teaching and scholarship -- not only because those German scholars focused on public finance, or what they referred to as the "science of finance," but because they examined economic policies from a historical perspective.21

Seligman returned to the United States in 1882 invigorated from his European travels. He notified his family that academia, not finance, would be his calling, although he did not seem to realize that finance in its more public and civic form would remain an important part of his career. Having imbibed the historical and cooperative theories of the European academy -- especially the German Historical School's emphasis on economic history and public finance - - Seligman returned to Morningside Heights in 1882 to enroll in Columbia's law school and the newly created School of Political Science.22

While Seligman described his decision to earn a law degree as "giving him another feather in his cap," he was also attracted to law because of Burgess, his college mentor. Burgess himself was trained in law, having studied briefly with Lieber at Columbia before departing for Germany to study history and politics, and he conveyed to Seligman the importance of studying law and legal processes. Among Seligman's peers in law school was Charles Evans Hughes, the future New York governor and Supreme Court justice. Seligman and Hughes remained good friends throughout their lives, even when their differing views on the constitutionality of a federal income tax brought them to loggerheads.

Seligman earned his law degree in 1884 and his doctorate the following year, when he completed a dissertation on the medieval guilds of England.23 With his personal links to Columbia and his New York City-based family connections, Seligman had little trouble securing employment after graduation. Having been groomed during his graduate years as a future colleague by Burgess and Mayo- Smith, Seligman won a prize lectureship at Columbia in 1885, immediately after he received his doctorate. Within three years, he was appointed adjunct professor and by 1891 had been promoted to full professor of political economy and finance. Seligman would remain at Columbia for more than four decades, becoming the first McVickar professor of political economy in 1904, chairing the department of economics for many years, and finally retiring in 1931.24

**C. Teacher, Scholar, and Institution Builder**

For Seligman, and many scholars of his generation, one of the main purposes of becoming a social scientist was to use knowledge for the benefit of society. Like many of his colleagues, Seligman wanted to identify and facilitate "those combined qualities which tend to ameliorate the condition of man." In that way, academics such as Adams, Ely, and Seligman struggled with what the historian Leon Fink has identified as the long-standing dilemma of progressive intellectuals: "how to bridge the world of educated opinion and that of the working masses." For Seligman's generation, the solution to that dilemma lay in applying their scientific expertise to the compelling issues of the day, both as educators and public guides.25

Throughout his career, Seligman demonstrated his democratic commitments through his teaching and scholarship. He developed, over the years, an extensive cadre of loyal students whom he supported intellectually and often financially. In his teaching, Seligman attempted to convey the importance of empathy and history to the study of economy and society. One of the main aims of his economic history course, as he frequently mentioned, was to provide students interested in economics and business with a much-needed humanistic perspective. "Economic science differs very decidedly from exact science," Seligman would often lecture his students. "We are dealing here with man and society." Illustrating how he had learned about the importance of empathy from his historical training, Seligman often concluded his lectures with the wish, "If we can learn from this course sympathy and appreciation and tolerance then my object will be complete."26

The scope and depth of Seligman's scholarship illustrated his desires to try to bridge the gap between academia and the larger society. Although he would become best known for his writings on taxation -- which, as we shall see, were driven by his desire to make contemporary policies historically specific -- Seligman's interests in law, history, and political economy reached well beyond public finance. He wrote hundreds of articles, book reviews, and popular essays; he participated in countless conferences, pursuing scholarly interests in such vast and various topics as railroad regulation, monetary reform, the living wage, labor strikes, and most especially economic history. Toward the end of his life he also guided an important study, financed by General Motors, regarding consumer credit. As an insatiable bibliophile, he compiled a personal library of monographs, pamphlets, and historical documents that exceeded 40,000 volumes. Even in retirement, Seligman's commitment to scholarship continued unabated, as he took on the role of editor-in- chief of the first edition of the *Encyclopedia of the Social Sciences*.27

Seligman was also an institution builder. He worked with Ely, Adams, and others in creating the AEA, and served as its first treasurer and as its president in 1902-1903. He also helped create the National Tax Association, becoming its president in 1913. Also, Seligman's commitment to melding theories with practice crossed over to his participation in civic institution building. He was an active member of the Social Reform Club of New York, the University Settlement, the Educational Alliance, Jane Addams's Greenwich House, and of course Adler's Society for Ethical Culture.28

Yet, his deepest institutional commitment was to his alma mater and the academy as a whole. His service to Columbia University, especially his editorship for many years of the *Political Science Quarterly* and Columbia's book series on political economy, helped establish the fledgling school of political science and the department of economics as leaders in their fields. As part of those duties, Seligman became the de facto translator of continental texts on public finance early in his career. He would later recount to Wesley C. Mitchell, one of his Columbia colleagues, that this "mere accident of departmental organization" would lead to his lifelong commitment to the study of taxation.29 Together with Mayo-Smith, he also developed and cultivated the graduate seminars that would become a hallmark of Columbia's doctoral program.

Though he was offered positions by other institutions, including Harvard, Seligman preferred to remain at Columbia and close to his extended family in New York City. In 1888 Seligman married Caroline Beer, the daughter of a wealthy New York tobacco trading family, and together they had three daughters and a son. The tragic deaths of two of his daughters may have influenced Seligman's decision to stay at Columbia, close to his boyhood home and extended family.

Beyond Columbia, Seligman was a staunch proponent of academic freedom. He helped establish the American Association of University Professors by assisting in the writing of its charter, and by supervising several controversial academic freedom disputes.30 In all, Seligman was remembered at his death in 1939 by his colleagues, students, and admirers as a path-breaking economist, a dedicated teacher, and a "public servant par excellence."31

**III. Common Experiences**

What united Seligman and many of the other ethical or proto- institutionalist economists were their personal backgrounds and the experiences of coming of age during the turbulent decades of the late 19th century. If his family background inclined Seligman toward social change, his observations of the harsh material realities of American life appeared to fortify his reformist tendencies. Not only did the late 19th century forces of rapid industrialization and urbanization heighten the disparity of wealth, the uneven development of modern American capitalism also fueled class conflict and labor unrest during that period.

The interchange of radical labor protests and conservative reactions fueled the tensions of the day. Tremendous industrial strikes, occasioned by periodic economic downturns, provoked antiradical and antilabor campaigns that heightened the anxiety surrounding the question of the role of an autonomous labor movement in an industrialized democracy. In 1886 alone there were approximately 1,500 strikes; none better known than the one that led to the Haymarket riot and the subsequent backlash against the labor movement.32 The public salience of the "labor question" was not lost on Seligman and the other aspiring academics. Although Seligman was the scion of a prestigious banking family, he was empathetic to the needs of trade unionism, as his early scholarship on the cooperative movement and Christian socialists suggested.33

**A. The German Influence**

What united the young progressive economists, above all else, was their economic training in Germany. As the historian Dan Rodgers and others have shown, a host of American academics made a sojourn to Germany in the late 19th century to complete and often complement their graduate school training. Seligman, who had family ties in Germany, studied in Heidelberg and Berlin, under the tutelage of Wagner, Schmoller, and other members of the German Historical School. Although modern scholars have disagreed about the coherence of the German Historical School, most agree that those continental thinkers pioneered the historical study of economic and political institutions.34

Those German scholars used the term "historical" in its broadest sense to highlight not only the significance of the past, but to renounce generalizing theories in favor of a fidelity to the particularity of actual events.35 Similarly, they used the term "institution" to refer to a broad category of norms and other socially created constraints on human behavior. From that vantage point, scholars such as Schmoller critiqued the tenets of classical and neoclassical economic theory, and took a normative position on the role of the state in guiding the economy and society. In contrast to the laissez faire commitment of classical theory, the German historical economists argued that the increasing complexity and interdependence of modern society required a changing and more active role for the positive state.36

The intellectual connection to Germany that the progressive economists shared was more than just a mere coincidence. Unlike some of their more conservative colleagues who also studied in Germany,37 Seligman and many of the reform-minded academics were deeply influenced by their German training. The more radical American students, in fact, became great admirers of the scholars who made up the German Historical School of Economics.

In one of his first published essays, Seligman claimed that his German mentors were the first thinkers to place economic ideas on a "truly scientific basis" by proclaiming "the necessity of treating economics from the historical stand-point." It was those German thinkers, and now their American counterparts in the new school, Seligman contended, who discarded "the exclusive use of deductive method" and called for the "necessity of historical and statistical treatment." It was they who denied "the existence of immutable natural laws in economics, calling attention to the interdependence of theories and institutions, and showing that different epochs or countries require different systems."38

It was the German historical school, Seligman continued, that abandoned any "belief in the beneficence of the absolute laissez- faire system" and maintained "the closer interrelation of law, ethics, and economics," while refusing to accept "the assumption of self-interest as the sole regulator of economic action." Finally, and most importantly for Seligman, the new school shared with its German counterpart the need to address contemporary problems. Once it was free from the reigning orthodoxy of laissez faire, "the new school, devoid of all prepossessions, devoted itself to the task of grappling with the problems which the age had brought with it." Those were the main principles, Seligman argued, that their German mentors had bequeathed to the new school of American political economy.39

The American new school was not, however, a simple imitation of German historical economics. Suggesting that it was would belie the true lessons of historicism. Both "schools of thought" were rather a function of historically specific social and economic conditions. Thus, the message of the German historical school was a manifestation of an industrial era, and similarly, "the new school," Seligman explained, "is the product of the age, of the *zeitgeist*, not of any particular country; for the underlying evolutionary thoughts of a generation sweep resistlessly throughout all countries whose social conditions are ripe for change."

