Cornell Law Review

Volume 83
Issue 2 *January 1998*

Article 2

Reinventing Tax Scholarship: Lawyers Economists and the Role of the Legal Academy

Michael A. Livingston

REINVENTING TAX SCHOLARSHIP: LAWYERS, ECONOMISTS, AND THE ROLE OF THE LEGAL ACADEMY

Michael A. Livingston†

† Associate Professor of Law, Rutgers-Camden School of Law; Visiting Associate Professor of Law, Cornell Law School, Spring 1998. A.B. 1977, Cornell University; J.D. 1981, Yale Law School. The author would like to thank Anne Alstott, Ellen Aprill, Joe Bankman, Bill Blatt, John Davies, Roger Dennis, Dennis Patterson, Dan Shaviro, Nancy Staudt, Allan Stein, Lawrence Zelenak, and Ed Zelinsky for helpful comments on earlier drafts of this Article. Barbara Brigham, Marc Korab, Myung Jae Lee, Jim Mills, David Ragonese, and Kosha Vora provided indispensable research assistance. This project was made possible in part by a Faculty Academic Study Program leave from Rutgers University and the Rutgers-Camden School of Law.

INTRODUCTION

What should law professors write about, and for whom should they write? Specifically, what is their role in statutory fields, where underlying theory is the work of economists and other nonlegal experts, and where outcomes result from a partisan political process? How can they avoid the trap of being second-tier economists on the one hand, or mere technicians on the other?

For the past two decades, these questions have been answered largely by default. Legal scholars have, to an unprecedented degree, adopted the methods of economics, philosophy, and other nonlegal subjects, calling into question the existence and even the desirability of a distinctly legal approach. In the past five years, there have been signs of an emerging counterattack, an effort to reassert lawyers' prerogatives and to shake off the dominance of economists and other outsiders. In particular, scholars have asserted "practical reason" as a lawyerly virtue that may counteract outside influences and serve as the basis for a rejuvenated, self-confident legal academy.[1] However, what these authors mean by practical reason is not always clear, and the effort to defend it often requires resort to the same external disciplines whose influence these writers decry.

The question of scholarly method is particularly acute for tax scholarship. More than other academic lawyers, tax professors share a long history with economists. More than others, they have long been aware of the partisan, politicized nature of their field. Notwithstanding these challenges, tax scholars have succeeded in creating a distinctively legal approach to tax issues and in carving out a constructive and important policy role. But that role has become increasingly difficult to maintain. Traditional tax scholarship today is comfortable but tired: it is overwhelmingly normative, when much of the academy is experimenting with empirical and narrative forms; methodologically

[1] *See infra* note 101 (discussing practical reason scholarship).

simplistic, when the broader academy has become more sophisticated in economics and other disciplines. Its emphasis on a search for apolitical neutrality would be considered naive or outdated in other subject areas. A new generation of writers has attempted to increase the range and sophistication of tax scholarship, but at the risk of losing the traditional approach's uniqueness, and of alienating many of the practitioners and policymakers who constitute the natural audience for their work. Within the tax field, legal scholars are gradually losing influence to economists and other social scientists, and only occasionally are lawyers' insights of interest to nontax authors. Tax scholarship, in short, is increasingly subject to the problems that face the broader legal academy—problems that are exacerbated by the relative isolation of the subject and its resulting slowness in adapting to changing times.

The relative isolation of the tax field, and the long history of lawyer-economist cooperation in it, make it, in one sense, an odd prism through which to examine the prospects for contemporary legal scholarship. Yet, these features also present an opportunity. The challenges facing tax scholars—how to balance theoretical sophistication with practical impact, and how to carve out a specifically legal territory in a field economists and other outsiders dominate—are merely more intense versions of the challenges facing the broader legal academy. To put the matter more pithily, if academic lawyers can retain a useful role in tax policy, they can probably do so in any field.

This Article evaluates the present situation in tax scholarship and makes recommendations for newer and more promising approaches. The Article starts by looking backward, at the evolution of contemporary tax scholarship and its accompanying limitations. I begin by describing traditional tax scholarship, which emphasized the search for a comprehensive tax base and (where possible) for "neutral" solutions to tax problems.[2] I argue that this scholarship may be understood as a compromise between the cultures of lawyers and economists, providing a language with at least a minimum of economic respectability that was also accessible to practicing attorneys and policy analysts.

Although easy to criticize, this approach proved remarkably successful in its era, producing a vibrant and accessible scholarship that had a significant impact on real-world tax policy developments. However, the traditional approach has become increasingly out of step with intellectual and practical developments. On an intellectual level, optimal tax theory[3]—which is beyond the grasp of most lawyers—and

---

2 *See infra* Part I.B (discussing traditional tax scholarship).

3 *See infra* text accompanying notes 52-55 (discussing optimal tax theory).

fiscal exchange or public choice theory[4]—which emphasizes political structure and would (if accepted) render much of the traditional debate obsolete—challenge the comprehensive tax base approach. On a practical level, tax practice and legislation are increasingly concerned with particular subject matters—most notably international tax, state and local taxation, and consumption and other non-income taxes—about which the traditional paradigm has little if anything to say. Tax scholarship also lags behind trends in the broader legal academy, including the breakdown in political consensus and the general skepticism of "neutrality" as a legal or policy goal. Tax scholars have met these challenges with sophisticated economic and other approaches, but the sophistication of these approaches threatens to alienate these authors' traditional audience, leaving open the question of what lawyers (as opposed to economists and other nonlegal experts) can contribute to tax policy.

After considering the current condition of tax scholarship, this Article turns to the future, proposing a reinvented scholarship that would reclaim a distinctive, self-confident role for tax legal scholars. This project requires that we rethink the goals, methods, and subject matter of the tax field. The goal of tax scholarship should be to move beyond its current normative focus—determining the "right" answer to tax problems under idealized and apolitical conditions—to encompass empirical studies, narrative projects, and an expanded normativity that recognizes the inherently partisan nature of taxation, and treats tax policy as one aspect of broader political and social issues. This change in goals would permit a more eclectic mix of methods, and would make increased use of political science, psychology, and other noneconomic social sciences that do not easily lend themselves to the current normative framework. In particular, this new approach would permit a more systematic scholarship regarding the tax legislative process. Finally, the subject matter of tax scholarship must also be updated. Scholars should pay increased attention to emerging (or reemerging) areas, especially international, multistate, and nonincome taxes; to areas involving a clash between tax and nontax policies, such as taxation and retirement policy, taxation and health policy, and so forth; and to issues affecting women, minorities, and less wealthy taxpayers generally. These areas, which involve competing jurisdictions or incommensurable political values, are difficult to squeeze into a purely economic framework. For this reason, lawyers' reasoning skills and their experience with institutional and process-based issues are uniquely suited to address them. Emphasizing these areas is an im-

4 *See infra* text accompanying notes 56-61 (discussing public choice theory).

portant way lawyers can reassert their influence and resist domination by economists and other outsiders.

To make these ideas a reality—that is, to ensure that they become more than mere rhetoric—will require significant institutional changes. Specifically, this Article recommends that tax faculty be required to teach at least one nontax course; that law schools make more aggressive efforts to integrate adjunct, practice-oriented faculty into the academic community (on a writing as well as a teaching basis); and that the basic law school (J.D.) tax curriculum adopt a more policy- and process-oriented approach, recognizing the fact that technical tax teaching now takes place primarily in masters degree (LL.M.) programs. This Article also repeats the oft-heard plea that law faculties consider the quality rather than the quantity of scholarship in evaluating tenure candidates. Without this change, authors are unlikely to make the investment in time and resources that creative (and especially empirical) scholarship requires.

The tax experience contains a lesson for the future of legal scholarship in general. The challenge facing tax scholars is simply a sharper version of the challenge facing the broader legal academy, and the answer may likewise provide a model for a broader institutional response. That answer is not for lawyers to be second-tier economists, but instead to expand their intellectual agenda and arsenal so that they can do things economists cannot. By drawing on a variety of sources—the noneconomic social sciences, the experience of other legal disciplines, and their own reasoning and technical skills—legal scholars can reclaim their appropriate role as weighers of conflicting evidence and crafters of creative, practical solutions to real-world problems. This Article thus joins a growing pool of literature asserting practical reason as the basis for a renewed and confident legal scholarship, but recognizes that, in a field like taxation, practical reason requires at least some knowledge of a variety of nonlegal fields.[5] Denying the outside world is mere ignorance; but applying selected aspects of it, together with lawyers' more traditional skills, may result in a rejuvenated legal academy.

This Article proceeds in three parts. Part I considers the past and present, including the traditional approach to tax scholarship, the intellectual and practical developments that have undermined that approach, and how tax scholars have responded to these developments. Part II considers the future, proposing changes in the scholarly goals, methods, subject matter, and ultimately the definition of the tax field. In particular, Part II proposes three project areas for future tax schol-

---

5 *Cf.* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 354-64 (1993) (positing the "lawyer-statesman" as an alternative to the scientific view of law).

ars. First, we must create a new tax legal process that integrates the insights of public choice economics and positive political science into the study of substantive tax issues, and that evaluates, inter alia, the relative effectiveness of tax and direct-spending measures and the relative efficacy of legislative and administrative tax decisionmaking. Second, we must develop a new progressivity that considers progressive taxation in light of broader jurisprudential theory, and is sensitive to the interests of women, minorities, and other nontraditional constituencies. Third, we must give renewed attention to international and comparative taxation, with an eye toward developing a unified theory for taxation by multiple jurisdictions. Each of these areas requires an eclectic, interdisciplinary scholarly approach. Furthermore, each area involves a clash of nonquantifiable and often incommensurable values, and is accordingly well suited to the application of practical reason and other lawyerly virtues. Part II concludes by recommending changes in law school hiring, promotion, and curricula, as are necessary to achieve this author's intellectual objectives. Finally, this Article uses the tax experience to derive broader lessons regarding the lawyer-economist relationship and the role of the modern legal academy.

I

TAX SCHOLARSHIP AND THE PLACE OF ACADEMIC LAWYERS

A. The Problem: Lawyers in an Economist's World

1. *The General Challenge of Legal Scholarship*

What should law professors write about? Is law a legitimate academic field at all, or a mere province for the application of external theories? These questions, although in a sense old ones, have attracted increased attention during the past two decades, albeit nearly all of it from legal scholars themselves. Although this "scholarship about scholarship" has many aspects, a few principal themes predominate.

First, as Richard Posner has argued, law has become a far less autonomous discipline in the past thirty years.[6] A generation ago, legal scholars considered law to be a largely self-contained field. Many authors wrote essentially descriptive materials, such as treatises and casebooks. Normative work, by contrast, emphasized doctrinal sub-

---

6 Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987). Arguably the most influential legal scholar of his generation, Posner has had much to say on the subject of other people's scholarship. *E.g.*, Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647 (1993) (celebrating the ascendancy of legal scholarship to the level where it has begun to influence other fields); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981) (discussing the doctrinal, positive, and normative strands of legal scholarship, and providing suggestions for the improvement of each).

jects and the pursuit of values such as fairness and consistency, which, if ultimately political in origin, were simply assumed to be shared by those in the relevant legal community.[7]

Under the influence of various movements—including legal realism, critical legal studies, and law and economics—this comfortable isolation has been lost. Today, it is difficult to open a law journal without seeing economics, philosophy, or other humanities or social science disciplines applied to a broad range of legal issues. Even traditional scholars frequently make reference to recent academic developments in support of their arguments.[8] Economics holds a particular fascination for law professors, and entire fields of scholarship are increasingly subject to its sway.[9]

---

7 The difference in style and content between legal scholarship of a generation ago and today is easily observed by perusing volumes of even an avant-garde late-1960s law journal and volumes of the same journal today. *Compare* Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970) (evaluating the conflict between the emerging preference for rulemaking over adjudication and the National Labor Relations Board's historic preference for adjudication, and recommending a two-year moratorium on rulemaking requirements during which the NLRB could resolve this dilemma), *and* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) (evaluating the confused state of existing doctrine regarding the role of motivation in constitutional cases and urging a significant expansion of that role), *and* Ellen A. Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 YALE L.J. 833 (1968) (evaluating the relationship between suretyship law and the law of negotiable interests as reflected in Article 3 of the UCC, and examining whether these provisions allow borrowers to choose rationally between suretyship and other security devices), *with* Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249 (1996) (law and economics analysis of the doctrine of promissory estoppel as it applies in the context of early contract negotiations), *and* Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253 (1996) (assessing the intersection of Heidegger's account of "being-in-the-world" and traditional Anglo-American jurisprudence), *and* Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1034 (1997) (relating the life story of Harriet Robinson Scott and the "precarious position [she] occupied at the intersection of multiple oppressions").

Even in the late 1990s, law journals offer relatively little empirical work in the strict sense of the term—that is, quantitative analyses using rigorous social science methodology—but there is an increasing amount of descriptive and historical work that appears closer to an empirical model than to a traditional normative or doctrinal label. *See, e.g.*, Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) (providing a detailed history of pre- and post-Civil War advocacy on behalf of women's property rights and briefly evaluating the implications of that history for contemporary feminist goals).

8 *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 292 n.260 (1994) (citing public choice theory in support of a broader constitutional law analysis).

9 On the general direction of legal scholarship, including the influence of economics and other nonlegal disciplines, see Edward L. Rubin, *Legal Scholarship, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 562 (Dennis Patterson ed., 1996) [hereinafter Rubin, *Legal Scholarship*]; Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988) [hereinafter Rubin, *Practice and Discourse*]; sources cited *supra* note 6. For a broader selection of (at times disputatious) views, see *A Symposium on Legal Scholarship*, 63 U. COLO. L. REV. 521 (1992); Symposium, *Legal Scholarship: Its Nature and*

Second, the rise of new methodologies has led to a re-examination of the underlying goals and purposes of legal scholarship. Many scholars have questioned the normative, argumentative character of legal scholarship, suggesting that empirical or narrative writing should complement (and in some cases supplant) the dominant normative framework.[10] While nonlegal methods are widely accepted, this broader challenge to normativity has generated stiff resistance.[11] Empirical and especially narrative scholarship have been subjected to some harsh criticism, and the dominant mode in law reviews remains a sort of expanded normativity, in which nonlegal tools and methods are used to fashion rather traditional legal arguments.[12]

Finally, to an unprecedented degree, the legal academy has become detached from the remainder of the legal profession. As professors have increasingly aimed their scholarship at an academic, rather than a practical, audience, the distance between their teaching and their scholarship has increased; and with it, the distance between academics and the practicing bar. Although many commentators bemoan this situation, others are indifferent, but all concede its existence.[13]

Although lawyers have been on the defensive against economists and other nonlegal experts, there are signs of an incipient counterattack. Anthony Kronman, dean of arguably the nation's most prestigious law school, has argued passionately for the reassertion of "practical wisdom" as a lawyerly virtue, and (implicitly) for a scholarship less dependent on external forms.[14] Similarly, Dennis Patterson has suggested that law is an argumentative practice having dignity equal with that of philosophy or other endeavors, and that the truth

---

Purposes, 90 YALE L.J. 955 (1981). On the cultural clash between lawyers and economists, see Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929.

10 *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347 (1995); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

11 *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (adopting a generally skeptical attitude toward narrative scholarship).

12 *See* Rubin, *Practice and Discourse*, *supra* note 9, at 1891-1904 (describing a new legal scholarship organized around clearly stated normative positions but using both empirical and doctrinal arguments to elaborate these positions).

13 *See* KRONMAN, *supra* note 5, at 353; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). *But see* AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT] (urging law schools to narrow the gap between legal practice and education).

14 KRONMAN, *supra* note 5, at 165-270 (lamenting the decline of the "lawyer-statesman" ideal in American law schools). On practical reason in legal teaching and scholarship, and its relationship to Kronman's "practical wisdom" concept, see *infra* note 101.

of a legal proposition should be determined without recourse to nonlegal arguments.[15] At a more practical level, an American Bar Association commission recently warned law schools of the danger of an increasing distance from the profession, calling for teaching and scholarship that "bridge the gap" between the academy and the practicing bar.[16] Where all this will lead is uncertain, but it is evident that there is a growing sense of resurgence among lawyers to reassert the value of their practical reasoning skills and their equality with (if not their independence from) nonlegal disciplines. This resurgence, however, leads to a paradox: the awareness of other disciplines has provided lawyers with the means to assert their own merit. To put the matter more pithily, lawyers may not need the help of philosophers, but the language of philosophy is needed in order to explain why this is true.

2. *Special Problems Facing Tax Scholars*

If academic lawyers are generally on the defensive, tax scholars face particularly special challenges. The first of these challenges arises from the statutory (and therefore, the legislative) origins of tax law. In a common law field, legal scholarship is aimed largely at judges. For instance, a scholar's ultimate purpose in writing an article about *Roe v. Wade*[17] might be to convince the Supreme Court justices (or more likely, their law clerks) that they have made either a good or a bad decision, and that the decision ought accordingly to be upheld or reversed. If a tax professor writes an article arguing that the passive loss rules should be repealed, or that tax rates should be more progressive, whom is she trying to convince? Why should a member of Congress, who is a professional politician and is responsible to a political constituency, give any regard to what the scholar thinks? A frequent answer is that tax scholarship is directed toward congressional and administrative staffs—the law clerk-equivalents, so to speak—but this is an incomplete answer, because it assumes that staffers are avid readers of academic articles, which, as a general rule, they are not.[18]

---

15 DENNIS PATTERSON, LAW AND TRUTH 50-51 (1996); *see also* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 204-31 (1995) (defending the "immanent intelligibility" of law against economic efficiency and other external concepts).

16 *See* MACCRATE REPORT, *supra* note 13, at 233–72.

17 410 U.S. 113 (1973).

18 The problem of audience was masked for many years by the general language of key tax provisions, and by the development of broad judicial doctrines—so-called "tax common law"—in order to fill the statutory gaps. Thus, the audience for much early tax scholarship was the federal appellate bench, and the style of argument was not appreciably different from that in constitutional law or other essentially judicial fields. Today, the increased detail and frequency of tax legislation and (some would add) the declining quality of judicial tax opinions means that more tax law is made at the legislative level, thus exacerbating the problems the text describes. *See generally* Rubin, *Legal Scholarship, supra* note 9,

In addition to this problem of audience is a problem of method. In a common law field, judges are required to explain their decisions in opinions that apply legal precedent and reasoned argument to the facts of the case. A scholar in such a field essentially duplicates the judicial function, collecting existing precedents and arguing that they should be applied in a particular way. Indeed, the leading scholars in this area tend to be former appellate law clerks who view their scholarship as a more reflective version of their clerkships. What is the equivalent function in a legislative area? If the tax scholar attempts to duplicate the legislator's function—counting votes, assessing political consequences, and so forth—he will merely recreate the political process and will offer no independent standing or expertise. But what is the framework, if any, from which he may offer independent advice? And why should politicians, who have no particular obligation to be either rational or consistent, listen?

For tax scholars, the question of method has been answered largely by relying on economics to supply a normative framework.[19] The principal themes of tax scholarship—fairness, efficiency, and the search for a comprehensive tax base—are essentially economic in nature, so that even "traditional" tax scholarship has something of a law-and-economics flavor. The question of audience has been resolved largely by default: authors simply assume that there is an audience of judges, Treasury and IRS personnel, enlightened legislators, and (especially) other tax scholars that is interested in good tax policy. Tax scholarship is presumably written for them.[20]

The reliance on economics raises a disturbing practical question. If tax policy is economic in nature, and there is no shortage of professional economists, why do we need any lawyers? What specifically is the role of the legal academy in a field where professional economists provide the theoretical muscle, and the practical outcomes are the result of a political process? This problem, which faces all legal scholars to some degree, is especially acute in taxation, given the long involvement of economists in tax policy and the quantifiable nature of many tax policy concepts. The issue is not, so to speak, academic: lawyers and economists are in daily contact with one another on con-

---

at 568 (describing the tendency of legal scholarship to focus on judicial decisionmakers and the costs of that approach in an increasingly legislative era).

19 The empirical, or descriptive, side of economics has generally received less attention from law professors. *See infra* Part II.A.1.

20 One particular audience for tax scholarship is the nonpartisan staff of the Congressional Joint Committee on Taxation, which assists both the House and Senate in writing tax legislation and which, together with the Treasury Department legislative staff, has traditionally been a voice for "good" tax policy in the legislative process. As a general rule, the Joint Committee appears to have lost power during the past decades to more partisan staffs. *See infra* text accompanying note 87.

gressional staffs and at the Treasury Department, and trained economists increasingly compete for tax positions at the elite law schools. Government lawyers can at least argue that they are needed for their technical skills, such as negotiating and drafting, and for their knowledge of specific legal provisions. But what are law professors needed for, and would tax law be any worse off without them?[21]

B. Traditional Tax Scholarship: Haig-Simons and Its Intellectual Descendants

For over a generation, academic tax lawyers responded to this challenge in an energetic and creative fashion. In the best pragmatic tradition, they borrowed sufficient economics to provide a normative framework for their scholarship, but kept their approach simple enough to be accessible to other noneconomists and to practicing lawyers. They supplemented this boiled-down economics with their own substantive legal knowledge and a variety of argumentative and reasoning techniques—analogy, precedent, etc.—to produce a distinctively legal approach to tax issues. In short, they created a practical reason approach—a tax law equivalent to traditional doctrinal scholarship in other legal fields—with the important difference that from the beginning, it involved nonlegal methods and attracted a significant nonlegal audience. The result was an intelligent and accessible scholarship that has exerted a substantial positive impact on real-world developments, in spite of being oversimplified at times.

