INTRODUCTION TO TAXATION
Sixth Edition

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SIXTH EDITION

WILLIAM D. POPKIN
Walter D. Foskett Professor Emeritus of Law
Indiana University Maurer School of Law

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MATTHEW BENDER

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To my children

Carol, Meera, and Lionel

Preface to the Sixth Edition

Incorporation of the 2013 tax law. This sixth edition includes updates to the income tax law that were contained in the American Taxpayer Relief Act of 2012 (ATRA). ATRA was passed to prevent the expiration of the Bush Tax Cuts that were part of the 2001 Tax Law (and later laws) and the sequestering of government expenditures that were scheduled to take effect on January 1, 2013.

Introduction to (not just income) taxation. When I started out teaching at Harvard's International Tax Program, it was obvious that the subject of taxation was much broader than the income tax. But when I suggested that the basic tax course should reflect the variety of available taxes, it aroused only skepticism. This edition includes my efforts — after some four decades of teaching — to overcome that skepticism. To that end, Part II of the coursebook deals with property taxes, the estate and gift tax, the Social Security (payroll) tax, the taxation of trusts and estates, corporate taxation, international tax issues, and multistate taxation. The treatment (necessarily) provides only a preliminary introduction but it should give the student a sense of the breadth of available taxes and their structure. It should also lay a useful foundation for advanced courses in those subjects. It can be taught at the end of the basic tax course or as a separate two-hour introductory course (or seminar).

Statutory interpretation. The bulk of the material in the coursebook continues to dwell on the income tax, with an emphasis on statutory interpretation. Tax law is the quintessential statutory course, originating solely from the legislative process and unencumbered by a common law tradition. In this respect, it differs from commercial law and criminal law. It is therefore an ideal vehicle for teaching statutory interpretation — either in the first year or in later years of law school.

I have drawn heavily on my own background as a legislation teacher and author of a Legislation casebook to provide the material on statutory interpretation. I do not mean to suggest that a study of tax law should be a substitute for a course in statutory interpretation; only that an understanding of the Internal Revenue Code and its application is vastly enhanced by an awareness of the statutory interpretation issues that recur in the case law. To that end, there are more than 25 separate statutory interpretation notes.

Lawmaking process. I have also tried to present the material in a way that makes the student aware of the lawmaking process in two major respects. First, the code is a document that is constantly changing. Students who are anxious to find some anchor amid the complexity are likely to look at the tax law as a still snapshot rather than as a moving picture and thereby overlook the fact that whatever they learn could become obsolete in the near future. The detail in the book is presented, not so that students can memorize the rules, but to give a rich sense of how Congress is constantly tinkering with the law. The Introduction, as well as subsequent chapters, describes the constant amendment process that has been typical of the income tax law. Second, income tax law is not only made by legislation. It also emerges from a variety of administrative and judicial sources. The book presents this avalanche of legal materials in a way that should make the student aware of their varying persuasive authority.

Pedagogy. This edition straddles the two approaches to teaching tax law. First, it includes many problems that force the student to work out an answer, usually when the answer is clear but the rules are not easy to read. Even though this is unlikely to involve work that will be done by lawyers, it is still a useful way to provide a window on how the law is structured and how it attempts to solve important policy issues. The phantom tax rates, the earned income credit, and the "child care" credit are illustrations. Second, it presents material that forces the student to worry about the uncertainties in the law — often involving statutory interpretation — that is the traditional stuff of legal work.

This edition also straddles another pedagogical divide. This edition tries to reduce some of the complexity that appeared in earlier editions without oversimplifying the material. Too much complexity can get in the way of a useful introduction to tax law. Too little complexity can give a misleading picture of the challenges and the richness that tax law presents.

Finally, Chapter 6 (dealing with the processes by which income tax law is made) can be taken up as a unit or split into sections. The material discusses the legislative process, administrative rulemaking, adjudication, and the ethical responsibilities of tax practitioners. It follows Chapters 1-5, because the Chapter 6 material makes more sense after the student is exposed to the various sources of income tax law. But it also makes sense to consider a selection of this material immediately after a particular source of law is referenced — e.g., right after Treasury Regulations or Revenue Rulings are cited as legal authority. Either way works.

