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## Critical Tax Policy: a Pathway to Reform?

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# CRITICAL TAX POLICY: A PATHWAY TO REFORM?

*Nancy J. Knauer*<sup>\*</sup>

## TABLE OF CONTENTS

INTRODUCTION .....	207
I. THE COSTS OF FALSE NEUTRALITY .....	214
A. <i>All Part of a Larger “Blueprint”</i> .....	215
B. <i>Hidden Choices and Embedded Values</i> .....	218
Taxpayer neutrality .....	219
Equity and efficiency .....	221
C. <i>Critical Tax Theory and Scholarship</i> .....	223
II. CHOOSING A CRITICAL LENS .....	230
A. <i>Identifying the Axes of Difference</i> .....	231
B. <i>Explicit and Implicit Bias in the Personal Income Tax</i> .....	234
1. Explicit bias – the marital filing provisions .....	236
2. Implicit bias – “qualifying child” .....	240
3. Interpretive discretion – medical treatment .....	243
III. DESIGNING CRITICAL TOOLS .....	246
A. <i>Good Policy Requires Good Data</i> .....	247
1. Too much, too little, or not at all .....	251
B. <i>Diversity Expenditure Budget</i> .....	254
C. <i>Diversity Assessment Statement</i> .....	257
CONCLUSION.....	262

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<sup>\*</sup> I. Herman Stern Professor of Law and Director of Law & Public Policy Programs, Temple University, Beasley School of Law. I first presented the idea for this paper at the Critical Tax Theory Workshop held at Emory Law School. I would like to thank all of the participants for their helpful and thoughtful comments, especially Dorothy Brown, who organized the workshop. I later presented the paper at the American University Washington College of Law Business Law Workshop, and I would also like to thank all of those participants for their engaging feedback. Finally, I would like to thank Andre Smith for his thought-provoking comments and Robin Maril for her work exploring the use of impact statements to further social goals.

## INTRODUCTION

The Global Recession of 2008 and ensuing austerity measures have renewed the urgency surrounding the call for fundamental tax reform.<sup>1</sup> In the United States, the so-called “fiscal cliff” and the automatic budget cuts imposed under the name of “sequestration” have decisively linked tax reform with the ongoing fight over budget priorities, both in the minds of the American public and their elected representatives.<sup>2</sup> This brinksmanship approach to policy making has squarely placed tax reform within the wider rubric of *fiscal* reform, thus marking the end of tax exceptionalism and severely compromising the established goal of revenue neutrality.<sup>3</sup> Tax reform in the face of staggering federal deficits will have to respond to political concerns over revenue and spending levels, and there will be clear “winners and losers.”<sup>4</sup> Before embarking on fundamental tax reform, however, this Article proposes adding a *critical* lens to existing U.S. tax policy to ensure that any proposals for change are informed, transparent, and responsive to the needs and abilities of individual taxpayers.

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<sup>1</sup> Nelson D. Schwartz, *Austerity Reigns Over Euro Zone as Crisis Deepens*, N.Y. TIMES, Jan. 2, 2012, at A1. See also MARK BYLTH, *AUSTERITY: THE HISTORY OF A DANGEROUS IDEA* (2013) (describing the roots of “austerity” as an economic political strategy). In terms of fundamental tax reform, this Article focuses almost exclusively on issues related to the federal personal income tax.

<sup>2</sup> Jennifer Steinhauer, *Under Pressure, House Approves Senate Tax Deal*, N.Y. TIMES, Jan. 2, 2013, at A1.

<sup>3</sup> The term “tax exceptionalism” is most frequently used in the context of administrative law norms where taxpayers have long-argued that Treasury regulations were entitled to a lower standard of deference than required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The notion that “tax is different” for purposes of judicial review was rejected by the U.S. Supreme Court in *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704, 716 (2011). See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) (arguing against the view that “tax is different or special” and therefore, not like other areas of law).