The pragmatic tradition in tax policy traces its principal lineage to Henry Simons, an economist whose most famous work, *Personal Income Taxation*, was published in 1938.[22] As Stephen Utz has noted, Simons established two main themes in tax scholarship: (1) an apolitical style, emphasizing proposals of interest to all political persuasions; and (2) a refreshingly simple economic approach, emphasizing the need to tax all sources of income at the same rate.[23] He applied these

---

21 On the (always uneasy) boundary between "technical" expertise and the political process, see Lisa Philipps, *Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy*, CANADIAN J.L. & SOC'Y, Spring 1996, at 141, 143-55 (assessing the role of technical discourse in obscuring normative assumptions of Canadian tax policy); David M. Frankford, *Measuring Health Care: Political Fate and Technocratic Reform*, 19 J. HEALTH POL. POL'Y & L. 647, 647-48 (1994) (review essay) (aiming to "implode the dichotomy between the 'technical' and the 'political'" in the context of U.S. health care reform); *see also* LOUIS EISENSTEIN, THE IDEOLOGIES OF TAXATION 14-15 (1961) (noting that individuals may believe in ideologies because of their economic interest or as uncompensated experts, but that there is no clear boundary between the two and no reason to believe that those who have an economic interest believe in their ideology any less than those who do not).

22 HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY (1938).

23 STEPHEN G. UTZ, TAX POLICY: AN INTRODUCTION AND SURVEY OF THE PRINCIPAL DEBATES 12–14 (1993).

themes to broad issues, calling for the repeal of capital gains tax preferences, the taxation of gifts and bequests, and the repeal of the tax exemption for municipal bonds.[24] Simons was arguably more pragmatic than rigorous; in Utz's memorable phrase, "he brandished economic analysis but argued from noneconomic hunches."[25] But in some ways this was an advantage: Simons's practical approach proved attractive across the political spectrum, while his simplified language was more accessible to lawyers and policymakers than other, more sophisticated approaches.

Economists have largely moved beyond Simons, but until recently most legal tax scholarship continued in his tradition. The most obvious example of his influence is the Haig-Simons concept of income, which defines income as consumption plus net accretions to wealth, and the ideal tax system as one that taxes all income at a uniform rate.[26] Appearing under various labels—the search for a comprehensive tax base, the call for reform of "tax expenditures," and so forth—the idea of an expanded, uniform tax base has been a powerful engine of academic tax scholarship and real-world tax reform for six decades. Scholarship in this tradition attempts to separate tax provisions that are necessary for an accurate definition of income from those (typically labeled tax subsidies, tax expenditures, or by some other pejorative term) that are not. The express or implied goal of this scholarship is typically the limitation or repeal of the latter provisions, allegedly to simplify and improve the fairness and efficiency of the

---

24 SIMONS, *supra* note 22, at 148-84. Simons's work on taxation was part of a broader world view, emphasizing the importance of freedom, equality, and other nonquantifiable values. He was skeptical of economic or other theories that downplayed these values. Indeed, Simons's most famous contribution—the idea of a comprehensive or uniform tax base—was conceived largely as a procedural rule, designed to prevent government from unfairly rewarding or punishing specific industries. Ultimately, he forced the debate on tax policy to be conducted in a principled, democratic manner. This broader, philosophical aspect of Simons's work has largely been lost on later tax scholars. *See* Walter Hettich, *Henry Simons on Taxation and the Economic System*, 32 NAT'L TAX J. 1 (1979). For a more critical view, see Nancy C. Staudt, *The Political Economy of Taxation: A Critical Review of a Classic*, 30 L. & SOC'Y REV. 651 (1996) (reviewing SIMONS, *supra* note 22) (assessing the intellectual context of Simons's book and the consequences of his reliance on the market/nonmarket dichotomy in assessing tax policy).

25 UTZ, *supra* note 23, at 13.

26 The Haig-Simons definition is named for Henry Simons and Robert Haig, a British economist who did earlier work on the subject; it is sometimes called the Schanz-Haig-Simons definition to honor a still earlier German scholar, Georg von Schanz. Haig defined income as "the *money value of the net accretion to one's economic power between two points in time.*" Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, *in* THE FEDERAL INCOME TAX 1, 7 (Robert Murray Haig ed., 1921). Simons expanded on this definition when he wrote: "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end of the period in question." SIMONS, *supra* note 22, at 50.

overall system. For example, an article on depreciation[27] might distinguish cost recovery methods that reflect the economic decline in the value of an asset from those designed to serve as industry subsidies (presumably favoring the former); an article on the exclusion for personal injury awards[28] might ask whether such awards are really outside the Haig-Simons definition of income, or have been excluded for other, less persuasive reasons.[29] There are limitations to these analyses—in practice, it is difficult to distingnish economics-based tax provisions from tax subsidies, and there may be good arguments for taxing different types of income at different rates—but the notion of a comprehensive, uniform tax base has an appealing simplicity, and serves as a useful guide for reform efforts where other, more sophisticated methods might not.

Even for those who doubt the feasibility of a uniform, comprehensive tax base, Simons's influence resonates.[30] To this day, typical law review tax articles adopt a normative but nominally apolitical stance. These articles often seek the "right" answer to a tax problem independent of political considerations. They employ an appealing, if unsophisticated, economic language that tends to emphasize the concepts of horizontal and vertical equity, economic efficiency, and simplicity or administrative feasibility, and that tends to focus primarily on the domestic income tax, although this has changed somewhat in the past decade.[31] Law journals publish some empirical work on taxation, including an occasional study of the tax legislative process, but these are far outnumbered by normative pieces primarily authored by

---

27 *See, e.g.*, Douglas A. Kahn, *Aceelerated Depreciation—Tax Expenditure or Proper Allowance for Measuring Net Income?*, 78 MICH. L. REV. 1, 7-9 (1979) (explaining why the realization requirement and its attendant effect on depreciation methods are necessary).

28 *See, e.g.*, Joseph M. Dodge, *Taxes and Torts*, 77 CORNELL L. REV. 143 (1992) (urging that lost earning capacity must be measured with regard to the nature of human capital).

29 For an alternate view of the latter issue, see Thomas D. Griffith, *Should "Tax Norms" Be Abandoned?—Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115.

30 For a skeptical view of the comprehensive tax base concept—and thus (implicitly) of the practical value of the Haig-Simons theory—see Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967) [hereinafter Bittker, *Comprehensive Tax Base*]. Closely related to the comprehensive tax base is the concept of tax expenditures. Critics suggest that deductions, credits, and exclusions that deviate from an ideal tax base and that benefit particular taxpayers or groups of taxpayers, constitute a form of hidden spending in the tax code and ought accordingly to be compared with equivalent nontax spending programs. One problem with this concept is the difficulty of defining an ideal tax base from which to measure deviations. For a lively exchange on this subject, see Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244 (1969); Stanley S. Surrey & William F. Hellmuth, *The Tax Expenditure Budget—Response to Professor Bittker*, 22 NAT'L TAX J. 528 (1969); Boris I. Bittker, *The Tax Expenditure Budget—A Reply to Professors Surrey & Hellmuth*, 22 NAT'L TAX J. 538 (1969).

31 For contemporary examples of (well-executed) traditional tax scholarship, see, for example, Dodge, *supra* note 28 (critiquing the section 104 exemption for personal injury awards) and sources cited *infra* note 46 (critiquing the section 469 passive loss rules).

those who have already proven themselves on more conventional subjects.[32] The tax field accords the noneconomic social sciences, such as political science and psychology, a distinctly secondary status, and, for the most part, marginalizes alternative and especially critical approaches.[33]

It has become fashionable to criticize traditional Haig-Simons based scholarship for its alleged unsophistication and its reliance on poorly defined concepts to support its normative claims.[34] Yet the traditional framework provided tax scholars with common goals and methods, and created a policy language accessible to practitioners, policymakers, and full-time academics.[35] Because it emphasized horizontal equity—essentially a game of reasoning by analogy—the Haig-Simons system especially attracted academic lawyers, providing both a context for their scholarship and a convenient teaching tool.

To appreciate the strengths and limitations of traditional tax legal scholarship, consider a classic law review debate regarding the propriety of income tax deductions for medical, charitable, and other "personal" expenses.[36] These deductions constitute exceptions to the general rule of nondeductibility for personal expenses, but have long been permitted in some form, and have broad intuitive and popular appeal.[37] Are they merely unprincipled subsidies, or can they be reconciled with Haig-Simons and similar income tax principles?

In a 1972 article, William Andrews agreed that the deductions would be hard to defend as tax subsidies, because they primarily benefitted wealthier taxpayers and were broader than necessary to achieve their intended result.[38] Instead, Andrews argued, they were not subsidies at all, because neither medical nor charitable expendi-

---

32 Economics journals publish a significant amount of work on taxation, but relatively little has yet made its way into law reviews. *See infra* note 103. For scholarship on the tax legislative process, usually including a substantial descriptive (if not quantitative) component, see *infra* notes 141-49.

33 *See infra* Part I.C.2.

34 *See infra* Part I.C.3.

35 For an example of the "translation" function of tax scholars, who serve as intermediaries among nontax academics, the broader public, and the political process, see William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287 (1996). Among the goals of a good tax system, Simons tended to emphasize equity (especially horizontal equity) issues, but questions of efficiency have assumed a larger role in the intervening decades. *See* Walter Hettich & Stanley Winer, *Blueprints and Pathways: The Shifting Foundations of Tax Reform*, 38 NAT'L TAX J. 423 (1985).

36 *See* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972); Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831 (1979).

37 *See* I.R.C. § 170 (1994) (deduction for charitable contributions); *id.* § 213 (deduction for medical expenditures that exceed 7.5% of adjusted gross income). At the time Andrews and Kelman were writing, the section 213 cutoff was set at 3% of adjusted gross income. *Id.* § 213 (1970); *id.* (1976).

38 Andrews, *supra* note 36, at 333.

tures involved a "private preclusive appropriation" of resources and thus constituted neither consumption nor accumulation for purposes of the Haig-Simons definition of income.[39] Money used to make such expenditures might thus be properly excluded from the tax base under generally applicable principles, without requiring special treatment.

Writing a few years later, Mark Kelman forcefully disagreed, arguing that medical, charitable, and other similar expenditures were indeed a form of consumption, and that permitting deductions for such expenditures resulted in a siguificant advantage for wealthy taxpayers in exchange for negligible gains in horizontal equity.[40] Kelman argued, with some cogency, that because charitable and medical expenditures are often elective in nature, there is no reason to except them from the tax system's general indifference toward how a taxpayer uses his or her income, once earned.[41] For good measure, Kelman added that the Haig-Simons definition of income was tautological,[42] and complained that Andrews and his compatriots tended to emphasize relatively minor issues of horizontal equity while remaining indifferent to broader progressivity concerns.[43]

Without choosing sides, one can note several interesting features of the Andrews-Kelman debate. Both authors ask an essentially normative question—should charitable and medical expenses be deductible?—and present their case in largely theoretical terms, with relatively little supporting empirical data.[44] Both are argumentative but nontechnical, making the debate accessible to practicing attorneys, policymakers, and tax academics. Moreover, the argument is conducted within a well-defined tradition: although Kelman criticizes the Haig-Simons approach, that approach continues to define the debate, and both authors agree that the deductions would be difficult to justify as tax expenditures if they are not part of the Haig-Simons definition of income.

---

39 *Id.* at 331-43 (deduction for medical expenditures); *id.* at 344-75 (charitable contribution deduction). Andrews wrote: "A good argument can be made that taxable personal consumption should be defined to include divisible, private goods and services whose consumption by one household precludes enjoyment by others, but not collective goods whose enjoyment is nonpreclusive or the nonmaterial satisfactions that arise from making contributions." *Id.* at 314-15.

40 Kelman, *supra* note 36, at 835-58 (charitable contribution deduction); *id.* at 858-79 (medical expense deduction).

41 *Id.* at 880.

42 *Id.* at 833–34.

43 *Id.* at 881 ("Protecting progressivity is not high on Professor Andrews's agenda.").

44 For a limited exception, see *id.* at 865-68 (presenting empirical evidence that wealthy taxpayers purchase both a greater quantity of, and a more expensive variety of, medical services than poor ones).

Similar in structure, if somewhat less entertaining, was the debate that greeted the enactment of the passive loss rules in 1986.[45] Most academics agreed that the passive loss rules were difficult to justify under the traditional criteria of fairness, efficiency, and administrative feasibility, and that they did not contribute to more accurate measurement of economic income.[46] But even those who disagreed conducted the debate on similar terms, using relatively simple economic language and a crisp, argumentative style.[47] These authors provided relatively little empirical data, and they generally considered the political context surrounding enactment of the passive loss rules to be external to their analysis.

It is easy to criticize this kind of scholarship. The economics are relatively unsophisticated, and in most cases the work (like most academic writing) has no immediate practical impact.[48] Yet the scholarship is coherent, well-argued, and relevant. It has identifiable goals and methods, and provides a bridge between theory and practice that only academic lawyers are likely to provide. It has, in sum, the strengths and weaknesses generally associated with traditional legal scholarship. At the cost of some sophistication and (perhaps) of a more complete understanding of the actual issues, it provides a clear and accessible argumentative structure and a program for constructive reform.

C. The Challenge to Traditional Scholarship

In the past two decades, the traditional paradigm for tax scholarship has become increasingly difficult to maintain. Three principal developments have contributed to this situation. First, among professional economists, alternate economic approaches, including optimal tax and public choice theory, have displaced the Haig-Simons comprehensive tax base approach, thereby undermining the theoretical foun-

---

45 *See* I.R.C. § 469 (1994). The passive loss rules generally prevent taxpayers from using losses in passive activities (including most tax shelters) to offset wages, salaries, and active business income. The rules were politically attractive because they added a measure of progressivity to the Tax Reform Act of 1986 and were more easily explainable to Congress than previous tax shelter restrictions. *See* STAFF OF THE JOINT COMM. ON TAXATION, GENERAL EXPLORATION OF THE TAX REFORM ACT OF 1986, at 6 (Comm. Print 1987) (stating that Congress questioned the fairness of the existing tax system to less affluent taxpayers and enacted the passive loss and new minimum tax rules in order to reduce these inequities).

46 *See, e.g.*, Joseph Bankman, *The Case Against Passive Investments: A Critical Appraisal of the Passive Loss Restrictions*, 42 STAN. L. REV. 15 (1989) (arguing for repeal); Robert J. Peroni, *A Policy Critique of the Section 469 Passive Loss Rules*, 62 S. CAL. L. REV. 1 (1988) (criticizing the rules as inconsistent with fundamental tax principles).

47 *See, e.g.*, Cecily W. Rock & Daniel N. Shaviro, *Passive Losses and the Improvement of Net Income Measurement*, 7 VA. TAX REV. 1 (1987).

48 The passive loss rules and the medical and charitable deductions remain in effect today. *See* I.R.C. §§ 469, 213, 170 (1994).

dation of traditional tax scholarship.[49] Second, changes within law schools, including the rise of law and economics and critical legal studies, have cast doubt upon the normative underpinnings of tax scholarship and (in some cases) on the value of normative scholarship altogether.[50] Third, modern tax practice and policy involve an increasing number of issues, including international taxation, state and local taxation, and consumption or other nonincome taxes, for which the traditional approach is unhelpful or simply irrelevant.[51] Institutional developments, including changes in the tax legislative process and the rise of graduate tax (LL.M.) programs, have further undermined the traditional structure. These developments are both cumulative and gradual: no single change is decisive, and there is no clear point at which traditional scholarship ends and something else replaces it. But their combined effect is powerful, and together they suggest that we are in the midst of a major paradigm shift.

1. *The External Challenge: Alternative Economic Theories That Compete with the Haig-Simons Approach*

The comprehensive tax base associated with Simons and other authors was never an exclusive approach to income tax policy. In a 1985 article, Walter Hettich and Stanley Winer describe three principal theories that compete for the attention of public finance economists: the comprehensive tax base approach; optimal tax theory, associated with Mirrlees, Ramsey, Diamond, and other scholars; and fiscal exchange or public choice theory, originating with the work of Brennan and Buchanan in the 1970s.[52] Of these three, the comprehensive tax base theory now probably ranks as the weakest among professional economists, although it retains disproportionate influence upon academic lawyers.

Optimal tax theory attempts, by means of a complex series of equations, to design a tax structure that will raise a given amount of revenue with the least aggregate sacrifice in social and individual welfare. This task identifies tax levels that provide the best possible tradeoff between fairness and economic efficiency, thereby short-circuiting the equity/efficiency debate that has traditionally vexed tax scholars.[53] Optimal tax theory is thus, in a sense, the ultimate economic tool in tax policy. Accordingly, it is not surprising that optimal tax theory has enjoyed increasing influence on law professors, and in sophisticated

---

49 *See infra* Part I.C.1.

50 *See infra* Part I.C.2.

51 *See infra* Part I.C.3.

52 Hettich & Winer, *supra* note 35.

53 *See id.* at 426-32. For classic works in optimal tax theory, see J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971); F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47 (1927).

circles, has arguably displaced the dominant Haig-Simons approach. But its mathematical complexity makes optimal tax theory inaccessible to most lawyers in any but the most simple form. Although several authors have made full-blown efforts to apply optimal tax theory in their discussion of substantive tax issues, others are simply willing to declare that a proposed solution is "optimal" and leave it at that.[54] Optimal tax theory also omits political considerations and tends to downplay horizontal equity, both of which are traditionally important concerns of tax lawyers.[55]

Fiscal exchange or (as it is more commonly known) public choice theory is potentially the most revolutionary of the three competing approaches.[56] Eschewing concepts like neutrality or optimality, public choice theory sees taxation as one of a series of efforts by an overbearing government ("Leviathan") to impose its will on its citizens.[57] This government is in turn captured by special interests, who use various forms of currency (especially campaign contributions) to purchase favorable tax and other legislation that tends inevitably to redistribute wealth from the public to them.[58] Public choice theory differs from other approaches both in its substantive recommendations and in its research agenda. Substantively, it tends to favor almost anything that reduces taxes. With regard to its research agenda, public choice theory is interested primarily in research on political structures because it believes that those political structures essentially dictate tax outcomes, and regards efforts to derive apolitical, "correct" solutions to tax problems as largely naive or counterproductive.[59] Public choice theory has proven highly attractive to law professors because of its normative bent and (probably) its cynical attitude toward public officials, which most scholars tend to share. But it has exerted a curiously limited effect on tax scholarship. Although tax professors have con-

---

54 For relatively sophisticated applications of optimal tax theory by academic lawyers, see Joseph M. Dodge, *Taxing Human Capital Acquisition Costs—Or Why Costs of Higher Education Should Not Be Deducted or Amortized*, 54 OHIO ST. L.J. 927 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1035-46 (1993); Rebecca S. Rudnick, *Enforcing the Fundamental Premises of Partnership Taxation*, 22 HOFSTRA L. REV. 229, 304-15 (1993).

55 *See* Hettich & Winer, *supra* note 35, at 441.

56 The classic statement of public choice theory is in JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962). On the application of public choice to taxation, see GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION (1980). On the implications of public choice for law and legal theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

57 *See* BRENNAN & BUCHANAN, *supra* note 56, at 13-33.

58 *See id.*

59 *See* Hettich & Winer, *supra* note 35, at 432 (stating that fiscal exchange or public choice theory is concerned primarily with limiting the government's power to tax rather than the ideal method of raising a budget of a given size).

ducted an extensive debate on the implications of public choice theory for the tax legislative process,[60] they have yet to integrate a public choice perspective into the discussion of most substantive tax issues.[61]

The relative decline of the comprehensive tax base approach means that traditional tax scholarship has become outdated, or is at best incomplete. It reads like an old textbook that has yet to incorporate the latest discoveries. Yet the complexity of optimal tax theory, and the pervasive cynicism of public choice theory, suggest that neither of these approaches is likely to become a full-scale replacement for the Haig-Simons system. One possible resolution is an eclectic scholarship that borrows from all three frameworks as appropriate. However, this solution may actually demand the most sophistication, for it requires a knowledge of all three systems and a pragmatic sense of when each is likely to be most useful.

In addition to the above approaches, there is a large body of noneconomic work on taxation and related public policy issues, such as political science, history, sociology, and psychology.[62] These works have proved difficult to integrate into legal scholarship, in part because they are largely descriptive and not easily applied in support of specific policy recommendations.[63] A more diverse scholarship, which mixes normative work with empirical analyses and other forms, might make better use of these insights.

