

FAIR TAXATION AS A BASIC HUMAN RIGHT

Allison Christians

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Abstract

This symposium issue explores the limits and possibilities of law and legal institutions in redressing poverty and economic inequality. The following essay approaches the question by considering the ways in which domestic tax policy interacts with internationally-recognized human rights. I suggest that focusing on human rights discourse provides a needed vocabulary for addressing the global impact of domestic policy choices. Evaluating whether tax laws and legal institutions protect or undermine human rights may thus advance tax policy discourse to consider the ways in which national tax law contributes to global problems of poverty and economic inequality.

I. Introduction

As a party to several important human rights agreements, the United States has committed itself to insuring at minimum that its domestic policies, including its tax policies, do not undermine the rights of people in other countries.¹ Yet the United States leads the world in an aggressive global tax competition that fosters regressive taxation and impedes the pursuit of social

Assistant Professor of Law, University of Wisconsin Law School. I would like to thank the participants of the Valparaiso Conference on Law, Poverty and Development, April 3-4, 2008, the 2008 Law & Society Annual Meeting, Panel on Taxation as a Global Socio-Legal Phenomenon, May 29, 2008, and the members of the CUNY faculty workshop, June 4, 2008, with particular thanks to Professors Penelope Andrews, Rebecca Bratspies, Karen Brown, Steven Dean, Howard Erlanger, Andrew Fields, Heinz Klug, Frank Munger, Diane Ring, and Adam Rosenzweig for their comments on the ideas presented in this Essay.

¹ These agreements and the obligations they may impose are discussed infra Part III.

welfare goals, especially in the world's poorest countries.² Traditional tax policy discourse lacks a framework for exploring whether or how these global impacts should constrain domestic lawmaking.³ In contrast, human rights principles guide the United States to pursue tax policy goals that would help create a social and international order in which individual rights and freedoms can be fully realized.⁴ Using the language of rights could thus help articulate an approach to tax policy that is more responsive to the problems of global poverty and economic inequality.⁵

The challenges posed for taxation in a global economy provide a context for analyzing how human rights principles might reframe tax policy discourse. As tax scholars have long observed, global tax competition has created a world in which states have gradually shifted the burden of taxation toward wages and consumption and away from capital and its owners, and in which tax revenues are increasingly falling behind the rising demands of the welfare state.⁶ This

² See Roy W. Bahl and Richard M. Bird, *Tax Policy in Developing Countries: Looking Back—And Forward*, 62 NAT'L TAX J. 279, 288 (2008) ("The level of taxes in low-income countries is held down by a political system that seems to favor lower taxes over higher public service levels, by administrative failings, and by perceived and real constraints from international competition."); Allison Christians, *Global Trends and Constraints on Tax Policy in the Least Developed Countries*, U.B.C. LAW REV. (forthcoming, 2009-2010); Neil Brooks & Thaddeus Hwong, *The Social Benefits and Economic Costs of Taxation: A Comparison of High and Low-Tax Countries* (2006) ("Tax cuts are disastrous for the well-being of a nation's citizens. . . . high-tax countries have been more successful in achieving their social objectives than low-tax countries"); Cordia Scott & Sirena J. Scales, *Tax Competition Harms Developing Countries*, IMF Official Says, 2003 WTD 238-9 (Dec. 10, 2003).

³ Robert Zoellick, Foreword, in *WORLD DEVELOPMENT REPORT 2009* xiii, available at http://siteresources.worldbank.org/INTWDR2009/Resources/42310061225840759068/WDR09_00_FMweb.pdf ("A billion people, living in the poorest and most isolated nations, mostly in Sub-Saharan Africa and South and Central Asia, survive on less than 2 percent of the world's wealth. These geographically disadvantaged people cope every day with the reality that development does not bring economic prosperity everywhere at once; markets favor some places over others.").

⁴ UDHR, Art. 28.

⁵ See, e.g., Radhika Balakrishnan, *Why MES With Human Rights? Integrating Macro-Economic Strategies With Human Rights* (describing a dialogue between economics and human rights scholars as necessary to "help identify and clarify the sites of negotiation, collaboration, and activism needed to bring about improvements in economic and social rights").

⁶ See, e.g., Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000); Bahl & Bird *supra* note 2 at 282-3 (examining the pressures created by tax competition on less developed countries, and noting that the failure to raise revenues leads to "suboptimal" spending on infrastructure which retards public policy goals including industrial development); Martin Sullivan, *Reported Corporate Effective Tax Rates Down since Late 1990s*, 118 TAX NOTES 882 (2008) (showing that effective corporate tax rates are falling, even though nominal tax rates have not changed and reported profits are increasing, thus suggesting that corporations are successfully employing tax minimization strategies). I put aside here the very important problem of attempts to minimize or eliminate taxes by means that circumvent legislative intent, to focus on the kinds of tax

has had especially devastating effects on the world's poorest countries, where development goals consistently miss targets even in years of global economic prosperity,⁷ and global economic downturns produce extreme setbacks for the poor in their pursuit of work opportunities, education, food, shelter, healthcare, and other basic needs.⁸ Despite a rich vocabulary regarding the need for taxation to fairly distribute the benefits and burdens of society among its members,⁹ tax policy discourse has few principles for addressing these global effects of tax competition.

Within the vocabulary of traditional tax policy, the phenomenon of tax competition and its effect on the tax mix reflect decades of policy choices that prioritize national economic efficiency, often to the detriment of distributional or "fairness" concerns.¹⁰ Tax policy discourse addresses the relationship of states to their citizens and residents in making these tradeoffs.¹¹ However, the discourse includes no principles for addressing the responsibility states might

minimization that are intentionally provided by governments in the pursuit of tax competition. For historical data regarding the tax mix in the United States, see, e.g., Christopher Chantrell Government Revenue in the United States of America, at http://www.usgovernmentrevenue.com/downchart_gr.php?year=1792_2014&view=1&expand=&units=b&fy=fy10&chart=F0-; see also Office of Management and Budget, Budget of the US Government FY 2009, Historical Tables, at <http://www.gpoaccess.gov/usbudget/fy09/hist.html>.

⁷ See, e.g., Bahl & Bird *supra* note 2 at 281 ("Most developing countries have consistently failed to meet the targets cheerfully established for them by outsiders"); Christopher Heady, Taxation Policy in Low-Income Countries, UN. WIDER Discussion Paper No. 2001/81, at http://www.wider.unu.edu/publications/working-papers/discussion-papers/2001/en_GB/dp2001-81/ ("low-income countries are having great difficulties in raising money to finance important development expenditure."); Tucker Thomas, Free Trade Agreements and the Poverty Reduction & Growth Facility 12 *LAW & BUS. REV. AM.* 571, 593-601 (2006) (Observing challenges faced by poor countries in meeting development targets even in years of economic growth and prosperity).

