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Applying Sustainability to Tax

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APPLYING SUSTAINABILITY TO TAX

by

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ABSTRACT

This Article argues that sustainability can and should be applied to taxation to ameliorate the effects of industrialization on society and the planet. In making the case for a sustainability approach to taxation, we suggest that prior approaches to tax policy analysis have been insufficiently interdisciplinary and have failed to fully embrace challenging normative questions that underpin tax. Using sustainability literature from other disciplines, we show how sustainability can provide a superior approach. Specifically, sustainability requires an examination of foundational, normative questions, integration of interdisciplinary collaboration, embrace of long-term solutions, and adaptation to an ever-evolving technological society. Using these attributes as a guide, we introduce a series of questions to prompt tax scholars to consider how tax policy can support the society that we wish to sustain.

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Introduction

Industrialization has fostered global wealth and innovation,[1] but improvements to GDP and prosperity have come at a price.[2] There has been tacit public acknowledgement of industrialization's detrimental environmental effects since the 1972 United Nations Conference on the Human Environment.[3] Only recently, however, has the public expressed a willingness to address the complex planet- and society-altering effects of industrialization.[4]

Public and academic discourse have coalesced around sustainability as an appropriate framework to address industrialization's effects.[5]

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1. Jacobus A. Du Pisani, *Sustainable Development—Historical Roots of the Concept*, 3 J. Integrative Envtl. Sci. 83, 84 (2007) (noting that the industrial revolution brought "economic growth and material advancement").

2. *See* Benedict Sheehy, *Conceptual and Institutional Interfaces Between CSR, Corporate Law and the Problem of Social Costs*, 12 Va. L. & Bus. Rev. 93, 98 (2017) (noting industrial advancement wrought "new types of waste and pollution").

3. *See* David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 Ga. L. Rev. 599, 600–01 (1995) (noting the conference as the "major turning point" for international attention for environmental degradation and protection and citing Lynton Keith Caldwell, International Environmental Policy: Emergence & Dimensions 55 (2d ed. 1990)).

4. Frank Newport, *Americans Want Government to Do More on Environment*, Gallup (Mar. 29, 2018), https://news.gallup.com/poll/232007/americans-want-government-more-environment.aspx (reporting survey data showing that 62% want more governmental action to protect the environment, up from 46% in 2010).

5. *See, e.g.*, G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015) (evidencing global support for 17 Sustainable Development Goals); Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, Harv. Bus. Rev. (May–June 2019), https://hbr.org/2019/05/the-investor-revolution (finding ESG issues as top concern when interviewing global executives); Andrew J. Hoffman & Jessica L. Axson, *Examining Interdisciplinary Sustainability Institutes at Major Research Universities: Innovations in Cross-Campus and Cross-Disciplinary Models* 1 (Univ. of Mich. Research Study, June 2017) http://webuser.bus.umich.edu/ajhoff/mitchell_report/Mitchell%20Report%20Final%20(a).pdf ("[S]ustainability education and research, especially in research-intensive universities, is finding a welcome home across the campus, in schools of

Sustainability work has moved beyond eco-conservation; sustainability has been applied to issues in higher education,[6] corporate governance,[7]

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business, architecture, public policy, public health, engineering, law, and many more.").

6. *See, e.g.*, William R. Blackburn, *The Practice of Sustainability at Colleges and Universities*, 46 Envtl. L. Rep. News & Analysis 10394 (2016) (discussing the impact that colleges and universities have on sustainability issues); Wynn Calder & Richard M. Clugston, *Progress Toward Sustainability in Higher Education*, 33 Envtl. L. Rep. News & Analysis 10003 (2003) (examining higher education in sustainable development in the U.S.); Carmela M. Federico et al., *Kindergarten Through Twelfth-Grade Education for Sustainability*, 33 Envtl. L. Rep. News & Analysis 10117 (2003) (applying the education of youth towards sustainability); Nicole Graham, *This Is Not a Thing: Land, Sustainability and Legal Education*, 26 J. Envtl. L. 395, 415–21 (2014) (discussing "sustainability education" to encourage law faculty and students to include sustainability as part of their higher-ordered thinking); Yoke Ling Woo et al., *Education for Sustainable Development: A Review of Characteristics of Sustainability Curriculum*, 3 OIDA Int'l J. Sustainable Dev., no. 8, 2012, at 33–44, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031102## (assessing the characteristics of a sustainability curriculum design in higher education); Mohammad Shamsuddoha, *Sustainability Development in Higher Education* (Dec. 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1302273 (focusing on sustainable development in education).