2. *The Internal Challenge: Has Tax Fallen Behind Other Areas of Law?*

If tax scholarship lags behind developments in economics and other social sciences, it is also frequently behind the curve within the legal academy. With its emphasis on neutrality as a policy goal, and its faith in analogical reasoning, tax scholarship recalls the world of the 1950s, when most legal scholars produced essentially doctrinal work and a broad political consensus prevailed throughout the law

---

60 *See* sources cited *infra* note 97.

61 With inevitable exceptions, see, for example, Julie A. Roin, *United They Stand, Divided They Fall: Public Choice Theory and the Tax Code*, 74 CORNELL L. REV. 62 (1988) (applying public choice perspective to substantive pension tax rules). The use of public choice theory by tax professors is discussed *infra* Part I.D.

62 On the study of taxation by noneconomists, see UTZ, *supra* note 23, at 71-88. For an insightful historical analysis, emphasizing long-range policy trends and (especially) the persistence of tax expenditures, see JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX (1985).

63 *See* UTZ, *supra* note 23, at 72 ("Cautious historians make no claim of authority in practical matters. Political theorists, psychologists and sociologists . . . steadfastly deny that they are offering advice when speaking as scientists.").

schools.[64] The world has changed, but tax has remained behind, resulting in a scholarship that is frequently quaint and isolated even by law school standards. In particular, the apolitical nature of tax scholarship, while responsible for much of the coherence and majesty of the field, seems increasingly out of touch with the remainder of the academy.[65]

The most obvious development that casts doubt on traditional tax scholarship is the rise of critical legal studies ("CLS"). CLS tends to see law as an extension of politics, and is accordingly skeptical of concepts like "efficiency" and "neutrality" that mask or rationalize existing political arrangements.[66] A CLS scholar might note, for example, that reducing tax expenditures in order to promote economic efficiency makes sense only if the private sector is economically efficient to begin with, an assumption which is by no means self-evident. A CLS observer might further note that the tax field has been disproportionately concerned with wealthy individuals and businesses, and has paid relatively little attention to issues involving women, minorities, and the poor. There has been a smattering of critical tax scholarship—Kelman's work arguably qualifies[67]—but critical scholars have generally shied away from the field, perhaps sensing its mainstream bias. Many of those who started out in the area (including Kelman himself) have left it.[68]

The rise of law and economics has paralleled and perhaps even overshadowed CLS. Although law and economics appeared at first glance to be uniquely suited to taxation, this movement has had a contradictory effect on tax scholars. While in one sense making tax scholars less isolated, the growing sophistication of law and economics has also exposed the limitations of traditional tax scholarship. For instance, Edward Zelinsky has argued that efficiency, as tax scholars use the term, is in fact, only one version of the concept (universal

---

64 *See supra* notes 6-7 and accompanying text. For a classic example of neutrality as a stated goal of legal scholarship, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

65 On the isolation of tax from the legal academy and the broader legal profession, see Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 519-31 (1994).

66 *See generally* ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986) (criticizing various aspects of traditional legal doctrine).

67 Kelman, *supra* note 36.

68 Kelman himself has retained a critical perspective, but most of his later work has been outside the tax field. *See, e.g.*, Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) [hereinafter Kelman, *On Democracy-Bashing*] (adopting a skeptical view of public choice scholarship); Mark Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) (describing the critical legal studies technique of "trashing" mainstream legal scholarship, and various criticisms of that technique).

market efficiency), and ignores alternate models of efficiency that are better developed in other subjects.[69]

Corporate law scholars have developed sophisticated behavioral models that account for risk aversion, portfolio theory, and similar concepts.[70] In important respects, this work is significantly ahead of tax scholarship. Tax law also trails the rest of the academy in applying the noneconomic social sciences and the humanities to the study of legal problems. Finally, tax scholars have made only limited efforts at non-normative styles of legal scholarship, such as empirical, narrative, and related forms, that have proliferated in other parts of the legal academy.[71]

Although tax scholars lag behind their colleagues in some areas, they have some compensating advantages. Their long experience with economists has given tax lawyers extensive training in defending their own turf; although tax scholars have failed to incorporate some law-and-economics insights, they are well prepared to withstand the simplistic viewpoints that predominate in some other subjects.[72] Tax scholars may also take comfort from the emerging counterattack against law and economics, CLS, and other social science approaches, and the concurrent resurgence of practical reason as a specifically legal approach to policy issues.[73] As indicated above, traditional tax scholarship, with its merger of (admittedly simplified) economics and analogical reasoning skills, may be seen as a form of practical reasoning applied to tax issues. The traditional approach is fraying, but the way may yet be open for a new scholarship that borrows from intervening developments in the same way an earlier generation borrowed from Haig and Simons—by merging social science insights with legal reasoning and institutional skills to create an independent and self-confident tax legal scholarship.

---

69 Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 978-95 (1986). In discussing tax scholarship, I focus on scholarship by academic lawyers who are not also professional economists.

70 *See, e.g.*, John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1 (1986) (applying risk analysis and portfolio theory to broader corporate law issues); Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 277, 295-302 (1990) (applying similar theories to corporate fiduciary rules).

71 For a rare—indeed, dramatic—example of narrative tax scholarship, see George Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553 (1980) (analyzing tax ethics in the form of a multi-act play).

72 *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 243 (1991) (opposing judicial protection for minority shareholders on the ground that the shareholders had the opportunity to negotiate for contractual protections, and holding that imposing nonnegotiated conditions may impede wealth maximization).

73 *See supra* text accompanying notes 14-15.

3. *The Challenge of New Subject Matters*

Perhaps the strongest challenge to traditional tax scholarship comes from within the tax field. The challenge is simply this: the issues confronting tax policy have increasingly focused on issues to which the traditional model has little, if anything, to say. Traditional tax scholarship emphasizes the domestic federal income tax. Tax practitioners—especially those at large, sophisticated law firms—are increasingly concerned with international and foreign tax issues, about which Haig-Simons provides little, if any, guidance. State and local tax issues, which have traditionally attracted little scholarly interest, have likewise become more prominent in practice. Indeed, the national tax debate increasingly concerns proposals for sales, value-added, and other nonincome taxes, yet another subject on which Haig-Simons has almost nothing to say.[74]

Even with respect to the domestic income tax, tax policy increasingly presents a blend of tax and nontax issues, to which traditional models provide incomplete guidance. The most obvious example is pension and employee benefits taxation, which implicates both tax and retirement security concerns.[75] The same can be said of employer-provided health benefits (which concern taxation and health policy), the earned income credit (which concerns taxation and welfare issues), and many other subjects. The traditional approach to these areas—attempting to define a neutral tax regime and treating deviations therefrom as extraneous tax subsidies or tax expenditures—fails to capture the policy debate, the essence of which involves the clash between tax and equally important nontax objectives. This problem is not new—Bittker recognized it as early as the 1960s[76]—but the decline of direct government spending has exacerbated it, which means that tax policy is often the principal battleground for political and social issues. For example, most of the nation's housing policy is now contained in the Internal Revenue Code.[77] Merely noting that

---

74 *See* Alan Schenk, *The Plethora of Consumption Tax Proposals: Putting the Value Added Tax, Flat Tax, Retail Sales Tax, and USA Tax into Perspective*, 33 SAN DIEGO L. REV. 1281, 1282-86 (1996) (discussing the current trend toward support for a variety of nonincome tax alternatives to the traditional federal tax system); Karen C. Burke, *VATs and Flat Taxes Reconsidered*, 96 Tax Notes Today 32-25, Feb. 14, 1996, *available in* LEXIS, Fedtax Library, TNT File.

75 For recent pension tax scholarship, see, for example, Joseph Bankman, *Tax Policy and Retirement Income: Are Pension Plan Anti-Discrimination Provisions Desirable?*, 55 U. CHI. L. REV. 790, 790-95 (1988); Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851 (1987).

76 Bittker, *Comprehensive Tax Base*, *supra* note 30 (noting the conflicting policy goals reflected in numerous deductions, exclusions, and other tax provisions, and denying the existence of any single "touchstone" for tax reform).

77 *See, e.g.*, I.R.C. § 163(h) (1994) (deduction for home mortgage interest); *id.* § 42 (credit for low income housing).

many housing provisions deviate from neutral tax principles, or assuming that they are inferior to hypothetical spending programs, does little to address the real-world policy issues.

Ironically, the limitations of traditional tax scholarship become most apparent in the work of scholars who have sought to stretch those limits by tackling new, hybrid subject matters. I am thinking particularly of the women who, in the light of developments in feminist theory and changing perceptions of gender roles, have rekindled the debate about taxation and the family.[78] These articles are models of good legal scholarship, combining sophisticated theory with impressive technical knowledge to make recommendations on important, real-world legal issues. Yet their tone is sometimes defensive, attempting to squeeze the debate into traditional tax policy categories—horizontal equity, efficiency, and so forth—before moving to the nontax benefits of feminism and feminist-inspired reforms.[79] A more inclusive scholarship, which balances tax and other considerations without treating nontax benefits as somehow "external" to the analysis, would appear to be highly desirable.

4. *Institutional Factors and the Changing Context of Tax Scholarship*

The preceding sections discuss the intellectual challenges to tax scholarship. But scholarship is not purely an intellectual affair. It exists in an institutional context, requiring financial support on the one hand, and an audience for its output on the other. In recent years, the institutional context for tax scholarship has changed dramatically, both within law schools and among the legislative and other actors who constitute the ultimate audience for tax scholarship. Institutional factors have had a curiously mixed effect. Although institutional factors have in many ways complemented the intellectual changes described above, they have also made it difficult for tax scholars to respond to them, and have, at times, caused outdated thought patterns to endure longer than they otherwise would.[80]

The first change is within law schools. A generation ago, tax was the most prestigious statutory subject in the law school curriculum. A large number of law schools made Federal Income Taxation a required course, and corporate and estate tax offerings often attracted

---

78 *See, e.g.*, Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996) (highlighting various examples of how tax policy can be used to further a feminist legal agenda); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (proposing that the tax base be broadened to include women's household labor and suggesting that such reform "builds on the traditional conception of income").

79 *See infra* notes 172-73 and accompanying text.

80 For a more complete discussion of institutional factors, and proposals for change, see *infra* Part II.C.

high enrollments as well. Many schools accordingly maintained sizable or at least stable tax faculties, devoted almost exclusively to tax subjects.

Today, tax is one of many statutory courses that compete for students' attention.[81] Fewer schools require Federal Income Taxation, and enrollments in J.D. tax courses have been declining or, at best, holding steady for several years.[82] Indeed, the tax field itself has shrunk, employing a smaller percentage of practicing attorneys than at any time in recent memory.[83] Students intending to practice tax law frequently enroll in graduate (LL.M.) tax programs, leaving J.D. tax professors uncertain as to what courses to cover and how to make them attractive to a broader, "nontax" audience.[84]

These changes mean that law schools may be disinclined to hire large numbers of tax (or at least purely tax) professors, so that tax is becoming, at least numerically, a relatively stagnant field. The rise of LL.M. programs further suggests a division of the field between faculty members in such programs, whose audience will tend to be present and future tax practitioners, and those teaching in regular J.D. curricula, who must work with largely "nontax" students and faculty. Contributing further to this division is the distinction between specialty tax journals, which are typically published by schools offering LL.M. programs and have an almost exclusively tax audience,[85] and general purpose law reviews, which publish relatively few tax articles in order to accommodate subjects of greater general interest. Young tax

---

81 Courses on environmental law, bankruptcy, and the federal anti-discrimination statutes come particularly to mind.

82 Enrollment in J.D. tax courses appears to be slowly declining, based on personal observation and conversations with law school textbook publishers, although the number of graduate (LL.M.) tax programs appears actually to be increasing.

83 *See* Mike France, *IP's Hot, Tax Is Not, In Mid-'90s Practice*, NAT'L L.J., Feb. 26, 1996, at A1 (reporting that tax was the third most popular specialty in 1979, behind litigation and corporate law, but fell to fifth in 1996, declining from 8.6% to 4.8% of attorneys in the country's 250 largest law firms). The relative decline in tax practice results, in varying measures, from the shrinkage of the tax shelter market following the 1986 tax reform act, competition from tax accountants, and the tendency of many businesses to assign tax and other legal work to in-house law departments. *See id.*

84 The rise of graduate tax programs has implications for tax scholarship as well, suggesting a possible division of the field into a more technical teaching and scholarship centered in the LL.M. programs, and a more general, policy-oriented approach at the remaining law schools. *See infra* text accompanying notes 207-08. For a skeptical view of LL.M. programs, see Dina A. Ellis, *Job Benefits of LL.M. Debatable: Maryland Firms Look at Post-J.D. Master's in Law as Icing, Not Cake*, DAILY REC. (Baltimore), Aug. 14, 1995, at 15 (suggesting that an LL.M. degree is helpful but not decisive in securing tax and other legal employment).

85 Examples include the *Tax Law Review* (N.Y.U.), the *Florida Tax Review* (University of Florida), and *The Tax Lawyer* (published by the American Bar Association and edited by Georgetown law students). The *Virginia Tax Review* continues to be in publication although the University of Virginia has dropped its formal tax program.

professors with whom I speak are routinely confused about what they should write and in which journals they should publish.

A second, more subtle change involves the tax legislative process. I noted above that nonpartisan tax staffs, especially those at the Treasury Department and the congressional Joint Committee on Taxation, constitute an important audience for tax scholarship, particularly for that portion of the scholarship that seeks to have practical impact.[86] But these staffs have lost power during the past two decades while more partisan actors, including the staffs of the Senate Finance and House Ways and Means Committees, and of individual members of Congress, have gained it.[87] Indeed, tax policy as a whole has increasingly become a subdivision of broader budgetary politics resulting in a loss of prestige and influence to tax experts. The emphasis on budget targets and on "big-picture" reform proposals also means that economists have tended to gain power at the expense of lawyers, although this latter development appears to be cyclical, and may not signify a permanent shift.[88]

The changes in tax politics suggest that the market for traditional tax scholarship, written by lawyers and emphasizing a "neutral," nonpartisan approach to tax issues, is not necessarily a growing one. Such scholarship assumed both a rough political consensus inside and outside law schools, and a self-contained tax policy debate that emphasized incremental changes to a progressive income tax whose essentials went largely unchallenged. By contrast, today's debate emphasizes the interrelationship of tax and nontax issues, with everything—progressivity, tax expenditures, and the existence of the income tax itself—seemingly up for grabs. These institutional

---

86 *See supra* note 20 and accompanying text.

87 *See* MICHAEL J. MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT 181 (1980) (noting that growth in the Senate Finance and House Ways and Means Committee staffs, together with the staffs of individual members, "has meant an obvious downgrading of the joint tax committee staff," but noting that this process has also made members of Congress more accepting of the joint committee and its nonpartisan role).

88 On the impact of the budget process and the role of "precise" economic projections in tax policy, see Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 614-19 (1995). The budget aside, economists typically have the most influence when Congress is considering broad policy changes, such as a consumption or other non-income tax, with lawyers regaining influence when those ideas are transformed into specific legislative proposals. It is probably also the case that "nonpartisan" staff personnel—whose outlook is likely to be somewhere between the two major parties'—have the most influence when there is broad consensus among members of Congress about tax issues, and less so in a period of serious partisan conflict. Because we are currently in a period of intense partisanship on tax issues, including debates about flat taxes and other large-scale changes, the influence of nonpartisan staffs and that of lawyers (as opposed to economists) has tended to wane. Either of these developments, but especially the latter, may reverse itself if these conditions change. On the tax legislative process generally, see *Conference Proceedings: The Tax Legislative Process—A Critical Need*, 10 AM. J. TAX POL'Y 99 (1992).

developments thus reinforce the intellectual changes discussed in previous sections. Even if tax scholars could somehow revive traditional tax scholarship, it is not clear that an audience for their efforts would exist. Moreover, the relatively stagnant number of tax professors, and their continuing isolation within the legal academy, may make an overhaul difficult.

Although the changes discussed above hold dangers for tax scholarship, they also present opportunities. If the subject matter of tax policy increasingly involves nontax issues, and if tax professors will (of necessity) be teaching more nontax subjects, the way may be open for a new, interdisciplinary scholarship involving greater exchanges between tax and nontax scholars than has previously been the case.[89] The partisan nature of the debate may further encourage scholars to revisit old foundational issues, such as progressivity and the tax legislative process, that tend to be ignored in periods of relative consensus. Many of these issues involve tradeoffs between incommensurable values—including efficiency, social justice, and democratic participation—and are thus uniquely suited to lawyers' practical reasoning and procedural skills. In the end, there is only so much that economists can say about them. A scholarship that emphasizes such issues might find a more receptive real-world audience, while concurrently staking out a firm and independent intellectual ground.

D. The Response of Contemporary Tax Scholars

Although I am the first to consider the issue systematically, most contemporary tax scholars are probably aware of the limitations of traditional tax scholarship.[90] But how have they responded to this challenge in their own writing? In particular, how have contemporary tax scholars attempted to define a role distinct from economists and other social scientists, given the relative decline of the Haig-Simons paradigm that previously served this function? Although generalizations are dangerous, I would identify three principal approaches.[91]

---

89 *See* Caron, *supra* note 65, at 531 (advocating a "synergistic" relationship under which tax and nontax scholarship would each benefit from the other's insights).

90 By "contemporary" tax scholars, I mean those writing in approximately the past fifteen years, during which the limitations of the Haig-Simons system have (I believe) been most evident. The focus here is on the better, more creative scholars, who are writing for a scholarly rather than a purely technical audience. Almost by definition, less sophisticated writers simply continue in the dominant paradigm as if nothing much has changed. My purpose in this Article is to provoke a debate about the future of tax scholarship, not to take issue with weaker scholars.

91 For an earlier version of this typology, see Michael Livingston, *Confessions of an Economist Killer: A Reply to Kronman's "Lost Lawyer"*, 89 NW. U. L. REV. 1592, 1602-07 (1995) (book review). For a 1980s-era comment on the state of tax scholarship generally, see Ljubomir Nacev, *A Commentary on the Literature on Tax Policy*, 30 TAX NOTES 1019 (1986).

The first and most popular approach is to continue in the dominant Haig-Simons paradigm, but recognizing (at least rhetorically) its limitations and applying other methodologies when useful to resolve specific problems. Articles in this mode remain aggressively normative and emphasize traditional subject matters. But they are likely to make at least passing reference to optimal tax or public choice theory, and even more likely to accept the need for "second best" solutions when pure Haig-Simons tax reform cannot be achieved for political reasons.[92] Examples of this format include most contemporary scholarship on corporate, partnership, and capital gains taxation, together with coverage of narrower issues such as the deduction for home office expenses or the exclusion for personal injury damage awards. For instance, a recent symposium on capital gains taxation included several fairly traditional approaches to the problem, but a number of authors made at least passing reference to the political dynamics of the issue, and several more cited recent empirical data in support of their arguments.[93]

Scholarship of this type continues to be quite viable, and its incorporation of new methods, if at times halfhearted, is a healthy sign of pragmatism and flexibility. But the subject matter and the methodology often appear somewhat tired. There are, I suspect, only so many articles that can be written about corporate integration or the desirability of a capital gains preference. Even with all the references to optimal tax theory and "second best" solutions, most discussions of these issues are, in the final analysis, not radically different from the classic treatments written twenty or thirty years ago. There is also a parochial feel to such scholarship, in the sense that it is out of touch both with contemporary developments in economics and with broader trends in the legal academy. Such scholarship also seems (not coincidentally) difficult to place in prestigious, general purpose law reviews. In short, much contemporary writing tends to recreate rather than solve most of the problems with traditional, Haig-Simons

---

92 On the applicability of "second best" solutions when perfect reforms are unattainable, see R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11-13 (1956).

93 *See Colloquium on Capital Gains*, 48 TAX L. REV. 315 (1993). Commenting on Noël Cunningham and Deborah Schenk's lead article, Daniel Shaviro emphasized political considerations, noting that Cunningham and Schenk's analysis "does not adjust for the fact that tax laws are enacted by the House and Senate and not, say, by the Brookings Institution or the American Enterprise Institute." Daniel N. Shaviro, *Uneasiness and Capital Gains*, 48 TAX L. REV. 393, 393 (1993). Another colloquium contributor incorporated significant empirical data into his analysis. *See* George R. Zodrow, *Economic Analyses of Capital Gains Taxation: Realizations, Revenues, Efficiency and Equity*, 48 TAX L. REV. 419, 429-64 (1993) (reviewing the issues that frustrate scholars' ability to collect reliable empirical data on capital gains realizations); *see also supra* text accompanying notes 45-47 (describing the scholarship on the passive activity loss rules).

scholarship, and it is probably better characterized as an adaptation of the traditional framework than as a creative new departure.