⁸ See, e.g., Andrew Berg et al, Fiscal Policy in Sub-Saharan Africa in Response to the Impact of the Global Crisis, IMF Staff Position Note, May 14, 2009 (describing deteriorating macroeconomic conditions in Sub-Saharan African countries as a result of the 2008 global financial crisis); World Bank, Global Monitoring Report 2009: A Development Emergency, 13, 23-4 (2009) at www.worldbank.org/gmr2009 (Reporting on extreme setbacks to food security, employment, and basic social services in the world's poorest countries, brought on by the global recession); World Bank, Protecting Progress: The Challenge Facing Low-Income Countries in the Global Recession 1-10 (Sept. 2009) (Analyzing how the world's poorest countries will struggle to recover from setbacks imposed by the global economic downturn); Int'l Monetary Fund, Faces of the Crisis, 38 *FIN. & DEVEL.* 38, 40-1 (Sept. 2009), available at <http://www.imf.org/external/pubs/ft/fandd/2009/09/faces.htm> (Observing the impact of global economic downturn on the world's poorest countries with respect to food security, agricultural production, and employment).

⁹ For a review of the extensive literature, see generally JOSEPH JACOBS THORNDIKE AND DENNIS J., JR. VENTRY, EDS., *TAX JUSTICE: THE ONGOING DEBATE* (2002).

¹⁰ See, e.g., Anthony Infanti, Tax Equity, 55 *BUFF. L. REV.* 1191 (2008).

¹¹ See, e.g., Thorndike & Ventry *supra* note 9.

have to “others.”¹² As a result, tax policy experts assume for the most part that no such responsibility exists. Policy tradeoffs are therefore made within a paradigm limited by unexamined assumptions about whose interests matter.

Human rights principles could bring about significant change in the way tax policy goals are articulated and prioritized by re-framing the debate in ways that provide “a trigger for policy learning.”¹³ First, human rights discourse could provide the necessary vocabulary for explaining why and how states should respond to the international impacts of their national tax policy choices.¹⁴ Second, human rights discourse could advance tax policy debate by providing context for the ongoing debate over what goals should drive state tax policy decisions. For instance, the evolution of the tax mix, framed within the vocabulary of human rights, may be seen to diminish the ability of individuals, especially those with few resources, to “freely determine their political status and freely pursue their economic, social and cultural development.”¹⁵ If individual rights and freedoms are thus impeded, existing human rights obligations should direct states to pursue alternative policies that might remove or least reduce these impediments.

Exploring how human rights principles might overcome some of the limitations of existing tax policy discourse is the aim of this Essay. Part II considers the limitations of conventional tax policy discourse in addressing the

¹² Allison Christians, *Sovereignty, Taxation and Social Contract*, 81 MINN. J. INT’L L. (2009).

¹³ Andrew Lang, *Rethinking Human Rights and Trade*, 15 TULANE J. INT’L & COMP. L. 335, 401 (2007).

¹⁴ The state is a relevant actor for study because state action is the key to globalization. See, e.g., DAVID KINLEY, *CIVILISING GLOBALIZATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY* 17-18 (2009) (“The modern history of economic globalization has been marked by its reliance on the deep connivance of states.”). Human rights scholars have noted the potential for injustice that arises if states are increasingly constrained in their ability to raise revenues due to the mobility of capital. See, e.g., Balakrishnan *supra* note 5 at 31 (“The increasing mobility of financial capital...from one tax haven to another makes it difficult for any particular government to tax capital. Analyzing the ensuing loss of tax revenues to a country could be a complementary effort to monitoring a national budget [for its impact on economic and social rights].) More broadly, the failure of human rights discourse to lead to the redistribution of resources or to build “economic bases that favour economic justice” may be attributed to the “inherent tendency of economic globalization...to diminish democracy and to privilege market-oriented rights, reducing the importance and feasibility of social and solidarity rights.” Yash Ghai, *Human Rights and Social Development: Toward Democratization and Social Justice*, UNRISD Programme Paper # 5 (2001) at 5.

¹⁵ ICCPR, Art. 1(1). The needs of the poor are paramount in this discussion, although the rights and freedoms in question extend equally to all persons. See Ghai *supra* note 14 at 4 (“It is obvious that poor people enjoy a disproportionately small measure of economic rights such as education, health and shelter. However, they are equally unable to exercise civil political rights, which would require not only an understanding of the dynamics of society and access to public institutions, but also confidence in themselves. They are for the most part unable to use the legal process to vindicate their human and legal rights. Nothing destroys confidence so much as poverty.”).

global impacts of national tax policy choices. Part III demonstrates how human rights principles could re-frame tax policy debate by providing vocabulary and principles that challenge the conventional approach. Part IV concludes by suggesting that tax policy discourse could be advanced in terms of its responsiveness to the ongoing problems of poverty and economic inequality by taking seriously the obligations states have undertaken to create a social and international order that enables the realization of human rights and freedoms.¹⁶

II. Limitations In Conventional Tax Policy Discourse

Conventional tax policy discourse suffers from limitations which impede analysis of the negative global effects of national policy decisions. First, traditional ideas confine the exercise of taxation within the sovereign state and assume that tax policy debate belongs to citizens. This approach often ignores without definition or explanation the interests and rights of “others” in U.S. tax policy development and reinforces the existing “tendency of democratic governments to disregard the interests and preferences of those outside their own publics.”¹⁷ In addition, while traditional tax policy is guided by the desire that taxation be both fair and efficient, the pursuit of efficiency has overwhelmed the pursuit of fairness in national tax policy decisions over the past several decades. The result is that nations are increasingly aggressive in pursuing tax competition even when this competition produces ever greater challenges to meeting social welfare goals through taxation. This Part explores why and how these limitations prevent tax policy debate from addressing the impact of national policy decision on global poverty and economic inequality, in order to highlight the areas in which human rights principles might activate a different approach.

A. Tax Sovereignty and the Interests of “Others”

Under conventional tax policy principles, citizens are thought to have a right to decide through political means whether and how their governments will tax, and outsiders—foreign persons and states—have no authority to interfere in or make claims to this process.¹⁸ Taxation is thus often equated with

¹⁶ See, e.g., Leo Martinez, *To Lay and To Collect Taxes: The Constitutional Case for Progressive Taxation*, 18 *YALE L. & POL’Y REV.* 111, 116 (1999) (“[C]rafting a system of taxation that results in a fair distribution has proven to be a daunting task.”)

¹⁷ Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT’L AFF.* 405, 434 (2006). See also Seyla Benhabib, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (Cambridge Univ. Press, 2004) (exploring the evolving principles that define political membership).

