Congratulations to Tax Notes for reviving a periodic digest of recent articles on tax subjects written by full-time professors and published in law review journals. Tax Notes has published this information in other forms: a “tax bibliography” that gave one sentence summaries of articles, or one paragraph abstracts, or longer distillations of articles.

The benefits of those digests are many: Nothing like them appears in material regularly read by tax practitioners, judges, and Treasury, IRS, and legislative staff lawyers who administer and write the federal tax laws; the digests can bring to their attention useful research as well as ideas for change; full-time professors can bring to legal writing advantages that may not be as common among other legal writers, including objectivity, the time and resources to delve into the history and background of issues, and the freedom to follow an idea where it leads without being bound to pursue only immediately practical results; and the professors should benefit from having their work exposed to the “real world.”

I will expand on these benefits below, but first I will explain how the conditions that now make the digests needed and useful did not always exist.

Tax Academic Writing, Past and Present

In the past, the average tax law practitioner had a more familiar and ongoing relationship with law journals than does the average tax practitioner today. The Tax Notes digests can repair that relationship.

My unscientific review of law journal tax articles of the past year suggests the following:

• With no disrespect to any school's publication, essentially no tax articles appeared in what some might consider the 30 law reviews in the Top 10, and the statistically insignificant exceptions were mostly student pieces.
• By volume, most of the tax articles were in tax law reviews of schools that operate LLM programs in tax.
• Many of the articles were specific to the area of the journal, for example tax related to sports or agriculture. That reflects the proliferation of journals in specific subject areas, particularly business law journals and international law journals, which have attracted tax articles specific to those areas.
• Most of the articles linked tax to some presumably sexier legal topic, such as women’s rights, income inequality, abortion, global poverty, same-sex partners, personal injuries, elite schools, and green tax.
• State tax topics seemed to have more appeal to some more local journals.

Turns out my unscientific survey is mostly right. In 2000 Prof. William Turnier of the University of North Carolina School of Law published a study titled “Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship.” Turnier said in 2000:

• “Over the course of the last half-century or so tax scholarship has seen the welcome mat for it at major law journals pulled in and has found itself to be as cordially received as a Quaker at a convention of Middle East arms dealers.”

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1 Although, as discussed further below, in the rare case of a practitioner article published in a law review, it should be brought to the attention of the Tax Notes readers for many of the same reasons.

2 As a perhaps extreme example of the assistance received by academic writers, Barry Friedman, a professor at New York University School of Law, wrote in the Acknowledgments section of his excellent book about the Supreme Court, The Will of the People (2009), that he was assisted by more than 133 named individuals over a 15-year period, which was kicked off by a sponsored sojourn in Bellagio, Italy.
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• “This editorial policy is inconsistent with contemporary political developments and with the needs of the profession and society as a whole.”
• The change has provided to “tax specialty journals . . . the opportunity to become the venue in which the debate on important tax policy issues takes place.”
• “As matters become more important to the practicing bar, they become less important to student editors, the overwhelming majority of whom will, ironically enough, soon be pursuing with diligence those matters on which they display the least interest when exercising editorial judgment.”
• “Another classic justification for scholarly research and writing is that it assists the judiciary in carrying out its official duties. In recent years, there has been considerable dispute as to how well legal scholars are performing this traditional role.”
• The article contains a chart showing “Sources Cited in Major Official Policy Analyses,” with law reviews generally receiving zero hits, tax specialty journals receiving a few hits, and “other journals” receiving by far the most hits.
• “To elevate the opinions of third-year law students and make them arbiters of the faculty marketplace is to stand the academic institution on its head.”
• “The small amount of tax scholarship that finds its way into major law reviews primarily deals with major tax redesign issues. Most of it is of no use to policy makers who play a major role in tax legislation design.” Whew. And that was from a longtime tax law professor. Things have not improved in the past 11 years.

It is important to observe that Turnier’s perspective on secondary tax materials in the field likely differs from the average user’s. The italicized sentence shows that he was most concerned about tax articles that debate policy issues, which he evidently classified as less rarified than “major tax redesign issues,” which even he found useless to legislative staffers. As for the major tax redesign issues, currently there are basically only two: consumption taxation (as it affects savings and investment) and taxing foreign business income. Any academic who has not weighed in on one of those topics likely is suspect in the academy. Presumably, Turnier was complaining about the lesser policy issues, such as corporate tax integration. But the average reader is looking for an even less rarified tranche of writing: those articles that take on the tax law as it is and try to make sense of it, which used to occupy the bulk of tax writing, even from academics.

