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# RADICAL SCHOLARS, CONSERVATIVE FIELD: PUTTING “CRITICAL TAX SCHOLARSHIP” IN PERSPECTIVE

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## I. INTRODUCTION

To understand critical tax scholarship, one has to know something about tax scholarship. Tax scholars have long been both ahead of and behind their peers in non-tax subjects. Rhetorically they have always recognized the political character of taxation and the difficulty of separating one’s views on tax matters from more general opinions about human nature or the character of a just society.<sup>1</sup> In this respect, tax scholars were “critical” before the rest of the legal academy. Yet tax scholars are a conservative breed, and—while all admit the political character of taxation—in practice their work tends to emphasize a series of rather dry and (to outsiders) technical issues, and their style of argument stresses the search for technically proficient, consensus solutions having appeal across the political spectrum. In this respect, tax scholars lag behind their non-tax colleagues, and their work has an almost anachronistic quality at times, exacerbated by the relative isolation of tax scholars and their tendency to teach only (or almost only) tax subjects.<sup>2</sup>

The paradoxical nature of tax scholarship means that critical tax scholars face two challenges, one theoretical and the other practical. The practical problem is that it simply may be difficult to find an audience for their work. Within the tax field, critical scholarship is

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1. See, e.g., MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION* 5-6 (7th ed. 1994) (illustrating the inherently political and moral nature of tax policy by reciting arguments Presidents Ronald Reagan and Bill Clinton used to support their contrasting philosophies regarding taxation).

2. On the nature and limitations of contemporary tax scholarship, see generally Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 370-94 (1998) (describing “traditional” tax scholarship and the intellectual and political changes that have made such scholarship increasingly problematic).

likely to appear radical, even a bit outrageous, in nature and may receive less attention than it would otherwise deserve. Yet to outsiders—especially those on the political left, the same work may appear tame or cautious in nature, and for these reasons, or because of a more general lack of interest in tax issues, may once again achieve less impact than it deserves. Thus, writing critical tax scholarship can be a lonely experience, and whatever one says is likely to prove upsetting to someone.

The theoretical challenge relates to the subject matter of tax scholarship and its prevailing argumentative mode. Tax scholars have traditionally evaluated tax policy from the perspectives of horizontal equity (fairness as between similarly situated taxpayers), vertical equity (fairness as between income classes), economic efficiency, and simplicity or administrability.<sup>3</sup> Critical scholarship frequently and sometimes deliberately blurs these lines. Because they assume that women and minorities suffer from a pervasive disadvantage in American society, critical scholars tend to see tax issues involving these groups as raising essentially vertical equity concerns.<sup>4</sup> Traditional scholars, who, when they have considered these issues at all, have viewed them largely in horizontal equity terms,<sup>5</sup> may find these arguments unconvincing or incoherent. Critical, and especially feminist, scholars likewise embrace a goal of consciousness-raising and “deconstruction” of laws and institutions that is altogether alien to tax scholarship.<sup>6</sup> Finally, critical scholars reject the underlying assumption of mainstream tax policy—the existence and desirability of a capitalist, market economy<sup>7</sup>—and they thereby render the very categories of traditional discourse unintelligible or obstructive of true understanding. Critical tax

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3. See WILLIAM A. KLEIN & JOSEPH BANKMAN, *FEDERAL INCOME TAXATION* 18-24 (11th ed. 1997) (describing the goals for a good income tax).

4. See, e.g., *TAXING AMERICA* (Karen B. Brown & Mary Louise Fellows eds., 1996) (collecting various articles that provide a “progressive” perspective on American tax law). *Taxing America’s* editors write that the anthology is devoted to “serious consideration of how the tax system exacerbates marketplace discrimination against traditionally subordinated groups.” Karen B. Brown & Mary Louise Fellows, *Introduction to TAXING AMERICA*, *supra*, at 2. The anthology’s essays primarily address “class issues and their implications in designing a fair tax base and rate structure.” *Id.*

5. See, e.g., Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *STAN. L. REV.* 1389 (1975) (providing a traditional, but impressive, discussion of family tax issues).

6. See generally ROBERTO MANGABEIRA ÜNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (describing the goals of the critical legal studies (“CLS”) movement).

7. See Brown & Fellows, *supra* note 4, at 4-10 (discussing the ways in which adherence to a traditional, market-oriented structure keeps tax analysis from considering methods of combating discrimination and economic exploitation).

scholars may thus find themselves writing for two very different audiences, having different goals and perspectives and using the same words in different ways.

This Article evaluates critical tax scholarship, and Professor Lawrence Zelenak's critique of it, in the context of these broader themes. The Article argues that critical tax scholarship is best seen not as a dangerous or even a particularly radical development, but as one of a series of ways in which tax scholarship is emerging from its long isolation and groping for a more constructive relationship with the broader legal academy. More specifically, critical scholarship marks an expansion of the traditional tax concept of progressivity or vertical equity—that is, justice between richer and poorer classes of taxpayers—to encompass disadvantage based on race, gender, and other immutable characteristics, as well as disadvantage based purely on income levels. That does not mean that critical tax scholarship is always good or that it should not be subjected to the same scrutiny as more traditional writing. It does mean that critical scholarship must be seen in an appropriate context and that critiques of it based on essentially horizontal equity arguments—in particular if the critiques emphasize comparisons to “similarly situated” white males—are likely to miss the point of such scholarship. A fair critique must also take into account the non-tax as well as the tax goals of critical scholarship, including the raising of consciousness on race and gender issues and the effort to link tax issues to other issues of governmental and non-governmental policy. Part of this Article will defend critical tax scholars on these and other grounds.

While the approach outlined above suggests a certain empathy for critical tax scholars, it contains an implicit warning. Critical scholarship, in tax or other fields, cannot survive without a broader revival of interest in social justice and distributive concerns. In the tax field, this revival means rethinking the entire issue of progressivity and vertical equity to consider the effects of increasing income inequality, the rise of the global economy, and the concentration of poverty among women, minorities, and recent immigrant groups. For this to occur, traditional scholars must pay greater attention to the issues raised by critical tax authors, and the “crits,” for their part, must begin to integrate their work into a broader argument for distributive fairness. A compartmentalized discourse, in which various groups advance separate complaints about the tax code, is unlikely to produce needed changes. A more unified discussion, organized around a revived concept of vertical equity and combining the best of traditional and critical tax

scholarship, is much more likely to succeed. This Article is thus a defense of some critical scholarship and also a plea for convergence so that tax scholars can retain a broadly progressive vision of their subject and avoid the ideological warfare that has plagued other fields.

This Article proceeds in four parts. Part II provides an overview of traditional tax scholarship, emphasizing scholarship that deals with progressivity or vertical equity issues.<sup>8</sup> Part III considers scholarship specifically concerning gender issues and reviews Professor Zelenak's critique of this scholarship.<sup>9</sup> Part IV conducts a similar analysis of critical race scholarship and Professor Zelenak's thoughts on it.<sup>10</sup> Finally, Part V addresses the future of critical tax scholarship and the need to integrate such scholarship with a broader discourse on progressivity and vertical equity concerns.<sup>11</sup>

## II. ALL KINDS OF EQUALITY ARE EQUAL (BUT SOME ARE MORE EQUAL THAN OTHERS): A VERY BRIEF TOUR OF TAX SCHOLARSHIP

Before evaluating critical tax scholarship, we should pause to consider its more conventional predecessor. Three features of traditional tax scholarship are especially relevant for critical tax scholars: its conservative (or at least mainstream) political bias; its emphasis on economic analysis; and its tendency to divide issues into rather neat, formal categories (horizontal equity, vertical equity, economic efficiency, etc.) with progressivity or vertical equity frequently being shortchanged in the process.<sup>12</sup> Each of these features suggests a limitation that critical tax scholars have sought, often effectively, to exploit. But each also suggests that there will be substantial resistance to the critical challenge and that critical

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8. See *infra* notes 12-29 and accompanying text.