¹⁸ See, e.g., Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 *TAX L. REV.* 261, 227 (2001) (“No function is more at the core of government than its system of taxation.”); Deborah Bräutigam, *Building Leviathan: Revenue, State Capacity, and Governance*, 33 *IDS BULL.* 10, 10 (2002)

sovereignty: the term “tax sovereignty” is generally intended to suggest that taxation is an inherent or essential component of sovereign status.¹⁹ As a result, much debate about tax policy begins with the premise that the concerns of “U.S. citizens,” “U.S. residents” and “U.S. families” must prevail over “others.”²⁰ But this premise is significantly complicated by the fact that for tax purposes, “U.S. residents” is a technical term that includes individuals who are not citizens and whose presence in the United States is minimal or even non-existent.²¹ This means that those “U.S. families” whose interests should be considered in formulating tax policy includes a broad variety of people, including U.S. citizens living temporarily or permanently abroad, non-U.S. citizens living temporarily or permanently in the United States, non-citizens living temporarily or permanently abroad, and even in some cases former residents and citizens living abroad.²² Despite the often passionate rhetoric

(quoting Hobbes for the proposition that the power to raise money is one of the “rights which make the essence of sovereignty.”; Peggy B. Musgrave, *Sovereignty, Entitlement, and Cooperation in International Taxation*, 26 *BROOK. J. INT’L L.* 1335, 1336 (2001) (“international law” recognizes “national entitlements to tax”).

¹⁹ Scholars often assume that the right to tax is intrinsically associated with sovereign status, but the case has not been persuasively made for why taxation should be or is in fact any more inherent or essential to sovereignty than any other form of regulation such as currency control, bankruptcy, anti-trust, or securities laws. For a discussion, see Christians *supra* note 12 at 103-104; see also Diane M. Ring, *What’s at Stake in the Sovereignty Debate*, 49 *VA. J. INT’L L.* 155 (2008).

²⁰ Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 *Tax L. Rev.* 261, 280-281 (2001) (“[p]aying attention to the distribution of the burdens and benefits of taxation among U.S. families. . . is a fundamental obligation of both legislators and the executive branch in our democracy.”); American Bar Association Task Force on International Tax Reform (Stephen Shay, principal draftsman), *Report of the Task Force on International Tax Reform*, 59 *Tax Law.* 649 (2006) (“It would be an impossible goal for U.S. tax policy to achieve global distributive justice. Only U.S. citizens and residents should be taken into account in applying the ability-to-pay fairness criterion.”); Michael S. Knoll, *International Competitiveness, Tax Incentives, and a New Argument for Tax Sparing: Preventing Double Taxation by Crediting Implicit Taxes*, working paper available at http://lsr.nellco.org/upenn_wps/242/ (stating that governments have an interest in promoting ownership of assets and wealth by their residents). See also Ghai *supra* note 14 (“Even Western governments, which claim to be the foremost champions of human rights, attach greater importance to their national interests than to the realization of human rights.”).

²¹ Residence for U.S. tax purposes is defined in I.R.C. § 7701(b), under which a non-citizen is generally defined as a U.S. resident if the person has legal status as a resident (i.e., the person holds a valid “green card” at any time during the year), regardless of their physical presence, or if the person satisfies an objective physical presence test.

²² See I.R.C. § 7701. Taxation of non-citizens is a common practice around the world, since in any exercise of taxation based on income, more than one nation may make what is readily recognized by other nations as a legitimate claim to tax with respect to the same person or in a given territory. For instance, two countries often impose a tax on the same dividend paid by a company in one of the states to a shareholder from the other. Thus, virtually any course of study on international taxation begins with a discussion of the source/territoriality and residence/nationality bases for tax jurisdictional reach. See, e.g.,

linking taxation and representation, unrepresented taxpayers are a common feature of the U.S. tax system, and this status is common around the world.²³

Once it becomes clear that relationships between individuals and states readily and frequently exist outside the status of citizenship, it becomes much more difficult to explain whose interests might be relevant in debates about tax policy.²⁴ If any non-citizens are in the pool of people considered to be relevant in tax policy debate, what philosophical or political theory defines the pool? Will non-citizens only matter in years in which they pay taxation, and if so, under what theory of political entitlement? In debates about fairness in which the foundational question is whether “equal incomes bear equal burdens,”²⁵ whose incomes should be compared? These difficult questions are typically ignored in tax policy discussion in favor of largely unexamined assumptions about tax sovereignty.

The evolving problem of international tax evasion puts additional pressure on assumptions about the significance of sovereignty and citizenship in taxation. As recent headline news stories suggest, tax evasion is global: U.S. taxpayers escape U.S. taxation by hiding assets and income in foreign jurisdictions under the protection of domestic laws that promise financial confidentiality.²⁶ Tax policy frameworks confined within the state/citizen paradigm give states few principles to explain how the United States can

Allison Christians et al, UNITED STATES INTERNATIONAL TAXATION: CASES, MATERIALS, AND PROBLEMS (Lexis Nexis, 2008); Hugh J. Ault and Brian J. Arnold, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 347 – 350 (2d Ed., Aspen, 2004).

²³ See, e.g., Reuven Avi-Yonah, INTERNATIONAL TAX AS INTERNATIONAL LAW 22 – 23 (Cambridge University Press 2007) (“every country in the world has adopted a definition of nationality for tax purposes that is much broader than citizenship, [namely] residence, which usually implies mere presence in the country for a minimum length of time”); Michael S. Kirsch, Tax Code as Nationality Law, 43 HARV. J. LEGIS. 375 (2006) (discussing the exertion of jurisdiction over non-citizens and suggesting that it may violate Congress’ Constitutional powers).

²⁴ PETER SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (Oxford Univ. Press 2008) (“as globalization detaches identity from location, it becomes difficult to draw the boundaries of human community in a meaningful way. Longstanding notions of democratic citizenship are becoming obsolete, even as we cling to them.”).

²⁵ See, e.g., Noel B. Cunningham and Deborah H. Schenk, The Case for a Capital Gains Preference, 48 TAX L. REV. 319 (1993) (Describing the premise that equal incomes should share equal burdens as “the classic standard of equity”).

²⁶ See, e.g., Lynnley Browning, Swiss Deal With I.R.S. May Hide Some Tax Cheats, N.Y. TIMES, Sept. 7, 2009; David Gow, OECD throws its weight behind campaign against tax evasion, THE GUARDIAN, Feb. 20, 2008; Kevin McCoy, Swiss Banker Charged In Huge US Tax Evasion Scheme, USA TODAY, Nov. 12, 2008, at http://www.usatoday.com/money/industries/banking/2008-11-12-ubs-exec-tax-evasion-charge_N.htm; Ryan J. Donmoyer, IRS Corporate Audit Division Will Examine UBS Tax Evasion Cases, Bloomberg, Sept. 1, 2009, at <http://www.bloomberg.com/apps/news?pid=20601103&sid=aIwcvA9gW3dE>.

compel Switzerland, the Cayman Islands, or the Netherlands to revise their laws so that the United States can pursue individuals who have found a safe haven in the democratically-chosen policies of these other nations. The international response has been to invent a taxonomy of tax competition practices, in which those deemed “harmful” by a self-appointed group of countries will incur sanctions in the international community.