A second type of scholarship makes more sophisticated use of economics. These articles—written largely, although not exclusively, by law professors who hold Ph.Ds. in economics—use optimal tax and other advanced economic theories to address emerging tax problems, such as the taxation of new financial products, or to provide new insights into longstanding but unresolved issues, such as the tax treatment of unrealized appreciation or the relative benefits of a consumption tax.[94] These articles tend to address broad conceptual categories rather than specific legal provisions, and they often include charts, equations, and other materials that are difficult for lawyers to understand, a fact that may enhance rather than diminish their appeal. In short, they represent the substitution of economic sophistication for legal pragmatism; in many respects they are the opposite of a practical reason approach. This is currently the "hot" form of tax legal scholarship, and it has generated anxiety among noneconomist law professors about their future role.

The advantages of this sophistication are obvious. If we intend to bring economics into the law schools, why not hire someone who really knows it? But the dangers are equally plain. Most law professors are not professional economists and are poorly, if at all, qualified to perform original economic analysis. Such analysis thus seems likely to remain the province of a few interdisciplinary scholars, rather than a generally applicable paradigm. There is also the question of audience: even when law professors are able to write such analyses, most of their colleagues may be unable to comprehend them. The same might also be said of practicing attorneys and policy experts who are the ultimate audience for tax legal scholarship. An overreliance on economics also suggests a diminished role for the legal academy, which would be reduced to a sort of intermediary status between professional economists and the practicing bar.[95]

A third form of scholarship, which is actually a variation on the second, involves the application of noneconomic approaches to tax. Such approaches include statutory interpretation, legal process the-

---

94 *See, e.g.*, Mary Louise Fellows, *A Comprehensive Attack on Tax Deferral*, 88 MICH. L. REV. 722, 737-55 (1990) (proposing assessment of tax on unrealized appreciation through the use of various quantitative models and economic assumptions concerning market activity); Reed Shuldiner, *A General Approach to the Taxation of Financial Instruments*, 71 TEX. L. REV. 243, 283-89 (1992) (outlining the "expected value taxation" approach to the difficulties associated with taxing income generated by new financial instruments); Jeff Strnad, *Taxing New Financial Products: A Conceptual Framework*, 46 STAN. L. REV. 569, 583-600 (1994) (examining theoretical alternatives for taxing emerging financial products).

95 *See* KRONMAN, *supra* note 5, at 165-270 (expressing concern about the decline of "practical wisdom" and the transformation of legal scholars into second-tier social scientists).

ory, and so forth, and are popular in other segments of the legal academy.[96] This type is by far the least prevalent of the three approaches, although it may yet prove the most promising, for reasons described below. Although nominally economics-based, most public choice scholarship probably belongs in this category, because it is largely nonquantitative and often makes reference to political science and other noneconomic disciplines.[97]

Each of the three approaches described above has its adherents, and each contributes its share of quality scholarship. Yet each seems somehow wanting. Haig-Simons scholarship, even in its updated version, appears respectable but timeworn, surviving more as a habit than as an analysis. More sophisticated economics is intellectually appealing, but has a limited audience and appears to deny the possibility of an independent legal perspective. Alternative noneconomic approaches have yet to make major inroads. Tax scholarship thus appears to be stuck between an aging paradigm, tired but not quite dead, and a new approach struggling to be born. Institutional factors reinforce this sense of inertia: tax professors have always been a conservative lot, and the rise of LL.M. programs may actually have increased their isolation from nontax intellectual and legal trends.

One can observe the role of institutional factors in preserving traditional approaches by considering the fate of public choice scholarship. With its emphasis on structural factors, and its interdisciplinary bent, public choice theory would appear to offer a golden opportunity for tax scholars. Scholars might, for example, consider the implications of public choice theory for congressional tax-writing procedures, for the allocation of responsibility between Congress and administrative agencies, and for the interpretation of tax statutes. Articles of this type would bridge the gap between procedural and substantive topics, and make tax scholarship at once more interesting and more relevant. Instead, tax scholars have, with some notable exceptions, been content to use public choice theory as a vehicle for criticiz-

---

96 For a concise sample of recent statutory interpretation scholarship, see, for example, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992). On the rebirth of legal process, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

97 For a sample of public choice scholarship on taxation and especially the tax legislative process, see Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987) (suggesting a public choice explanation for the frequency of 1980s-era tax legislation); 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) (questioning Doernberg and McChesney's model and suggesting a variety of factors public choice scholarship ignores). In the sections that follow, I will sometimes refer to public choice theory as a "noneconomic" scholarly genre.

ing the legislative process, which they see as an effort by Congress to extract campaign contributions and other favors rather than to enact serious and lasting reform.[98] For these scholars, public choice theory reinforces, rather than breaks down, a sense of superiority to, and distance from, the real-world tax-writing process. Indeed, by reducing the tax legislative process to a sort of conspiracy theory, it actually reinforces the traditional Haig-Simons paradigm: our normative agenda is correct, so the argnment goes, but Congress fails to enact it because special interest groups have effectively captured it.[99]

The experience of public choice theory suggests that reinventing tax scholarship requires a change in attitudes as well as in analysis. The intellectual tools are available—a growing economic sophistication, together with the insights of the noneconomic social sciences and scholars in nontax legal fields. But intellectual ambitions are likely to be frustrated if institutional forces continue to discourage innovation and if tax scholars continue to feel compelled to squeeze new approaches into an existing, outmoded framework. Reinventing tax scholarship thus requires a conscious rethinking of the goals, methods, and subject matter of the tax field, more daring than heretofore tried. It means breaking, once and for all, the dependence on Haig-Simons and allowing a new paradigm to replace it. Most of all, it means sacrificing some of the comfort and predictability of present day tax scholarship in order to embark on new journeys. It is to this task of reconstruction that I now turn.

II
REINVENTING TAX SCHOLARSHIP

The remainder of this Article considers how a new, more creative tax scholarship might look, and how such a scholarship would fit with developments in the broader legal academy. I intend to be modest about this effort. I am not Charles Reich, and I do not pretend to reconceptualize tax as he did property and others have done with

98 *See* Doernberg & McChesney, *supra* note 97, at 926-46 (describing tax legislation as a "contract" between legislatures and private interests, and explaining the increasing frequency of tax legislation as reflecting a preference for shorter-term contracts).

99 *See id.* (discussing the strengths and weaknesses of the interest group model in the legislative process). The fate of public choice is in some respects reminiscent of that of tax expenditure theory, a dominant theme in tax scholarship during the 1960s and 1970s. Tax expenditure theory began as a useful tool for comparing tax and direct spending alternatives, but tended at times to dissolve into a rather reflexive condemnation of tax preferences and (perhaps) an equally reflexive idealization of direct spending programs. *See* Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 HARV. L. REV. 491 (1985) (book review) (criticizing the tax expenditure theory).

other subjects.[100] My project is better understood as an effort to jump-start promising but, as yet, tentative developments within existing tax scholarship, than as a call to discard the old model and start entirely from scratch. But small changes have a way of adding up to one big change, and if adopted, my proposals would result in a tax scholarship that differs greatly from that which we have today.

Reinventing a field means returning to basics. The ensuing discussion does just that, recommending changes in the goals, methods, subject matter, and ultimately the definition of the tax field. In general, I advocate a scholarship that is less exclusively normative than the existing model, balancing prescriptive scholarship with empirical and (to a lesser degree) narrative forms. This proposed scholarship also makes greater use of the noneconomic social sciences and the insights of nontax jurisprudence. Moreover, it makes currently peripheral subjects, especially international and comparative taxation and various interdisciplinary domestic issues, its principal substantive concerns. These changes are intended to support one another: a less normative emphasis makes it easier to incorporate the noneconomic social sciences, while the insights gleaned from these fields (and from nontax jurisprudence) are relevant to new substantive areas. Taken together, the proposed changes would make tax scholarship both more contemporary and more practical in focus, gradually shifting the emphasis away from defining ideal solutions under a Haig-Simons system and toward a richer understanding of the functioning of tax law and policy in the real world.

In addition to revitalizing tax scholarship, the changes this Article proposes would reassert an independent and self-confident role for academic lawyers. By expanding their intellectual toolkit to include noneconomic social science, nontax jurisprudence, and the insights of practicing lawyers, legal scholars can avoid becoming second-tier economists, and can reassume their traditional role as judges of competing forms of evidence and authors of creative, practical solutions. This approach may be described metaphorically as taking one step backward in order to take two steps forward. By accepting these proposals, lawyers would recognize the need to learn more nonlegal and nontax methods, and thereby move beyond the prevailing Haig-Simons system. However, they would avoid subservience to any one such methodology, instead combining these methods with lawyers' reasoning and technical skills to create an independent and vigorous new scholarship. What I am recommending, in essence, is a revived practical reason approach, but with the recognition that, in a field as

100 *Cf.* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (explaining how government policy has fundamentally altered the traditional concepts of wealth and property).

complex as taxation, practical reason requires more rather than less knowledge of a variety of nonlegal subjects.[101]

The ensuing discussion proceeds from general themes to specific applications. Part II.A sets forth the building blocks for a new scholarship, including proposed changes in scholarly goals, methods, and subject matter. Part II.B describes three specific scholarly projects that exemplify these proposals. The first, which I dub "tax legal process," applies the insights of public choice theory and positive political science in an effort to develop a more systematic understanding of tax lawmaking and its relationship to substantive tax provisions. In particular, it envisions that empirical research would shed light upon the relative effectiveness of tax and direct spending measures and the relative desirability of legislative and administrative tax decisionmaking—issues now too often left to anecdote and supposition. The second project, "the new progressivity," reconsiders progressive taxation as part of the broader debate on the role of government in our

101 By "practical reason," I mean a method that borrows from various intellectual sources without treating any one source—Haig-Simons economics, optimal tax theory, or others—as foundational or as necessarily superior to other sources, and which relies upon lawyers' reasoning and evidence-weighing skills to determine which sources are likely to be most persuasive in the context of any specific problem. Although dating to Aristotle, the concept of practical reason finds more recent expression in the pragmatism associated with William James, Richard Rorty, and other twentieth-century philosophers; its hallmark is the idea that one can seek right or truth in specific cases even in the absence of a universal theory of what is true or right. *See* THE NICOMACHEAN ETHICS OF ARISTOTLE 142-43 (Sir David Ross trans., 1954) (1925) (setting forth the concept of practical wisdom); *id.* at 154-58 (describing the relationship of philosophic to practical wisdom); THE WRITINGS OF WILLIAM JAMES 311-472 (John J. McDermott ed., 1977) (essays on the pragmatic method and its relationship to other trends in contemporary philosophy); Richard Rorty, *Pragmatism, Relativism, and Irrationalism, in* CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972-1980) 160 (1982) (comparing pragmatism to relativist and irrationalist thought in twentieth century philosophy); *See generally* JOHN P. MURPHY, PRAGMATISM: FROM PEIRCE TO DAVIDSON (1990) (providing an overview of pragmatic thought as reflected in the work of James, Rorty, John Dewey, and other nineteenth- and twentieth-century philosophers). In law, it is historically associated with legal pragmatism and finds echoes in Kronman's idea of a lawyer's "practical wisdom" or "horse sense" as an alternative (or at least a complement) to more sophisticated social science methodologies. KRONMAN, *supra* note 5, at 209-25; *see also supra* text accompanying note 14. The most common use of practical reason in the legal literature is to describe judicial methods of statutory interpretation; various authors have advocated an eclectic or practical reason method as an alternative to textualism, purposivism, and other foundational interpretive theories. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322-23 (1990). I am among the few to use the term to describe scholarly (as opposed to judicial) behavior, although this use is implicit in Kronman's posing of prudence or practical wisdom as an alternative to "scientific" methods in legal teaching and scholarship and also, to a degree, in the work of Eskridge and Frickey, whose arguments appear equally applicable to scholarly and judicial activity. KRONMAN, *supra* note 5, at 165-270; Eskridge & Frickey, *supra*. I differ from Kronman, at least in emphasis, in arguing that practical reason scholarship requires more rather than less knowledge of a variety of nonlegal subjects; only by acquiring such knowledge can lawyers avoid dependence on any one, incomplete methodology and successfully construct (or reconstruct) a complete practical reason approach. *See infra* CONCLUSION.

contemporary, post-Cold War society. This project would also draw upon nontax jurisprudence (including the insights of feminism, critical race theory, and broader theories of social justice) and on empirical data regarding the real-world distribution of income and power, and the effect of progressive taxation on that distribution. The third project emphasizes international and, to a lesser degree, multistate taxation. This project attempts to develop a general theory for the allocation of taxing authority between competing jurisdictions. Each of these three projects is of obvious interest to tax scholars: each concerns a subject that, because of its inherently legal nature or because it involves the weighing of incommensurable (and often nonquantifiable) values, appears uniquely suited to lawyers' practical reasoning and problem solving skills. I intend these projects to be somewhere between mere examples and a full-fledged scholarly program. Together, they give a useful indication of what a rejuvenated tax scholarship might accomplish.

Part II concludes by recommending a series of institutional changes that are necessary to make a new tax scholarship a réality. These changes concern the hiring and retention of tax professors, tenure and promotion standards, and the role of adjunct professors and LL.M. programs. Finally, this Article concludes by considering the broader implications of this study for lawyers, economists, and the future of the legal academy.

A. Plans: A Model for Practical Reason Tax Scholarship

1. *Goals: Beyond Normativity*

The first proposed change concerns the purpose of tax scholarship. To address a broader variety of subjects, and employ a broader range of methods, tax scholarship must move beyond the narrow normative focus that continues, despite considerable fraying at the edges, to predominate in the field. A reinvented scholarship would include many normative projects, but would balance these with empirical, narrative, and other forms. This would increase the understanding of tax issues without necessarily advocating or even seeking the "right" answers to specified problems. Normative or prescriptive scholarship would itself use an expanded variety of normative frameworks and would be more broadly supported by empirical evidence. Tax scholars would be encouraged to undertake these alternate forms of scholarship and their careers would not suffer if they did so.[102]

---

102 On the limitations of normative scholarship, see Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991). My colleague Nancy Moore has described the legal scholar's condescension toward empirical work as "the culture of the legal brief," that is, the notion that

By "empirical" scholarship, I mean to include not only work applying sophisticated social science methodologies, but also less systematic work that gathers and describes evidence in a manner useful to lawyers and other policymakers. For example, in studying the medical or charitable deductions, theoretical arguments related to the consumptive character of these expenditures and their resulting place in the Haig-Simons system would remain highly relevant. But articles that investigated the actual impact of these deductions on the health care or tax-exempt markets, respectively, or that simply recounted, in appropriate detail, how the deductions affect taxpayers in specific real-world cases, would take on new relevance. Tax expenditures for energy, housing, and other necessities would similarly be subjected to empirical study and evaluation rather than be presumptively branded as inferior to direct spending programs. This effort might include large-scale quantitative studies that ask whether tax subsidies are actually less fair, efficient, and administrable than their nontax counterparts, or more localized "case studies" that investigate the effect of tax provisions on actual taxpayers and other affected parties. Some work of this kind exists today,[103] but argumentative, nonempirical pieces tend to overwhelm it. A reinvented scholarship would seek to redress this balance.[104]

---

legal scholarship is an extension of litigation and that external methodologies are valuable only to the extent that scholars can apply them to support a pre-existing argument.

103 *See, e.g.*, William M. Speiller, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUM. L. REV. 214 (1980) (describing the effect of capital gains and other tax law rules on the real-world art market). It may be more accurate to call this form "descriptive" rather than "empirical" scholarship; I use the latter term to highlight the distinction from more purely normative, argumentative pieces. Quantitative empirical scholarship on taxation, making use of economic and other social science methodology, has as yet been largely restricted to nonlegal journals. *See, e.g.*, Symposium, *Fundamental Tax Reform: Possibilities and Problems*, 49 NAT'L TAX J. 317 (1996) (containing a mixture of empirical work on the 1986 tax act and suggestions for future reform).

104 The argument is sometimes made that empirical work should be left to economists and other social scientists, who have (arguably) superior training in these areas, leaving lawyers to apply these insights in support of normative positions. Indeed, an increasing percentage of public finance tax scholarship has been devoted to empirical studies in the past decade. I think that the "leave it to the economists" argument is mistaken for two reasons. First, the expertise point is exaggerated: lawyers can acquire empirical skills no less easily than, say, they can learn normative economics or philosophy, and if they require additional expertise, they can participate in joint projects with nonlegal experts. Second, tax research that economists or other social scientists conduct tends to be broad in scope, and only rarely considers the effects of specific legal or institutional provisions that are of interest to academic lawyers. Thus, an economist might indeed study the market for appreciated works of art, but would be unlikely to consider the import of specific capital gains rules or real-world tax planning strategies in that market. *See* Speiller, *supra* note 103. Economists studying the impact of tax subsidies for, say, oil and gas exploration tend to consider such provisions in idealized or isolated form, without considering potential interrelationships with other tax provisions or the technical and institutional difficulties of implementing changes to these rules. Only academic lawyers are likely to consider these

In some instances, empirical or narrative work would stand alone, without being applied in support of any particular normative position. In other cases, however, such work would be part of an expanded normativity that proceeds from a variety of normative frameworks but makes greater use of empirical evidence to support its policy arguments.[105] Thus, research demonstrating that the charitable deduction encourages donations of unwanted or overvalued art to museums might stand on its own, or might form part of a broader argument for restricting the deduction for such contributions. On the other hand, a finding that mortgage credit certificates deliver benefits more efficiently than tax-exempt bonds obviously suggests replacing the latter with the former. The point is that scholars should not feel compelled to make a normative argument in each article, or to force the evidence, which is often mixed and contradictory, to conform to a fixed argumentative structure. Knowledge for its own sake is valuable, in tax and other fields; policy implications sometimes take years to become apparent.

A range of goals is consistent with developments in other fields, and would help tax scholars catch up with the remainder of the legal academy. Normative scholarship corresponds roughly to the argumentative, "law"-centered aspect of legal practice—the lawyer as advocate for a position based on a fixed set of facts. Empirical or descriptive scholarship emphasizes the "fact"-centered aspect—the lawyer's skill as information gatherer and weigher of competing evidence. By using both of these skills, academic lawyers will be better able to carve out a distinct territory for their scholarship and resist the encroachment of economists and other outsiders.

A range of goals is also important because it enables a broader range of methods. Economics, at least in its simplified form, is relatively easy to apply in support of normative arguments. Conversely, political science, psychology, and other social sciences are more difficult to use in this manner because they are primarily descriptive disciplines and are not easily reducible to simple formulae that use variables to support an argumentative framework.[106] Even the empirical side of economics has often received short shrift from legal scholars, because it tends to be time-consuming and, like the noneconomic disciplines, is difficult to apply in an argumentative manner. By valu-

---

issues, or to fully develop the link between empirical observation and possible reform efforts, as described in the following pages.

105 *See* Rubin, *Practice and Discourse*, *supra* note 9, at 1895-1905 (describing an expanded normativity that applies empirical and doctrinal evidence in support of clearly stated normative positions).

106 Some forms of jurisprudence may likewise be difficult to apply in support of normative arguments, as described *infra* Part II.A.3.

ing empirical and narrative projects, a reinvented scholarship would make greater use of these disciplines.

Finally, a range of goals makes possible a far greater range of subject matters. This is especially true for subjects involving the tax legislative process. There has been much good scholarship on the legislative process, but these authors often feel compelled to force themselves into an argumentative pattern that reduces the range and effectiveness of their work. For example, much of the recent work on tax legislation has been consumed by an inherently irresoluble debate over whether the public choice or the public interest theory better describes the legislative process, while only a few studies of how the process actually works in specific cases have been published.[107] What is needed here is not more argument, but more understanding of the relationship between structure and outcomes, and the effectiveness (or ineffectiveness) of various historical strategies for promoting tax reform.[108] Concerns about the definition and fairness of tax expenditures have similarly given rise to a heated debate, despite a limited base of knowledge concerning the actual effectiveness of tax and nontax spending measures. Empirical work on these subjects, whether or not it yields immediate policy recommendations, appears to be highly desirable.

There is a belief in some circles that law professors cannot do empirical work, because they lack appropriate training or because it requires too many resources to be cost effective.[109] I think this explanation is largely an excuse. The truth is that most legal scholars lack training in any scholarly method—normative, empirical, or otherwise. They pursue argumentative topics, not because they like to argue, but because they perceive—accurately, in most cases—that this is what law schools reward. The issue is not new resources but new attitudes—an appreciation of the value of empirical work and a recognition that scholarship can be valuable without promoting an immediate policy agenda. In this respect, the presence of specialized tax journals may be a blessing. If these journals—nearly all of which are at least partially faculty-edited—decide to publish more empirical work, it will rapidly become accepted in the field, even if it remains beyond the interest or competence of student law review editors.

---

107 *See supra* text accompanying notes 96-98.

108 For a noteworthy example of a study that explores these relationships, see Robert S. McIntyre, *Lessons for Tax Reformers from the History of the Energy Tax Incentives in the Windfall Profit Tax Act of 1980*, 22 B.C. L. REV. 705, 744-45 (1981) (evaluating different tax reform strategies in the light of actual legislative experience).