9. See *infra* notes 30-82 and accompanying text.

10. See *infra* notes 83-104 and accompanying text.

11. See *infra* notes 105-20 and accompanying text.

12. Progressivity refers to the imposition of progressively higher tax rates on higher levels of income, a regular feature of U.S. (and most foreign) income taxation. Progressivity thus differs from vertical equity, a broader term that encompasses the entire issue of fairness between income classes; one might, in theory, support vertical equity but believe that it was best achieved by proportional or even regressive taxation and hence be opposed to the progressivity concept. In practice, people who express a concern about vertical equity are most frequently supporters of progressive taxation, and this Article uses the terms interchangeably at several points. See generally Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1907-08 (1987) (defining progressive, regressive, and proportional or "flat" income taxes).

scholars may have some difficulty establishing a dialogue with more traditional experts.

The first point is a sociological rather than intellectual fact. Tax at American law schools is a largely conservative (or at least non-radical) field. Most tax professors come to teaching either from private practice or government service, and they tend to pursue the same issues—essentially, incremental tax reform proposals—that they encountered in these venues. People who believe that the capitalist system is unjust or oppressive, or that the government itself lacks legitimacy, may find it difficult to get excited about these issues. When such people do enter the field, they are often frustrated: After writing one or more pieces exposing the alleged unfairness of the existing tax system, they typically revert to more traditional subjects or, if they remain unconverted, leave the field.<sup>13</sup> These tendencies are exacerbated by the relative isolation of the tax field, which insulates tax scholars from developments in the remainder of the legal academy. Relatively few radicals remain very long in the tax area, so that the label of “critical tax scholar” has an almost oxymoronic feel.

The second point concerns the intellectual structure of the tax field. When tax scholars move beyond purely legal materials, they turn overwhelmingly to economics, and a rather old-fashioned economics at that.<sup>14</sup> Relatively few tax scholars are conversant with political science, philosophy, or the remaining non-economic social sciences, or even with the long-term history of their own field.<sup>15</sup> Arguments based on these disciplines tend to be viewed as soft or political in nature, as compared to the hard, “scientific” character of

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13. A good example is the career of Mark Kelman, who criticized conventional tax scholarship in a celebrated 1979 article, see Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831 (1979) [hereinafter Kelman, *Personal Deductions Revisited*], but quickly moved on to other areas, see, e.g., Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Mark G. Kelman, *Concepts of Discrimination in “General Ability” Job Testing*, 104 HARV. L. REV. 1157 (1991); Mark G. Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215 (1993).

14. For a more complete treatment of this subject, see Livingston, *supra* note 2, at 374 (noting that the principal themes of tax scholarship are essentially economic in origin).

15. One reason why tax scholars avoid the non-economic social sciences may be that it is difficult to apply the findings of these fields in support of specific policy recommendations. See STEPHEN G. UTZ, *TAX POLICY: AN INTRODUCTION AND SURVEY OF THE PRINCIPAL DEBATES* 72 (1993) (noting that political scientists, historians, and other social scientists typically deny that they are offering advice on practical matters).

economic analysis.<sup>16</sup> This situation presents a challenge for critical scholars, who make frequent use of political argument and are often concerned with categories such as race,<sup>17</sup> gender,<sup>18</sup> or sexual preference<sup>19</sup> that cut across economic lines. In particular, the narrative or consciousness-raising aspect of critical legal studies is likely to be alien to tax scholars. Critical tax scholars may accordingly feel pressure to squeeze their arguments into more recognizable forms of discourse, sacrificing much of their emotional energy and perhaps some of their intellectual persuasiveness in the process.

A third point—really, an extension of the second—relates to the organization of the tax field. Tax scholars have traditionally divided their concerns into three principal areas: horizontal equity (similarly situated taxpayers ought to be taxed in a similar manner); vertical equity (fairness between income classes); and economic efficiency or the minimizing of distortion by the tax system.<sup>20</sup> (A fourth area, simplicity, is perpetually on the back burner.) In theory, these areas are equal in importance. In practice, vertical equity tends to get less attention than the remaining categories, at least where academic lawyers are concerned.<sup>21</sup> This difference in attention is reflected in the choice of subject matter, with subjects emphasizing horizontal

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16. See *id.* at 71 (“Tax policy writing often seems to ignore the historical forces that condition and constrain the design of our tax laws.”).

17. See, e.g., Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751.

18. See, e.g., Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

19. See, e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991).

20. See KLEIN & BANKMAN, *supra* note 3, at 18-24 (describing the goals for a good income tax).

21. The emphasis on horizontal equity dates in part from the work of Henry Simons, who influenced all later tax scholars and whose work emphasized horizontal equity issues. See HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 30-31, 106 (1938). It is also a matter of intellectual cultures. Lawyers feel comfortable with horizontal equity, which is essentially a game of competing analogies, and they are increasingly influenced by economists, whose work emphasizes the measurement of economic efficiency and suggestions of how to achieve it. Vertical equity has, by contrast, no obvious champion. It is hard (although not impossible) to systematize a case for social justice, and one is always open to the charge that one's views are merely a political opinion or that the issue is inherently subjective in nature. Assessing the distributive impact of tax provisions may also require a large volume of empirical data with which lawyers are uncomfortable working. On conflicting goals in tax policy analysis, see generally William S. Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 299-308 (1996).

equity or efficiency concerns (for example, the tax treatment of various forms of business enterprise) tending to receive more extensive treatment than topics emphasizing vertical equity issues (for example, personal deductions and credits or the tax treatment of poorer taxpayers). It also is reflected in the academic approach to these issues. For example, as Mark Kelman noted in a 1979 article, medical and charitable deductions have historically been discussed primarily as horizontal equity issues (that is, are medical and charitable expenses more like consumption or reduced income?) rather than vertical equity concerns (that is, are rich or poor people more likely to benefit from these deductions?).<sup>22</sup> Discussions of family tax issues similarly tend to emphasize horizontal equity comparisons.<sup>23</sup> For example, such discussions might focus on a comparison between one couple earning \$50,000 and having no child care expenses and another couple earning \$60,000 but having \$10,000 of such expenses, a classic horizontal equity issue. By contrast, at least until recently, such scholarship was less likely to discuss the consequences of different rules for richer and poorer families, and least likely of all to consider the allocation of economic power within the family unit.<sup>24</sup>

The categorization of tax discourse and the tendency to emphasize horizontal equity or efficiency over vertical equity concerns mean that critical tax scholars are unconventional in several respects. By emphasizing topics like family taxation or the treatment of poorer taxpayers, these scholars are focusing on areas that—while hardly insignificant—are not subjects on which the leading tax scholars typically have spent much time. By emphasizing distinctions based on race, gender, and other non-economic criteria, they are stepping outside the usual economic analysis and blurring the distinction between horizontal and vertical equity arguments. It is possible to squeeze these criteria into a horizontal equity model by asking if the tax code discriminates between women or minorities and similarly situated white males. Such analysis, however, fails to capture the spirit of critical scholarship, the starting point for which is the dissimilarity of status between gender and racial groups. Critical tax scholarship also may be difficult to reconcile with the traditional (and historically less prominent) vertical equity discourse, because

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22. See Kelman, *Personal Deductions Revisited*, *supra* note 13, at 835-79 (evaluating tax deductions for medical expenses and charitable contributions).