<sup>4</sup> See THE PRESIDENT’S ECON. RECOVERY ADVISORY PANEL, *THE REPORT ON TAX REFORM OPTIONS: SIMPLIFICATION, COMPLIANCE, AND CORPORATE TAXATION* [hereinafter PERAP TAX REPORT] (August 2010), available at [http://www.whitehouse.gov/sites/default/files/microsites/PERAB\\_Tax\\_Reform\\_Report.pdf](http://www.whitehouse.gov/sites/default/files/microsites/PERAB_Tax_Reform_Report.pdf). According to the Report, “revenue neutrality by income class might result in increases or decreases in tax liability for subgroups or individual taxpayers within each income class—that is, revenue neutrality might result in ‘winners’ and ‘losers.’” *Id.* at v. When looking at tax reform across income class, the prospect of raising tax rates for higher income taxpayers has led to charges of “class warfare.” See Doug Bandow, *The Path To Tax Reform: Cutting Taxes For Those Who Pay For Them*, FORBES, Sept. 10, 2012, available at <http://www.forbes.com/sites/dougbandow/2012/09/10/the-path-to-tax-reform-cutting-taxes-for-those-who-pay-for-them/> (observing that “[t]axes also offer a means for the Democrats to play their traditional class war card”).

In many ways, traditional tax policy is ill-equipped to navigate the political demands and trade-offs inherent in fiscal reform.<sup>5</sup> Primarily focused on macro distributional concerns, the public welfare perspective of traditional tax policy intentionally looks past the identities of individual taxpayers, with the exception of income level.<sup>6</sup> It is self-consciously indifferent to the impact that taxation can have on existing social, political, and economic disparities in terms of participation or access and does not acknowledge the various ways that tax policy can reinforce existing inequities or biases.<sup>7</sup> As a result, our facially neutral tax practices can sometimes produce a string of unintended consequences that, although objectively undesirable, traditional tax policy would consider both irrelevant to its goals and beyond its power to correct.<sup>8</sup> Critical tax policy can help policymakers evaluate these unintended consequences and pierce the structural assumptions of neutrality.

It has been almost thirty years since the United States last undertook the collective project of fundamental tax reform.<sup>9</sup> Since that time, a growing international consensus has emerged regarding the connection between taxation and inequality,<sup>10</sup> as well as a sophisticated and vibrant critique of the U.S. tax

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<sup>5</sup> Albert R. Hunt, *Slim Chance for Tax Fix as Things Are*, INT'L HERALD TRIB, Mar. 18, 2013, at 2 (asserting that increasing polarization in Congress makes a major tax "overhaul next to impossible").

<sup>6</sup> See, e.g., LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002). Murphy and Nagel assert that: "Justice or injustice in taxation can only mean justice or injustice in the system of property rights and entitlements that result from a particular tax regime." *Id.* at 8.

<sup>7</sup> See *id.* at 26 (discussing the "purely economic impact" of the "justice of taxation").

<sup>8</sup> For example, the combined effect of the marital filing provisions and the Earned Income Tax Credit (EITC) has historically produced a strong penalty upon marriage for low-income taxpayers eligible for the EITC. See EDWARD J. MCCAFFERY, *TAXING WOMEN* 146-50 (1997); see also Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995). The American Recovery and Reinvestment Act of 2009 provided some relief for the marriage penalty and expended the credit for some families, but it did not eliminate the penalty. John J. Fichtner & Jacob Feldman, *Taxing Marriage: Microeconomic Behavioral Responses to the Marriage Penalty and Reforms for the 21<sup>st</sup> Century*, Sept. 12, 2012, available at <http://mercatus.org/publication/taxing-marriage-microeconomic-behavioral-responses-marriage-penalty-and-reforms-21st>.

<sup>9</sup> The result was the Tax Reform Act of 1986, which drastically broadened the tax base and flattened rates while adhering to the mandate of revenue neutrality. Bruce Bartlett, *The Tax Reform Act of 1986: Should We Do It Again?*, N.Y. TIMES ECONOMIX (Oct. 18, 2011, 6:00AM), <http://economix.blogs.nytimes.com/2011/10/18/the-tax-reform-act-of-1986-should-we-do-it-again/>. See also JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987).

