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THE PROMISE OF INTERNATIONAL TAX SCHOLARSHIP AND ITS
IMPLICATIONS FOR RESEARCH DESIGN, THEORY AND METHODOLOGY

By Diane Ring*

INTRODUCTION

What should international tax scholars be doing? Over the past two decades, international tax has grown both as a practice area and as a field of study. Scholars have begun devoting significant attention to the development, design, and implementation of international tax law. This activity is accompanied by a reflection on the scholarship and its goals, method and content. Such reflection is not unique. Legal scholarship generally and tax scholarship in particular has struggled to understand the role and contribution of legal scholars.

How do scholars evaluate international tax policy? What approaches do they adopt in their efforts to better understand, assess, and influence international tax? A review of modern international tax scholarship reveals that as the field has matured, international tax scholars have increasingly turned to other disciplines, especially social sciences, to draw upon their insights, ideas, and research to improve understanding of international tax policy. But this intersection with the social sciences (and the humanities) forces us to confront some distinct differences between the approach of the legal academy to research and scholarship and the approaches reflected in other fields. Many of the disciplines upon which international tax scholars rely explicitly discuss and examine questions of research design, methodology, and analysis in ways that are relatively foreign to the international tax scholar. In many other fields, a conscious examination of methodological options and decisions forms an important component of the research process as scholars consider their goals, their questions, and the sources available for their work. As the tax academy increasingly reaches into other disciplines, we question what constitutes the core of our own discipline and what we can uniquely contribute.

The relationship between law and social sciences has been the subject of both theoretical analysis by legal scholars examining the distinctive role of legal scholarship and by other scholars critical of the quality of research and empirical analysis in the legal setting.¹ The purpose of this essay is

* Professor of Law, Boston College Law School. I would like to thank the Carney Endowment at Boston College Law School for its research support. I would like to thank the participants of the St. Louis University School of Law Conference on Critical Issues in International and Comparative Taxation for their comments and insights. I would also like to thank Kathryn McHugh and Natalene Ong for their valuable research assistance.

¹ See, e.g., Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1987-1988); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002),

not to revisit the question of the overarching role of legal scholarship. Rather the goal is to draw upon this existing literature and its insights regarding research agenda, methodology, and analysis. Ultimately, international tax scholars have a strong claim to a vital role. The importance of non-legal disciplines to the development of international tax policy, combined with the perceived inaccessibility of international tax to those working outside the field, renders international tax distinctive if not unique. The burden rests upon the tax community to establish a robust, broad and comprehensive research structure capable of integrating guidance from other disciplines. International tax scholars need to look beyond the traditional bounds of their field – but they cannot abdicate the territory to other disciplines. The real challenge is how to manage both strands effectively.

At a minimum, international tax scholars must develop increased sophistication regarding the content, limits, and potential weaknesses of various forms of social science research, allowing them to be both more sophisticated consumers of work from other fields and more confident producers of research that contributes to our understanding of international tax policy. Tax research itself can ultimately be influential on the disciplines from which it draws. This essay outlines an example from the intersection of international tax with international relations and political science, revealing the potential for mutual influence.

To better understand the potential challenges and possibilities for international tax scholarship, Part I of this essay reviews general critiques of legal scholarship offered in recent decades, and of tax scholarship specifically. This literature recognizes the limits of certain legal scholarship, but does provide a path to more relevant scholarship—including a path for those working within international tax. Part II examines how the body of existing international tax scholarship fits within the critiques and possibilities explored in Part I. Although international tax research held promise as a path for reinvigorating tax scholarship, it has not been entirely free of the constraints that bound traditional domestic tax scholarship. Despite these all too familiar limitations and constraints, international tax scholarship also exhibits much of the anticipated promise of a field that can be dynamic, commercially relevant, and global. Part III considers the unique position of international tax scholarship and how it can most effectively fulfill its promise. The aim is not to mimic another discipline but to learn what steps can produce valuable international tax scholarship within the goals and needs of the legal system. The Conclusion ponders the benefits of an international tax scholarship that has more consciously reflected upon its purpose and design, and that recognizes the distinctive place of international tax scholarship relative to legal scholarship and relative to the social sciences.

I. REFLECTIONS ON LEGAL SCHOLARSHIP

What is the function of legal scholarship? What makes it distinctive and its production by lawyers and legal scholars valuable? In recent decades these questions have been raised in a variety of contexts by those seeking to understand the appropriate relevance and value of legal scholarship in a changing world.² These self reflections have emerged in other, nonlegal fields albeit with a somewhat different history.³ During the 20th century, the social sciences faced challenges to their methodologies and self-conceptions from a set of broad critiques often grouped under the umbrella term of “critique of methodology” analyses. At its core, this work was a challenge to positivism that had pervaded the 20th century. This critique was less directly troubling to legal scholars because law had already come to terms with a related challenge through the rise of legal realism in the 1920s and 30s.⁴ The difficulty for legal scholarship was, instead, the absence of a clear and distinctive mission, methodology, and purpose. These potential failings were highlighted by comparisons to other disciplines with which legal scholars were becoming increasingly familiar and which were viewed as having more robust and distinctive identities and methodologies. Moreover, to the extent that legal scholars borrowed or adopted methodologies from other disciplines, the questions of competency and value added continued to shadow their work.⁵

As legal scholars generally have wrestled with these questions and sought to carve out a plausible vision and future for legal scholarship which is vibrant, distinctive, and valuable, tax scholars have pondered comparable questions in the specific context of tax scholarship. Although much of the broader literature on legal scholarship resonates with the tax field, the effort to narrow the focus of discussion to one field promised to generate more concrete and more readily accessible guidance for scholars. In his 1997- 98 article, Michael Livingston posed the question of how legal scholars, in particular tax scholars, could “avoid the trap of being second-

² See, e.g., Edward L. Rubin, “On Beyond Truth: A Theory for Evaluating Legal Scholarship,” 80 CAL. L. REV. 889 (1992), Larry Alexander, “What We Do, and Why We Do It,” 45 STAN. L. REV. 1885 (1992-1993); Edward L. Rubin, “Law and The Methodology of Law,” 1997 WIS. L. REV. 521 (1997); Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 HARV. L. REV. 761 (1987).

³ See, e.g., Edward L. Rubin, “The Practice and Discourse of Legal Scholarship,” 86 MICH. L. REV. 1835, 1855-1859 (1987-88).

⁴ Edward L. Rubin, “The Practice and Discourse of Legal Scholarship,” 86 MICH. L. REV. 1835, 1854-56 (1987-88).