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INTRODUCTION

[A] A BRIEF HISTORY OF U.S. TAXATION[1]

[1] Federal Taxation

The federal government does not have to depend solely on taxes to raise revenue. It can borrow funds and print money. It can sell public land. It can also charge customers for buying or using government property, in which case the payment is for a benefit received, not a tax; for example, federal lands are sometimes leased for oil and gas exploration; and charges are imposed for entry into national parks and for use of toll roads. This introduction (and the course book) deal only with taxes.

[a] Before the Civil War

Until 1863 (when the Civil War changed the fiscal landscape), more than 90% of federal revenue came from customs duties — that is, tariffs imposed on imported goods. In other words, the revenue source was "external," not "internal." Sale of public lands contributed a significant percentage of the remaining federal revenue.

A few other federal taxes — primarily excise taxes on specific goods — produced a small amount of revenue before the Civil War, but gained a lot of attention. First, an excise tax on liquor in the 1790s led to the Whiskey Rebellion, during which a tax collector's home was burned. The rebellion was suppressed with federal troops sent by President Washington. (Other excise and stamp taxes, such as those on legal instruments and bonds, did not produce a similar reaction.)

Second, a 1791 tax on carriages led to an important Supreme Court decision. *Hylton v. United States*, 3 U.S. 171 (1796), held that the carriage tax was not a direct tax. This holding was important because the U.S. Constitution (in Article I, sec. 2, cl. 3) requires "direct" taxes to be apportioned among the states according to population. This requirement prevents populous states from voting in favor of a federal tax on real estate, which will fall mostly on people living in property-rich, low-population states.

As is often the case in the history of taxation, the need for military expenditures produced an expansion of the tax base. The undeclared naval war with France led (in 1798) to a direct tax apportioned among the states by population on houses, land, and slaves. And a death tax was imposed by the Stamp Act of 1797. Neither of these taxes survived the end of the military confrontation and was repealed at the beginning of the nineteenth Century.

[b] From the Civil War to the Sixteenth Amendment

[1] The data regarding federal, state, and local revenue is based on the following: Historical Statistics of the United States, Millennial Edition On Line (Cambridge University Press 2006) — Federal government revenue, by source, 1789–1939, 1934–1999 [OMB]; Federal government internal tax revenue, by source, 1863–1940 & 1940–1999; Federal, State, and Local Government Finances — Census of Governments, Total government revenue and expenditure, by level & by source, 1902–1995; State and Local government revenue, by source, 1902–1995; State government revenue, by source, 1902–1996; Local government revenue, by source, 1902–1995. In addition, some of the discussion relies on Brownlee, Federal Taxation in America (2d ed. 2004); Teaford, The Rise of the States (2002).

The Civil War also spawned a new tax — the first income tax, which became effective in 1862. An early version of the law imposed progressive tax rates in the 3%-5% range with a $600 exemption; these rates rose to 5%-10% by the end of the War. An inheritance and a gift tax were also adopted at this time. However, by 1872, these taxes had expired and would not be revived for many decades.

After the Civil War and until the first modern income tax in 1913, customs duties continued to be the major source of federal revenue. Internal revenue, primarily in the form of excise taxes on alcohol and tobacco, usually produced between 40-50% of federal revenue and occasionally exceeded customs duties.

In 1894, political pressure from labor, farmers, and small businesses led to adoption of the first modern income tax, but it was vigorously opposed by Eastern financial interests (whose income from intangibles, such as stocks and bonds, would now be taxed). They insisted that the 2% tax on income amounted to "socialism" and "communism." And, in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), they won a judicial victory after losing in Congress. The tax on income from property was deemed an unconstitutional unapportioned direct tax, despite a number of judicial precedents to the contrary. The constitutional part of the tax on personal service income was found to be inseverable from the unapportioned direct tax, and it fell along with the unconstitutional tax on property income. An estate tax, which was adopted by the War Revenue Act of 1898 and lasted until 1902, did better in the courts; the tax was deemed an indirect tax on the transfer of property in *Knowlton v. Moore*, 178 U.S. 41 (1900). Similarly, the corporate income tax (adopted in 1909) was upheld as an indirect tax on doing business in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

[c] The Modern Era

[i] New Taxes

But the political forces favoring an income tax proved too strong to resist. The Sixteenth Amendment to the Constitution, adopted in 1913, removed the apportionment obstacle for taxes on income from property. Although you sometimes hear statements that this Amendment permitted taxes on income, an income tax is authorized elsewhere in the Constitution, by Article I, sec. 8, cl. 1: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." The 16th Amendment only removed the apportionment requirement.