Even English economists -- those most ardent supporters of timeless economic and legal doctrines -- Seligman argued, could not resist the force of the spirit of the times. John Stuart Mill "himself had gone through an evolution and was sincere enough to express his disbelief in the old economy, and to a certain extent in his own work." That commitment to the relative and relational aspects of economic and legal doctrines -- a commitment that Seligman acquired mainly during his German education -- would be an essential part of his overall fiscal vision.40

**B. The New Political Economy and Tax Policy**

In using their historicist approach to mold the legacy of Anglo- American thinking about taxation, those American economists were operating on relatively new ground. During most of the 19th century, there was little scholarly discussion in the United States about the general economic principles of taxation beyond the political controversy surrounding the tariff. The taxing powers of state and local governments in the United States were, of course, necessary in promoting a "well-regulated" society, and state and local sales and property taxes were topics of discussion among some social commentators.41

Yet few contemporary scholars considered the political and economic power that lay behind the federal government's ability to levy taxes. As late as 1880, Francis A. Walker, a professor of political economy at Johns Hopkins, could confidently claim: "The body of English literature in finance is shabby in the extreme." The main explanation for the "feebleness and emptiness of the English literature in this department," Walker explained, was the lack of serious scholarly attention given to taxation. "Most of our political economists have not dealt with the subject at all, or have done so very perfunctorily."42

Seligman and the other reform-minded economists set out to change all that. They did so by applying the historicism of the new political economy to public finance issues such as the tariff, public debts, and of course the income tax. To be sure, the tariff had been a persistent issue throughout American history, but by the 1880s, professional economists like Adams began applying a historicist perspective to the critiques of protectionism.43

Tariff reform, however, was only one of the areas of fiscal policymaking that attracted the attention of the progressive economists. In fact, redirecting tariff policy was just one step in their agenda for an income tax. The more important task was to apply a form of historicist political economy to the underlying principles of taxation. In criticizing the benefits theory, new school economists, led by Seligman, singled out the anachronistic political implications of this principle.

In fact, Seligman, in no uncertain terms, condemned the social theory that buttressed the benefits principle. He argued that the benefits doctrine was based, at bottom, on an outmoded conception of modern citizenship.

* It is now generally agreed that we pay taxes not because the state protects us, or because we get any benefits from the state, but simply because the state is a part of us. The duty of supporting and protecting it is born with us. In a civilized society the state is as necessary to the individual as the air he breathes; unless he reverts to stateless savagery and anarchy he cannot live beyond its confines. His every action is conditioned by the fact of its existence. He does not choose the state, but is born into it; it is interwoven with the very fibers of his being; nay, in the last resort, he gives to it his very life. To say that he supports the state only because it benefits him is a narrow and selfish doctrine. We pay taxes not because we get benefits from the state, but because it is as much our duty to support the state as to support ourselves or our family; because, in short, the state is an integral part of us.44

Progressive economists also disapproved of the benefits doctrine because it was framed in an idiom of market relations. With their emphasis on the importance of ethical duty and social bonds, those theorists loathed how the benefits doctrine commodified the relationship between citizens and the state. Taxes are "one-sided transfers of goods or services, and are not mutual," Ely emphasized. "The citizen pays because he is a citizen, and it is his duty as a citizen to do so. It is one of the consequences which flow from the fact that he is a member of organized society. . . . Only an anarchist can take any other view."45 If citizens were part of a greater whole, taxation based on a notion of exchange or barter seemed wholly out of place. In sum, the progressive economists saw the benefits doctrine as misrepresenting the social obligations of citizenship.

When it came to applying the benefits theory to the structure of a tax system -- to the issue of whether the wealthy should pay more than the poor -- the progressive economists argued that the benefits principle was intrinsically incoherent. The "give-and-take theory," as Seligman called it, left the issue of degrees of taxation "inconclusive." In his 1894 treatise on progressive taxation, Seligman illustrated how advocates of the benefits principle could use this theory to defend both a progressive tax as well as a regressive one. Because "most of the public expenses are incurred to protect the rich against the poor," Seligman coyly noted, the benefits theory would dictate that "the rich ought to contribute not only actually, but relatively more."46 If the justification for taxation, under the benefits doctrine, was protection of private property, those with more property had more to protect and hence ought to have a larger tax burden.

Yet at the same time, proponents of the benefits theory could also demonstrate that "the very reverse is true." Since "the millionaire who is able to hire his own watchmen, his own detectives, his own military guard, and who often relies more on his individual efforts than on the government for the protection of his property causes the state less expense than the man of smaller means who must depend entirely on the government," wrote Seligman. Taxes based on benefits could mean that "the poor man should then pay relatively more than the rich man."47 Even variants of the benefits doctrine that viewed taxes in terms of "the cost of government services," and not "the value of protection granted to individuals," were for Seligman "untenable." The benefits doctrine, however it was defined, was "indefensible" because, as Seligman succinctly put it, "It is absolutely impossible to apportion to any individual his exact particular share in the benefits of governmental activity. The advantages are quantitatively immeasurable."48

Of course, the faculty theory, as Seligman acknowledged, had its own problems when it came to addressing the rate structure of a practical tax system. Nonetheless, whereas proponents of ability to pay could unambiguously support some form of a graduated rate structure, the benefits theory provided its advocates with an inconsistent rationale for setting practical tax rates. Indeed, Seligman claimed that certain individual payments for particular government services did not even deserve to be called taxes. He conceded that "some payments made by individuals for particular" government services "should represent as nearly as possible the cost of service to the government." But those payments, Seligman concluded, "are not taxes." They should be viewed, instead, merely as "fees or tolls."49 That distinction was critical. It suggested that Seligman and his like- minded colleagues still believed that the benefits theory had an important, although subordinate, role to play in public finance discourse. There was no other way to define a toll, a fee, or a special assessment accurately without some reference to the benefits conferred by the state.50 Yet when it came to financing those public goods and services that could not be divisible within a community, or at the individual level, the best justification for those "taxes" was the criterion of ability to pay.

**C. Historicizing the Income Tax**

Seligman took a slightly different approach in promoting the faculty theory. While he agreed that the social interdependence occasioned by modern industrial capitalism had displaced the logic of autonomous individualism, Seligman contended that the principle of faculty, in one form or another, had been evolving for centuries. As one of the progressive economists most steeped in historical analysis -- his treatises were well-known for their coverage of the historical development of tax concepts -- and as the theorist who popularized the notion of ability to pay, Seligman believed that class dynamics were driving modern society as a whole to recognize the importance of creating an equitable tax system based on faculty. "Amid the clashing of divergent interests and the endeavor of each social class to roll off the burden of taxation on some other class, we discern the slow and laborious growth of standards of justice in taxation, and the attempt on the part of the community as a whole to realize this justice," proclaimed Seligman. "The history of finance, in other words, shows the evolution of the principle of faculty or ability to pay -- the principle that each individual should be held to help the state in proportion to his ability to help himself."51

Like other new school economists, Seligman recognized the inadequacies of an income tax. But whereas others appeared to be disillusioned with the limited reach of the income tax in assessing tax-paying ability, Seligman accepted the levy as a practical step toward the ideal of taxing one's ability to pay. In that way, faculty or ability to pay was, for Seligman, an aspirational aim -- an ideal type that could not be achieved in practice but could be a useful touchstone for policymakers. Given the changing historical conditions wrought by industrial capitalism, the income tax was a necessary feasible step because it helped establish an equitable distribution of tax burdens; it helped, as Seligman put it, to round "out the existing tax system in the direction of greater justice."52

In the process of promoting tax laws and policies in the direction of greater justice, Seligman applied a thoroughgoing historicism that set him apart from his like-minded colleagues. If taxation was Seligman's first priority, comparative economic history was a close second. For he not only infused his tax treatises with discussions of historical antecedents and transatlantic comparisons, he also wrote widely on the history of economic thought,53 publishing in 1902 a relatively popular monograph on the philosophy of history, modestly entitled *The Economic Interpretation of History*.54

Seligman combined his interests in comparative economic history and tax policy in charting the global development of the income tax. In one of his best-known treatises, which was published in several editions and translated into numerous languages, Seligman set out to demonstrate that an urban industrial democracy required a progressive income tax.55 Applying a crude type of economic determinism, Seligman argued that theories of taxation had evolved over the centuries to meet the changing functional needs of society. What remained constant during this historical evolution was the criterion used by the state to determine the basis of taxation. That criterion, according to Seligman, was the principle of ability to pay.

