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# Théorie du Droit. Principles of Legal Commoning

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# A CRITIQUE OF CRITICAL TAX POLICY CRITIQUES (OR, YOU'VE GOT TO SPEAK OUT AGAINST THE MADNESS)\*

Leo P. Martinez\*\*

## ABSTRACT

*Critical tax scholarship is not universally embraced. This is a surprising observation given that the premise underlying critical tax scholarship is simple, and—if one aspires to intellectual honesty—should be uncontroversial. The premise is that subpopulations of taxpayers are treated differently. This raises a significant impediment toward achieving distributional equity. If distributional equity is a worthy goal, then the question posed by critical tax scholars is whether the Internal Revenue Code, in whole or by operation of individual provisions, achieves that salutary purpose.*

*In this piece, I map out some of the critiques of critical tax theory. My primary aim is to encourage a more thoughtful dialogue with respect to how we view taxes and how taxes affect significant subpopulations of taxpayers. At a minimum, this article will argue that there are inherent inequities in the Code that deserve our attention. My secondary aim is that in mapping out the flaws in the critiques of critical tax theory, those who pursue critical tax theory will be amply prepared to respond to their critics.*

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\* The reference, for those who are not aging rockers (or fans of folk-rock), is from Crosby, Stills & Nash's album by the same name. David Crosby, Long Time Gone, on Crosby, Stills, & Nash (Atlantic Records 1969).

\*\* Albert Abramson Professor of Law, U.C., Hastings College of the Law. I am grateful to Professor Neil H. Buchanan of The George Washington University School of Law for his invitation to present this paper at the June 2017 Law & Society Annual Meeting in Mexico City and I am grateful for the constructive comments made by the participants in that meeting. In particular, I want to thank Professor Heather Field, Professor Michael Olivas, Dean Kevin Johnson, Dean Nancy Staudt, Professor Gregg D. Polsky, Professor Anthony C. Infanti, and Professor Alice G. Abreu for their collective wisdom in shaping this article. I am also grateful for the able research assistance of Nicole L. Bizzarri (U.C. Hastings, Class of 2019) and Karl Johnston (U.C. Hastings, Class of 2019). Finally, I am grateful for the sharp editorial eye of Andrew Palma (U.C. Hastings, Class of 2018). Despite the valuable help, errors creep in. Those are mine. A second acknowledgement is apt. My career was guided by the sage advice and friendship of Professor Miguel Angel Mendez Longoria who passed away much too soon on May 25, 2017. His voice is reflected in this piece just as it was in our joint work in this Journal in *Toward A Statistical Profile of Latinos in the Legal Profession*, 13 *La Raza L.J.* 59 (2002), which we presented at the U.C. Berkeley, School of Law in October 2001. As he always said "I am often asked for a word of advice by my Latino students and other students of color. My reply over the years has been the same. We are overrepresented only among the poor and the incarcerated. Whatever you choose to do with your law degree, just make sure that you leave the door you enter through a little wider for those who follow." My hope is that I have captured his spirit in this article.

ABSTRACT .....	49
INTRODUCTION .....	50
I. WHY THIS DESERVES OUR ATTENTION .....	51
A. Basic Justice .....	51
B. The Foundation of This Discussion .....	53
II. CRITIQUES OF CRITICAL TAX THEORY AND THEIR SHORTCOMINGS.....	55
A. All Taxpayers are Treated Fairly and Alike.....	55
B. The Progressive Rate Structure Cures All .....	57
C. Selection Bias in the Choice of Code Sections Examined .....	58
D. The Earned Income Credit Cures All.....	59
E. The Case for Disparate Impact Is Weak .....	62
F. The Code is Too Complex to Address the Problem.....	62
G. No Solutions Are Proposed.....	63
III. POSSIBLE APPROACHES .....	64
A. Is the Code Progressive Enough? .....	65
B. Shortcomings of a Progressive Tax System.....	65
C. Target Individual Code Provisions .....	66
D. Start From Scratch .....	69
CONCLUSION .....	69

## INTRODUCTION

Professor Ed McCaffery succinctly stated that “tax affects *each* of us *every* day.”<sup>1</sup> As such, it behooves us to pay attention to the effects our tax system has on our constitutional democracy.<sup>2</sup> Our tax system should not create distinct winners and losers. Furthermore, to the extent the winners and losers are racial and ethnic minorities, we have an obligation to point out the injustice. We have to be willing to recognize that a discriminatory Internal Revenue Code (Code) causes real harm.<sup>3</sup>

Critical tax scholarship does exactly that. It “fills a gap in the traditional tax discourse by providing ‘serious consideration of how the tax system exacerbates marketplace discrimination against traditionally subordinated groups.’”<sup>4</sup> The premise is that subpopulations of taxpayers are treated differently—raising the significant problem of distributional equity. If distributional equity is a worthy goal, the question posed by critical tax scholars is whether the Code or individual Code provisions achieve that salutary purpose. Given that the premise underlying critical tax scholarship is simple and—if one aspires to intellectual honesty—uncontroversial, it

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1. Edward J. McCaffery, *Tax’s Empire*, 85 GEO L.J. 71, 72 (1996).

2. Karen B. Brown, Mary L. Fellows & Bridget J. , *The Past, Present, and Future of Critical Tax Theory: A Conversation*, 10 PITT. TAX REV. 59, 65 (2012). Even “law professors view the study of tax primarily as a technical exercise and fail to appreciate the role of tax in our society.” *Id.*

3. See e.g., Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575, 577 (2001) (“Although tax systems operate less directly than civil rights systems in determining the well-being of an individual or group, an individual or group which is taxed disproportionately suffers an injury that is not unlike the injury suffered by an individual or group denied access to employment.”).

4. Anthony C. Infanti, *Tax Equity*, 55 BUFFALO L. REV. 1191, 1194 n.10 (2008).

is surprising that critical tax scholarship is not universally embraced.<sup>5</sup>

As I have noted in previous scholarship,<sup>6</sup> it was long ago questioned whether critics of the Code's fairness were too narrow and purposely taking a selective view through examination of only those Code provisions that advanced a particular point of view.<sup>7</sup> A Pavlovian metaphor neatly captured this sentiment: "Within the critical tax movement, there is a reward for examining a tax provision and finding it guilty of hidden discrimination; there is no reward for discovering a provision is innocent."<sup>8</sup>

In this piece, I map out some of the critiques of critical tax theory. My primary aim is to encourage a more thoughtful dialogue with respect to how scholars view taxes and how taxes affect subpopulations of taxpayers. My secondary aim is to amply prepare those who follow my path to respond to their critics using my map of flaws in these critiques. At a minimum, my reward, using the Pavlovian metaphor, will be to encourage scholars to be aware of the inherent inequities the Code enables.

Part I explains why the distributional equity of the Code deserves our attention. Part II discusses several criticisms of critical tax theory and their shortcomings. Lastly, Part III outlines some approaches for dealing with the Code's inequities.

## I. WHY THIS DESERVES OUR ATTENTION

At the threshold, is it a worthwhile endeavor to question the distributional equity of the Code? If the answer is yes, then why has there been so little critical examination of the criticism of critical tax theory in the last twenty years?<sup>9</sup> Both of these inquiries are explained and addressed below.

### A. *Basic Justice*

Three classic foundational pillars of tax policy are equity, efficiency, and ease of administration.<sup>10</sup> This piece focuses on the first pillar, equity. In particular, it

5. See James D. Bryce, *A Critical Evaluation of the Tax Critics*, 76 N.C. L. REV. 1687, 1688 (1998); Charles O. Galvin, *Taking Critical Tax Theory Seriously—A Comment*, 76 N.C. L. REV. 1749, 1749 (1998) ("[T]o meet the criticisms of feminists or racial groups rapidly becomes a nightmare of dilemmas that are just not resolvable."); Erik Jensen, *Critical Tax Theory and the Loneliness of the Tax Profession*, 76 N.C. L. REV. 1753, 1757 (1998) (suggesting that critical tax theory is couched in "loaded, offputting language"). One commentator captures this sentiment: "Lower-income, middle-income, or higher-income African-Americans, Hispanics, Asians, Native Americans, or other groups all struggle with the human predicament. To try to solve particular problems through the Internal Revenue Code would present a daunting challenge no lawmaker should or could take on." Galvin, *supra* note 5, at 1752.

6. Leo P. Martinez & Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective*, 22 U. FLA. J. L. & PUB. POL'Y 377, 386–87 (2011).

