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## Interpreting the Interpreters: Assessing Forty-Five Years of Tax Literature

David M. Schneider

*Northern Illinois University College of Law*

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## Interpreting the Interpreters: Assessing Forty-Five Years of Tax Literature

*Daniel M. Schneider\**

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\* Professor of Law, Northern Illinois University College of Law. A.B. 1970, Washington University; J.D. 1973, University of Cincinnati; LL.M. 1976, New York University. I would like to thank Peter Abrams and Charles Cappell, colleagues at Northern Illinois University, for helping me to understand quantitative analysis tools necessary to assemble and interpret the data collected for this article. I would also like to thank Marjorie E. Kornhauser, Beverly I. Moran, Alan J. Samansky, and Lorraine A. Schmall for reading prior drafts of this article, as well as Beverly, Alan, Boris I. Bittker, and Dale A. Nance for their initial observations about characterizing information to be drawn from the sampled articles. Finally, I would like to express my gratitude to the College's Research Librarian, Susan Boland, for her assistance in my research.

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## I. INTRODUCTION

When I began practicing tax law in the 1970s, I kept current by reading *Journal of Taxation*, *Taxes*, *Tax Law Review*, and *Tax Lawyer*. I'm sure the genesis of my reading lies in advice from more senior attorneys with whom I worked. Even as my interests have expanded and as topics of current interest in tax have shifted over the last two decades, I still read these journals.

How has tax literature changed over time? Why do these changes matter? To paraphrase a well-known book title, we are what we write.<sup>1</sup> What we write reflects what we hold important. Were there no articles, for example, about business tax or the intersection of tax and race or tax and gender, the absence would suggest that these topics are not important or, if important, that they have been ignored. The steady production of business tax articles over the years and the more recent publication of articles about tax and race and tax and gender lets us deduce that business tax (to state the obvious) has always been important and that tax and race and tax and gender have been examined more recently.<sup>2</sup>

In an attempt to ascertain what tax literature can tell us about tax culture, this article samples articles from four tax journals—*Journal of Taxation*, *Taxes*, *Tax Law Review*, and *Tax Lawyer*—written during the forty-five year period between 1954 and 1998. Over 1,500 articles, comprising roughly 20% of all articles published in these journals during this period, are classified for a number of different variables, such as gender and professional status of the author, and the subject matter and stylistic approach of the article. Subject to the limitations of sampling itself, and a willingness to draw conclusions beyond the sampling, several benefits inure from this review. One benefit is to examine trends because a forty-five year review reveals whether women and men have published at comparable rates, for example, more readily than a one or five year review.<sup>3</sup> Another benefit of this longitudinal review is what the sample tells us about scholarship and tax practice. To draw on women again, others have written

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1. See Victor H. Lindlahr, *You Are What You Eat* (1st ed. 1940).

2. For business tax, see text discussed below in Part III.D.2 (discussing subject matter of articles sampled). For tax and race, see generally Beverly L. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 Wis. L. Rev. 751 (black critique of Internal Revenue Code). For the response it has generated and for other observations about critical tax theory, including tax and gender, see Symposium, *Critical Tax Theory: Criticism and Response*, 76 N.C. L. Rev. 1519 (1998).

3. For criticisms of other quantitative assessments of legal scholarship, see, e.g., William M. Landes & Richard A. Posner, *Symposium on Trends in Legal Citations and Scholarship: Heavily Cited Articles in Law*, 71 Chi.-Kent L. Rev. 825 (1996) (criticizes assessment of most cited law review articles, *infra* note 51); David H. Kaye & Ira Mark Ellman, *The Pitfalls of Empirical Research: Studying Faculty Publication Studies*, 36 J. Legal Educ. 24 (1986) (criticizes study of declining rates of publications for more senior law faculty).

about women's presence in law and in publishing; this sampling casts light on how women have published in tax.

Part II of this article explains the methodology of the article: what journals I chose, why I chose them, and how I drew information from them. Part III examines the data extracted from the sampling and places it in the context of what others have observed about the relevant areas. The data is grouped in three areas, (i) authors' gender, (ii) authors' professions, and (iii) other aspects of the scholarship, such as the type of scholarship the articles represent (e.g., normative, empirical), the subject matter of the articles, and the institution which authors would have remedied the problems addressed in their articles—Congress, the Internal Revenue Service, or the courts.

Part IV sets forth conclusions to this article. Briefly stated, my conclusions about the sampled literature are:

- (i) Women lawyers, including law professors, published at lesser rates among the sampled articles than their presence in the legal profession or in teaching would suggest, but the trend has been reversed among professors in the last several years;
- (ii) Tax's movement away from law firms and towards accounting firms has not been reflected in authorship of the articles;
- (iii) Doctrinal scholarship has remained an important part of tax scholarship, although normative scholarship has become more important, the subject matter of the articles has remained remarkably stable over time, and the development of more complex tax statutes and regulations has been reflected, albeit modestly, in the sampled articles.

## II. METHODOLOGY

### A. *Sampling Tax Literature*

Part of the rationale for my sampling was personal; the four journals sampled were those I was encouraged to read when I began to practice tax and among those I assume other tax lawyers and accountants read.<sup>4</sup> More formally, these have long been important tax journals. *Journal of Taxation* and *Tax Lawyer*, and even *Taxes*, have relatively wide circulations, especially when compared with the number of subscribers typically associated with general law reviews, and so trends discerned from the sampled articles gave me a larger base.<sup>5</sup> While the *Tax Law Review* has a more modest subscription, its place in

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4. See *supra* Part I.

5. For example, the circulation figures for the journals in 1992-93 were: *Journal of Taxation*, 16,621; *Taxes*, 8,491; *Tax Law Review*, 2,704; and *Tax Lawyer*, 31,500. For information about circulation of these journals dating from 1997-98 back to 1978-79, see Table 1A in the Appendix.

tax literature is secure, having been published by New York University's School of Law graduate tax faculty since 1945. The dedication of these journals exclusively to tax made them a better field from which to reap information than general law reviews. Significant tax articles might have appeared in the *Harvard Law Review* or the *Yale Law Journal*, for example, but the likelihood that these tax articles would appear in a sampling of articles published in general law reviews is less than that they would appear in a sampling of journals exclusively devoted to tax. In addition to *Tax Law Review's* association with New York University, *Tax Lawyer*, the publication of the American Bar Association's Section of Taxation, also has a scholarly patina, if somewhat less and somewhat more recent than the *Tax Law Review*, and academicians certainly have also published articles in the other two journals.<sup>6</sup> Thus, I chose these journals because of their focus on tax, their relatively wide circulations, and because, both at first glance and upon further inspection, they might offer a mix of scholarly and less scholarly articles.

The articles published in these four journals were reviewed over a forty-five year period, from 1954 to 1998, in order to increase the visibility of trends. 1954 signifies the enactment of a new Internal Revenue Code, and 1998 brings the review to a close after forty-five years. Other, equally meritorious tax journals, were excluded, largely because of their shorter lives. For example, University of Florida's College of Law also has a graduate tax program and a tax journal—*Florida Tax Review*—but its journal has been published only since 1992. The University of Virginia School of Law has a tax journal—*Virginia Tax Review*—but the review has been published only since 1981. *Tax Notes* also was a suitable candidate for review, but its shorter life—it has been published only since 1972—led to my not choosing to sample it either.

The review of literature in this article is a sampling, not an exhaustive analysis.<sup>7</sup> *Journal of Taxation* and *Taxes* are published monthly, and the *Tax Law Review* and *Tax Lawyer*, quarterly. I analyzed articles from two of the twelve monthly issues in the first two journals in each year of the forty-five year period, and one of the four quarterly issues published in each of these forty-five years in the other two journals. Thus, I reviewed either 17% or 25% of all of the issues published in these four journals during the forty-five year period; presumably, I also analyzed roughly between 17% and 25% of all articles

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6. See *infra* note 21 (*Tax Lawyer* merely reported activities of American Bar Association for a number of years).

7. For articles about tax literature, see Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 *Cornell L. Rev.* 365 (1998); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 *Va. Tax Rev.* 517 (1994). While not directly on point, useful insights into publishing by tax professors after they gain tenure are set forth in Philip F. Postlewaite, *Life After Tenure: Where Have All the Articles Gone?*, 48 *J. Legal Educ.* 558 (1998).

published in these journals during this time. I reviewed the issues in a pattern designed to examine issues without bias, so that I would sample as many January issues of *Journal of Taxation*, for example, as May or September issues, in order to preclude the possibility that a more exclusive reliance on the issues of any particular month would somehow skew the sample.<sup>8</sup>

I reviewed only signed articles. *Journal of Taxation* publishes more than just signed articles, but limiting myself to articles authored by an acknowledged person, persons, or committee, reflects my observation that signed articles have been the element most common to all the journals while student notes or unsigned, largely informational, articles, for example, have not.<sup>9</sup>

The sample might have been cast differently. I might have sampled articles from other journals, including the unread tax journals noted above or general law reviews. Undoubtedly, some articles by female lawyers or law professors or normative articles were excluded because of the journals not read. Nevertheless, the sample offers a good snapshot. I believe that some trends, such as how the percentages of authors who were women lawyers lagged, relative to the percentages of women lawyers in the general population, would occur, even in a reshaped sampling. Other trends, such as the subject matter of the articles, might be more drastically affected by a different population of sampled articles. Such speculations are the subjects of further research.

## B. *Interpreting the Results*

I compiled the information by entering it into a database system and then by asking questions about the variables in my entries.<sup>10</sup> To some extent, the

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8. Fewer articles tended to be published in *Tax Law Review* and *Tax Lawyer* than *Journal of Taxation* or *Taxes*. See *infra* Table 1. Even though 25% of all issues of the first two journals were examined, the total number of articles published in all four journals ultimately sampled was probably closer to 17% than 25%, because more of the articles appeared in the other two journals, in which I reviewed only 17% of all issues.

Variances sometimes existed among a journal's issues. Papers presented at the University of Chicago's annual Federal Tax Conference have usually been reprinted in *Taxes'* December issue since 1949. As noted in the text, I ignored these variances by sampling the December issues no more nor less than the other eleven months' issues. See text accompanying note 8.

9. Student notes appear only in *Tax Lawyer*. Unsigned articles conveying information, such as the likely trend in the Internal Revenue Service in a particular substantive area, appear in *Journal of Taxation* and *Taxes*. I also took the information at face value so that a speech treated as an article was included in the sampling while a speech treated as a speech was not, nor was a signed piece in the nature of a column. See also *infra* note 16 (gender of some authors not identified because of inability to determine gender based upon names and immediately surrounding material).

10. For those even less familiar than I about databases, this sampling required entering the information into a database, for which I used Paradox 8. Sophisticated assessment of the data was made through SPSS 9.0.

variables I entered reflected the nature of the articles I reviewed. I was quickly struck, for example, by the absence of women authors, and so I backtracked and started almost immediately recording authors' gender. Similarly, my assessment of the taxonomy of the scholarship—was it descriptive or did it tell a lawyer how to advise her client—reflects what I perceived as I read the articles as opposed, for example, to more traditional characterization of scholarship as doctrinal or normative.<sup>11</sup>

Statistical information can reveal trends in the surveyed population, and the data collected in this article reveals trends among the four law journals since 1954.<sup>12</sup> For example, one trend is that women did not seem to publish much. Only around 5% of all sampled articles—actually, 72 of the 1,520 articles—were written by women, the first one appearing in 1959.<sup>13</sup> Possibly women chose to publish in issues I did not review or in unsigned articles. Sampling does not guarantee that 5% of all articles published in these journals during this forty-five year period were published by women, but it can suggest that the proportion of articles published by women in the forty-five year population of articles probably was around 5%.

### C. *Questions Asked*

Statistical information can reveal trends in the population of surveyed material. What I learned, therefore, was a function of the data I derived from the articles. I derived information from the articles by cataloguing the following characteristics about each article.

- *Year*—To state the obvious, by designating the year in which an article was published, I could more easily discern trends.
- *Subject matter*—Categories from which I used articles ranged from accounting to utilities.<sup>14</sup> The material dictated my choices.

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11. See *infra* Part III.D.1.

12. The data underlying the sampling is on file with the author.

13. See *infra* Table 2 (identity of authors by group and by percentage).

14. The categories are: accounting, capital assets, compensation, corporate, credits, crime, deductions, employment tax, estate planning, excise tax, exempt organizations, financial entities, financial products, foreign, gross income, individual, insurance, intellectual property, jurisprudence, leasing, mortgages, natural resources, partnerships, policy, procedure, rates, real estate, retirement, stamp tax, state tax, tax practice, tobacco tax, and utilities.

I also used secondary categories when inputting the data, e.g., for accounting, I added secondary categories for allocations, depreciation, inventory, and prepayment, and for corporate, consolidated returns, distributions, S corporations, and transformations. I have not listed the secondary categories in this article because, ultimately, I did not use them when interpreting the data.



- *Authors*—Authors were classified by gender.<sup>15</sup> I characterized a few authors as having no gender, at least in my sampling, because gender was not apparent from the author's name or because the author was a committee and not an individual. More frequently, the name itself or a footnote identified the author's gender, and so gender identification was not problematic, with the few exceptions.<sup>16</sup> Whenever there were multiple authors, I entered information only for the first author.<sup>17</sup>

Authors were further categorized by whether they were academicians or practitioners and the nature of their profession. Academicians were either identified as teaching at law schools, business schools, or elsewhere (most probably in an economics department in a college of arts and science). Students at such schools or departments were also identified as academicians, but most of the academicians were teachers, not students. Authors who appeared to have another, nonacademic, position, but had listed themselves in some diminished academic capacity, such as an instructor or lecturer, were not treated as academicians. Because the author's rank, e.g., as a partner or associate or as an assistant, associate, or full professor, was not uniformly or readily available, I did not attempt to ascertain rank.

Practitioners also were categorized by profession. Either they were lawyers, accountants, or something such as an employee of the Treasury Department, the Internal Revenue Service, a corporation, or an institute. Because I took the journal's description of the author at face value, I always tried to characterize an author by the predominant tenor of the description. For example, if he were both a lawyer and accountant, and listed as a lawyer first, I characterized him as a lawyer; if listed as an accountant first, I characterized him as an accountant. Obeisance to the journal's description of the author also meant that the late Professor Stanley Surrey could be characterized as a law school professor in one of his articles included in the sampling and as a government employee in another.<sup>18</sup>

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15. I also entered names, but they did not prove helpful in assessment of the data, other than to ascertain gender.