109 *See* Nard, *supra* note 10, at 368 ("The legal profession is bereft of empirical scholarship, and the primary reason for this is that law professors are not well trained in the empirical method.").

2. *Methods I: Alternative Economics and Noneconomic Social Sciences*

Together with a broader range of goals, tax scholars would benefit—in both normative and empirical projects—from more diverse scholarly methods. These include a more varied array of nonlegal (primarily social science) methodologies and a greater awareness of developments in nontax jurisprudence. A diversity of methods is an important step toward constructing (or reconstructing) a practical reason approach to taxation, under which scholars borrow from various nonlegal sources but forgo any single foundational account. Such diversity is, in turn, an important tool for asserting the independence of tax lawyers: less dependent on any one approach, law professors are less likely to become second-tier economists and more likely to become the pragmatic, independent thinkers that they rightfully ought to be.

Three methodologies, one an alternate form of economics and the others noneconomic in nature, appear especially promising. The first of these, public choice economics, has already been discussed at some length.[110] Although public choice theory seems to fascinate tax scholars, the argumentative bias of legal scholarship, and perhaps a fashionable cynicism regarding the political process, has restricted its use. A more constructive use of public choice theory—investigating the actual process of tax decisionmaking and formulating proposals for constructive reform—offers significant potential. For example, scholars might use public choice theory together with empirical political science to study the impact of budget procedures on the tax writing process, and to determine whether changes in those procedures might help produce improved legislation.[111] Scholars might also include a public choice perspective in articles using a different normative framework to examine the political implications of alternative proposals. This more creative use of public choice theory would provide a third economics-based methodology for legal scholars, along with Haig-Simons and optimal tax theory, instead of remaining essentially a sideshow.

A second, largely untapped, methodology is that of positive, or descriptive, political science, and the other noneconomic social sciences. After exhausting public choice theory, legal scholars are often surprised to find a stockpile of more traditional studies of the legislative and administrative processes, together with detailed research on public opinion and voting patterns.[112] Of particular interest to tax

---

110 *See supra* text accompanying notes 56-61, 96-98.

111 *See infra* Part II.B.1.

112 On the value of traditional political science to legal scholarship, see Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 42-110 (1994).

scholars are studies of committee structure and decisionmaking, the role of ideology, and the triangular relationship among Congress, the administrative agencies, and private interest groups in the lawmaking process.[113] Scholars could further benefit from the many studies of symbolic legislation and its role in communicating values from the government to its citizens, especially as these studies relate to tax expenditures and incentive provisions.[114] Studies of this type might help tax scholars construct a real, as opposed to an idealized (or demonized) model of the legislative process, and evaluate the relationship between political structures and substantive tax outcomes.

Finally, tax scholars should make greater use of history, both in a macroscopic sense and as part of the study of individual provisions. I am often struck by how little scholars know about the history of the provisions about which they write, let alone the broader history of taxation and tax reform efforts. For example, studies of the tax shelter problem typically take little note of previous efforts to confront similar problems during the early years of the income tax.[115] Historical subjects offer countless law review topics, while an awareness of history may help scholars distinguish between useful proposals and those better left unmade.[116]

Academic lawyers fear that, if they adopt nonlegal methods, they will become inferior social scientists and will lose much of legal scholarship's distinctiveness. I think exactly the opposite is true. It is not the use of social science itself, but the reliance on selected, incomplete social science methodologies that makes some law professors appear second-rate. Armed with a more complete arsenal, legal scholars can resume their traditional role as weighers of conflicting evidence and crafters of practical solutions, a role that practitioners of the various social sciences are unlikely to fulfill. This is merely another way of saying that practical reason remains the lawyer's forte, but that intelli-

---

113 For classic works on Congress, see, for example, RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (4th ed. 1996). On the contemporary status of the American political system, see ROBERT A. DAHL, THE NEW AMERICAN POLITICAL (DIS)ORDER (1994); HAYNES JOHNSON & DAVID S. BRODER, THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT (1996); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996).

114 *See, e.g.*, MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 1-21 (1964); Michael Livingston, *Risky Business: Economics, Culture and the Taxation of High-Risk Activities*, 48 TAX L. REV. 163, 182-87 (1993) (assessing the symbolic or "cultural" aspect of tax incentives for allegedly risky activities). Other noneconomic social sciences, including psychology, sociology, and anthropology, are also relevant to this effort.

115 A notable exception is George Cooper, *The Taming of the Shrewd: Identifying and Controlling Income Tax Avoidance*, 85 COLUM. L. REV. 657 (1985).

116 For examples of the creative use of tax history, both as a key to understanding the past and as a guidepost for future reform efforts, see *infra* note 149.

gent application of practical reason requires a knowledge of all the relevant facts.[117]

Consider in this context the debate over medical and charitable deductions.[118] Andrews, Kelman, and others have ably set forth the basic outlines of this debate using a predominantly Haig-Simons methodology. What is left for younger scholars to do? One approach is to cut the theoretical issues more finely—to debate the consumptive character of medical and charitable expenses at ever higher levels of abstraction, or to seek a mathematical formula for resolving the equity and efficiency issues at the optimal level. But this approach seems unlikely to resolve the issue, and in any event there is no reason to believe that lawyers, as opposed to economists or other experts, are the best qualified people to conduct this research.

A better approach is to recognize that the issue involves diverse and contradictory forms of evidence—the theoretical nature of the expenses, real-world changes in the delivery of health care and the functioning of charitable organizations, popular sympathy for medical expenses being "beyond the control" of individual taxpayers, and, in the case of charitable expenditures, residual notions of the separation of church and state and the cultural significance of nongovernmental charitable activity. Scholars may evaluate each of these types of evidence in varying degrees, using different methodologies. Economics remains relevant with respect to the consumptive character of the relevant expenses. Sociological and other data are relevant with respect to the real-world delivery of health care and the actual functioning of charitable organizations. Legal and political theory, together with appropriate empirical evidence, are relevant for the separation of church and state and the importance of nongovernmental charitable activity. The lawyer's role in this reinvented scholarship would be to gather and evaluate these different forms of evidence and eventually—armed with the lawyer's institutional and problem solving skills—to craft a consistent and workable solution. This structure contrasts with the approach of much present-day legal scholarship, which presents economic evidence systematically but too often assumes that noneconomic arguments are "just politics" and unworthy of serious treatment.[119] By rigorously evaluating all forms of available evidence,

---

117 *Cf.* KRONMAN, *supra* note 5, at 53-108 (describing practical reason as the traditional hallmark of academic lawyers). On "economic imperialism"—that is, the tendency of economists to dominate various noneconomic disciplines—see Kelman, *On Democracy-Bashing, supra* note 68. For a lighter approach to essentially the same issue, see Steven Lubet, *Notes on the Bedouin Horse Trade or "Why Won't the Market Clear, Daddy?"*, 74 TEX. L. REV. 1039, 1053-57 (1996) (using Middle Eastern bazaars to demonstrate the conditional and incomplete nature of law and economics analysis).

118 *See supra* text accompanying notes 36-44.

119 *See supra* notes 45-47 and accompanying text (discussing the passive loss rules).

lawyers can create a genuine practical reason approach, one that economists or other nonlegal experts are unlikely to pre-empt.

3. *Methods II: Updating Tax Jurisprudence*

Perhaps the main limitation upon tax professors is not that they know too much economics, but that they frequently know so little law. The conceit of tax scholars aside, a knowledge of nontax law and scholarship is vital to the resolution of an increasing number of tax issues. This is obviously true for interdisciplinary topics, where the nontax component is readily apparent, but it is equally so at the level of broader jurisprudential theory, which has important implications for the methodology and subject matter of tax scholarship. Nontax jurisprudence is especially important if we are to construct (or reconstruct) a specifically legal approach to taxation, one that economists and other nonlawyers are unable to supersede.

The role of nontax scholarship is most obvious for interdisciplinary projects. Thus, feminist and critical race scholarship is relevant to progressivity and the taxation of family units, international and choice-of-law scholarship is important for international tax issues, and corporate or business law developments are increasingly significant for issues of business taxation. This is almost too obvious to say; yet tax scholars are conditioned to think of tax as a largely self-contained subject, and those who invoke "outside" experts are sometimes defensive about doing so.[120] A new scholarship should make unapologetic use of such sources.

Nontax jurisprudence is also important with respect to broader theoretical issues. These issues include both procedural questions, which are likely to occupy increasing attention of tax scholars, and more traditional substantive topics. The contribution of nontax scholars is particularly relevant with respect to distributional issues, which involve inherently political choices with respect to which economists can provide only incomplete, conditional guidance.

On the procedural front, tax scholars can benefit immensely from the new legislation and administrative law scholarship, which is slowly displacing constitutional law as the most influential segment of the legal academy.[121] In a 1994 article, Paul Caron cites statutory interpretation, administrative law, and appellate jurisdiction/choice-of-forum issues as three areas in which tax scholars might learn from the

---

120 *See supra* text accompanying notes 78-79. For an early effort at applying critical race scholarship to tax policy, see Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751.

121 *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) (identifying problems and exploring new solutions with respect to the traditional legal process approach).

insights of their nontax colleagues, from whom (so he argues) they have typically become much too distant.[122] Of interest here is not only recent public choice-inspired scholarship, but also more traditional scholarship including the legal process approach of Hart and Sacks, and the efforts by Eskridge, Frickey, and others to update that approach for contemporary circumstances.[123] Such matters are hardly peripheral: issues such as the interpretation of tax statutes and deference to IRS regulations are ultimately questions of institutional competence. Moreover, perhaps the biggest tax issue of the past generation—the efficacy of taxation versus direct expenditures—is, to a large degree, dependent upon assumptions about the tax, as opposed to the nontax, legislative process. Tax scholars are gradually reaching this realization, and recently there has been an upsurge of scholarship that blurs the line between tax and more generic legal process issues.[124] But we still have a long way to go. There remains among scholars a lingering sense that tax is "different" from other subjects and is therefore immune to outside analysis. A reinvented scholarship must bridge this gap.[125]

Nontax jurisprudence may also play an important role with respect to more substantive (as opposed to procedural) concerns. The traditional issues of tax policy—horizontal equity, progressivity, and the fairness/efficiency tradeoff—ultimately concern the construction of a just society and the role of government in that process. The work of legal philosophers, no less than economists and political scientists, is relevant to this question. This fact is most apparent for scholars like Rawls and Nozick whose work directly addresses distributional questions.[126] But the insights of all major jurisprudential figures—Dworkin, Posner, MacKinnon, and similar figures—are ultimately significant for tax policy. This is especially true as tax policy becomes intertwined with budgetary and other spending issues, and as discussion of a flat tax and similar reforms exposes the underlying ideological cleavages in tax policy. Edward McCaffery has recently attempted to develop Ronald Dworkin's "law as integrity" model into a comprehensive, law-driven view of taxation and tax policy.[127] Others have attempted to do the same for Rawlsian ethics and feminist

122 Caron, *supra* note 65, at 531-89.

123 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

124 *See generally* Shaviro, *supra* note 97 (taxation and the legislative process); sources cited *infra* note 153 (taxation and administrative law).

125 On "tax legal process" generally, see *infra* Part II.B.1.

126 ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971).

127 Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71 (1996).

jurisprudence.[128] A reinvented scholarship would accelerate these efforts, seeking to reintegrate tax into the broader world of legal thought, and providing an alternative to an economics-centered view of the field.

The reluctance of scholars to utilize nontax sources is, I suspect, a matter of sociology rather than of intellect. Most tax professors teach tax subjects exclusively. Their tax training makes them aware of at least some tax theory, but of relatively little general purpose jurisprudence. They are evaluated for tenure by reviewers who share the same biases. Thus, when they reach for theory, tax professors tend to look to others within the tax field rather than to nontax legal thinkers. Promoting a more fluid tax scholarship requires that we address these patterns. Part II.C of this Article contains proposals for changes in the law schools, designed in part to make these adjustments.

4. *Subject Matter I: New (and Renewed) Subjects*

The first question for any scholar is what to write about. Although there is much original writing on tax issues, the tax field—like any area of scholarship—has an inevitable tendency to revisit the same subjects at increasingly high levels of abstraction. Reinventing tax scholarship requires that we find new material. In particular, it requires choosing subjects in which academic lawyers, as opposed to economists or other trained social scientists, can make an original contribution. Although categorizations are dangerous, two principal kinds of new subjects come to mind.

The first category is driven by changes in the real-world practice of law. It consists of subjects that have become important areas of tax practice and legislation, but to which scholars have been slow to respond. International taxation and employee benefit tax issues are the two most obvious examples. Others include taxation and health care, state and local taxation, especially as it relates to interstate transactions, and nonincome taxes, including sales, value-added, and other excise-type levies. Tax scholars have begun to address these subject matters, but the technical complexity of these areas and the relative unfamiliarity of many professors with them hampers the process.[129] A reinvented scholarship would seek to accelerate the process of bringing these new areas to the forefront of published scholarship.

The second category is driven by external changes. It involves issues that received detailed treatment in earlier generations, but which bear revisiting due to changing intellectual and political condi-

128 *See, e.g.*, Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 771-86 (1995) (applying the theories of Rawls, Nozick, and Dworkin to the issue of progressive tax rates); *supra* text accompanying notes 78-79 (feminism).

129 *See infra* notes 199-200 and accompanying text.

tions. Progressivity is an obvious example.[130] Taxation of the family, an issue irretrievably bound to shifting social practices and attitudes, is another.[131] The changes in these areas are so extensive as to render them effectively fresh subjects. By incorporating the insights of nontax scholars, along with empirical data regarding real-world social and political developments, tax scholars can produce a new and original scholarship in these areas, without fear of duplicating previous efforts.

New subject matters are attractive both in their own right and because of the types of issues that they tend to raise. Many emerging areas of taxation involve clashes between competing jurisdictions or values, to which lawyers' practical reasoning and problem solving skills appear especially relevant. This fact is most obvious for international and multistate taxation, both of which emphasize overlapping jurisdictions and related choice-of-law issues. Hybrid subjects, including pension taxation, and health care taxation, likewise feature clashes between competing values and institutions, which are only partially subject to economic or other quantitative analysis. Progressivity and family tax issues, although traditional tax topics, involve similar conflicts. Haig-Simons scholarship has tended to downplay these conflicts, instead emphasizing the definition of economic income and treating nontax policy as largely extraneous to the tax system.[132] The way may be open for a more eclectic, interdisciplinary scholarship that balances tax and nontax considerations without relying exclusively on any conceptual scheme.

The issue of subject matter is largely a matter of time lag. Scholars tend to write about things that were important when they were in law school or legal practice. They often lose touch with practitioners as they move further into their careers. Adjunct professors, who remain in daily contact with the world of tax practice, typically produce little scholarship. The dichotomy between "tax" and "nontax" issues similarly reflects the segregation within the legal academy. Addressing both of these problems requires both institutional and intellectual change. Part II.C of this Article contains proposals to bridge the gap between full- and part-time tax faculty, and between tax and nontax

130 *See infra* Part II.B.2.

131 For a classic treatment of family tax issues, see Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975). For an early feminist perspective, differing with Bittker in several important respects, see Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971). For more recent articles, incorporating intervening developments in feminism and broader social theory, see, for example, Alstott, *supra* note 78; McCaffery, *supra* note 54; Staudt, *supra* note 78; Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

132 *See supra* Part I.B.

scholars, in order to reduce the isolation and improve the quality of tax legal scholarship.

5. *Subject Matter II: New Approaches to Old Subjects*

Whatever angry young men and women may propose, much tax scholarship will continue to address subjects that are neither as new as international or pension taxation, nor as politically sensitive as progressivity or family tax issues. Yet scholarship may also be reinvented in these traditional areas. By expanding their goals and methods, tax lawyers can produce original scholarship even on more traditional subjects, making new contributions in areas previously considered complete.

Consider capital gains, perhaps the classic tax policy topic. The arguments for and against a reduced capital gains rate—inflation, "bunching," distributional and incentive effects—are by now well rehearsed.[133] Yet a mound of empirical work regarding the impact of reduced rates on real-world behavior is only now beginning to appear in the legal literature. The subject of capital gains is also ideal for the integration of public choice and other process-based theories into the analysis of substantive issues. For example, a short-term reduction in the capital gains rate may be attractive on its own terms, but becomes less so if political factors make it unlikely that the reduced rate can ever be increased again.[134] Finally, public opinion merits further study: many taxpayers with low capital gains nonetheless support reduced rates as a symbolic reward for investment, risk-taking, and thrift.[135] Scholars have begun to address these issues, but only in a preliminary fashion, and their work remains subject to strong disagreement from those who prefer more traditional modes of analysis.[136] A reinvented scholarship would take these approaches much further.

The passive loss rules provide a similar example.[137] Most scholarship on the passive loss rules emphasizes their substantive limitations under traditional tax policy standards.[138] What might be called the

---

133 *See* Walter J. Blum, *A Handy Summary of the Capital Gains Arguments*, 35 TAXES 247, 247 (1957) (surveying the arguments on altering capital gains taxes, and noting, even in 1957, that there were "more than just a few articles" on the subject). For an updated analysis of the capital gains debate, see John W. Lee, *Critique of Current Congressional Capital Gains Contentions*, 15 VA. TAX REV. 1 (1995).

134 *See* Shaviro, *supra* note 93, at 402-03.

135 On the symbolic aspect of tax legislation, see Livingston, *supra* note 114, at 182-87 (assessing the symbolic aspect of tax incentives for "risky" activities); Blatt, *supra* note 35, at 314-25 (providing a similar analysis for estate tax "family business" provisions).

136 *See Colloquium on Capital Gains*, *supra* note 93 (reflecting a range of traditional and nontraditional approaches to capital gains tax policy).

137 I.R.C. § 469 (1994).

138 For examples of existing scholarship on the passive loss rules, see *supra* notes 46-47.

procedural argument for the rules—that they helped eliminate a dubious tax shelter industry and were more politically appealing than other limitation proposals—has been acknowledged at a colloquial level, but generally has not been evaluated in a systematic fashion.[139] Empirical research on public attitudes toward tax shelters and the real-world impact of the passive loss limitations would add greatly to our understanding of this issue, and would help us determine whether the passive loss rules are indeed "the best we can do" in this area. A theoretical modeling, using public choice theory or another methodology, would likewise contribute to our understanding. By expanding the range of relevant evidence, and by bridging the gap between substantive and process-oriented tax scholarship, scholars can discover new opportunities in this area, as well as in other "old" fields.

One must be careful about this last point, however. Academic lawyers are neither politicians nor journalists (and they should not be). Nor should they endlessly reargue old issues in the light of every trendy new theory. But it is odd, in a field bursting with political energy, for scholars to be missing so much of the action. This is especially true for academic lawyers, representing a field whose lifeblood should be practical experience rather than theoretical logic.[140] This is, yet again, merely a further call for a practical reason-based scholarship that considers all relevant evidence and thereby avoids dependence on any single, foundational approach.

B. Applications: Three Projects for Future Tax Scholars

The prior sections of this Article set forth themes and building blocks for a reinvented tax scholarship. These include changes in scholarly goals and methods, which would in turn permit scholars to emphasize new subjects and to approach old ones in fresh new ways. Our ultimate goal is the construction (or reconstruction) of a practical reason tax scholarship, in which lawyers borrow from various nonlegal disciplines but retain an independent, assertive scholarly role.

The remainder of Part II presents specific applications of these changes. These applications are intended to fall somewhere between mere examples on the one hand, and a fully developed scholarly agenda on the other. Call them carefully chosen examples—three project areas that exemplify the ideas discussed above and that demonstrate the potential range and impact of a reinvented tax scholarship.

---

139 *See, e.g.*, Rock & Shaviro, *supra* note 47, at 1-2 (acknowledging the "public anger" at tax avoidance that gave rise to the 1986 tax act and specifically to the adoption of the passive loss rules).

140 *Cf.* O.W. HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience.").

The three projects represent various combinations of new goals, methods, and subject matter. The first, which I call "tax legal process," applies the insights of political scientists and nontax legal scholars, moves toward a more rigorous study of the tax lawmaking process, and includes a significant amount of descriptive or empirical work. The second project, "the new progressivity," applies contemporary nontax jurisprudence, together with statistical and other evidence of economic inequality, to the issue of tax fairness or vertical equity, recognizing that this question has become irretrievably mixed with welfare, income maintenance, and other nontax policy issues. The third project emphasizes international and other multijurisdictional taxation, which has become a dominant practice area but to which scholars have been slow to respond. Thus, the first two applications principally involve the reinvigoration of old subjects, and are driven primarily by intellectual and political changes; the third involves new (or at least renewed) subject matter, and is driven by changes in the day-to-day practice of law. All three emphasize an eclectic, interdisciplinary scholarship involving a mix of goals and methods, and each breaks down traditional boundaries between tax and nontax subject matters. Furthermore, each project involves a clash between nonquantifiable and, to a large degree, incommensurable values, and is accordingly an area to which lawyers can make a significant contribution with or without the help of economists. Finally, all make use of social science or other nonlegal methods, but avoid dependence on any one method, and are thus consistent with a pragmatic, practical reason approach.