7. *See, e.g.*, Mozaffar Khan et al., *Corporate Sustainability: First Evidence on Materiality*, 91 Acct. Rev. 1697 (2016) (providing measures for a firm's sustainability performance); David K. Millon, *Two Models of Corporate Social Responsibility*, 46 Wake Forest L. Rev. 523 (2011) (discussing the application of sustainability to CSR); Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 Am. Bus. L.J. 255 (2015) (examining how multinational companies can use CRS to better formalize corporate sustainability); Tara J. Radin, *Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making*, 31 Wm. & Mary Envtl. L. & Pol'y Rev. 363 (2007) (emphasizing the need for businesses and organizations to approach sustainability matters both responsibly and proactively); Issachar Rosen-Zvi, *You Are Too Soft!: What Can Corporate Social Responsibility Do For Climate Change?*, 12 Minn. J.L. Sci. & Tech. 527 (2011) (evaluating the codes of conduct and CSR reports of corporations in an effort to minimize climate change).

economics,[8] finance,[9] and accounting,[10] among others. To date, however, too little work has applied sustainability to taxation.[11] This gap in the literature is curious given how tax intersects so universally with social and economic issues. We opine that the dearth of sustainable tax work lies with traditional approaches to tax policy analysis.[12]

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8. *See, e.g.*, Stefan Baumgärtner & Martin Quaas, *What Is Sustainability Economics?*, 69 Ecological Econ. 445 (2010) (offering an essay defining "sustainability economics"); Peer Ederer et al., *The Economic Sustainability Indicator*, *in* Handbook of Intergenerational Justice 129 (Joerg Chet Tremmel ed., 2006) (discussing the mechanics of the Economic Sustainability Indicator); Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 Am. Bus. L.J. 215, 246 (2001) (commenting on Paul Hawken's research to bring about sustainable economics).

9. *See, e.g.*, Iveta Cherneva, *The Business Case for Sustainable Finance: Beyond Public Relations, Ethics, and Philanthropy*, Fletcher F. World. Aff., Summer 2012, at 93 (identifying the need for sustainable finance); Virginia Harper Ho, *Sustainable Finance & China's Green Credit Reforms: A Test Case for Bank Monitoring of Environmental Risk*, 51 Cornell Int'l L.J. 609 (2018) (examining the use of creditors to monitor firm sustainability); Stephen Kim Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, 54 Stan. J. Int'l L. 1 (2018) (analyzing the expansion and regulation of green bonds within the broader scope of sustainable finance).

10. *See, e.g.*, Khan et al., *supra* note 7, at 1697–98 (noting the creation of the Sustainability Accounting Standards Board which defines materiality and develops standard for reporting of environmental, social and governance issues); Geoff Lamberton, *Sustainability Accounting—A Brief History and Conceptual Framework*, 29 Acct. F. 7 (2005) (discussing the history of sustainability accounting); Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 Va. J. Int'l L. 97, 123 (2013) (noting that the SEC could draw guidance from the sustainability accounting standards in place by the Sustainability Accounting Standards Board); *see also* Sustainability Acct. Standards Board, https://www.sasb.org/ (last visited July 11, 2020).

11. *See, e.g.*, Robert Bird & Karie Davis-Nozemack, *Tax Avoidance as a Sustainability Problem*, 151 J. Bus. Ethics 1009 (2018) (showing tax avoidance as consistent with the presentation of other sustainability issues); Eric C. Chaffee & Karie Davis-Nozemack, *Corporate Tax Avoidance and Honoring the Fiduciary Duties Owed to the Corporation and Its Stockholders*, 58 B.C. L. Rev. 1425, 1477–80 (2017) (applying the lens of sustainability to tax avoidance).

12. *See infra* Part I.

Much tax policy analysis follows one of two paths. Some scholars and industry groups, like the Association of International Certified Professional Accountants (AICPA),[13] build upon Adam Smith's four canons.[14] More recent work builds upon optimal tax theory and seeks to maximize social welfare.[15] Both approaches contribute to a rich tax policy literature that expands our understanding of tax systems, but work based in either approach suffers from the same deficiency.[16] For too long, tax policy literature has skirted meaningful normative analysis.[17] It avoids contemplating challenging normative questions and interrogating underlying assumptions.[18] The world faces the simultaneously marvelous and pernicious effects of industrialization and rapid economic expansion, but current analytical approaches to tax have not adequately considered the role that tax plays in contributing to and can play in ameliorating the national and global crises wrought by industrialization.[19]

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13. AICPA, *Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals* 3–10 (2017), https://www.aicpa.org/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf (proposing 12 principles for tax policy analysis, which include the 4 original cannons proposed by Smith).

14. *See* Bret N. Bogenschneider, *A Philosophy Toolkit for Tax Lawyers*, 50 Akron L. Rev. 451, 452 (2016) (stating that "the most common citations given in tax scholarship are to Adam Smith . . ."); Tyler A. LeFevre, *Justice in Taxation*, 41 Vt. L. Rev. 763, 769 (2017) (noting continued application Adam Smith's maxims); Rodney P. Mock et al., *When Economics Makes Bad Tax Policy: Tax Phase-Outs,* 37 Va. Tax Rev. 485, 516 (2018) (noting the continued employ of Smith's tax canons of "good" tax policy).

15. *See* N. Gregory Mankiw et al., *Optimal Taxation in Theory and Practice*, J. Econ. Persp., Fall 2009, at 147 (summarizing work on optimal tax theory and its challenges).

16. *See infra* text accompanying notes 40–47.

17. *See infra* text accompanying notes 40–47.

18. *See infra* text accompanying notes 40–47.

19. *See* Intergovernmental Panel on Climate Change, Special Report: Global Warming of 1.5°C (2018), https://www.ipcc.ch/sr15/ (noting that global carbon emissions must decrease by 45% by 2030 to avoid the worst effects of climate change); Hiroshi Komiyama & Kazuhiko Takeuchi, *Sustainability Science: Building a New Discipline*, 1 Sustainability Sci. 1, 3–4 (2006) ("The fundamental cause of the current crisis in sustainability is the industrialization that followed the industrial revolution and the rapid economic growth it fostered.").