But tax sovereignty discourse provides few principles for explaining the obligations of states to one another in this international community. Policymakers therefore use the rhetoric of “fairness” to explain their efforts to prevent what they have defined as harmful tax competition. The imposition of economic sanctions to coerce countries to adopt different domestic policies has accordingly been described as necessary to “level the playing field” and to promote “fair competition” among nations.²⁷ Predictably, the objects of this leveling are resisting the paradigm by insisting that countries adhere to conventional views about the entitlement of sovereigns to formulate tax policy free of outside interference.²⁸ The result is that both sides are locked into a debate about what sovereign entitlement means, with no definitive guidance to explain who has obligations to whom.²⁹

The lack of a vocabulary to explain the relationships between individuals and governments outside of the citizenship relationship virtually ensures that unexamined assumptions will continue to fuel the status quo of global tax competition. Within this limited discourse, states have few principles to explain why they should pursue other approaches to taxation if it imposes a higher cost. The increasingly frequent use of the term “fair” to describe the global implications of national tax practices may be an implicit attempt to move the debate beyond the confines of citizenship and sovereignty. But little reconciliation is likely to be found in this pursuit, because the concept of fairness is itself an embattled concept in tax policy.

B. The Efficiency/ Fairness Paradigm

Fairness is one of three main tenets that traditionally guide tax policy, along with efficiency, and simplicity in administration and compliance. This rhetorical tripartite has become so entrenched that few would attempt to discuss or write about tax policy without at least summarily treating the three in

²⁷ OECD, A PROCESS FOR ACHIEVING A GLOBAL LEVEL PLAYING FIELD 2 (June 4, 2004); OECD, THE OECD’S PROJECT ON HARMFUL TAX PRACTICES: THE 2004 PROGRESS REPORT 4 (Mar., 2004). For a discussion of the evolution of this rhetoric over several years of OECD attention, see generally Christians *supra* note 12.

²⁸ See, e.g., Papali’i T. Scanlan, Globalisation and Tax-related Issues: What are the Concerns?, in INTERNATIONAL TAX COMPETITION: GLOBALISATION AND FISCAL SOVEREIGNTY 43 (Rajiv Biswas ed., 2002).

²⁹ See Christians *supra* note 12.

tandem.³⁰ Virtually every tax law casebook in the country has devoted several pages to passing on this analytical structure to future generations of tax scholars, practitioners, and policymakers.³¹ Yet the familiarity of the tripartite structure and its implicit assumptions mask serious deficiencies.³² Under traditional tax policy analysis, each of the tenets are accorded rhetorical equivalence, but they are often incompatible. As a result, tax policy debate features a persistent struggle for balance between these competing goals.³³ Over the past several decades, the debate has featured an intellectual minimization of the importance of fairness in relation to other tax policy goals, especially efficiency.³⁴ Internationally, this translates to a world in which “policymakers are obsessed with the competitiveness of their domestic companies and domestically based multinational corporations (MNCs).”³⁵

The prioritization of efficiency over fairness concerns is in part a product of a limited vocabulary, similar to that encountered in the context of sovereignty: traditional ideas about fairness lack conceptual foundations for distinguishing the interests and rights of U.S. citizens and the interests and rights of others. Fairness in tax policy has traditionally been assessed according to two main principles: that similarly situated taxpayers should be taxed

³⁰ See, e.g., Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 *UCLA L. REV.* 1793 (2005); Anthony Infanti, *Tax Equity*, 55 *BUFF. L. REV.* 1191 (2008); Herbert I. Lazerow, *Criteria of International Tax Policy*, 41 *SAN DIEGO L. REV.* 1123 (2004); J. Clifton Fleming Jr. and Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and its International Dimension*, 27 *Va. Tax Rev.* 437, 451 (2008).

³¹ For just a few of many examples, see Paul R. McDaniel et al, *FEDERAL INCOME TAXATION: CASES AND MATERIALS* 1-4 (6th ed., 2008); Michael Graetz and Deborah H. Schenk, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 28 – 32 (6th ed., 2009); Samuel A. Donaldson, *FEDERAL INCOME TAXATION OF INDIVIDUALS: CASES, PROBLEMS AND MATERIALS* 10 – 11 (2d ed., 2008).

³² See Anthony Infanti, *Tax Equity*, 55 *BUFF. L. REV.* 1191 (2008) (arguing that the traditional concept of tax equity is narrowly focused on economic dimensions and fails to address fairness in a rigorous way). The concept of simplicity appears to suffer a similar fate, often being reduced to platitudes despite its rather complex implications. For a discussion of some of the intricacies, see Samuel Donaldson, *The Easy Case Against Tax Simplification*, 22 *VA. TAX REV.* 645 (2003); see also Charles Kingson, *Leonardo Da Vinci And The 861 Regulations*, 26 *Brook. J. Int'l L.* 1565, 1569 (explaining why “specificity may be better than simplicity”); Charles Kingson, *The Great American Jobs Act Caper*, 58 *TAX LAW REV.* 327, 395 (2005) (“Simplicity lumps: It disregards distinctions such as categories, and puts the wolf with the lamb. When a large corporation says it wants simplicity, it wants money.”). Simplicity plays an integral role in any robust debate about tax policy, and issues of simplicity inform and integrate with the issues surrounding fairness and efficiency.

³³ For the classic treatment, see WALTER J. BLUM AND HARRY KALVEN JR., *THE UNEASYCASE FOR PROGRESSIVE TAXATION* (1953).

³⁴ Dennis Ventry Jr., *Equity versus Efficiency and the U.S. Tax System in Historical Perspective*, in Thorndike & Ventry *supra* note 9.

³⁵ Michael Knoll, *Business Taxes and International Competitiveness* (May 28, 2008), U. Penn. Inst for L. & Econ. Research Paper No. 08-12, available at SSRN: <http://ssrn.com/abstract=1138374>.

similarly (“horizontal” equity) and that differently situated taxpayers should be taxed differently (“vertical” equity”).³⁶ But as in the sovereignty debate, the scope of the term “taxpayers” is complex and too often not examined closely. The assumption that likely informs most dialogue is that the universe of comparables for these purposes includes anyone subject to tax under U.S. law, viz, U.S. persons. The fact that this term includes non-citizens may never be considered.

But more broadly, the increasing emphasis on efficiency over fairness concerns is the result of multiple political and social factors. For instance, it is clear that the discussion of fairness is nuanced, philosophical, and contested, while economic efficiency imparts some measure of theoretical certainty to policymakers³⁷ even though theory and reality may part ways significantly.³⁸ Indeed, among international tax policy circles, the concept of fairness is too often reduced to a meaningless platitude, while efficiency is manifested regularly in the call for “competitive” tax policies.³⁹

³⁶ See, e.g., Leo Martinez, *To Lay and To Collect Taxes: The Constitutional Case for Progressive Taxation*, 18 *YALE L. & POL’Y REV.* 111, 116 (1999) (“In their attempt to achieve a fair distribution of the tax burden, tax policymakers rely on two crude principles: horizontal equity and vertical equity”); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 *CAL.L.REV.* 1905 (1987); Cunningham & Schenk *supra* note 25.