In 1913, Congress took advantage of its new power and passed an income tax, with progressive rates ranging from 1%-6% on individuals (with a $1,000 exemption), as well as a 1% tax on corporate income. The income tax fell primarily on the wealthy, reaching only about 5% of the population in 1920. On the judicial front, the Court turned back an objection that the tax was not uniform, relying on precedent which established that the U.S. Constitution's Uniformity Clause (Art. I, sec. 8, cl. 1, quoted above) required only geographic uniformity; *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916).

An estate tax was adopted in 1916, which also fell mainly on the wealthy. It left open a major loophole — which was the taxpayer's ability to make lifetime gifts free of tax. Consequently, a gift tax was adopted temporarily from 1924-1926, and became permanent in 1932.

The next important fiscal development occurred during the Depression — to finance new social insurance programs: specifically, Social Security for the aged and Unemployment Insurance. These programs were financed through payroll taxes on personal service income. In the case of Social Security, employers and employees each paid one half of the Social Security tax, but most economists assume that the employer's tax is shifted to employees in the form of lower wages. (The only prior federal experience with a social insurance program provided retirement and disability benefits for Civil War Union veterans.) At present, the Social Security tax exceeds the income tax for many lower-income workers, although a refundable earned income credit provided by the income tax reduces the impact of this burden.

Despite the importance of the income tax after passage of the 16th Amendment, this tax did not become a mass tax until World War II (no longer falling primarily on the wealthy). Exemptions were reduced to $500, top tax rates rose to a high of 50%, and taxes on wages were collected through withholding. Rates decreased after the end of World War II and increased during the Korean War in the early 1950s. Top individual tax rates went as high as 91%, but they have been steadily lowered in the past few decades. At one time, when the top rate was 70%, the maximum rate on personal service income was limited to 50%.

An interesting feature of federal taxation is the absence of a general sales tax (which falls on the sale of most tangible personal property and not just on selected items, such as a federal tax on alcohol and gasoline). Occasional suggestions that the U.S. adopt such a tax have failed, in part because it is viewed as regressive (falling disproportionately on those with lower incomes); and, since the 1930s, because the general sales tax has been adopted by many states which fear that federal use of this tax base would displace state reliance on this revenue source.

[ii] Data

The adoption of the income tax in 1913 began a major shift in the sources of federal revenue. Customs duties, which had been the mainstay of nineteenth-century federal taxation, hovered around 10-20% of federal revenue in the 1920s and dipped below 10% during most of the 1930s; thereafter, it produced only around 1-2% of federal revenue. Tariffs are now important only for trade policy.

The contribution of excise taxes — the other significant source of federal revenue in the nineteenth century — has also declined. These taxes sometimes equaled or exceeded that of the income tax during the Depression — for example, the contributions to federal revenue of excise taxes and income taxes in 1934 were 46% and 26% respectively, but the balance shifted in 1937 to 35% and 39%. With the end of the Depression and the expansion of the income tax during World War II, excise taxes produced an increasingly insignificant percentage of federal revenue. The dollar amounts of excise taxes on selected goods and services, such as alcohol, tobacco, gasoline and diesel fuel, and airplane travel, are still significant (about $88 billion in 2013), but only about 3-4% of federal revenue.

Estate and gift taxes, despite being politically important, have been a small contributor to federal taxes throughout their history — in recent years, contributing less than 2% of federal revenue, declining to less than 1% with recently adopted high exemptions.

The individual income tax began to be a significant source of federal revenue in the 1920s, but its contribution to federal revenue was cut almost in half during the

Depression. Since becoming a mass tax during World War II, and despite fluctuations in legislatively enacted tax rates, the individual income tax has annually produced between 45-48% of federal revenue.