7. See Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1522–23 (1998).

8. *Id.* at 1578. In singling out Professor Zelenak, I mean no disrespect. On the contrary, I view his work as a must-read for any tax professor, and it is the clarity, precision, and erudition of his work that invites my foray into this largely uncharted area. Moreover, Professor Zelenak was not necessarily predisposed to dismiss critical tax scholarship, rather a major thrust of his criticism recognized the importance of the subject and his upset was his view that some of the scholarship is not carefully done. *Id.* at 1523.

9. *But see* Infanti, *supra* note 4; Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004) (Professor Anthony Infanti has been a notable exception).

10. Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J. L. & SOC. POL'Y 206, 209 (2014); Infanti, *supra* note 4, at 1192 (defining this principle as "tax equity"—stating that "we

focuses on distributional equity. While distributional equity is multi-faceted, there are a number of approaches that incorporate race and ethnicity as relevant avenues of inquiry. This type of approach is based on income level. To the extent that low-income levels correlate with a taxpayer's race or ethnicity, the appropriate inquiry is whether any tax imposed could be structured in a way as to avoid racial and ethnic disparities.

A second approach to distributional equity is based on wealth.<sup>11</sup> To the extent that low wealth levels correlate with a taxpayer's race or ethnicity, the question is whether any tax imposed could be structured to avoid racial and ethnic disparities.

Finally, distinct from income and wealth inquiries, I discuss how the complexities of race and ethnicity subtly add to the effects of tax policy on a particular subpopulation of taxpayers.<sup>12</sup>

In prior works, I expressed the thought that highlighting racial inequities in the Code is a useful task because exposure is the best avenue for promoting discourse with respect to whether the inequalities can be justified.<sup>13</sup> That view remains unchanged. It is beyond my comprehension that someone would be anything other than vigilant about inequities in the Code. As Professor Margaret Montoya aptly observes "budgets are moral documents; budgets, including tax expenditures, expose and reveal our lawmakers' values and commitments."<sup>14</sup> Another colleague, Professor

should strive for a tax system that (1) minimizes interference with economic decision making, (2) is fair, and (3) is easy to administer and comply with."); Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567-69 (1965); Leo P. Martinez, *The Problem with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413, 414 (2004). The idea of fairness as an integral part of the Code does not necessarily resonate with the American people. See Brian J. Gaines, *Flat is Fair: American Public Opinion on Taxes and the Myth of Egalitarianism*, INDEP. REV. 93, 103 (Summer 2017). In 2011, the Pew Institute conducted a "fairly representative" poll in which "the most popular choice for describing the current system was 'moderately fair' (40 percent), ahead of 'not too fair' (31 percent) and 'not fair at all' (24 percent)." *Tax System Seen as Unfair, in Need of Overhaul*, PEW RESEARCH CENTER, (December 20, 2011), <http://www.people-press.org/2011/12/20/tax-system-seen-as-unfair-in-need-of-overhaul/>.

11. "Wealth" could mean a personal residence, as well as liquid and illiquid assets, depending on the context and the applicable Code provision. See, e.g., 26 U.S.C. § 163(h)(3) (2018) (mortgage interest deduction); 26 U.S.C. § 2013 (2018) (definition of "gross estate" for estate tax purposes). It is important, however, not to conflate income/wealth level with race/ethnicity. While there is some overlap, the concepts are separate and distinct.

12. My colleague, Professor Heather Field observes that my generality ignores, for now, the caveat that subpopulations of taxpayers are not completely homogenous. For example, the class of Latino law professors might be substantially different in terms of education, income and wealth than the Latino population in general. The same observation could certainly be made with any subpopulation of taxpayers. That said, a Code provision that adversely affects Latinos is not less adverse because some Latinos are not disadvantaged. That is, while all Latino/as might not be similarly situated, neither are they similarly situated to otherwise similar white people. See Wilton Hyman, *Race, Class, and the Internal Revenue Code: A Class Based Analysis of a Black Critique of the Internal Revenue Code*, 35 CAP. U. L. REV. 119, 120 (2006) (suggesting a race-based approach is not up to the task "because it may eliminate tax provisions that benefit middle-income blacks in an effort to assist lower-income blacks."); Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771, 1774 (1998) (expressing the idea that not all members of a group will want the same treatment); Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 10 (2006) (showing that many Latinos are undocumented). Professor Francine Lipman writes that "the high effective tax rates imposed on the poorest undocumented working families relative to their less unfortunate friends and neighbors is inconsistent with fundamental tax policy." *Id.* at 8.

13. Martinez & Martinez, *supra* note 6; Leo P. Martinez, *Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration*, 20 HARV. LATINO L. REV. 101 (2017).

14. Margaret Montoya, *Threats Demand Our Action*, THE ALBUQUERQUE J., (Mar. 24 2017), <https://www.abqjournal.com/975110/threats-demand-our-action.html>, archived at <https://perma.cc/FQX9-96E9>; see also Marjorie E. Kornhauser, *Through the Looking Glass with Alice and Larry: The Nature of*

Alice Abreu expresses the same view: “[a] study of the ways in which the law entrenches the distribution of money and enhances its multiplication should be within the purview of all scholars who care about anti-subordination, because the law can entrench and abet the absence of money and thus contribute to continued subordination.”<sup>15</sup> As participants in a constitutional democracy, our voices should matter. Indeed, they must matter.

### B. *The Foundation of This Discussion*

The pioneering work of Professors Beverly Moran and William Whitford in 1996, *A Black Critique of the Internal Revenue Code*,<sup>16</sup> was the first significant article to raise the question of whether the Code was biased toward racial and ethnic minorities. They concluded that certain key Code provisions created benefits that were outside the reach of many African Americans because of socioeconomic, educational, and cultural differences.

Professors Moran’s and Whitford’s work drew most of the salient criticisms of critical tax theory in the 1998 symposium issue of the *North Carolina Law Review*.<sup>17</sup> The few criticisms since then trace their genealogy to that symposium. A few scholars followed Professor Moran’s and Whitford’s lead in questioning the Code’s effects on other groups. These scholars demonstrated that different treatment of some taxpayers based on their particular ethnicity or race was observable and demonstrable.<sup>18</sup>

Yet, since the symposium, neither the critical tax scholars nor their critics have devoted much effort to a comprehensive response to the criticism. A fair question, then, is why this has not been given more attention over the years. Why don’t those who earnestly believe that the Code is unfair as applied to certain subpopulations of taxpayers fight it? There are several plausible explanations.

First, there is an insidious aspect to the effects of the Code. As Professor Abreu has observed, as “tax systems often act invisibly, they may be even more dangerous than systems that act overtly and thus invite more immediate scrutiny and resistance.”<sup>19</sup> While certainly true, this observation is nevertheless incomplete. Tax policy—in contrast to taxes, which are measured by the total amount paid—does not receive its due. Someone predisposed to discounting critical tax theory might believe that the case has irrefutably been made,<sup>20</sup> and not have any inclination to further investigate the issue. Thus, it is worth our effort to look deeper.

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*Scholarship*, 76 N.C. L. REV. 1609 (1998) (“Taxes also tell us more generally about our society, since what we tax and how we tax reflect a multitude of philosophical, social, and political choices.”).

15. Abreu, *supra* note 3, at 576.

16. Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1997).

17. Symposium, *Critical Tax Theory: Criticism and Response*, 76 N.C. L. REV. 1519 (1998).

18. Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN AM. L.J. 117, 124 (2004); Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 466 (2000) (noting various ways in which the Internal Revenue Code disadvantages homosexuals). Professor David Brennan surveyed related literature some years ago. See David Brennan, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336, 337 n.5 (2004).

19. Abreu, *supra* note 3.

20. Anthony C. Infanti, *Tax as Urban Legend*, 24 HARV. BLACKLETTER L.J. 229 (2008) (reviewing ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006) (“‘mainstream apathy’ towards critical tax theory seems to be on as firm a footing as ever.”)).