16. Most articles listed the author as, e.g., *Frank Smith* or *Mr. Smith*. Photographs appended to an article helped identify an author's gender, but an author listed as F. Smith did not.

17. My impression, however, is that many secondary authors were women.

18. Compare Stanley S. Surrey, *Income Tax Problems of Corporations and Shareholders—American Law Institute Project—American Bar Association Committee Study on Legislative Revision*, 14 *Tax L. Rev.* 1 (1958) (professor) with Stanley S. Surrey, *The United States Tax System and International Tax Relationships*, 43 *Taxes* 6 (1965) (Assistant Treasury Secretary).

- *Timeliness*—Was the article written about some new development? If it was, did the author write about something triggered by an action taken by Congress, such as a new law or a hearing, an action taken by the Service, such as promulgation of a new ruling or proposal or publication of a regulation, or a decision by a court?
- *Breadth of the article*—What was the scope of the article? The scope could have ranged from the very technical, to the merely technical, to the very general.
- *Taxonomy of the scholarship*—Was the article advisory, descriptive, prescriptive, interpretive, or empirical? Working with the easiest category first, empirical research might result, for example, from a survey of a social science nature, but not from the more traditional, lawyer-like, survey of cases, for example, about unrelated trade or business income of an exempt organization. Interpretive articles assembled material in a particular manner to promote some normative evaluation. All articles tended to interpret particular cases, rulings, facts, etc., but I judged interpretive articles to do this to a much higher degree. Prescriptive articles tended to call for a certain course of action to be taken. I further categorized that call for action by the body that should take action—courts, Congress, or the Internal Revenue Service. Descriptive articles merely described a particular problem, such as “This is what a tax practitioner should think about when one company acquires another.” My research also suggested that some articles were advisory: “These are three things *you* should consider when your client’s company acquires another company, and they are *a*, *b*, and *c*.” As explained below, I characterized the interpretive and prescriptive articles as normative, and the descriptive and advisory articles as doctrinal.<sup>19</sup>

Authors rarely wrote just a descriptive article or an empirical article. I tended to categorize articles as I saw them presenting themselves. I was struck by how almost any topic could be approached in a variety of ways, ranging from the mere presentation of information and thus as a descriptive article, to an advisory article, which told the reader what to do with the information, to an interpretive article, which put the same event into a broad stream of events over a period of time. Thus, articles frequently fell into more than one category.

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19. For taxonomy, see *infra* Part III.D.1. Examples of all four types of article are set forth at notes 73-78. Some of the classifications were divided further, e.g., prescriptive articles were characterized for the degree to which an institutional course of action was suggested, ranging from articles that emphasized the problem and offhandedly suggested that courts, for example, might do something, to articles that explicitly stated that a certain action should be taken and how the appropriate body should act. That line of research did not prove useful, and it has not been included in the article.

Reading these articles led me to discover the breadth of thoughtful articles, many academic and many practical, that have been written, even though this is a judgment not within the systematic analysis of data contained in the sampling.

The data have been presented in a variety of formats, each designed to display the information as sensibly and clearly as possible. Most of the sampled articles were written by lawyers or accountants. But because I was more interested in data about lawyers, I frequently sorted for information only dealing with lawyers and not with a wider base, such as all women or all authors. Sometimes, figures have been set forth annually. In these cases, such as the identity of the authors in Table 2, I thought that an annual summary let a reader see that the first article published by a women author in the sampled articles was published in 1959. In other cases, setting forth data by decade, starting with 1954-1959, 1960-1969, and ending with 1990-1998, was appropriate, because tracking annual changes did not add substantially to a reader's understanding the material. The percentage of doctrinal articles in Table 8 illustrates this approach.<sup>20</sup>

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20. Another benefit of collapsing years into decades is that it better enabled me to test for "statistical significance," viz, whether the "pattern" I observed actually was a pattern or just chance fluctuations that I willed into becoming a pattern. For example, I believed that the proportion of normative articles increased in *Tax Law Review* and *Tax Lawyer* over time, but not in *Journal of Taxation* and *Taxes*, see infra Table 9, a conclusion I base on the 1,520 articles I sampled during that period. Had I read all of the articles in those journals published during that 45 year period (which probably number around 5,000), I could have made, or rejected, this conclusion with certainty. Instead, this conclusion has been tested for and been found to possess statistical significance. In other words, a pattern exists in the sampled material, one that is likely to be repeated if other samples were taken of the same base.

Statistical significance is ascertained for the data assembled for this article through application of the  $X^2$  test. In turn, the  $X^2$  test is generated by cross tabulating data, such as the professions of authors and decades, in Table 6, and creating a "table cell" for the intersection of each job for each decade that contains the count of articles that have both of those attributes. Generally, statistical data is thought to be significant if there is a small likelihood of the results occurring by chance, generally no more than 5%. However, too many empty cells in the cross tabulations can weaken the assertion that the data is statistically significant. Because I collapsed some data into decades, sometimes I was able to apply the  $X^2$  test and thus can state that the data in Table 8 is statistically significant. Since I frequently presented data in more detailed form, e.g., annually, too many cells were created, thereby impeding establishing statistical significance.

The following tables possess statistical significance and few, if any, empty cells: Tables 8, 9, 14. Some other tables are statistically significant, but possess several empty cells. For example, the cross tabulation in Table 2 of year and identity leads to many empty cells because there are many years, few women authors, and even fewer unknown and group authors. By collapsing data further, something commonly done in statistical analysis in order to minimize existence of empty cells, I was able to examine and establish the level of statistical significance for the following tables and under the following conditions: Tables 2 (collapsing years into decades and gender identity into two categories—(i) male and (ii) female, group, and unknown); 3 (same); 6 (collapsing jobs into (i) lawyers and judges, (ii) accountants, and (iii) all others);

As can be gleaned from Table 1, more articles were published in *Journal of Taxation* and *Taxes* than the other two journals. In order to avoid having the results skewed towards *Journal of Taxation* and *Taxes*, tabulations have also been made journal by journal, when appropriate. Finally, I frequently used graphs to visually display information then immediately set forth in following tables. The information set forth in concomitant graphs and tables is identical; it has simply been presented in different forms.

### III. THE SAMPLE

#### A. Data About Tax Journals

Table 1 sets forth the number of articles published, by journal and by year, in order to aid in an understanding of the scope of the sampling. As can be seen, the number of articles per year ranged from 20 to 47, and many more articles were sampled from the journals that published monthly—*Journal of Taxation* and *Taxes*—than the other two, quarterly, journals.

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the tables in note 63 (by collapsing jobs as in Table 6 in the first table and years into decades and jobs as just noted in the latter table); 7 (collapsing years into decades and jobs as in Table 6); 13 (by collapsing areas into (i) Congress, (ii) courts, (iii) Internal Revenue Service, and (iv) all others); 2A (by collapsing identity as in Table 2); 3A (by collapsing years into decades and gender identity as in Table 2); and 4A (by collapsing years into decades and jobs as noted in Table 6).

By collapsing the data for Table 4, I was able to establish the likelihood of the table resulting from chance fluctuations only to about 20%, and many empty cells still remained. Table 5 was statistically significant, but I was unable to eliminate its several empty cells. The frequent presentation of detailed data, such as annual figures, the manipulation of data in the tables as noted, and even the inability to reduce the risk of randomness in Table 4 does not invalidate the findings. I think that detailed presentation underscores much of the material, and thus have chosen to use it regardless of the effect it has on statistical significance. Collapsing the data enables me to test for general patterns as best as possible by accepted statistical standards. And, while Table 4 does not meet the usually accepted maximum 5% risk that randomness prevails and others may find the increased, 20%, risk unacceptable, I am willing to accept it, given the weight of the other data about women. Similarly, I accept Table 5, even though I was unable to avoid its several empty cells.

Table 1. Number of Articles, by Journal and Year<sup>21</sup>

<u>Year</u>	<u>J. Tax'n</u>	<u>Taxes</u>	<u>Tax L. Rev.</u>	<u>Tax Law.</u>	<u>Total</u>
1954	1	16	3		20
1955	9	14	5		28
1956	11	14	3		28
1957	19	13	4		36
1958	19	13	5		37
1959	19	13	4		36
1960	16	10	3		29
1961	21	13	4		38
1962	16	21	3		40
1963	20	11	6		37
1964	7	9	4	1	21
1965	19	12	4	1	36
1966	16	12	3	5	36
1967	14	11	4		29
1968	17	18	3	2	40
1969	16	10	1	5	32
1970	16	11	3	3	33
1971	20	10	1	5	36
1972	15	10	4		29
1973	17	12	1	6	36
1974	16	16	2	3	37
1975	15	9	2	6	32
1976	17	15	2		34
1977	15	13	4	4	36
1978	15	16	2	7	40
1979	16	19	3	8	46
1980	19	19	3	6	47
1981	15	16	4	6	41
1982	18	13	2	3	36
1983	15	14	2	4	35
1984	14	16	3	4	37

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21. *Tax Lawyer* was first published in 1947, but the blanks in its column through 1963 and in a few later years reflect the journal's failure to publish articles in the sampled issues. Instead, the *Tax Lawyer* served as more of a house organ, setting forth material such as proceedings of the A.B.A. Section of Taxation. Articles were published in the *Tax Lawyer* thereafter, so that subsequent blanks reveal a particular issue's devotion to the Section's activities and the exclusion, in that issue, of more traditional articles. Similarly, the blank in *Tax Law Review's* column in 1998 indicates that it had not published an issue for 1998 at the time of this article's publication.

<u>Year</u>	<u>J. Tax'n</u>	<u>Taxes</u>	<u>Tax L. Rev.</u>	<u>Tax. Law.</u>	<u>Total</u>
1985	15	17	3	4	39
1986	14	21	4	2	41
1987	11	15	3	3	32
1988	12	12	3	4	31
1989	13	12	4	3	32
1990	12	14	3	3	32
1991	12	9	2	4	27
1992	13	17	5	5	40
1993	15	8	3	5	31
1994	12	9	3	3	27
1995	14	8	3	2	27
1996	12	8	4	5	29
1997	13	8	5	5	31
<u>1998</u>	<u>13</u>	<u>7</u>	<u>—</u>	<u>3</u>	<u>23</u>
Total	664	584	142	130	1520

The data is analyzed below for a variety of trends.

#### B. Literature and Data About Women

1. *Observations About Women, Careers, and Publishing.*—A substantial amount of literature documents the difficulty women have establishing themselves in the legal profession. Women, and members of minority groups, did not appear in substantial numbers in law schools until the late 1960s. Until then, most law students were white men. But others—white women and all minorities—began to make inroads.<sup>22</sup> Similarly, at one point, few women were law school professors. One author documents the rise in the number of women law school professors from 14 women total in 1960, up to 2% of tenure track professors in 1967.<sup>23</sup> Women, whether student, professor, or lawyer, tended to be isolated, given their small numbers.<sup>24</sup> This older generation of women entering law were outsiders.<sup>25</sup>

While women form larger percentages of students, faculty, and practicing lawyers than they used to,<sup>26</sup> they still fail to match their broader

22. See Cynthia Fuchs Epstein, *Women in Law* chs. 3, 4 (2d ed. 1993).

23. Deborah Jones Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. Ill. L. Rev. 93 (1995). See also Herma Hill Kay, *The Future of Women Law Professors*, 77 Iowa L. Rev. 5 (1991) (recounting early days of women law school teachers).

24. See, e.g., Epstein, *supra* note 22, at chs. 3, 4, 5 (especially pp. 61-70).

25. *Id.* at 60-61.

26. See, e.g., A.B.A., *Official American Bar Association Guide to Approved Law Schools* 1999 Edition 455 (Rick L. Morgan & Kurt Snyder eds. 1998) (in fall 1997, 43% of all

demographic presence. In teaching, they still tend to be marginalized by teaching at less prestigious schools, by entering teaching at lower ranks, and by teaching less attractive courses than men.<sup>27</sup> In practice, the importance of larger firms has increased over time; the greatest number of lawyers may still be sole practitioners, but that segment of practice is smaller than it used to be, and the percentage of lawyers engaged in a large firm practice has increased.<sup>28</sup> Furthermore, women in practice tend to be younger than their male counterparts<sup>29</sup> and are less likely to be partners in these larger firms.<sup>30</sup> Many women avoid practice in firms; they tend to cluster, for example, in government work.<sup>31</sup>

Additionally, women lawyers have lagged behind in assumption of positions of leadership in the bar. For example, women participated more than their percentages of membership in the American Bar Association would have suggested on the Board of Governors of the ABA, one of three types of leadership positions in the ABA, but less in the other two, the House Delegates and the

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full-time law school students were women and 29% of all full-time law school teachers were women); Merritt, *supra* note 23, at 95 (women comprised roughly 38% of law school teachers between 1986-1991, and were 38% of student population from 1981-1983); A.B.A., Comm'n on Women in the Profession, Goal IX Report Card 2 (1998) [hereinafter GOAL IX Report Card] (for preceding 5 years, women comprised about 25% of A.B.A. members); Barbara A. Curran & Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in the 1990s* 1-6 (1994) (discussing gender composition of lawyers, with percentage of women lawyers expected to rise to 27% by 2000).

27. See Merritt, *supra* note 23, at 100-01; Barbara A. Curran, A.B.A., Comm'n on Women in the Profession, *Women in the Law: A Look at the Numbers* 13-16 (1995) (places women in a greater breadth of professional settings); Linda R. Hirschman, *Battle of Sexes Rages in Law Schools*, 21 Nat'l L.J. A20 (August 23, 1999) (current review of women's status at law schools).

See Merritt, *supra* note 23, at 99. Constitutional law is an "attractive" course, while legal writing and trial advocacy are not. Merritt has no position on the interest tax generates, but does characterize its cousin, trusts and estates, as another unattractive course. But see Caron, *supra* note 7, at 524 n. 20 (high status accorded tax). See *infra* Table 12 (major topics of articles by gender of author).