23. See, e.g., Bittker, *supra* note 5.

24. The vertical equity implications of family tax issues are discussed at some length in EDWARD J. MCCAFFERY, *TAXING WOMEN* 137-60 (1997).



critical scholarship often assumes differential status for women and men<sup>25</sup> (or whites and nonwhites)<sup>26</sup> even at the same income level. Thus, critical scholars sometimes appear to be speaking a different language than their more traditional colleagues, making arguments that straddle the usual categories and that lose much of their emotional and logical force when scholars try to squeeze inside these categories. This intellectual problem is exacerbated by the argumentative style of critical scholars, who sometimes make deliberately extreme proposals in order to stimulate debate and to raise political consciousness with respect to their particular issues.<sup>27</sup>

Even if critical scholars are likely to find much of the tax landscape discouraging or unfriendly, they have some compensating advantages. Even conservative tax scholars recognize the inherently political nature of their subject;<sup>28</sup> the frequently heard objection to critical legal studies—that it is attempting to “politicize” a previously apolitical field<sup>29</sup>—thus has relatively little weight in taxation. It is my personal experience that tax scholars also tend to be supportive of each other, even in disagreement, a likely response to years of indifference from the remainder of the legal academy. Therefore, critical tax scholars are likely to encounter little of the hostility that greets similar scholars in other areas. The danger is less of being attacked than of being ignored—making a series of provocative insights that stimulate a brief debate but leaving traditional structures essentially unchanged and the field at more or less the same place from which it started.

### III. FEMINIST CRITIQUES AND PROFESSOR ZELENAK'S RESPONSE

Against this background, feminists and other critical tax scholars make two essential claims, one implicit and the other explicit in nature. The implicit claim is that tax scholars should devote more time to issues that have received relatively little attention in the past, and less time to some more traditional subjects. In particular, the tax

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25. See, e.g., Staudt, *supra* note 18, at 1571-75 (emphasizing the role of women specifically as primary familial care-givers).

26. See, e.g., Moran & Whitford, *supra* note 17.

27. See, e.g., Staudt, *supra* note 18, at 1618-36 (proposing taxation of uncompensated household services). Staudt's proposal, and criticisms of that proposal, are discussed further *infra* in Part III.

28. See CHIRELSTEIN, *supra* note 1, at 5-6.

29. See, e.g., Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 414 (1984) (describing CLS as “receptive to paternalistic coercion to override the stated preferences of real human beings” and as advancing “[g]rottesque proposals . . . without pragmatic basis or sensitivity to institutional issues”).

treatment of women, minorities, and poorer taxpayers deserves more scholarly interest than it usually has received. In this claim, the "crits" have been quite successful, and the existence of this Symposium is a testament to that success.

The explicit claim is that the tax treatment of women, minorities, and so forth is not merely a worthy subject, but a case study of the subordination of these groups in the broader American society.<sup>30</sup> Far from being a passive observer, the tax system plays an important role in this subordination, discouraging women from working outside the home and adopting a male-centered worldview that systematically slights female concerns.<sup>31</sup> In racial matters the Internal Revenue Code is similarly biased, discriminating against Blacks and in favor of Whites even at the same income level.<sup>32</sup> This race-based analysis is predictably more controversial, and is the principal subject of Professor Zelenak's essay.<sup>33</sup>

The explicit claim itself takes various forms, reflecting broader divisions within the feminist movement.<sup>34</sup> One group—what might be called the reformist or moderate feminists<sup>35</sup>—remains more or less within the traditional tax discourse, using conventional tax policy criteria (fairness, efficiency, etc.), together with mainstream feminist analysis, to critique the existing tax system and to evaluate proposals for change. This group is generally willing to accept the good faith of previous actors, albeit faulting their mistakes, and tends to make incremental or at least not unrealistic policy proposals. Grace Blumberg,<sup>36</sup> Anne Alstott,<sup>37</sup> and (most of the time) Edward

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30. See Brown & Fellows, *supra* note 4, at 2 (arguing that the present tax system exacerbates already existing societal discrimination against traditionally subordinated groups).

31. See, e.g., Grace Blumberg, *Sexism in the Code: A Comparative Study of the Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 49 (1971) (assessing the tax code's role in discouraging women from working outside the home).

32. See Moran & Whitford, *supra* note 17, at 799-803 (assessing evidence that the tax code is systematically biased against Blacks).

33. Zelenak would be unlikely to deny the first observation—that is, that the tax treatment of women is a worthy scholarly subject—as he himself has written extensively on the subject of women taxpayers. See, e.g., Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

34. I begin with feminism as the older and as yet more developed approach to the tax code. Cf. *infra* Part IV (discussing race and tax issues).

35. See *Introduction to FEMINIST JURISPRUDENCE* 4-8 (Patricia Smith ed., 1993) (distinguishing between moderate and radical factions of the feminist movement).

36. See, e.g., Blumberg, *supra* note 31.

37. See, e.g., Anne L. Alstott, *Tax Policy and Feminism, Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996).

McCaffery<sup>38</sup> appear to be largely in this camp, although the lines become blurry in some cases.

A second group—what might be called the radical or revolutionary feminists—is more strident than the first. These writers tend to adopt more extreme analyses and to make more extreme proposals than the first group and are somewhat more willing to question the motives (conscious or unconscious) of those responsible for existing law. The styles of these two groups are also different: Radical feminists tend to emphasize the narrative, consciousness-raising side of feminism more than the reformists do and are perhaps less careful to remain within existing tax categories. Nancy Staudt<sup>39</sup> and Mary Louise Fellows,<sup>40</sup> together with many of the participants in the *Taxing America* project,<sup>41</sup> appear to be largely in this group, although the lines blur in individual cases.<sup>42</sup>

Not surprisingly, Professor Zelenak—a creative, but essentially traditional tax scholar—agrees with the first category of feminists more than the second. Among the many sins of which he accuses the latter are an overeagerness to identify sexist provisions in the tax code,<sup>43</sup> a habit of making unrealistic and poorly thought-out proposals,<sup>44</sup> and a failure to recognize the diversity of feminist theory and its sometimes conflicting policy prescriptions.<sup>45</sup> Zelenak contrasts this carelessness with the work of Alstott, McCaffery, and others that he finds more convincing, although he devotes relatively little space to them.<sup>46</sup>

Zelenak's criticisms are, of course, not unique. They are the tax equivalent of the attacks that have been leveled for years at critical

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38. See, e.g., MCCAFFERY, *supra* note 24; Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993).