⁵ See, e.g., See, e.g., Edward L. Rubin, “The Practice and Discourse of Legal Scholarship,” 86 MICH. L. REV. 1835, 1853 note 56 (1987-88) (recognizing the question of what makes legal scholarship distinct from political science); Lee Epstein and Gary King, “The Rules of Inference” 69 U. CHI. L. REV. 1 (2002) (offering a critical and unflattering assessment of “empirical research” in legal scholarship).

tier economists on the one hand, or mere technicians on the other?”⁶ Driven by the questions haunting legal scholars who increasingly utilized the methods of economics, philosophy and other non-legal disciplines and thus questioned their own role, Livingston, suggested that these concerns were most pressing for tax lawyers who had long shared their field with economists but were finding their distinctive place in the field more vulnerable.⁷

The relationship between tax law and economics is not new (as it is in some fields). As Livingston observed, tax scholars, whose audience is primarily the legislative branch and administrative staff, have generally relied on economics to provide the method and normative structure for their work. In approaching tax analysis from the perspective of equity, efficiency and the ideal of a comprehensive tax base – tax scholars crafted a field ultimately grounded in economics.⁸ This reality prompted the question, why have lawyers intermediate this work between economics and legislation? The answer that the tax academy offered was that they were creating an “accessible scholarship” that combined streamlined economic discussion with an understanding of legal rules, arguments, and precedent to provide guidance for the real world – the “practical reason approach.”⁹ Initially reflected in the work of pioneer tax scholar Henry Simons, scholarship in this mode was apolitical in style and was grounded in the “economic” principles of a comprehensive tax base ideal.¹⁰ Livingston outlined how subsequent tax scholars strongly echoed this tradition in their work – and although the underlying economics were not sophisticated, the scholarship maintained a valued function by virtue of its accessibility and potential for guiding reform.¹¹

Where then did the problem arise for tax scholars? Livingston identified three sources of challenge to the established role of the tax scholar in a framework undergirded by economics: (1) The rise of new economic approaches (including optimal tax theory¹²) that replaced the dominant position of the comprehensive tax base approach; (2) the rise of ideas including critical legal studies that challenged the value of normative

⁶ Michael A. Livingston, “Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy,” 83 CORN. L. REV. 365, 366 (1997-1998).

⁷ Id. at 366-367.

⁸ Livingston, supra note 6 at 374.

⁹ Livingston, supra note 6 at 375-376.

¹⁰ Livingston, supra note 6 at 375-376.

¹¹ Id. at 380.

¹² See, e.g., 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); J.A. Mirrlees, and Peter A. Diamond, “Optimal Taxation and Public Production, I: Production Efficiency,” 61 THE AM. ECON. REV. 8 (Mar. 1971); J.A. Mirrlees and Peter A. Diamond, “Optimal Taxation and Public Production II: Tax Rules,” 61 THE AM. ECON. REV. 261 (Jun. 1971).

scholarship generally; and (3) the growing importance of tax issues for which traditional scholarship with its comprehensive tax base foundation was not really relevant.¹³ First, with the rise of optimal tax theory (and other theories including public choice theory¹⁴), the traditional tax scholarship (with its comprehensive tax base model) seemed increasingly “outdated” and insufficiently sophisticated.¹⁵ Second, the neutral and generally apolitical mode of traditional tax scholarship faced challenges from a range of movements including work in critical legal studies which questioned core concepts and underlying assumptions (such as the efficiency of the market). Additionally, other developments in legal scholarship (including law and economics with its increasingly complex and varied models of efficiency) expanded the expectations for legal scholarship.¹⁶ Finally, Livingston contended that perhaps the most serious challenge to traditional tax scholarship was the reality that the more pressing policy questions of the day were ones for which the traditional model offered little guidance. Attention to the idea of a neutral regime and a comprehensive tax base resonates in only limited ways with for example, the major problems of international tax.¹⁷

In an effort to encourage the reinvention and hence the invigoration of tax scholarship for the future, Livingston made a number of recommendations both for tax scholars and for legal institutions – two of which are particularly significant for international tax scholars. The first of these recommendations concerns the way in which tax scholars approach their work. He advocated for an expanded range of normative frameworks and for projects that pursue empirical and other approaches.¹⁸ His conception of “empirical” is rich and intended to capture “work that gathers and describes evidence in a manner useful to lawyers and other policymakers.”¹⁹ Thus, a rigid adherence to certain highly sophisticated methodologies from the social sciences is not essential. The goal is gathering and analyzing relevant information in useful ways for those designing policy. Case studies on the effect of certain tax provisions, for example, could be a very valuable tool. Livingston directly confronts one of the common critiques levied at those who encourage legal scholars to pursue more “empirical” work – that such efforts should be handled by the

¹³ Id. at 381.

¹⁴ See, e.g., James M. Buchanan & Gordon Tullock, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY*, (1962); Geoffrey Brennan & James M. Buchanan, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* (1980); Daniel Shaviro, “Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s,” 139 U. Penn. L. Rev. 1 (1990).

¹⁵ Livingston, *supra* note 6 at 383.

¹⁶ Livingston, *supra* note 6 at 385.

¹⁷ Livingston, *supra* note 6 at 368, 386-87.

¹⁸ Livingston, *supra* note 6 at 399, 401-402.

¹⁹ Livingston, *supra* note 6 at 398.

experts, i.e. economists and social scientists. He argues that the work of social scientists is typically different in nature because of their training and their limitations – their projects tend to be broader in scope, more idealized, and less linked to actual legal rules or other constraints relevant to legal scholars.²⁰

Livingston's second important recommendation urged tax scholars to pursue new material and resist continued attention to topics to which little can be added and for which the policymakers' needs are low. One new target area Livingston identified was international tax, which he characterized as one of the subjects "that have become important areas of tax practice and legislation, but to which scholars have been slow to respond."²¹ Livingston did not go into extensive detail on the international tax research agenda that might be crafted, but he did see the field as commercially significant, and as one for which scholarship was "at a relatively early stage" (in 1997):²² the fundamental tensions and core neutralities at stake had been identified but much remained to be examined. Specifically, he envisioned international tax scholarship of the future as exploring progressivity (understood as using tax rules to assist weaker economies), the possibilities of new forms of taxation (valued added tax), comparative issues, and the international ramifications of any traditionally domestic question.²³ Legal scholars have an advantage in this work because the tax systems themselves are complex, and because detailed knowledge of both the international tax systems and the likely planning techniques would be important for serious work.²⁴ Additionally, the inherently global nature of cross border taxation means that the arena is multicultural and multijurisdictional. Thus, a straightforward appeal to efficiency would be incomplete. The tax academy could not plausibly confine itself to determining the "best" (i.e. most efficient) rule and still hold sway over policy makers. The multiplicity of taxing sovereigns increases the gravity of many noneconomic issues, making it "difficult to contain [international tax] within purely economic model."²⁵ Correspondingly, Livingston advocated for a "diverse, interdisciplinary, scholarship."²⁶ International tax therefore appears to be capable of reviving tax scholarship on both of these Livingston prongs – it encourages use of expanded methodologies and analysis, and the subject matter itself would be sufficiently uncharted territory. But does the world of international tax hold the promise imagined? The next Part looks at the history and trajectory of international tax scholarship to answer this question.