Conveniently ignoring how his own historical research demonstrated the long-standing coexistence of benefits and faculty theories, Seligman claimed that a variety of different levies over time embodied the faculty principle. The standard of faculty had undergone several manifestations from its origins in preliterate society to modern times, but it remained the benchmark by which leaders were able to shape tax laws and policies. Using an evolutionary theory of historical change reminiscent of Darwinian gradualism, Seligman illustrated how different stages of economic development led to different types of taxes embodying the ability to pay metric. In that stage analysis, Seligman used a highly functionalist perspective, focusing on how tax systems adapted to material changes, without emphasizing the contingency and vagaries of those changes.

Although Seligman claimed that the income tax was the "final" stage in the development of tax laws, he went to great pains to emphasize in his treatise that the income tax should not be viewed as the only accurate measure of tax-paying ability. The income tax, for him, was not without its faults. It left unanswered many thorny questions, such as what constituted income, whether all sources of income could be treated equally, and the all-important issue of "whether different amounts of income present identically the same criteria of ability to pay."56 In addition to those substantive questions, the income tax also posed a host of administrative concerns, not the least of which was whether it could be executed without being overly intrusive.57 In the end, Seligman admitted that, although a tax based on income was perhaps the final stage of fiscal evolution, a system of taxation that accurately gauged an individual's faculty or ability to pay would remain an ideal beyond the reach of practical politics.

It was that pragmatic concession that compelled Seligman to apply historicism, in a self-reflexive manner, to his own ideas. Seligman's theory of fiscal evolution was, therefore, not a teleological one with the income tax as some sort of whiggish culmination of progress. Seligman recognized that the income tax by itself was no panacea for the complexities of a modern, industrial society. Pinning all his hopes on the income tax would only make him as "unscientific" as the amateur economic commentators that he and his new school colleagues sought to distance themselves from. Instead, he saw the income tax as a vital component in a larger matrix of policies promoting economic and social justice -- a component that remained tied to the criteria of ability to pay. Seligman acknowledged the idealistic aspects of his theory when he wrote: "While the system of taxation should endeavor, roughly at all events, to adjust itself to income in general, the income tax as such can form only a part, even though it may be a permanent part, of the system, the other elements of which must be based on the remaining criteria of faculty to reach as close an approximation to justice as may be possible."58

Writing at a time when the future fate of the American income tax was still unclear, Seligman and his colleagues did not lose sight of their historicist methods. The income tax had come into its own as the necessary policy for a modern, industrialized nation. But that did not mean that an income tax was or should be sacrosanct. For the progressive economists to give it such timeless, transhistorical prominence would be to betray their own historicism. Instead, because the income tax seemed to correspond with the level of political and economic development that existed in turn-of-the-century America, Seligman and his reformist colleagues became vocal advocates for the implementation of a permanent federal income tax. Yet at the same time they recognized that conditions elsewhere and at other times might dictate other forms of fiscal policies.

**IV. Ideas, Politics, and the Development of Tax Law**

In their attempts to influence policymaking, the progressive economists realized that the power of their ideas alone were often not enough to change the laws and institutions that undergirded the American tax system. They needed to take a more active role in the political and policymaking process by participating as consultants and part-time tax commissioners, and by capturing the attention of lawmakers.

As the economists and other social scientists were promoting their ideas, the American political system itself was undergoing a radical transformation. For it was during the turn of the 20th century that the state of "courts and parties" was giving way to a more fractured and pluralistic system of American politics. The 19th century dominance of party politics and patronage was being eroded by the rise of a more competitive political process, one that helped forge the modern American fiscal, regulatory, and administrative state.59 With that shift in politics, reform- minded economists joined organizations like the NTA and formed other coalitions, such as the New York Tax Reform Association, to provide an outlet for their ideas -- an outlet that, they hoped, could more directly shape tax policy.

To meet the challenges of the emerging political system, the progressive economists needed to defend their support for an income tax based on the faculty principle against opposition from both the political right and left. For political conservatives wedded to a classical "night watchman" view of the state, the move to a graduated income tax was equated with creeping socialism. The progressive economists observed, often to their personal detriment, the overwhelming power that the conservative critics held, particularly in delineating the bounds of academic freedom. Addressing those opponents, the progressive economists sought to demonstrate that support for graduated income taxes could be compatible with traditional American notions of equality and fairness.

The reform-minded economists faced a more amorphous, though equally formidable, kind of opposition from the political left. There the populist attraction to the single-tax ideas of Henry George appeared to distract important constituencies away from the income tax movement. In defusing that opposition, the economists sought to debunk the amateur economic analysis conducted by George and his disciples. They also attempted to unmask the "ultraconservative" social theory that underpinned George's call for a single tax on land.60 By navigating between the conservative critics who equated a progressive income tax with socialism and the populist reformers who advanced a seemingly more radical form of taxation, the progressive economists combined their theories with other prevailing economic ideas of the times, namely marginal utility analysis. Their aim in the end was to show that a progressive income tax was an assault on privilege that did not amount to a move toward state socialism.

**A. In Defense of Progressivity**

Faced with critiques from the political right and left, the reform-minded economists attempted to navigate between those poles in advancing the income tax cause. The fundamental problem for Seligman and his colleagues was that many commentators and old guard political economists erroneously assumed that "progressive taxation necessarily implies socialism and confiscation." Citing explicitly to the work of David Wells, one of the leading conservative opponents of progressive taxation, Seligman argued "it is quite possible to repudiate absolutely the socialistic theory of taxation and yet at the same time advocate progression."61 Decoupling progressive income taxes from state socialism thus became one of the principal aims of the reform- minded economists.

That was no easy task. As part of the professionalization process, many of the young, reform-minded economists were forced to moderate their more radical views in light of larger political pressures. Many social scientists faced the harsh reality that the institutional powers behind the American research university were not always tolerant of ideas that ran counter to the administrators, alumni, and benefactors of those new institutions. Seligman and his colleagues were well aware that the "socialistic" tag often blinded people to the logic and reasoning behind plausible reforms. Within that environment, it was incumbent on the intellectual supporters of graduated taxes to create some distance between their ideas and the conventional impressions of socialism.62

While political pressures may have forced the progressive economists to temper their reformist inclinations, it is unlikely that they ever embraced the radically redistributive notions held by their German mentors and American socialists. The new school economists abhorred the radical individualism inherent in classical political economy, but many of them continued to believe that economic progress was driven mainly by private industry rather than state action. It was that allegiance to the productive powers of capital that led them to restrain their advocacy for a redistributive tax policy.

Indeed, the tax theorists were especially concerned about not disturbing what Adams referred to as the "machinery of industry," by which he meant economic productivity. Adams, in fact, made preserving economic incentives a fundamental part of his fiscal vision. The "first fiscal axiom of the Science of Finance," Adams declared, is "that a sound financial policy will not impair the patrimony of the State." Although Adams was genuinely concerned about the growing disparity of wealth in the nation, he harbored an even greater fear that steeply progressive tax rates would somehow jeopardize the seemingly eternal nature of the state; for, as he stated, ultimately, "patrimony of the State consists in the productiveness of industries."63

Seligman and the other progressive public finance economists agreed with Adams's general comments. They appeared to concur that progressive taxes could create the risk of distorting economic incentives, but they were careful not to overstate the case. Retreating on the issue of progressivity -- on the need, that is, for a graduated rate structure -- could signal the death knell for the faculty theory. As Seligman explained, the vital political tension beneath the calls for an income tax was expressed in the choice between progressive and proportional taxes, and the resolution of that choice turned on "the fundamental tension as to the basis of taxation -- the theory of benefits or the theory of ability."64

Put simply, the reform-minded economists believed that they could not defend the income tax and the principle of faculty without defending the need for some level of progressivity. Seligman did that by using his historicist perspective to combine traditional Anglo- American thinking on taxation with marginal utility analysis, an increasingly popular economic idea in the American academy.