39. See Staudt, *supra* note 18.

40. See Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137 (1991).

41. See TAXING AMERICA, *supra* note 4.

42. The same authors sometimes revert to a more or less conventional approach in dealing with other subject matters. See, e.g., Mary Louise Fellows, *A Comprehensive Attack on Tax Deferral*, 88 MICH. L. REV. 722, 810-11 (1990) (arguing that the current practice of deferring taxation of certain gains until they are "realized" undermines the fairness and allocative efficiency of the tax system and suggesting an alternative approach).

43. See Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1523 (1998).

44. See *id.* at 1524.

45. See *id.* at 1523.

46. See *id.* at 1578 (describing as "impressive" the work of Alstott, McCaffery, Blumberg, and other writers).

(and especially feminist) legal scholars in fields far removed from taxation.<sup>47</sup> In essence, they boil down to the idea that critical scholars elevate emotion over thought and political rhetoric over balanced and reasoned analysis. Augmenting this idea—and here the special history of the tax field becomes important—is the sense that the radicals have broken the rules of tax scholarship, making politically impractical proposals and failing to show adequate respect for previous generations of tax scholars.<sup>48</sup>

These criticisms are not without force, and there are certainly many degrees of quality in feminist (or any other) tax scholarship. But categorizing others' scholarship is always a dangerous enterprise, and Zelenak is perhaps too quick to dismiss several examples of unconventional, but still effective, analyses. In particular, he almost completely misses the narrative or consciousness-raising side of feminist scholarship, the ability of an author to make us think about gender in a different way than we did before, even if her proposals are politically unrealistic or inconsistent with some versions of feminist theory. His focus on the "tax" side of critical tax scholarship sometimes blinds him to the "critical" aspect, and he misses the feminist forest for the tax trees.

Nancy Staudt's study of housework provides a good example of this aspect of feminist scholarship.<sup>49</sup> Staudt's article addresses a classic problem in feminist scholarship. In seeking better treatment for working women, feminists may ignore or even hurt the large number of women who work principally at home as child care providers and performers of other domestic tasks.<sup>50</sup> To remedy this oversight, Staudt proposes that the value of such housework be included in the tax base and credited toward social security and other benefits that are in some way tied to tax payments.<sup>51</sup> The potential regressivity of this tax would be reduced by a credit for lower-income families, so that the tax would be imposed largely on middle- and

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47. See, e.g., Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 248 (1984) ("[H]ere is a movement composed of supposedly radical law professors who proudly proclaim themselves to be 'utopian,' and whose positive program seems to contain nothing more substantial than an instinctive dislike for 'domination' and hierarchy.'").

48. See Blatt, *supra* note 21, at 301-04 (describing "pragmatic reconciliation" as the dominant theme in tax policy).

49. See Staudt, *supra* note 18. Throughout the article, Staudt refers explicitly to women as houseworkers rather than indulging (for her) the fiction that men and women engage equally in this form of activity.

50. See *id.* at 1575.

51. See *id.* at 1618-36.

upper-class households.<sup>52</sup> According to Staudt, this proposal would provide both a substantive benefit to the relevant women, in the form of increased benefit levels, and a symbolic benefit, by assigning a measurable value to housework rather than assuming that it is without value or else performed as an obligation without expectation of reward.<sup>53</sup>

Staudt's proposal flies in the face of traditional tax analysis, which tends to be extremely skeptical about taxing imputed income,<sup>54</sup> as well as most feminist analyses of the tax code, which emphasize improved treatment for women who work outside the home.<sup>55</sup> The proposal is also unusual in that it proposes taxation of the very group—houseworking women—that it wishes to help. As such, it is an inviting target for criticism. Zelenak takes up the challenge, criticizing Staudt for political unrealism (it is unlikely Congress would enact such a proposal without significant changes),<sup>56</sup> flawed technical analysis (at least some of the intended beneficiaries would not get benefits in excess of their additional tax burden, and others might actually be hurt by the proposal),<sup>57</sup> and failure to take adequate notice of the differences among various strains of feminist theory.<sup>58</sup> Additional concerns are that Staudt's proposal may tend to "commodify" women's activities and, on a more practical level, that the proposal might provide an excuse for a further political assault on stay-at-home (especially poorer, stay-at-home) women.

But unless Staudt is terribly naive, which is doubtful, she has no illusion that her proposal will be enacted at any time in the foreseeable future. Nor is she ignorant of the valuation problems in taxing imputed income, or of the fact that most people view taxation as a penalty rather than a prize. What Staudt is doing is classic feminist consciousness-raising. By making a radical—but by no means absurd—proposal to tax "non-working" women,<sup>59</sup> she is highlighting the ambiguities in the tax treatment of such women in a way that a more incremental suggestion would not. Even if her proposal is never enacted, this increased awareness might lead to many new and provocative insights. For example, recognizing the

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52. *See id.* at 1636-40.

53. *See id.* at 1573-74.

54. *See* KLEIN & BANKMAN, *supra* note 3, at 117-25 (discussing imputed income).

55. *See, e.g.,* Blumberg, *supra* note 31; McCaffery, *supra* note 38.

56. *See* Zelenak, *supra* note 43, at 1530-31.

57. *See id.* at 1529-38.

58. *See id.* at 1538-40.

59. *See* Staudt, *supra* note 18, at 1574, 1618-36.

value of housework might make us more skeptical of proposals to cut welfare and other programs for poorer women on the grounds that such women are seeking benefits without providing anything of value in return. Or, Staudt's proposal—an increased tax base coupled with a credit for poorer families<sup>60</sup>—might help us to reconceptualize the entire issue of family taxation as a matter of vertical rather than horizontal equity, emphasizing the problems faced by both “working” and “non-working” poor women rather than the traditional comparison between two differently situated, middle-class families. Such reconceptualizing is not incidental, but is a principal purpose of feminist scholarship, which seeks to increase awareness of and resistance to female subordination<sup>61</sup> and which has been regularly accused of extremism or unrealism on that basis.<sup>62</sup> The disproportionate attention that Staudt's article has attracted, as exemplified by this Symposium, suggests that she has succeeded rather well in this task.

Marjorie Kornhauser's work on progressive taxation provides a similar example.<sup>63</sup> Kornhauser's work proceeds from the “difference” feminism of Carol Gilligan and other writers, which suggests that women on average tend to be more communitarian and to think more in terms of responsibility to others, while men on average tend to be more individualist and to think in terms of their own abstract rights.<sup>64</sup> Since women are supposedly gaining power in our society, one might expect the female outlook to be taken more seriously in policy debates. Yet the tax debate—and with it, much of the national political dialogue—appears to be going in an opposite direction, emphasizing individualist values and cutting back on precisely those programs that express a shared sense of responsibility or commitment. The flat tax/progressive tax debate is a case in point: The flat taxers, armed with a rhetoric of individual rights and entitlements, appear everywhere on the offensive,<sup>65</sup> and progressive

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60. *See id.* at 1637.

61. *See Introduction* to FEMINIST JURISPRUDENCE, *supra* note 35, at 3.

62. *See id.* at 9-11 (discussing the feminist movement and male responses to that movement).

63. *See, e.g.*, Kornhauser, *supra* note 18.

64. *See id.* at 507 n.136 (citing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)).