The percentage contribution of the corporate income tax to federal revenue has gradually declined from around 30% just after World War II to about 10-12% or less today — in part, because business tax breaks are more pervasively available to corporations and because foreign corporate income (which has become more important with globalization) is not usually taxed until it is brought back to the United States.

The other major contributor to federal revenue is Social Security taxes. These taxes (expanded to include Medicare in 1965) now raise a significant percentage of federal revenue — gradually rising from less than 10% prior to 1958 to about 33% today.

[d] The Contemporary Income Tax

The pattern of wartime increases and peacetime decreases in income tax rates continued until recently. Despite the need to finance military actions in the first decade of the twenty-first century, the President and Congress have agreed on income tax reductions, primarily on the theory that this would provide economic incentives and, eventually, increase revenue. Lower taxes resulted not only from lower progressive tax rates, but also from a maximum 15% tax rate on long-term capital gains and dividends and the provision of numerous deductions and credits that lower the effective tax rate on a broad-based definition of income.

The other major feature of the current income tax — which has exploded since the 1960s — has been its use to address nearly every major economic and social problem. Tax breaks for all sorts of activities — from investing in machinery and environmental clean-up to social programs such as child care, education, retirement, and medical expenditures — have proliferated in the tax code. This has resulted in large part from the political difficulty that Congress encounters in spending money directly, with a resulting reliance on tax breaks to achieve specific goals. Legislators are able to say that they did something about a problem, without worrying too much about whether it is the best way to achieve their objectives.

The result of using the tax law for many nontax purposes has been an immensely complex income tax law, which contains provisions that have nothing to do with raising revenue. The complexity of the current legislation has deprived the income tax of whatever clarity it might once have had and, incidentally, created a pedagogical nightmare. It is fair to say that there are very few income tax specialists any more. Instead there are practitioners who specialize in the taxation of particular industries and activities — natural resources, real estate, the entertainment industry, retirement planning, etc. Moreover, tax law practice has yielded significant ground to accountants, who are better trained to deal with the kind of jigsaw-puzzle complexity that yields a clear answer after negotiating the statutory maze. Lawyers are better able to deal with the application of general and uncertain principles to complex fact situations than they are with rules for which complex algorithms provide answers. Indeed, tax preparers using computer programs are often better able to provide answers to complex tax problems than tax practitioners.

Among the most distracting features of current law, which results in part from the need to make federal deficits less daunting, is the adoption of some tax breaks with a statutory expiration date. The 2001 Tax Law (Economic Growth and Tax Relief Reconciliation

Act of 2001) contained numerous such provisions and a series of subsequent statutes dealt, among other things, with the need to revisit these provisions. The following partial list of these laws suggests how much legislative time was taken in addressing these issues: Job Creation and Worker Assistance Act of 2002; Jobs and Growth Tax Relief Reconciliation Act of 2003; Working Families Tax Relief Act of 2004; American Jobs Creation Act of 2004; Katrina Emergency Tax Relief Act of 2005; Tax Increase Prevention and Reconciliation Act of 2005; Small Business and Work Opportunity Tax Act of 2007 (a subtitle of Pub. L. 110-28); and Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010. Finally, the American Taxpayer Relief Act of 2012 (Public Law 112-240) (ATRA) made many (but not all) of these tax breaks permanent. Some tax breaks are extended only through 2013, requiring Congress to revisit these rules periodically. This political process makes it very difficult to say what the law is or will be in the near future.

The complexity of the modern income tax — riddled as it is with special tax breaks — has also called into question its status as the fairest tax. Polling data show that the percentage of people ranking the income tax as the fairest way to raise revenue has sharply declined. Feeding this view has been a loss of confidence in the tax administration from two diverse perspectives. Anecdotes about an overbearing agency lead many to believe that the tax falls unfairly on the "little" individual. At the same time, expensive tax advisors are able to exploit weaknesses in the tax law and an overburdened agency is unable to successfully catch tax evasion or litigate whether tax avoidance schemes are legal, leading to the view that the law benefits the rich.

[2] State and Local Taxation

Our knowledge of nineteenth-century state and local taxation is hampered by inadequate data. We know that states borrowed heavily until the depression in the early 1840s; and that, thereafter, property taxes increasingly dominated state and local tax sources. Data for the twentieth century are more reliable and they provide us with an insight into the shifting role of different revenue sources at the state and local level. Keep in mind that the following discussion aggregates data for all state and local jurisdictions and that there are significant variations among states and localities. In addition, the percentages are of government revenue from its own sources, not intergovernmental (especially federal) grants.