**B. Marginalism and Progressive Taxation**

As a variant of neoclassical economics, marginalism emerged as the predominant theory in American economics at the turn of the century. The notion that the value of an item was determined at the margin of diminishing returns was not unique to American conditions. European thinkers, building on the classical ideas of David Ricardo, had throughout the mid- and late-19th century applied new mathematical approaches to measuring value based on the concept of diminishing returns. The British economist Alfred Marshall helped synthesize the ideas of prior theorists, and John Bates Clark, Seligman's colleague at Columbia, popularized and expanded the application of marginal utility analysis in the United States.65

The application of marginalism to tax policy reached its heights, not surprisingly, through the work of Seligman. But at about the same time other reform-minded economists in the United States and Britain were also independently using the particular idea of the diminishing marginal utility of money to justify progressive taxes. Thomas N. Carver, a professor of political economy at Oberlin College and later Harvard, and F.Y. Edgeworth of Oxford not only refined marginalist theories, they also used a version of the "minimum sacrifice" idea to support a "moderately progressive system of taxation." By turning the utilitarian principle of "the greatest good to the greatest number" on its head, Carver reasoned that "the evils of taxation are two-fold -- the sacrifice to those who pay the taxes, and the repression of the industry and enterprise which they occasion."66

Policymakers needed to be aware of both of those evils and balance the two against each other when they structured a tax system. They needed to realize that, on one hand, an equality of sacrifice among individuals meant that each taxpayer would pay a proportional yet varying amount of taxes, insuring that the proper work incentives remained intact. At the same time, a minimum amount of total aggregate sacrifice suggested that the wealthy should pay more taxes because they received less utility from their last, or marginal, dollar. In Carver's words, "The minimum amount of repression is secured by imposing an equal sacrifice on all members of the community, but the minimum amount of sacrifice is secured by collecting the whole tax from those few incomes which have the lowest final utility."67

Although he agreed with Carver's theoretical conclusions, Seligman was much more pessimistic about the practical application of progressivity given some of the administrative obstacles the concept faced in the United States. Seligman wholeheartedly agreed that "progressive taxation is to a certain extent defensible as an ideal, and as an expression of the theoretical demand for the shaping of taxes to the test of individual ability." Still, he conceded, "it is a matter of considerable difficulty to decide how far or in what manner the principle ought to be actually carried out in practice."68

In terms of pure economic theory, Seligman confidently believed that marginalism explained why progressive taxes were neither a defense of status quo inequalities nor a form of socialist confiscation. Progressivity seen from the perspective of marginalism was the theoretical crystallization of faculty theory. In reconciling marginalism with the faculty principle, Seligman explained that "the elements of faculty [were] twofold: (1) those connected with acquisition or production (2) those connected with outlay or consumption." On the production side, it seemed rather self- evident that those with large fortunes or incomes had "a decided advantage in augmenting their possessions." In those cases, faculty "may be said to increase faster than fortune or income," suggesting the need for something "more than [a] proportional rate of taxation."69

The analysis from the consumption perspective was a bit more complicated. Here, the faculty or ability to pay theory rested on a version of equal sacrifice, which itself was based on the notion of diminishing marginal utility. Building on the work of European theorists who refined marginal utility analysis, Seligman illustrated how the individual utility received from the consumption of different items dictated the need for a progressive system of taxation:

* Since the intensity of our wants and therefore their final utility decreases as we ascend from the lower or more pressing to the higher or less urgent wants, and since larger incomes supply the means of satisfying these less intense wants, a strictly proportional tax would involve small sacrifices in the case of the larger incomes. Strict equality of sacrifice in the sense of relatively proportional diminution of burden thus involves progressive taxation.70

In theoretical terms, Seligman believed that the principle of faculty required progressive rather than merely proportional taxes.

Using marginal utility analysis to defend the progressive income tax posed some theoretical problems, however. While most economic thinkers and perhaps even policymakers could agree that the last dollar held by the Astors or Vanderbilts was worth much less than the last dollar held by a common member of the working class, marginalism rested at bottom on a problematic interpersonal comparison of utility. Although it would not be difficult to make the case at the extremes, it was much more challenging to differentiate the subjective utility that different citizens within the middle class placed on their last dollar. Despite that theoretical challenge, the reform-minded economists maintained that adherence to the notion of faculty required a progressive rather than a simply proportional rate structure. If the problem of interpersonal comparisons of utility complicated the setting of optimal rates, it did not completely undermine, at least for the turn-of-the-century economists, the superiority of a progressive rate structure.

More practical constraints, however, tempered the progressive public finance economists' calls for progressive income taxes. Above all else, those economists were pragmatists, who were constantly concerned about how tax laws and fiscal policies would operate in concrete situations, how changes in tax law and other institutions would alter individual behavior. Not only did the individualistic beliefs of American political culture operate as one set of impediments, those German-trained theorists realized that the federal government in the United States lacked the national administrative capacity of its European counterparts.

More than any of his colleagues, Seligman was well aware of the administrative hurdles that a progressive income tax needed to overcome -- not the least of which was setting the degree of progression. "Theory itself cannot determine any definite scale of progression," wrote Seligman. "And while it is highly probable that the ends of justice would be more nearly subserved by some approximation to a progressive scale, considerations of expediency as well as the uncertainty of the interrelations between various parts of the entire tax system should tend to render us cautious in advocating any general application of the principle" of progressivity. Even when it came to defending one of the most fundamental applications of the faculty principle, Seligman could not abandon his faith in the importance of having tax laws and policies comport with social and institutional contexts. "It remains to investigate as to how far the principle" of progressivity "is applicable to the conditions surrounding us in America to-day," wrote Seligman in 1894. "But, in last resort, the crucial point is the state of the social consciousness and the development of the feeling of civic obligation."71 Ultimately, for Seligman, economic theory could not trump historically bound social conditions and political culture.

**C. Economists and the Making of the Income Tax**

While the progressive public finance economists may have agreed that, as Seligman put it, "the state of social consciousness" would dictate whether American society would be receptive toward graduated income taxes, this did not mean that the economists themselves had no role to play in shaping "social consciousness" and in developing "the feeling of civic obligation."72 Indeed, it was during pivotal moments of social change that reform was in fact possible. "It is always on the border line of the transition from the old social necessity to the new social convenience that the ethical reformer makes his influence felt," wrote Seligman. "Unless the social conditions . . . are ripe for the change, the demand of the ethical reformer will be fruitless."73

The progressive economists, therefore, were able to advance their vision of a new fiscal state only when social conditions were ripe. While Ely, Adams, and Seligman had been writing and lecturing for decades about the need for taxes based on the notion of ability, it was not until the tumultuous process of ratifying the 16th Amendment -- from 1909 through 1913 -- that they were able to see their ideas come to fruition at the federal level. By then, of course, Seligman had become the dominant academic voice calling for a moderately progressive income tax based on the notion of faculty. As the legal historian Herbert Hovenkamp has demonstrated, Seligman had a profound influence on judicial policymaking throughout the first half of the 20th century.74 But the professor had an equally important -- and even more direct -- role in establishing the legal foundation of the American income tax system.

**D. Seligman, *Pollock*, and the 16th Amendment**

Even before 1909, when the constitutional amendment was first introduced, Seligman in particular spoke up in support of the national income tax. Like many other tax experts, he believed that *Pollock*, the Supreme Court case striking down the 1894 federal income tax, was wrongly decided.75

Seligman played a small, behind-the-scenes part in advising each of the parties to that case. Clarence Seward, one of the attorneys representing the taxpayers who opposed the law, requested Seligman's assistance in determining the original intent behind the Constitution's direct tax clause.76 Seligman explained how his historical research and his legal analysis verified that an income tax was, in fact, constitutional. Although he was no supporter of original intent, he believed that during the colonial period and the drafting of the constitution there was no clear legal meaning attached to direct or indirect taxes.77 That was probably not what Seward and his colleagues were hoping to learn from the professor, and they conveniently ignored his counsel.78

By contrast, Seligman concurred with the government lawyers that a string of previous Court decisions had already analyzed the direct tax clause,79 holding that it applied only to land and poll taxes, not income taxes.80 Like the government lawyers, Seligman did not expect the Court to strike down the 1894 income tax law. When it did, a surprised Seligman turned his energies toward supporting a constitutional amendment that would overturn the *Pollock* decision.

Indeed, even before the decision was handed down, Seligman published an article in the popular journal *Forum* taking on the principal objections to the 1894 law.81 In a previous issue of that journal, Wells had recycled his earlier opposition to progressive income taxes.82 Graduated rates were a form of discrimination, Wells claimed, that was contrary to the notion of "uniformity" embodied in the Fifth Amendment. Responding directly to Wells, Seligman maintained that the constitutional restriction on uniformity applied not to the classification of a tax but to its geographical application. "Uniform throughout the United States," wrote Seligman, meant that "the same rate of taxation should be imposed on all the States."83 Because Seligman did not think that objections to the law based on the Constitution's "direct tax clause" were a serious consideration, he casually confirmed that the settled legal precedents and the economic analysis meant that any attempt "to declare the income tax unconstitutional" as a violation of the Constitution's direct tax was "foredoomed to failure."84 Seligman must have been aghast when he learned that the Court struck down the 1894 law precisely along those lines.

Nearly 15 years later, when Congress introduced the 16th Amendment, Seligman wasted no time in declaring his support for the amendment. He not only published an article in support of the amendment, he also testified before the New York State Legislature during the ratification process. At his first appearance before the Legislature in 1910, Seligman attempted to defuse the highly critical comments leveled by his old friend, Gov. Charles Evans Hughes.85 In an earlier message before the Legislature, Hughes had objected to the amendment's language empowering Congress "to lay and collect taxes on income from whatever source derived."86 Hughes, like many others, believed that the phrase "from whatever source derived" gave Congress the power to destroy the fiscal powers and the political sovereignty of the individual states by taxing their debt obligations.87 Seligman joined many others, including prominent Republican politicians such as Elihu Root, the U.S. senator from New York,88 in attempting to assure New York lawmakers and other state-level officials throughout the country that the amendment was not designed to allow the federal government to supersede the fiscal power of states and localities.89

Despite those assurances, the income tax amendment could not survive the initial resistance of the Republican majority in the New York Assembly. The resolution was put to a vote in the Assembly three times during the 1910 session, and all three times the Republican majority resoundingly defeated it. Because New York was a pivotal state in the ratification process -- mainly because it was representative of the Northeastern wealth hostile to reallocating tax burdens -- income tax supporters realized that they would have to get New York's approval if they expected other states to ratify the amendment.90 That appeared to be a historical moment. According to Seligman and many other income tax advocates, New York lawmakers appeared to be oblivious to the ripening of social consciousness and public support for the amendment. As an ethical reformer operating at the threshold between the "old social necessity" and the "new social convenience," Seligman set out to neutralize the opposition to the income tax amendment.