65. *See, e.g.*, ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX (2d ed. 1995) (arguing for a flat or proportionate tax rate on fairness and efficiency grounds); *cf.* Charles R. O'Kelley, Jr., *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 S. CAL. L. REV. 727, 775-77 (1985) (arguing that a flat tax with an expanded tax base and generous exemption amount could result in tax burdens that are more progressive than under the

taxation, which has traditionally been justified on communitarian grounds, appears to be losing support.<sup>66</sup>

To remedy this situation, Kornhauser proposes a link between tax and feminist scholarship, designed to strengthen the case for progressivity and perhaps encourage feminists to pay more attention to the tax field.<sup>67</sup> In part, this is a deconstructive project, exposing the overwhelmingly male character of the flat tax movement and the individualist assumptions of its prevailing "neo-conservative" rhetoric.<sup>68</sup> But Kornhauser also suggests a new argument in favor of progressivity: It may be a relatively easy way of expressing a feminist commitment to communitarian values at precisely the time that such values are under attack in the broader society.<sup>69</sup> More specifically, progressive taxation may be a way of expressing the intermediate level of commitment that we feel to individuals who are not our immediate family or friends but who are part of the larger society that makes our individual wealth and happiness possible.<sup>70</sup> A minimal level of community being necessary to the conduct of economic activity, this vision of progressivity ought to be acceptable even to those who adhere to a more male-oriented, neo-conservative philosophy.<sup>71</sup> At the very least, the debate is a different one once the feminist perspective has been considered, and the argument is no longer conducted in exclusively male terms.

An argument like Kornhauser's provides numerous opportunities for disagreement, and Zelenak again obliges, noting several perceived gaps in the argument and generally dismissing Kornhauser's work as flawed and unconvincing. According to Zelenak, Kornhauser over-generalizes about the nature of men and women, there being no inevitable difference in male and female worldviews, or at least no demonstrable differences in attitudes toward progressive taxation.<sup>72</sup> Even if women were more altruistic

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current tax system).

66. See Kornhauser, *supra* note 18, at 465 ("The progressive income tax is currently under siege.").

67. See *id.* at 491.

68. See *id.* at 485-90 (discussing rhetoric of the anti-progressive-tax movement).

69. See *id.* at 504-07.

70. See *id.* at 504-18 (setting forth "alternate vision" of progressivity based on feminist principles).

71. See *id.* at 522 ("Paradoxically, the Neos [that is, neo-conservatives] must cultivate this sense of community, or connectedness to others, in order to preserve and protect their individualistic society.").

72. See Zelenak, *supra* note 43, at 1551-52. Zelenak further accuses Kornhauser of misreading Gilligan concerning the persistence of gender differences in adult life and the obligations owed to "nonproximate" strangers. See *id.* at 1551-53.

than men, such altruism would not necessarily support an increase in progressive taxation, but might be better reflected in a proportional tax with high levels of charitable contributions by altruistically inclined taxpayers.<sup>73</sup> Zelenak also notes that Kornhauser's argument implicitly assumes that tax revenues will be used largely for communitarian purposes, whereas a sizable portion is actually used for defense and other activities.<sup>74</sup>

But Kornhauser, like Staudt, surely realizes that men and women are not homogeneous; she is making an argument based on feminist theory, rather than an argument that all women will necessarily support. Many of Zelenak's other criticisms—that altruism is best expressed voluntarily,<sup>75</sup> that there is no scientific basis for preferring progressive to proportional taxation,<sup>76</sup> and so forth—are in fact criticisms of progressive taxation in general, and not of Kornhauser's specific approach. He is clearly right that difference feminism would require a reorientation of spending as well as tax priorities, but Kornhauser never denies this. Rather, she limits her analysis to tax issues for the sake of convenience,<sup>77</sup> not because she thinks only tax is important. Overall, her argument is rather convincing; at the very least, she makes some provocative links between tax and feminist scholarship and suggests a potential for future scholarly exchanges.

Zelenak also misses a key implication of Kornhauser's article: that feminist tax theory goes beyond family taxation and other traditionally "female" tax problems. Her particular concern is progressivity and the flat tax movement. But one can imagine feminist critiques of numerous tax issues, and indeed of the very structure of the tax field, which tends to adopt a rather rigid distinction between the market and private spheres and assumes the superiority of market to government solutions in ways that feminist scholars may find quite problematic.<sup>78</sup> The same is true of other critical scholars, who may question the conceptual underpinnings of tax law as well as the treatment of particular taxpayers. By defining critical scholarship as essentially a movement of disgruntled

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73. See *id.* at 1556.

74. See *id.* at 1554.

75. See *id.* at 1556.

76. See *id.* at 1553-54.

77. See Kornhauser, *supra* note 18, at 470.

78. See Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1524 (1983) (criticizing the market/family dichotomy and arguing that this prevailing worldview has limited the effectiveness and range of feminist reform efforts).



groups<sup>79</sup>—a misconception unfortunately shared by some critical scholars—Zelenak threatens to trivialize the movement and miss some of its potentially greatest contributions.

My objective here is not so much to defend Staudt or Kornhauser, who are rather capable of defending themselves, as to make a point about traditional tax scholarship and its own historic thought patterns. If critical tax scholars are sometimes too eager to identify bias in the tax system, traditional scholars have an equal or greater tendency to downplay such evidence and to marginalize scholarship that crosses traditional boundaries or refuses to play by traditional rules. Traditional scholars tend to favor economic over non-economic arguments and incremental solutions over radical reevaluations, often labeling those on the wrong side of these dichotomies as unrealistic or incoherent.<sup>80</sup> The danger is that many new and creative approaches may be smothered by such responses. It is no doubt important, as Zelenak argues,<sup>81</sup> to retain high academic standards and not to allow attractive political causes to become an excuse for careless or inferior scholarship. But it is equally important to examine our own ingrained thought patterns, and not to cut off new inquiries at just the point at which they begin to bear fruit.<sup>82</sup>

79. See Zelenak, *supra* note 43, at 1569-70.

80. Professor Zelenak, for instance, argues:

The most serious problem [with critical tax literature is its advocates'] failure to think through proposed solutions with sufficient care. The solutions are often presented as afterthoughts, with minimal consideration of whether the author's goal is best achieved through the tax system rather than through non-tax legal reform . . . and with minimal consideration of whether the proposed tax solution will have the desired effects.

*Id.* at 1524 (footnotes omitted).

81. See *id.* at 1570.

82. The foregoing defense of Staudt and Kornhauser should not be taken to imply that other critical tax scholars (for example, Alstott, McCaffery, or Blumberg) are in any sense less convincing. There being a general agreement as to the value of these scholars' work, it is simply less important (not to mention a good deal less fun) to talk about them. Notably, Alstott makes many of the same points as Zelenak, especially regarding the conflicting goals of different feminist approaches, albeit without the sometimes oppositional flavor of Zelenak's article. See Alstott, *supra* note 37, at 2004 ("[A]ny feminist tax proposal incorporates normative judgments about the best way to help women, and none of these norms are uncontroversial, even among feminists.").