Second, a short story about the glacial pace of racial justice regarding matters much less esoteric than tax policy might shed some light on the lack of attention to this area. On May 17, 2000—the forty-sixth anniversary of *Brown v. Board of Education*—the American Civil Liberties Union, Public Advocates, the Mexican American Legal Defense and Educational Fund, and other civil rights organizations, along with Morrison & Foerster LLP, filed a class-action lawsuit, styled *Williams v. California*, on behalf of public school students against the State of California.<sup>21</sup> The plaintiffs argued that the State and its agencies were denying thousands of students their fundamental right to an education, as provided under the California Constitution,<sup>22</sup> by failing to provide them with the basic tools necessary for that education. The State operated thousands of classrooms without enough textbooks for students; provided school facilities that were overcrowded, in disrepair, and unhealthy for students; and employed many under-trained teachers. The most affected schools were located primarily in urban areas and children who were members of racial or ethnic minorities disproportionately attended them.<sup>23</sup>

While it should strain credulity that such cases have to be brought in the twenty-first century, it serves to highlight that members of racial and ethnic minorities and their advocates are often distracted by matters more elemental than the effects of tax policy on their lives. Indeed, according to celebrated psychologist Abraham Maslow's hierarchy of needs, self-actualization cannot be reached if one is dealing with matters that impact basic survival.<sup>24</sup> In the same manner, the parents and children affected by the *Williams* litigation were concerned about receiving a basic education; taxes were not on their minds. When racial and ethnic minorities are concerned with accessing necessities of life, the tax system becomes an abstract concept, an afterthought unrelated to very present exigencies faced.<sup>25</sup> Thus, their advocates are steered in a particular direction.

Finally, a reason for the lack of research in this area is the dearth of relevant data.<sup>26</sup> The Internal Revenue Service does not collect demographic data from taxpayers.<sup>27</sup> One reason Professors Moran and Whitford began their examination with African Americans was because data was perceived to be more widely available for

21. Brooks M. Allen, *Williams v. California: A Progress Update*, ACLU FOUND. S. CAL. (2009), [http://www.decentschools.org/settlement/Williams\\_Progress\\_Update\\_May\\_2009.pdf](http://www.decentschools.org/settlement/Williams_Progress_Update_May_2009.pdf). This story is repeated in another work urging all to avoid complacency in achieving a perfect union. Leo P. Martinez, *Toward A More Perfect Union?: The Dangers of Conflating Progress and Equality*, 44 SW. L. REV. 727, 732–33 (2015).

22. CAL. CONST. art. IX, § 1.

23. Cindy Lavorato & Frank Spencer, *Back to the Future with Race-Based Mandates: A Response to Missed Opportunity*, 36 WM. MITCHELL L. REV. 1747, 1774–75 (2010).

24. Abraham H. Maslow, *A Theory of Human Motivation*, 50 PSYCH. REV. 370 (1943) (outlining a hierarchy of needs).

25. Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, "Globalization," and the New Millennium*, 4 FLA. TAX REV. 731, 741 (2000). As one scholar astutely observes, "[t]ax scholars themselves have become less interested in overall tax structure and more interested in provisions affecting women, minorities, and other discrete, identifiable groups." *Id.*

26. Knauer, *supra* note 10, at 221 n.36 (noting dearth of relevant information); J. Clifton Fleming, Jr. & Robert J. Peroni, *Can Tax Expenditure Analysis be Divorced from a Normative Tax Base: A Critique of the "New Paradigm" and its Denouement*, 30 VA. TAX REV. 135 (2010) (generally discussing dearth of information and data).

27. Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1823 (1998).

this group.<sup>28</sup> The lack of data complicates and discourages further work.

It is entirely possible that critical tax theory has reached a stage of maturity such that its precepts are a given, much as might be the case with corporate or international tax. Evidence in support of this proposition is scant. The suggestion that the debate has not advanced in any significant way since the North Carolina symposium is a powerful one.

Few pursue this area of inquiry. This, coupled with the enormity of the task, the misguided belief of most tax scholars that the Code is neutral, and a dearth of data, all suggest that there is much work to be done.<sup>29</sup> The importance of pointing out unfairness causes me to cling to this work.

## II. CRITIQUES OF CRITICAL TAX THEORY AND THEIR SHORTCOMINGS

I begin with an outline of some of the major critiques of critical tax theory and discuss how each is flawed. My goal is not necessarily to be comprehensive; rather it is to gather sufficient material to shift the burden of proof to the other side. For too long has it appeared that critical tax scholars have borne the burden of proof. This must change.

### A. *All Taxpayers are Treated Fairly and Alike*

A fundamental theory underlying the Code is that it contains a neutral set of statutes that apply equally to all taxpayers.<sup>30</sup> Under this theory, the only important distinction to the Code is income level, rather than demographic differences like race, gender, and ethnicity.<sup>31</sup>

While this position is simplistic, it is easily rebutted by Anatole France's description of law as having that "majestic quality . . . which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread."<sup>32</sup> In France's world, the rich and the poor were subject to the same limitation on their behavior—neither could steal a crust of bread. The law could be seen as fair in this regard. France's genius was to recognize that this "equal" treatment bore upon the poor more harshly than the rich.<sup>33</sup>

28. Moran & Whitford, *supra* note 16, at 754.

29. Brown, Fellows, Bridget, note 2.

30. Knauer, *supra* note 10, at 219–20 (observing but not endorsing the theory of neutrality); Schmalbeck, *supra* note 27, at 1834 ("The federal income tax is certainly facially race-neutral."); Johnson, *supra* note 12, at 1781 (underscoring that the Code provides something for everyone implicitly arguing for the offset mode); Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 *FORDHAM URB. L.J.* 1219, 1237 (2007) (some dispute that law plays some role in the creation and maintenance of wealth disparities based upon race); Brown, Fellows, Bridget, note 2, at 65 ("most nontax scholars erroneously believe tax law's technical rules chiefly are designed to achieve nonbiased and objective purposes.").

31. Knauer, *supra* note 10, at 210; *see also* Schmalbeck, *supra* note 27 (highlighting that the IRS does not collect demographic data from taxpayers; thus, complicating research in this area).

32. ANATOLE FRANCE, *LE LYS ROUGE* 49 (1894). Anatole France won the 1921 Nobel Prize for literature. For an excellent explication of historical relief mechanisms for the poor, see Larry C. Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 *CASE W. RES. L. REV.* 871, 953–65 (1995).

33. A recent article cleverly captures this sentiment. Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 *WIS. L. REV.* 491, 493 ("A [seemingly neutral tax]

In much the same way, many scholars have shown that individual Code provisions treat racial and ethnic minorities in different ways—even when controlling for income level.<sup>34</sup> Without rehashing the literature, the case that some Code

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law as implemented may incorporate or exacerbate existing gender bias.”).

34. The following is not an exhaustive listing. I use it to illustrate that there is much written about this problem. See Moran & Whitford, *supra* note 16 (addressing four concrete areas including (1) benefits granted to wealth and wealth transfers, (2) the benefits of homeownership, (3) employee benefits associated with pension plans, and (4) the different tax rate treatment of single and married persons). In another work, my daughter and I have examined five different areas. They were: the deduction for personal residence interest, the Code benefits associated with pension plans, the treatment of undocumented persons, the tax benefits provided under the Code for the pursuit of higher education, and the Earned Income Tax Credit. Martinez & Martinez, *supra* note 6, at 391–401. We examined the first two in order to compare and contrast with two of the areas touched on by Moran and Whitford. We examined the last two to test whether the suggestion that the Earned Income Tax Credit serves to even out inequities in the Code is supported. In each area, we show that Latino realities result in significant differences in the way the Code deals with the equally wealthy (or equally poor) in different racial groups.

Professor Dorothy A. Brown has been relentless in her coverage of this area. Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 343–44 (2009) (showing how federal tax subsidies for homeownership create winners and losers generally along racial and class lines); Dorothy A. Brown, *Tax Treatment of Children: Separate But Unequal*, 54 EMORY L. J. 755, 823 (2005) (showing how middle-class white children receive Earned Income Tax Credit and the Child Tax Credit benefits while low-income children who are disproportionately racial and ethnic minorities do not); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1514 (2004) (discussing how Latinos, blacks, and Asians are less likely to participate in their employer-provided tax-favored pension plans); Dorothy A. Brown, *The 535 Report: A Pathway to Fundamental Tax Reform*, 40 PEPP. L. REV. 1155 (2013) (noting that slightly more than two in ten Latino workers participate in their tax-favored pension plans or are eligible for this benefit). Professor Brown observes that less than one-third of Latino workers have jobs that come with tax-favored pension benefits; even when Latinos have jobs that do provide pension benefits, an even smaller group actually participates. *Id.* Others have reached similar conclusions. See Amy L. Cavanaugh, *Cultural Relevance: An Essential Component of Participant Education*, 42 BENEFITS L.J. 25 (2012) (broadly discussing the lack of Latino participation in tax-advantaged pension plans.).

To the extent racial and ethnic minorities have historically amassed little capital, they are ill-equipped to take advantage of Code provisions that require accumulated wealth such as the home mortgage deductions and capital investment benefits. John Edwards, *A Tax System that Embraces Fairness and Equality*, 73 SOC. RES. 431, 439 (2006) (noting that one-quarter of all Latino households had zero or negative wealth); Lipman, *supra* note 12, at 5 (noting the comparatively low rate of home ownership by Latinos means that the very real tax benefits associated with home ownership are not well distributed); Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-income Generosity*, 6 CORNELL J. L. & PUB. POL’Y 325, 339 (1997) (observing low-income taxpayers, disproportionately racial and ethnic minorities, are not well placed to take advantage of the deduction for home mortgage interest).