Soon after the resolution was rejected by the New York Assembly in 1910, Seligman reaffirmed his views with an article directly supporting the amendment. Writing in the *Political Science Quarterly*, Seligman used his historicism to scrutinize the opposition's general reliance on original intent, and to dissect Hughes's specific hostility to the amendment. "The conditions which existed when the constitution was framed are no longer existent," Seligman wrote. "During the last century . . . the development of the underlying economic and social forces has created a nation, and this development calls for uniform national regulation of many matters which were not dreamed of by the founders."91 With Hughes's comments no doubt in mind, Seligman concluded that economic and legal progress should not be hindered by antiquated attachments to the ideas of state and local self-governance. "Let us not make a fetish of self- government," Seligman argued, "and let us not oppose central authority in those cases where self-government means retrogression rather than progress."92

While it is difficult to gauge precisely the influence of Seligman's comments, he was convinced by 1910 that a vast majority of the American people supported a national income tax. He was, in fact, quite prescient. For when the political winds changed direction the following year, delivering the New York Legislature to the Democrats, the income tax amendment received new and considerably greater attention. Although Hughes by then had become a member of the U.S. Supreme Court, his dire warnings continued to resonate among state lawmakers across the country. Seligman appeared once again before the New York Senate; this time he explicitly rejected Hughes's arguments against the amendment and reminded Republican legislators of the significance of the 1911 elections and his earlier comments.93 "It was my good fortune," Seligman stated in his 1911 testimony, "to say to the Senate committee that though I was as good a Republican as any of those present, I believed the party would be snowed under at the polls, if it refused to accept the amendment. The Republican Party was snowed under and one of the reasons was its failure to observe my warning."94

Seligman's rebuke of Hughes's earlier warning was no less blunt. Essentially, Seligman reiterated his comments that Hughes and his ilk did not realize that (1) the proposed amendment would simply restore the constitutional status quo pre-*Pollock*; (2) a tax on the interest from state bonds would not, in a relative sense, harm the fiscal fortunes of state governments; (3) even if the federal government did limit the fiscal powers of states and localities, the increased revenue of an income tax would benefit all, not just the federal government; and (4) the political will of the people, representing the spirit of the age, was behind the amendment.95

Seligman peppered his second argument, the economic analysis, with a personal attack on Hughes. He explained that an income tax that taxed the interest from all bonds at equal rates would not harm the market for those securities. Emphasizing the illogic of Hughes's economic comments, Seligman concluded: "If any of my students at Columbia had made the same mistake as Governor Hughes, I should have flunked him dead."96 In rebuffing Hughes's earlier message, Seligman was able to help galvanize the pro-income-tax forces by lending them the prestige and prominence of a well-known expert in the field -- an expert who was not afraid to tell lawmakers and even a former governor what he believed. Indeed, Seligman's position against his old friend Hughes seemed to be vindicated several years later in the 1916 Supreme Court decision in *Brushaber v. Union Pacific*,97 where then-Justice Hughes assented to a unanimous decision that essentially refuted his earlier position on the general power of the 16th Amendment.

**E. An Enduring Legacy of Reform**

If Seligman's role in the ratification process was the most conspicuous example of the influence of progressive economic ideas on the making of tax law and policy, he and his like-minded educators left a lasting legacy of reform in other less obvious ways. For it was in their role as teachers that the progressive economists perhaps had their greatest effect on the development of American public finance. As instructors and writers, they helped mold the next generation of scholars, reformers, and policymakers. Students such as Robert Haig became tax experts in their own rights.

Haig, Seligman's most successful student, carried his mentor's historicist message to subsequent discussions about tax policy. After completing a dissertation on the history of the Illinois property tax, under Seligman's supervision,98 Haig remained in nearly constant contact with his old teacher, conducting empirical field research for him on the property tax in Canada, and the British excess profits tax of World War I.99 Toward the end of Seligman's career, Haig eventually joined him as a colleague at Columbia.

But Haig's greatest intellectual debt to Seligman was most visible in Haig's early attempts to define the concept of income. In his 1921 essay, "The Concept of Income," Haig not only credited Ely, Seligman, and others for providing the intellectual foundation to address the challenging issue of defining taxable income, he also reminded his readers that this definition was historically contingent.100

Haig modestly suggested that what would become his path-breaking definition of income was, in fact, a refinement of earlier theories. Haig defined income as "the money value of the net accretion to one's economic power between two points of time," and he declared that "it will be readily agreed that this definition . . . constitutes then the closest practicable approximation of true income."101 But lest one believe that Haig had forgotten the historicism of his mentor, Haig pointedly added that "the concept of *taxable* income is a living, mutable concept which has varied widely from time to time and from country to country with the conditions under which it has had to operate."102 Seligman could not have put it better himself.

By the 1920s, with the rise of the next generation of economists, the paradigm shift in tax theory initiated by the progressive, public finance economists began to crystallize. Toward the end of World War I, Seligman himself could proudly proclaim that in justifying a tax, as opposed to a toll or special assessment, "the criterion is always ability to pay."103 Over time subsequent generations of tax theorists echoed that claim, as the American system of public finance became increasingly reliant on the income tax. Indeed, by the 1950s not only did the graduated income tax appear to be entrenched as the principal source of federal government revenue,104 the notion of ability to pay had become axiomatic among many tax scholars, some of whom mistakenly presumed that its "universal acceptance" stretched back well before the turn of the century.105 Although some legal scholars have more recently come to question the substantive content of the notion of ability to pay,106 as well as the use of income as the proper tax base,107 even those theorists still resolutely adhere -- often implicitly -- to the notion of taxpaying ability as a compelling, albeit indeterminate,108 guide for policymaking.

The current self-evident nature of the principle of ability to pay is a result of the theoretical shift that fostered the turn-of- the-century structural transformation in American public finance. To be sure, the paradigm shift in ideas explains only part of that historic change; other salient factors, including popular social movements and institutional changes, helped usher in this new fiscal order.109 That transformation was brought about by a combination of material and idealistic forces. In the end, it was a fusion of the functional need for increased government revenue together with the desire for creating a fairer and more transparent system of taxation that eventually led to the theoretical ascendancy of the American income tax.

Indeed, throughout their efforts and achievements, the reform- minded public finance economists were concerned mainly about the equitable distribution of tax burdens, with what Seligman referred to as rounding "out the existing tax system in the direction of greater justice."110 Through their scholarship, teaching, and public lectures, those Progressive Era economists guided a paradigm shift in the theories that undergirded American taxation -- a paradigm shift away from the benefits theory toward the principle of faculty or the ability to pay.

In so doing, they helped inject a sense of redistributional reasoning into the prevailing fiscal order. Though they did not go as far as some of their German mentors, or other American reformers, in advancing radically redistributive, progressive taxes, they did bring a vigorous defense of justice and equity to an otherwise anemic American dialogue about taxation. In their unyielding support for tax reform, they demonstrated that contemporary political, social, and economic conditions dictated that the American system of fiscal governance required a permanent progressive income tax. In that way, those political economists became the visionaries or architects of the modern American fiscal state -- they drew the blueprints for a new, more equitable fiscal polity.

**V. Conclusion**

Recounting the intellectual history of the American income tax is not a story of mere antiquarian interest. Rather, at a time when national discussions about fundamental tax reform appear to echo the past, and when our current hybrid income tax system seems to be in some peril, the ideas and historical circumstances that gave shape to the initial creation of this system are highly relevant to the present.

By investigating how and why the notion of faculty or taxpaying ability came to dominate the justifications for a progressive income tax, this article has attempted to illuminate the ideas and events which, over time, combined to create the intellectual and institutional boundaries within which current tax laws and policies are made. In that sense, this historical study does not contain an explicit normative lesson for current scholars and lawmakers, nor is it an attempt to recapture the timeless origins of the modern American income tax. Instead, the more subtle aim has been to unearth the implicit historical forces that have shaped the institutional limits and possibilities that confront current policymakers. Some factors emerged in the recent past, such as the leveling of exemptions and the use of withholding; others are more remote. Together those factors are crucial for understanding contemporary issues.

This story about the intellectual construction of the American income tax, moreover, holds some humbling lessons for scholars, reformers and policymakers in our own time. For those historically minded scholars who have bemoaned the failure of the U.S. income tax to radically redistribute wealth,111 the efforts of Seligman and others to reform the 19th century system of indirect taxes should be seen as a modest reminder of what was accomplished by the establishment of an income tax. While redistributing wealth in a dramatic way through a combination of steeply progressive rates and government transfer payments was not the principal aim of the turn- of-the-century theorists, their ideas and actions did have an enduring effect on reallocating the fiscal burdens of financing a modern nation-state.