In the interest of space, this Article does not discuss several additional articles mentioned by Zelenak, including Mary Louise Fellows's and Wendy Gerzog's work on QTIP trusts, see Fellows, *supra* note 42; Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995), and Gwen Thayer Handelman's article on return preparation standards, see Gwen Thayer Handelman, *Sisters in Law: Gender and the Interpretation of Tax Statutes*, 3 UCLA WOMEN'S L.J. 39 (1993). Zelenak's critique of these authors suffers from many of the same problems as his critique of Staudt and Kornhauser, although he is probably right

## IV. RACE, GENDER, AND THE PROBLEM OF VERTICAL EQUITY

Thus, the quality and originality of critical tax scholarship is higher than Zelenak indicates, and at least some of his comments reflect a time-honored but unduly narrow vision of the tax field. Yet the question remains: Is this trip worth the effort? If issues like progressivity, imputed income, and the taxation of married couples can be discussed in gender- and race-neutral terms—and if the addition of these considerations may sometimes preclude, rather than facilitate, agreement—what exactly is gained from the new, critical focus? Once our consciousness has been effectively raised, do the benefits of critical tax scholarship exceed its probable costs?

This cost-benefit question becomes especially prominent when we turn from gender to race issues. The work of Beverly Moran and William Whitford provides a case in point.<sup>83</sup> Moran and Whitford study four aspects of the Internal Revenue Code: tax benefits for wealth and wealth transfers (including the gift exclusion, reduced capital gains rate, and realization requirement);<sup>84</sup> tax benefits of home ownership (including the deduction for mortgage interest and taxes and various exclusion or rollover rules);<sup>85</sup> employee benefit tax incentives;<sup>86</sup> and the joint return marriage penalty.<sup>87</sup> According to the authors, each of the first three items deviates from the ideal of a comprehensive income tax, under which all economic income would be taxed at essentially the same rate.<sup>88</sup> Moran and Whitford argue that all four aspects of the Code discriminate against African-Americans, because African-Americans tend to own less of the favored categories of assets and are more likely to have similar incomes at the time of marriage, resulting in imposition of a relatively high marriage penalty.<sup>89</sup> Moreover, this discrimination cannot be explained on solely economic grounds, because the

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that it is more difficult to identify a pattern of gender discrimination in these areas of law. See Zelenak, *supra* note 43, at 1543-49, 1556-61.

83. See Moran & Whitford, *supra* note 17.

84. See *id.* at 759-72.

85. See *id.* at 773-83.

86. See *id.* at 783-91.

87. See *id.* at 791-99.

88. See *id.* at 753 ("Our hypothesis is that deviations from the ideal of a comprehensive income tax systematically favor whites over blacks."); cf. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955) (identifying congressional intent to tax all sources of income not subject to clear statutory exception); SIMONS, *supra* note 21, at 6 (discussing taxation of economic income at a uniform rate).

89. See Moran & Whitford, *supra* note 17, at 800 ("Because of extensive participation in the work force by black women, blacks are less likely to enjoy marriage bonuses and more likely to incur marriage penalties.").

relevant provisions treat Blacks worse than Whites even after controlling for income differences.<sup>90</sup> Thus, while Moran and Whitford cannot yet conclude that the Code is systematically biased against African-Americans, the evidence so far gathered lends credence to that hypothesis.

Zelenak is predictably critical of Moran and Whitford's article, which he faults on three different levels. First, Zelenak questions the provisions that Moran and Whitford select to study, noting that other provisions may be less unfavorable to African-Americans and some may even discriminate in their favor.<sup>91</sup> Second, he finds Moran and Whitford excessively eager to focus on harm to African-Americans, when under different assumptions the same provisions might be less harmful or even have a beneficial effect.<sup>92</sup> Finally, Zelenak criticizes Moran and Whitford's proposed solutions, which he argues would not solve the relevant problems and might actually make things worse for Blacks in some cases.<sup>93</sup> On a more conceptual level, Zelenak questions Moran and Whitford's reliance on the comprehensive income tax concept,<sup>94</sup> which has been subject to serious academic criticism<sup>95</sup> and which tends to make any savings or investment incentive look like an unwarranted tax expenditure. By contrast, had the authors started with a consumption tax ideal, which excludes

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90. See *id.* Moran and Whitford's work thus parallels studies of "environmental racism," which suggest that Blacks are more likely than Whites to be subjected to environmental hazards even at the same income level. See Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121, 139 (1994); Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 723 (1993) (review essay). Why it is important to demonstrate the existence of race and not "merely" class discrimination—as if it is acceptable to hurt poor black people so long as you hurt poor white people, too—has never been clear to me, but may have something to do with the nature of anti-discrimination laws, which prohibit discrimination based on race and (sometimes) gender but not discrimination based on class alone. Compare *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (outlawing overt race discrimination in public education), with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (refusing to extend equivalent protection to poorer school districts).

91. See Zelenak, *supra* note 43, at 1567-70.

92. See *id.* at 1563. In particular, Zelenak notes that joint tax returns may hurt black couples more than white couples at the time of marriage (because black couples tend to have more even incomes than white couples at that point), but joint returns may play a stronger role in discouraging white women from later working outside the home (because their income will then be taxed at their husbands' higher rates). See *id.* at 1570-71.

93. See *id.* at 1571-74.

94. See *id.* at 1563-66.

95. See, e.g., Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967) (assessing limitations and inconsistencies of the comprehensive tax base concept); see also Livingston, *supra* note 2, at 381-83 (discussing alternative economic theories that compete with the comprehensive tax base approach).

savings from the tax base, the same provisions would be part of the normative tax base, and provisions imposing a tax on savings or investment income might be said to disadvantage white taxpayers.<sup>96</sup>

Although I have not studied the area, my instinct is that Moran and Whitford have a strong, if as yet inconclusive, argument, and that Zelenak's criticisms are too harsh. In particular, his methodological critique is only partly convincing. Although the idea of a comprehensive tax base has been roundly criticized, it remains the starting point for most analyses of the tax code, and scholars regularly target deviations from it for criticism and reform.<sup>97</sup> Complaining about Moran and Whitford's use of this concept is thus somewhat unfair. It is also quite believable that, with the nationwide electorate remaining well over one-half white,<sup>98</sup> Congress tends to favor the interests of Whites over other groups in enacting tax expenditures. Indeed, if it did not, it would probably be removed by the voters and replaced by a Congress that did.

But even if one accepts Moran and Whitford's basic argument, a question of priorities remains. African-Americans have significantly lower incomes, on average, than Whites,<sup>99</sup> a difference that is likely to overwhelm more particular variations in the configuration of their income or assets. Given this difference, macroscopic issues of vertical equity—the progressivity of tax rates, the choice between an income or consumption tax, and health care and welfare reform—are likely to be more important to African-Americans than incremental changes to individual tax code provisions. Even the provisions cited by Moran and Whitford discriminate largely on the basis of class rather than race. Thus, investment tax incentives (for example, reduced capital gains rates) tend to favor Whites over Blacks because the latter—even if they have the same income as Whites—have probably had it for a shorter period of time, and typically have little inherited wealth with which to construct a long-range investment

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96. See Zelenak, *supra* note 43, at 1563-67.

97. See Bittker, *supra* note 95, at 925 ("It is no exaggeration to say that a 'comprehensive tax base' . . . has come to be the major organizing concept in most serious discussions of our federal income tax structure."); Livingston, *supra* note 2, at 375-80 (arguing that tax scholarship continues to be strongly influenced by the Haig-Simons and comprehensive tax base traditions).