From one point of view there is nothing wrong with the described tendencies of law journals. They are entitled to publish what they want, and professors are entitled to write what they want (although untenured professors must be acutely aware of the predilections of their tenure committees, as Turnier pointed out). They both do what they want because the world of law school law review is not arranged to benefit the general legal reader but to benefit the schools, the students, and the professors who publish therein; that won’t change in our lifetimes.

But from the viewpoint of the practitioners, judges, and government lawyers mentioned above, there is a fundamental problem inherent in the arrangement that suits the schools and professors so well: Aside from the government policymakers — and that is a thin layer indeed, as Turnier acknowledged — there is very little now appearing in the academic journals to assist the policymakers in understanding the tax law as it exists and operates and how it might be improved interstitially. To some extent, that criticism extends even to the “tax law reviews,” which have edged toward the economic articles in recent years. Thus, even as an accidental byproduct of the academic publication machine, there is little for the general legal reader to put to practical use.

If Tax Notes endeavors to bring the useful articles to the fore, it will have to search far and wide.

Retrospective

It was not always so. The dean of Harvard Law School once was a tax expert. Dean Erwin N. Griswold seemed to treat the Harvard Law Review as his personal journal, using it to expound right thinking on very mundane issues of the nuts and bolts of the tax law: no “tax and . . .” for Dean Griswold. For example:

• “Charitable Gifts of Income and the Internal Revenue Code”;
• “In Brief Reply” [to Boris Bittker];
• “Securities and the Continuity of Interest”;

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\[\text{id}\]
\[\text{id. (Emphasis added.)}\]
\[\text{id. at 201.}\]
\[\text{id. at 203.}\]
\[\text{id. at 209.}\]
\[\text{id. at 211.}\]
\[\text{id. at 212.}\]

1125 Harv. L. Rev. 84 (1951).
1135 Harv. L. Rev. 1389 (1951).
1144 Harv. L. Rev. 361 (1951).
“Powers of Appointment and the Federal Estate Tax”15;  
169Powers of Appointment and the New Revenue Act16;  
“An Argument Against the Doctrine That Deductions Should Be Narrowly Construed as a Matter of Legislative Grace.”17

These subjects were right down the middle of the tax law fairway and would have been of interest to persons actually applying tax law, particularly because they were penned by Dean Griswold.

Another example is Boris Bittker of Yale Law School. He cobbled a series of articles together into the cornerstone of the most enduring tax book of all time: Federal Income Taxation of Corporations and Shareholders:

- “Corporate Liquidations and the Income Tax”18;  
- “Stock Redemptions and Partial Liquidations under the Internal Revenue Code of 1954”19;  
- “Corporate Dividends and other Non Liquidating Distributions in Cash, Property, Stock and Obligations”20;  
- “The Corporation and the Federal Income Tax: Transfers to a Controlled Corporation”21;  
- “The Tax Treatment of Collapsible Corporations.”22

Many other tax articles followed. Of course, Bittker became a rare star, but he may not have been such a star in the mid 1950s when he was making his way up the academic ladder; nevertheless his articles were published.

Unlike most academic tax writing today, articles by the prior generation of tax professors actually explained (and questioned along the way) the tax law as it existed — particularly new tax law. That may seem like a pedestrian undertaking to some, but to those who know the federal tax laws intimately, it is the acme of the legal profession. In no other area of the statutory laws have so many very smart people (Dr. T.S. Adams, Randolph Paul, Stanley Surrey, Larry Woodworth, Wilbur Mills, and Russell Long to name a very few) labored so long the income tax actually dates back to the Civil War (antitrust goes in and out of Income Tax) over something so perpetually important, such a star in the mid 1950s when he was making his way up the academic ladder; nevertheless his articles were published.