Part II.C concludes with recommendations for changes in law schools, designed to effectuate the above proposals. Lastly, Part II.D contains a word regarding the continuing value of many traditional approaches to tax scholarship.

Inevitably, there is a degree of repetition in moving from themes to examples. However, I think that the value of specific applications justifies such repetition. I ask the reader to bear with me if these examples revisit some of my previously enunciated themes, or if the earlier thematic discussion has foreshadowed the examples themselves.

1. *Beyond Public Choice: Toward Tax Legal Process*

My first project seeks to integrate previously diverse strands of scholarship into a unified theory of the tax lawmaking process, including legislation, administrative decisionmaking, and statutory interpretation. In particular, the project addresses—more comprehensively than at present—the relationship between institutional structures and the content and quality of substantive tax outcomes. Resources for this project include existing scholarship on the tax legislative process,

the insights of political scientists and of other noneconomic social scientists, together with the theories of public choice economics, and the work of nontax legal scholars in the fields of legislation, statutory interpretation, and administrative law. Much of the work, at least in the beginning, should be descriptive or empirical in nature, in order to build a necessary base of knowledge about tax procedures and institutions. The project thus exemplifies the need for legal scholars to embrace a range of scholarly goals and methods, and to utilize nonlegal methods without becoming overly awed by or dependent upon them. The project is significant both in its own right and as a step toward the general revival of the tax field. Without a better understanding of the relationship between tax procedures and tax outcomes, it is difficult to construct a practical reason tax scholarship, and scholars may be doomed to make a series of idealistic proposals that have little or no real-world impact.

Let me begin with a bit of history. Tax scholars have long been interested in the legislative process, if only because the fate of their substantive recommendations is dependent on that process. Early discussions emphasized the activities of tax lobbyists and their role in securing favorable tax legislation for specific taxpayers and industries.[141] Public choice theorists built more sophisticated models, but the essential message remained the same: the legislative process is inevitably captive to special interests and, accordingly, cannot be relied upon to produce meaningful tax reform. Others were less pessimistic, but the theories on which they relied have been to some degree discredited and, as a general rule, they stand on the defensive against the public choice scholars.[142]

Although the study of the tax legislative process has become more sophisticated, it has remained largely separate from the study of substantive tax issues. Articles recommending substantive changes in the tax law usually pay little attention to process issues, while pieces

---

141 *See, e.g.*, William L. Cary, *Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws*, 68 HARV. L. REV. 745, 747-73 (1955) (identifying sources of pressure on Congress to create special tax rules); Stanley S. Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1149-81 (1957) (attempting to enumerate reasons why tax lobbyists seek "loopholes"). For an intermediate view—more sophisticated than 1950s-era models but less systematic than the later public choice critique—see Michael J. Graetz, *Reflections on the Tax Legislative Process: Prelude to Reform*, 58 VA. L. REV. 1389 (1972). The classic journalistic account of the tax legislative process is JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987). *See also* TIMOTHY J. CONLAN ET AL., TAXING CHOICES: THE POLITICS OF TAX REFORM (1990) (analyzing the processes behind the passage of the Tax Reform Act of 1986); THOMAS J. REESE, THE POLITICS OF TAXATION (1980) (explaining the difficulty in passing meaningful tax reform legislation).

142 On public choice scholarship generally, see *supra* text accompanying notes 56-61, 97-98.

discussing the legislative process tend to do so in generic terms, without distinguishing among the various treatments of different types of tax issues.[143] Tax legislation scholarship has also remained surprisingly insulated from the outside world. Until recently, such articles contained few references to social science or even to nontax legal materials. Even today, scholars seem to prefer stylized public choice models to empirical, political science or other intellectual traditions. Indeed, much of the scholarship on tax legislation has a vaguely anecdotal flavor. The arguments are frequently based on the author's personal experience, and they attempt to draw general lessons from that experience.[144]

While the study of the legislative process remains largely self-contained, assumptions about the process—usually negative ones—have a strong influence upon work in related substantive areas. Thus, Stanley Surrey, in considering the issue of tax complexity, has concluded that the Treasury Department is better able than Congress to handle complex materials, and accordingly recommends that Congress delegate a larger portion of tax lawmaking to the Department.[145] Surrey and McDaniel's work similarly cites flaws in the tax legislative process as a reason for preferring direct spending to tax expenditures.[146] Public choice theory, with its largely negative assumptions about the legislative process, has further influenced work on legislation and statutory interpretation, both in tax and nontax areas.[147] The scholarship in these areas is original and stimulating, but it tends to be unsystematic. Given the relatively limited base of empirical knowledge concerning the actual workings of the tax lawmaking process, this condition is not surprising.

A reinvented scholarship would attempt to fill these gaps. A three-part agenda suggests itself. First, scholars should be more sys-

---

143 *See supra* notes 45-48 and accompanying text (discussing the scholarly response to the passive loss rules).

144 *See, e.g.*, Michael Livingston, *Reform or Revolution? Tax-Exempt Bonds, the Legislative Process, and the Meaning of Tax Reform*, 22 U.C. DAVIS L. REV. 1165, 1170-1212 (1989) (describing tax-exempt bond legislation from the perspective of a congressional staff member); McIntyre, *supra* note 108, at 713-32 (evaluating the congressional debate on the windfall profits tax from the perspective of a public interest tax lobbyist).

145 Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS. 673, 702-07 (1969).

146 STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 104-07 (1985) (citing lower visibility and confusion over political responsibility as arguments against tax expenditures). For a dissenting view, see Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993) (arguing that the diversity of interests represented in tax legislation may actually result in a more public-spirited process than that pertaining to direct spending programs).

147 *See, e.g.*, Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819 (1991); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (general theory of statutory interpretation).

tematic in studying the tax legislative process by using the descriptive or empirical political science methods as well as public choice and other economic models. Priority topics include the role of ideology in tax policy, the impact of the budget process and other procedural reforms, and the use of tax incentives as a vehicle for communicating symbolic values between the government and its citizens.[148] There is a substantial body of literature on each of these subjects, which could serve as the basis for numerous case studies focusing on tax legislation in particular periods, or with regard to particular legal provisions. A reinvented scholarship would also make more constructive use of public choice theory, shifting the emphasis from criticism of the tax legislative process to proposals for constructive reform. The role of congressional committees in controlling the agenda for tax legislation, and thereby blunting the power of special interests, is of particular interest here. Historical studies would likewise be of great benefit: under what conditions, if any, has effective tax legislation been enacted, and what does this tell us about the prospects for future reform?[149]

Second, and relatedly, scholars should develop a deeper understanding of the relationship between the lawmaking process and the content of substantive tax provisions. The conventional wisdom is that tax expenditures are inferior to direct spending programs because they are often carelessly enacted and tend to be inefficient and overbroad.[150] Edward Zelinsky has suggested that tax expenditures may in some cases be superior, because they piggyback on an existing return and information system, and because the tax legislative process is (in Zelinsky's view) more public-spirited than that of most spending provisions.[151] By comparing the fate of tax and direct spending programs in parallel substantive areas, it is possible to study these claims. Housing subsidies are one obvious example. It is likewise possible to evaluate through carefully chosen case studies the truth of Surrey's

148 For early efforts in this direction, see Blatt, *supra* note 35, at 314-25 (on ideology and symbolism in estate tax legislation); Graetz, *supra* note 88 (on the impact of the 1990s-era budget process and related reforms); Shaviro, *supra* note 97, at 98-101 (on ideology in the tax legislative process); *id.* at 101-04 (on the impact of political rules and structures). For an interesting study of the relationship between the private tax bar and tax legislation, see Howard J. Hoffman, *The Role of the Bar in the Tax Legislative Process*, 37 TAX L. REV. 411 (1982).

149 For long-term tax history, attempting to place current debates in an historical context, see, for example, WITTE, *supra* note 62; Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119 (1994); Joseph Bankman, *The Politics of the Income Tax*, 92 MICH. L. REV. 1684 (1994) (book review). For more recent tax history, see C. EUGENE STEUERLE, THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA (1992); Sheldon D. Pollack, *Tax Reform: The 1980's in Perspective*, 46 TAX L. REV. 489 (1991).

150 *See* Wolfman, *supra* note 99; *supra* note 30.

151 Zelinsky, *supra* note 69.

assertion that administrative decisionmaking is superior to legislative decisionmaking in tax matters. Of course, projects of this type will be subject to the limitations of all empirical research: the findings will never be exhaustive, and the effect of unwanted variables can never be completely eliminated. However, a broader base of empirical knowledge is nearly always preferable to intuition, and would provide a firmer basis for normative recommendations.

Third, the study of the judicial and administrative processes related to tax should be integrated with that of tax legislation, with the goal of developing a comprehensive theory of decisionmaking on tax issues. This is particularly urgent with respect to statutory interpretation: the question whether courts should hew closely to statutory language, or attempt to fill gaps under a legislative purpose or similar doctrine, is closely related to assumptions about the nature of the legislative process and the relative competence of Congress, the courts, and the IRS to attend to detail.[152] The issue of judicial deference to regulations is similarly dependent upon these assumptions.[153] In short, I envision a comprehensive investigation of the entire issue of institutional competence in tax matters, using selected case studies and incorporating insights and methods originating outside the tax field.

What this Article proposes are the beginnings of a tax legal process, under which the study of lawmaking would become part of the mainstream study of tax policy, rather than languishing as an interesting but ultimately temporary diversion. The most immediate consequence of this new outlook would be an increased number of books and articles on the process itself. However, scholars addressing substantive tax issues would also be encouraged to consider institutional or process-based issues in framing their policy recommendations. For example, a scholar writing on housing tax policy would consider whether direct spending programs have actually been better crafted and managed than tax expenditures in this area—and whether they

---

152 For a recent decision suggesting these issues, see Albertson's, Inc. v. Commissioner, 42 F.3d 537 (9th Cir. 1994) (holding that I.R.C. section 404 prevents deduction of interest paid on nonqualifying pension contributions despite statutory language appearing to permit such deduction). On the judicial response to tax avoidance, and its institutional and other limitations, see Bernard Wolfman, *The Supreme Court in the* Lyon*'s Den: A Failure of Judicial Process*, 66 CORNELL L. REV. 1075 (1981); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859 (1982) (book review).

153 On the interplay of tax and administrative law, and (specifically) the authority of tax regulations, see Ellen P. Aprill, *Muffled* Chevron*: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35 (1995). The use of aggressive regulations to compensate for real or perceived difficulties with existing judicial outcomes is demonstrated by the so-called partnership "anti-abuse" regulations, adopted with much fanfare in 1996. Treas. Reg. § 1.701-2(b) (1996).

are likely to be enacted at all—and evaluate political, cultural, and economic factors affecting these evaluations.[154] A scholar addressing tax deductions for educational expenditures would consider the likelihood that Congress will be able to define (and the IRS to enforce) appropriate limits on the type and extent of qualifying expenditures. She would also address the more theoretical issues—e.g., taxation of human capital and the distinction between personal and business expenses—traditionally considered in such an analysis. One has to be careful in these types of cases: economics and political science are different methodologies, and it is perfectly appropriate to consider the "correct" economic approach to an industry or transaction before moving to political issues. For example, the question whether educational expenses would be deductible in an ideal world is different from the question whether they should be deductible in this one. However, it seems to me that both questions are relevant, and a mature tax policy properly ought to take both into account. Process-based considerations are especially important for a practical reason-based scholarship, which seeks to develop pragmatic solutions to tax problems without relying on any one underlying method or source of truth.

The issue of tax legal process exemplifies several of the themes suggested in the preceding pages, including the need for more descriptive or empirical work and the need to utilize the insights of noneconomic social scientists and nontax legal scholars. The need for empirical work is especially pronounced. We simply know too little about the relative effectiveness between tax and direct spending programs, or the relative advantages between statutes of varying complexity, to make conclusive recommendations without further research. Political scientists and other nonlawyers can conduct, and actually have conducted, some of this research, but their work tends to be general in nature, rarely focusing on specific legal provisions.[155] In particular, nonlegal experts are unlikely to develop the relationship between tax legislation and administration, and the implications for statutory interpretation. Only lawyers have the knowledge and the interest to do the job properly.

Tax legal process is moreover an area in which lawyers can make an original contribution without excessive dependence upon economic or similar models. Although political science, history, and public choice economics are relevant, the ultimate issues—e.g., the relationship between substance and procedure or questions of institu-

154 *See, e.g.*, Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 885-93 (1993) (contrasting tax provisions with nontax housing policies).

155 *See supra* note 104.

tional competence—are quintessentially legal in nature, and indeed, are increasingly prominent throughout the legal academy.[156] The study of tax legal process thus provides both an example of practical reason scholarship and a tool for its advancement: the study itself uses various nonlegal methods while avoiding dependence upon any one of them. An awareness of these process-based issues may contribute to a pragmatic, balanced analysis of other substantive tax issues.

2. *The New Progressivity*

My second project involves a subject—progressive taxation—that lies at the juncture of law, economics, and political and moral philosophy. Dormant for several decades, progressivity scholarship has undergone a modest revival in recent years, sparked by nontax academic trends and (in a more immediate sense) by the challenge of the rejuvenated anti-progressive or "flat tax" movement.[157] Much of this new work is excellent, but like much tax scholarship, it tends to be abstract and self-contained, connected only partly to the larger public debate on the role of government and the future of redistributive, "progressive" politics in the post-Cold War world. My project would seek to connect the tax discussion with this broader debate. I would also attempt, by means of empirical and other work, to take account of real-world changes in the nature and degree of economic inequality, which shift the context for the progressivity debate from where it was a generation ago. In short, I would attempt to create (or recreate) a practical reason scholarship on progressivity, borrowing from various theoretical and practical sources, but with lawyers weighing the disparate evidence and crafting creative and balanced solutions.

As with my first subject area, progressivity is well suited to a practical reason approach: it requires the weighing of incommensurable and (to a large degree) nonquantifiable values, and economic or similar models can never fully resolve it. Walter Blum and Harry Kalven presented the classic treatment of progressivity almost a half century ago.[158] In their 1952 article, the authors considered a broad spectrum

---

156 On the potential for a new legal process scholarship based on themes originating in law and economics and critical legal studies but also incorporating some traditional elements, see Rubin, *supra* note 96. A mature legal process scholarship must also consider the role of practitioners as makers and enforcers of tax law.

157 *See infra* notes 161-66 and accompanying text.

158 Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952). "Progressivity" refers to the imposition of higher percentage tax rates on increasing levels of income. By contrast, a proportionate or "flat" tax would apply equal percentage rates at all income levels. A flat tax may still be partially progressive if it provides—as most flat tax proposals do—an exemption or zero bracket amount, below which no tax is assessed. Although progressivity typically refers to tax rates, substantive tax rules may make the system more or less progressive by favoring poorer or wealthier taxpayers, respectively, in the definition of the tax base. For example, the passive loss rules are

of arguments for progressivity, including the diminishing marginal utility of money; various theories of benefit, sacrifice, and ability to pay; and more openly redistributive purposes, designed to reduce the inequality of income or opportunity in the broader society. Blum and Kalven conclude that "[t]he case for progression . . . turns out to be stubborn but uneasy," with the reduction of inequality constituting the strongest but also the most perplexing argument, especially for those unwilling to contemplate the more radical social changes that this inequality might suggest.[159]

Owing perhaps to the comprehensiveness of Blum and Kalven's treatment, scholars of the ensuing generation devoted relatively little attention to progressivity issues.[160] During the past decade, this situation has begun to change. In a 1987 article, Joseph Bankman and Thomas Griffith used a mixture of distributive justice and optimal tax theories to argue that the case for progressivity was more convincing than previously thought.[161] According to Bankman and Griffith, a progressive tax is best implemented by a system of flat or even declining tax rates coupled with cash grants to lower income taxpayers.[162] In the same year, Marjorie Kornhauser defended progressivity from a feminist perspective, arguing that progressive taxation is a way for even diehard (presumably male) individualists to recognize their responsibility to the broader community.[163] More recently, Donna Byrne has considered the implications of contemporary jurisprudence, including the work of Rawls, Nozick, and Dworkin, for the progressivity issue,[164] while Nancy Staudt has applied economic and political philosophy to argue that the poor have affirmative rights and obligations that the traditional debate ignores.[165] Other scholars have

---

often said to increase progressivity by making it more difficult for wealthy taxpayers to engage in tax shelter transactions.

159 *Id.* at 519. In a 1982 article, Blum concluded that the case for progression had become "no less, and perhaps even more, uneasy" as a result of intervening developments, including increased inflation, a slower rate of economic progress, and changes in the government's economic and social role. Walter J. Blum, *Revisiting the Uneasy Case for Progressive Taxation*, 60 TAXES 16, 21 (1982).

160 A notable exception is CHARLES O. GALVIN & BORIS I. BITTKER, THE INCOME TAX: HOW PROGRESSIVE SHOULD IT BE? (1969).

161 Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905 (1987).

162 *Id.* at 1958–65.

163 Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

164 Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739 (1995); *see also* Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994) (applying a Rawlsian analysis to the issue of estate and gift taxation).

165 Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919 (1997).

taken a more conservative, pro-flat-tax view, suggesting the beginnings of a lively, ongoing argument.[166]

In assessing the debate on progressivity, three principal points stand out. First, for such a vital subject, relatively little has yet been written about it. This relative dearth of scholarship reflects the comprehensiveness of Blum and Kalven's work, but I suspect that it also reveals a sense that the debate rests on political and moral judgments that are only partly susceptible to academic analysis. In this respect, Henry Simons, who defended progressivity with the simple assertion that pretax income distribution was "distinctly evil or unlovely," captured the essence of the argument better than most later writers.[167]

Second, the debate on progressive taxation remains largely separate from parallel debates on both budget and spending policy and from broader debates on the purposes and priorities of government in a conservative political era. To a large degree, this detachment reflects the training of tax professionals, who are typically asked to design the best tax system to raise a predetermined sum of money without considering how the money is to be used. But it creates a strangely neutered debate where progressivity is concerned. This is especially true when the benefit theory of taxation, which holds that those who benefit from the resulting expenditures should pay the taxes, is applied in support of progressive taxation.[168] How can such a theory be applied, without knowing how the money is used? Specifically, how does the post-Cold War shift in government expenditures affect the Blum and Kalven analysis, which was conducted largely in Cold War terms? Further, what are we to make of the more overtly political arguments in favor of progressive taxation, which scholars developed in a different period, and which may not survive the transition to a more conservative political era?

Third, the debate on progressivity, at least as far as lawyers are concerned, tends to be conducted in an empirical vacuum. Articles on the subject typically emphasize the design of an appropriate rate structure for an ideal society, but incorporate relatively little data on real-world income allocations or the effect of tax (and nontax) policy on those allocations. For example, the changes in the U.S. economy

---

166 *See* ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX (2d ed. 1995) (arguing for a flat or proportionate rate tax on fairness and efficiency grounds); *cf.* Charles R. O'Kelley, Jr., *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 S. CAL. L. REV. 727 (1985) (arguing that a flat tax with an expanded tax base and generous exemption amount could result in tax hurdens more progressive than under the current tax system).

167 SIMONS, *supra* note 22, at 19.

168 *See, e.g.*, Blum & Kalven, *supra* note 158, at 451-55 (expressing guarded skepticism regarding the benefit theory); Kornhauser, *supra* note 163, at 491-97 (discussing the benefit theory as an argument for progressive taxation and concluding that the argument "is not as weak as others suppose").

during the past decade, which some believe will result in a permanent division between the "haves" and the "have nots" in society, have only begun to be reflected in the tax literature.[169] Other changes, including the femininization of poverty and the advent of an increasingly global economy, which make it difficult for any nation to increase its level of progressivity without exporting jobs and money to other countries,[170] similarly must be recoguized. There is, of course, a vast economic literature on such topics, but as yet, this work—as opposed to more normative economics—has exerted only limited influence on legal scholars.

A reinvented scholarship would begin to address these concerns. The first step is to continue the work of Bankman and others by updating the tax debate to account for changes in nontax legal and political philosophy.[171] Scholars such as Rawls and Nozick, who explicitly address distributional issues, are an obvious first target. But each of the major jurisprudential movements—critical legal studies, civic republicanism, and contemporary law and economics—has implications for the progressivity debate. In particular, scholars should incorporate the insights of feminism, critical race theory, and similar movements into the discussion. The subjects mentioned above have particular relevance when progressivity is conceived not merely as a matter of tax rates, but also as including specific tax provisions that disadvantage weaker economic or social groups. The latter concerns are frequently subsumed under a horizontal equity heading: do existing provisions unfairly disadvantage women, gays, and minorities as compared to similarly situated white men? However, these concerns are perhaps more accurately viewed as progressivity issues, because the underlying premise of these movements is the disadvantageous treatment of the relevant group in the pretax world.[172] Feminism is especially significant in this respect. Numerous tax provisions may be taken to slight women, either in a direct financial sense or by elevating an individualist, male viewpoint over more traditionally feminine at-

169 *See* MICKEY KAUS, THE END OF EQUALITY 29 (1992) (citing economic statistics to demonstrate that "the rich [are] getting relatively richer, [and] there are relatively fewer Americans clustered in the middle of the income distribution").