Similarly, for those current tax theorists who have attempted to revive the benefits principle,112 the intellectual debate that framed the creation of the American income tax may prompt some reconsideration of the political implications of the benefits theory. While the progressive economists, with their historicist leanings, would have been loath to suggest that either the benefits or faculty principles were timeless, transhistorical touchstones for tax policy, they might be surprised by the current use of the benefits principle to support the prevailing tax system. For in explicating the larger social and political theories that undergirded the contending principles of taxation at the turn of the 20th century, those economists sought to reveal how the benefits doctrine contained within it a rather narrow and limiting view of social citizenship -- a view that may ultimately belie the normative goals of current tax scholars who see in the benefits principle a potential bulwark for current tax policies.

To be sure, much has changed since Seligman and the Progressive Era economists mounted their assault on the old fiscal order. Given the current concerns about security, especially in a post-9/11 world, the benefits of protection provided by the state may have taken on a new valence, one that may justify a reexamination of the theories underpinning the benefits principle. Still, for Seligman and his colleagues, the intellectual project of advancing the faculty theory was based on restructuring the American system of public finance -- on transferring, that is, the fiscal obligations of financing a modern state onto those with the greatest taxpaying ability. In the process, those reform-minded academics were also attempting an even more fundamental transformation. Operating within the institutional constraints of American political culture, those theorists were also seeking to alter the meaning of social citizenship as they attempted to redefine the modern relations among state, society, and economy.

**FOOTNOTES**

1 The continuous coexistence of the benefits and ability to pay rationales over time illustrates how the history of ideas is seldom about the complete victory of one concept over another. As the legal historian Neil Duxbury has noted, "Ideas -- along with values, attitudes and beliefs -- tend to emerge and decline, and sometimes they are revived and refined. But rarely do we see them born or die." Duxbury, *Patterns of American Jurisprudence* (1995), pp. 2-3.

2 For a sampling of the recent social and academic commentary identifying the rise of a New Gilded Age at the turn of the 21st century, see Kevin P. Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* (1990); David Remnick, ed., *The New Gilded Age* (2001); Paul Krugman, "For Richer," *The New York Times Magazine*, Oct. 20, 2002; Thomas Piketty and Emanuel Saez, "Income Inequality in the United States, 1913-1998," 118 *Quarterly Journal of Economics* 1 (February 2003); "Ever Higher Society, Ever Harder to Ascend -- Meritocracy in America," *The Economist*, Dec. 29, 2004, at Special Report; Nathan Glazer, "On the American Indifference to Inequality," 132 *Daedalus* 111 (2003).

3 Robert Stanley, *Dimensions of Law and the Service of Order: Origins of the Federal Income Tax, 1861-1913* (1993); John F. Witte, *The Politics and Development of the Federal Income Tax* (1985); Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992).

4 Deborah A. Geier, "Incremental Versus Fundamental Tax Reform and the Top 1 Percent," 56 *S.M.U. Law Review* 99, 119 (2003); Geier, "Time to Bring Back the 'Benefit' Norm?" *Tax Notes*, Mar. 1, 2004, p. 1155; Herwig J. Schlunk, "Double Taxation: The Unappreciated Ideal," *Tax Notes*, Feb. 16, 2004, p. 893; Schlunk, "I Come Not to Praise the Corporate Income Tax, But to Save It," 56 *Tax Law Review* 329 (2003).

5 Thomas S. Kuhn, *The Structure of Scientific Revolutions* (1996), p. 181. *See also* Theodore Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (1995).

6 On the ongoing elusiveness of the ability to pay doctrine, see, e.g., Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2002), pp. 20-31; Joseph M. Dodge, "Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles," 58 *Tax Law Review* (2005).

7 Daniel T. Rodgers, "In Search of Progressivism," 10 *Reviews in American History* 113, 122 (December 1982).

8 In charting the role that these economists played in laying the intellectual groundwork for the new fiscal order, this article is not meant to be a traditional history of disembodied ideas or a philosophical explication of the claims made by these historical figures. Instead, this article seeks to historicize the ideas that underwrote the emergence of the modern American income tax by placing these theories within their social, political, and economic context. The principal aim is to show how a multitude of historical forces combined to facilitate the paradigm shift in tax theories at the turn of the 20th century. The more normative task of uncovering the philosophical underpinnings of progressive income taxes, and revealing the tensions within tax theories, is left to others. *See supra* note 6; on the inherent philosophical tensions within the tax theory of ability to pay, see Stephen Utz, "Ability to Pay," 23 *Whittier Law Review* 867 (2002).

9 For more on the professionalization of the social sciences, see generally Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth Century Crisis of Authority* (1977); Mary O. Furner, *Advocacy & Objectivity: A Crisis in the Professionalization of American Social Science, 1865-1905* (1975); Dorothy Ross, *The Origins of American Social Science* (1991).

10 For more on the "new school" of American political economy, see generally Furner, *supra* note 9, chapter 3; Sidney Fine, *Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901* (1964).

11 Furner, *supra* note 9, at 69-75; Fine, *supra* note 10, at 216-219. In drafting the initial charter of the AEA, Richard Ely explicitly proclaimed that the state should be viewed as an "ethical agency whose positive aid is an indispensable condition of human progress." "American Economic Association, Platform" quoted in Richard T. Ely, *Ground Under Our Feet: An Autobiography* (1938), p. 136. Ely's language for the charter led to an enormous controversy at the founding of the AEA that helped define the fault lines between the "new school" and the orthodox political economists.

12 Herbert Hovenkamp, "The First Great Law and Economics Movement," 42 *Stanford Law Review* 993 (April 1990); Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998).

13 R. Rudy Higgens-Evenson, *The Price of Progress: Public Services, Taxation, and the American Corporate State* (2003), p. 78.

14 Dorfman, "Edwin Robert Anderson Seligman," *Dictionary of American Biography*, Suppl. 2 (1958), pp. 606- 609; Ross L. Muir and Carl J. White, *Over the Long Term: The Story of J. & W. Seligman & Co.* (1964), p. 24; Thomas Walek, "From Pack Peddlers to High Tech Funds: J. & W. Seligman & Co. and the American Experience," 67 *Financial History* 12-15 (1999); Seven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850-1896* (New York), p. 123.

15 William Weisberger, "Seligman, Joseph" *American National Biography*, vol. 19, eds. John A. Garraty and Mark C. Carnes (1999), pp. 623-625; Interviews with Eustace Seligman, Columbia Oral History Collections, Butler Library, Columbia University, New York. For more on the elder Seligman and his role in the New York Jewish community, see Stephen Birmingham, *Our Crowd: The Great Jewish Families of New York* (1967).

16 Edwin R.A. Seligman to Isaac Seligman, Mar. 14, 1905; Nicholas Murray Butler to Isaac Seligman, Mar. 31, 1905, Cataloged Correspondence, Edwin R.A. Seligman Papers, Butler Library, Columbia University, New York, (hereinafter ERASP).

17 Furner, *supra* note 9, at 56; Ross, *supra* note 9, at 103. For a recent account of how religion affected the institutional economists that more accurately excludes Seligman from the social gospel movement, see Robert William Fogel, *The Fourth Great Awakening and the Future of Egalitarianism* (2000), ch. 3.

18 Interview with Eustace Seligman, Sept. 3, 1974, Columbia Oral History Collections; Weisberger, "Seligman, Joseph" *American National Biography*, p. 625; Lee Livney, "Let Us Now Praise Self-Made Men: A Re-examination of the Hilton- Seligman Affair," 75 *New York History* 66-98 (1994); "Berthold Auerbach and the Hilton-Seligman Affair," 11 *American Jewish Archives* 184-187 (1959). Eustace Seligman also recounted that as part of his belief "in breaking down barriers between Jew and Christian," Edwin Seligman sent his children to Catholic grade schools on the Upper West Side of Manhattan. Interview with Eustace Seligman, Sept. 3, 1974, Columbia Oral History Collections.

19 Horatio Alger Jr. to Seligman, Feb. 21, 1876; May 7, 1876; Apr. 1, 1876, Cataloged Correspondence; "Seligman Report Cards," Box #58 -- Father, School, and College, ERASP; Carl S. Shoup, "Seligman," in David L. Sills, ed., *International Encyclopedia of the Social Sciences* (1968).

20 For a sampling of some of the courses Seligman took and the papers that he wrote during college, see Box #57 -- Father, School, and College, ERASP; Frank Rozwadowski, "From Recitation Room to Research Seminar: Political Economy at Columbia University," in *Economists and Higher Learning in the Nineteenth Century*, ed. William J. Barber (1993), pp. 188-197.

21 "Notebooks from Classes in Berlin," Box #86, Lecture Notes, ERASP; Cataloged Correspondences with Schmoller and Wagner, ERASP; Joseph Dorfman, "The Role of the German Historical School in American Economic Thought," 45 *American Economic Review* 2 (May 1955), 17-28; Jurgen Herbst, *The German Historical School in American Scholarship: A Study in the Transfer of Culture* (1965); Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (1998), ch. 3.