[a] State Taxes

Around 1900, property taxes were the major source of state tax revenue, but the property tax was in trouble. Taxpayers did not report intangible property (such as stocks and bonds), which had become a significant source of wealth; in addition, few taxpayers reported their tangible personal property, such as furniture, watches, etc. States therefore began to leave the property tax to local governments and to rely on other sources of revenue. Consequently, property taxes lost their importance at the state level during the twentieth century. In 1902, property taxes produced a little more than 50% of total state tax revenue, after which this percentage declined, as follows: 1922 (37%); 1934 (14%); 1950 (4%). Since 1969, property taxes produce less than 2% of state revenues.

In the first few decades of the twentieth century, a significant minority of states adopted income taxes, influenced by federal precedent and by the fact that a tax on income could reach interest and dividends accruing to intangible wealth. Wisconsin led the way by demonstrating that the tax could be effectively administered by professional civil servants and through the reporting of wages paid by employers and dividends and interest paid by businesses. As of 1922, 13 states had adopted an income tax, producing around 11% of state revenue.

However, during the Depression, the income tax became unreliable as a revenue source despite its widespread adoption. By the end of the 1930s, two-thirds of the states had adopted an income tax, but that tax still produced only about 11% of state tax revenue. States therefore turned increasingly to sales taxes, imposed both on sales generally and on selected items (such as gasoline). By the end of the 1930s, 23 states had adopted general sales tax (fewer than the income tax), but this tax accounted for more state revenue than the income tax. Sales taxes (both general and selective) continued to dominate as a revenue source during and after World War II, although the percentage contribution declined — 1950 (59%); 1964 (57%); 1969 (57%). Since 1966, the percentage has been about 48-49%. In 1969, revenue from general sales taxes exceeded excise taxes on selected items for the first time, and that pattern has continued ever since.

Income taxes on individuals and corporations also became a more important source of state tax revenue after the Depression, although the percentage contribution was at first much less than sales taxes — 1934 (7%); 1950 (17%); 1964 (21%); 1969 (26%). Since 1996, the percentage has been about 39%. In 1973, for the first time, income tax revenue exceeded *general* sales tax revenue (but not general sales taxes and excise taxes on selected items combined), and that remains the contemporary pattern. The vast majority of states now rely on both income and sales taxes.

[b] Local Taxes

At the beginning of the twentieth century (and unlike today), local tax revenues greatly exceeded state tax revenues — by approximately a five-to-one ratio. About 90% of local taxes came from the property tax (which was rapidly becoming just a tax on real property).

Today, the mix of local revenue has changed, but the property tax still produces well over 50% of local tax revenue. The change has been in the increase in local government use of sales and income taxes.

[B] CRITERIA FOR A SUCCESSFUL TAX

A successful tax must satisfy a number of criteria. First, the tax base must be broad enough to provide significant revenue. That is one reason why wars and economic depressions are usually the occasion for significant changes in the tax laws.

Second, a tax must be administrable without too much difficulty. Concerns about administration shape the tax law — for example: in limiting the current property tax base to real property; in relying on withholding from wages to support an income tax; and in deciding whether a sales tax can be reliably collected. The current global economy places tremendous strains on tax administration, as businesses are able to shift income around among geographic locations (either legally or illegally), and governments are hard-pressed to keep up with astute tax planners.

Third, the impact of a tax on behavior must be considered. No tax is ever completely neutral. For example, an income tax burdens wage work more than untaxed "leisure" and self-performed services (such as housework). It also burdens savings by taxing the income that generates the savings and the income from savings (such as dividends and interest). This burden is one reason that some people advocate greater reliance on taxes that fall on consumption (such as a sales tax). However, sales taxes have their own imperfections — some sales tax regimes do not tax services, which is a major omission in our service economy; and sales taxation sometimes burdens purchases by businesses as well as personal consumption, which can distort both business and personal consumption.