28. See A.B.A., Comm'n on Women, *Women in the Law*, *supra* note 27, at 14-15; Curran & Carson, *supra* note 26, at 15-26.

29. See A.B.A., Comm'n on Women, *Women in the Law*, *supra* note 27, at 11-12; Curran & Carson, *supra* note 26, at 4-6, 11-14.

30. See A.B.A., Comm'n on Women, *Women in the Law*, *supra* note 27, at 27, 21-28; Curran & Carson, *supra* note 26, at 13; see also Ann J. Gellis, *Great Expectations: Women in the Legal Profession*, A Commentary on State Studies, 66 Ind. L.J. 941, 945 (1991).

For an equally grim sociological assessment of law firms and women's marginalization in them, see generally John Hagan & Fiona Kay, *Gender in Practice: A Study of Lawyers' Lives* (1995).

31. See, e.g., Epstein, *supra* note 22, at ch. 7 (discussing women lawyers in government practice).

Nominating Committees.<sup>32</sup> (To compound matters, as of 1998, the Section of Taxation was one of the few remaining ABA sections that had never had a woman chair.<sup>33</sup> Women, however, have assumed some other positions of leadership in the Section, e.g., on the Section Council and its Nominating Committee.<sup>34</sup>)

Several reasons have been assigned for women's continued marginalization in practice. Growth in the profession has been generated primarily through the numbers of women who have become lawyers. Thus, the ascendance of large firms has been fueled by the increased numbers of women practicing law.<sup>35</sup> Because women are less likely to have mentors than men, they frequently have less challenging assignments at their law firms and become even less likely to become rainmakers.<sup>36</sup> The school and social ties that have been important for advancing the careers of men are less important for women.<sup>37</sup> Women are also more likely to leave a practice which, at a large firm, is likely to be from the less desirable employee status of associate, and not from the narrower group of partner-owners.<sup>38</sup> Personal choices, such as childbearing and parenting, have an adverse impact upon professional advancement as well.<sup>39</sup>

In some ways, academia offers no greater solace for women. Some recent studies indicate that university men outside law schools are more likely to publish articles than similarly situated women. Another set of studies, while focusing more on publishing and less on academia, addresses law, and also indicates the preponderance of men in publishing.<sup>40</sup> The good news for women is that

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32. See Goal IX Report Card, *supra* note 26, at 2. Epstein, *supra* note 22, at 250, suggests that women lawyers, unlike other women professionals, have joined bar associations in numbers proportionate to their professional presence.

33. See Goal IX Report Card, *supra* note 26, at 8. But see Karen Hube, Tax Report, *Wall St. J.*, Jan. 27, 1999, at A1 (first woman, Pamela F. Olson, nominated to head Tax Section in 2000).

34. See Goal IX Report Card, *supra* note 26, at 8-15.

35. See Hagan & Kay, *supra* note 30, at 43-48 (discussing how the structure of the legal profession changed between 1977 and 1990); Epstein, *supra* note 22, at ch. 11 (discussing women's entrance into prestigious law firms).

36. See generally Cynthia L. Rold, *Women and Law*, 1995 U. Ill. L. Rev. 105 (1995); Elizabeth K. Ziewacz, Comment: Can the Glass Ceiling Be Shattered?: The Decline of Women Partners in Large Law Firms, 57 *Ohio St. L.J.* 970 (1996).

37. See generally Hagan & Kay, *supra* note 30, at ch. 4 (discussing the factors that prevent women from attaining partnership status); Epstein, *supra* note 22, at ch. 11 (discussing women in prestigious law firms).

38. See Hagan & Kay, *supra* note 30, at 35-42; (discussing hierarchy in law firms).

39. See *id.* at 76-77, 91 ("having a family can be an asset for men and a liability for women"), 92-95, 104-12; Ziewacz, *supra* note 36, at 986-89.

40. Compare Elizabeth G. Creamer, *Assessing Faculty Publication Productivity: Issues of Equity* (1998) (broad study of publication productivity) and Yu Xie & Kimberlee A. Shauman, *Sex Differences in Research Productivity: New Evidence About an Old Puzzle*, 63



statistics about women publishing are not as bad as they once were. The bad news, however, is that statistically women are still not as productive as men.<sup>41</sup>

One study about the scholarly productivity of scientists suggests that women scientists are less likely to be productive than their male counterparts.<sup>42</sup> Reexamining broad studies from the past, the authors, Professors Xie and Shauman, concluded that the relative ratio of women's to men's production increased from 60-65% in 1969 to 75-80% in 1993.<sup>43</sup> They do not believe that this gap can be explained by gender. Some aspects of the gap may result from marriage, which is more likely to benefit men than women,<sup>44</sup> and "women's extra family responsibility associated with childbearing . . . reaffirms the importance of structural sources of gender inequality in science: Women and men scientists are located in different academic structures with differential access to valuable resources."<sup>45</sup>

In another, broader-based, study, Professor Creamer examines publishing productivity in a variety of academic disciplines.<sup>46</sup> She also concludes that women are publishing more than they used to, but that they still publish less than men do; they have closed the gap when measured over a short term more than when measured of an entire career.<sup>47</sup> Like Professors Xie and Shauman, she also

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Amer. Soc. Rev. 847 (1998) (study of scientists) with Symposium on Trends in Legal Citations and Scholarship, 71 Chi.-Kent L. Rev. 743 (1996) (discussing trends in demographics in legal scholarship and publishing).

41. More good news for law school teachers is that they argue about the same things as other professors, such as how to measure scholarship. Compare Landes & Posner, *supra* note 3, at 826 (discussing methods of studying legal scholarship), with Xie & Shauman, *supra* note 40, at 849 (scholarship of scientists) and Creamer, *supra* note 40, at 5-7 (discussing the criteria used to study publishing productivity).

42. See Xie & Shauman, *supra* note 40, at 863. Xie and Shauman chose to measure this productivity on a short-term basis, not over a scientist's entire career, because they believed that women were more likely to withdraw from teaching on a short-term basis than men. By not examining production over an entire career, they believed they were better able to isolate variables that could account for scholarly production. See *id.* at 849-50.

43. See *id.* at 863.

44. See *id.* (making the observation that "[t]here is very little *direct* effect of sex on research productivity."); *id.* at 859-60 (discussing aspects of the gap).

45. *Id.* at 864. As women entered the labor force and academic institutions in increasing numbers and the gender differences in teaching loads have diminished, women have become more prolific authors.

The disadvantage with which women have worked at universities is echoed in law schools. For an account of the difficulty women have had in obtaining equal academic rank to men with respect to both entry-level and tenured faculty appointments as opposed to some lesser status such as "research assistant" or "research fellow," see Epstein, *supra* note 22, at 224-29; Kay, *supra* note 23, at 9-10.

46. Some of the fields Professor Creamer examined include accounting, physical education, science, and social science. See Creamer, *supra* note 40, at 5-8.

47. See *id.* at 8, 15.

believes that productivity in publishing has less to do with individual qualities, such as the desire to write, and more to do with institutional or environmental factors, such as work assignments, funding for research, or the network necessary to publish scholarly articles, at least outside law.<sup>48</sup> She also describes the mixed authority about the effect of marriage and child rearing on women's publishing productivity, although she notes that family responsibilities never make publishing easier.<sup>49</sup> She believes that other factors have a gender impact. For example, men tend to cite other men more in their research, and women tend to cite other women more; gatekeepers, who enable others to publish, tend to be men.<sup>50</sup>

Chicago-Kent Law School devoted a recent issue of its law review to a symposium about legal citations and scholarship. In the symposium, Fred Shapiro updated his earlier study of the most cited law review articles.<sup>51</sup> He and others note that the dearth of women on the earlier list and their increased presence, as well as the increased presence of minority scholars on the list, means that these outsiders have become insiders. They disagree as to the meaning of the change in status,<sup>52</sup> but some of the conclusions that can be drawn from the symposium articles echo the experience of women academicians teaching outside law school. They have improved their lot, but not necessarily in proportion to their numbers; they tend to teach at less prestigious schools, and thus might expect to be rewarded less for scholarship than those—men—who tend to teach at more prestigious schools.<sup>53</sup>

2. *Data About Women in Fields Associated With Tax.*—What does the data about the sampled articles say about women writers in the sampling? The following table indicates the character of authors of all 1,520 articles by percentage annually—what percentage were women, men, groups or individuals

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48. See *id.* at 47-61. But cf. J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 *Chi.-Kent L. Rev.* 843 (1996).

49. See Creamer, *supra* note 40, at 26-27, 67.

50. See Creamer, *supra* note 40, at 40-41, 53-54.

51. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 *Chi.-Kent L. Rev.* 751 (1996).

52. See *id.* at 757-59 (outsiders have become insiders); Frances Olsen, *Affirmative Action: Necessary But Not Sufficient*, 71 *Chi.-Kent L. Rev.* 937 (1996) (inside status notwithstanding, women still suffer at law schools); William N. Eskridge, Jr., *Outsider-Insiders: The Academy of the Closet*, 71 *Chi.-Kent L. Rev.* 977 (1996) (outsiders based on sexual orientation have yet to come inside). See also Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 *Chi.-Kent L. Rev.* 871, 895-97 (1996) (authors contrast citations by articles and by courts, and note smaller percentage of women authors on their list of articles cited by courts).

53. See generally Olsen, *supra* note 52.

whose gender could not be identified. Thus, all authors whose articles were published in 1954 were men.

**Table 2. Identity of Authors by Year**

<u>Year</u>	<u>Female</u>	<u>Male</u>	<u>Group</u>	<u>Unknown</u>
1954		100%		
1955		100%		
1956		96%		4%
1957		100%		
1958		97%		3%
1959	3%	97%		
1960	3%	93%	3%	
1961		100%		
1962		98%		3%
1963		100%		
1964		95%		5%
1965		100%		
1966	3%	97%		
1967		100%		
1968		100%		
1969		97%	3%	
1970	3%	91%	3%	3%
1971	3%	97%		
1972	7%	93%		
1973	3%	92%	3%	3%
1974	3%	93%		
1975		100%		
1976		100%		
1977	8%	86%	6%	
1978	3%	93%	5%	
1979		96%	4%	
1980		94%	4%	2%
1981	10%	88%	2%	
1982	3%	94%		3%
1983	11%	89%		
1984	11%	89%		
1985	13%	87%		
1986	2%	95%		2%
1987	9%	88%	3%	
1988	16%	84%		
1989	6%	94%		
1990	3%	97%		

<u>Year</u>	<u>Female</u>	<u>Male</u>	<u>Group</u>	<u>Unknown</u>
1991	19%	78%	4%	
1992	5%	95%		
1993	13%	84%	3%	
1994	19%	82%		
1995	4%	96%		
1996	14%	86%		
1997	16%	81%		3%
<u>1998</u>	<u>13%</u>	<u>83%</u>	—	<u>4%</u>
Total	5%	94%	1%	1%

These statistics indicate that women in the sampled literature have tended to publish more over time, with the trend beginning in the 1970s. The climb, however, has not been a focused one. While highwater marks of 19% were reached in 1991 and 1994, 1991 was sandwiched between two years reminiscent of the 1970s, when only 3 and 5% of all authors sampled were women and 1994 was followed by a year in which 4% of all sampled authors were women.

Nor does the distribution of the gender of authorship by journal reveal a cluster of women authors in any one of the four journals. The greatest percentage of female authors published in any one journal was in *Taxes*—7%—and the lowest percentage was in the *Journal of Taxation*—3%. But neither figure varies significantly from the overall percentage of women authors in all journals over all 45 years—5%.<sup>54</sup>

This information becomes more meaningful when contrasted with the percentage of women in other, relevant, groups set forth in Tables 3 and 4. Table 3 sets forth two figures: (i) the percentage of women in the sampling who either were lawyers or judges and (ii) the percentage of women who were lawyers or judges in the population at large. The latter information did not come neatly packaged, and some information related more easily to the sampling than others.<sup>55</sup> The American Bar Foundation and the Department of the Census provide information, but not over each year of the year span of the sampling. Consequently, the baseline I have used for comparison are figures provided by the Department of Labor's Bureau of Labor Statistics. The Bureau's information is for employed lawyers and judges. Figures about the percentage of employed "lawyers and judges" were first made available in 1962.<sup>56</sup> The percentage in the

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54. See *infra* Appendix Table 2A.

55. The Taxation Section of the A.B.A. apparently has not published information about the gender of its members. If available, such information obviously would have been useful.

56. The statistics about women lawyers and judges in the general population have been compiled from published and unpublished data from the Bureau, and the unpublished information is on file with the author. The Bureau aggregated lawyers and judges in some years,

middle column represents that percentage of all lawyer or judge authors in the sampled literature who were women. Thus, in 1996, only 25% of authors who were lawyers or judges were women, while 29% of all lawyers and judges counted by the Bureau of Labor Statistics were women.

**Table 3. Women Lawyer/Judge Authors in Sample  
and Women Lawyer/Judges in Population at Large, by Year**

<u>Year</u>	<u>% Women Lawyer/Judge Authors</u>	<u>% Women per BLS</u>
1954	0%	
1955	0%	
1956	0%	
1957	0%	
1958	0%	
1959	0%	
1960	0%	
1961	0%	
1962	0%	3%
1963	0%	2%
1964	0%	2%
1965	0%	4%
1966	5%	3%
1967	0%	3%
1968	0%	3%
1969	0%	3%
1970	8%	4%
1971	4%	4%
1972	8%	4%

and not in others. While it seems reasonable to believe that the proportion of tax lawyers who are judges is less than the proportion of general lawyers who are judges, for consistency, I used the figures for lawyers and judges for all 36 years for which figures were available because these figures were the only ones available for several years.

One published source, however, is *Employment & Earnings*, a monthly publication of the Department of Labor, Bureau of Labor Statistics, in which annual statistics are published for each year in the January issue of the following year. See, e.g., Bureau of Labor Statistics, Department of Labor, No. 45 *Employment & Earnings* 174 (1998) (1997 figures); Bureau of Labor Statistics, Department of Labor, No. 31 *Employment & Earnings* 178 (1984) (1983 figures). Another is the Bureau of Labor Statistics web site, which, when this article was published, set forth figures from 1995 on. See Bureau of Labor Statistics home page (visited Sept. 30, 1999) <ftp://ftp.bls.gov/pub/special.requests/lf/>.