170 *See Disappearing Taxes: The Tap Runs Dry*, THE ECONOMIST, May 31, 1997, at 21 (noting that globalization and new technologies make it more difficult for governments to tax their citizens, and suggesting strategies for coping with these changes); *cf.* Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CAL. L. REV. 1599 (1993) (investigating the role of globalization in perpetuating income inequality and its consequences for traditional American ideals).

171 *See supra* notes 161-65 and accompanying text.

172 This treatment is particularly true of feminism: an attempt to treat "similarly situated" men and women in a similar manner may prove unavailing when the very point of the feminist movement is that men and women are often not similarly situated. *See* Alstott, *supra* note 78, at 2006-08 (noting that equal treatment is only one of several feminist goals and that these goals may conflict in assessing specific tax proposals).

tributes. Even superficially addressing these issues is enough to occupy a generation of scholars.[173]

The second step is to connect the tax discourse with the broader public debate over the role of government and its spending priorities. A public that questions the wisdom of redistributive spending programs, as the American public has done in recent years, must eventually rethink the validity of progressive taxation as well.[174] Advocates of progressivity must be prepared to debate this broader issue, recognizing that the conservative shift in governing philosophy has profound implications for the tax question.

The benefit theory is of particular interest for this purpose. Does the post-Cold War shift in spending priorities, away from defense and toward domestic entitlements, make progressivity less imperative—because the rich now have less need for governmental protection—or more so—because only a progressive tax base can ultimately finance entitlement programs? If the political right succeeds in further reducing redistributive spending programs, does this occurrence counsel reduced progressivity—because the overall governing philosophy is now less redistributive in nature—or increased progressivity—because the remaining governmental benefits are more likely to flow to wealthy and middle class taxpayers? What is the proper role of dedicated taxes and user fees, which represent an especially stark application of the benefit theory, but may be highly regressive in nature?[175] These issues can be addressed only from a combined tax and spending perspective. Indeed, it may no longer be appropriate to speak of progressive taxation at all. Instead, perhaps we should be discussing the combined progressivity of tax, spending, and other government policy.[176]

---

173 In addition to issues that affect women as taxpayers, such as joint returns, the child care credit, and income averaging, many facially neutral provisions, from progressive tax rates to incentives for risky activities, may reflect an individualist male-oriented cultural viewpoint and hence may be appropriate subjects for feminist analysis and criticism. *See* Kornhauser, *supra* note 163 (applying a feminist critique to the progressivity/flat tax debate).

174 *See* KAUS, *supra* note 169, at 62 (arguing that the "[t]ax and [t]ransfer [i.e., redistributive spending] [c]ure" for economic inequality has become both technically and politically unworkable in the United States).

175 *See* John Copeland, *Fees, User Charges, and Excises in the Deficit Era*, 92 Tax Notes Today 190-82, Sept. 18, 1992, *available in* LEXIS, Fedtax Library, TNT File (discussing fees and excises as deficit reduction tools but noting the regressivity of these charges).

176 A combined, tax-and-spending measure of progressivity tends to make the government appear far more progressive than a pure tax-rate view, especially when Social Security and Medicare spending are taken into account. *See* Lee A. Sheppard, *News Analysis: Stripping Social Security of Its Redistributive Features*, 96 Tax Notes Today 233-7, Dec. 2, 1996, at 1, *available in* LEXIS, Fedtax Library, TNT File (noting that social security "has a well-disguised redistributive aspect in its pension formulas, which provide a proportionally larger pension to lower-paid workers than to higher-paid workers"); Joint Comm. on Taxation, *Impact on Individuals and Families of Replacing the Federal Income Tax* (JCS-8-97) (Apr. 14,

Third, scholars should incorporate real-world economic changes in their analyses of progressivity issues. Today's society is vastly different from that of Blum and Kalven, a fact that requires significant adjustments to the arguments both for and against progressive taxation. On the one hand, rising economic inequality appears to strengthen the case for progressivity.[177] This is particularly true in light of the increased concentration of poverty among women, minorities, and immigrant groups, which makes less tenable the position that economic success is a matter of ability rather than an accident of birth.[178] Yet, the proliferation of allegedly meritocratic standards, as exemplified by standardized tests and similar measures, may work against progressivity, giving the economic elite a sense that they have "earned" their status and that lower achieving individuals are necessarily less deserving of government support.[179] The advent of the global economy also complicates the equation, making it difficult for any one nation to tax its citizens too progressively without cooperation from its sister states. The notion of progressivity itself may require adjustment to include the question of distribution between poor and wealthy nations, as well as among richer and poorer citizens of each individual nation.

Finally, scholars should make a greater effort to capture the rhetoric on both sides of the progressivity/flat-tax debate. A large number of Americans, whose taxes would rise under a flat-tax regime, are nonetheless supportive of the concept. Are they merely confused, as some experts believe, or do they have a hidden wisdom that escapes the experts?[180] For example, might these flat-tax supporters intui-

---

1997), *reprinted in* 97 Tax Notes Today 72-32, Apr. 14, 1997, at 94 n.141, *available in* LEXIS, Fedtax Library, TNT File ("[T]he social security system is a program of taxes and benefits. . . . [W]hen taxes and benefits are combined, the overall program is progressive.").

177 *See* Blum & Kalven, *supra* note 158, at 486-506 (evaluating the argument for progressive taxation as a form of income redistribution).

178 *See* KAUS, *supra* note 169, at 103-20 (describing the concentration of poverty among minorities and female-headed households).

179 *Cf.* Blum & Kalven, *supra* note 158, at 496-97 (stating that the argument for progressive taxation becomes stronger in the case of "undeserved" income). On the contemporary argument for redistribution and the future of redistributive, "progressive" politics generally, see, for example, E.J. DIONNE JR., THEY ONLY *LOOK* DEAD: WHY PROGRESSIVES WILL DOMINATE THE NEXT POLITICAL ERA (1996); JEFF FAUX, THE PARTY'S NOT OVER: A NEW VISION FOR THE DEMOCRATS (1996); KAUS, *supra* note 169; MICHAEL LIND, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION (1995); Jeffrey C. Isaac, *The Poverty of Progressivism: Thoughts on American Democracy*, DISSENT, Fall 1996, at 40. The rise of the meritocracy has been accompanied by a change in the nature of wealth and wealth transmission, which today emphasizes the transfer of skills, knowledge, and similar advantages rather than land and other tangible assets. This change insulates these transfers from the reach of the tax system, but even if they could be taxed it is not clear whether the political will to tax them exists. *See* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

180 *See* David R. Francis, *The Flat Tax Shifts Onto the Slow Track*, CHRISTIAN SCI. MONITOR, Feb. 16, 1996, at 9 (reporting that support for the flat tax begins to ebb when voters realize

tively understand that higher rates are likely to be dissipated in assorted, largely regressive tax expenditures, so that the gains progressivity provides are largely squandered anyway? Or is support for a flat tax really just an expression of a preference for lower taxes, which is destined to fizzle when people realize that under the proposed plan their taxes may actually rise? Edward McCaffery's study of cognitive theory[181] and Marjorie Kornhauser's work on feminism,[182] have made important steps toward understanding these apparent anomalies, but far more work remains to be done. Historical work is important here, for if, as John Witte has suggested, opposition to high taxes always grows in peacetime, the flat-tax movement is less likely to be a passing fad and more likely to be a semi-permanent feature of the tax equation.[183]

Here again, as in my first project, my purpose is not to displace existing scholarship, but rather to take certain embryonic tendencies and develop them into a more promising whole. The themes are similar to those previously identified: the needs to diversify intellectual sources by incorporating developments in the noneconomic social sciences and the broader legal academy, to connect tax and nontax discourse, and to pay greater attention to real-world economic and political developments. The goal is an eclectic, interdisciplinary scholarship that borrows from several fields without being dominated by any; in short, it is a practical reason approach.

The choice of topics is also significant. By its nature, progressivity requires the weighing of incommensurable political, economic, and moral factors. It is not susceptible to a "correct" answer using Haig-Simons or any single economic (or noneconomic) methodology. Lawyers can thus make a major contribution to the progressivity de-

---

that gains by some would be offset by correspondingly increased taxes on others); Miriam Hill, *Flat Tax Would Hit Home: Deductions for Home Mortgages and Charity Contributions Could Be Eliminated, Essentially Raising Taxes for Middle Class*, PLAIN DEALER (Cleveland), Jan. 22, 1996, at 1D (reporting that the flat tax has broad support but "many people may not realize a flat tax would eliminate deductions and thereby raise taxes on the middle class").

181 McCaffery hypothesized that

> cognitive tendencies have played an important role in the evolution of our tax system, because the people, through democratic input and popular opposition, create powerful constraints on what practical tax systems can emerge. More specifically, . . . [c]ognitively favored tax systems are more apt to survive and become stable fixtures of a tax regime than are cognitively-disadvantaged ones.

Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1864 (1994); *see also* Deborah A. Geier, *Cognitive Theory and the Selling of the Flat Tax*, 71 TAX NOTES 241 (1996) (applying McCaffery's theory to the flat tax debate). On the role of rhetoric in tax policy generally, see Beverly Moran, *Income Tax Rhetoric (or Why Do We Want Tax Reform?)*, 1992 WIS. L. REV. 2063 (letter to the editors of the *Wisconsin Law Review*).

182 Kornhauser, *supra* note 163.

183 WITTE, *supra* note 62, at 247-57 (observing that taxes have traditionally increased in wartime and more or less consistently declined in times of peace).

bate without becoming second-tier economists. This is especially true if progressivity is conceived not merely as a matter of tax rates, but also as taking into account the effect of substantive tax rules on taxpayers of varying wealth, thus requiring legal analysis to identify progressive or regressive provisions and to craft appropriate reform proposals.

As in my first project, a portion of the work on progressivity must be descriptive or empirical in nature. We have too much to learn about too many issues—such as the impact of taxes on disadvantaged groups, public attitudes on progressivity, and the impact of economic and societal changes—to make recommendations without further research. Some of this information can be garnered from existing sources, including the work of economists and other social scientists, but tax legal scholars must gather much of it. Yet, this information-gathering process is itself part of a creative, diverse legal scholarship. A scholarship based wholly on existing models invariably becomes stale and derivative; one that constantly accumulates new information is likely to stay fresh and productive.

3. *Practice-Driven Scholarship: Herein of International and Comparative Tax*

The topics discussed above originate with intellectual and political changes taking place outside the tax field. However, developments in the day-to-day practice of law will continue to drive much of tax scholarship. A large portion of this work consists of materials designed for use by practicing attorneys. However, changes in tax practice also inspire more theoretical projects. These changes include wholly new practice areas, such as the pension and employee benefits practices that sprang up after the enactment of ERISA, and areas like partnership or international tax that have become more important because of changes in tax rates or nontax business conditions. Academics tend to slight practice-driven scholarship, which may seem less sophisticated than purely theoretical writing. Yet a practical reason approach can hardly ignore these materials, and indeed the tension between theory and practice is likely to be its best source of inspiration.

Perhaps the most significant change in contemporary tax practice is the rise of international tax as a specialty area. Once limited to a few large law firms, international tax now affects all sizable businesses and many smaller clients to an increasing degree and scope. The field has a deserved reputation for elitism because it requires knowledge of both U.S. and foreign tax rules, and because it requires an ability to manipulate the tax rules in transactions that are nearly incomprehen-

sible to outsiders. As such, it is a frustrating but potentially exhilarating area for tax scholars.

International tax scholarship is at a relatively early stage. Some insightful articles have identified the basic tensions (e.g., source versus residence taxation) that underlie the field and the alternate forms of "neutrality" (import neutrality, export neutrality, etc.) that an international tax regime might seek to accomplish.[184] Other pieces have addressed narrower issues,[185] while treatises and a handful of casebooks provide a more comprehensive overview.[186] In short, the field is similarly poised as the domestic income tax was a generation or two ago: an intellectual framework is developing, emphasizing horizontal equity and (to a lesser degree) efficiency and administrability concerns, and with it, the beginnings of an independent, critical perspective on the part of tax academics is taking shape. As in any practice-driven field, practicing lawyers have done much of the best work in international tax, although this situation is changing as more tax lawyers with international experience begin full-time teaching careers.

I am hardly an expert in international tax, but it seems to me that the subject will occupy an increasing proportion of tax scholars in the decades to come, and may eventually come to dominate the field. I envision three principal research areas.

First, and most obviously, the technical questions international taxation poses will attract increasing attention as business becomes more and more international in nature. Issues such as the "sourcing" of income, the minimum contacts required to subject income to United States taxation, and the use of tax havens, transfer pricing, and other tax planning devices are a potential gold mine for legal scholars. As yet, these fertile grounds have been only lightly explored. These are quintessentially legal issues, involving questions of domestic and foreign tax law, choice-of-law provisions, and the form-versus-substance tax avoidance doctrines, all of which must be balanced against political reality and the cultural and economic sensibilities of our major trading partners. Many of the same issues arise in domestic multistate taxation, which has increased in importance with advances in

184 *See, e.g.*, Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1336-52 (1996) (attempting to find such a "neutral" regime in consensus); Charles I. Kingson, *The Coherence of International Taxation*, 81 COLUM. L. REV. 1151, 1158-63 (1981) (distinguishing between principles and interests); Robert L. Palmer, *Toward Unilateral Coherence in Determining Jurisdiction to Tax Income*, 30 HARV. INT'L L.J. 1 (1989).

185 *See, e.g.*, Robert A. Green, *The Future of Source-Based Taxation of the Income of Multinational Enterprises*, 79 CORNELL L. REV. 18 (1993); Richard L. Kaplan, *Creeping Xenophobia and the Taxation of Foreign-Owned Real Estate*, 71 GEO. L.J. 1091 (1983).

186 *See, e.g.*, RICHARD L. KAPLAN, FEDERAL TAXATION OF INTERNATIONAL TRANSACTIONS, PRINCIPLES, PLANNING AND POLICY (1988) (casebook); JOEL D. KUNTZ & ROBERT J. PERONI, U.S. INTERNATIONAL TAXATION (1992) (treatise).

electronic marketing and other technologies that render traditional formulas obsolete.[187] I envision the taxation of multijurisdictional transactions as a robust, growing field, becoming a part of basic tax courses and attracting an increasing percentage of scholarly efforts.

Second, as international practice becomes more "mainstream," the doctrines and principles of international taxation will be increasingly integrated with those of the domestic tax field. We can expect this process to move in both directions. First, international tax—to date concerned largely with horizontal equity issues—must eventually reflect the broader concerns of contemporary tax legal scholars. Thus, international scholars must consider the issues of global progressivity,[188] legal process,[189] and the role of cultural and economic factors in making law and policy. International factors will also become increasingly important, if not dominant, in domestic tax policy. At a macroscopic level, international effects are already an important consideration in choosing between an income, consumption, or a value-added ("VAT") tax base.[190] On a more pedestrian plane, international tax problems implicate realization-of-income, form-versus-substance, and other domestic tax concepts in ways that force us to rethink the nature and purpose of those rules. For example, the rules

---

187 *See* Amy Hamilton, *Former New York Revenue Chief Outlines Emerging Tax Issues in Electronic Commerce*, 96 Tax Notes Today 213-4, Oct. 31, 1996, *available in* LEXIS, Fedtax Library, TNT File (discussing international and state tax issues resulting from the rise of Internet commerce and other electronic transactions). Multistate differs from international taxation in that the states are ultimately subject to the U.S. Constitution and in some cases to federal legislation; multistate taxation is thus distinguished by the availability of an ultimate appeal to a uniform authority that is absent in the international arena. The issues of multistate and international tax overlap when states attempt to assert global taxing authority under a "unitary" or similar theory. *See The Unitary Tax Controversy: Articles and Commentary*, 86 Tax Notes Today 153-13, Aug. 3, 1986, *available in* LEXIS, Fedtax Library, TNT File (reprinting three articles on the subject of unitary taxation).

188 The primary issue here is whether the international tax regime should promote neutrality at all costs, or instead provide a competitive advantage for weaker, more vulnerable economies. Another emerging issue is the degree to which U.S. tax law may encourage the export of jobs to other, frequently lower wage countries. *See* Joan Pryde, *Dorgan Pushing Bill to End Tax Break Encouraging Firms to Move Overseas*, Daily Tax Rep. (BNA) No. 173, at G-5 (Sept. 6, 1996).

189 The primary issues here are the relationship of treaties to domestic law, and the relative desirability of bilateral versus multilateral treaties. For a recent example of this problem, involving the Treasury Department's authority to override treaty obligations by means of regulatory changes, see Richard L. Doernberg, *Treaty Override by Administrative Regulation: The Multiparty Financing Regulations*, 2 FLA. TAX REV. 521 (1995); Timothy S. Guenther, *Tax Treaties and Overrides: The Multiple Party Financing Dilemma*, 16 VA. TAX REV. (forthcoming 1997). On the broader relationship between treaties and domestic (and foreign) law, see Julie Roin, *Rethinking Tax Treaties in a Strategic World with Disparate Tax Systems*, 81 VA. L. REV. 1753 (1995).

190 *See, e.g.*, Harry Grubert & T. Scott Newlon, *The International Implications of Consumption Tax Proposals*, 48 NAT'L TAX J. 619 (1995). European countries have historically made extensive use of the VAT, in part because it can be imposed on imported goods (and rebated on exports) in a manner that is difficult or impossible with an income tax.

regarding controlled foreign corporations,[191] which require taxation of unrealized income when necessary to prevent tax avoidance, provide a precedent for similar treatment in appropriate domestic instances. While transfer pricing[192]—perhaps the quintessential foreign tax problem—is, in essence, a form-versus-substance and arm's-length-transaction issue, with implications throughout the tax system. I envision a situation in which no tax scholarship would be considered complete until it had considered international ramifications of the relevant issue.

Third—and perhaps most importantly—the rise of international tax will increase the attention paid to foreign tax systems and will revive interest in comparative taxation as a scholarly field. Comparative law is slighted by American scholars, receiving less attention than in European or other smaller countries. Comparative tax is no exception: legal scholars only rarely discuss foreign precedents in addressing domestic tax issues. With the rise of a global economy and the gradual convergence of national economies and tax systems, this situation is slowly changing. Tax issues attending NAFTA—the North American parallel to the European Union—have already attracted significant attention from U.S. tax experts.[193] American tax scholars are increasingly called upon to draft tax codes for emerging economies, which are ironically closer to the experts' recommendations than is our own domestic tax system.[194] More challenges of this type can be expected, requiring a mix of universal principles and attention to local legal and business practices that only lawyers are likely to provide.

As compared to my previous ideas, my advocacy of international tax scholarship must appear tame, or even obvious. Yet the rise of international tax is significant for two reasons. The first is the sheer complexity of the subject, which requires a detailed knowledge of U.S. and foreign tax law and tax planning techniques in order to write meaningful scholarship. Only lawyers are likely to possess this knowledge, or to have the experience and inclination to produce detailed reform proposals. International tax scholarship is therefore likely to remain a lawyer-driven field in the foreseeable future, and the increasing prominence of the field may be an important factor in the lawyer-economist balance.

---

191 I.R.C. §§ 951-964 (1994).

192 *See id.* § 482; Joint Comm. on Taxation, *Impact on International Competitiveness of Replacing the Federal Income Tax*, 96 Tax Notes Today 141-7, July 19, 1996, at 20-21, *available in* LEXIS, Fedtax Library, TNT File (describing the purpose and effect of transfer pricing rules).

193 *See, e.g., Colloquium on NAFTA and Taxation*, 49 TAX L. REV. 525 (1994).

194 *See, e.g.*, WARD M. HUSSEY & DONALD C. LUBICK, BASIC WORLD TAX CODE AND COMMENTARY (1996) (model tax code designed for former Soviet bloc and other nations and authored by U.S. tax experts).

The second reason relates to the multicultural and multijurisdictional nature of international tax and the scholarly issues it raises. Domestic tax policy concerns the laws of only one country; its essential mode is to assume the existence of an omnipotent sovereign and to provide advice to that sovereign. Given this assumption, it is perhaps inevitable that various economics-based theories (e.g., Haig-Simons, optimal taxation, and so forth) which purport to tell the sovereign the "right" or "best" way to tax particular transactions, and which treat noneconomic factors essentially as implementation problems, will develop. By contrast, international tax assumes a world of competing sovereigns and often, competing world views. As such, the subject is uniquely suited to a practical reason method, which considers a variety of evidence without elevating any one conceptual framework over the other approaches. This is true both of the rules themselves, which implicate choice-of-law and other nontax legal doctrines, and of international taxation's broader mindset, which requires policymakers to balance political, cultural, and economic implications of even the most basic policy choices. That is not to say that economics are irrelevant, however. Some outstanding economic work on international taxation already exists, and there is certain to be more of it as the field matures.[195] But the multijurisdictional and multicultural aspects of international tax make it extremely difficult to contain within a purely economic model. As a result, a diverse, interdisciplinary scholarship appears to be especially promising in this area.