Others have joined the fray. Akari Atoyama-Little, *Taxing Single Mothers: A Critical Look at the Tax Code*, 88 N.Y.U. L. REV. 2146, 2169 (2013) (making the case that Latina single mothers are systematically disadvantaged by the Code); Martin Chavez, *Remittances and the Charitable Deduction: A New Approach to Encouraging Development in Mexico*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 565, 593–94 (2011) (recognizing the disparate effect of seemingly neutral tax legislation and arguing for use of the charitable tax deduction to encourage increased spending of collective remittances by Latino immigrants in order to further benefit specific communities within and without the United States); Uy, *supra* note 18 (discussing treatment of Asians under the Code); Infanti, *supra* note 9 (broadly outlining how gays are treated differently under the Code); Cain, *supra* note 18 (noting various ways in which the Internal Revenue Code disadvantages gays and gay couples); Schmalbeck, *supra* note 27 (“tentatively persuaded that there really may be important features of the federal income tax that raise horizontal equity concerns.”); Crawford & Spivack, *supra* note 33 (analyzing the uneven application of “neutral” state tax law on women); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (advocating taxation of imputed income for work performed in the home as a means of recognizing the value of women’s labor); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2006–08 (1996) (outlining proposals for feminist tax reform). Professor David Brennan neatly surveyed related literature extant in the year 2004 and before. Brennan, *supra* note 18.

Finally, Professor Francine Lipman has explored the ill-treatment, under the Code, of the

provisions are skewed against racial and ethnic minorities is a strong one.

In developing a taxonomy of the criticism, I realized that the critics of critical tax theory do not directly disagree or *explicitly* refute the idea that subpopulations of taxpayers are treated differently.<sup>35</sup> Certainly, no one seems to deny that subpopulations *are* disparately affected.<sup>36</sup> Instead, the critics take issue with one or more aspects that are peripheral to this basic proposition. For instance, some criticisms do not focus on the underlying inequities of the Code, but rather on the rigor of the scholarship. Some critics believe critical tax scholars are over eager to accuse the Code of hostility, that critical tax scholars selectively choose Code provisions that are disadvantageous to subpopulations, and that critical tax scholars fail to think through proposed solutions.<sup>37</sup> These and other criticisms are outlined below.

### B. *The Progressive Rate Structure Cures All*

A small refinement of the basic argument about tax neutrality posits that low-income taxpayers—a proxy for ethnic and racial minorities—are beneficiaries of the low tax rates characteristic of a progressive tax structure.<sup>38</sup>

There are a number of problems with this view. First, it ignores the fact that even when controlling for income level, subpopulations of taxpayers experience different levels of taxation that correlate with race and ethnicity.<sup>39</sup>

Second, it ignores the fact that those who occupy the bottom rungs of the income ladder are unable to exploit the many Code provisions available only to those who have accumulated wealth.<sup>40</sup> These Code provisions range from capital gains to accelerated cost recovery to mortgage interest deductions. Indeed, some have suggested that the Code is complicit in an ever-increasing income gap between rich and poor.<sup>41</sup>

Third, the proper or “fair” rate of progressive taxation is difficult to fix. A 100 percent rate followed by a distribution could be the extreme. We have come close with ninety percent maximum marginal tax rates and the republic was able to survive.<sup>42</sup> As recently as 1986, the United States had seventy percent maximum

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undocumented who are primarily Latinos. Lipman, *supra* note 12, at 5 (noting that undocumented immigrants pay billions each year in excise, property, and payroll taxes, and that hundreds of thousands more file state and federal tax returns); Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M.L. Rev. 219 (1991) (concluding undocumented immigrants pay more in taxes than they cost in social services); Luis Larrea, *Taxation Inequality and Undocumented Immigrants*, 5 LAW RAZA 1 (2013) (undocumented immigrants, who are overwhelmingly Latino, pay a disproportionate amount of taxes compare to the benefits they receive.).

35. See Nancy C. Staudt, *Tax Theory and “Mere Critique:” A Reply to Professor Zelenak*, 76 N.C.L. REV. 1581, 1584 (1998) (noting that Professor Zelenak does not deny that a problem exists).

36. *Id.*; see also Zelenak, *supra* note 7, at 1566–67.

37. Zelenak, *supra* note 7; see also, Eric Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39, 108 (1996) (even the underlying goal of “fairness” is not susceptible to simple formulations because fairness can mean different things to different people.).

38. Bryce, *supra* note 5; see also Schmalbeck, *supra* note 27, at 1819 (describing an initial response to this phenomenon).

39. Moran & Whitford, *supra* note 16; Uy, *supra* note 18; Cain, *supra* note 18.

40. Livingston, *supra* note 25 (progressivity is less effective at assisting the very poor because many poor people do not pay income taxes at all.).

41. David Wessel, *How much does the tax code reduce inequality?*, TAX POL’Y CTR. (2015) (answer—not much).

42. Martin J. McMahon, Jr. and Alice G. Abreu, *Winner-Take-All Markets: Easing the Case*

marginal tax rates. Currently, the tax rate in the United States is 39.6 percent.<sup>43</sup> Is one rate of taxation any better or worse than the other? Maybe the conclusion is that progressive taxation is too blunt an instrument in order to achieve greater tax equity across racial and ethnic lines.

Finally, tax rates may not be progressive at all. At least one researcher has found that the bottom twenty percent of income earners pay an effective tax rate of twenty-seven percent while the top twenty percent of income earners pay an effective tax rate of nine percent.<sup>44</sup>

### C. Selection Bias in the Choice of Code Sections Examined

Critics openly question critical tax theory's focus on Code provisions that, they argue, advance a particular point of view.<sup>45</sup> Essentially, critical tax scholars are accused of deliberately cherry-picking Code sections that feed into a favorable narrative. A subtext of this argument is that critiques of the Code themselves uncritically assume that the income tax is a neutral baseline and that the Code provisions that disadvantage one racial group might be offset by provisions that advantage that same group.<sup>46</sup>

The first response is a methodological retort. Professor William Whitford, the coauthor of *A Black Critique of the Internal Revenue Code*,<sup>47</sup> refutes the idea that he should have resorted to a random selection of Code provisions for his study.<sup>48</sup> He argued that the study was an initially exploratory one in which "one would never randomly select the Code provisions to be studied. There is too great a risk that a random method would select an inconsequential section, or one about which it is impossible to obtain relevant data, and the goal of testing our method would not be achieved."<sup>49</sup> He deliberately chose Code provisions for which data was available.<sup>50</sup> Not only is this approach methodologically defensible, but it also reflects common sense.

My response is more nuanced. First, a determination of unfairness does not necessarily require a neutral baseline.<sup>51</sup> For example, no one would disagree with the

for *Progressive Taxation*, 4 FLA. TAX REV. 1, 12 (1998) ("[I]n 1965 the top rate was reduced to 70 percent as part of a general tax cut, and 1969 the top rate on 'earned income' was reduced to 50 percent.").

43. I.R.C. § 1 (imposing the income tax). The Tax Cuts and Jobs Act, signed into law by President Donald Trump in December 2017 will reduce the top rate to thirty-seven percent, <https://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>.

44. Bret N. Bogenschneider, *Critical Legal Studies and Regressive Taxation in the United States*, 10 HARV. UNBOUND J. OF LEGAL L. 98 (2015).

45. Zelenak, *supra* note 7.

46. *Id.*

47. Moran & Whitford, *supra* note 16.

48. William C. Whitford, *Remarkable*, 76 N.C. L. REV. 1639, 1645 (1998).

49. *Id.*

50. *Id.*

51. Martinez & Martinez, *supra* note 6, at 387. In commenting on the prior work, Professor Leandra Lederman raised the question of why it isn't the overall result that matters. Her comments are worth repeating:

For example, if Code sec. X provides that women have \$500 of extra gross income, but Code sec. Y allows only women a \$500 above-the-line deduction, presumably Code sec. X is not unfair, because its result is undone by sec. Y. It would be misleading to look just at sec. X in the abstract. My example is of course artificial. I

notion that it would be unfair to tax women based on a rate schedule that is ten percent higher than the rate schedule for men, regardless of whether the income tax base is neutral. In the same way, a similar reaction might follow a more nuanced examination of certain Code provisions that are overall neutral but benefit or burden specific groups over others.