Moreover, within the boundaries of any tax base, there is an opportunity to influence behavior. Particular industries and specific expenditures can be encouraged — for example, through special depreciation deductions under the income tax or by property tax holidays. Social values can also be advanced — for example, the income tax law provides incentives for retirement, education, and medical expenditures; and taxes on personal consumption typically exempt education and hospital services and some food.

Fourth, the tax must satisfy some notion of fairness, at least in a political democracy. Tax fairness is often measured by something referred to as "ability to pay," a criterion that is remarkably fuzzy when examined closely but which remains clear enough in its popular conception. The idea is that taxation should treat equals equally with respect to their economic well-being (horizontal equity).

Another and more controversial notion of equity taxes people with more of the tax base at progressively higher tax rates (vertical equity). For example, in an income tax, it is not just that some people with $100,000 income pay more taxes than someone with $50,000 income; a flat rate tax would do that. Vertical equity calls for taxing someone with higher income at a higher tax rate. Thus, the first $50,000 of income might be taxed at 15%, but the next $50,000 at 25%. If only consumption were taxed, vertical equity calls for taxing higher consumption at higher tax rates.

[C] CONTEMPORARY POLICY ISSUES

This review of the evolution of taxation in the United States focuses attention on several contemporary policy issues. A law course is not going to make any serious attempt to address questions of public finance, such as whether taxes should or should not be raised to deal with future budget deficits. But there are a number of important policy issues that shape current debates about taxation that we will consider in this course.

[1] Progressivity

Progressive tax rates have long been an intrinsic part of United States taxation — sometimes praised as a positive "equity" feature or vilified as evidence of socialism or a threat to economic expansion.

Progressive income taxation is sometimes defended on the "scientific" notion that people with more income have a lesser preference for higher amounts of income than for lower amounts of income, but such psychological observations give progressive income taxation a scientific veneer that cannot be sustained. (Who knows how badly someone craves their particular lifestyle? It often depends on their social and economic background and on whether they are going up or down the income scale.) *See generally* Blum & Kalven, THE UNEASY CASE FOR PROGRESSIVE TAXATION (1952).

The best defense of progressive tax rates rests on the "political" value of wealth. As people have more and more wealth, the relative value of that extra wealth to society as a whole goes up in relation to its private value — or at least that is one political point of view. When the argument is made that progressive taxes are bad because they take an individual's wealth, that is an indirect way of asserting that the relative value of public and private expenditures disfavors public over private spending. Put differently, instead of taxes being the price we pay for civilization, as Oliver Wendell Holmes, Jr. once put it, the argument is that progressive taxes undermine the economic initiatives and political freedoms that are valuable in our society. An electorate that has lost faith in the government's public spending is not likely to embrace Holmes's aphorism.

The debate over the political value of wealth is not limited to the income tax. It also underlies disputes over whether an estate tax is a good idea. Proponents of the estate tax argue that inherited wealth lacks social value in the hands of those who inherit it. Opponents of the tax label it a "death" tax and describe it as an unfair burden on the wealth that someone has struggled to acquire.

Taxes on personal consumption can also be tailored to fall more heavily on those with higher income or consumption — by fiddling with the tax rates (higher rates on luxury goods) and exemptions (no tax on groceries).

[2] Flat Tax

In recent years, proposals have been floated for a flat tax, usually around the low 20% range. These proposals might seem to derive much of their impetus from objections to progressive tax rates, but that would misread their political attraction. The most important feature of a flat tax is that it would fall on a greatly simplified tax base — an income tax without many of the tax breaks that now dot the tax code. In other words, the flat tax is defended primarily as economically efficient (because the tax would fall neutrally on different types of economic activities) and as administratively simple (making it easier for taxpayers to fill out returns and for the agency to audit those returns).

Although a flat tax has had some political traction, its lack of success may result from the fact that the tax rate on lower income taxpayers would have to be higher than the current rate to raise enough revenue to replace the current income tax. In addition, many taxpayers benefit from the tax breaks in the current law (such as the deduction of interest on some home loans, retirement savings, some state and local taxes, and charitable contributions), some of which would have to be eliminated by a flat tax rate on a simplified tax base.

[3] Greater Reliance on Consumption Taxes?