<sup>10</sup> See, e.g., UNDP, *Issues Brief: Gender Equality and Poverty Reduction – Taxation* (Apr. 2010), available at <http://www.undp.org/content/dam/undp/library/gender/Gender%20and%20Poverty%20Reduction/Taxation%20English.pdf>. This consensus has recognized that even the best intended tax systems

policy known as critical tax theory.<sup>11</sup> This Article explores how the insights of both developments can lead to the creation of a critical tax policy that is built on the articulation of difference rather than false assumptions of sameness. It argues for a tax policy that is transparent and responsive to individuals; one that acknowledges its constitutive role as part of a larger “blueprint for the aims and ambitions of the nation state.”<sup>12</sup>

In many ways, these insights build on the tax expenditure concept that is now an accepted mainstay of tax policy.<sup>13</sup> Originally developed to further transparency and promote better budgeting practices, the tax expenditure concept exposes how a tax system designed to raise revenue can also contain hidden expenditures in the form of indirect spending.<sup>14</sup> In the 1970s, Stanley Surrey argued that the failure to acknowledge the vast indirect spending in the tax code compromised the integrity of the budgeting process.<sup>15</sup> Congress responded by mandating the creation of the Tax Expenditure Budget, which accounts for the indirect spending by budget function.<sup>16</sup>

The three classic pillars of tax policy—equity, efficiency, and ease of administration—aim to design a system of taxation that fairly apportions the burdens of citizenship, minimizes tax distortions in economic behavior, and simplifies the task of compliance and administration.<sup>17</sup> These organizing principles reflect widely-held equality and autonomy norms but proceed from a very strong presumption of taxpayer neutrality where the only salient distinction among taxpayers is that of income level.<sup>18</sup> In other words, U.S. tax policy does not take into account demographic differences among taxpayers, such as race, ethnicity, gender, sexual orientation, or gender identity, nor does it attempt to

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have the ability to entrench existing disparities, and it has urged policy makers “to be aware of the extent to which tax policies . . . reinforce or break down. . . inequalities.” *Id.* at 4.

<sup>11</sup> See, e.g., CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009) (excerpting over fifty articles written from a critical tax theory perspective).

<sup>12</sup> ANN MUMFORD, TAX POLICY, WOMEN AND THE LAW 3 (2009) (crediting Joseph Schumpeter with the observation regarding the budget function).

<sup>13</sup> See STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973).

<sup>14</sup> See also STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985).

<sup>15</sup> SURREY, *supra* note 13. Stanley Surrey was the Assistant Secretary of the Treasury for Tax Policy in 1968 when he coined the term “tax expenditures” to refer to provisions that represented a departure from the normally accepted principles of income and are designed to achieve the same results usually accomplished through direct spending. JOINT COMMITTEE ON TAXATION, A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS (May 12, 2008), *available at* <https://www.jct.gov/publications.html?func=startdown&id=1196>.

<sup>16</sup> The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 601-688 (2006)).

<sup>17</sup> C. EUGENE STEUERLE, CONTEMPORARY US TAX POLICY 10 (2004).

<sup>18</sup> *Id.* (“In the tax laws, horizontal equity—often called equal justice—asserts that those with equal ability to pay should pay equal taxes”).

evaluate the potentially disparate impact of taxation on the members of these groups.<sup>19</sup> The Internal Revenue Service does not collect information regarding demographic characteristics, making it extremely difficult to “put a face on America’s tax returns.”<sup>20</sup>

By viewing taxpayers only in terms of income level, tax policy is free to consider distributional issues without having to account for countervailing concerns such as gender or race equity.<sup>21</sup> For example, the fiction of taxpayer neutrality is a constituent feature of optimal tax theory, which seeks to maximize social welfare by identifying the optimal tax base.<sup>22</sup> Increasingly, however, this strong presumption of tax neutrality is out of step with emerging international norms.<sup>23</sup> Tax equity initiatives undertaken by the United Nations, NGOs, and adopted by numerous countries all recognize the connection between gender and taxation.<sup>24</sup> For example, a 2010 United Nations Development Programme Issues Brief cautions that “[p]olicy makers need to be aware of the extent to which tax policies . . . reinforce or break down gender inequalities.”<sup>25</sup>

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<sup>19</sup> The Internal Revenue Service (IRS) does not collect demographic data, thereby complicating any attempt to “put a face on America’s tax returns.” The Tax Foundation, a non-partisan tax research group, has started a project called *Putting a Face on America’s Tax Returns* that is designed to provide enhanced information about who actually pays taxes. Tax Foundation, *Putting a Face on America’s Tax Returns: A Chart Book* (2012), available at [http://taxfoundation.org/sites/taxfoundation.org/files/docs/putting\\_a\\_face\\_on\\_americas\\_tax\\_returns\\_chartbook.pdf](http://taxfoundation.org/sites/taxfoundation.org/files/docs/putting_a_face_on_americas_tax_returns_chartbook.pdf). The project uses tax statistics and Census data, but it does not provide a breakdown of the information based on race, ethnicity, or gender. *Id.* It does provide information based on age and educational level. *Id.* at 25-30.