Second, it is possible, though highly unlikely, that Code provisions disfavoring one group over another may mask a grand design so that these Code provisions are balanced out by provisions that favor the same, previously disadvantaged, ethnic group. The rationale would be that the different treatments even out in the wash as a sort of rudimentary justice. Assuming a random distribution of favorable and unfavorable Code provisions, this idea may be even demonstrable. The criticism, then, is that some scholars (including me) have spent their efforts on the Code provisions that are unfavorable to racial and ethnic minorities while ignoring more favorable.<sup>52</sup>

My intuition, however, is that the distribution of favorable and unfavorable Code provisions is not random or, perhaps more accurately, does not counterbalance Code inequities. However attractive the idea might seem—certainly no articulation of this idea has found a voice in the enactment of any Code provision—I have left to others the task of showing that this intuition is not well-founded. So far, the challenge has gone unanswered.

Despite the foregoing, it might be possible to show at a macro-level the maldistribution of the tax benefits provided by the Code. A tax expenditure analysis of the Code might reveal the degree of maldistribution. I address this below in the discussion of the Earned Income Tax Credit.

#### D. *The Earned Income Credit Cures All*

The Earned Income Tax Credit (EITC), which provides for a tax refund (even if no tax is paid or owed) to low-income taxpayers, is often cited by critical tax theory opponents as carrying the weight of balancing the Code provisions unfavorable to racial and ethnic minorities.<sup>53</sup> At the outset, it is worth questioning whether the EITC

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think a good rebuttal is that absent a situation where one Code section neatly undoes the effect of another, looking at the effects of the Code overall still might have a disproportionate impact. For example, if some Code sections favor married couples and others favor unmarried couples, is the Code neutral as to marriage? Not necessarily. It depends on the amounts of benefits and burdens, as well as whether subsets of each group are disproportionately benefitted [sic] or are burdened. For example, it could be that all the marriage penalty provisions apply to elderly couples, so the Code encourages marriage only late in life. The former would not be neutral as to marriage for any couple, even if, overall, the Code penalized some couples by the same amount it benefited other couples.

52. See Moran & Whitford, *supra* note 16.

53. Zelenak, *supra* note 7, at 1568 (“It seems likely the benefits [of the EITC] go disproportionately to blacks.”); Bryce, *supra* note 5, at 1695–96 (“Economists have estimated that . . . 24 percent of earned income tax credit recipients are black . . . because they are less likely to be married and less likely to be affected by the phase-out.”); Schmalbeck, *supra* note 27 (mentioning that the EITC favors black taxpayers); Johnson, *supra* note 12, at 1781 (“[T]he less affluent (and disproportionately black) have less in home ownership tax benefits, [but] they do have . . . a substantial refundable earned income credit.”).

The undocumented fare poorly under the EITC. They do not qualify for the EITC and one undocumented family member taints the entire household. I.R.C. § 32(c)(1)(E) (requiring a taxpayer identification number in order to be eligible); see Francine J. Lipman, *Bearing Witness to Economic*

offsets discriminatory Code provisions before beginning with a back-of-the-envelope analysis of the tax expenditure budget. If the EITC functions to offset discriminatory Code provisions, then the Code, indeed, contains discriminatory provisions. Whether the EITC functions in this way or it is a legitimate undertaking is another matter.

One way to analyze the relative fairness of the EITC is to examine tax expenditures. Tax expenditures are those benefits provided by the Code which reduce a taxpayer's tax liability "[b]y offering tax breaks to taxpayers who engage in favored activities, [which] Congress 'spends' by for[e?]going collection of taxes that otherwise would be due."<sup>54</sup> As many scholars have observed, tax expenditures are effectively direct spending programs that encourage certain behaviors, such as charitable donations.<sup>55</sup> Therefore, it is instructive to see how the tax expenditures are allocated among taxpayers.

According to the Tax Policy Center, a nonpartisan tax policy think tank, the thirteen largest tax expenditures will total approximately \$1.2 trillion in Fiscal Year 2018.<sup>56</sup> The EITC is eighth on the list at \$63.6 billion in Fiscal Year 2018. The table below shows the entire picture:

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*Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Working Poor*, 7 NEV. L.J. 736, 743–46 (2007) (discussing the EITC and the undocumented).

54. Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 981 (2011).

55. Gregg D. Polsky, *Rationally Cutting Tax Expenditures*, 50 U. LOUISVILLE L. REV. 643, 644 (2012); Mason, *supra* note 54, at 981–87.

56. URBAN INST. & BROOKINGS INST. TAX POL'Y CTR., BRIEFING BOOK 90 (2017),

[http://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc-briefing-book\\_1.pdf](http://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc-briefing-book_1.pdf) (In Fiscal Year 2018 these expenditures include: \$235.8 billion for the exclusion of employers' contributions for employees' medical insurance premiums and medical care; \$112.7 billion for the exclusion of net imputed rental income; \$68.1 billion for the home-mortgage interest deduction; \$63.3 billion for non-business property taxes as part of the deductibility of non-business state and local taxes; \$48.5 billion to the exemption of the first \$500,000 of capital gains for couples (\$250,000 for singles) on the sale of principal residences.).

Rank	Tax Expenditure	Billions (\$)
1	Exclusion of employer contributions for medical insurance premiums and medical care	235.8
2	Exclusion of net imputed rental income	112.7
3	Deferral of income from controlled foreign corporations (normal tax method)	112.6
4	Capital gains (except agriculture, timber, iron ore, and coal)	108.6
5	Defined benefit employer plans	71.0
6	Defined contribution employer plans	69.4
7	Mortgage interest expense on owner-occupied residences	68.1
8	Earned income tax credit	63.6
9	Deductibility of non-business state and local taxes other than on owner-occupied homes	63.3
10	Child credit	54.3
11	Step-up basis of capital gains at death	54.1
12	Deductibility of charitable contributions, other than education and health	51.2
13	Accelerated depreciation of machinery and equipment (normal tax method)	50.3

Here, several observations can be made. First, although many have examined the discriminatory effects of specific Code provisions, to suggest that these effects are offset by the EITC, which accounts for only 5.3 percent of the total tax expenditure budget (the \$63.6 billion EITC is 5.3 percent of the \$1.2 trillion tax expenditure budget of the top thirteen items), is misplaced. Indeed, my own prior examination of Code provisions focused on two items in the Fiscal Year 2018 tax expenditure budget: pension plans that comprise \$140.4 billion (\$69.4 billion in defined contribution plans plus \$71 billion in defined benefit plans) and the mortgage interest deduction totaling \$68.9 billion. My other two areas did not make the top thirteen tax expenditures.<sup>57</sup> The \$213.3 billion total (pension plans plus mortgage interest) that appears to discriminate against racial and ethnic minorities is offset, in the critic's view by the \$63.6 billion which is represented by the EITC. On an order-of-magnitude basis, this does not seem a fair criticism. But as I show below, diving deeper into the data shows that the picture is far worse.

Second, Professor Dorothy Brown has observed that "less than half of EITC-eligible taxpayers are racial or ethnic minorities."<sup>58</sup> The result is that the so-called balancing of Code provisions is attenuated further. It is thus at best questionable whether the EITC could even begin to accomplish distributional equity by balancing

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57. *Id.* I did not examine the remaining items in the top thirteen. None, save the child care credit, seems likely to make up for the differences caused by pension plans or the mortgage interest deduction. Other items on the list, such as capital gains (\$108.6 billion) or deferral of income from foreign controlled corporations (\$112.6 billion), seem likely candidates to exacerbate the problem.

58. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 821. Professor Brown further notes that "less than 20% of EITC eligible taxpayers are Latino." *Id.* Even the most ardent critics of critical tax theory concede that blacks, among others, receive less than a majority of the benefits under the EITC. See Bryce, *supra* note 5, at 1695 (estimating blacks' share at twenty-four percent).

off the discriminatory effects of other Code provisions.<sup>59</sup> The EITC as it currently stands is a poor proxy for a solution that does not even begin to solve the tax disparity problem which disproportionately affects minorities.

Third, and as if to rub salt on an open wound, one researcher notes that EITC recipients are subjected to approximately 461,000 IRS audits per year.<sup>60</sup> This suggests that resorting to the EITC is somewhat less than systematically encouraged and undermines the argument that Code provisions can in effect balance out in the long run. At best, the EITC is an inadequate offset of the discriminatory effects of other Code provisions, and at worst, the EITC is a cruel hoax.