For comparison of the Bureau of Labor Statistics, the Census Bureau, and Foundation methods of counting lawyers, see Barbara A. Curran, *Comm'n on Women in the Profession*, A.B.A., *Women in the Law: A Look at the Numbers* 1-2 (1995).

<u>Year</u>	<u>% Women Lawyer/Judge Authors</u>	<u>% Women per BLS</u>
1973	0%	6%
1974	0%	7%
1975	0%	7%
1976	0%	9%
1977	7%	10%
1978	0%	9%
1979	0%	12%
1980	0%	13%
1981	12%	14%
1982	3%	15%
1983	13%	16%
1984	5%	16%
1985	11%	18%
1986	0%	18%
1987	5%	20%
1988	5%	19%
1989	5%	22%
1990	0%	21%
1991	18%	19%
1992	3%	21%
1993	10%	23%
1994	16%	25%
1995	0%	26%
1996	25%	29%
1997	17%	27%
1998	13%	29%

With a few exceptions, such as 1966, 1970-1972, 1981, 1983, 1991, and 1996, the percentage of women lawyer/judge authors in the sample lagged behind, sometimes substantially, the percentage of lawyers who were women, according to the Bureau of Labor Statistics.<sup>57</sup>

Table 4 sets forth information about women law professors in the sampling and in the population at large. The middle column represents that portion of authors in the sampled articles who were law school professors and

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57. Thirty-nine of the authors in the sample were women lawyers or judges. The Bureau grouped accountants and auditors in most years. See *infra* note 106. Because the Bureau figures indicate that the percentage of accountants and auditors who were women was even higher than the percentage who were lawyers and judges, the lag between women in the population at large who were accountants or auditors is even greater when compared to the percentage of authors in the sampled literature who were women accountants. For the figures regarding accountants and auditors, see Appendix Table 3A.

also were women. Therefore, for example, none of all articles written by law school professors in 1988 were written by women (and all were written by men). The third column consists of the percentage of women law professors according to the American Bar Association. Again, the information was limited, here from 1987-1998, because of the shorter period of time for which the American Bar Association has kept records about women law professors than the information that is available from the Bureau of Labor Statistics.<sup>58</sup>

**Table 4. Women Law Professor Authors in Sample and Women Law Professors at Large, by Year**

<u>Year</u>	<u>% Women Law Professor Authors in Sampling</u>	<u>% Women Law Professors per ABA</u>
1987	50%	20%
1988	0%	23%
1989	17%	24%
1990	0%	25%
1991	0%	26%
1992	0%	27%
1993	0%	29%
1994	25%	26%
1995	0%	27%
1996	67%	28%
1997	33%	29%
1998	33%	29%

There is no clear pattern. Earlier on, women law school professor tended to publish at lower percentages than their presence in law schools generally would have suggested and, in the last four to five years, have published as much as or more than their presence generally would suggest.

Other statistics can be gleaned about women and men, if comparisons to populations at large for lawyers or judges and for law school professors are set aside. For example, 36% of all articles in the sampling written by female lawyers and judges were written by law school professors; in contrast, only 14% of all articles in the sampling written by male lawyers or judges were written by

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58. This information was provided by the A.B.A., Office of the Consultant. Because data was self-reported until 1994, one school may have counted women differently than men, and so the earlier information may not be uniform. Nor was information was not available before 1987. Eight women law professors were authors in the sample from 1987 through 1998, and six were women in all prior years of the sample. But cf. Merritt, *supra* note 23, at 95 (larger percentage of women comprise law school professors than noted in Table 4, but she used her own research, not A.B.A.'s).

law school professors. Women law school professors were also more likely to publish in the more academic journals than men law school professors. Table 5 indicates what percentage of articles in the sampling in each of the four journals were written by women and men law professors. Thus, 7% of all articles by women lawyers or judges published in *Journal of Taxation* were written by women law professors; the comparable percentage for men was only 6%.

**Table 5. Comparison of Authors Who Were Law School Professors, by Gender and Journal<sup>59</sup>**

<u>Journal</u>	<u>Of Authors in Journal Who Were Law School Professors, % Who Were Women</u>	<u>Of Authors in Journal Who Were Law School Professors, % Who Were Men</u>
J. Tax'n	7%	6%
Taxes	29%	11%
Tax L. Rev.	83%	44%
Tax Law.	80%	22%

In addition to publishing in greater percentages in the sampled literature than their percentages in the population of law school professors at large would suggest, women law professors also have published in greater percentages than men law professors and also seem to have published in greater percentages than in the two more scholarly journals, *Tax Law Review* and *Tax Lawyer*.

3. *Conclusions.*—Tables 2-4 sets forth the presence of women in a variety of settings—as a percentage presence in the practice of law, as a presence in law schools and, most importantly, as a presence in the sampling as the authors of articles by these two measures. Although there are some years in which the percentages of lawyer or judge authors who were women equaled or exceeded the percentage of lawyers or judges in the population at large who were women and other years in which there was no significant difference between the two, once women entered the legal profession in the late 1970s in greater numbers, according to Bureau of Labor Statistics figures, they usually did not publish in proportion to these numbers. Thus, the trend has been that the percentage of women lawyers and judges who have published tax articles has been less, sometimes dramatically so, than the percentage of women who practice law or are judges. Until the last few years, a similar statement could be made when contrasting the percentage of law professors who were women publishing in the sampled journals to the percentage of women law professors generally. In the last few years, the percentage of women law professors in the sample has been in proportion to, and even exceeded, the proportion of law professors

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59. In the sample 14 women and 131 men were law school professors.



generally who were women. The sampling of tax articles written by lawyers is consistent with the literature and studies, but the recent trend in the sampled tax articles written by law school professors is not. Furthermore, Table 5 indicates that authors in the sampled literature who are women and either a lawyer or a judge were more likely to be law school professors than men authors who were a lawyer or a judge. Female law school professors were also more likely to publish in the more scholarly journals in the sample than their male counterparts.

Further research might illuminate whether institutional and environmental factors that have led to women lawyers not rising as high as men in law or publishing have led to their publishing tax articles less than men, and why they have been more successful in publishing if they were women law professors. The importance attached to publishing frequently and publishing well might lead women authors to try to avoid the less scholarly journals included in this sample, even though one of these lesser journals, *Taxes*, included a higher percentage of women among its authors than any of the other journals. Arguably, they are more at risk than men, especially white men, who are more entrenched in law firms and law schools, and thus need to achieve more than men. But it seems hard to believe that such over achieving women should congregate in law schools and avoid practicing law.

### C. Literature and Data About the Professions of Those Who Write Tax Articles

1. *Observations About Tax Practice.*—The practice of tax has shifted from law to accounting firms in recent years. As said of one lawyer who departed from a law firm to a Big Six accounting firm, he was “yet another in the stream of lawyers leaving law firms for CPA firms for the familiar triad of reasons: more money, fewer chargeable hours required, and no material client development responsibilities.”<sup>60</sup> Additional stimuli for the change include the statutory extension of privileged communications with clients to certified public accountants in 1998<sup>61</sup> and a growing amount of Tax Court litigation conducted by accounting firms.<sup>62</sup>

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60. Sheryl Stratton, *Top Tax Litigator Leaves Law Firm For Big Six CPA Firm*, 79 *Tax Notes* 683 (May 11, 1998). See also Ass'n of Am. Law Schools, 1999 Annual Meeting Program 89-90 (1999 AALS Tax Section meeting examined consequences of growing influence of accounting firms practicing tax law); Lisa Brennan, *Baker & McKenzie Taxed By Brain Drain*, 21 *Nat'l L.J.* at A13 (May 31, 1999) (describes firm's loss of “nine prominent tax partners” to Big Five accounting firms in six month period).

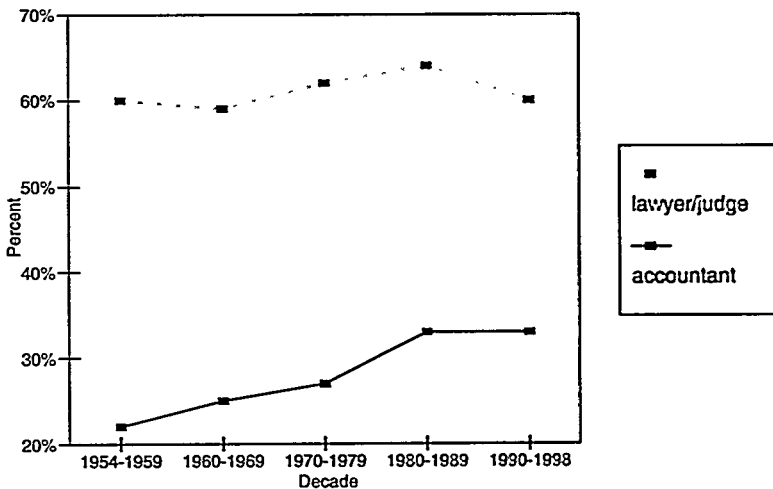
61. IRC § 7525, enacted as part of Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3411, 112 Stat. 685, 750 (1998). Section 7525 applies to persons subject to 31 U.S.C. § 330. In turn, that section includes certified public accountants. See S. Rep. No. 105-174, at 70 (1998).

62. See, e.g., Sheryl Stratton, *More Big Five Attorneys Appearing in Court Than Before MDP Commission*, 82 *Tax Notes* 779 (Feb. 8, 1999). The push towards multidisciplinary practice affects much more than the practice of tax law. See, e.g., *Testimony of Stefan F.*

2. *Data About the Professions of Authors of Tax Articles.*—The observations that tax practice is being handled more by accountants and less by lawyers was tested against data from the sampling. In order to avoid skewing the results towards lawyers, the data was drawn from the two journals more likely to favor accountants, *Journal of Taxation* and *Taxes*. The other two journals, published respectively by a law school and the American Bar Association, arguably are primarily intended for an audience of lawyers.

The trend of tax practice towards accountancy notwithstanding, authors in the sampling have tended to be lawyers or judges. Graph 1 sets forth visually the percentage of articles in each decade written by lawyers or judges and by accountants in *Journal of Taxation* or *Taxes*, whether they were engaged in practice or taught at law or business schools. Table 6 does this in more detailed form. The percentages given are relative to all authors engaged in the same type of job so that, for example, from 1954-1959, only 18% of the authors sampled were something other than lawyers or judges, on the one hand, or accountants. Members of this minority might have been others professors, such as an economics professor, or a student.

**Graph 1. Authors in Sample in *Journal of Taxation* and *Taxes*  
Who Were Lawyers or Accountants, by Decade**



**Table 6. Authors in Sample in *Journal of Taxation* and *Taxes* Who Were Lawyers or Accountants, by Decade<sup>63</sup>**

<u>Decade</u>	<u>Lawyer/Judge</u>	<u>Accountant</u>
1954-1959	60%	22%
1960-1969	59%	25%
1970-1979	62%	27%
1980-1989	64%	33%
1990-1998	60%	33%

On a more academic side, Graph 2 visually sets forth comparisons in each decade between the percentage of sampled articles from all four journals which were written by academicians, comparing the percentage of those academicians in each year who either taught at a law school or at a business

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63. 664 articles from the *Journal of Taxation* were included in the sampling, and 584 from *Taxes*. Of these, 763 authors were lawyers or judges, and 353 were accountants. Nor do accountants fare better if articles by them and lawyer/judges are drawn from all four journals. Then the statistics are as follows:

<u>Decade</u>	<u>Lawyer/Judge</u>	<u>Accountant</u>
1954-1959	65%	19%
1960-1969	61%	22%
1970-1979	64%	23%
1980-1989	69%	27%
1990-1998	66%	27%

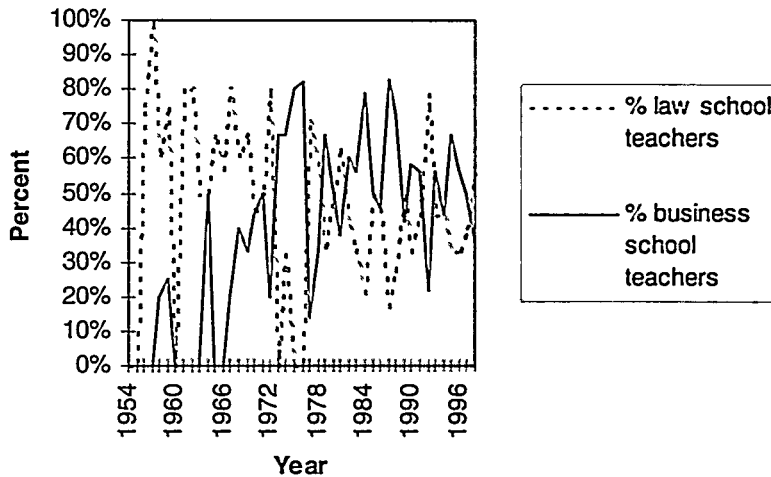
Again, these are percentages relative to all authors in the sampling. From 1954-1959, for example, 16% of the authors were neither lawyer/judges nor accountants.

And, even if one examines recent *Journal of Taxation* and *Taxes* annually, e.g., since 1989, accountants still do not fare as well as the literature suggests. They seem to have written about a third of sampled articles each year, sometimes more, sometimes less, and the proportion of published articles written by accountants contained in the sampling has not inevitably increased over the decade, as the following table suggests.

<u>Year</u>	<u>Lawyer/Judge</u>	<u>Accountant</u>
1989	60%	36%
1990	69%	31%
1991	57%	38%
1992	77%	17%
1993	57%	39%
1994	67%	29%
1995	41%	50%
1996	50%	35%
1997	52%	38%
1998	60%	30%

school. Table 7 repeats this information in a more detailed fashion. Thus, in years such as 1967, professors at law and business schools wrote all the articles and in years such as 1970, other academicians, perhaps an economics professor, possibly a student, wrote articles among the sampled literature as well.