³⁷ See, e.g., Liam B. Murphy and Thomas Nagel, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (Oxford University Press 2002).

³⁸ See, e.g., Cunningham & Schenk *supra* note 25 (discussing the ambiguity of the available empirical evidence yet the strong popular/political support for the proposition that lower taxes on capital gains will introduce efficiency and stimulate economic growth); DEIRDRE N. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* (1998) (arguing that economic analysis is as susceptible to manipulation and misconception as any other discipline). Recent empirical evidence may be capable of casting some doubt on the certainty offered by efficiency analysis, but tax policy dialogue may adapt slowly to empirical evidence that controverts accepted wisdoms. See, e.g., James R. Repetti, *The Uneasy Case for Efficiency in Tax Policy* (2009), unpublished manuscript on file with the author (recent studies cast doubt on the empirical accuracy of the theoretical mantra that low rates and a broad base ensure efficiency in taxation, and that taxes.

³⁹ For instance, a speaker at a recent international tax policy conference likened the use of fairness to political maneuvering he engaged in as a former Treasury official, stating that “whenever we couldn’t think of a really good reason for doing something, we would say, ‘it’s all about the children.’ Fairness is a little bit like that.” Panel V, *The OECD’s Evolving Role in Shaping International Tax Policy*, Washington, D.C., June 2, 2009. In contrast, the OECD is currently emphasizing the need for “fair” and even “fair but fierce” competition. Jeffrey Owens, Dir. of the OECD Ctr. for Tax Policy & Admin., *Presentation at the INEKO International Conference on Economic Reforms for Europe, Fair Tax Competition: A Pillar of Positive Economic Reform* (March, 18 2004). See also Jeffrey Owens, *Fair Tax Competition: A Pillar of Positive Economic Reform* (PowerPoint), http://www.oecd.org/findDocument/0,3354,en_2649_33745_1_119835_1_1_1,00.html (last visited June 9, 2009). In light of the recent global crisis and the possibility that more regulation may be in store for international financial transactions and instruments, the OECD continues to stress the importance of competition, suggesting that any regulation should be “light and smart” so as to avoid impeding the competitiveness of firms in the global economy. Jeffrey Owens, *The OECD’s Evolving*

As continual global tax reform demonstrates, however, designing an efficient tax system is difficult and perhaps impossible in a world of highly mobile capital.⁴⁰ The prevailing view is that cross-border income taxation, especially corporate income taxation, significantly impedes cross-border capital flows and therefore slows economic growth.⁴¹ Tax policy experts are increasingly suggesting that corporate income taxation should be minimized if not eliminated in the name of efficiency,⁴² and conventionally viewed as more economically distortive may in fact produce more efficient outcomes than their theoretically more efficient alternatives) nations around the world have embraced extensive tax incentives for foreign investors in an effort to be competitive with their neighbors.⁴³

These practices create major constraints, especially on poor countries, which “have little leeway in deciding what incentives to provide [since] this is largely decided by international competition.”⁴⁴ Despite this status quo, fairness may be reclaiming a role in defining the scope of legitimacy in the

Role in Shaping International Tax Policy, Washington, D.C., June 2, 2009 (notes on file with the author).

⁴⁰ See, e.g., Keenan Simone, *Tax Policy in Developing Countries*.

⁴¹ Joel Slemrod, *Competitive Advantage and the Optimal Tax Treatment of the Foreign-Source Income of Multinationals: The Case of the United States and Japan*, 91 *AM. J. TAX POL'Y* 113 (1991) (“It is nothing new to hear that taxes on business reduce the incentive to invest and innovate, and are therefore detrimental to a nation’s economy”). OECD COMMITTEE ON FISCAL AFFAIRS, *MODEL TAX CONVENTION ON INCOME AND ON CAPITAL*, 2005 ed. (2005) at 7; Mihir A Desai & James R. Hines Jr., *Old Rules and New Realities: Corporate Tax Policy in a Global Setting*, 57 *NAT’L TAX J.* 937, 957 (2004) (taxation of foreign income impedes productivity of U.S. firms abroad as well as investment in the United States); James R. Hines Jr., *CORPORATE TAXATION* 8 (2001) (“Corporate taxation increases the cost of producing corporate output....”).

⁴² For example, at a recent conference, the Director of the OECD’s Centre for Tax Policy and Administration stated that countries wishing to pursue pro-growth tax strategies should “avoid like hell” both corporate taxation and progressive income taxation. Statement of Jeffrey Owens, *The OECD’s Evolving Role in Shaping International Tax Policy*, Washington D.C., June 2, 2009. See also Thomas F. Field, *If the Corporate Tax Has No Future, Is Tax Competition a Threat?*, 2000 *WTD* 42-1 March 1, 2000 (at a Canadian Tax Foundation conference, a panelist “invited attendees to ‘pick the date on which the last OECD member country will abolish the corporate income tax.’ One conference speaker “bet on 10 years from now,” while another suggested 20, adding that “[t]he corporate income tax is in deep trouble, ... and I think there are genuine questions as to whether it can survive 20 years.”); Roger H. Gordon, *Can Capital Income Taxes Survive in Open Economies*, 47 *J. FIN.* 1159 (1992) (suggesting that they cannot).

⁴³ See, e.g., H. David Rosenbloom, *Cross-Border Arbitrage: The Good, the Bad, and the Ugly*, 85 *Taxes* 115 (2007) (arguing that “there are and probably always will be innumerable situations in which cross-border income is earned with no tax imposed by any jurisdiction” because most countries choose not to exercise their full jurisdiction to tax, whether on a residence or source basis, and even if they did, opportunities abound for taxpayers to use creative planning to escape such efforts).

⁴⁴ World Bank, *Export Processing Zones in Sub-Saharan Africa* (Oct., 2001).

exercise of taxation as states face significant revenue shortfalls, owing in part to the drive for efficiency.⁴⁵

The deleterious revenue effect of tax competition is forcing a re-examination of what fairness means, who may have claims to it, and whether it can claim priority over efficiency.⁴⁶ This leaves tax policy in an uncertain position. Conventional views about sovereignty, citizenship, and the scope of persons whose interests and rights are included in tax policy debate are all contested. Existing discourse on domestic and international policy issues has failed to address the changing nature of these concepts in a socially, economically, and politically globalized world. It is clear that new frameworks are needed for thinking about who owes what to whom.

III. Tax Policy Through The Lens of Human Rights

Human rights principles could create an alternative framework for tax policy discourse by providing vocabulary and points of reference for exploring and debating the autonomy of the state in making determinations about how to impose taxation. First, by illuminating the fact that states have undertaken certain international obligations with respect to individual rights and freedoms, human rights discourse provides a vocabulary for explaining why and how states should respond to the international impacts of their national tax policy choices. Second, by focusing on the state's role in creating an international order that promotes human flourishing, human rights discourse provides a context for explaining what goals should drive state tax policy decisions. This Part discusses each of these roles for human rights in tax policy discourse, and concludes that human rights principles could advance tax policy debate by addressing more explicitly the obligations of states to consider how current tax practices contribute to the problems of global poverty and economic inequality.