Within the boundaries of some general notion of ability to pay, there is a modern debate about whether the tax base should be income and/or consumption. There are several types of consumption taxes. First, there is a sales tax imposed (usually) at a single point — retail sales. Second, a value-added tax is imposed at each step of the production and distribution chain, which (in theory) adds up to the same total as a single-point retail sales tax. Third, a consumption tax is imposed on income minus savings; it would be administered like an income tax but with a deduction for all savings. A consumption tax is likely to have a broader tax base than other taxes on consumption. For example, unlike typical retail sales taxes, it would not exempt most services.

The debate about income and consumption taxes is usually about the proper mix of these tax bases, not replacement of the income tax with a tax on consumption. Some observers suggest use of consumption taxes, supplemented by an income tax on those with higher incomes to preserve a measure of progressivity. Lower income taxpayers would be subject to a flat consumption tax, which would amount to a flat tax on income if they consumed all of their income.

Consumption taxes are sometimes defended on the ground that they tax what someone takes out of the economy rather than what they earn. Income equals consumption plus savings and (so the argument goes) people should not be taxed on the savings they leave in the economy. Moreover, a better measure of ability to pay is lifetime consumption, which tends to smooth out fluctuations in income — because taxpayers save when they are young and consume their savings when they retire. A consumption tax is neutral regarding when consumption occurs but an income tax favors earlier consumption because current savings and the return on those savings (such as interest) are included in the tax base.

Taxes on consumption are also said to encourage savings, which many observers think is inadequate in the United States. And some taxes on consumption — specifically, retail sales and value added taxes — are easier to rebate to the seller than income taxes when sales occur outside the country, thereby encouraging exports.

Consumption taxes have attracted support from such varied political philosophers as Adam Smith, Thomas Hobbes, and John Stuart Mill. A recent discussion in the legal literature rejects arguments that the consumption tax is regressive and inefficient, and concludes that its Achilles' heel is its implementation; *see* Bankman & Weisbach, *The Superiority of an Ideal Consumption Tax* over an Ideal Income Tax, 58 STAN. L. REV. 1413 (2006).

[4] Tax Levels

Underlying the discussion of tax policy is the fundamental question of the overall tax level, regardless of the tax base. When taxpayers are suspicious of government, they do not trust public sector spending and are more reluctant to permit the purchase of goods and services by the government — leading to objections to taxes in general. When a bridge collapses, there is a public outcry for more spending on infrastructure, but the enthusiasm fades when the legislature considers whether or not to raise taxes for this purpose. We seem especially unwilling to tax ourselves to help others — viz., medical insurance — even if the benefits are financed by payroll taxes. An economic reason for this reluctance may be that taxes (especially payroll taxes, which increase the cost of labor) might encourage taxpayers to move their operations abroad in our global economy.

[D] OUTLINE OF THE BOOK

Although there is now serious doubt about whether the federal income tax is the fairest tax, it continues to be the primary source of federal revenue. My guess is that a "better" income tax would still pass muster as our best tax. Consequently, Part I of this book follows the usual practice in law school courses of emphasizing the income tax on individuals.

Nonetheless, because of doubts about the current individual income tax, it is appropriate for an introductory tax course to include material about other taxes as well — including the following:

— state and local taxes — especially property and sales taxes;

— payroll taxes — especially Social Security taxes, which have increased considerably in recent years;

— taxes on consumption — including not only the sales tax but also the tax on value added (used widely in Europe), and proposals for a consumption tax (much talked about but rarely adopted);

- the estate and gift tax — which is a flash point for liberal and conservative politics (the estate tax actually expired in 2010 but was later revived with high exemption levels);
- entity taxation — the income tax rules regarding partnerships, trusts, estates, and corporations; and
- inter-jurisdictional issues — international taxation and the problems of allocating the tax base to different states.

To that end, Part II of the book deals with the following taxes.

- Taxation of property
  - Property tax
  - Estate and gift tax
- Payroll taxes
  - Social Security tax
- Taxes on consumption
  - Sales tax
  - Value added tax
  - Consumption tax
- Entity taxation
  - Pass-thru entities; Partnerships, Trusts, and Estates
  - Corporate income tax
- Multi-jurisdictional issues
  - International taxation
  - Interstate taxation