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For other examples from earlier generations, Roswell Magill of Columbia University Law School used to write articles on new tax laws.24 John M. Maguire and Roger Traynor, of Harvard and the University of California, respectively, wrote a highly detailed article on the mechanics of an early version of the tax benefit rule.25 Surrey wrote many articles while a professor at Harvard.26 Walter Blum of Chicago was particularly prolific.27

An interesting attribute of many of the professors of an earlier era is that they were not embarrassed to publish in mere practitioner journals. For example Prof. Blum republished his Kretsches piece in Taxes.28 One of the most brilliant of all academics still writing is Alvin Warren of Harvard. He has tackled the most basic issues in the everyday application of the tax laws, such as the deductibility of capital losses29 and safe harbor leasing,30 but, like Blum, has been willing to write important pieces in practitioner journals.31

Moving to another part of the spectrum, it used to be common for professors at state-funded law schools to publish surveys of each year’s statutes enacted by the local legislature. For example, a biannual Survey of Statutory Changes was published in the North Carolina Law Review from 1927 to 1955; the survey was written by faculty and staff professors. Those articles are valuable because there basically is no legislative history in North Carolina. In a recent high-profile North Carolina tax decision,
the appellate court cited and relied on (erroneously as it happens) such a survey from the 1941 North Carolina Law Review.\textsuperscript{32} To the extent those articles have waned, the tax practitioner loses, both at the state and federal levels. Contemporaneous analysis of statutory changes by academics can bring a hard and penetrating light to bear on the frequently faulty products of the legislature in time for corrections to be made, or if not made, in a way that at least can inform later students of the inscrutable legislation.

Of course, not only have tax articles written by professors disappeared from regular law reviews, but even more completely have practitioner authored tax articles disappeared. In contrast, important tax articles appeared for decades in law school journals by practitioners such as William T. Plumb,\textsuperscript{33} Randolph Paul,\textsuperscript{34} Robert N. Miller,\textsuperscript{35} J.S.Y. Ivins,\textsuperscript{36} and Louis Eisenstein.\textsuperscript{37} One of the last of this line of practitioner authors in tax appearing in top-tier law reviews may have been Charlie Kingson’s 1976 article, and other exceptions to the rule appear sporadically.\textsuperscript{38}

\textbf{Law and Economics}

Even practitioners are aware of the “law and something else” movement in the law schools over the last several decades. It has long been out of fashion to study just torts or real property; it must be torts and social change or real property and housing discrimination or policy. That trend inevitably caught up with the tax law through one of the most thoughtful of academics, William D. Andrews of Harvard.

He started out as a nuts-and-bolts writer on subjects such as earnings and profits of corporations.\textsuperscript{39} But in 1972 he published “Personal Deductions in an Ideal Income Tax.”\textsuperscript{40} As usual, Bittker had gotten there first with a 1967 article on a comprehensive tax base, but Andrews’ article captured the imagination of academic tax writers — or so it seems in retrospect. Footnote 7 contained what became the obligatory citation to Henry C. Simons.\textsuperscript{41} Footnote 20 contained the obligatory citation to Robert M. Haig.\textsuperscript{42} There were citations to Musgrave. In a second article, Andrews added the obligatory citation to E. Cary Brown.\textsuperscript{43} The two Andrews articles have been cited in 275 and 361 separate articles, respectively.

Bittker and Andrews began a vast migration of academic tax writing away from how the law works to why we can’t have another system of taxation since ours doesn’t work like Haig-Simons said it should. That migration fit the needs of tax academics like a hand in a glove because it offered the alternative of learning and explaining exotic new things that your tax peers didn’t have a clue about, it carried the cachet of reform, and it was a good “law and something else” option that seemed not to stray too far from the law part.

But it did stray far enough to render much of the academic work practically useless. My research reveals that the U.S. Supreme Court has never decided a federal tax case on the basis of the Haig-Simons definition of income, despite all best efforts of academics to start their articles by stating that income is what Haig and Simons said it is.\textsuperscript{44} And there is a good reason for that: It is not the law.

It is an inescapable fact that tax law is mostly — and most fundamentally — law and not economics or social policy. But that wasn’t clear as to the definition of income in 1921 when Haig edited The Federal Income Tax and wrote the chapter on “The Concept of Income” that won him fame in the Haig-Simons duo.\textsuperscript{45} He argued against taxing based on events and money flows and thought accretions in value were more accurate. He lost. He lost because the income tax is at base a method of funding the government that was laid over events as they actually occur as normally determined for