²⁰ Livingston, *supra* note 6 at 398 note 104.

²¹ Livingston, *supra* note 6 at 406.

²² Livingston, *supra* note 6

²³ Livingston, *supra* note 6 at 424-426

²⁴ Livingston, *supra* note 6 at 426.

²⁵ Livingston, *supra* note 6 at 427.

²⁶ Livingston, *supra* note 6 at 427.

II. INTERNATIONAL TAX SCHOLARSHIP: PAST AND PRESENT

Can international tax scholarship live up to the aspirations that Livingston outlined? Is it free of the limitations and constraints he identified in traditional tax scholarship? Ultimately, as this Part determines, although a careful look at the history of international tax scholarship reveals that it has struggled with some of the same (or related) challenges as traditional tax scholarship, Livingston was nonetheless accurate in sensing that more widespread and in-depth pursuit of international tax questions would inevitably offer potential energy to the field of tax scholarship. That said, international tax did have its own history of normative, economics driven theory, which though valuable in framing some issues, was ultimately in need of expansion.

The following section begins by sketching a brief overview of early work in international tax. The goal here is to offer a basic sense of the literature, its work and general scope, so as to appreciate its position relative to traditional tax scholarship. The remainder of this Part considers international tax scholarship as measured against the specific qualities that Livingston seemed to anticipate that it possessed and that would allow it to be part of the vibrant future of the tax academy.

A. *Early Scholarship*

One of the first pieces of scholarship in the United States to offer the promise of pursuing international tax issues was a short 1915 article by Edwin Seligman based on his 1914 address before the International Tax Association. Seligman's name is familiar in international tax scholarship circles. In these early years, the international community coalesced around the problem of double taxation – the concern that two jurisdictions would tax the same income. The question they sought to resolve was, assuming double taxation was agreed to be undesirable, which jurisdiction should have the right to tax? As a leading American economist, Seligman, along with three other international economists,²⁷ played a major role in the League of Nations' work in the 1920s on double taxation (following initial efforts by the International Chamber of Commerce). Despite Seligman's important role in shaping the contours of the global system of cross border taxation and allocation of revenue among nations, his 1915 article was in fact a foray into differences between personal and property taxes, the proper theoretical grounds upon which to impose tax (citing the shift to "ability to pay" theories), and the need to preserve a local revenue

²⁷ The other economists were Sir Josiah Stamp of Great Britain, Professor G.W.J. Bruins of the Netherlands, and Professor Luigi Einaudi of Italy. See Michael J. Graetz & Michael M. O'Hear, "The 'Original Intent' of U.S. International Taxation," 46 DUKE L. J. 1021, 1074 (1997).

base in the face of federal income taxation. The only real international element in the analysis came from the consideration of property taxes and local taxes in other jurisdictions. Even the organization which Seligman addressed was “misnamed.” The conference had been held under the auspices of the National Tax Association, but during the period 1908-1910 the organization was designated as the “International Tax Association” because Canadian provinces joined the conferences.²⁸

It is not until approximately the late 1930s that scholarship focused specifically on issues of international taxation. Double taxation, which formed the core of states’ initial interactions over cross-border tax questions during the 1920s and 1930s, drew scholarly attention. For example, a 1938 Columbia Law Review article²⁹ outlined the “current” state of affairs, and observed that the prior 15 years contained much activity (including the work of the International Chamber of Commerce and the League of Nations) but that there was no universal understanding and the field remained in its infancy.³⁰ Proceeding to consider double taxation and the underlying issues of jurisdiction to tax and sovereignty, the 1938 article worked from an international law perspective and ultimately concluded that countries can no longer ignore revenue laws of other jurisdictions and that “[t]he most reliable method of extending moderate assistance to American taxpayers is to follow the example set by the trade agreements and to proceed through bilateral treaties.”³¹ In a follow up article,³² the author noted the progress on treaties, but found that inadequate attention had been paid to the estate taxation of nonresidents. Reflecting upon estate taxation in other jurisdictions the article explored the uncertainties and problems in any U.S. efforts to tax the estates of nonresidents.³³

²⁸ Ohio Historical Society Online Collection Catalog, Local Note to “State and local taxation: international conference,” International Tax Association (1909-1911), available at

http://web2.ohiohistory.org/ipac/20/ipac.jsp?session=126859466W2U1.13254&profile=all&uri=full%3D3100001%7E%2170000%7E%211&booklistformat=plain&ri=2&bla_send_full_bib=true&aspect=basic_search&menu=search&view=items&page=0&group=0&term=International+Tax+Association.&index=&uindex=&aspect=basic_search&menu=search&ri=2&postmaster=Ohio%20Historical%20Society&subject=State%20and%20local%20taxation%20:%20international%20conference%20...%20/%20under%20the%20auspices%20of%20the%20International%20Tax%20Association.&emailaddress=ringdi@bc.edu&fullmarc=false#focus. The catalog listing for the volumes describes the connection between the National Tax Association and the International Tax Association.

²⁹ Harold Wurzel, “Foreign Investment and Extraterritorial Taxation,” 38 COLUM. L. REV. 809 (1938).

³⁰ Id. at 814-15.

³¹ Id. at 857.

³² Harold Wurzel, “Nonresident Aliens and Federal Estate Tax: A Legislative Problem,” 40 COLUM. L. REV. 52 (1940).

³³ In both case, most of the materials referenced were statutes, treaties, cases, treatises, foreign law documents, and restatements. Wurzel, *supra* note 29, and Wurzel, *supra* note 32.

