

## Learning from Our Mistakes

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Lawrence Zelenak, [Figuring Out the Tax: Congress, Treasury, and the Design of the Early Modern Income Tax](#) (2018).

The income tax is a formidable institution in American political life. Understanding the many facets of its current form is a challenge, given the myriad forces that have interacted in its evolution. Larry Zelenak, in his book [Figuring Out the Tax](#), published in January 2018 as part of the Cambridge Tax Law Series, offers the reader substantial insights into these forces through a close examination of the early history of the income tax in the United States.

Zelenak does not attempt to outline the entire history of the income tax, or even its complete history during the two decades following 1913, with which he deals most completely. Zelenak instead has chosen to provide the history of a number of discrete aspects of the income tax: the use of withholding for income streams other than wages, the step-up of basis at death, the use of value rather than basis to define the charitable deduction, the allowance of investment losses, the special treatment afforded families, the omission of imputed rental values enjoyed by homeowners and the surprisingly favorable treatment of earned income. These topics are not intended to be exhaustive or even representative; instead they were chosen because they had not, in Zelenak's view, been the subject of adequate earlier treatments.

Although he limits the topics he discusses, Zelenak does not limit the influences he examines and the sources through which they reveal themselves. Despite his title, Zelenak does not get bogged down in evaluating the roles of Congress and Treasury in light of modern administrative law, but instead offers many anecdotes that reveal the ever-fluctuating amount of discretion Congress has given to tax bureaucrats.

Zelenak takes his stories not just from traditional committee reports and hearing testimony, but also from newspaper reports, tax advice columns, constituent letters to members of Congress, and personal memoirs. Perhaps aided by the relatively new capacity of online searching to uncover previously obscure sources, he is able to offer his readers many intriguing new anecdotes. Through these fresh sources the reader is shown not just what tax reformers hoped to accomplish, but also the ways in which their efforts were often misinterpreted and sometimes totally derailed.

The result is a wonderful journey down the evolutionary path of the income tax. The stops along the way are often surprising. Those who lived through the timid efforts in the last few decades to buttress compliance through expanded withholding (including on payments made to government contractors) may be surprised to learn that the first income tax act, modeled on the British practice, included withholding on virtually all recurring payments that were likely to be subject to tax. Those who accept as obvious the virtues of an income tax that avoids taxing investment income (since taxing investment income amounts to a "double tax" on savings) may be surprised to learn that the income tax historically often treated income from services more favorably than investment income.

Zelenak's history assigns several original "mistakes" to those whose labors produced the income tax. These include both the step-up-in-basis at death and the overstated amount of charitable deductions. Zelenak labels these as obvious "mistakes" that should have been recognized as such even as the decisions leading to them were made. In retrospect the cost of these mistakes was as great as Zelenak asserts.

Yet the mistakes may have been more in miscalculating the durability of the positions once they were implemented rather than in failing to understand the internal logic of the income tax. Some of the moves that Zelenak most rues were probably the result of unspoken political compromises that seemed entirely sensible when the income tax was first

introduced. Although the record only rarely provides express acknowledgement, the early advocates of the income tax likely had to ensure that the tax they were molding would not produce a backlash bigger than they could control. The backlash could have taken several forms, including a Supreme Court willing to gut the tax even if it did not strike it down completely. For instance, the base they crafted could not too “retroactive” (in the sense that it taxed values that predated the sixteenth amendment’s ratification), lest the tax be vilified and perhaps struck down as a wealth tax rather than an income tax. The base, furthermore, needed to include some escape valves to relieve political pressure, even if the resulting leaks were large.

But by characterizing these positions as “mistakes,” Zelenak confirms his commitment to the ideal of a logical income tax. Thus Zelenak’s is a history that defends the twentieth century income tax, even if he is sometimes unforgiving of the original errors made from its start.

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