\begin{footnotesize}
\begin{enumerate}
\item[See, e.g., Plumb, “The Tax Benefit Rule Today,” 57 Harv. L. Rev. 129 (1944). Plumb was with Hogan and Hartson LLP.]
\item[See, e.g., Paul, “Ascertainment of Earnings and Profits for the Purpose of Determining Taxability of Corporate Distributions,” 51 Harv. L. Rev. 40 (1938). Paul was the founder of Paul Weiss and served in Treasury positions.
\item[See, e.g., Miller, “The Taxation of Intercompany Income,” 7 Law & Contemp. Prob. 30 (1940). Miller was a founder of Miller and Chevalier.
\item[See, e.g., Ivins, “Comparison of Court Rules Affecting Review of Tax Court Decisions,” 36 Va. L. Rev. 583 (1950). Ivins was a founder of Ivins, Phillips & Barker.
\item[37]Personal Income Taxation (1938).
\item[38]The Concept of Income (1921).
\item[39]Andrews, “A Consumption-Type or Cash Flow Personal Income Tax,” 87 Harv. L. Rev. 1113 (1973). Footnote 22 reads: “The fact that completely accelerated depreciation when coupled with complete loss offset is equivalent to exemption of net return from an asset was discovered by E. Cary Brown.”
\item[41]The Federal Income Tax (1921).
\end{enumerate}
\end{footnotesize}
legal purposes. Those events are sales, compensations, dividends, and the like. Sure, there are disputes around the edges about stock dividends based mostly on the insistence of the law to respect the fiction of corporations, but at the end of the day the tax law came down on the side of law and not economics.

What Andrews and probably the majority of other tax academicians have done over the last 40 years is to again fight against a transactions-based tax system. Their efforts received a tremendous boost when the conservative antitax folk discovered that the same theoretical analyses could support a tax that did not fall on passive income of the type normally enjoyed by the wealthy, at least until they consume it. But of course this convergence of academic benefit and class benefit is merely a happy byproduct for both groups.

The bottom line is that tax and economics is quite an interesting subject for law school classes and relieves the drudgery of figuring out what is a collapsible corporation (which may come back in a couple years). But if you don’t enjoy reverse-engineering a collapsible corporation, you probably shouldn’t be in this business (including the business of teaching tax to future tax practitioners).

The ‘Tax Law Reviews’

Practitioners could pretty much ignore the paucity of tax articles in traditional law school journals if the space had been filled by the “tax law reviews.” I put the term in quotes to distinguish the group of tax-specific law school journals from the first of them, which claimed that title. To some degree the space was filled, and still is filled in part, but the tax law reviews are tending to succumb to the same prejudices as their big brothers.

The tax law reviews differ from the traditional law school journals in sometimes being peer reviewed, which is code for “faculty selected and edited.” In fact, the peer part frequently is reduced in scope to one faculty member being pressured or enticed into assuming the role of sole editor, which is a thankless job. Therefore, although most of the “tax law reviews” benefit from not being dependent on students to pick articles, they probably do not much benefit from peer review (except possibly to the extent the articles are from symposiums, which is frequent).

The tax law reviews have become the second best choice as publishing venues for aspiring academics. It is generally acknowledged that law school hiring and tenure committees give little weight to publishing in such venues, but since aspiring academics have little control over the predilections of students editing traditional law journals, they take what they can get.

From the practitioners’ viewpoint, the main problems with the tax law reviews are that the schools that sponsor them directly or indirectly apply pressure to move them toward the traditional law journal model (which often succeeds), and also that you can’t find the tax law reviews. To take an example of the first point, the Tax Law Review started the same way the Graduate Tax Program at NYU Law School did — as an intensely practical undertaking. The first article in volume 1 was by George E. Cleary, founder of Cleary Gottlieb, Steen & Hamilton, entitled “The Corporate Entity in Tax Cases.” But in the last two years, the majority of its articles have been from symposiums on fairly exotic policy topics; there are essentially no “hard law” articles.

The problem of not being able to find tax law reviews may be addressed by Tax Notes’ new undertaking. Like the SSRN (Social Science Research Network, an online posting spot for aspiring and actual academics), articles from tax law reviews don’t pop up in your normal online search. They do not appear in RIA Checkpoint (which carries only its publisher’s journals). Lexis/Nexis TaxCenter provides an optional search database “TAXLR,” which is really the entire Lexis law journal database supposedly limited to tax articles. But you have to drill down to it to select it, unlike the handier Checkpoint approach of making the journals a more readily accessible general option. And Westlaw provides the tax research access to its journal database too, but, again, you have to drive down to select it. And in the case of Westlaw, you are first led to RIA’s own journals.