**Graph 2. Academic Authors Who Were Law or Business School Teachers, by Year**



**Table 7. Academic Authors Who Were Law or Business School Teachers, by Year**

<u>Year</u>	<u>% Law School Teachers</u>	<u>% Business School Teachers</u>
1954	0	0
1955	0	0
1956	75%	0
1957	100%	0
1958	60%	20%
1959	75%	25%
1960	0	0
1961	80%	0
1962	80%	0
1963	50%	0
1964	50%	50%
1965	67%	0

<u>Year</u>	<u>% Law School Teachers</u>	<u>% Business School Teachers</u>
1966	57%	0
1967	80%	20%
1968	60%	40%
1969	67%	33%
1970	44%	44%
1971	50%	50%
1972	80%	20%
1973	0	67%
1974	33%	67%
1975	0	80%
1976	0	82%
1977	71%	14%
1978	58%	33%
1979	33%	67%
1980	50%	50%
1981	63%	38%
1982	40%	60%
1983	33%	56%
1984	21%	79%
1985	50%	50%
1986	46%	46%
1987	17%	83%
1988	27%	73%
1989	50%	42%
1990	33%	58%
1991	44%	56%
1992	78%	22%
1993	44%	56%
1994	44%	44%
1995	33%	67%
1996	33%	56%
1997	38%	50%
<u>1998</u>	<u>55%</u>	<u>36%</u>
Avg. %	45%	47%

In contrast to lawyer and accountant contributions to these journals, law school teacher articles declined and business school teacher articles increased, with few exceptions, over time.<sup>64</sup>

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64. 328 of the authors were academicians, of whom 146 taught at law schools and 154 taught at business schools. If the only journals reviewed are *Journal of Taxation* and *Taxes*, the

3. *Conclusions.*—The increased practice of tax law by accountants notwithstanding, lawyers in the sampled articles wrote and continue to write more than accountants have. It seems unlikely that lawyers are more adept at generating business or more academically inclined than accountants, either of which could generate articles. One possible explanation is that the shift has been so recent and sudden that it has not registered in the literature. It seems equally arguable that the developments prompting the shift could not occur overnight. Neither the accounting firms who entice them, nor the lawyers who have been seduced, suddenly realized, sometime after 1998, that better money, billable hours and client development could persuade the lawyers to work for accounting firms.

Another possibility is that law has been held in higher esteem than accounting by people interested in tax during the period of the sampling. Although I cannot document my conclusion, many authors in the sample were both lawyers and accountants, but almost invariably the author's status as a lawyer preceded mention of his status as an accountant. My impression of the sampled articles is that only in later years of the sampling, and then only occasionally, did the reverse occur. This could account for lawyers having always been more productive authors than accountants in the sampling.

In contrast, the percentage of law school teachers in the sampled articles declined over time—even more if the articles are drawn just from *Journal of Taxation* and *Taxes*—even as the percentage of business school teachers increased. I believe that presumably rising standards of tenure at law schools accounts for the declining percentages of sampled articles written by law school teachers in these two journals.<sup>65</sup> An increased distance between law school tax teachers and tax lawyers may also account for this trend, as might a decreased distance between business school teachers and tax accountants.

#### D. *Literature and Data About Tax Scholarship*

The third area for inquiry encompasses other aspects of the tax scholarship revealed by the sampling. First, what is the taxonomy of the

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same question—what were the percentages of authors who were law school or business school teachers—shows an even more dramatic tilt towards the latter teachers. Those results are set forth in the Appendix, in Graph 1A and Table 4A.

65. Cf. Richard A. Posner, *Legal Scholarship Today*, 45 *Stan. L. Rev.* 1647 (1993) (widening gap between practitioners and law school teachers); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *Mich. L. Rev.* 34 (1992) (same). But see Livingston, *supra* note 7, at 375 (tax authors of whom he writes, able to make their scholarship accessible to practicing lawyers). I cannot begin to address personnel standards at business schools and, indeed, often have difficulty determining them at law schools, including my own.

scholarship: were the articles, e.g., doctrinal, normative, empirical? Second, what were the subject matters of the articles? Finally, were there any discernable trends in the institutions—be they Congress, the Internal Revenue Service, or courts—about which authors wrote?

### 1. *Taxonomy of Tax Scholarship*

a. *Observations About the Taxonomy.*—Scholarship, including tax scholarship, can be characterized in many ways. It may be practical, for which any number of treatises are good and obvious examples.<sup>66</sup> And it may be less practical. For example, scholarship might promote a particular course of action to remedy a perceived infirmity in the law. Both a practical and a prescriptive article could be interesting to a practicing lawyer, but she presumably would find a practical article more useful, because it would more easily enable her to advise a client than a merely prescriptive article.

Judge Richard Posner wrote about the three types of legal scholarship he perceived—doctrinal, positivist, and a new normativist scholarship.<sup>67</sup> Doctrinal scholarship might be understood to be analogous with what, and how, students learn in law school. “It involves the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis.”<sup>68</sup> In turn, positivism entails a seemingly scientific, or more probably a social scientific method of analyzing law. It encompasses any number of “law and . . .,” the best known of which is law and economics.<sup>69</sup> Normativism evaluates legal doctrine, and thus might analyze “discrimination, including reverse discrimination, the ethical basis of contract and tort law,” and so on.<sup>70</sup> Solutions for the

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66. See, e.g., Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* (6th ed. 1994); Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* (2d ed. 1989).

67. See generally Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 *Yale L.J.* 1113 (1981) (discusses three types of scholarship, while conceding “that my taxonomy is crude, the categories both incomplete and overlapping”). See also Posner, *supra* note 65 (further discussion of scholarship, especially doctrinal scholarship); Edwards, *supra* note 65, at 35 (“‘Practical’ scholarship, as I envision it, is not wholly doctrinal . . . . Ideally, the ‘practical’ scholar always integrates theory with doctrine.”).

68. Posner, *supra* note 67, at 1113.

69. *Id.*, at 1119-25. See also William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 *J. L. & Econ.* 385 (1993).

70. See Posner, *supra* note 67, at 1127 (footnotes omitted). See generally Symposium, 139 *U. Pa. L. Rev.* 801 *et. seq.* (1991) (discusses normativism); Pierre Schlag, *Normative and Nowhere to Go*, 43 *Stan. L. Rev.* 167 (1990) (same); Livingston, *supra* note 7 (discusses current state of tax scholarship and ways in which to improve it).

deficiencies in these doctrines are promoted, e.g., through a proposed change in the law.<sup>71</sup>

b. *Data About the Taxonomy*.—Nomenclature for scholarship notwithstanding, the articles in the sampling were not self-labeling. Instead, as already noted,<sup>72</sup> patterns became apparent. One pattern was articles that *described* a concrete problem, possibly attempting to solve it, although the description of the present state of the law was invariably more important than the solution.<sup>73</sup> Another, often cruder, pattern was for the author to simply render *advice* to a practicing lawyer, e.g., “The five things you should remember when considering the tax consequences of the marital deduction are . . . .”<sup>74</sup> Some of the descriptive articles rose to high levels, such as the chapters from their treatise, “Federal Income Taxation of Corporations and Shareholders,” that Professors Bittker and Eustice first published in *Tax Law Review*.<sup>75</sup> It is harder, however, to dress up the “five points” type of article as anything other than a bare conveyance of information to the reader. Fit within the framework usually given to legal scholarship, these descriptive and advisory articles might be characterized as doctrinal scholarship.

Other articles suggested or prescribed a solution to a problem, either by action to be taken by courts, the Internal Revenue Service or Congress. The *prescriptive* articles ranged from the very crude, where a solution was tacked to a more descriptive article almost as an afterthought to much more sophisticated

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71. See Posner, *supra* note 67, at 1125-29. Within tax, see generally Livingston, *supra* note 7, at 375-80.

72. See *supra* Part ILC.

73. See *supra* Part ILC (describes author's sense of descriptive and advisory articles). For examples of descriptive articles in the sampling, see, e.g., A. Finley Schuldenfrei & Aryeh Guttenberg, Acquisitions of S Corporations, 63 *Taxes* 802 (1985); John H. Birkeland & Philip F. Postlewaite, The Uncertain Tax Ramifications of a Terminating Disposition of a Partnership Interest—The Constructive Termination of a Partnership, 30 *Tax Law* 335 (1977); Joseph P. Giljum, Federal Tax Problems Encountered in Advance Tax Payment Transactions, 21 *Tax L. Rev.* 495 (1966); Frank K. Greisinger, Decisions to Lease or Buy Equipment are Made No Easier by New Revenue Rulings, 4 *J. Tax'n* 191 (1956).

74. For examples of advisory articles in the sampling, see, e.g., Harry J.J. O'Neill & David A. Schenck, Using Discount Stock Options as Executive Compensation, 72 *J. Tax'n* 348 (1990); Richard S. Mark, Windfall Profit Tax—Traps to Avoid in the Incremental Tertiary Maze, 60 *Taxes* 571 (1982); John H. Young, The Role of Motive in Evaluating Tax Sheltered Investments, 22 *Tax Law* 275 (1969); Harry Yohlin, The Short-Term Trust—A Respectable Tax-Saving Device, 14 *Tax L. Rev.* 109 (1958).

75. One chapter included in an article in this sampling is Boris I. Bittker & James S. Eustice, Collapsible Corporations in a Nutshell, 22 *Tax L. Rev.* 127 (1967) [hereinafter, Collapsible]. For another chapter not in the sampled material, see Boris I. Bittker & James S. Eustice, Complete Liquidations and Related Problems, 26 *Tax L. Rev.* 191 (1970).



solutions.<sup>76</sup> Finally, some articles were of a more *interpretive* nature. Invariably, the interpretive articles were of a more sophisticated nature than prescriptive articles, especially the simpler prescriptive articles. However, both the prescriptive and the interpretive articles might be characterized as normative scholarship, in that they tended to hold some value to be important, and tried to enable that value.<sup>77</sup>

None of the articles sampled could be characterized as positivist. As noted above, there were a few *empirical* articles, but not on substantial topics. Invariably, the empirical research was about tax preparation software.<sup>78</sup>

Two graphs and two tables set forth below reveal the doctrinal and normative nature of the sampled articles. The percentage of sampled articles in each journal, annually, which were doctrinal are set forth in summary and visual form in Graph 3 and then set forth in greater detail in Table 8. These doctrinal articles were either advisory or descriptive, as I have just used the terms, and the normative articles were, in turn, either prescriptive or interpretive.

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76. For examples of prescriptive articles in the sampling, see, e.g., Michael Asimow, Public Participation in the Adoption of Temporary Tax Regulations, 44 Tax Law. 343 (1991) (more sophisticated prescription); James S. Eustice, Contract Rights, Capital Gain, and Assignment of Income—the Ferrer Case, 20 Tax L. Rev. 1 (1964) (same); John S. Ellett, II & Steven S. Rubinstein, Disallowed Deductions: 1969 Tax Reform Act Changes to Code Sec. 162, 48 Taxes 457 (1970) (simpler prescription); Robert J. McDonald, IRS Errs in Denying That No-Restricted Options Can Be Compensation at Grant, 12 J. Tax'n 331 (1960) (same).

77. For examples of interpretive articles in the sampling, see, e.g., Daniel Schaviro, Perception, Reality and Strategy: The New Alternative Minimum Tax, 66 Taxes 91 (1988); Kenneth F. Joyce & Louis A. Del Cotto, Interest-Free Loans: The Odessey of a Misnomer, 35 Tax L. Rev. 459 (1980); Daniel S. Goldberg, Open Transaction Treatment for Deferred Payment Sales After the Installment Sales Act of 1980, 34 Tax Law. 605 (1981); Herman T. Reiling, Developing a Law of Income Taxation, 32 Taxes 546 (1954).

78. See, e.g., Journal of Taxation Editorial Staff, 32 Software Packages for Preparing Individual Returns Reviewed by Practitioners, 79 J. Tax'n 218 (1993); Norman A. Kanter, 1975 Survey of Computer Tax Return Preparers; A Report on Services Available This Year, 43 J. Tax'n 236 (1975). But see, e.g., Robert G. Bromley, A Closer Statistical Look at Tax Court Compromise, 57 Taxes 325 (1979) (example of empirical research that was not about tax return software). As Livingston suggests, tax scholars have not taken to empirical research. See Livingston, *supra* note 7, at 385, n.71.

Graph 3. Doctrinal Articles in Sample, by Journal and Decade

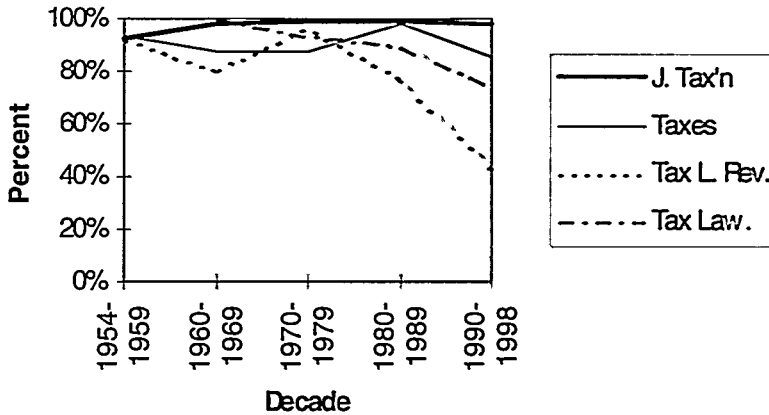
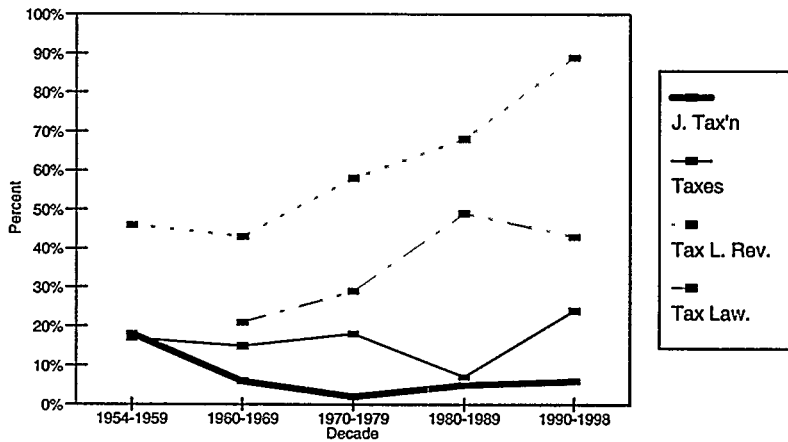


Table 8. Doctrinal Articles in Sample, by Journal and Decade

<u>Decade</u>	<u>J. Tax'n</u>	<u>Taxes</u>	<u>Tax L. Rev.</u>	<u>Tax Law.</u>
1954-1959	92%	93%	92%	92%
1960-1969	98%	88%	80%	100%
1970-1979	99%	88%	96%	93%
1980-1989	99%	98%	77%	90%
1990-1998	98%	86%	43%	74%

As can be seen, there was a high degree of doctrinal scholarship, especially in the *Journal of Taxation* and *Taxes*, usually between 80% and 100%. While somewhat constant in both these journals, the percentage of doctrinal articles in *Journal of Taxation* increased modestly and held firm, while they diminished, then held constant, but for an increase in one later decade, in *Taxes*. There was a high degree of doctrinal scholarship in *Tax Lawyer* and in *Tax Law Review*, earlier on. But doctrinal scholarship dropped off in both journals in the two decades since 1980, especially in *Tax Law Review*.