98. Of the 193.7 million members of the voting-age population in 1996, 162.8 million were white. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997, at 288 tbl.462.

99. Per capita income in 1995 for Whites was \$18,304, while it was \$10,982 for Blacks. See *id.* at 474 tbl.735. Median family income in 1995 was \$42,646 for Whites, while it was \$25,970 for Blacks. See *id.* at 469 tbl.724.

portfolio.<sup>100</sup> Similarly, Blacks would likely benefit less from employee benefit tax incentives, even at equivalent income levels, not because they are indifferent to retirement but because their lesser wealth means they are likely to need more of their income for immediate consumption.<sup>101</sup> I suspect that Whites of modest origins—for example, the children of immigrants or working class families—would find themselves in a similar financial position.

Given this situation, one cannot help but wonder if it would be better for scholars to focus on broader issues of vertical equity, including the progressivity of tax rates and the distributive implications of specific incentive provisions, than to engage in a protracted debate over whether the tax code discriminates against African-Americans or “only” against poor people, regardless of race. That regressive tax rules have a disproportionate effect on minorities would be an important part of this analysis, but would not distract attention from the underlying, multi-racial point. It may be that Moran and Whitford agree with this approach and simply believe that the impact upon black people is an important aspect of the broader debate. (It is hard for a white person to tell black people that they should refrain from worrying about black concerns.) But it is discouraging to see black and white liberals arguing about the particular nature of black victimization, in tax and other matters, while both continue to be clobbered by conservatives in the real world of policy-making. An excessive focus on race, and a relative reluctance to confront class issues, is likely to exacerbate these difficulties.

Some, although not all, of this analysis also applies to feminist scholarship. Many of the points made by Staudt, Kornhauser, and others are uniquely female in nature, and it is unlikely that men

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100. See Moran & Whitford, *supra* note 17, at 772 tbl.3 (demonstrating that Whites receive significantly larger inheritances than Blacks and that by the time he reaches the age of 65, the average white American will hold property worth more than five times the value of the property possessed by the average 65-year-old black American).

101. See *id.* Investment and employee benefit tax incentives present a relatively simple issue of class (and hence racial) impact. The issue of housing is more complicated. Blacks spend less on housing than Whites, partly because they have less money, but partly because they are excluded from many neighborhoods in which the more desirable houses are located. Yet even in this area there may be a tendency to overstate the degree of racial, rather than class, discrimination. See *Black, White, and Wrongheaded*, *ECONOMIST*, Aug. 30, 1997, at 14, 14 (“The administration believes that the failure of many blacks to get mortgages is race-based; but the evidence is that this prejudice is not systematic, and in any case has little to do with the failure of blacks to enter the housing market. . . . The problem is one of poverty, not race . . . .”); cf. Moran & Whitford, *supra* note 17, at 773-83 (discussing racial impact of housing tax incentives).

would have made them. (I cannot remember the last article by a man about housework.) But other points are essentially humanist in character and relate to universal concepts of equity and fairness more than the particular interests of women taxpayers. Kornhauser is actually rather explicit about this, utilizing feminist theory as one of a series of arguments in favor of progressive taxation.<sup>102</sup> Staudt begins with an avowedly feminist perspective, but modifies this somewhat with her proposed credit for lower-income taxpayers and related adjustments.<sup>103</sup> By the end of her article, she is effectively arguing on behalf of lower- and middle-income families rather than for women and against men.<sup>104</sup> Without taking anything away from Staudt or Kornhauser, these arguments—like those of Moran and Whitford—might at times be more effective if made in gender- or race-neutral terms. Certainly, a more universal approach would engender less hostility from traditional scholars, increasing the chance for academic (and perhaps political) success.

My issue here is not with the quality of critical tax scholarship, but with its intellectual agenda. If critical tax scholars focus exclusively on discrete (even if very large) groups, they run the risk of being perpetually marginalized, making sporadic insights but leaving the structure of the tax field essentially unchanged. But if they can combine their diverse perspectives into a broader, more systematic program, might they not have a more permanent impact? Might we not see a convergence of critical and mainstream tax scholarship, based not on the interests of competing groups, but on principles of distributive fairness that are equally applicable to all taxpayers? Might critical tax scholarship provide the occasion, not for the decline of the tax field, but for its eventual revival?

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102. See Kornhauser, *supra* note 18, at 518-22 (alluding to benefit theory and (implicitly) the diminishing marginal utility of money together with feminist arguments for progressivity).

103. See Staudt, *supra* note 18, at 1636-40.

104. By the end of her article, Staudt's argument is, at the very least, a mixture of feminist and traditional vertical equity concerns. See *id.* at 1647 (emphasizing women's "economic vulnerability" and arguing that "to improve women's economic security, housework must be recognized as valuable and productive"). Staudt's later work has addressed progressivity issues more explicitly. See Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 922 (1997) (arguing that conventional progressivity doctrine has failed to consider adequately the rights and responsibilities of poorer citizens).

## V. CONCLUSION: "PROGRESSIVE" TAX POLICY AND THE DANGERS OF COMPARTMENTALIZED DISCOURSE

A discussion of the possible future agenda of critical tax scholarship brings us back to the issue of progressivity (or vertical equity) and its place in mainstream tax discourse.<sup>105</sup> There has been a creative and diverse scholarship on progressivity for decades, asking whether progressive tax rates are justified on political and economic grounds and whether their benefits outweigh their costs. Scholars have considered a variety of arguments for progressivity, ranging from the overt redistribution of income<sup>106</sup> to the diminishing marginal utility of money<sup>107</sup> and the potential danger to democracy arising from excessively unequal incomes.<sup>108</sup> More recently, some scholars have considered the implications of contemporary legal philosophy, as developed by John Rawls, Robert Nozick, and other scholars, and of optimal tax and welfare economics theory.<sup>109</sup> The consensus is that the argument for progressivity remains, in the words of Walter Blum and Harry Kalven, "stubborn but uneasy,"<sup>110</sup> although a vocal minority opposes the idea altogether.<sup>111</sup> Other scholars have moved beyond the rate structure to consider the vertical equity implications of tax incentives and other specific tax rules.<sup>112</sup>

The scholarship on progressivity is creative and original, but it has become in many ways out of date. It has yet to adjust fully to many of the changes in post-Cold War America, including an increasingly conservative political philosophy, the globalization of the national economy, and an increasing recognition that poverty has become concentrated among women and minority groups. Indeed

105. Once again, I am using the terms "progressivity" and "vertical equity" more or less interchangeably, although they have somewhat different meanings and distinct (but related) histories. See *supra* note 12 (discussing progressivity and vertical equity).

106. See Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 486-506 (1952) (assessing arguments for progressive taxation based on the overt redistribution of income).

107. See *id.* at 455-86 (assessing the diminishing marginal utility of money as an argument for progressive taxation).

108. See *id.* at 444-51 (assessing the role of a progressive income tax in maintaining economic and political stability).

109. See, e.g., Bankman & Griffith, *supra* note 12, at 1949-50 (discussing Rawlsian philosophy and optimal tax theory); Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 771-86 (1995) (applying John Rawls, Robert Nozick, and Ronald Dworkin to the subject of progressive taxation).