This Article introduces sustainability analysis for tax policy. Sustainability is conceived to remedy problems arising from the effects of industrialization,[20] and a sustainable tax framework fulfills a lacuna in tax policy analysis.[21] Sustainable taxation will not supplant prior tax policy work.[22] Rather, it is sufficiently robust and interdisciplinary to incorporate prior approaches.[23] Further, sustainability compels examination of fundamental, normative questions.[24] To advance the literature, this Article provides the contours of a sustainable taxation framework with first and second order questions. A sustainability tax analysis initiates by asking "What kind of society do we want to sustain?"[25] Subsumed in this primary question are numerous secondary questions: "How can tax policy support [the quality of life, social justice and cohesion, diversity, democratic rights, broad participation, and social capital and individual capabilities] that we wish to sustain?"[26] Scholars also simultaneously consider: "What resources will be available for future generations?"—within the framework.[27]

Sustainable taxation begins with normative analysis.[28] It also offers a unique and valuable path for interdisciplinary collaboration, long-term solutions, and adaption to an ever-evolving technological society.[29] Once a normative foundation is established, long-standing (and hopefully future) approaches to tax analysis can provide guidance in forming tax policies that will support a sustainable societal future.

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20. *See* Komiyama & Takeuchi, *supra* note 19; Intergovernmental Panel on Climate Change, *supra* note 19.

21. *See infra* Part I.

22. *See infra* text and accompanying notes 76–80.

23. *See infra* text and accompanying notes 76–80.

24. *See* Leslie Paul Thiele, Sustainability 190 (2d ed. 2016) (noting sustainable thinking as valuing "critical thinking and interdisciplinary knowledge; understanding systems and complexity; appreciating multi-stakeholder perspectives and developing empathetic capacities; planning and managing change; clarifying values, communicating effectively, and making decisions under uncertainty"); *infra* Part III.

25. *See* Magnus Boström, *A Missing Pillar? Challenges in Theorizing and Practicing Social Sustainability: Introduction to the Special Issue*, 8 Sustainability: Sci. Prac. & Pol'y, no. 1, 2012, at 3; *see also infra* Part III.

26. *See infra* Part III.

27. *See infra* Part III.

28. *See infra* Part III.

29. *See infra* Part III.

I. Prior Approaches to Tax Policy Analysis

Modern tax policy analysis originated with Adam Smith in 1776 during the first industrial revolution,[30] and 250 years later many scholars continue to apply his principles.[31] Smith presented an analytical cannon for tax in *The Wealth of Nations*.[32] A well-designed tax, from Smith's perspective, is one that is as equitable, certain, convenient, and efficient as possible.[33] Smith's theories have attracted tax scholars for centuries.[34] As a philosopher and economist,[35] Smith provided the groundwork for

30. *See* LeFevre, *supra* note 14, at 769 (noting the effect of Adam Smith, his theories, and the European Age of Enlightenment on modern tax theory).

31. *See* Bogenschneider, *supra* note 14, at 452 ("the most common citations given in tax scholarship are to Adam Smith . . ."); LeFevre, *supra* note 14, at 770 ("In evaluating taxes today, we continue to apply Adam Smith's maxims"); Mock et al., *supra* note 14, at 516 (noting the continued employ of Smith's tax canons of "good" tax policy).

32. *See* Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 213 (1776); *see also* Jane Frecknall-Hughes, *Locke, Hume, Johnson and the Continuing Relevance of Tax History*, 12 eJournal Tax Res. 87 (2014) (describing the impact of Smith and others on tax policy development).

33. *See* Chris Farrell, *My Two Cents: Adam Smith on Taxes*, Marketplace (Apr. 15, 2009), https://www.marketplace.org/2009/04/15/your-money/my-two-cents/adam-smith-taxes (quoting Adam Smith's canons as "1) The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities . . . 2) The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person . . . 3) Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it . . . 4) Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state . . ." (emphasis omitted)).

34. *See, e.g.*, Bogenschneider, *supra* note 14; LeFevre, *supra* note 14; Mock et al., *supra* note 14.

35. *See* Donald Winch, *Adam Smith: Scottish Moral Philosopher as Political Economist*, 35 Hist. J. 91, 91–94 (1992) (arguing for Smith's importance as economist and philosopher).

modern capitalism[36] but also incorporated social justice goals.[37] Unlike his contemporaries, Smith expressly discussed the role of taxes in the economy and society as well as the relative merits of alternative systems.[38]

Smith's four canons continue to be the genesis for various tax law analysis today[39] and particularly, for analysis by tax practitioners. In the *Guiding Principles of Good Tax Policy*: *A Framework for Evaluating Tax Proposals*, the AICPA added eight principles to Smith's original four, including information security, simplicity, neutrality, economic growth and efficiency, transparency and visibility, minimum tax gap, accountability to taxpayers, and appropriate government revenues.[40] Undoubtedly, these additional principles provide for a more hearty tax analysis but, like Smith's work, are still incomplete. These principles do not contemplate the purpose of tax or the relationship of economic progress to social progress in tax policy and are insufficiently integrative. Smith's principles, the AICPA framework, and similar work "relate primarily to the practice of taxation rather than the principles that underpin it."[41] Moreover, these principles are most often applied as

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36. *See* G. R. Bassiry & Marc Jones, *Adam Smith and the Ethics of Contemporary Capitalism*, 12 J. Bus. Ethics 621, 622–24 (1993) (providing historical context for Adam Smith's work).