The percentage of all sampled articles in each journal, by decade, which were normative are set forth in summary and visual form in Graph 4 and then in greater detail in Table 9. These normative articles were either prescriptive or interpretive, again as I have just used the terms.

**Graph 4. Normative Articles in Sample, by Journal and Decade****Table 9. Normative Articles in Sample, by Journal and Decade**

<u>Decade</u>	<u>J. Tax'n</u>	<u>Taxes</u>	<u>Tax L. Rev.</u>	<u>Tax Law.</u>
1954-1959	18%	17%	46%	
1960-1969	6%	15%	43%	21%
1970-1979	2%	18%	58%	29%
1980-1989	5%	7%	68%	49%
1990-1998	6%	24%	89%	43%

As Graph 4 and Table 9 indicate, relatively little sampled literature in the *Journal of Taxation* and *Taxes* was normative, while a greater percentage of the sampled articles in the other two journals, especially *Tax Law Review*, became normative as time passed. More specifically, normative scholarship in *Journal of Taxation* was and remained low, was fairly low and then increased modestly in *Taxes*, continually increased in *Tax Law Review* and continually increased, but for a modest decrease in the last decade, in *Tax Lawyer*.

Presumably, conveyance of information has been important to readers of the four sampled journals, and the continued presences of doctrinal articles in all four journals sustains that conclusion. In recent years, the two more academic journals, *Tax Law Review* and *Tax Lawyer*,<sup>79</sup> have had diminished percentages

79. See *supra* Part II.A. There were 1,403 doctrinal articles and 262 normative articles in all four journals. The sum of these two figures exceed the number of sampled articles because some of the articles were characterized as being both doctrinal and normative. See *supra* Part II.C.

of doctrinal articles; this is especially true of *Tax Law Review*. These two journals have had greater percentages of normative articles as well, more than the first two journals. Change that have hit other areas of academic legal scholarship, including a decline of doctrinal scholarship,<sup>80</sup> seems to have affected the academic tax scholarship that was included in the sampling.

c. *Conclusions.*—Doctrinal scholarship has a secure basis in the sampled tax scholarship. Normative scholarship has become more prevalent over time, and has been present in *Tax Law Review* for some time. The earlier one looks in the sample, the stronger the doctrinal nature of the scholarship. This comports with the belief that doctrinal scholarship once was more prevalent than today.<sup>81</sup> Readers of these journals might have guessed that *Tax Law Review* would be the most academic of the journals and, if it joined contemporary currents of legal scholarship, the one least likely to have remained doctrinal. In fact, *Tax Law Review's* articles seem to have become less doctrinal in the last two decades, and have long been normative. Even the articles in *Tax Lawyer* became less doctrinal in the last decade of the sampling.

The doctrinal nature of the scholarship is not surprising. All of the journals are devoted to tax; whether or not viewed as an academic journal, all of them conveyed information, especially technical information, to the tax technicians that presumably comprised their audiences. Doctrinal scholarship is more “practical” than normative scholarship,<sup>82</sup> and the absence of doctrinal scholarship from this base would be more striking than its presence, even if it has diminished in some journals over time.

## 2. *The Subject Matter of the Sampled Articles*

a. *Observations About Specialties in Tax.*—Tax is a less attractive specialty in which to practice law than it once was. Even as the Tax Reform Act of 1986<sup>83</sup> killed tax shelters, it wounded tax practice. From a heady prediction in 1985 that tax would continue to be a good area in which to specialize—based upon the information that the size of the American Bar Association Section of Taxation had more than doubled from 1970 to 1980, to 28,000 members—the number of lawyers belonging to the section peaked at 27,483 in 1984-85 and has slowly declined since, to 19,741, in 1997-98, even as

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80. See Landes & Posner, *supra* note 3, at 829-32 (lack of influence of perceived doctrinal scholarship elsewhere in law).

81. See, e.g., Posner, *supra* note 65, at 1648-54 (doctrinal scholarship more prevalent when legal community was more cohesive).

82. See Posner, *supra* note 67 (call for doctrinal scholarship); Edwards, *supra* note 65 (call for practical scholarship).

83. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

ABA membership has increased?<sup>84</sup> Viewed from another perspective, the percentage of lawyers specializing in tax at the largest firms, as measured by the *National Law Journal*, diminished from 8.6% in 1979 to 4.8% in 1995.<sup>85</sup>

It is difficult to determine which tax specialties have become more and or less popular over the years. On the other hand, some articles have hinted at different directions the practice of tax has taken over time. For example, the *Tax Lawyer* engaged a number of lawyers to look back on their practices over the years.<sup>86</sup> While several noted qualitative changes in the practice, e.g., the increased complexity of tax rules, the larger size of firms,<sup>87</sup> only one commented upon the areas in which he practiced.

What were the issues that seemed most important in the fifties. . . . Debt/equity questions; unreasonable compensation; accumulated earnings tax; personal holding company problems; doing business questions; multiple surtax questions; organizing base company operations for United States companies doing business abroad; Section 482 questions galore; liquidation reincorporation problems; utilization of net operating losses; section 269 questions; constructive receipt. . . .

In terms of the practice of tax law, the sixties and seventies were for me the most exciting, the most demanding and the most stimulating. . . . Tax-free reorganizations were in vogue; imaginative equity interests hopefully known as stock were being created; new reorganization techniques in the form

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84. See Stephen Koff, *Why Specialize?—Tax*, 14 *Student Law* 20 (Nov. 1985) (prediction). During the same time period, A.B.A. general membership rose from 288,896, in 1984 to a peak of 362,104, in 1992, reached a nadir of 339,476, in 1995, and has since risen to 347,903 in 1998. Information from A.B.A. Market Research Department (on file with author).

85. Mike France, *IP's Hot Tax is Not*, in *Mid-90s Practice; Trends in Specialization at Large Firms*, 18 *Nat'l L.J.* A1 (February 26, 1996). But cf. *Make Work: Headhunters Survey*, *Amer. Law.*, Jan./Feb. 1999, at 30 (in survey of legal recruiters, tax viewed both as cold and hot area in which to practice). The practice of tax law by men may be compounded by female lawyers' aversion to dating them. See Karen Hall, *The Lunch Bunch*, *Amer. Law.*, July, 1999, at 20 (article about president of dating service, one fourth of whose clients are lawyers, in which tax lawyers rated at the bottom of the list of male lawyers that female lawyers would like to date).

86. *Tax Lawyering: A Changing Profession*, 46 *Tax Law* 665 (1993).

87. See, e.g., N. Jerold Cohen, *It Always Looks Better When You Look Back*, 46 *Tax Law* 683 (1993) ("the aspect of tax practice which has been the most aggravating in the past and which appears a sure bet to be the most aggravating in the future is this accelerating growth in the spider web of complex rules in the Code and regulations"); Theodore Tannenwald, Jr. & Mary Ann Cohen, *A Dialogue Between Tax Court Judges*, 46 *Tax Law* 672 (1993) (Judge Tannenwald notes size of his firm when he left practice in 1965); Paul J. Sax, *The More Things Change the More They Stay the Same*, 46 *Tax Law* 690 (1993) (growth of his firm).

of subsidiary mergers were being utilized, as well as complicated earnout transactions; spin-offs were being combined with mergers. [Other areas the author lists includes: "complicated ABC transactions" in the mineral area; deducting antitrust damages, "new investment companies" being formed under Code section 351; manufacturing companies selling assets and being acquired by mutual funds in C reorganizations; and a whole panoply of foreign tax issues].<sup>88</sup>

And another recent article suggested that, among the members of a group of accountants it had interviewed, the five areas most often the subject of tax specialties were: estate planning, partnerships and S corporations, succession planning in closely held businesses, personal financial planning, and taxation of divorce.<sup>89</sup>

b. *Data About the Subject Matter of Sampled Articles.*—There is no direct evidence in the sampling about tax specialties, but classification of the subject matters of the articles enables us to determine what topics intrigued the authors of these articles. The topics on which articles have been written during the course of the sampling have been remarkably stable. Table 10, which follows, sets forth areas which have been addressed over the years in declining order of frequency. Certain areas have been combined in order to simplify the information. For example, corporate and partnership tax were combined into business tax, retirement, employment taxes and compensation articles were combined into compensation, and procedure and criminal tax issues were combined into litigation.<sup>90</sup> The percentages are relative to all articles so that, of all the articles published during 1954-1959, 28% were written about business tax.

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88. M. Bernard Aidinoff, *Reflections On My Tax Practice*, 46 *Tax Law* 665, 666-67 (1993) (footnote omitted). See also *The Changing Practice of Tax Law for Lawyers and Accountants*, 72 *Taxes* 190 (1994), including the comments of Herbert Lerner, at 201 ("[I]n most large [accounting] firms we tend to think of two areas of specialty—industry and functional areas—whereas the law firms tend to think about specialization only in terms of functional areas, whether it's estate planning, employee benefits, international, M and A, etc."); Robert Mundheim, at 208-09 (notes increased importance of state tax).

If one may deduce the change in practice over years from what has been written about particular individuals, other articles may be of interest. See, e.g., Boris I. Bittker, *Federal Income Taxation—Then and Now*, 74 *Tax Notes* 903 (1997) (first lecture in behalf of Larry Woodworth, a long-time government employee, whose career began in 1944); Michael J. Graetz, Edwin S. Cohen's *A Lawyer's Life Deep in the Heart of Taxes*, 65 *Tax Notes* 1045 (1994) (review of book written by Edwin Cohen, whose career began in the 1930s).

89. Burgess J.W. Raby & William L. Raby, *Tax 20 Forum: Tax-Related Niches or Specialties*, 76 *Tax Notes* 379 (July 21, 1997).

90. Other areas in which significant percentages of articles were written include: accounting (7% of all articles sampled), tax practice (5%), deductions (5%), gross income (5%), and individuals (3%).

**Table 10. More Common Topics of Articles in Sample, by Decade<sup>91</sup>**

Decade	<u>Business</u>	<u>Compensation</u>	Estate		<u>Litigation</u>	<u>State Tax</u>
			<u>Planning</u>	<u>Foreign</u>		
1954-1959	28%	6%	9%	7%	9%	9%
1960-1969	21%	7%	10%	11%	6%	3%
1970-1979	21%	10%	9%	11%	7%	2%
1980-1989	22%	11%	7%	7%	6%	1%
<u>1990-1998</u>	<u>24%</u>	<u>8%</u>	<u>9%</u>	<u>9%</u>	<u>6%</u>	<u>3%</u>
avg. %	23%	9%	9%	9%	6%	3%

There is some variance among the areas, but there is also a remarkable consistency among the areas as well. All, more or less, varied between 0% and 30% of the total of the number of articles published in each year during the sampling. Much of the literature was devoted to business tax.

Only one of the combined areas—business tax—is worthy of further analysis. Table 11 sets forth the component parts of this business tax specialty by breaking that information down into the relative percentages of all articles in the sampling which were about corporate tax and then about partnership tax, again on an annual basis, after 1969.

**Table 11. Business Tax Articles in Sample—Corporate Tax and Partnership Tax Articles, by Year<sup>92</sup>**

<u>Year</u>	<u>Corporate</u>	<u>Partnership</u>
1970	21%	0%
1971	17%	6%
1972	14%	7%
1973	14%	6%
1974	24%	3%
1975	28%	6%
1976	21%	0%
1977	14%	6%
1978	15%	5%
1979	9%	0%
1980	13%	4%
1981	10%	0%
1982	8%	8%

91. The same information is set forth, by year, in the Appendix, at Table 5A.

92. Before 1970, lesser percentages of articles were written about partnership tax. The percentage was 11% in 1957, 5% in 1954 and 1958, less in six other years, and nonexistent in six other years.

<u>Year</u>	<u>Corporate</u>	<u>Partnership</u>
1983	20%	3%
1984	19%	8%
1985	18%	3%
1986	34%	12%
1987	13%	9%
1988	3%	13%
1989	9%	13%
1990	16%	13%
1991	7%	0%
1992	30%	5%
1993	10%	7%
1994	7%	7%
1995	26%	11%
1996	14%	17%
1997	7%	7%
<u>1998</u>	<u>22%</u>	<u>13%</u>
avg. %	18%	5%

The percentage of partnership tax articles in the sampling has increased, and the percentage of corporate tax articles has decreased. But these are not precipitous changes. The stability of topics addressed over the years suggests that, if authors are writing about their clients' needs, then these needs have not changed much. People still need advice about estate planning (richer people, to be sure, in 1993 than 1954) and they still need advice about business planning. Only the contours of business planning have changed, as partnership tax has become more important than it once was.<sup>93</sup>

On a related topic, 95% of the articles sampled were written in a highly technical manner, one that presumably would not be readily comprehensible to someone who did not have a strong background in tax.<sup>94</sup> For example, while an article might have been written about the marital deduction for a general practitioner—the “five things you should know” type article—even this type of article inevitably was written on a more technical level, more for someone with a prior understanding of the area.<sup>95</sup> Given the devotion of these journals to tax practitioners, this result is not surprising.