Moving into the 1940s, examination of double taxation and bilateral treaties remained popular topics of analysis.³⁴ In a 1946 Yale Law Journal article entitled “International Tax Relations,” the two authors Henry S. Bloch and Cyril E. Heilemann (both from the U.S. Treasury Department) explored the connection between tax law and foreign economic policy.³⁵ In particular, the article examined ways in which international tax rules could facilitate or impede trade including the effects of (1) multiple levels of tax on cross border income, (2) use of nondiscrimination provisions, (3) inclusion of exemption and credit systems in treaties, and (4) exchange of information. Further foreshadowing more extensive work on these subjects today, Bloch and Heilemann’s piece devoted 2½ pages to a section entitled “The Role of Intergovernmental Organizations in the Field of Taxation.” These pages detail the historical role played by international organizations such as the League of Nations and the U.N. in the process of developing tax conventions. Although the analysis remained focused on preliminary considerations of core questions of international tax design and economic implementation, it is nonetheless fascinating to see some of the most prominent contemporary tax questions in their decades old nascent form.

As bilateral treaties became more established in the 1950s and 1960s, scholarship addressed a range of implementation related questions concerning exchange of information and support for foreign judgments,³⁶ the growth of domestic incentives for foreign investment (e.g., the Western Hemisphere Trade Corporation), and the potential for tax treaties to operate as an investment incentive or disincentive device.³⁷ In the

³⁴ See, e.g., Mitchell Carroll, “Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion, 39 AM. J. OF INT’L L. 852 (1945) (a book review of the League of Nations publication of its Model Bilateral Convention, noting the prodigious growth in such bilateral conventions and the corresponding (but often appreciated) significance of these developments); Ke Chin Wang, “International Double Taxation of Income: Relief Through International Agreement 1921-1945,” 59 HARV. L. REV. 73 (1945) (providing a comprehensive discussion of the core questions of allocation of revenue, and a historical review of international efforts to reach levels of consensus on these matters); Book Review of F.E. Koch, THE DOUBLE TAX CONVENTIONS (1947), 8 U. of Toronto L. J. 180 (1949) (a book analyzing the double income tax treaties between the United Kingdom and other countries – with significant attention devoted to the U.S.-U.K. treaty).

³⁵ Henry S. Bloch and Cyril E. Heilemann, “International Tax Relations,” 55 YALE L. J. 1158 (1946).

³⁶ “International Enforcement of Tax Claims,” 50 COLUM. L. REV. 490 (1950)

³⁷ “Tax Incentives to Investment Abroad,” 8 STAN. L. REV. 77 (1955); see also Stanley S. Surrey, “Current Issues in the Taxation of Corporate Foreign Investments,” 56 COLUM. L. REV. 815 (1956); Herrick K. Lidstone, “Double Taxation of Foreign Income? Or an Adventure in International Double Tax,” 44 VA. L. REV. 921 (1958) (evaluating the potential for both double tax and deferral for foreign investments by U.S. business and the difficulty in determining what is “equitable” taxation of foreign investments.); Stanley S. Surrey, “The United States Taxation of Foreign Income.” 1 J. OF L. AND

1960s, law review articles on international taxation were still introducing their audiences to the basic framework.³⁸ Of course some pieces explored questions in more depth, such as Detlev Vagts' 1970 article entitled "The Multinational Enterprise: A New Challenge for Transnational Law."³⁹ Although not an international tax article per se, the work offered a sophisticated examination of the changing structure, function and role of multinational corporations and contemplated the challenges that these global actors posed for individual nations absent a more coordinated legal and regulatory government response. Similarly, a comparative examination of international tax policy between the U.S. and West Germany added depth to the broader discussion of international tax incentives for foreign investment.⁴⁰

By the mid to late 1960s, an economics based language began circulating that defined and captured the normative implications of the work on international tax, especially the problem of double taxation.⁴¹ This language identified two dominant "neutral" outcomes that international tax rules could achieve – capital export neutrality (CEN) and capital import neutrality (CIN).⁴² Both neutralities assumed a normative goal of worldwide efficiency.⁴³ Over time, each neutrality became associated

ECONOMICS 72 (1958) (reviewing the basic questions of jurisdiction, double taxation, foreign tax credits, deferral, and calls for tax incentives for foreign investment).

³⁸ See, e.g., Adrian A. Kragan, "Double Income Taxation Treaties: The O.E.C.D. Draft," 52 CAL. L. REV. 306 (1964) (walking through a basic treaty structure and the dominant function of each article); Dan Throop Smith, "Tax Policy and Foreign Investment," 34 L. AND CONTEMP. PROB. 146 (1969) (reviewing the basics of double taxation, foreign tax credits, and deferral in a short article)

³⁹ Detlev F. Vagts, "The Multinational Enterprise: A New Challenge for Transnational Law," 83 HARV. L. REV. 739 (1970).

⁴⁰ Dietrich von Boetticher, "A New Approach to Taxation of Investments in Less Developed Countries: A Comparison of Tax Laws in the United States and in West Germany," 17 AM. J. OF COMP. L. 529 (1969).

⁴¹ See Peggy Brewer Richman, "Taxation of Foreign Investment Income: An Economic Analysis" Johns Hopkins Press, 1963; Peggy Musgrave, "United States Taxation of Foreign Investment Income: Issues and Arguments," International Tax Program, Harvard Law School, 1969. See generally, Mihir A. Desai and James R. Hines, Jr., "Evaluating International Tax Reform," Harvard NOM Working Paper No. 03-48 (June 2003) (noting the influence of Musgrave's work from the 1960s in forming the "mainstays of the welfare analysis of international tax reform."); Office of Tax Policy, U.S. Department of the Treasury, "Approaches to Improve the Competitiveness of the U.S. Business Tax System for the 21st Century," at 56 note s 77 and 78 (Dec. 20, 2007) (similarly citing this seminal 1960s scholarship).

⁴² Office of Tax Policy, U.S. Department of the Treasury, "Approaches to Improve the Competitiveness of the U.S. Business Tax System for the 21st Century," at 56(Dec. 20, 2007).

⁴³ An additional neutrality was often added to this list because it corresponded to one of the three possible "solutions" to double taxation. The first solution, a foreign tax credit -- the one introduced by the United States in 1918--comported with capital export neutrality. The other main solution, an exemption of foreign source income, supported capital import neutrality. The third possible solution, granting of a deduction for foreign

with certain solutions to double taxation and with certain economic policies. Going forward, this model shaped much normative discussion and analysis in international tax.⁴⁴ The U.S. Treasury Department incorporated this framework in its own policy papers – thereby establishing it as a prominent government policy model in addition to an academic one.⁴⁵

This brief review of early scholarship highlights a few striking points. First, not surprising, the total volume of international tax scholarship was low and perhaps correspondingly the work tended to address the core questions at a less detailed level than we might expect today.⁴⁶ Second, and similarly, the number of academics identifying themselves as working in the area remained small through the 1980s. A search of the American Association of Law Schools (AALS) database for the years 1925 through 1985 revealed no professors listing international tax as one of their subjects until 1955 (Herrick Lidstone, Assistant Director of the International Program in Taxation at Harvard Law School⁴⁷). By 1960, both Stanley Surrey and Oliver Oldman, professors at Harvard Law School (and both actively involved in Harvard’s International Tax Program) were identified as working in the area of international tax. But even in 1985, the AALS directory included only one academic listing international tax. Certainly the listings are likely to be incomplete as a reflection of scholarly work in the field, but nonetheless the field was not teeming with participants.

taxes paid, was often aligned with “national neutrality” which differed from the first two because it did not operate from a premise of world-wide efficiency. See, e.g., Office of Tax Policy, U.S. Department of the Treasury, “Approaches to Improve the Competitiveness of the U.S. Business Tax System for the 21st Century,” (Dec. 20, 2007) at 56 note 79 (“Another standard, national neutrality, assumes that home governments cannot obtain reciprocal concessions necessary to approximate worldwide efficiency.”).