22 Rozwadowski, "From Recitation Room to Research Seminar: Political Economy at Columbia University," p. 196. Seligman's decision to turn his back on the family business seemed to come at a high financial cost. He was effectively cut off from the family wealth, and was forced to live on his salary as a college instructor until 1888, when he married Caroline Beer, who came from a wealthy trading family. Eustace Seligman Interview, Jan. 21, 1975, Columbia University Oral History Collections.

23 Seligman, "Notebook From Burgess's Comparative Constitutional Law Class, 1883," Box #87 -- Berlin and French Lecture Notes, ERASP; Charles Evans Hughes to Seligman, Apr. 4, 1904, Cataloged Correspondence, ERASP; Edwin R.A. Seligman, *Two Chapters on the Mediaeval Guilds of England* (1884). Seligman admired Burgess so much that he sent his son, Eustace, to Amherst College mainly because that was where Burgess was a student. Interview with Eustace Seligman, Sept. 3, 1974, Columbia Oral History Collections.

24 Joseph Dorfman, "Edwin R.A. Seligman," in *Dictionary of American Biography* vol. 12; Supp. 2 (1958), pp. 606-609; Rozwadowski, "From Recitation Room to Research Seminary," pp. 197-198.

25 Seligman, "The Political Influence of Mental Culture," unpublished paper, Box #58 -- Father, School, and College, ERASP; Leon Fink, *Progressive Intellectuals and the Dilemmas of Democratic Commitment* (1997).

26 P.S. Allen, "Course Notes -- Economics 203- 4," Box #52 -- Seligman, Joseph Dorfman Collection, Butler Library, Columbia University, New York.

27 For a selected bibliography of Seligman's scholarship, see G. Findlay Shirras, "Edwin Robert Anderson Seligman," *Economic Journal* (September 1939), pp. 577-589; for a more thorough, yet still incomplete listing of his writings, see Milton Halsey Thomas and Howard Lee McBain, *A Bibliography of the Faculty of Political Science of Columbia University, 1880- 1930* (1931); "E.R.A. Seligman, Economist, 78, Dies," *The New York Times*, July 19, 1939, p. 26. For his role in the consumer credit study, see Lendor G. Calder, *Financing the American Dream: A Cultural History of Consumer Credit* (1999). During his retirement, Seligman sold his personal library to Columbia University for roughly $250,000; the collection became the greater part of Columbia's holdings in the history of economic thought. Columbia Library to Seligman, date unknown, Box #54 -- Miscellaneous, 1932-7, ERASP; Dorfman, "Seligman," p. 607.

28 Laurence S. Moss, "Seligman, Edwin Robert Anderson," *American National Biography*, vol. 19, pp. 620- 621; Mary K. Simkhovitch (former Seligman student and social worker), "The Humanitarian," in *Edwin Robert Anderson Seligman*, 1861-1939: Addresses Delivered at the Memorial Meeting Held on December 13th, 1939, in the Low Memorial Library at Columbia University (1942); Jane Addams and many other progressive social reformers were close personal friends of Seligman's; see Addams to Seligman, Cataloged Correspondence, ERASP.

29 Wesley C. Mitchell, "Tribute," in *Edwin Robert Anderson Seligman, 1861-1939*, p. 60; "In Memoriam," 54 *Political Science Quarterly* 3 (September 1939).

30 Moss, *supra* note 28; Seligman helped build the *Political Science Quarterly* by reaching out to well-known public intellectuals such as Sidney Webb and Carl Schurz for article contributions, *see* Schurz to Seligman, Jan. 8, 1887; Feb. 22, 1888; Webb to Seligman, Jan. 9, 1891, Cataloged Correspondence, ERASP. On Seligman's role in academic freedom cases both at Columbia and elsewhere, see John Dewey to Seligman, May 12, June 9, 1915, Sept. 25, Oct. 3, Oct. 11, Oct. 15, 1917, Cataloged Correspondence, ERASP; E. Benjamin Andrews to Seligman, July 28, 1897; John H. Wigmore to Seligman, Apr. 1, Dec. 8, 1916, Cataloged Correspondence, ERASP; Metzger, *Academic Freedom in the Age of the University*.

31 Charles Evans Hughes, "Letter," in *Edwin Robert Anderson Seligman, 1861-1939*; Eustace Seligman Interview, Sept. 3, 1974, Columbia Oral History Collections; "E.R. Seligman, Economist, 78, Dies," *The New York Times*, July 19, 1939, p. 26.

32 *See generally* David Montgomery, *The House of Labor* (1987); Walter Licht, *Industrializing America: The Nineteenth Century* (1995); Melvin Dubofsky, *Industrialism and the American Worker, 1865-1920* (1975); P.K. Edwards, *Strikes in the United States, 1881-1974* (1981).

33 Seligman, *Two Chapters on the Mediaeval Guilds of England*; "Owen and the Christian Socialists," 1 *Political Science Quarterly* 206-249 (June 1886).

34 Carl S. Shoup, "Seligman," in David L. Sills, ed., *International Encyclopedia of the Social Sciences* (1968); Frank Rozwadowski, "From Recitation Room to Research Seminar: Political Economy at Columbia University."

35 Pearson, "Was There Really a German Historical School of Economics?" 31 *History of Political Economy* 547 (1999).

36 Rodgers, *supra* note 21; Ross, *supra* note 9; Furner, *supra* note 9.

37 Arthur Hadley and Frank Taussig, two contemporaries of the "new school" economists, also studied in Germany but came away from their experiences with a very different attitude toward historicism. Furner, *supra* note 9, at 54-55.

38 Seligman, "Change in the Tenets of Political Economy With Time," *Science* -- Supplement, Apr. 23, 1886, p. 381.

39 *Id*.

40 *Id*.

41 William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996). For more on the politically charged nature of the tariff, see Richard F. Bensel, *The Political Economy of American Industrialization, 1877-1900* (2000).

42 Francis A. Walker, "The Principles of Taxation," 2 *The Princeton Review* (July-December 1880), pp. 93-94.

43 Henry Carter Adams, *Taxation in the United States, 1789- 1816* (1884). For more on how Adams applied his version of historicism in analyzing the protective tariff, see Mehrotra, "Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax," 52 *UCLA Law Review* 1793 (2005), at 1826- 1827.

44 Seligman, *Essays in Taxation* (1895), pp. 70, 72.

45 Ely, *Taxation in American States and Cities* (1888), p. 13.

46 Seligman, *Progressive Taxation in Theory and Practice* (1884), p. 82. This treatise was based on some of Seligman's previously published work. *See* Seligman, "The Theory of Progressive Taxation," 8 *Publications of the American Economic Association* (1893); "The Theory of Progressive Taxation," 8 *Political Science Quarterly* 220 (1893).

47 Seligman, *Progressive Taxation in Theory and Practice* (1884), pp. 83-84. Protection was not the only government benefit that the poor received in greater proportion. Seligman described how nearly every aspect of state services could be seen as inuring to the benefit of the poor more than the rich. "The rich man sends his children to private schools and colleges, the poor man has his family educated in public schools," wrote Seligman. "The rich man has his street swept by a hired laborer, the poor man has his cleaned at the expense of the city." *Id*. at 83.

48 *Id* at 85.

49 *Id*. at 86.

50 *See* Seligman's contribution to the discussion, "Federal Taxes Upon Income and Excess Profits -- Discussion," 8 *American Economic Review* 36, 42-45 (March 1918).

51 Seligman, *The Income Tax: A Study of the History, Theory and Practice of Income Taxation at Home and Abroad* (1914, 2d ed.), p. 4.

52 Seligman, "The Income Tax," 9 *Political Science Quarterly* (December 1894), p. 610.

53 During his retirement, Seligman sold his personal library to Columbia University for roughly $250,000; the collection became the greater part of Columbia's holdings in the history of economic thought. Columbia Library to Seligman, date unknown, Box #54 -- Miscellaneous, 1932-7, ERASP. *See also* Joseph Dorfman, "Edwin Robert Anderson Seligman," in Robert L. Schuyler and Edward T. James, eds. *Dictionary of American Biography*, vol. 22, 2nd Supp. (1958), p. 606-607.

54 Seligman, *Economic Interpretation of History* (1902).

55 Seligman, *The Income Tax, supra* note 51.

56 *Id*. at 16.

57 In fact, the issue of fairly and accurately administering an income tax has been a dominant issue in tax policy since the American origins of the income tax during the Civil War. *See generally* Joseph J. Thorndike, "Reforming the Internal Revenue Service: A Comparative History," 53 *Administrative Law Review* 717 (2001).

58 Seligman, *The Income Tax, supra* note 51, at 18.

59 *See generally* Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982); Richard L. McCormick, *The Party Period and Public Policy: American Politics From the Age of Jackson to the Progressive Era* (1986); Joel Silbey, *The American Political Nation, 1838-1893* (1991). For a recent review essay challenging the continuing dominance of the "party-period" paradigm for 19th century American history, see generally Richard J. John, "Farewell to the 'Party Period': Political Economy in Nineteenth Century America," 16 *Journal of Policy History* 117 (2004).