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93. See also Raby & Raby, *supra* note 89 (areas of importance to group of accountants).

94. 95% were highly technical, 4% were moderately technical (or moderately free of technical language, depending upon one's view) and 1% were not technical at all.

95. For example, compare Bittker & Eustice, *supra* note 75 (technical), with Boris I. Bittker, *Dedication: Charles Stuart Lyon*, 37 *Tax L. Rev.* 159 (1982) (less technical).



The articles also can be broken down by gender. Among all sampled articles, percentages of the total number of articles by women and by men were devoted to the following, selected, topics, again combining certain topics (such as corporate and partnership tax to form business tax).

**Table 12. Identity of Authors of Sampled Articles, by Gender and More Common Topics**

<u>By %, Topic</u>	<u>Women</u>	<u>Men</u>
business tax	13%	23%
compensation	15%	8%
estate planning	11%	9%
foreign	10%	9%
litigation	7%	4%
state tax	6%	3%

Thus, 13% of all articles sampled that were written by women were about business tax, as defined above, while 23% of the articles sampled were written by men were on the same topic. Articles by male authors were more concentrated in business tax while articles by women authors were more concentrated in compensation.<sup>96</sup>

c. *Conclusions.*—The data also tends to suggest that authors whose articles were sampled have written fairly consistently about the same topics. Business tax has always been important, to judge by the articles written about it, as have other areas such as foreign tax, compensation matters, estate planning, litigation and state tax. Some of the literature indicates that areas such as foreign and state tax have become more important over time but, with the sole exception of partnership tax, this has not been reflected in the percentage of articles devoted to these areas. There does not seem to be much of a gender gap in areas about which men and women have written, although the greatest percentage of men's articles were about business tax and women, about compensation.

The stability and the technicality of the sampled articles suggest one relatively simple truth to me, and also leaves me puzzled. Taxpayers do business; taxpayers die. They have always needed to know the tax consequences of running a business and of dying, and the literature has followed clients' needs. As the underlying laws have changed and, for example, partnership tax blossomed, some of the subjects about which authors wrote have changed, but the underlying subject matter, the taxation of business, has not. I cannot explain, however, why areas such as foreign tax and state tax, presumably more important areas of

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96. But cf. A.B.A., Comm'n on Women, *Women in the Law*, supra note 27 (citing areas in which women law professors are likely to teach).

practice than they once were, have not reflected an increase in the percentage of articles written about them. Possibly, they always have been important anchors in tax practice, and thus people have always written about them.

### 3. *Interplay in Tax Among Congress, the Internal Revenue Service, and Courts*

a. *Observations About the Interplay of These Institutions.*—Tax law is drawn from statutes enacted by Congress. As tax students recognize all too painfully, the essential elements of tax law consist of sections of the Internal Revenue Code and not what each of them thinks it is (either when examined Socratically or at the end of the semester). Of course, tax law is much more, and the meanings, for example, of a gift or of alimony under sections 102 or 71, are amplified by many other sources, including court decisions, government pronouncements, and legislative history.<sup>97</sup>

Tax also is more complex than it used to be.<sup>98</sup> A number of reasons have undoubtedly propelled this complexity, but it has, in part, occurred as statutes and regulations have proliferated.<sup>99</sup> Simple statutes have become more complex

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97. The institutional inquiry is not exclusive to tax. One useful way in which to analyze the separation of powers is to engage in a comparative institutional analysis, in which one might ask which legal institution can best offer an answer to a particular problem. For example, trespass has traditionally been handled by courts, which is appropriate because of the highly factual nature of the inquiry of an individual incursion onto someone else's property. But another type of trespass, or trespass-type activity, such as air pollution, might be dealt with more effectively by another institution, such as a legislature. See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 14-28 (1994). See also Neil K. Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. Rev. 191 (1987); Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. Chi. L. Rev. 366 (1984); Neil Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 Mich. L. Rev. 1350 (1981).

98. One analysis of this complexity questions which branch of government is best suited for "making" tax law. Compare John F. Coverdale, *Text as Limit: A Plea for Decent Respect for the Tax Code*, 71 Tul. L. Rev. 1501 (1997) (argues for respect for the statutes comprising the Code and, thus, for the primacy of Congress) with Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 Fla. Tax Rev. 492 (1995) (looks to structure of Code and, thus, beyond mere textualism), Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 Tax L. Rev. 677 (1996) (disagrees with Geier, but still agrees with need to interpret statutes) and William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. Cal. L. Rev. 541 (1988) (believes that courts must "collaborate" with legislatures in interpreting statutes).

99. For studies of increased complexities in specific areas, see James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 Dick. L. Rev. 265 (1995) (grantor trusts); Edward A. Zelinsky, *Another Look at Tax Law Simplicity*, 47 Tax Notes 1225 (June 4, 1990) (ERISA). For the need for detailed rules, such as the drive towards

and complex statutes have multiplied in number. Congress has frequently delegated responsibility for devising rules to the Treasury Department, and regulations have become more complex as well.<sup>100</sup>

b. *Data About the Interplay.*—Implicit in any article in which the author perceives a problem and then suggests how to solve it is his belief about the best institution to effect that solution. An author might suggest that a new law or regulation is all that is needed to correct the perceived ill, or that courts only need to decide cases in line with the author's proposals. Each of these solutions would, in turn, chose a different institution to cope with the problem—Congress, the Internal Revenue Service, or the courts. For example, implicit in the unwillingness, or inability, of the Treasury Department in the 1980s to adopt regulations regarding discriminating between debt and equity in the corporate area is that it and, more specifically, the Internal Revenue Service, were not the best institutions to deal with the difference between the two. Instead, the highly factual nature of the difference made the courts a better institution for handling this problem.<sup>101</sup> On the other hand, Congress' enactment of a statute

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certainty, see, e.g., Colliton; John A. Miller, Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation, 68 Wash. L. Rev. 1 (1993); Deborah L. Paul, The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?, 76 N. Car. L. Rev. 151 (1997).

Several authors have noted the accelerating rate of tax legislation. See, e.g., Michael Livingston, Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes, 69 Tex. L. Rev. 819, 827-28 (1991) (notes legislative action in 1980s); Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s, 139 U. Pa. L. Rev. 1 (1990) (same); Richard L. Doernberg & Fred S. McChesney, On the Accelerating Rate and Decreasing Durability of Tax Reform, 71 Minn. L. Rev. 913 (1987) (same).

100. See generally Asimow, *supra* note 76 (discussing regulations, especially temporary regulations).

On the other hand, what is complicated is relative, and what may have once seemed to be difficult may have untangled, if only in comparison, as time passes. Consider the Board of Tax Appeals' view in *Gregory v. Commissioner*, 27 B.T.A. 223 (1932), *rev'd*, *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) about the reorganization statute under examination almost 70 years ago. "A statute so meticulously drafted must be interpreted as a literal expression of the taxing policy, and leaves only the small interstices for judicial consideration." *Gregory*, 27 B.T.A. at 225. Or consider the § 305 regulations promulgated in 1969, and one commentator's weighty assessment of them. "One has the impression that the authors of the [new § 305] regulations regarded the new provisions as intended to have an *in terrorem* purpose." Henry W. deKosmian, Taxable Stock Dividends Under New Section 305, 28 Tax. Law. 57, 59 (1974). They certainly had that effect on me when I first learned about them in a corporate tax course, but they pale in comparison to other, even more intricate, subsequent regulatory schemes.

101. For a history of this inaction, see Bittker & Eustice, *supra* note 66, at ¶ 4.02. For a still-exhaustive summary of the cases distinguishing debt from equity, see William T. Plumb,

creating a safe harbor for debt that is not treated as stock, thus easing an S corporation's burden of possessing only one class of stock, as well as regulations illuminating that safe harbor, tends to suggest that Congress and the Service were better institutions for solving a more discrete problem.<sup>102</sup>

Two aspects of the sampled data illustrate trends in institutional bias. First, some authors wrote about new developments—newly enacted statutes, newly issued regulations or rulings, or court decisions just rendered. Presumably, a tendency towards the increasing complexity of statutes and regulations and concomitant frequency with which they would have been enacted or promulgated could have been reflected in tax literature. Assuming that people wrote about what was currently happening and that complexity translates into proliferation of statutes and regulations, new developments should increasingly have been about the activities of Congress and the Internal Revenue Service and decreasingly about court decisions.

Second, authors wrote about problems they felt were open to a specific remedy (some more specifically and in greater detail than others). An author's solution, for example, to a complicated question about accounting just described in her article could lie only in the hands of Congress, the Service, or the courts.<sup>103</sup> Although somewhat weaker in my view than the presumed relationship between complexity and the growth of new developments by Congress and the Service, I still think that the tendency towards complexity might translate into a greater percentage of articles about what Congress or the Service should do and less about what courts should do. Faced with a simple statute largely interpreted by court decisions, an author seems likely to remedy whatever problem he perceives by more decisions, in a certain vein. But faced with an area governed by regulations or by statutes, he is more likely to encourage the Service to change its regulations to reach the result he desires, or Congress, its laws.

Graphs 5 and 6 and Tables 12 and 13 respectively set forth these aspects of the sampling. In each graph and then, in greater detail, in each table, the percentage for each institution is contrasted against all of the institutions, not just against the other two institutions set forth in the tables. Because authors sometimes proposed remedies from some other institutions, e.g., state legislatures, the totals sometimes do not add up to 100%.

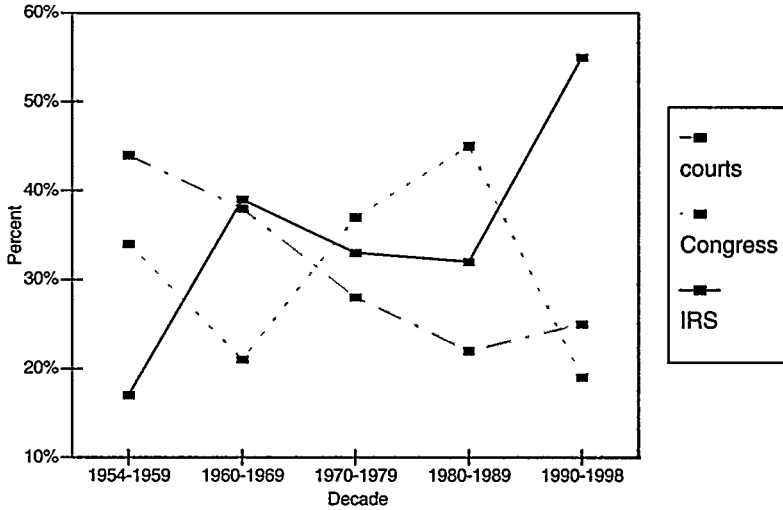
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Jr., *The Federal Income Tax Significance of Corporate Debt: A Critical Analysis and a Proposal*, 26 *Tax L. Rev.* 369 (1971).

102. See IRC § 1361(b)(1)(D), (c)(5); Regs. § 1.1361-1(l)(5).

103. See, e.g., Marvin A. Chirelstein, *Some Aspects of Basis and the Proposed Regulations*, 35 *Taxes* 151 (1957) (Congress should act, to correct proposed regulations); Marvin J. Garbis, *Improving the Procedural System Under Which Tax Controversies are Resolved*, 33 *J. Tax'n* 278 (1970) (Service should act); Elwood L. Thomas, *Brother-Sister Multiple Corporations—The Tax Reform Act of 1969 Reformed by Regulation*, 28 *Tax L. Rev.* 65 (1972) (courts should act).

**Graph 5. Institutions Examined in Articles About New Developments, by Decade**

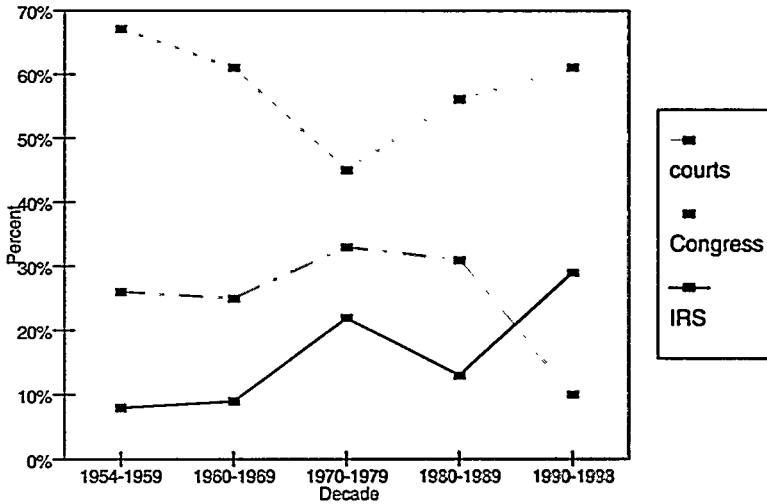


**Table 13. Institutions Examined in Articles About New Developments, by Decade<sup>104</sup>**

<u>Decade</u>	<u>Courts</u>	<u>Congress</u>	<u>IRS</u>
1954-1959	44%	34%	17%
1960-1969	38%	21%	39%
1970-1979	28%	37%	33%
1980-1989	22%	45%	32%
1990-1998	25%	19%	55%

104. Only the articles in these three areas are included in this table. Articles triggered by some new development, other than by one of these three institutions, totaled 1% of all 690 articles triggered by a new development. The other institutions included a government agency other than the Service, such as a state agency, or a legislature other than Congress, such as a state legislature.

**Graph 6. Institutions Authors Would Use to Remedy Problems, by Decade**



**Table 14. Institutions Authors Would Use to Remedy Problems, by Decade<sup>105</sup>**

<u>Decade</u>	<u>Courts</u>	<u>Congress</u>	<u>IRS</u>
1954-1959	26%	67%	8%
1960-1969	25%	61%	9%
1970-1979	33%	45%	22%
1980-1989	31%	56%	13%
1990-1998	10%	61%	29%

The two sets of data do not readily correspond with one another. A smaller percentage of new development articles were triggered by court decisions in the 1990s than earlier, but seems to have risen modestly in the 1990s. A lesser percentage of authors proposed judicial remedies for perceived problems in the 1990s than in prior decades. While authors have not turned to courts recently as much as they did earlier, court decisions are still noted more in the 1990s as new

105. Only the articles in these three areas are included in this table. Articles in which another institution was prescribed as the remedy for the problem, totaled 1% of all 221 articles for which some remedy was prescribed. The other institution would be a legislature other than Congress, such as a state legislature.

developments (25%) than they are as authors' choices to remedy problems (10%).