⁴⁴ For example, a search of the Lexis law review file for the period 2001-2010 produced 107 tax articles referencing “capital export neutrality.”

⁴⁵ See, e.g., George N. Carlson, U.S. Treasury Department, “International Aspects of Corporate Shareholder Tax Integration,” OTA Paper 40 (July 1980); Office of Tax Policy, U.S. Department of the Treasury, “Approaches to Improve the Competitiveness of the U.S. Business Tax System for the 21st Century,” (Dec. 20, 2007).

⁴⁶ The observation regarding volume is intended to signal the likely number of scholars and interested (and sophisticated) readers of international tax scholarship at this time and how that number might impact the nature of the discourse in the field. Whether or not more or fewer scholars worked in corporate tax or state and local taxation is an interesting question, but a comparative one that is not explicitly at issue here.

⁴⁷ Although programs in international taxation have been introduced in recent years (for example, University of Florida Law School’s LLM in international taxation began in 2006 and New York University Law School’s LLM in international taxation began in 1996), the Harvard International Tax Program which started in 1952 pursuant to a U.N. resolution had a distinctive focus on training foreign government officials in tax, as well as those pursuing academia and the private sector and was early entrant in the field. See <http://www.law.harvard.edu/programs/about/tax/international-tax-program.html>.

B. Continued Growth in International Tax Scholarship

Moving through the later decades of the 20th century to the present, international tax scholarship has seen a significant growth in both output and participants. For example, a search of Westlaw's law review index for 1980 yields one article citing the phrase "international tax" three or more times, but by the year 2000 that number increases to over 60, and in 2009 exceeds 125. During this same window, Tax Notes International began publication in 1989 and seven years later in 1996, the Bureau of National Affairs Transfer Pricing Report was introduced.⁴⁸ Similarly, for the 1994-95 academic year, 13 professors identified in the AALS directory under the subject matter "international tax," and ten years later, in 2004-2005 the number had almost doubled. Once again, these numbers are rough cut indications simply of the increasing community participating at some level in conversations and inquiries over international tax policy. Whether the specific numbers are in part a reflection of increasing law faculty size, increased course specialization, or broader self-identification, there is nonetheless a palpable difference in the prominence of international tax. The interesting question for us is, what does this change mean in terms of international tax research and scholarship?

C. Implications for the Modern Place of International Tax

With the passage of more than 10 years since Livingston's article, (and a quick but targeted look at the history of international tax scholarship in the U.S.), what can we say about international tax as one of several crucibles of hope for a revitalized tax academy? We can see that many of Livingston's instincts regarding international tax were on target, although international tax proved much more similar to traditional tax scholarship than was perhaps anticipated. A number of specific points elaborate both the problematic similarities and the fruitful differences.

Despite Livingston's characterization of international tax as a new or renewed field,⁴⁹ it has a longstanding and persistent history (though a somewhat marginal place in the tax academy). Given that history, the field not surprisingly reflects many of the elements and practices of traditional tax work. The early international tax writings described in Part II.A were similar in many respects to traditional tax scholarship – they were positive, doctrinal, and closely linked to economics. Recall that the initial, galvanizing issue for the global community on international taxation was the problem of double taxation – and that economists were selected to lead the charge in that discussion.

⁴⁸ Devoted to one of the most controversial and high dollar value issues in international tax – questions of cross border transfer pricing.

⁴⁹ Livingston, *supra* note 6 at 406.

Perhaps more significantly, although Livingston accurately viewed traditional domestic scholarship – with its grounding in the quest for a comprehensive tax base – as of limited relevance for international tax, the result was not a field free of any constraining and potentially limiting normative economic model. As outlined above, by the 1960s a normative framework for international tax was introduced (capital export and capital import neutralities) that became the dominant model for international tax analysis.⁵⁰ Just as the dominant model in traditional tax scholarship initially provided both a coherent focus and a valuable and accessible way to evaluate many policy questions but *ultimately* proved to be an incomplete model for tax scholarship – so too has the position of the core international tax model shifted. By the 1990s a notably more critical eye was cast on the capital import/capital export neutrality framework⁵¹ though it continued to function as the dominant model. This critical shift reflected a broader trend that Livingston identified for the tax field as a whole. First, the increased range of economic analysis being introduced into legal scholarship led tax scholars to consider more sophisticated and differentiated ways to evaluate efficiency in the global tax setting. Some considered the CEN/CIN approach as one that conceived of efficiency in far too narrow terms.⁵² Others specifically articulated an additional measure of neutrality to be incorporated into policy analysis.⁵³

Second, the overall growth in the number of participants in international tax scholarship increased the scope of discussion, the perspectives, and the questions that the academy began to pursue. Some scholars pursued economic models, such as game theory, that were not based on the familiar neutralities.⁵⁴ Others extended the concept of economic neutrality

⁵⁰ See supra text accompanying notes 41- 45.

⁵¹ See, e.g., Karen B. Brown, “Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries,” 23 U. PA. J. INT’L ECON. L. 45 (2002) (noting the limitations of policy based exclusively on capital export neutrality goals).

⁵² See, e.g., Daniel Frisch, “Economics of International Tax Policy: Some Old and New Approaches,” 47 TAX NOTES 581 (Apr. 30, 1990) (contending that current policy grounded in capital export and capital import neutrality is inadequate because it does not reflect the significant changes in the structure of the global economy).

⁵³ See, e.g., Mihir A. Desai and James R. Hines, Jr., “Evaluating International Tax Reform,” Harvard NOM Working Paper No. 03-48 (June 2003) (urging capital ownership neutrality (CON) and national ownership neutrality (NON) as important benchmarks for international tax policy reforms); Michael P. Devereaux, “Capital Export Neutrality, Capital Import Neutrality and Capital Ownership Neutrality and All That,” IFS Working Paper (Institute for Fiscal Studies, London) (June 1990) (introducing concept of CON).