37. *See* Beverly I. Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61 SMU L. Rev. 337 (2008) (providing support for Adam Smith's concern for issues of social justice and class mobility).

38. *See* Frecknall-Hughes, *supra* note 32 (discussing the impact of John Locke, David Hume, and Samuel Johnson on tax policy); Moran, *supra* note 37 (noting the emphasis on tax in Smith's work and contrasting that with his contemporaries); *see also* David Lieberman, *Adam Smith on Justice, Rights, and Law*, *in* Cambridge Companion to Adam Smith 214, 238 (Knud Haakonssen ed., 2006) (noting Smith's "discussion of the relative merits of rival approaches to taxation").

39. *See* Jane Frecknall-Hughes, The Theory, Principles and Management of Taxation: An Introduction (2014); *see also* Frecknall-Hughes, *supra* note 32, at 89 (describing Smith's 250 year old work as "commanding near universal support" (quoting Inst. for Fiscal Studies, Tax by Design: The Mirrlees Review 22 (2011)).

40. AICPA, *supra* note 13.

41. Richard Murphy, *A Code of Conduct for Taxation* 7 (Oct. 2007), https://www.taxjustice.net/cms/upload/pdf/AABA-TR-Code_long.pdf.

a multi-prong analysis to each new provision or proposal, ignoring the integrative effect of tax policy.

Other scholars often use an economics-based approach to tax law analysis. Considerable work has been published applying optimal tax theory,[42] which designs tax systems that maximize individual utilities.[43] Optimal tax models have been evolving since Scottish economist James Mirrlees published his seminal work in 1971,[44] but current models still struggle to reflect realistic human preferences and decision-making.[45] More importantly, however, these models cannot answer fundamental, normative questions.[46] Even scholars who recognize the limitations of optimal tax theory continue to use it as a basis for their reasoning.[47] While work building on optimal tax theory has begun to integrate knowledge from other disciplines, an analysis that relies solely on optimal tax theory is as incomplete as an analysis that relies solely on Smith's canons.

Some tax analysis has embraced foundational, normative questions. One example is Liam Murphy and Thomas Nagel's *The Myth of Ownership: Taxes and Justice*, which examines tax within its

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42. *See* Mankiw et al., *supra* note 15.

43. *See* Marc Fleurbaey & François Maniquet, *Optimal Taxation Theory and Principles of Fairness* 15 (Ctr. for Operations & Econometrics, Discussion Paper no. 2015/5, 2014), http://wws.princeton.edu/system/files/research/documents/Fleurbaey_Optimal%20Taxation%20Theory%20and%20Principles%20of%20Fairness.pdf.

44. *See* James A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 Rev. Econ. Stud. 175 (1971).

45. *See* Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics*, 98 Cornell L. Rev. 523 (2013) (discussing optimal tax theory, and other economics approaches, struggles with deterrence, redistribution, and baselines).

46. *See* Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice 136 (2002) ("[O]ptimal tax analysis sets out to determine, for different criteria of justice in outcomes, the right trade-off between revenue raised and welfare lost due to the effect on how hard and how much people choose to work.").

47. *See* Joel Slemrod & Christian Gillitzer. Tax Systems 6 (2014) (arguing that optimal tax theory is useful but is limited; they proffer a rival "tax systems" approach that begins with optimal tax but also incorporates other analytical work).

broader relationship to legal, moral, and political theory.[48] Murphy and Nagel noted that "certain concepts have been developed specifically for application to the evaluation of tax policy: vertical equity, horizontal equity, the benefit principle, equal sacrifice, ability to pay" and then showed how these concepts fail to "adequately capture the considerations that ought to enter into the normative assessment of tax policy."[49] Murphy and Nagel provided a model for an excellent entry point for tax analysis within contemporary conversations, but little subsequent work applying their approach to tax law analysis has ensued.

Each approach—Smithian, optimal tax theory, and interdisciplinary normative work—offers much to tax analysis, but none alone is sufficient. Smith's principles and optimal tax theory skirt questions of intergenerational equity and social and economic balancing. Neither Smith's principles nor optimal tax theory place tax policy within broader philosophical frameworks; these approaches—and those that build on them—permit tax to be analytically separate from everything that is not tax. To help remedy the social, environmental, ethical, and legal effects of industrialization, a different approach to tax analysis is required.