Accordingly, the theory that the EITC helps racial minorities receive the tax benefits they need should be questioned. We are entitled to a Code that is, if not perfectly neutral, at least as neutral as possible. If this is a defensible view, each Code provision should be able to stand on its own—subject to a test of whether it is equitable or not. The notion that one Code provision should exist to offset the discriminatory effects of another Code provision should offend us all. In short, the EITC although equitable in theory, fails in practice. Furthermore, implicit within this argument is tacit admission that, at least with respect to certain Code provisions, discriminatory effects actually exist. Pronouncements that suggest that the EITC or any other Code provision offset the harmful effects of other Code provisions are simply not defensible. The purported offset is not demonstrable as a matter of substance and process.

#### *E. The Case for Disparate Impact Is Weak*

Professor Richard Schmalbeck, a respected tax scholar, seemed to question whether the disparate impact of the Code was real or not.<sup>61</sup> The title of his work, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, might lead the casual reader to conclude that the case for disparate impact is weak. Nonetheless, on closer examination, it becomes clear that Schmalbeck's question is merely rhetorical. Indeed, Schmalbeck acknowledges that taxpayers, including those in subpopulations consisting of racial and ethnic minorities "are entitled to the benefits of horizontally equitable tax laws."<sup>62</sup> Schmalbeck understands that subpopulations of taxpayers can differ in important respects and, as a consequence, might be treated differently.<sup>63</sup> He concludes that the case regarding disparate impact and the Code has been made, even if it could have been made better. His work serves to highlight the tacit recognition that there is a problem that is largely unaddressed.

#### *F. The Code is Too Complex to Address the Problem*

Professor Charles O. Galvin has noted "[l]ower-income, middle-income, or higher-income African Americans, Hispanics, Asians, Native Americans, or other groups all struggle with the human predicament. To try to solve particular problems through the Internal Revenue Code would present a daunting challenge no lawmaker

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59. Brown, Fellows, Bridget, note 2, at 64 (observing the lack of support for the claims that the EITC benefits blacks disproportionately). This view further homogenizes minority groups in unhelpful and disparaging ways by assuming that everyone in minority groups is poor enough to be EITC eligible.

60. Bogenschneider, *supra* note 44, at 99.

61. Schmalbeck, *supra* note 27, at 1817.

62. *Id.* at 1821.

63. *Id.* at 1817.

should or could take on.”<sup>64</sup> Galvin is not alone in suggesting that the already complex Code presents a formidable challenge to address racial and ethnic bias.<sup>65</sup>

However, my reaction is different. Although tax policy is difficult, I concede that even the apparently simple taxation of a married couple raises difficult issues. That said, why should we not want to improve the Code to the point that blatant inequities are addressed? The problems pointed out by various scholars are not difficult to track.<sup>66</sup> Yet there is a lack of initiative to deal with the problems in even the most rudimentary way. This must change. These results should be as appalling to policymakers as they are to those who are shortchanged.

A core tenet of tax policy is that taxes have to be perceived as fair. To the extent taxes are not fair we invite chaos and noncompliance. Lawmakers must have the initiative and the will to address problems. Professor Anthony C. Infanti has written that “[a]nyone who devotes herself to the task of furthering the equity of our tax system must, by definition, be engaged in the noble task of making that system fairer—of ensuring that all taxpayers are treated in an impartial and even-handed manner.”<sup>67</sup> In short, we should approach our system of taxation in a way that reflects our better selves working to create an equitable community.

#### G. No Solutions Are Proposed

The final criticism is the easiest to deal with because it has been addressed. The criticism is that because the critical tax scholars do not always propose solutions, the scholarship is not worthy of attention or at least merits diminished attention.<sup>68</sup> Notwithstanding, this criticism misapprehends the very nature of scholarly inquiry.

As Professor Marjorie E. Kornhauser has noted, while:

[O]ne role of scholarship is to propose solutions to problems, . . . it is not the only one. There are many other valid purposes of scholarship, such as describing what exists, exploring historical origins, and identifying problems. Consequently, a blanket criticism

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64. Galvin, *supra* note 5, at 1753 (advocating for a consumption-type tax). Professor Anthony Infanti’s retort to Professor Galvin dripped with sarcasm. He wrote:

To paraphrase Galvin’s article: Taking the reality of invidious discrimination into account makes tax policy analysis far too complicated and messy. Tax policy analysis is much simpler and tidier when the possibility of discrimination is flatly ignored, when we assume that the real and ideal are one and the same, and when we focus only on the economic aspects of taxation with which we are far more comfortable.

Infanti, *supra* note 4, at 1220.

65. Johnson, *supra* note 12, at 1783–84.

66. This probably overstates the ease with which ferreting out discriminatory Code provisions can be done. Schmalbeck, *supra* note 27, at 1823 (the apparent racial blindness of the Code may make it difficult to discover horizontal discrimination in tax returns). Perhaps this explains the “selection bias” noted by the critics. What is viewed as “selection bias” may very well reflect a focus on those Code provisions that reveal, in connection with other available data, basic discrimination.

67. Infanti, *supra* note 4, at 1199.

68. See, e.g., Zelenak, *supra* note 7, at 1573 (in response to Moran and Whitford, Professor Zelenak criticized proposed solutions because “[t]hey are described only in broad outline, and their implications are not carefully explored.”); Johnson, *supra* note 12, at 1771–72 (arguing that to be fully persuasive a critical view of the Code should show a solution exists).

that the scholarship fails to offer solutions indicates a far too narrow view of scholarship.<sup>69</sup>

An immediate solution is not required to advance an idea. For example, science is rife with circumstances in which researchers posed a problem whose solution was not forthcoming for decades.<sup>70</sup> Even so, a problem discovered or illuminated does not magically disappear if there is no answer. Often the discovery of the problem is the catalyst for an entire body of research and subsequent knowledge. Here, any contribution to the tax analysis scholarship exposes the vaunted neutrality of the Code for what it is.<sup>71</sup>

Similarly, a solution that is incomplete or inadequate in the eyes of the critic does not justify ignoring the problem.<sup>72</sup> Solutions to knotty issues do not always arise immediately and solutions, like many Code provisions, are effectively works in progress.<sup>73</sup> To suggest that scholarship merits attention only when the scholarship produces fully functioning solutions sets the bar too high and also misperceives the fundamental nature of scholarly inquiry.<sup>74</sup> The natural response to this criticism is that any information is useful information, and even absent a workable solution, the study is worthwhile and can promote the finding of other solutions. In analyzing this, one is tempted to agree with the suggestions made by some that the perceived threat of critical tax scholars seems to stifle objectivity and intellectual honesty.<sup>75</sup>

### III. POSSIBLE APPROACHES

With the preceding in mind, it is a daunting task to discuss potential solutions. While I might be accused of leaving stones unturned and tempt a critic to discount this article, I am more hopeful that outlining possible approaches will lead to more examination of the topic. For example, Professor Zelenak has suggested that some

69. Kornhauser, *supra* note 14, at 1622.

70. For example, the mathematics that predicted the possibility of coherent light predated the laser by many years. Emil Wolf, *Early Days of Coherence Theory and the First Rochester Conference on Coherence* at 159, in *A JEWEL IN THE CROWN: ESSAYS IN HONOR OF THE 75TH ANNIVERSARY OF THE INSTITUTE OF OPTICS* (Carlos Stroud ed. 2004); see JOAN LISA BROMBERG, *THE LASER IN AMERICA, 1950–1970* (1991); NICK TAYLOR, *LASER: THE INVENTOR, THE NOBEL LAUREATE, AND THE THIRTY-YEAR PATENT WAR* (2000).

71. Kornhauser, *supra* note 14, at 1626.

72. Zelenak, *supra* note 7, at 1772 (arguing that a “reasonable” solution should exist).

73. Kornhauser, *supra* note 14 (solutions might be in their “infancy.”). Even one who advocates for solutions concedes that identifying a problem is a worthy task. Johnson, *supra* note 12, at 1771 (“Something similar may be said of critical tax studies. Such studies have shown that the Internal Revenue Code as a whole, or significant features of it, disadvantage—intentionally or unintentionally—groups historically oppressed or ignored by American society. Some of these arguments have had force, but many, have failed to present a persuasive case. However, that does not mean that even those efforts have been wasted. Like alchemy, those efforts have been worthwhile because they have hit unintended but still important targets.”).