110. Blum & Kalven, *supra* note 106, at 519.

111. See generally HALL & RABUSHKA, *supra* note 65 (arguing for a flat tax on fairness and efficiency grounds).

112. See generally TAXING AMERICA, *supra* note 4 (collecting articles that analyze the tax system's impact on vertical equity issues).

the debate, at least where lawyers are concerned, tends to be conducted in an empirical vacuum, with only limited evidence regarding the actual distribution of income and the political context in which the tax system operates. The debate is also surprisingly self-contained, with relatively little connection to the parallel debates in health and welfare policy or to the increasing calls to replace gender- and race-based affirmative action with an income-based (that is, redistributive) program.<sup>113</sup> These limitations make the argument for progressivity less effective than it could be, and account for at least some of the intellectual success of the flat tax movement.

Critical scholarship has a role in reversing this trend. By calling attention to the tax treatment of women, minorities, and other disadvantaged groups, critical scholars may help to bring the debate over progressive taxation up to date, to encompass the treatment not only of taxpayers at different income levels but those who belong to more or less powerful groups in the wider society.<sup>114</sup> Indeed, the critical tax movement is in some ways a contemporary equivalent of the progressive movement that created the income tax in the first place, with the difference that class is today defined along race and gender as well as along economic lines. The economic and social disadvantage facing women and minorities is, after all, the reason that we care about discrimination against them more than, for example, discrimination between the oil and natural gas industries, or between different types of research and development spending. That is why efforts to approach race and gender issues using horizontal equity analysis—by asking whether the Code treats women and minorities differently from similarly situated white males—have a tendency to fall rather flat. The whole point of critical scholarship is that women and minorities are not similarly situated to white men, and it seems more accurate to view these problems as vertical equity or at least hybrid issues rather than as purely horizontal equity concerns.<sup>115</sup>

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113. See, e.g., Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913 (1996) (evaluating merits of affording preferences based on economic disadvantage rather than on race or other such criteria).

114. For a discussion of the limitations of conventional analyses of traditional progressivity discourse, see Brown & Fellows, *supra* note 4, at 9-10, 17-20 (arguing that progressivity theory fails to consider adequately the role of wealth as opposed to income, the significance of tax base as opposed to tax rates, and the tax treatment of poor individuals). Brown and Fellows suggest that these limitations make progressivity a "contestable" proposition. *Id.* at 10. A better view is that they suggest the need for an expanded, more sophisticated version of the progressivity concept.

115. Edward McCaffery is perhaps most honest about this, proposing intentionally



An expanded concept of progressivity offers the basis for a potential convergence between mainstream and critical scholars. This could be a dynamic process, in which mainstream scholars take critical perspectives into account in debating progressivity and vertical equity issues, and critical scholars make a greater effort to consider the implications of their work for the wider tax system. For example, in evaluating comprehensive reform proposals—like the flat tax or the consumption tax—traditional scholars should consider the impact of these proposals on women, minorities, and other disadvantaged groups as well as on economically defined income classes. Mainstream scholars also should consider the “feminization” of poverty, and the concentration of poverty among minorities and immigrant groups, in evaluating the philosophical debate between progressivity and flat tax advocates.<sup>116</sup> Finally, mainstream scholars should pay increased attention to the effect of individual tax law provisions—for example, capital gains rates, the marriage penalty, and investment and savings incentives—on these disadvantaged categories of taxpayers. For their part, critical scholars should consider whether at least some of their arguments might be made as effectively in class-based terms as in race- or gender-based terms. As Zelenak suggests, they should also try to distinguish tax rules that involve a genuine pattern of discrimination against women or minorities from other, more quirky provisions that may not reflect such a pattern.<sup>117</sup>

More broadly, the challenge posed by critical scholarship may cause a much-needed awakening for the entire tax field. Even for mainstream authors, the strictures of traditional tax scholarship have become excessively confining. There is an emerging consensus on the need for a scholarship that has more diverse goals and methods, including empirical and narrative (as well as normative) forms, that makes expanded use both of non-economic social science and the insights of non-tax legal scholars, and that addresses a new and

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advantageous tax treatment of women to compensate for past (and continuing) discrimination. See MCCAFFERY, *supra* note 24, at 277-78 (proposing to “tax married men more, and married women less,” although arguing that this would be best achieved by a facially gender-neutral reform).

116. A traditional argument for progressivity is the injustice of pre-tax income allocations, the case for which would appear stronger if poverty was concentrated among discrete racial or gender groups. Cf. Blum & Kalven, *supra* note 106, at 486-506 (assessing the reduction of inequality as a goal of progressive taxation).

117. For example, the marriage penalty and the treatment of child care expenses appear more systematic than the QTIP or return preparation rules. See *supra* note 82 (citing articles on these and other subjects).

broader range of subject matter.<sup>118</sup> By challenging many of the traditional limitations of the tax field, and making extensive use of empirical data, critical scholars help make such a scholarship possible. That does not mean most tax scholars will suddenly turn into “crits” or embrace radical reform proposals. But it does suggest that critical and mainstream scholars will eventually be able to find a common language and that it will become increasingly difficult to dismiss critical writers as beyond the scholarly pale. This convergence, in turn, will permit critical scholars to adopt a less defensive tone and to make their arguments in less particularistic terms.

My hope is that mainstream and critical scholars can create a new progressive synthesis on tax issues, to the point that the very label of “critical” scholar appears quaint and outdated. My fear is that they will exhaust their energies fighting each other and have little strength left to face the conservative onslaught. That is why the tone of Zelenak’s article causes me such concern. The legal academy—not to mention the American Left—has suffered immeasurable damage from the proliferation of special interest groups, and perhaps greater damage from the angry reaction that such groups have engendered among traditional liberal forces.<sup>119</sup> I would like to see the tax field avoid this dynamic. A field organized around universal principles of fairness and equity, with groups competing for influence but sharing a common language and values, seems likely to achieve much that is of lasting value. A field in which everyone is shouting at each other is likely to come to no good.

It may be that there is an inevitable phase of anger before new ideas are taken seriously and become part of the established order in any field. From this perspective, the contentious nature of this Symposium may be a sign of progress rather than a cause for alarm. The traditional consensus on tax matters resulted not from the acquiescence of women, minorities, and other disadvantaged groups,

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118. See Livingston, *supra* note 2, at 394-409 (calling for a change in the goals, methods, and subject matter of contemporary tax scholarship).

119. See, e.g., Todd Gitlin, *The Anti-Political Populism of Cultural Studies*, *DISSENT*, Spring 1997, at 77, 77 (lamenting the rise of identity politics and group-oriented “cultural studies” and the tendency to substitute such activities for the building of effective political coalitions and the pursuit of broad-based leftist objectives).

but because they were not represented at all. We are far from agreeing on everything, but at least we are all in the room.<sup>120</sup>

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120. Edward McCaffery provides a rather eloquent, if idealistic, case for the value of dialogue and (implicitly) for the consciousness-raising function of critical scholarship: A principal lesson of contemporary social theory is that dialogue, and the conditions of dialogue, is often the most important political mechanism. Sometimes it is the only thing. Our discussion of gender and equality has been hampered by the obscurity of many of the gendered forces at work. We need to shed light on these . . . . We need to think more about what equality and respect mean.

MCCAFFERY, *supra* note 24, at 279.