II. Why Use a Sustainability Approach?

We propose a sustainability approach to tax analysis because industrialization and the economic growth it propagated is the catalyst for the emerging crisis in sustainability.[50] A sustainability approach will not abandon previously used methods of tax analysis.[51] Rather, it is broad enough to incorporate the contributions of other approaches.[52] However, sustainability demands examining foundational, normative questions and only then permits ensuing questions that traditional approaches to tax analysis can help answer. Sustainability also contemplates a longer time horizon for solutions. Sustainability itself continually evolves, and this evolution better accommodates often unknowable changes in

48. *See* Murphy & Nagel, *supra* note 46.
49. *Id*. at 7–8.
50. *See* Komiyama & Takeuchi, *supra* note 19, at 3–4.
51. Thiele, *supra* note 24.
52. *Id*.

technology, society, and values. These attributes of sustainability analysis are absent from prior approaches to tax policy analysis. We propose using sustainability because, as an approach, it fulfills long-standing gaps in tax analyses. It is integrative, future-focused, and adaptive to ever-evolving technology and society.

Sustainability asks whether a system "meets the needs of the present without compromising the ability of future generations to meet their own needs."[53] This question incorporates both normative and analytical analyses,[54] which have too rarely been paired in modern tax analysis. Sustainability does not merely ask how we make the status quo incrementally better.[55] To create a sustainable society, we must first determine "what type of society we want to sustain."[56]

Sustainability is most often associated with environmental protection, but sustainability is not solely concerned with eco-conservation.[57] Environmental protection serves as only one of the three principles—or pillars—of sustainability.[58] Social development—sometimes noted as social equity—and economic development join environmental protection

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53. *Compare* Report of the World Commission on Environment and Development: Our Common Future, at ch. 2, U.N. Doc. A/42/427, (Aug. 4, 1987) [hereinafter Report of the World Commission] (defining sustainable development), *with* R. Kerry Turner, Sustainable Environmental Management 12 (1988) (noting sustainable growth as "an acceptable rate of growth in per-capita real incomes without depleting the national capital asset stock or the natural environmental asset stock").

54. *See* Egon Becker et al., *Exploring Uncommon Ground: Sustainability and the Social Sciences*, *in* Sustainability and the Social Sciences: A Cross-Disciplinary Approach to Integrating Environmental Considerations into Theoretical Reorientation 1–22 (Egon Becker & Thomas Jahn eds., 1999); *see also* Beate Littig & Erich Griessler, *Social Sustainability: A Catchword between Political Pragmatism and Social Theory*, 8 Int'l J. Sustainable Dev. 65, 65–79 (2005).

55. *See* Sheldon D. Pollack, *Tax Reform: The 1980's in Perspective*, 46 Tax L. Rev. 489, 503–07 (1991) (discussing incrementalism in tax reform).

56. *See* Boström, *supra* note 25, at 3–14; *see also* Becker et al., *supra* note 54.

57. *See* Kent E. Portney, Sustainability 6 (2015) (discussing the origin and three pillars of sustainability).

58. *See id.*

to form the widely accepted three pillars of sustainability.[59] Some seek to elevate one pillar over the others—particularly the environmental pillar;[60] however, the three pillars are interdependent.[61] A sustainable approach requires addressing each of the three pillars. Advancement of any one pillar is challenging if improvement of the other two pillars lags.[62]

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59. *See* Robert W. Kates et al., *What Is Sustainable Development? Goals, Indicators, Values and Practice,* 47 Env't, no. 3, 2005, at 8, 8–12 (2005) (discussing the evolution of sustainable development and noting the three pillars from the 2002 World Summit on Sustainability, Johannesburg Declaration).

60. *See, e.g.*, Markku Lehtonen, *The Environmental–Social Interface of Sustainable Development: Capabilities, Social Capital, Institutions*, 49 Ecological Econ. 199, 201 (2004) (arguing that "[t]he social would thus be in the command of the economic, but at the same time submitted to the ultimate environmental constraints"); Gerald Rebitzer et al., *LCC—The Economic Pillar of Sustainability: Methodology and Application to Wastewater Treatment*, 22 Envtl. Progress 241, 246 (2003) (suggesting that "[s]ustainability can only be achieved if proposed solutions and environmental or social improvements are economically viable.").

61. *See* Robert B. Gibson, *Beyond the Pillars: Sustainability Assessment as a Framework for Effective Integration of Social, Economic and Ecological Considerations in Significant Decision-Making*, *in* Tools, Techniques and Approaches for Sustainability: Collected Writings in Environmental Assessment Policy and Management 389, 391 (William R. Sheate ed., 2009) (discussing pillar interdependence); Susan M. Opp & Kyle L. Saunders, *Pillar Talk: Local Sustainability Initiatives and Policies in the United States—Finding Evidence of the "Three E's": Economic Development, Environmental Protection, and Social Equity*, 49 Urb. Aff. Rev. 678, 681 (2013) (arguing the pillars are "equally as important"); *see also* Ralph Hansmann et al., *Principal Sustainability Components: Empirical Analysis of Synergies Between the Three Pillars of Sustainability*, 19 Int'l J. Sustainable Dev. & World Ecology 451, 451–52 (2012) (discussing the positive and negative relationships amongst the pillars); David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development*, 18 Bus. Ethics Q. 447, 449–50 (2008) (noting the relationship between the pillars and that economic development does not conflict with sustainability).