⁵⁴ See, e.g., Tsilly Dagan, “The Tax Treaty Myth,” 32 N.Y.U INT’L L. & POL. 939 (2000); Eric T. Laity, “The Competence of Nations and International Tax Law,” 19 DUKE J. COMP. & INT’L L. 187 (2009); Reuven Avi-Yonah, “More Open Issues Regarding the Consolidated Corporate Tax Base in the European Union,” 62 TAX L. REV. 119 (2008); Adam Rosenzweig, “Harnessing the Costs of International Tax Arbitrage,” 26 VA. TAX

beyond its original role with the movement of capital – to apply it in the context of labor, reflecting the changing realities of the late 20th century global economy.⁵⁵ Still others reached into disciplines beyond economics (philosophy, international relations, sociology) to develop a more complete understanding of the issues relevant in international tax.⁵⁶ Although some scholarship continued to adopt a normative stance, other work presented case studies and related empirical work in an effort to provide context for analysis.⁵⁷

Third, as Livingston intuited, some of the driving, unresolved questions of international tax would ultimately push scholars to reach beyond the standard framework. The absence of a single sovereign establishing global cross border tax policy inherently introduces a dimension notably distinct from the domestic sphere in which traditional tax work developed.⁵⁸ The reality of multiple sovereigns is a pervasive and significant force in the design and implementation of international tax policy, whether in domestic legislation on cross border transactions, in bilateral tax treaties, or in “soft law” generated by international organizations such as the Organisation for Economic Co-operation and Development. This reality puts a premium on developing an understanding of the complex ways in which tax policy forms on a global scale – how “norms” are established and how countries influence each

REV. 555 (2007); Diane Ring, “International Tax Relations: Theory and Implications,” 60 TAX L. REV. 83 (2007).

⁵⁵ See, e.g., Ruth Mason, “Tax Expenditures and Global Labor Mobility,” 84 N.Y.U. L. REV. 1542 (2009).

⁵⁶ See, e.g., Ilan Benshalom, “The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law,” 85 N.Y.U. L. REV. 1 (2010) Allison Christians, “Networks, Norms, and National Tax Policy,” 9 WASH. U. GLOBAL STUDIES L. REV. 1 (2010); Steven A. Dean, “Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation,” 58 HASTINGS L. J. 911 (2007); Diane Ring, “International Tax Relations: Theory and Implications,” 60 TAX L. REV. 83 (2007).

⁵⁷ See, e.g., Craig Boise, “Change, Dependency and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles,” U. Ill. L. & Econ. Research Paper No. LE 08-20 (2009); Diane Ring, “What’s At Stake in the Sovereignty Debate: International Tax and the Nation-State,” 49 VA J. INT’L L. 155 (2008); Diane Ring, “One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage,” 44 B.C. L. REV. 79 (2002); Arthur Cockfield, “Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation,” 85 MINN. L. REV. 1171 (2001); Allison Christians, “Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study,” 71 BROOK. L. REV. (2005); Eduardo Baistrochhi, “The Transfer Pricing Problem: A Global Perspective for Simplification,” 59 TAX LAWYER 941 (2006) (reviewing transfer pricing issues from perspective of developed-developing countries by comparing Argentina and the U.S.); Jinyan Li, “The Rise and Fall of Chinese Tax Incentives and Implications for International Tax Debates,” 8 FLA. TAX. REV. 669 (2008)

⁵⁸ See Allison Christians, “Case Study Research and International Tax Theory,” ST. LOUIS L. J. (forthcoming 2010) (reviewing the reliance on case studies by international tax scholars and offering an assessment of how that use comports with a more specific conception of the case study approach in the social sciences).

others' policy choices.⁵⁹ Thus, attention to the emerging theories of international relations, of international organizations, and of global networks adopts increasing significance.⁶⁰

The multiplicity of sovereigns not only requires that we study and understand the dynamic process of developing tax norms and tax laws on this stage – it also spawns certain very specific challenges for the international tax system. The absence of an overarching tax authority allows capital and labor mobility, tax avoidance, and tax competition to converge and create serious challenges for the collection of revenue. Tax competition on the one hand and tax avoidance on the other, constitute the “legal” and “illegal” constraints on certain types of revenue collection. What are the implications? As states, international organizations, and scholars have argued,⁶¹ the costs can include limited revenue and/or shifted tax burdens. Although some of the underlying questions (competition, efficiency) exist in a federal system as well, the core residual difficulty stems from the multiple sovereigns. Thus, international tax may derive more value from examining the experiences of regulation in the international banking and finance arenas.

In addition to the unwieldiness of multiple taxing jurisdictions, the related question of global distributive justice continues to suffuse theoretical considerations of international tax policy. Distributive justice has been a longstanding companion of domestic tax analysis – but in that context political philosophers have frequently made assumptions about the nature of the state and the “agreement” by members of that state to accept the power (or force) of the state and hence its ability to collect and redistribute tax. In a global setting, this leap is not so easily supported and it becomes difficult to find a firm grounding for specific obligations to other states and to members of other states.⁶² Yet these questions are a core element

⁵⁹ See, e.g., Lisa Philipps and Miranda Stewart, “Defining Fiscal Transparency: Transnational Norms, Domestic Law and the Politics of Budget Accountability,” 34 *Brook. J. Int’l L.* 797 (2009).

⁶⁰ Even an empirical concept as familiar as the case study, which has been employed without much angst by international tax scholars can itself be examined in more detail and the resulting knowledge can help international tax scholars make more conscious and informed decisions. See generally Allison Christians, “Networks, Norms, and National Tax Policy,” 9 *WASH. U. GLOBAL STUDIES L. REV.* 1 (2010); and Diane Ring, Who is Making International Tax Policy? International Organizations as Power Players in a High Stakes World, 33 *FORDHAM INT’L L. J.* 649 (2010).

⁶¹ See, e.g., OECD, *Harmful Tax Competition Report* (1998); Reuven Avi-Yonah, “Globalization, Tax Competition and the Fiscal Crisis of the Welfare State,” 113 *HARV. L. REV.* 1537 (2000).