<sup>20</sup> *Id.*

<sup>21</sup> Tony Infanti refers to the sole focus on income as the “homogenizing effect.” Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1206 (2007-2008) (discussing “equity’s systematic erasure of all but the economic dimension of individuals”).

<sup>22</sup> See generally J.A. Mirrlees, *Optimal Tax Theory: A Synthesis*, 6 JOUR. PUBL. ECON. 327 (1976) (outlining necessary conditions for optimal taxation).

<sup>23</sup> See generally TAXATION AND GENDER EQUITY: A COMPARATIVE ANALYSIS OF DIRECT AND INDIRECT TAXES IN DEVELOPING AND DEVELOPED COUNTRIES (Caren Grown & Imraan Valodia eds., 2010) (examining the relationship between gender and taxation in eight countries: Argentina, Ghana, India, Mexico, Morocco, South Africa, Uganda, and the United Kingdom).

<sup>24</sup> See UNDP, *Issues Brief*, *supra* note 10. For example, the United Kingdom and South Africa “have undertaken reforms to remove explicit gender biases in their personal income tax laws, no personal income tax system can yet be classified as transforming unequal gender relations.” Caren Grown, *Taxation and Gender Equality: A Conceptual Framework*, in TAXATION AND GENDER EQUITY, *supra* note 23, at 1, 17. A number of countries have instituted gender-responsive budgeting initiatives, starting with Australia in 1994. UN Women, *Gender Responsive Budgeting*, [http://www.gender-budgets.org/index.php?option=com\\_content&view=article&id=46&Itemid=112](http://www.gender-budgets.org/index.php?option=com_content&view=article&id=46&Itemid=112) (last visited Sept. 4, 2013). To date, there are over forty gender-responsive-budgeting initiatives being implemented across the world. *Id.*

<sup>25</sup> *Id.* at 4.

The presumption of taxpayer neutrality has also come under sustained critique by a group of U.S. tax scholars who self-identify as critical tax scholars and write from a relatively diverse range of perspectives, including critical race theory,<sup>26</sup> feminist legal theory,<sup>27</sup> and queer theory.<sup>28</sup> These critical tax scholars have exposed implicit bias in the tax system by examining facially neutral tax provisions to illustrate how existing tax law and policy can both reflect and reinforce disparities based on race or ethnicity, socioeconomic status, gender or gender identity/expression, sexual orientation, and disability.<sup>29</sup> They have also explored explicit bias by engaging the more obviously gendered or otherwise exclusionary provisions of the tax code, such as the marital provisions,<sup>30</sup> and the exclusion of same-sex couples from the joint filing provisions.<sup>31</sup>

U.S. tax policy debates have largely ignored the international developments connecting taxation with inequality, as well as the contributions of critical tax scholars.<sup>32</sup> This Article argues that federal tax policy would benefit from the addition of a critical lens or perspective and explores a number of ways to integrate these collective insights toward the creation of a truly *critical* tax policy. By considering the impact of tax policy on marginalized taxpayers at the outset, policymakers will have the opportunity to avoid (or at least openly acknowledge) the types of persistent disparities and inequities that have been catalogued by

<sup>26</sup> See, e.g., Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751(1996); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997); Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575 (2001); Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L. J. 117 (2004).

<sup>27</sup> See, e.g., Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L. J. 1571 (1996); Marjorie E. Kornhauser, *A Taxing Woman: The Relationship of Feminist Scholarship to Tax*, 6 S. CAL. REV. L. & WOMEN'S STUD. 301 (1997).

<sup>28</sup> See, e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY REV. LESBIAN AND GAY LEGAL ISSUES 97 (1991); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998); Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004).

<sup>29</sup> See, e.g., Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053 (2006).