62. *See* Hansmann et al., *supra* note 61, at 451–52 (noting the need for improvement in the pillars); *see also* Amartya Sen, *What Is the Role of Legal and Judicial Reform in the Development Process?*, *in* World Bank

Although it is possible to improve economic development without improving social development, this often leads to inequality fostering civil unrest.[63] Likewise, it is difficult to encourage social development without improving economic opportunity, as they are inextricably linked.[64] American economist Joseph Stiglitz has noted that "[a]t the most general level, the goal of economic policy is to maximize long-run societal *well-being* in an *equitable* and *sustainable* manner."[65] In other words, economic goals are ultimately in service of social goals.[66] Economist and philosopher Amartya Sen has similarly affirmed the importance of social development accompanying economic development.[67] While linked, improvements in social and economic development do not always progress at the same rate.[68] Both Stiglitz and Sen cite dramatic improvements in social indicators in Asia, without correspondingly large economic improvements, to suggest that these pillars are related but are not in lockstep.[69]

Legal Review: Law, Equity, and Development: Volume 2, at 33, 36–37 (Ana Palacio et al. eds., 2006) ("We don't ask: which kind of human development: economic, social, political or legal? Rather human development encompasses them all, and they can be, in this perspective, only seen together, not in isolation from each other.").

63. *See* Thiele, *supra* note 24 (noting that states failing to offer security, basic needs, social justice, and political rights are prone to revolution); *see also* Robert B. Gibson, Specification of Sustainability-Based Environmental Assessment Decision Criteria and Implications for Determining "Significance" in Environmental Assessment (2001).

64. *See* Thiele, *supra* note 24.

65. Joseph E. Stiglitz et al., Stability with Growth: Macroeconomics, Liberalization, and Development 11 (2006); *see also* Joseph E. Stiglitz, *Participation and Development: Perspectives from the Comprehensive Development Paradigm*, 6 Rev. Dev. Econ. 163, 164 (2002).

66. *See* Stiglitz et al., *supra* note 65; Stiglitz, *supra* note 65.

67. *See* Amartya Sen, *The Ends and Means of Sustainability*, 14 J. Hum. Dev. & Capabilities 6 (2013).

68. *See* Sudhir Anand & Amartya Sen, *Human Development and Economic Sustainability*, 28 World Dev. 2029, 2032 (2000) (stating that income differences do not fully predict life expectancy, child mortality, or adult literacy rates); Sen, *supra* note 67.

69. *See* Anand & Sen, *supra* note 68, at 2032 (citing Sri Lanka, China, Jamaica, Costa Rica, and the state of Kerala in India as examples of locations with higher than expected human development based on GDP).

If the economic progress pillar is measured and pursued only in the aggregate (such as, for instance, using GDP), the measurement might obscure other issues of poverty and/or income inequality that advancements in industrialization could ameliorate.[70] Both Stiglitz and Sen suggest the need to look beyond GDP to other indicators, including life expectancy, child mortality, and literacy.[71] An educated and healthy society is a more productive society, which further facilitates economic progress.[72] A healthier and educated society also enhances a more stable populace.[73] Consequently, tax policy should embrace and seek more than the mere increase in GDP that industrialization can provide.

A sustainability analysis is appropriate in remedying the effects of industrialization because "it is only now that humankind itself *and* its economic activity has reached a scale that is potentially big enough to threaten the welfare prospects of future generations."[74] Industrialization's large-scale impact on the environment, society, ethics, and law threatens future generations. This presents a classic intergenerational conflict common in sustainability issues.[75]

Sustainability inherently takes an integrative approach.[76] Indeed, sustainability was conceived to address issues that "are not only complex but also interconnected" because these issues "involve disparate elements—from science and technology, to politics and economics, to

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70. *See id*. *See generally* Report by the Commission on the Measurement of Economic Performance and Social Progress 11 (2009), https://web.archive.org/web/20150720212135/http://www.stiglitz-sen-fitoussi.fr/en/index.htm (known as the Stiglitz-Sen-Fitoussi Report; noting the difference between "current well-being" and sustainability as well as advocating for measurements alternative to GDP).

71. *See* Anand & Sen, *supra* note 68.

72. *Id*. at 2039 ("Human development, in the form of people being better educated, more healthy, less debilitated, and so on, is not only constitutive of a better quality of life, but it also contributes to a person's productivity and her ability to make a larger contribution to the progress of material prosperity.").

73. *See id*. at 2032.

74. Eric Neumayer, Weak Versus Strong Sustainability: Exploring the Limits of Two Opposing Paradigms 15 (2013).

75. *See* Hansmann et al., *supra* note 61, at 451–52.

76. Gibson, *supra* note 61 (discussing the nature of sustainability as integrative).

human lifestyles and behavior."[77] Issues with global and national scales are created from a complex web of causality and are generally unsolvable using any single solution, approach, or discipline. In addressing problems, sustainability requires scholars to undertake interdisciplinary collaboration,[78] which is contrary to the siloed approach of most academic disciplines to both problem identification and problem solving.[79] The power of sustainability to prompt scholars towards interdisciplinary collaboration is one of its greatest strengths.[80]

In addition to requiring interdisciplinary collaboration, sustainability also requires scholars to think long-term when seeking solutions. In asking whether a solution "meets the needs of the present without compromising the ability of future generations to meet their own needs,"[81] sustainability acknowledges the inherent conflict over resources between present and future generations.[82] Few, if any, other analytical approaches concede that future generations have a claim to resources.[83] The application of a future-focused time frame has been absent from much of the work involving tax policy, yet is necessary to create robust solutions.[84]

Finally, a sustainability approach is adaptive. Indeed, "to practice sustainability is to promote adaptive change."[85] Sustainability seeks "not only the development of scientifically sound models for predicting

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77. *See* Komiyama & Takeuchi, *supra* note 19, at 4–5.