When viewed individually, the Internal Revenue Service and Congress do not bear much relationship in the two tables. A decreasing percentage of new development articles noted new laws in the 1990s, but Congress remained a popular institution among authors who proposed remedies for problems they perceived. And the dramatic rise in the percentage of new developments written about Internal Revenue Service activities resonated, faintly, in the institutional remedies authors proposed.

The increasing complexity of the Code should have suggested increased activity by Congress or the Internal Revenue Service. Both measures, especially the new developments criterion, somewhat display such activity. Beyond that, however, new developments articles appear to have been written more about activity by the Service than by Congress, while authors chose to remedy perceived problems more by Congressional action than by the Service. While authors can, of course, chose to write about new developments they favor and ignore the rest, that does not seem likely. Thus, new developments articles tend to reflect increased activity, by Congress and especially by the Service, at the cost of judicial decisions, and thus may reflect an increased complexity in the tax laws. To judge by the articles in which authors prescribed a specific course of action, they do not seem to reject this complexity, only to give greater weight to Congressional than Service action.

c. *Conclusions.*—Theoretical observations suggest that our tax statutes have become increasingly complex, and that more detailed statutes and regulations are the source of that complexity. It follows that courts would initially have been the remedial institution of choice, when there was less complexity, but not subsequently.

The percentage of articles about courts, whether new decisions or the preferred institution to remedy a perceived problem, have somewhat diminished. While authors favored Congress and the Internal Revenue Service both as the source of new developments about which to write and to remedy perceived problems, new developments articles reveal greater activity by the Service and the remedial articles, by Congress. In either case, the articles seem to reflect an increased complexity in the tax law.

#### IV. CONCLUSIONS

Forty-five years of articles from four standard tax journals—*Journal of Taxation*, *Taxes*, *Tax Law Review*, and *Tax Lawyer*—were sampled and catalogued for a variety of variables. What does the sampling tell us about who has written articles, what they wrote, and what they held to be important?

Recent studies indicate that women academicians publish more than they once did, but still lag behind their male colleagues. In tax, women in the sampled articles tended to publish at lesser percentages than their male colleagues, if they were practicing lawyers and even if they were law professors, although the trend for law professors has changed in the last several years. While literature suggests that accounting is taking over more of the practice of tax from lawyers, even in the two journals less directed towards lawyers—*Journal of Taxation* and *Taxes*—the percentage of sampled articles written by lawyers still substantially exceeds the percentage written by accountants. The percentage of articles written by law school teachers in these two journals has declined, especially when compared to those written by business school professors, suggesting that these journals are less enticing to law school teachers than they once were.

Doctrinal scholarship is less ubiquitous than it once was, but still has a strong hold in tax, especially in *Journal of Taxation* and *Taxes*. Normative scholarship is more prevalent than it once was—certainly in *Tax Law Review* and even, somewhat, in *Tax Lawyer*. Within the sampling, there is scant evidence of empirical research. There also appears to be a remarkable stability in what people have written about over the years, topics such as business and estate planning, foreign tax, and compensation. Among the sampled articles, partnership tax seems to have become a more compelling topic over time, but that cannot be said of other topics which would appear to have become a larger part of tax practice, such as foreign tax or state tax.

The perceived tendency towards complexity, driven by more detailed statutory and regulatory schemes, has somewhat been reflected in the sampled articles.



## APPENDIX

**Table 1A. Issues Printed Per Year, From 1978-97**

Journals are required to post the number of copies printed during the prior year. All four journals posted the "average number" of issues printed during the prior fiscal year. Those numbers are set forth below. No information was available for the three years left blank for *Tax Law Review*.

<u>Year</u>	<u>J. Tax'n</u>	<u>Taxes</u>	<u>Tax L. Rev.</u>	<u>Tax Law.</u>
1997-98	12,000	4,700		22,950
1996-97	12,633	5,200	2,100	25,100
1995-96	12,996	7,200	2,660	25,000
1994-95	14,667	7,517		26,500
1993-94	16,067	7,450	2,666	31,500
1992-93	16,621	8,491	2,704	31,500
1991-92	18,095	9,460	2,700	31,000
1990-91	19,745	11,010	3,548	33,000
1989-90	21,591	13,670	3,776	33,000
1988-89	22,583	14,255	4,520	33,000
1987-88	25,020	13,710	4,967	33,000
1986-87	27,879	13,490	5,238	31,810
1985-86	31,058	15,210	5,675	33,333
1984-85	31,517	15,560	5,975	31,814
1983-84	27,885	12,710	6,125	32,024
1982-83	25,333	11,920		28,625
1981-82	26,266	15,640	6,825	28,625
1980-81	24,167	13,830	6,775	27,000
1979-80	23,614	12,350	5,925	26,824
1978-79	20,500	9,600	5,250	26,619

**Table 2A. Identity of Authors by Journal**

<u>Journal</u>	<u>Female</u>	<u>Male</u>	<u>Group</u>	<u>Unknown</u>
J. Tax'n	3%	96%	1%	0%
Taxes	7%	92%	0%	1%
Tax L. Rev.	5%	90%	3%	2%
<u>Tax Law.</u>	<u>4%</u>	<u>89%</u>	<u>5%</u>	<u>2%</u>
avg. %	5%	94%	1%	1%

Broken down more specifically by decade, the results for the last two decades are:

## 1980-1989

<u>Journal</u>	<u>Female</u>	<u>Male</u>	<u>Group</u>	<u>Unknown</u>
J. Tax'n	4%	95%	1%	0%
Taxes	11%	88%	0%	1%
Tax L. Rev.	13%	84%	0%	3%
Tax Law.	5%	87%	6%	3%

## 1990-1998

<u>Journal</u>	<u>Female</u>	<u>Male</u>	<u>Group</u>	<u>Unknown</u>
J. Tax'n	10%	89%	1%	0%
Taxes	16%	82%	0%	2%
Tax L. Rev.	7%	89%	4%	0%
Tax Law.	6%	94%	0%	0%

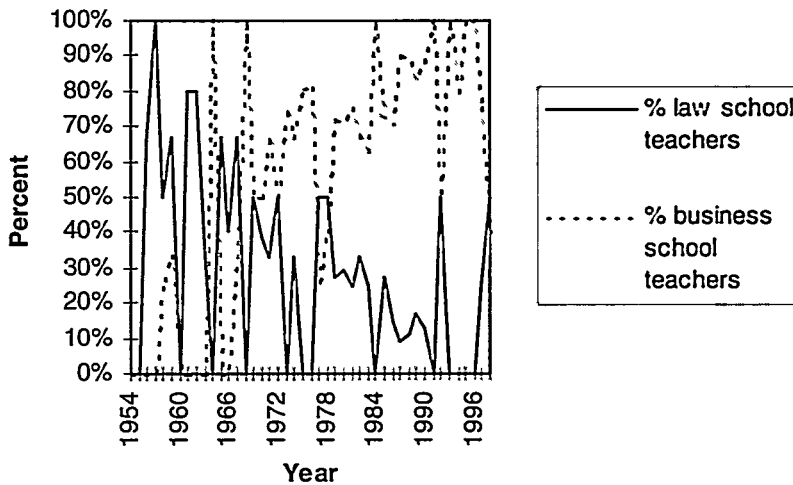
**Table 3A. Women Authors in Sample and Women Accountant/Auditors in Population at Large, by Year<sup>106</sup>**

<u>Year</u>	<u>% Women Accountant Authors</u>	<u>% Women Accountant/Auditors per BLS</u>
1954	0%	
1955	0%	
1956	0%	
1957	0%	
1958	0%	
1959	11%	
1960	0%	
1961	0%	
1962	0%	19%
1963	0%	18%
1964	0%	18%
1965	0%	19%
1966	0%	20%

106. For 1972-1982, information from the Bureau of Labor Statistics was available only for accountants. For all other years, it includes both accountants and auditors. As in Table 3, the percentage in the middle column reveals the percentage of accountants in the sampling who were women. For example, in 1993, 22% of all accountants were women (and 78% were men), while 49% of all accountants and auditors counted by the Bureau of Labor Statistics were women.

<u>Year</u>	<u>% Women Accountant Authors</u>	<u>%Women Accountant/Auditors per BLS</u>
1967	0%	19%
1968	0%	22%
1969	0%	22%
1970	0%	23%
1971	0%	20%
1972	0%	22%
1973	8%	22%
1974	17%	24%
1975	0%	25%
1976	0%	27%
1977	25%	28%
1978	0%	30%
1979	0%	33%
1980	0%	36%
1981	0%	39%
1982	0%	39%
1983	13%	39%
1984	20%	41%
1985	17%	44%
1986	11%	45%
1987	20%	46%
1988	44%	50%
1989	11%	49%
1990	13%	51%
1991	13%	52%
1992	20%	51%
1993	22%	49%
1994	33%	52%
1995	9%	52%
1996	0%	56%
1997	11%	57%
1998	17%	58%

**Graph 1A. Authors in *Journal of Taxation* and *Taxes* Who Were Law or or Business School Teachers, by Year**



The percentages are measured against all of the articles written by law and business school professors in either of these journals. The percentages will not total 100% in years in which other academics, e.g., arts and science professors or students, published articles. In these two journals, 238 articles were written by academicians.

**Table 4A. Authors in *Journal of Taxation* and *Taxes* Who Were Law or or Business School Teachers, by Year**

<u>Year</u>	<u>% Law School Teachers</u>	<u>% Business School Teachers</u>
1954	0%	0%
1955	0%	0%
1956	67%	0%
1957	100%	0%
1958	50%	25%
1959	67%	33%
1960	0%	0%
1961	80%	0%
1962	80%	0%
1963	33%	0%
1964	0%	100%

<u>Year</u>	<u>% Law School Teachers</u>	<u>% Business School Teachers</u>
1965	67%	0%
1966	40%	0%
1967	67%	33%
1968	0%	100%
1969	50%	50%
1970	38%	50%
1971	33%	67%
1972	50%	50%
1973	0%	75%
1974	33%	67%
1975	0%	80%
1976	0%	82%
1977	50%	25%
1978	50%	40%
1979	27%	73%
1980	29%	71%
1981	25%	75%
1982	33%	67%
1983	25%	63%
1984	0%	100%
1985	27%	73%
1986	14%	71%
1987	9%	91%
1988	11%	89%
1989	17%	83%
1990	13%	88%
1991	0%	100%
1992	50%	50%
1993	0%	100%
1994	0%	80%
1995	0%	100%
1996	0%	100%
1997	25%	75%
<u>1998</u>	<u>50%</u>	<u>40%</u>
Avg. %	27%	63%

The percentages are measured against all of the articles written by law and business school professors in either of these journals. The percentages will not total 100% in years in which other academics, e.g., arts and science professors or students, published articles.

In Table 5A, some of the topics were combined, as described in the text accompanying note 90 (e.g., corporate and partnership tax, to form business tax).

**Table 5A. More Common Topics of Articles, by Year**

<u>Year</u>	<u>Business</u>	Estate			<u>Litigation</u>	<u>State Tax</u>
		<u>Compensation</u>	<u>Planning</u>	<u>Foreign</u>		
1954	20%	10%	5%	0%	20%	5%
1955	32%	7%	4%	11%	11%	11%
1956	18%	7%	14%	7%	4%	11%
1957	28%	6%	6%	8%	8%	17%
1958	38%	5%	16%	5%	3%	5%
1959	28%	6%	8%	8%	11%	6%
1960	17%	7%	0%	10%	14%	0%
1961	21%	11%	5%	16%	8%	5%
1962	25%	5%	8%	5%	8%	0%
1963	11%	5%	8%	8%	5%	0%
1964	10%	10%	10%	14%	10%	14%
1965	25%	6%	14%	8%	0%	3%
1966	28%	6%	14%	17%	6%	6%
1967	24%	10%	10%	7%	0%	0%
1968	23%	8%	13%	13%	3%	0%
1969	19%	6%	19%	9%	6%	6%
1970	21%	6%	9%	21%	3%	9%
1971	22%	11%	8%	8%	11%	3%
1972	21%	3%	7%	10%	14%	0%
1973	20%	8%	3%	11%	3%	0%
1974	27%	14%	3%	14%	5%	0%
1975	34%	3%	13%	0%	6%	0%
1976	21%	12%	15%	6%	9%	0%
1977	20%	8%	6%	17%	8%	0%
1978	20%	15%	10%	10%	5%	3%
1979	9%	13%	13%	9%	4%	4%
1980	17%	11%	6%	11%	9%	0%
1981	10%	12%	5%	12%	5%	0%
1982	17%	17%	6%	0%	0%	3%
1983	23%	9%	14%	14%	0%	0%
1984	27%	11%	8%	3%	8%	3%
1985	21%	13%	10%	8%	8%	5%
1986	46%	5%	5%	2%	7%	2%
1987	22%	16%	9%	0%	6%	0%
1988	16%	10%	3%	10%	10%	0%

<u>Year</u>	<u>Estate</u>					
	<u>Business</u>	<u>Compensation</u>	<u>Planning</u>	<u>Foreign</u>	<u>Litigation</u>	<u>State Tax</u>
1989	22%	13%	3%	3%	6%	0%
1990	28%	6%	6%	6%	9%	3%
1991	7%	7%	11%	4%	7%	4%
1992	35%	5%	3%	20%	3%	0%
1993	16%	10%	0%	3%	7%	0%
1994	15%	15%	7%	15%	15%	4%
1995	37%	7%	11%	7%	4%	4%
1996	31%	7%	10%	10%	0%	0%
1997	13%	6%	19%	7%	3%	13%
<u>1998</u>	<u>35%</u>	<u>9%</u>	<u>17%</u>	<u>9%</u>	<u>9%</u>	<u>0%</u>
avg. %	23%	9%	9%	9%	6%	3%