A. Tax Sovereignty in Light of U.S. Membership in Human Rights Covenants

According to Edwin R.A. Seligman, an economist who was instrumental in shaping the international contours of modern income taxation, “political rights involve political duties. Among them is certainly the duty to pay taxes.”⁴⁷ The relationship between political rights and political duties is

⁴⁵ Clearly, the recent global crisis has also had a significant impact on state revenues.

⁴⁶ See Christians *supra* note 12.

⁴⁷ EDWIN R. A. SELIGMAN, *ESSAYS IN TAXATION* 111 (10th Ed. 1931). Seligman's influence over the formation of international tax standards and principles was demonstrated by his involvement in the earliest transnational collaboration on coordination in international tax matters. See, e.g., Allison Christians, *Networks, Norms and National Tax Policy*, *WASH. U. GLOB. STUDIES L. REV.* (forthcoming 2010), available at http://papers.ssrn.com/abstract_id=1358611.

complicated, but Seligman's main point is clear and well understood among tax policy scholars: taxation is linked to an individual's political status. Yet a vocabulary for explaining and debating this relationship in the context of economic globalization has not developed in conventional tax policy discourse. This discourse might be advanced if it was reconsidered through the lens of the international rights and freedoms to which the United States has subscribed by virtue of its membership in international society and its undertakings in specific international covenants.

The United States has been described as "the single most important force in shaping the international human rights regime."⁴⁸ This may be because the United States was instrumental in bringing about the main set of documents that encapsulate international human rights, namely, the Universal Declaration of Human Rights (UDHR),⁴⁹ a statement of the United Nations reflecting the consensus position of its members, and the two main multilateral human rights covenants, namely the International Covenant on Civil and Political Rights (ICCPR)⁵⁰ and the International Covenant on Economic, Social and Cultural Rights (ICESER).⁵¹ It may also be because of the uneasy relationship that the United States has historically had with these documents. Although it helped to draft and signed the UDHR and the ICESER, the United States has only ratified—and is therefore only formally bound by the provisions of—the ICCPR.⁵² The relationship of the United States to economic and social rights

⁴⁸ Philip Alston, *Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States*, in WILLIAM SCHULZ, ED., *THE FUTURE OF HUMAN RIGHTS: U.S. POLICY FOR A NEW ERA* 120 (2009).

⁴⁹ Adopted and proclaimed by UN General Assembly resolution 217 A (III), December 10, 1948, available at <http://www.un.org/Overview/rights.html> [hereafter *Universal Declaration*].

⁵⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S.171, available at <http://www2.ohchr.org/english/law/ccpr.htm> [hereafter *ICCPR*].

⁵¹ International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3, available at http://www.unhchr.ch/html/menu3/b/a_ceser.htm [hereafter *ICESER*]. Economic and social rights are also included in other human rights legal instruments, for example the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, and the Conventions of the International Labor Organization.

⁵² Both the ICCPR and the ICESER were signed by President Carter on Oct. 5, 1977 and submitted to Senate for advice and consent on Feb. 23, 1978, together with the Convention on the Elimination of All Forms of Racial Discrimination which had been signed by President Johnson on September 28, 1966. See Kathleen Teltsch, *U.S., Fulfilling Promise, Signs 11-Year-Old Rights Pacts at U.N.*, N.Y. TIMES, Oct 6, 1977 at p. 2; Treaty Number 95-20, 95th Cong., 2d Sess., International Covenant on Civil and Political Rights; Treaty Number 95-19, 95th Cong. 2d Sess., International Covenant on Economic, Social, and Cultural Rights; Treaty Number 95-18, Convention on the Elimination of All Forms of Racial Discrimination. Hearings were held on all three agreements from Nov. 14 to 19, 1979. Only the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination were ultimately consented to by the Senate. See Text of Resolution of Advice and Consent to Ratification as Reported by the Committee on Foreign Relations and Approved by the Senate, S. Rep. 102-23, Ex. E, 95th Congress, 2nd Sess., April 2, 1992 (consenting to the ICCPR); Text of Resolution of Advice and Consent to Ratification as

has therefore been characterized by reluctance in the eyes of the international community.

Nevertheless, the United States is a member of the ICCPR and its status as a signatory to the ICESER is generally held to create an obligation to refrain from acts that would defeat the purpose of this covenant as well.⁵³ These obligations, and the general obligations of the United States to other states as fellow members of the United Nations, provide sufficient foundation for analyzing the U.S. tax system in the context of the aims laid out in these agreements.

We may begin with a premise that whether human rights principles ought to inform tax policy choices depends on whether the UDHR, the ICCPR, the ICESER, or other human rights principles or agreements impose requirements or restrictions on the way states impose taxation. An examination of these documents reveals that none contain any explicit strictures on tax policy per se. But it is equally clear that the realization of several of their provisions will depend on laws that regulate the allocation of resources within society. For example, the UDHR provides in Article 22 that “[e]veryone, as a member of society ... is entitled to realization...of the economic...rights indispensable for his dignity and the free development of his personality.” Article 25 states that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care.” Finally, Article 28 states, “Everyone is entitled to a social and international order in which the rights and freedoms set forth in [the Declaration] can be fully realized.”

These consensus statements reflect the view that the state has an important role to play in moderating the allocation of the world’s resources. Taxation is a significant mechanism for fulfilling that role. While some may view taxation as primarily a pragmatic task undertaken by the state to raise revenue for government functions, tax law unavoidably introduces issues of allocation and redistribution of the burdens and benefits of living in organized

Reported by the Committee on Foreign Relations and Approved by the Senate, S. Rep. 103-29, Ex. C, 95th Congress, 2nd Sess., June 24, 1994 (consenting to the Convention on the Elimination of All Forms of Racial Discrimination).

⁵³ According to the National Economic and Social Rights Initiative (NESRI), a nongovernmental organization that “promotes a human rights vision for the United States,” status as a signatory means that “the U.S. has at a minimum agreed not to violate the spirit and purpose of the treaties.” See http://www.nesri.org/about_us/index.html. In addition, there may be political, diplomatic, or moral aspects which effectively bind the United States to its content. Nevertheless, the United States is generally viewed as having a “central role in discouraging and sometimes blocking the development” of economic and social rights. Philip Alston *supra* note 48 at 121.

society.⁵⁴ Taxation transfers resources from the people to rulers as well as amongst “the people” as determined and implemented by rulers.⁵⁵ Any attempt to raise revenues results in a transfer of resources from individuals to states, while the spending of tax revenues transfers benefits to various individuals in varying amounts.⁵⁶ Allocation and redistribution of resources are therefore both a major task and a major product of national tax policy. This essentially redistributive nature is the foundation for using human rights principles to re-examine how we assess the exercise of taxation.