78. *See* Marilu Hastings, *Foreword* to Andrew J. Hoffman & Jessica L. Axson, Examining Interdisciplinary Sustainability Institutes at Major Research Universities: Innovations in Cross-Campus and Cross-Disciplinary Models (2017).

79. *See id.*; *see also* Komiyama & Takeuchi, *supra* note 19, at 3–4.

80. *See* Emma Partridge, *'Social Sustainability': A Useful Theoretical Framework?* 1 (Australasian Political Sci. Ass'n Annual Conference, 2005), https://www.academia.edu/3678834/Social_sustainability_a_useful_theoretical_framework (noting that sustainability's strength "lies in its integrative capability").

81. Report of the World Commission, *supra* note 53.

82. *See* Anand & Sen, *supra* note 68, at 2030 (noting sustainability's focus on intergenerational equity); *see also* Sen, *supra* note 67 (discussing intergenerational justice).

83. *See* Anand & Sen, *supra* note 68, at 2030 (discussing intergeneration sharing of resources).

84. *See* Boström, *supra* note 25, at 3–14.

85. Thiele, *supra* note 24, at intro.

future scenarios and evaluating the effects of different countermeasures and solutions but also effective management of the process by which these forecasts and evaluations are accepted by society, to generate the social reforms necessary to ensure global sustainability."[86] Sustainable solutions must be nimble because they deal with problems for which the inputs and causalities are complex and dynamic. As such, sustainability itself must be adaptive.

III. Sustainable Taxation

Sustainability is conceived to remedy problems arising from the effects of industrialization[87] and can provide an approach to fill a lacuna in tax analyses.[88] But what does sustainability analysis look like for taxation? While sustainability provides a robust interdisciplinary approach that asks fundamental, normative questions, incorporates knowledge from tax and other disciplines, and frames questions with a future-focus,[89] sustainability is a relatively young, evolving discipline.[90] Sustainability literature in supply chain, accounting, and other areas exists; however, minimal scholarly work has been published on sustainable taxation.[91] In fact, no comprehensive sustainable taxation framework currently exists. This Article argues for the necessary development of sustainable tax analysis that is superior to and also sufficiently inclusive of other currently accepted tax policy approaches.

A sustainability tax analysis begins by asking: "What kind of society do we want to sustain?"[92] Subsumed in this question are numerous secondary questions:[93]

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86. Komiyama & Takeuchi, *supra* note 19, at 5.

87. *See id.*

88. *See id.*

89. *See supra* Part I.

90. *See* Nicola Dempsey et al., *The Social Dimension of Sustainable Development: Defining Urban Social Sustainability*, 19 Sustainable Dev. 289 (2011) (noting that sustainability is dynamic).

91. *See* Bird & Davis-Nozemack, *supra* note 11; Chaffee & Davis-Nozemack, *supra* note 11.

92. *See* Report of the World Commission, *supra* note 53.

93. *See* Boström, *supra* note 25 (discussing issues implicated in social sustainability); *see also* Portney, *supra* note 57 (discussing equity issues as integral to sustainability).

> What kind of social welfare do we want to sustain?
>
> What kind of quality of life do we want to sustain?
>
> What kind of social justice do we want to sustain?
>
> What kind of social cohesion do we want to sustain?
>
> What kind of cultural diversity do we want to sustain?
>
> What kind of democratic rights do we want to sustain?
>
> What kind of broad participation in society do we want to sustain?
>
> What kind of social capital and individual capabilities do we want to sustain?[94]

This is not an exhaustive list of secondary questions. While these questions provide a great deal of germane inquiries, additional questions should be added as we discover attributes of the society we wish to sustain.

Some readers may be uncomfortable with the potential diversity of answers to the normative primary and secondary questions. Sustainability is robust and nimble enough to survive this concern.[95] Indeed, it is one of its strengths. As one scholar has noted, while sustainability

> must conform to scientific standards of objectivity, [it] must not be expected to yield a singular solution to any given problem. Indeed, a diversity of solutions should be sought in accordance with the particular environmental and cultural conditions of each nation or region. Any attempt to impose uniform solutions of global

94. *See* Efrat Eizenberg & Yosef Jabareen, *Social Sustainability: A New Conceptual Framework*, 9 Sustainability 68 (2017) (discussing social equity).

95. *See* Boström, *supra* note 25, at 5 (noting that "pluralism is preferable to a single common approach"); *see also* Gibson, *supra* note 61 (discussing the role of uncertainty in sustainability).