Despite its increased importance, international tax continues to attract a disproportionately small share of scholarly resources. I suspect that this results from a sociological rather than an intellectual phenomenon. International tax practice is extremely lucrative, and international tax experts tend to practice law rather than write academic articles. At the same time, the transactional nature of the field means that full-time academics are often ill-equipped to tackle international tax issues. Reversing this situation—and thereby reducing the time lag between practice and scholarship—requires that we find some way to keep practitioners interested in scholarship and to keep full-time academics in closer touch with legal practice. The following section contains proposals intended to address this and other institutional problems affecting tax scholarship.[196]

---

195 *See, e.g.*, GARY CLYDE HUFBAUER, U.S. TAXATION OF INTERNATIONAL INCOME: BLUEPRINT FOR REFORM (1992); Grubert & Newlon, *supra* note 190.

196 The issues facing international tax are also relevant for other practice-driven areas, including trusts and estates, pension taxation, and (to a lesser degree) the taxation of new business entities. In these areas it also may be difficult to attract scholars with the sophistication necessary to understand the relevant transactions and the willingness to apply that sophistication in pursuit of a full- or part-time academic career. Yet these areas also offer opportunities for legal scholars: the issues are inherently legal in nature and nonlawyers

C. Caveat: The Importance of Institutional Change

In the preceding pages, I suggested changes to the goals, methods, and subject matter of tax scholarship. Many of these things have been recommended before. In particular, lawyers and law professors have long decried the absence of empirical work and the increasing distance of the academy from the legal profession.[197] What is going to be different this time?

The answer, I think, is that reinventing tax scholarship requires institutional as well as intellectual change. Today's tax scholarship exists in a particular institutional context.[198] Part of this context concerns the general culture of law schools, which demand prolific scholarship, favor normative over empirical work, and tend to be condescending if not actively hostile to the real-world practice of law. The self-contained nature of tax law further aggravates this condition. Most tax professors teach only tax courses, so that they have relatively little exposure to nontax legal scholarship, let alone to the outside academic world.

Taken together, these factors account for many of the distinguishing features of tax scholarship. The general law school culture accounts, in large measure, for the lack of empirical work and cooperative projects. The isolation of tax professors results in a similarly isolated scholarship. Both factors together contribute to a mindset that is habitually conservative and resistant to change. The tug-of-war between teaching and scholarship, as described by Kronman and others,[199] is particularly acute for tax professors. Both students and practitioners tend to see tax as a technical nuts-and-bolts subject, and it may be difficult to move back and forth between this perspective and a more theoretical scholarly viewpoint.

Changing tax scholarship requires changing this culture. This process should begin with tax-specific changes, but must ultimately encompass adjustments in the broader legal academy. The insularity of taxation may ironically provide an advantage in this process: while contributing to a certain backwardness, the autonomous nature of taxation provides an opportunity for reform that more integrated subjects may lack.

My first recommendation is that law schools should be wary of hiring new professors who want to teach only tax courses. If the field is to become more interdisciplinary—that is, if tax scholars are to profit from the insights of nontax law and policy—then people with

---

are unlikely to achieve the planning and technical sophistication necessary to address them convincingly. *See infra* Part II.D.

197 *See supra* notes 10, 13 and accompanying text.

198 *See supra* Part I.C.4.

199 KRONMAN, *supra* note 5, at 264-70.

some footing in other legal subjects should take a more active role. Courses in related substantive fields, such as health law and welfare law, or in legal process subjects, such as legislation, administrative law, and conflict of laws, seem especially attractive. The goal should be to deliberately develop dual loyalties, to train professors who will be sensitive to the tensions between tax and nontax issues from their first day on the job. For example, a professor who teaches both tax and health care law is likely to be more sensitive to the conflict between taxation and health care policy than one who approaches the issue solely from the tax perspective. I suspect that this change is happening already because the tax field is not growing quickly enough to permit exclusively full-time tax hires. However, we should treat this situation as an opportunity rather than as a setback.

If young scholars are to produce interdisciplinary and empirical work, they need the time and the resources to do so. My second recommendation is that tax and other law school professors should resist both the increasing emphasis on quantity of publications in the tenure and promotion process, and the discouragement of joint projects that typically accompanies it. I realize that this is an old complaint. The usual excuse is that the broader university imposes these requirements and the law schools are powerless to resist them. I think this response is only half true.[200] Universities are actually quite accustomed to joint projects and, if they like to see frequent publication, they often are willing to allow this goal to be met with shorter, more focused works that apply a variety of empirical and normative methodologies. It is the law schools themselves that demand lengthy argumentative pieces published in prestigious law journals, and that frown upon collaborative work, especially with authors outside law schools. Tax has an advantage here due to the prevalence of tax specialty journals and the willingness of most nontax faculty to defer to tax referees: if tax professors say that empirical work is valuable, and if they are more receptive to co-authored pieces, then the rest of the academy is likely to defer to them.[201] We should put this advantage to work.

---

200 I think the related excuse—that law professors lack the requisite skills for interdisciplinary or empirical projects—is similarly exaggerated. *See supra* note 104. More generally, the comparison between law professors and those in "purer" academic disciplines (a comparison invariably to the detriment of law professors) has always struck me as uninformative and fruitless—uninformative, because the situation of law professors, who typically enter the academy without advanced degrees and with little if any teaching experience, is different from that of professors in most other disciplines; fruitless, because any serious field must define its own standards and cannot use others' misunderstanding of its work as an excuse for perpetuating that same misunderstanding. By accepting such negative characterizations of their own discipline, law professors contribute to their own submergence.

201 Thus, for example, the publication of economically oriented work in the *Tax Law Review*—the leading refereed journal in the field—has gone a long way toward legitimizing

If adopted, the changes described above would counteract the isolation of tax professors and encourage them to pursue more interdisciplinary and empirical work. Yet tax scholars will continue to face the conflicting demands of teaching and scholarship—of their duties to their academic colleagues on the one hand, and to students and practitioners on the other.[202] What, if anything, can be done to resolve this conflict?

One answer is to rethink the currently strict boundary between full-time teaching and the practice of law. A first possibility is to experiment with adjunct or super-adjunct positions, permitting outstanding practitioners to try their hands at teaching and scholarship for (say) a one- to three-year period, without the pressure of a long-term commitment on either side.[203] The converse is also possible—a program permitting law schools to loan professors to public (or approved private) employers for brief refresher periods, even if the law school had to assume all or part of the costs in the short run.[204] These programs contrast with the present situation, under which adjunct faculty, including those in LL.M. programs, are used largely on a fill-in basis, and professors perform outside "consulting" with little concern for its educational or scholarly value.

Blurring the line between practice and scholarship would also be an important step toward constructing (or reconstructing) a practical reason scholarship that emphasizes the tension between theoretical and real-world concerns. This is especially true for practice-driven subjects like international tax, in which it is difficult to write without high-level practical experience. Professors who are fresh from practice are more likely to write on new subjects, and the tension between them and their longer-term academic colleagues is likely to result in enhanced creativity on all sides.

A second and related solution is to reconstruct tax teaching to parallel the changes in tax scholarship. With tax now largely an elective subject, and with much of technical tax teaching concentrated in LL.M. programs, the basic J.D. income tax course is already becoming more of a "skills" course, emphasizing statutory interpretation and other legal process issues. It makes more sense to embrace this

---

such work as appropriate "legal" scholarship. *See, e.g.*, Robert H. Scarborough, *Risk, Diversification and the Design of Loss Limitations Under a Realization-Based Income Tax*, 48 TAX L. REV. 677 (1993); Reed Shuldiner, *Indexing the Tax Code*, 48 TAX L. REV. 537 (1993); Theodore S. Sims, *Long-Term Debt, the Term Structure of Interest and the Case for Accrual Taxation*, 47 TAX L. REV. 313 (1992).

202 *See* KRONMAN, *supra* note 5, at 264-70 (describing the "pathological division" between teaching and scholarsbip as a defining problem at contemporary law schools).

203 My own law school has experimented with this strategy, albeit on an ad hoc basis; at least one "super-adjunct" professor later accepted a full-time teaching position.

204 The IRS "Scholar in Residence" program is a present example of this type of arrangement.

change than to resist it. Ideally, I envision a full-blown legal process approach, in which each substantive unit—income, timing, deductions, and so forth—examines the issue in question from the point of view of a legislator, a judge, and a practitioner, with writing assignments supplementing the cases and problems at appropriate intervals. For example, a unit on tax shelters might include the usual cases,[205] an assignment requiring a student to write a tax shelter-related opinion letter, and a legislative drafting project related to the passive loss rules or alternate tax shelter limitations. The idealized basic tax course also would include materials on international and employee benefits taxation, on the assumption that most students will not take advanced courses in these areas, and would pay increased attention to distributional issues.[206] Advanced J.D. courses would likewise emphasize policy issues and an integrated tax-and-business approach. This agenda is no doubt overambitious, and professors may in practice have to compromise some of these goals in order to cover more technical material. But an interdisciplinary, process-oriented approach would result in a livelier classroom and would reduce the distance between scholarly and teaching activities, so that professors' various activities would complement rather than conflict with one another.[207]

I have alluded several times to the division between J.D. and LL.M. programs, which is an emerging fault line within the tax specialty. Here again, it makes more sense to profit from diversity than to resist it. I envision a field with two distinct but closely related parts: a practice-oriented teaching and scholarship, centered in the LL.M. programs, and a more interdisciplinary, policy-oriented teaching and

---

205 *E.g.*, Frank Lyon Co. v. United States, 435 U.S. 561 (1978); Knetsch v. United States, 364 U.S. 361 (1960).

206 I find that students uniformly have greater difficulty with vertical equity than horizontal equity issues, perhaps because the former concept is less visible in other courses. *Cf.* WILLIAM A. KLEIN & JOSEPH BANKMAN, FEDERAL INCOME TAXATION 19-24 (10th ed. 1994) (stating that the goals for a good income tax include fairness (including horizontal and vertical equity), administrative feasibility, and sound economic effects).

207 On reforming the tax curriculum generally, see Section of Taxation, Ass'n of Am. Law Sch., 1989 Annual Meeting, Panel on the Effect of Recent Tax Legislation on the Structure and Content of the Law School Tax Curriculum (Jan. 6, 1989) (collected papers) (copy on file with the author). Some teachers object to a policy or planning approach, arguing that professors have an obligation to "teach the law" to their students, and that other objectives will interfere with this project. I think this objection is ill-founded. Students cannot learn anything approaching the full tax law in J.D. tax courses. What the objection really means is that students should learn the same aspects of the tax law that their predecessors did, which strikes me as largely unconvincing. A more technical approach may be justified in LL.M. courses, which are designed to have a direct practical application, although even here professors are abandoning a pure casebook approach to incorporate more varied and creative teaching methods.

scholarship at the remaining law schools.[208] The line between these would remain fluid, and creative (including creative empirical) scholarship would be encouraged in both contexts. In each case, tax scholars would benefit from ongoing creative tension with nontax scholars (especially at J.D. institutions), practitioners (especially in LL.M. programs), and each other. A variety of teaching approaches would also be encouraged in each context. The existence of different educational programs would thus be seen as an opportunity to promote a more diverse and dynamic teaching and scholarship, rather than as a cause for alarm.

The common theme is that, as we shake up the institutional structure of the tax field, we become more likely to develop a new and better tax scholarship. Today's scholarship—comfortable, isolated, and somewhat old-fashioned—derives from a culture that rewards these virtues. Changing that culture is the best way to change that scholarship.

The recommendations discussed above also have implications beyond the tax field. Changing any legal scholarship requires that we first change the institutional culture of law schools, such that we reward interdisciplinary and especially empirical work, increase our contact with practicing lawyers, and make teaching and scholarship reinforce rather than contradict each other. This is particularly true of scholarship based on pragmatism or practical reason, which depends upon the tension between theory and practice and the weighing of evidence from diverse intellectual and practical sources. A law school that encourages a range of scholarly goals and methods, and that values rather than dismisses legal practice, is more likely to produce such scholarship.

The medical school experience is instructive here. Medical schools are major research institutions, but medical school professors regularly see patients, and they frequently conduct joint research projects with nonmedical scientists. Medical schools also utilize an advanced and varied mix of teaching methods, emphasizing patient contact at the earliest possible stage, and placing significantly less faith than law schools in purely book-centered learning. Law schools have some catching up to do, in teaching, scholarship, and their relationship to their profession. Tax scholars merely have one step further to go.

---

208 For example, my first two subject areas would fall in the latter category, while the third (international tax) would fall largely, although not exclusively, in the former. *See supra* Part II.B.

D. The Continuing Need For "Traditional" Tax Scholarship

In making an argument, one tends to exaggerate. The discussion above may leave the impression that I am contemptuous of traditional tax scholarship and its practitioners. Let me say it explicitly: traditional tax scholarship that emphasizes classical issues and a Haig-Simons approach will continue to play an important role in the legal academy. I respect its practitioners, and indeed many of my ideas are taken from their work. The question is one of emphasis: what is the future direction of tax scholarship, and where can new resources most profitably be allocated? It is to these questions, rather than to a criticism of existing scholarship, that I hope I have directed my readers' attention.

Even for scholars who favor traditional subjects, a reinvented scholarship would provide a needed shot in the arm, encouraging new (especially empirical) methods and a more creative interdisciplinary attitude. In a previous Part I cited capital gains tax preferences and the passive loss rules as examples of this phenomenon.[209]

Consider another classic subject: the taxation of dividends and the integration of corporate and individual income taxes.[210] Much excellent scholarship has been written on this issue, but until recently, it has stood with relatively little empirical data on how corporations actually pay dividends, or on comparative patterns of distribution and reinvestment in corporations and other taxable entities.[211] The politics of the issue—concerning whether full integration is realistic, or is merely a ploy for reduced business taxes—has similarly been considered at a colloquial, but not a systematic, level, and tax and corporate law scholarship remain largely separate in this area.[212] Addressing these aspects would result in a richer, more practical scholarship, without sacrificing traditional policy concerns. This is hardly a radical

---

209 *See supra* text accompanying notes 45-47, 93.

210 Integration refers to the combination of corporate and individual taxes into a single, comprehensive system. Corporate income is currently taxed separately from the income of individual shareholders, resulting in double taxation of income distributed as dividends. This system contrasts with the treatment of partnerships, limited liability companies, and electing Subchapter S corporations, the income of which is taxed directly to individual owners without an intervening entity-level tax. *See generally* ALVIN C. WARREN, JR., AMERICAN LAW INSTITUTE FEDERAL INCOME TAX PROJECT: INTEGRATION OF THE INDIVIDUAL AND CORPORATE INCOME TAXES: REPORTER'S STUDY OF CORPORATE TAX INTEGRATION (1993) (concluding that the United States should adopt an integrated corporate tax system).

211 *See* William Andrews, The Unintegrated Economics of Corporate Integration (paper presented at the NYU School of Law Colloquium on Tax Policy and Public Finance, Feb. 1, 1996) (on file with author).

212 On integration of corporate taxes generally, see Stanley S. Surrey, *Reflections On "Integration" of Corporation and Individual Income Taxes*, 28 NAT'L TAX J. 335 (1975). For recent corporate law treatment of the dividend issue, see, for example, Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CAL. L. REV. 1072 (1983); Zohar Goshen, *Shareholder Dividend Options*, 104 YALE L.J. 881 (1995).

idea, but rather, a plea to update tax scholarship to reflect intellectual and real-world changes. The goal is a legal tax scholarship that is perhaps less comfortable than today's efforts, but that is built on a more solid foundation.[213]

CONCLUSION: LAWYERS, ECONOMISTS, AND THE ROLE OF THE LEGAL ACADEMY

This Article has evaluated the present condition of tax scholarship and has made proposals for a more promising future. I began by describing the strengths and limitations of traditional tax scholarship and the factors—including more sophisticated economic models and changes in the tax legislative process—that have contributed to its relative decline. I then considered how a new, reinvented scholarship might look and the role that academic lawyers might play in creating it. In particular, I argued that future tax scholarship should mix normative with empirical and narrative projects; make expanded use of the noneconomic social sciences and the work of nontax legal scholars; and make a conscious effort to choose subject matters that involve institutional issues or the weighing of incommensurable forms of evidence, and are thus especially suited to legal (as opposed to economic) analysis. As examples, I outlined potential research projects in tax legal process, progressivity, and international and comparative tax areas. Finally, I considered the institutional changes necessary to make these proposals a reality. By pursuing these and similar agendas, academic tax lawyers can rebuild an interdisciplinary, practical reason-based scholarship, thereby avoiding the fate of being second-tier economists on the one hand, or mere technicians on the other.

The story above is unique, and yet it is strangely familiar. The challenge facing tax scholars—how to carve out an authentic legal territory in a field economists and other nonlawyers increasingly dominate—is but a sharper version of the challenge facing the broader legal academy. For many years, law schools have been on the defensive in this battle. Economists, philosophers, and other outsiders have laid claim to the intellectual territory of legal scholars, and sometimes to their jobs as well. Lawyers have been uncertain about when and how to fight back. By contrast, the coming decades are shaping up as years of counterattack—of reasserting lawyers' prerogatives and the value of their own unique contributions. This counterattack is already visible in the academic literature; in the pressures being brought to bear by the legal profession; and most of all, in the attitudes of legal scholars themselves, who are unwilling to see their profession reduced

213 For an unconventional approach to corporate tax issues, emphasizing the differing perspectives of investors and managers, see Jennifer Arlen & Deborah M. Weiss, *A Political Theory of Corporate Taxation*, 105 YALE L.J. 325 (1995).

to a permanently dependent condition.[214] In the future, it will likely grow stronger.

The crucial question is whether lawyers will fight back wisely or foolishly. To fall back on old practices—continuing to publish traditional scholarship on traditional subjects, or pretending that the outside world neither exists nor matters—strikes me as fighting back foolishly. A mimicking process in which lawyers merely become second-tier economists, philosophers, or other nonlegal experts, is similarly unappealing. The first approach courts irrelevancy, while the second flirts with obsolescence and denies the possibility of a uniquely legal outlook and contribution. Each has the character of a graceful retreat rather than a genuine resurgence.

The better course is to expand the arsenal and agenda of academic lawyers so that we can defend our own ground more effectively. To do so requires that we canvass all the resources at our disposal—including the noneconomic (and especially the empirical) social sciences, the contributions of other legal disciplines, and the wisdom and experience of practicing lawyers—and meld them into a new scholarship that is more than merely technical, and yet, strong enough to withstand outside challenges. It requires that we expand the goals and methods of our scholarship, and actively seek topics in which lawyers' procedural and evidence-weighing skills are likely to be most valuable. It requires changing the institutional structure of law schools so as to reward rather than punish new approaches. In short, it means reviving practical reason as the basis for legal scholarship, but with a recognition that, in the modern era, practical reason requires more rather than less knowledge of the world beyond our immediate subject area. The same analysis applies to tax law and to the entire legal academy.

The creation (or re-creation) of an interdisciplinary practical reason scholarship is consistent with broader trends in intellectual and cultural life. Known alternatively under the labels "postmodernism," "anti-foundationalism," and so forth, contemporary thought emphasizes the absence of any single "correct" method for ascertaining the truth and (in more extreme formulations) denies that a single ascertainable truth exists in the first place.[215] A practical reason approach is consistent with these developments: it eschews any single methodology and emphasizes pragmatic balancing of competing factors rather than identifying the "right" answer to legal problems under idealized and perhaps unrealizable conditions. By creating such a scholarship,

---

214 *See supra* notes 14-15 and accompanying text.

215 *See* PATTERSON, *supra* note 15, at 152-79 (contrasting modern and postmodern conceptions of language and truth).

legal scholars would become both more relevant and, in their own way, more sophisticated than they otherwise would be.

A return to practical reason is also consistent with the best traditions of the legal profession. The importance of lawyers has always been a consequence not merely of their technical ability, but of their prudence and practical wisdom, their ability to gather evidence from diverse and at times contradictory sources, and to use that evidence, together with lawyers' procedural and problem solving skills, to forge creative solutions to real-world problems.[216] A scholarship that seeks to outsmart one's opponents, using ever more sophisticated theoretical models, is not true to this tradition and is likely to result in lawyers' continued loss of influence and prestige. A practical reason scholarship, borrowing from various disciplines but relying ultimately on lawyers' traditional skills, is likely to be more authentic and more successful.

Most important of all, reinventing legal scholarship would enable academic lawyers to regain their own confidence and a sense of the worthiness of their own mission. The legal academy is a culture that has come under attack from external forces, but that has the will and the resources to fight back if it so chooses. The challenge is there if we are willing to take it. Cultures that grow and change in response to external stimuli live on. Those that cannot change, die.

216 *See* KRONMAN, *supra* note 5, at 53-108 (describing the "lawyer-statesman" ideal as a model for academic and practicing lawyers).