B. Fairness and Efficiency in Light of Human Rights Obligations

Human rights principles might advance tax policy discourse by centering the efficiency / fairness debate within the framework of states’ obligations to focus on how they contribute to the allocation of resources. Rather than allowing tax policy choices to be made largely or solely based on efficiency concerns, human rights discourse might focus tax policy choices on the fact that states must expend resources to fulfill certain political and social obligations.⁵⁷ For example, civil and political rights, whether enumerated under a domestic constitution or under the ICCPR, require states to fund a judicial and administrative infrastructure that is sufficient to provide individual access to legal institutions, including legal representation and courts. Such obligations prevent rulers from denying rights on grounds that the requisite revenues have

⁵⁴ See, e.g., LIAM B. MURPHY AND THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002); see also Cunningham & Schenk *supra* note 25 (“We reject . . . the premise that a tax is per se acceptable because it raises the needed amount of revenue”; “revenue production alone does not justify a particular provision. . . . revenue should be raised in as fair and efficient manner as possible”).

⁵⁵ For the seminal classic view, see JOSEPH A. SCHUMPETER, *THE CRISIS OF THE TAX STATE* (1918) (exploring the emergence of the modern state as the product of an evolving fiscal relationship based on the “common exigency” of economic and social interdependence between rulers and the ruled).

⁵⁶ It is therefore imperative to examine both the raising and the spending of tax revenues in order to make determinations about the impact of taxation on the lives and opportunities of people. See, e.g., Bankman & Griffith *supra* note 36 (explaining that the distributed burden of taxation cannot be measured accurately without incorporating “the consequences of government expenditures on the wealth of individuals,” but that measuring how much individuals benefit from public services such as national defense and the judiciary is “extremely difficult”). The analysis is also difficult because it is not always clear whether a provision is in fact a tax or an expenditure. For a discussion, see, e.g., Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 *UCLA L. REV.* 1867 (2005) (making the case that the earned income tax is an expenditure purposefully disguised as a tax to make it more politically acceptable).

⁵⁷ See, e.g., Kinley *supra* note 14 at 22 (“The significance...of the role of governments in the global economy is not just to facilitate the conditions for productive, prosperous and prudent commercial enterprise, but also to ensure that, in the process, they do not renege on their social responsibilities to promote freedom, equality, order and welfare as represented, in part, by their international human rights law obligations.”).

not been or cannot be collected, no matter how much international tax competition might pressure the state to lower its spending. The ICCPR and other human rights documents contain numerous such principles that implicate how states manage the allocation of resources.

Both the ICCPR and the ICESER articulate a right of self-determination and a right to pursue economic, social and cultural development, although neither defines specific obligations of states in protecting these rights.⁵⁸ The ICESER contains a list of particular items that contribute to such self-determination and development, including the right to social security and social insurance,⁵⁹ the right to an adequate standard of living, “including adequate food, clothing and housing, and to the continuous improvement of living conditions,”⁶⁰ the right “to the enjoyment of the highest attainable standard of physical and mental health,”⁶¹ and the right to be limited in the pursuit of these rights by law “only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”⁶² These principles are obviously subject to widely divergent interpretations.⁶³ The signatories of the ICCPR and the ICESER, including the United States, are therefore engaged in a continuous, often passionate, contestation of what these provisions actually require in terms of state action.⁶⁴

While the role of the state in protecting civil and political rights has been quite clearly articulated and the details worked out through much international discourse, the role of the state in protecting basic economic and

⁵⁸ ICCPR, Art. 1; ICESER, Art. 1.

⁵⁹ ICESER, Art. 9.

⁶⁰ ICESER, Art. 11.

⁶¹ ICESER, Art. 12.

⁶² ICESER, 51Art. 2.

⁶³ Some of these principles are traced to President Franklin Delano Roosevelt’s vision of a “Second Bill of Rights” for the United States which would develop the idea of freedom from want as a fundamental human right. See, e.g., CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004). President Roosevelt stated that “This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights We have come to a clear realization of the fact, however, that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’” President Franklin D. Roosevelt, Eleventh Annual Message to Congress, January 11, 1944, available at http://xooqi.mondoplex.com/iboox/xo_0010_roosevelt_fireside.html. This view might be associated with the instrumentalist justification for economic, social and cultural rights. See, e.g., MATTHEW R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* 13 (1995). A broader view of the rights holds that they have intrinsic values without reference to their impact on other rights. *Id.* at 13.

⁶⁴ See, e.g., Amnesty International, Economic, Social, and Cultural Rights <http://www.amnestyusa.org/demand-dignity/economic-social-cultural-rights/page.do?id=1011006>.

social rights is less well-defined.⁶⁵ The major distinction offered is that the former represent negative rights, which require states to abstain from a given conduct, while the latter represent positive rights, which require states to take affirmative steps to ensure the distribution of a given good or service.⁶⁶ These provisions are arguably no different than those required under civil and political rights obligations in that both involve significant financial costs.⁶⁷ Even so, much of the discussion about economic and social rights focuses on the merits of the argument that governments owe their citizens a basic level of entitlements, such as food, shelter, and health care.⁶⁸ The differing capacities and resources of different states have led human rights scholars to agree that minimum obligations cannot be imposed on all states equally. As a result, applying these principles to tax policy may yield no easy answers. In addition, translating these principles to conventional tax policy discourse is difficult because tax policy is often considered “in almost complete isolation from the expenditure side of the budget.”⁶⁹ Even so, human rights principles contribute to tax policy analysis by raising the possibility that states are obliged to refrain from impeding access to these basic rights, and that they may accordingly be obliged to reconsider the tax mix in light of its impact on such access.⁷⁰

Rather than being satisfied with the tradeoff between efficiency and fairness, human rights obligations would thus lead to a debate about the role of taxation in the “underlying and structural causes” of economic uncertainty and insecurity.⁷¹ For example, a human rights approach would illuminate the inappropriateness of tax competition to the extent it creates a situation in which “social safety nets become more difficult to finance just as the need for social

⁶⁵ See, e.g., Henry J. Steiner, Philip Alston and Ryan Goodman, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 263-374 (Oxford University Press 2008).

⁶⁶ For a discussion, see *id.* at 185-89.

⁶⁷ See, e.g., Balakrishnan *supra* note 5 at 11 (“Human rights provisions to ensure adequate livelihoods and social protections have significant economic and financial implications; these protections require resources and involves costs.”).

⁶⁸ One example of this approach from the U.S. perspective is that at the 2002 World Food Summit in Italy, the United States presented an official reservation to a proposed declaration regarding the right to food as a basic human right, stating that “the United States understands the right of access to food to mean the opportunity to secure food and not a guaranteed entitlement.” Food and Agriculture Organization of the United Nations, Explanatory Notes/Reservation to the Declaration of the World Food Summit: Five Years Later (Rome: FAO, 2002), available at <http://www.fao.org/DOCREP/MEETING/005/Y7106E/y7106e03.htm>. This approach, while unsatisfactory to many, is at least compatible with the perspective that people should not “collaborate in upholding a coercive institutional order that avoidably restricts the freedom of some so as to render their access to basic necessities insecure.” Pogge *supra* note 79 at 70.