60 Ely, *supra* note 45, at 16.

61 Seligman, "The Theory of Progressive Taxation," 8 *Political Science Quarterly* 220, 222 (1893).

62 Rader, *The Academic Mind and Reform*, ch. 6; Furner, *supra* note 9, ch. 7.

63 Henry C. Adams, *Science of Finance: An Investigation of Public Expenditures and Public Revenues* (1898), p. 285.

64 Seligman, "The Theory of Progressive Taxation," 8 *Political Science Quarterly* 220, 223 (1893).

65 Alfred Marshall, *Principles of Economics* (1890); John Bates Clark, *The Philosophy of Wealth* (1886). *See also* Ross, *supra* note 9, at 172-175. Joseph Schumpeter identified Clark as "the master of American marginalism." Joseph Schumpeter, *History of Economic Analysis* (1954), pp. 868-870. For more on the rise of marginalism, see generally "Papers on the Marginal Revolution in Economics," 4 *History of Political Economy* 503 (1972).

66 T.N. Carver, "The Ethical Basis of Taxation and Its Application to Taxation," 6 *Annals of the American Academy of Political and Social Science* (July 1895), pp. 97, 99.

67 *Id*.; F.Y. Edgeworth, "The Pure Theory of Taxation," 7 *Economics Journal* (1897), p. 550. For a comparison of Carver and Edgeworth and their views on progressive taxation, see Hovenkamp, *supra* note 12, at 1002-1008.

68 Seligman, *Progressive Taxation in Theory and Practice*, *supra* note 46, at 199.

69 Seligman, "The Theory of Progressive Taxation," 8 *Political Science Quarterly* 220, 245-246 (1893).

70 *Id*. at 239.

71 Seligman, *supra* note 46, at 200.

72 *Id*.

73 Seligman, *supra* note 54, at 131.

74 Hovenkamp, *supra* note 12, at 1008-1009. Since "Seligman's books on taxation read as much like legal treatises as economic texts," writes Hovenkamp, "they seemed to the courts to be as much 'law' as 'economics'." *Id*.

75 Seligman, "Is the Income Tax Constitutional and Just?" 19 *Forum* 48 (1895). *Pollock* has been both vilified by an older generation of scholars as an example of conservative constitutionalism, and acknowledged more recently by revisionist historians as a potential Jacksonian attack on congressional efforts at maintaining "state capitalism." For the former, see Robert G. McCloskey, *The American Supreme Court* (1960), pp. 140-144; Sidney Ratner, *Taxation and Democracy in America* (1967), pp. 193-214; Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (1969). For an example of the revisionist view, see Robert Stanley, *Dimensions of Law*, pp. 136-175.

76 Clarence Seward to Seligman, Jan. 22, Jan. 28, 1895, Uncataloged Correspondence, ERASP.

77 In his treatise on the income tax, Seligman subsequently wrote "there was no agreement at all as to the use or meaning of the newer term, 'direct tax,'" during the period leading up to the Constitution. "As a matter of fact, the term was scarcely employed at all before 1787." Seligman, *The Income Tax: A Study of the History, Theory, and Practice of Income Taxation at Home and Abroad* (1911), p. 561.

78 In their brief on behalf of the taxpayer, Seward and his colleagues claimed that "at the date of the Constitution, the words 'direct taxes' and 'indirect taxes' were household words. . . . They are to be found in the literature of the period. They had been used in Europe as meaning taxes which fell directly upon property and its owner, like a land tax, or a tax on incomes." Argument of Mr. Seward in the Income Tax Cases, 1895, in Phillip B. Kurland and Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, vol. 12, Pollock v. Farmers' Loan and Trust Co.* (1895) (1975).

79 James C. Carter to Seligman, Mar. 20, 1895, Uncataloged Correspondence, ERASP.

80 *Hylton v. United States,* 3 Dall. (3 U.S.) 171 (1796); *Pacific Insurance Co. v. Soule*, 7 Wall. (74 U.S.) 433 (1868); *Veazie Bank v. Fenno*, 8 Wall. (75 U.S.) 533 (1869); *Scholey v. Rew*, 23 Wall. (90 U.S.) 331 (1874); *Springer v. United States*, 102 U.S. 586 (1881).

81 Seligman, *supra* note 75.

82 David A. Wells, "Is the Existing Income Tax Unconstitutional?" *Forum* 18 (1895), p. 537.

83 Seligman, *supra* note 75.

84 *Id*.

85 Charles Evans Hughes to Seligman, Apr. 4, 1904, Cataloged Correspondence, ERASP.

86 Article XVI, U.S. Constitution.

87 In his speech, Hughes proclaimed that placing "the borrowing capacity of the State and of its governmental agencies at the mercy of the Federal taxing power would be an impairment of the essential rights of the State which, as its officers, we are bound to defend." State of New York, Senate, *Special Message from the Governor Submitting to the Legislature Certified Copy of a Resolution of Congress Entitled "Joint Resolution Proposing an Amendment to the Constitution of the United States,"* Jan. 5, 1910, p. 3.

88 "Root on Income; Senator Upholds Levy in Letter to Albany Solons," *The Washington Post*, Mar. 1, 1910.

89 John Buenker, *The Income Tax in the Progressive Era* (1985), pp. 278-280.

90 *Id*.

91 Seligman, "The Income Tax Amendment," 25 *Political Science Quarterly* 193 (June 1910), at 214.

92 *Id*.

93 "Corrects Hughes on Income Tax," *The New York Times*, May 21, 1911, p. 12; "Says Hughes Made Mistake," *The Washington Post*, May 21, 1911. Buenker, *supra* note 89, at 286-288.

94 Buenker, *supra* note 89, at 288. During that same testimony, a Republican member of the Judiciary Committee attempted to impeach Seligman's expertise in taxation. Holding up a public finance text, he asked the professor whether he had read the whole book through. The question caused a great deal of amusement among onlookers, and some embarrassment for the legislator, when he realized that he was holding up one of Seligman's own treatises. *Id.*

95 Seligman, *supra* note 55, at 595-610.

96 "Corrects Hughes on Income Tax," *The New York Times*, May 21, 1911, p. 12; "Says Hughes Made Mistake," *The Washington Post*, May 21, 1911.

97 240 U.S. 1 (1924).

98 Robert Murray Haig, *A History of the General Property Tax in Illinois* (University of Illinois Studies in the Social Sciences, 3:2-3, March-June 1914).

99 Haig to Seligman, Aug. 1, Aug. 17, Sept. 6, 1917; July 22, July 30, 1919; Sept. 6, 1937, ERASP.

100 Haig, "The Concept of Income -- Economic and Legal Aspects," in *The Federal Income Tax*, ed. Robert M. Haig (1921), pp. 1-28.

101 *Id*. at 7.

102 *Id*. at 27 (emphasis in the original).

103 *See* Seligman contribution to "Federal Taxes Upon Income and Excess Profits -- Discussion," 8 *American Economic Review* 36 (March 1918). Despite conceding that the benefits principle could still explain the need for fees and special assessments, Seligman boldly proclaimed that the ability to pay theory had vanquished the benefits principle when it came to tax policy discussions. "No achievement of modern finance is more enduring and certain than the distinction that has been made by economists and lawyers alike between special assessments and taxes," wrote Seligman. "And nothing is more firmly established than the substitution of the ability theory for the old benefit theory in taxation." *Id*.

104 By 1954 individual and corporate income taxes accounted for more than 70 percent of total federal government revenue. *Historical Statistics*, p. 1105.

105 In 1955 Nicholas Kaldor took it for granted that "[t]axation according to ability to pay for the last hundred years or more has been a universally accepted postulate, not only among political and economic writers, but amongst the public at large." Nicholas Kaldor, *Expenditure Tax* (5th ed., 1969), p. 26.

106 Utz, *supra* note 8.

107 For the classic case for a consumption-based tax system, see, e.g., William D. Andrews, "A Consumption-Type or Cash Flow Personal Income Tax," 87 *Harvard Law Review* 113 (1974).

108 Utz, *supra* note 8, at 877 ("ability to pay, when disconnected from the utilitarian analysis of welfare, provides a compelling guide to at least some income tax issues, although on the whole its results are indeterminate").

109 The larger work in progress, from which this article is derived, explores the multitude of forces that affected the emergence of this new fiscal polity. For an earlier version of this project, see Ajay K. Mehrotra, *Creating the Modern American Fiscal State: The Political Economy of U.S. Tax Policy, 1880-1930* (2003) (unpublished Ph.D. dissertation, University of Chicago).

110 Seligman, "The Income Tax," 9 *Political Science Quarterly* (December 1894), p. 610.

111 *See, e.g.*, Stanley, *supra* note 3.

112 *See supra* note 4. Although a limited return to the benefits theory may be useful in retaining the current corporate income tax, a wholesale acceptance of the quid pro quo notion underlying the benefits principle would surely restrict the scope of the modern regulatory and administrative social-welfare state.

**END OF FOOTNOTES**