

Normative Theories and Research in Taxation

CBS Tax Colloquium

17 March 2021

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What are we going to talk about?

1. Interdisciplinary Research in Tax Law / Philosophy
2. Positive and Normative Legal Research
3. Normative Implications of Empirical Data
4. Normative Theories in International Tax Law and Policy

1. Interdisciplinary Research in Tax Law / Philosophy

- context: publish or perish
- incentive: publish!
- problem: suboptimal input/output ratio of interdisciplinary work

2. Positive and Normative Legal Research

- factual/positive statements \neq normative statements
- **positive legal research:**
 - What is the law on a certain matter?
 - What were the considerations that led to the law being as it is?
 - How does the law on a particular matter differ internationally?
 - What are the actual consequences of the law as it is?
- **normative legal research:**
 - What should the law on a certain matter be?
 - How should the legal status quo be changed in order to make it „better“?
 - What does „better“ mean in this context?

2. Positive and Normative Legal/Tax Research

- „Naturalistic fallacy“:
normative claims cannot be inferred from positive claims.
- But: Normative claims must be informed by correct factual premises, and the reality to which these premises must conform is very complex.
- Example: Arguing that a certain design of a tax would lead to „more just“ outcomes presupposes an understanding of what those outcomes would actually be (factual, not normative question).
- Complicated in the national context, even more complicated in international tax research.

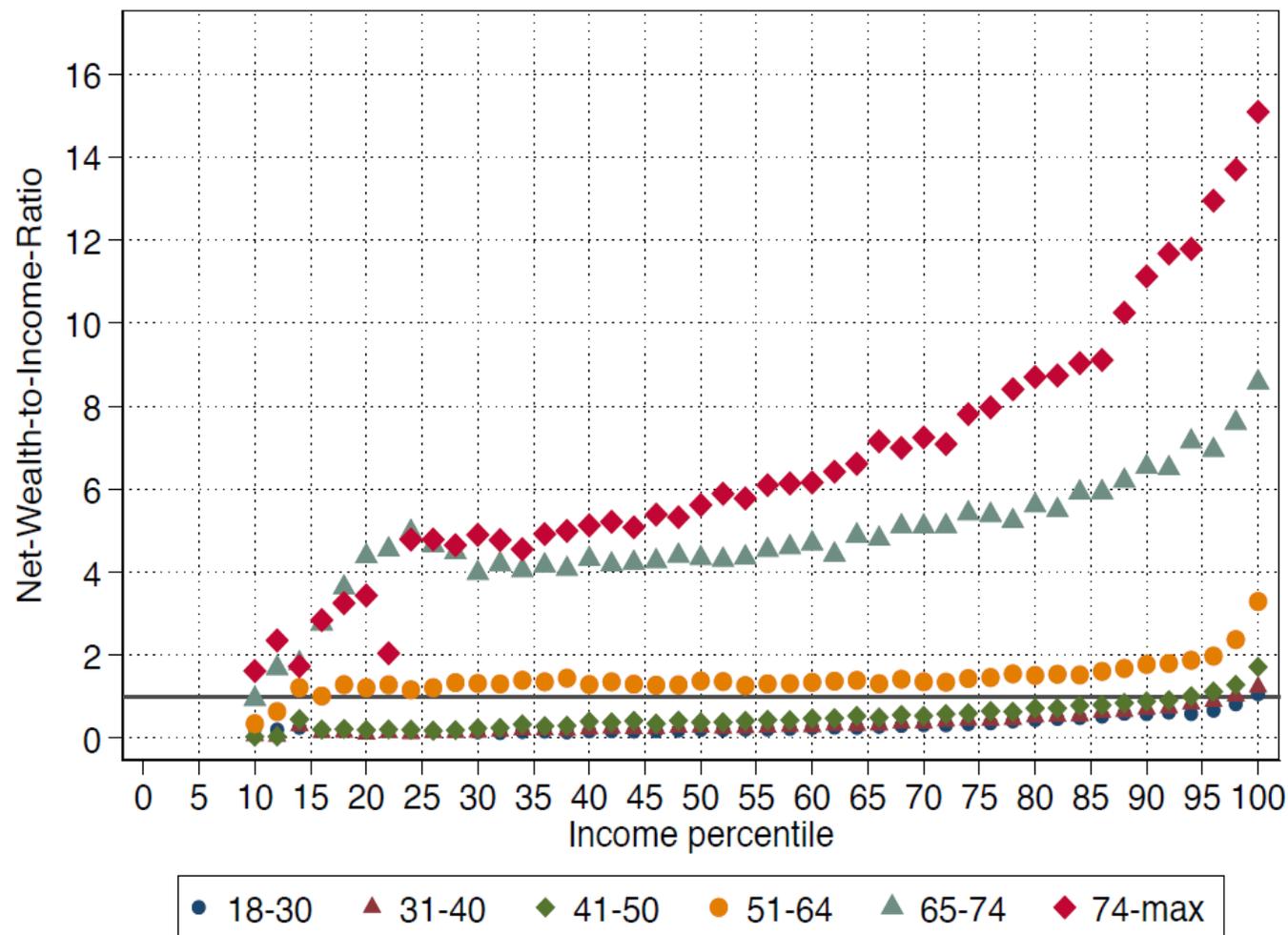
3. Normative Implications of Empirical Data

- Example: ability to pay as a design principle in national tax law
- Common claim: „**Persons with the same ability-to-pay should pay the same amount of taxes.**“
- Contains two claims:
 1. persons should be treated equally and
 2. the ability-to-pay should be the guideline
(and 3. income is in general considered to be a normatively valid measurement for the ability to pay)

3. Normative Implications of Empirical Data

- Let us introduce
 - Anna, 37 years old, no kids, annual income EUR 250'000 (belongs to the top 1%!)
 - Joe, 74 years old, no kids, annual income EUR 250'000 (belongs to the top 1%)
 - Assumption income tax rate is 20%
 - Result: Both Anna and Joe should pay EUR 50'000 income taxes
 - Conclusion: This seems to be a normatively valid result

3. Normative Implications of Empirical Data



Net-welth-to-income-ratio in Switzerland
(around 50% of the population)

Median wealth of Anna is EUR 250'000 (1:1)
Median wealth of Joe is EUR 3'500'000 (1:14)

Normative judgements are difficult with
incomplete data!

Martinez, Isabel Z. (2021). "Evidence from Unique Swiss Tax Data on the Composition and Joint Distribution of Income and Wealth", in: Measuring Distribution and Mobility of Income and Wealth. Raj Chetty, John N. Friedman, Janet C. Gornick, Barry Johnson, and Arthur Kennickell (Hrsg). NBER Conference held March 5-6, 2020. University of Chicago Press. Forthcoming

4. Normative Theories in International Tax Law and Policy

- Arm's length principle (ALP)
- Inter-company transaction have to be at arm's length
- Current solution according to Art. 7 & 9 OECD MC and the TP guidelines

- Formulary apportionment
- Currently used in some state for domestic allocation of income (e.g. US, Switzerland, but also CC(C)TB)
- Example:
- Consolidated income is shared according to labour (1/3), assets (1/3) and revenue (1/3) in the various states

4. Normative Theories in International Tax Law and Policy

- Example: „We should use formulary apportionment as a guiding principle in distributing taxing rights internationally.“
- “We should“: normative claim!
Implies that it would be somehow better. → But how?
- Efficiency
 - neutrality?
 - effective single taxation?
- Fairness/Justice
 - distributive justice between states?
 - effective single taxation?

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