⁶⁹ Bahl & Bird *supra* note 2 at 288.

⁷⁰ See, e.g., Pogge *supra* note 79 at 67-70.

⁷¹ Copenhagen Declaration on Social Development, para 2.

insurance becomes greater.”⁷² This framework requires a reconsideration, from a rights-based perspective, of the distributive implications of the changing tax mix, which has rearranged the burden of taxation to focus on wages and consumption rather than other sources of revenue, such as business profits and capital income.⁷³ Human rights discourse may advance tax policy by concentrating on whether tax competition, in guiding the evolution of the tax mix, tends to undermine the opportunities of economically disadvantaged people around the world.⁷⁴

The application of human rights principles to the tax policy discourse seems not only warranted but practically necessary in light of the limitations of conventional tax policy in addressing the effects of global economic integration on the world’s poorest people. An increasing volume of tax scholarship is dedicated to exploring how the institutional design of the international tax system may be impeding development and prosperity in the world’s poorest countries.⁷⁵ Although a human rights approach alone might not necessarily change priorities and shift the trend in taxation toward a more equitable system, it may provide tax policymakers and scholars with a context for assessing the tax policy choices that have been made and that are being made by governments that have the resources and ability to make alternative decisions.

IV. Conclusion

It is critically important to continually assess how national tax policy decisions affect the world’s poorest peoples.⁷⁶ Human rights insights could

⁷² DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 195-196 (2007).

⁷³ See, e.g., Bahl & Bird *supra* note 2 at 288 (“The new global economy and capital mobility are pushing tax structures away from reliance on the corporation income tax”).

⁷⁴ This inquiry would be consistent with recent efforts to foster dialogue between human rights experts and heterodox economists. See, e.g., Balakrishnan *supra* note 5 at 11 (“Agendas for economic and social human rights often do not adequately address the impediments to the realization of rights that derive from the very structure of the global economy”).

⁷⁵ See, e.g., Kim Brooks, Tax Treaty Treatment of Royalty Payments from Low- Income Countries: A Comparison of Canada and Australia’s Policies, 5 *eJournal of Tax Research* 168 (2007); Neil Brooks & Thaddeus Hwong, The Social Benefits and Economic Costs of Taxation: A Comparison of High and Low-Tax Countries (2006); Jinyan Li, Development and Tax Policy: Case Study of China, in A. Usha, ed., TAX LAWS: GLOBAL PERSPECTIVES (2007); Miranda Stewart, Tax Reform and Development: Global and Local Politics (Report/Working Paper No 2004, 2004); Arthur J. Cockfield, Purism and Contextualism With International Tax Law Analysis: How Traditional Analysis Fails Developing Countries, Queen’s Univ. Legal Studies Research Paper No. 07-03, available at <http://ssrn.com/abstract=989770>.

⁷⁶ The object of such continual inquiry is to “go beyond the dominant beliefs, assumptions and loyalties (the myth) of any given society and look into its operational technique,” in order to reappraise the appropriateness of existing practices. Myers S. McDougal and

contribute to the tax policy discourse by showing that some social welfare goals must take precedence over others considerations based on principles that involve moral rights and reasons, independent of any legal or social undertakings.⁷⁷ This does not necessarily mean that human rights discourse must “spawn fully formed policy proposals,” but rather that engaging with human rights principles should help re-frame policy debate in a manner that allows policymakers to consider a broader range of desirable policy goals.⁷⁸ This suggests that a human rights-based approach to taxation might introduce situations in which one course of tax policy should predominate because one is more morally defensible than another, even if the other fulfills competing policy goals.

Human rights claims run against destructive social and legal institutions and against those who uphold such institutions.⁷⁹ A rights-based inquiry would challenge traditional tax policy arguments to focus on whether a given policy choice accords with the state’s obligation to prevent institutions and systems from destroying fundamental opportunities for individuals to thrive.⁸⁰ This is a different question than that asked in conventional tax policy discourse, and it could challenge tax law and legal institutions to be engaged more effectively in the pursuit of improvement in the quality of life of the poor as a matter of entitlement rather than charity.⁸¹

Approaching tax policy through the lens of human rights obligations thus might re-center the focus on fairness, and call for the rejection of a regime that, for example, tends to distribute tax burdens towards more economically vulnerable groups.⁸² This approach rejects the sacrifice of human dignity and entitlements to “utilitarian calculations of social or economic good.”⁸³ It also

Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 13 (1959).

⁷⁷ See, e.g., David A. Reidy and M. N. S. Sellers, *UNIVERSAL HUMAN RIGHTS: MORAL ORDER IN A DIVIDED WORLD* (Rowman & Littlefield 2005).

⁷⁸ Kinley *supra* note 14 at 226-227.

⁷⁹ Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* 45 (Polity 2002).

⁸⁰ See, e.g., Andreas Føllesdal and Thomas Pogge, *REAL WORLD JUSTICE: GROUNDS, PRINCIPLES, HUMAN RIGHTS, AND SOCIAL INSTITUTIONS* (Springer 2005). This is not to suggest that no other literature articulates these ideas, but only to point to a human rights analysis as one source of such a perspective.

⁸¹ See, Balakrishnan *supra* note 5 at 20 (“The entitlement framework positions people as holders of rights rather than possessors of needs to be met through charity”); Ghai *supra* note 14 (“the regime of rights is crucial because it speaks in the language of entitlements. ... The language of rights makes it clear that the poor are not the subject of charity or benevolence, but are entitled to a decent standard of living.”)

⁸² Balakrishnan *supra* note 5 at 16 (“if an international trade policy leads to decreases in the level of national resources and public services that a state can provide, then the policy should be considered to be in conflict with human rights norms such as self-determination, non-discrimination, progressive realization, and non-retrogression.”).

⁸³ Balakrishnan *supra* note 5 at 12.

challenge us, in evaluating the efficiency aspects of a given policy, to consider the potential costs of social unrest and even violent conflict that arise from poverty and inequality.

Ultimately, viewing tax policy through the lens of human rights obligations might lead to a change in the way we consider the relationship between individuals and sovereign governments, the way we debate what fairness requires and with respect to whom, and the way we balance fairness against efficiency and other tax policy goals. We might advance tax policy discourse if we evaluated the tax system by whether it tends to uphold or prevent “a coercive institutional order that avoidably restricts the freedom of some so as to render their access to basic necessities insecure.”⁸⁴ Cast in these terms, debates about tax policy would be able to account for a broader conception about the kind of economic order to which individuals—regardless of their status as citizens or political actors—are entitled as a matter of basic human dignity.⁸⁵ The inquiry could help us to illuminate ways to ensure that our tax laws and legal institutions are being used to prevent, rather than foster, global poverty and economic inequality.

⁸⁴ See Pogge *supra* note 79 at 70.

⁸⁵ As one human rights scholar asserts, “no appeal can be legitimately made to the need to prefer the economy over human rights.” Kinley *supra* note 14 at 237.