This is part of a bigger practical problem for tax researchers: If the tree falls in the woods and no one hears it, did it really fall? For too many of us, if the article does not appear in Tax Notes or the Daily Tax Reporter, it didn’t happen. I am not defending that method of “research” — I am just stating a fact. What tax practitioners need is an all-purpose tax research modality set up like RIA Checkpoint, but which is not limited to the publisher’s materials (in contrast to RIA’s Checkpoint, which is so limited), and includes all the basic primary and secondary materials without having to run around and cobble together a set of research databases.

But this is wishful thinking; it will never happen, as illustrated by the fact that Westlaw and RIA.

46 And because most consumption tax proposals do not close the circle and propose to tax death as the ultimate consumption of whatever the taxpayer “has left,” consumption taxes work out quite nicely for the wealthy.

The Exceptions That Prove the Rule

Nevertheless, some tax academics soldier on, beyond just placing one tax article in a traditional law review for benefit of the tenure committee. For example, the Supreme Court cited University of Tennessee Prof. Don Leatherman’s article on consolidated returns (even though it was published in *The Tax Lawyer*). It goes without saying that this was not a “policy piece.” It was a dreadfully dull but brilliant exposition of a very hard piece of tax law, which the Supreme Court evidently appreciated.

Prof. David Shores, emeritus at Wake Forest University School of Law, has persisted in publishing a list of useful articles, again mostly in *The Tax Lawyer*. Nancy Staudt at Northwestern University has written very practical pieces about tax litigation. Ajay Mehrotra at Indiana University-Bloomington has written important articles on the history of taxation. Stephen Bank has written detailed analyses of the origins of corporate tax provisions. Howard Abrams actively publishes useful pieces. Larry Lokken of Miami University and the University of Florida wrote an indispensable article on the time value of money, making the strange appear logical. Marty McMahon writes on many useful topics. University of Texas Prof. Robert Peroni and Brigham Young University Prof. J. Clifton Fleming Jr. are perhaps some of the few tax academics whose articles play a role in actual debates about legislation (in this case about deferral of U.S. Tax on Foreign Source Income), the Supreme Court evidently appreciates.

And one can hope there are many more useful articles that will be digested and surveyed as part of the new *Tax Notes*’ effort. But as even Turnier said, the bulk of the shrinking crop of academic tax articles are focused on policy and suggested changes in law that are so dramatic as to be beyond the purview of even most government readers. Those policy articles do not reach the players in the tax system where they are. Judges must judge cases applying the law as it is; IRS agents must apply the law to taxpayers as they find it in the books or online. That is no simple task.

My research has convinced me that many of the tax “rules” with which we are saddled today are pure and simple mistakes that at times can be traced back to a court’s specific failure to properly read a precedent. Tax litigators may have a strategic reason to point out those errors. IRS attorneys generally avoid questioning any juridical authority, no matter how low the court. Who will say the emperor has no clothes, if not academic tax writers?

We need smart, thoughtful academics with the time to sift through the chaff and find the wheat to revive the tradition of Bittker and Griswold and explain to us what this elephant called the federal tax law is.

Conclusion

If academic tax articles are useful and findable, then the long, slow trend that has led practitioners away from them may be reversed. But it will take a lot of effort on both sides. Having served in the IRS Office of Chief Counsel, I can report from experience that I never saw an issue solved, or even illuminated, by finding a law journal article explaining what the law meant. I don’t deny that it happens on occasion — I just never saw it.

Conversely, when I clerked for a federal district judge in 1971, he gave me a copy of “Developments in the Law — Federal Habeas Corpus.” The article was about 250 pages long and pretty much provided a roadmap for habeas corpus, which was a fairly big deal for federal district judges before they began running drug courts.

Let’s hope the editors of *Tax Notes* find some habeas corpus-type articles that illuminate the issues tax lawyers actually deal with, and leave the consumption taxes to Congress.

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56See Cummings, supra note 23, at pp. 193-244.
57For example, the majority of tax shelters of the past decade were based on an erroneous or misapplied opinion of the Tax Court, Helmer v. Commissioner, T.C. Memo. 1975-160. Because the IRS chose to attack those shelters by relying on the economic substance doctrine and in the process got into big disputes over its efforts to change the partnership regulations, it largely failed to question the source of the problem, which was the misreading of Helmer (perhaps because it was an IRS victory).