74. Staudt, *supra* note 35 (noting the irony that the critics of critical tax theory also fail to advance a solution).

75. Brown, *supra* note 34, at 365 (2009) (an incisive and biting commentary about those whose otherwise sound judgment appears clouded when issues of race arise); Brown, Fellows, Bridget, note 2, at 64 (“This type of unsubstantiated claim that a genre of scholarship lacks rigor, while offering no independent authority other than self-proclaimed assertions about probability or suspicion, suggests that the matters uncovered by critical tax analysis evoke a visceral reaction that in some cases blocks intellectual engagement.”).

solutions to discriminatory Code provisions go too far, in his judgment, amounting to more a “surrender than a solution.”<sup>76</sup> That said, he is willing to consider retention of the Code provision but combining it with “education and exhortation” to encourage the use of the Code by those otherwise adversely affected.<sup>77</sup> His approach is one I have embraced in the past,<sup>78</sup> and one that I will continue to embrace.

Going forward, the challenge is how to integrate the critiques in thinking about the future of tax law, with a variety of possible approaches. What follows is the beginning of a necessary foundation for future analysis.

#### A. *Is the Code Progressive Enough?*

The answer to the question of whether the Code is progressive enough, which is to ask whether it is fair enough, raises the question of what precisely we consider fair. Not only is it difficult to determine what is fair, but it is also plain that what is “fair” means different things to different people.<sup>79</sup> A sense of the dilemma is given by the diversity of opinion on the subject. On one hand, some suggest that the Code is too progressive.<sup>80</sup> Others see that a progressive tax system “may be necessary in order to preserve [a dynamic, merit-based society].”<sup>81</sup> Even apart from perceptions of fairness, the rates we fix to achieve a fair system are far from certain. As I suggested above, the very fact that maximum tax rates have ranged from ninety percent to 39.6 percent in the course of my professional career, reflects the indeterminacy of fairness.

While my views align with the idea that progressive taxation is a good thing, I am beginning to harbor doubts. Certainly, progressive taxation seems to have done little to stem the increase in income inequality.<sup>82</sup> Or, perhaps it has been instrumental in slowing the growth of income inequality.<sup>83</sup> While many members of the tax community would disagree with me, progressive taxation has its limitations in achieving fundamental tax fairness.

#### B. *Shortcomings of a Progressive Tax System*

There are many reasons that a progressive tax system fails. First, a

76. Zelenak, *supra* note 7, at 1571.

77. *Id.* at 1572.

78. Martinez & Martinez, *supra* note 6.

79. Zolt, *supra* note 37; *see also* Martinez & Martinez, *supra* note 6.

80. Howard Gleckman, *Is It Time To Rethink the Scale and Progressivity of the Tax System?*, TAX POL’Y CTR. (2016) (asking “[i]s the US [sic] tax code both too small and too progressive?” and citing the work of Alan Viard and Sita Nataraj Slavov of the American Enterprise Institute).

81. Livingston, *supra* note 25, at 50. (“On a rhetorical level, scholars must make a more candid and forceful case for progressivity as a means of redistribution, emphasizing the unfairness of today’s “winner-take-all” society and the role of irrelevant factors such as race, gender, and immigrant status in pretax income distributions.”).

82. Drew Desilver, *U.S. income inequality, on rise for decades, is now highest since 1928*, PEW RES. CTR. (Dec. 5, 2013); Bruce Drake, *Americans see widening income gap*, PEW RESEARCH CTR. (Dec. 5, 2013), <http://www.pewresearch.org/fact-tank/2013/12/05/americans-see-growing-gap-between-rich-and-poor/>.

83. One prominent scholar notes “Although taxes cannot level up distributional inequities, proper fiscal design can avoid increasing inequality. The main direct distributive role of taxes, however, is to level down.” Richard M. Bird & Eric M. Zolt, *Tax Policy in an Era of Rising Inequality: Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. Rev. 1627, 1682 (2005).

progressive tax system does not address the circumstances of the very poor. Professor Michael Livingston precisely captures the problem:

Progressivity is a good vehicle for redistributing income between the upper and middle segments of society, but is generally less effective at assisting the very poor. Many poor people do not pay income taxes at all, and for those that do, sales and payroll levies often remain more important than the income tax. Progressive (i.e., higher) taxes on the wealthy might in theory be used to fund direct spending programs that benefit poor individuals, but this depends on numerous political assumptions, and in the current political environment it is unlikely that this would happen.<sup>84</sup>

Second, progressivity is an incredibly crude and ineffective tool for ameliorating the racial effects of the tax system. A progressive tax system is insufficiently nuanced to address the different circumstances faced by ethnic and racial minorities. I and others have argued that a horizontal equity approach in this instance does not work well. That is because, even adjusting for incomes, racial and ethnic minorities are not similarly situated.<sup>85</sup> They vary in terms of basic wealth and educational accomplishment—factors that significantly affect the ability to exploit seemingly neutral Code provisions. Progressive taxation (or horizontal equity), it seems, may not be up to the task of addressing the situations of racial and ethnic minorities.

### C. *Target Individual Code Provisions*

Another approach would be the “testing” of individual Code provisions for discriminatory effect. A threshold question is whether it is reasonable to focus exclusively on one piece of the puzzle to the exclusion of all of its context without being myopic. I maintain that this avenue is worth pursuing for several reasons. First, it is a manageable task one can undertake systematically. Taking on the Code as a cohesive whole would be a Herculean feat. Second, a holistic approach seems to place a nearly impossible burden of proof of showing the Code contains discriminatory provisions on those of us who claim the Code is not neutral—in addition to being inherently suspect. Third, no one has yet shown that the offset theory is indeed true. Finally, the symbolism of beginning in a systematic way, as outlined below, would be powerful if it yielded results as I suspect.

I recognize that this might not be an easy task. One way to begin could be to

84. Livingston, *supra* note 25, at 741.

85. Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 957 (1997) (“Horizontal fairness, however, can play only a small, almost insignificant, role in tax policy, while the concept of vertical equity is key for tax policymaking and has been at the center of controversy for over a century.”); Martinez & Martinez, *supra* note 6, at 426 (discussing the limits of being “similarly situated”); Livingston, *supra* note 25, at 758 (“[C]ritical tax scholarship is more about vertical than horizontal equity, so that attacks by traditional scholars miss the point to a considerable degree. The argument is not that women or minorities are treated differently from similarly situated white men, but that they are not similarly situated in the first place because of the historic real-world disadvantages that adhere to these groups.”). *Id.* at 758 (opining that the starting point for critical scholarship is the dissimilarity of status between racial and gender groups (citing Michael A. Livingston, *Radical Scholars, Conservative Field: Putting “Critical Tax Scholarship” in Perspective*, 76 N.C. L. REV. 1791, 1797 (1988))).

prioritize the effort in terms of tax expenditure amount. The task would start with the largest tax expenditures, specifically with the exclusion of employer contributions for medical insurance premiums and medical care. To the extent discriminatory tax provisions are represented in the top tax expenditures, this approach would have two major advantages. First, on a simple dollar basis, it would yield the greatest immediate benefit. Second, it would have the virtue of avoiding the criticism that Code selection was occurring in a way that only examines problematic provisions—by selecting Code provisions based on the tax expenditure, the perceived selection bias is eliminated.

Within the tax legislative process, it should not be a difficult matter to undertake this kind of review. There are tax experts on staff in both the House Committee on Ways and Means and the Senate Committee on Finance.<sup>86</sup> Similarly the Joint Committee on Taxation (JCT) has a professional staff of attorneys, accountants, and economists whose jobs are to assist members of Congress on tax legislation.<sup>87</sup> Another option could be to resort to the type of regulatory oversight performed by the Office of Regulatory Affairs (OIRA) that does cost-benefit analysis of all regulations.<sup>88</sup>

Yet another path is to emulate our Northern neighbors—the Canadian government undertakes a comprehensive tax expenditure analysis of its tax code.<sup>89</sup> Among the discernible objectives of their analysis, several are centered around the fairness of the Canadian tax system.<sup>90</sup> These include: promoting fairness of the tax system, ensuring neutral tax treatment across similarly situated taxpayers, and providing relief for special circumstances.<sup>91</sup> This kind of undertaking seeks to enhance transparency, which in turn seems to be one of the motivations of the publicly available tax expenditure information in the United States.<sup>92</sup> The main point is that there are mechanisms that could either be slightly augmented or created to serve as an oversight function. It should not be a difficult matter to test for any discriminatory effect. This is not a novel concept.<sup>93</sup>

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86. Leo P. Martinez, *Structural Impediments to Tax Reform: The Environment as Case Study*, 14 FLA. TAX REV. 45, 52 (2013).