⁶² Benschalom, *supra* note 56 (discussing the limitations of philosophical perspectives including cosmopolitanism in adequately supporting an obligation to redistribute beyond the nation state).

of the debate over the global allocation of tax revenue.⁶³ Although some tax policies may have the effect of increasing the tax pie and/or increasing economic activity,⁶⁴ at some point the real debate involves the division of a relatively set amount of tax revenue and economic activity. To what extent does the status of a country as developing or low income constitute a factor in this allocation process? Does distributive justice resonate on this level? These questions have been underexplored by political philosophers. The pressing and concrete questions of the tax academy may provide impetus for further examination, although no ready resolution seems likely.

Ultimately, this closer look at the world of international tax scholarship suggests that Livingston was accurate in suggesting that the field offered potential for invigorating work both because of its relative freshness and because it compels scholars to reach beyond traditional tax analysis -- and even beyond the traditional methods and models of international tax. The next Part considers what additional guidance or suggestions can be offered for international tax scholarship eager to stake out a valuable, and first-rate, role.

III. INTERNATIONAL TAX SCHOLARSHIP OF THE FUTURE

If Livingston was correct – and international tax can be a central part of an enlivened tax academy of the future (both because it is “new” and because its problems truly demand inquiry beyond the historical confines of the legal realm) – then why have international tax scholars themselves circled back to ask some of the very same questions legal scholars in the late 20th century posed –What should legal (international tax) scholars be doing? And, how can they do that work with confidence that they are not simply second-rate philosophers, political scientists or the like, as tax scholars have more generally feared with regard to their interdisciplinary ventures?

A. *Research Agendas*

As to the first concern regarding the scope of projects, the relative youth of the field (more in terms of volume than time) offers many important issues for study. Scholars can provide valuable work on a wide range of topics with varying degrees of abstraction. Most broadly, the fundamental questions of inter-nation equity (or even inter-person equity) remain under-examined and under-theorized, as noted in the prior Part. Is inter-

⁶³ See generally, Kim Brooks, “Inter-Nation Equity: The Development of an Important But Underappreciated Tax Value,” in *TAX REFORM IN THE 21ST CENTURY* (Richard Krever, John G. Head, eds.) (Kluwer Law Int’l).

⁶⁴ See, e.g., Yoram Y. Margalioth, “Tax Competition, Foreign Direct Investment and Growth: Using the Tax System to Promote Developing Countries,” 23 *VA. TAX. REV.* 161 (2003).

nation equity required from international tax policy? If so, why and how defined?

Another important research avenue comes from the significance of coordination and shared agreement among states on questions of international tax.⁶⁵ The prospect of seeking agreement places a premium on understanding all of the processes involved. This author has advocated the use of the extensive international relations (IR) literature to better understand the complicated dynamic among individual states (and their component parts), international organizations, and other multi-lateral players who create the international tax policy we see today.⁶⁶ Case studies here could provide a powerful picture of policy formation that would be relevant for both scholars and for policymakers.

To the extent that understanding and fostering cooperation in the realm of international tax becomes an important goal of tax policy – it would be useful to consider what our best examples or models of cooperation look like and what qualities are central to their success. Even if these qualities prove idiosyncratic and difficult to replicate (e.g., a certain degree of geographic proximity, or historical connection) that information is valuable. More recently, the debate over exchange of information has dominated the international tax press (and even penetrated mainstream media).⁶⁷ As we continue to push beyond the basic idea of a commitment to exchange of information and examine the realities of its implementation, many risks and limits emerge. But not all such agreements have looked or operated in the same manner. If some arrangements have functioned more smoothly and generated the anticipated and desired flow of information, what features – explicit or implicit – were crucial to that level of effectiveness? Additionally, to what extent does the ever-changing reality of technology influence what is plausible and what is desirable in exchange of information?⁶⁸

Even the core subjects which have received both “popular” and academic attention, such as the advisability of deferral for U.S. corporations operating through foreign subsidiaries, have room for important additions

⁶⁵ See e.g., Reuven Avi-Yonah, “Globalization, Tax Competition and the Fiscal Crisis of the Welfare State,” 113 HARV. L. REV. 1537 (2000); Diane Ring, “One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage,” 44 B.C. L. REV. 79 (2002); Allison Christians, “Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20,” 5 NW J. of L. & Soc. Pol. (forthcoming 2010). See also, Julie Roin, “Taxation Without Coordination,” 31 J. of Legal Studies S61 (2002).

⁶⁶ See, e.g., Ring, *supra* note 54.

⁶⁷ Lynnley Browning, “Swiss Approve Deal for UBS to Reveal U.S. Clients Suspected of Tax Evasion,” NYT, Sec. B3 (July 18, 2010).

⁶⁸ For an interesting look at the link between technology and taxation in developing countries, see Richard M. Bird and Eric M. Zolt, “Technology and Taxation in Developing Countries: From Hand to Mouse,” UCLA Sch. of Law, Law-Econ. Research Paper No. 08-07, (2008), available at <http://ssrn.com/abstract=1086853>.

to the literature.⁶⁹ For example, a more detailed examination of whether and to what degree sweeping assumptions about the implications of deferral, elimination of deferral, or permanent exemption of foreign source income vary by industry, by time frame, or by other factors is essential for major policy decisions.

This discussion does not establish the definitive research agenda for the international tax scholar but rather offers a sense of the scope of research beyond the still necessary doctrinal analysis. But can international tax scholars pursue this research with confidence that they bring distinctive value to the task? The second question posed at the outset of Part III (can tax scholars avoid being second-rate social scientists?) poses this dilemma bluntly.

B. Research and Methodology in an Expanded International Tax Research Agenda

Livingston argued that tax academics could perform their role successfully because international tax is relatively complicated and few non-lawyers likely invest in developing their knowledge base (there have been notable examples of this failure over the years).⁷⁰ But additional factors support the active participation of legal scholars in the pursuit of tax analysis even where that work draws upon other disciplines. First, some of the disciplines most relevant for international tax (including IR theory and related examinations of international organizations and cross-border networks) almost never seek to apply their broad theories and concepts in the context of international tax. To the extent that they introduce any case studies or context specific analysis, the practice fields upon which they draw are commonly defense, military, the environment, even human rights – just not tax. Thus, if we seek to use ideas from the vast IR literature to improve our assessment of international tax policy formation, tax scholars will need to take the initiative.

Second and somewhat related, the examination of theories from other disciplines in the international tax setting is not simply a service to those responsible for tax policy. Tax can offer new insights to the very field from which it borrowed method and theory.⁷¹ For example, notable strands of the literature on sovereignty (from the IR literature, political science, and other fields) often characterize the sovereignty concept as

⁶⁹ See, e.g., Clifton Fleming, Jr., Robert Peroni, and Steven E. Shay, “Worse Than Exemption,” 59 EMORY L. J. 79 (2009).

⁷⁰ See Livingston, text accompanying note 26.