> environmental problems will threaten the diversity of the earth's regions and cultures in the same way that economic globalization does now. Destroying this diversity will, in turn, prevent the realization of a society that is truly sustainable in the sense that it embraces human fulfillment, not merely survival. If the process of structuring sustainability-related scholarship and its knowledge base yields different structuring models for different regions and nations, then structuring itself can be a driving force for greater diversity.[96]

Inviting broad public and scholarly participation to examine the primary and secondary questions is necessary.[97] Diverse answers to these inquiries will inevitably arise. Such discourse does not signal a weakness in sustainability.[98] Diverse perspectives trigger the process of "reconciling different and sometimes opposing values and goals toward a new synthesis and subsequent coordination of mutual action to achieve multiple values simultaneously and even synergistically."[99] Introducing a cacophony of voices may create discomfort—particularly for those used to hearing only their own voice in policymaking—but it will ultimately lead to a more stable and sustainable outcome.[100] As Justice Stephen Breyer has noted, one of the national treasures in the United States is the willingness of people to follow the rule of law, even when they disagree, because they have seen its virtue and the social stability it brings.[101] The willingness to adhere to a rule of law with which one disagrees often depends upon whether one has a voice in its making.

Tax scholars cannot provide all of the expertise necessary to answer the primary and secondary questions.[102] Such a lack of

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96. Komiyama & Takeuchi, *supra* note 19, at 5.

97. *See* Kates et al., *supra* note 59, at 20 (discussing diversity in sustainability); *see also* Boström, *supra* note 25 (noting mosaic viewpoints).

98. *See* Kates et al., *supra* note 59, at 20; *see also* Boström, *supra* note 25.

99. Kates et al., *supra* note 59, at 20.

100. *See* Gibson, *supra* note 61 (noting the need to tailor solutions).

101. *See* chrisbellco, *Breyer on the U.S. Court System*, YouTube (Sept. 8, 2006), https://www.youtube.com/watch?v=pn3X-7BGcng (discussing the rule of law and the U.S. population's embrace).

102. *See* Komiyama & Takeuchi, *supra* note 19, at 3–4 (discussing fragmented approach to academic research and its impact on sustainability);

expertise, however, does not mean that tax scholars should avoid participating in the development of a sustainable tax analysis. Scholars should collaborate with other experts in seeking answers to the primary and secondary questions. It is critical, however, that scholars and policymakers ultimately identify the attributes of the society that we, as a nation and world, want to sustain. Tax scholars need that end in mind if they hope to design effective tax policy. A tax policy must be more than equitable, certain, convenient, and efficient to support the society that we want to sustain. It is imperative that tax policy remains securely tethered to its purpose. Guiding principles can be easily forgotten as policy evolves incrementally.

Moving forward, we urge tax scholars to consider how tax policy can support transformation to the kind of society that we want to sustain. Implicit in this inquiry is "How can *tax policy* support the quality of life, social justice and cohesion, diversity, democratic rights, broad participation, and social capital and individual capabilities that we wish to sustain?"[103] Tax scholars' expertise, including proficiency in other tax analyses approaches, can help to shape the answers to this question. When crafting tax policy to support these societal attributes, scholars should also examine the intergenerational equity of tax policy, asking "What resources will be available for future generations?"[104]

Tax scholars should collaborate with others to design indicators and measures to determine the effectiveness of tax policies for sustaining society.[105] As noted, sustainability is an iterative process.[106] It is not a checklist that is completed once, but is more like a dynamic system that repeatedly cycles.[107] Sustainability uses normative questions to set goals,

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see also Hastings, *supra* note 78 (noting the need for an interdisciplinary approach to sustainability).

103. *See* Boström, *supra* note 25 (noting issues of social sustainability); *see also* Littig & Griessler, *supra* note 54, at 70 (noting the need for "analytical depth and clarity as well as clearly defined ideas about what kind of social values should be attained through sustainable development").

104. *See* Portney, *supra* note 57.

105. *See* Littig & Griessler, *supra* note 54.

106. *See* Eizenberg & Jabareen, *supra* note 94 (discussing the need for process); *see also* Thiele, *supra* note 24 (describing sustainability as a systems approach).

107. *See* Gibson, *supra* note 61 (noting cases involving multiple, iterative decisions); *see also* Portney, *supra* note 57 (describing sustainability as a process).

and then it requires designing indicators and measures to determine whether those goals are met.[108] If goals are unmet, then scholars use the outcomes to refine current policy.[109] Because sustainability is dynamic and iterative, it allows adaptation when technology and society change. Introducing a sustainability approach to taxation invites tax scholars to engage in interdisciplinary collaboration to explore this proposed analysis. Using the lens of sustainability to remedy the effects of industrialization will not displace other approaches currently in place, but instead is suitably interdisciplinary and robust to incorporate prior work.

Conclusion

Current analytical approaches to tax, including those based on Adam Smith and optimal tax theory, have not fully contemplated the role of tax policy within the current sustainability crisis resulting from industrialization and its economic consequences. This Article introduces the idea that sustainability can be applied to taxation to assist in remedying the effects of industrialization on society and the planet. Sustainability requires an examination of foundational, normative questions, integrates interdisciplinary collaboration, embraces long-term solutions, and adapts to an ever-evolving technological society. With too little scholarly work about sustainable taxation, no comprehensive sustainable tax analysis currently exists. To advance the literature in this arena, we introduce a series of questions to prompt tax scholars to consider how tax policy can support the society—with quality of life, social justice and cohesion, diversity, democratic rights, broad participation, and social capital and individual capabilities—that we wish to sustain.

108. *See* Littig & Griessler, *supra* note 54 (noting the need to examine processes).

109. *See id.*