87. *Id.* “The JCT is a nonpartisan Congressional committee established under the 1926 Revenue Act that alternates chairmanship between the House Ways and Means Committee and Senate Finance Committee. The JCT prepares revenue estimates for all tax legislation considered in Congress, analyzes (and sometimes even drafts the statutory language) of tax proposals, investigates relevant issues in the federal tax system, and reports back to each committee the results of their findings. Additionally, congressional committees can seek input from relevant departments and agencies, including the Government Accountability Office, who can provide a report on the efficiency or desirability of enacting a given tax bill into law.” *Id.*

88. *Id.* at 53.

89. REPORT ON FEDERAL TAX EXPENDITURES—CONCEPTS, ESTIMATES AND EVALUATIONS 2017, <https://www.fin.gc.ca/taxexp-depfisc/2017/taxexp-depfisc17-eng.pdf>. Canada is not alone in taking this approach. See Daniel Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 188 (2004) (identifying 16 countries as of 1996).

90. *Id.* at part 3.

91. *Id.*

92. Lisa Philipps, *Globalization of Tax Expenditure Reporting: Transplanting Transparency in India and the Global South*, at 2–3 (2012), <http://digitalcommons.osgoode.yorku.ca/clpe/34/>; Professor Philipps cites scholarship describing similar use of tax expenditure information in the United States. *Id.* at 3 n.11.

93. Whitford, *supra* note 48, at 1644 (“[t]ax policy, like other public policy . . . should take racial effects into account in deciding on normative ideals.”); Polsky, *supra* note 55, at (suggesting distributional tax expenditures should be evaluated to determine whether they make the tax system more or less fair); Livingston, *supra* note 25, at 759 (advocating consideration of tax legislation for its effect on

For instance, Professor Daniel Shaviro, drawing on Richard Musgrave's classic text, *The Theory of Public Finance*,<sup>94</sup> has observed that tax expenditures can be allocative, focusing on the acquisition and use of assets in our society, or distributional, focusing on income "to determine tax liabilities or transfer receipts."<sup>95</sup> It is within this distributional category that there is potential for affecting fundamental tax fairness.<sup>96</sup> That said, some allocative tax expenditures can nevertheless affect distributional equity. Professor Gregg Polsky recognizes this possibility. He writes, "[s]ome tax expenditures [like the home mortgage deduction and tax-favored pension plans] are commonly justified on allocative grounds, but in reality do not substantially affect the allocation of resources in the manner intended. As a result, their impact is mostly distributional."<sup>97</sup>

My point is not to quibble with traditional or progressive tax theorists, but rather to emphasize that the examination of tax expenditures deserves attention. As Professor Shaviro suggests, there is an unrealized potential in tax expenditure analysis as a tool, if used with an awareness of its limitations. He explains: "[b]y adapting [tax expenditure analysis] to use more flexible and varied measures that clarify its relationship to underlying distributional aims and that take account of reasonable disagreements as to those aims, we can hope to improve both its informational content and its general background influence on budgetary and tax policy debate."<sup>98</sup>

Moreover, the same can be said about all scholars who work in this area. If we are flexible in clarifying all measures with respect to distributional aims and we account for reasonable disagreements, we will emerge with an improved tax policy debate and consequently an improved tax policy.

This is not to suggest that discrimination, once discovered, would be easy to address. However, how we, as a society, analyze different Code provisions could change and that would be a good start. Of course, in any discovered (presumably widely agreed upon) discrimination, particularly regarding Code provisions, theorists would face the daunting task of building consensus on a specific solution. In this vein, legislators and tax policy experts undoubtedly have a range of options. For example, the tax expenditure analysis of a particular Code provision might encompass weighing of discriminatory effect against its utility with respect to the greater public good.<sup>99</sup> Or

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women and minorities); *see also id.* ("A tax system would be considered progressive only if it were fair to lower-income individuals, regardless of race or gender, but also if it dealt fairly with disadvantaged groups. Particular attention would be paid to provisions (such as joint returns and the capital gain rules) that have disproportionate effects on disadvantaged groups."). Even Professor Zelenak has joined this chorus. Zelenak, *supra* note 7, at 1575 (suggesting a multi-step approach that begins with the inquiry as to whether a particular Code provision was intended to have a disparate impact and whether there exists a legitimate purpose for the provision). My contribution would be to delete intentionality. An unintentionally created discriminatory effect is nonetheless harmful.

94. Shaviro, *supra* note 89, at 188–89 n.8.

95. *Id.*

96. Polsky, *supra* note 55, at 657.

97. *Id.* Professor Polsky's examples, the home mortgage deduction and tax-favored pension plans, were both studied by Professors Moran and Whitford. Moran & Whitford, *supra* note 16, at 774, 783.

98. Shaviro, *supra* note 89, at 253.

99. The public good would have to be good indeed. At some point even national policy has to yield to basic fairness. One scholar has suggested that investment in financial assets might be one such public good. Jensen, *supra* note 5, at 1761. Of course, even the Code's seeming encouragement of capital investment is nuanced proposition. Luzi Hail, Stephanie A. Sikes & Clare Wang, *Cross-Country Evidence on the Relation between Capital Gains Taxes, Risk, and Expected Returns* (Nov. 27, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404044](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404044) (arguing that an increase in capital

a discriminatory Code provision might be tweaked so as to diminish its discriminatory effect. Alternatively, a Code provision might be ripe for repeal with the replacement of a more equitable Code provision.<sup>100</sup> In short, there cannot be, nor should there be, one single solution for all cases. The development of a rubric to systematically deal with individual Code provisions should not be beyond us.

#### D. Start From Scratch

It is tempting to suggest that we start from scratch. Many critics have suggested that the Code is broken and that we would all be better off to scrap it and start anew.<sup>101</sup> However, even with a new system, the problem would remain.<sup>102</sup> Seemingly neutral legislation is not always neutral, and vigilance regarding discrimination would still be needed. Discrimination and its disparate impacts are pervasive in American society; to expect them not to creep into the law would be unrealistic. Without a systematic attempt to allay the disparate impacts of new provisions, the result would be as bad, or nearly as bad, as what we have already.

### CONCLUSION

Taxes make the nation-state possible.<sup>103</sup> A corollary is that tax systems function to redistribute wealth.<sup>104</sup> This article is founded on the idea that the distribution should be fair. That said, many still fail to appreciate the role played by taxes in our constitutional democracy and “there is much real, exhausting work still to be done to unmask the discriminatory bias in the tax law.”<sup>105</sup> Added to this mix is a more conservative environment that can be seen as an impediment to tax reform benefiting the poor or minorities. Thus, one can easily conclude that the future of equitable redistribution does not seem promising.<sup>106</sup>

Realistically, the goal may not be the complete elimination of discriminatory Code provisions, but to at least reduce the extreme forms of such discrimination. In this vein, the critical tax critiques are similar to the critical theory critiques generally. The point of critical theory is that law is imbued with values, and the values it reflects are the values of the folks who make the law: the status quo. In that sense, tax is no different from other areas of law, the same patterns of discrimination that exist in society generally are reflected in the Code. This idea is at the heart of any critical take on the law, but seems especially relevant in tax, where the law maps our lives and our

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gains rates does not always impair the ability to raise capital).

100. Lily Kahng, *Path Dependence in Tax Subsidies for Home Sales*, 65 ALA. L. REV. 187, 189 n.5 (2013).

101. A consumption tax seems to be the popular alternative. The difficulty is that a consumption tax is regressive and tends to affect low-income taxpayers adversely. Bird & Zolt, *supra* note 83, at 1639 (citing a South African study to the effect “that without a progressive income tax, the reliance on the VAT and other consumption taxes would have made the entire tax system regressive”).

102. The South African study’s “key point is not that the progressivity of the income tax affects income distribution significantly. Rather, because taxes on consumption are regressive, without the income tax offset the tax system as a whole would be undesirably regressive.” *Id.*

103. Justices Holmes and Brandeis expressed a similar thought: “Taxes are what we pay for civilized society.” *Compania General de Tabacos v. Collector*, 275 U.S. 87, 100 (1927) (Holmes, J. & Brandeis, J., dissenting).

104. Abreu, *supra* note 5.

105. Brown, Fellows, Bridget, note 2

106. Livingston, *supra* note 25, at 738.

society so closely. We cannot ignore the problem.

For too long, critical tax scholars have been on the defense. The time is long past to take the offense and shift the defense to those who cling to the claim that the Code is neutral and applies equally to all. Even for traditional defenders of the Code, there is a need to address all of these issues. The elephant in the room can no longer be ignored because the Code is embedded with tax provisions which have produced discriminatory disparities against minorities—in a just and democratic system this is simply intolerable. The time is now to address and eliminate discriminatory tax provisions which affect us all in our constitutional democracy.