⁷¹ See generally, Edward L. Rubin, “The Practice and Discourse of Legal Scholarship,” 86 MICH. L. REV. 1835, 1899 (1987-88) (contending that law is an independent discipline and that the developments in law through time impacts norms in society and thus the work, data, and experience other disciplines).

undesirable, outmoded or on the decline.⁷² However, examination of “sovereignty” in the tax context reveals the distinctive role that it plays (rhetorically, politically, and fiscally) in taxation. Even if that distinctive application of the sovereignty concept is insufficient to completely shift the views of an IR scholar, it should give that scholar pause.

Third, much of the angst experienced by tax scholars venturing into other disciplines derives from the critiques⁷³ of empirical scholarship leveled against legal scholars in the past. Without rehashing that debate,⁷⁴ some criticisms nonetheless may resonate with those who, for example, might negatively compare the empirical work of legal scholars to formal work emanating from the social sciences. However, several important points caution against viewing empirical work as the sacrosanct dominion of the social scientist: (1) quantitative research is not the only type of empirical research; much valuable empirical information comes from a variety of more qualitative approaches; (2) quantitative analysis itself embeds many choices and decisions subject to challenge, and tax scholars would benefit from witnessing how other disciplines struggle with their own role, meaning, methods, and boundaries;⁷⁵ (3) legal scholars are often comfortable with more messy and less stylized models that may imperfectly but more comprehensively reflect the world and thus may more readily translate into real life policy dilemmas that our legal system encounters; and (4) the goals of tax and other legal scholars are distinctive—legal scholarship is ultimately directed towards policy;⁷⁶ even if a particular work is predominantly descriptive (e.g., a case study), a vital

⁷² Diane Ring, “What’s at Stake in the Sovereignty Debate? International Tax and the Nation State,” 49 VA. J. INT’L L. 155, 165-66 (2008) (reviewing assessments of sovereignty in age of globalization).

⁷³ See, e.g., Lee Epstein and Gary King, “The Rules of Inference,” 69 U. CHI. L. REV. 1 (2002); Lee Epstein and Gary King, “Empirical Research and the Goals of Legal Scholarship: A Reply,” 69 U. CHI. L. REV. 191 (2002).

⁷⁴ See e.g., Frank Cross, Michael Heise, and Gregory C. Sisk, “Above the Rules: A Response to Epstein and King,” 69 U. CHI. L. REV. 135 (2002); Jack Goldsmith and Adrian Vermeule, “Empirical Method and Legal Scholarship,” 69 U. CHI. L. REV. 153 (2002); and Richard L. Revesz, “A Defense of Empirical Legal Scholarship,” 69 U. CHI. L. REV. 169 (2002).

⁷⁵ See, e.g., Frank Cross, Michael Heise, and Gregory C. Sisk, “Above the Rules: A Response to Epstein and King,” 69 U. CHI. L. REV. 135, 151 (2002) (contending that benchmark to which these critiques hold legal empirical scholarship “are aspirational, and very few studies in any field are clearly in full compliance with all of those rules. Legal researchers should not be intimidated by these rules and the authors’ associated criticisms. Researchers should not be deterred from attempting empirical research but should simply strive to attain the article’s inferential standards insofar as practicable. We fear that Epstein and King were overcome by zeal in the intensity of their criticism of the current state of legal research. Such research warrants and would benefit from a well-conducted study and fair criticism, but Epstein and King’s polemic does not really tell us much about the true state of empirical legal research.”)

⁷⁶ See, e.g., Yariv Brauner, “An International Tax Regime in Crystallization,” 56 TAX L. REV. 259 (2003).

mission of legal scholarship is to influence, shape and guide the legal regimes, and failure to appreciate this distinction between law and other disciplines can breed confusion.⁷⁷ The vision of legal scholarship urged by Livingston and others as an exercise in practical reasoning continues to reflect the needs of a society which must integrate analysis, facts, values, and competing goals.

C. Recommendations

What advice might be offered an international tax scholar who is open to participating most fully in the project of legal scholarship? Beyond the identification of an expansive research agenda in Part III.A. and the exhortation to engage with other fields in Part III.B, two distinct types of advice might be valuable. First, international tax scholars would benefit from explicitly asking what is the goal of a given project – is it advocating a particular action, urging acceptance of a specific norm, explicating a range of potentially applicable norms, presenting empirical information (qualitative or quantitative) with an expectation that it will add to our body of understanding? Policy is ultimately the result of multiple, connected layers of analysis, and legal scholars may be engaged in pursuing one or more of them at any time – fully aware that they are operating in a discipline whose larger role is more intimately connected to unraveling and constructing debates over legal norms and prescriptions.

Second, international tax scholars can also consider pursuing a number of concrete techniques or steps – most of which should be apparent or implicit from the discussion in this essay, including: (1) accept with enthusiasm discussion, debate, and even challenge about the risks of an expanded reach into the social sciences for their work; (2) increase familiarity with and consciousness of methods and techniques – giving particular attention to the relevance of any approach for the mission of legal scholarship; (3) directly engage with social science literature with the dual aim of enhancing tax policy and introducing international tax to social scientists (certainly joint projects can be one way to integrate both goals); and (4) collaborate with international tax scholars outside the U.S. (such scholars will more be intimately aware of international tax, and yet may invite a unique way of employing social sciences – thereby combining a comparative legal dimension with a comparative cross disciplinary dimension).

CONCLUSION

⁷⁷ Jack Goldsmith and Adrian Vermeule, “Empirical Method and Legal Scholarship,” 69 U. CHI. L. REV. 153, 153-54 (2002) (suggesting that non legal scholars, as “outsiders,” not surprising “overlook that legal scholarship frequently pursues doctrinal, interpretive, and normative purposes rather than empirical ones. Legal scholars often are just playing a different game than the empiricists play, which means that no amount of insistence on the empiricists' rules can indict legal scholarship--any more than strict adherence to the rules of baseball supports an indictment of cricket.”).

Law is ultimately most relevant and successful as the field within which we grapple with the normative questions for which our work as a whole seeks to offer prescriptive guidance. International tax scholarship is capable of making a valuable contribution on behalf of the legal academy. Future choices in international tax policy will shape our fiscal, national, and global future. With an expanded vision of the relevant issues and the ways the tax academy can contribute, such scholarship can be purposeful and directed. For those international tax scholars looking to pursue more empirical work as part of their broader agenda, it is useful to seriously engage with the literature on methodology. Not only can this work reach beyond the doctrinal and more traditional economic analysis, it can and should reach beyond the individual scholar to encourage collaborative projects.