<sup>30</sup> See, e.g., McCaffery, *supra* note 8, at 58-88 (describing the joint filing provision and the "marriage penalty" and "marriage bonus").

<sup>31</sup> See, e.g., Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI. KENT L. REV. 481, 483 (2009). As a result of the decision of the U.S. Supreme Court in *U.S. v. Windsor*, legally married same-sex couples are now considered married for federal tax purposes. See *infra* text accompanying notes 164-72.

<sup>32</sup> Critical tax scholarship was the subject of intense criticism by mainstream tax scholars. In 1998, the North Carolina Law Review devoted an entire issue to an extended critique of critical tax theory. See, e.g., Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1749, 1749 (1998); Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1734 (1998).

critical tax scholars and international tax equity efforts. In this way, the addition of a critical lens has the potential to reveal the false neutrality of tax provisions, just as the tax expenditure concept made indirect spending visible to policymakers in the 1970s.<sup>33</sup> Professor Stanley Surrey taught a generation that the choice not to tax is often equivalent to spending.<sup>34</sup> Similarly, critical tax policy can illustrate how stated considerations of equity and neutrality could actually serve to reify and perpetuate inequity.<sup>35</sup>

Critical tax scholars have identified three common themes that have direct relevance for U.S. tax policy makers: (1) current taxpayer information is insufficient to measure the incidence of taxation across different demographics; (2) neutrality principles can obscure existing disparities in the distribution of tax benefits and burdens; and (3) the insistence on taxpayer neutrality can lead to unintended and undesirable consequences. This article takes up each of these issues in turn and addresses how each concern could be addressed within the existing income tax system using familiar administrative or legislative measures. For example, the question of insufficient taxpayer information could be addressed through enhanced data collection. Although this solution may present its own set of negative externalities and objections, it illustrates that the answer to the basic question posed by critical tax theory—how is the burden of taxation allocated across different groups within society—is not unknowable.<sup>36</sup>

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<sup>33</sup> See, e.g., Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C. L. REV. 225, 263 (1979).

<sup>34</sup> *Id.* Surrey and McDaniel explained the distinction between direct and indirect spending as follows:

Put differently, whenever government decides to favor an activity or group through monetary assistance, it may elect from a wide range of methods in delivering that assistance. Direct assistance may take the form of a government grant or subsidy, a government loan, perhaps at a special interest rate, or a private loan guaranteed by the government: Instead of direct assistance, the government may work within the income tax system to reduce the tax otherwise owed by a favored activity or group.

*Id.* at 228.

<sup>35</sup> Anthony C. Infanti & Bridget J. Crawford, *Introduction to CRITICAL TAX THEORY: AN INTRODUCTION*, at xxii (Anthony C. Infanti & Bridget J. Crawford eds., 2009) (noting “critical tax scholars’ assertion that the tax laws . . . reflect and even reify discrimination based on race, gender, sexual orientation, class, disability, or family structure”).

<sup>36</sup> Enhanced data collection would also answer a longstanding evidentiary objection to the critical tax project, namely that it was impossible to substantiate disparate impact because there is no national data set of taxpayer information based on race or other identity characteristics. Richard Schmalbeck, *Race and the Federal Income Tax: Has A Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1834 (1998). As explained *infra* in Part III, this objection presents a classic Catch-22 and illustrates the closed nature of a tax policy bounded by neutrality. Critical tax theory



The two remaining concerns could also be addressed through enhanced reporting and transparency, which admittedly would also raise a host of questions. With respect to the issue of the disparate distribution of tax benefits and burdens, the practice of gender-sensitive budgeting has shown that it is possible (and sometimes desirable) to track expenditures and spending to determine the impact of programs and policies on specific disadvantaged groups within society.<sup>37</sup> Critical tax policy would support the creation of a diversity expenditure budget to provide essential information to tax policy makers regarding the incidence and burden of taxation that would not only be relevant for tax purposes but also for broader social-entitlement programs.<sup>38</sup> The question of unintended consequences could likewise be addressed at the outset through the use of a diversity impact assessment that would be analogous to an environmental impact statement<sup>39</sup> or the minority impact assessments that are gaining support at the state level, especially in the context of sentencing issues.<sup>40</sup> Each of these proposals would further the goals of critical tax policy to make tax policy more informed, transparent, and responsive to the needs of individual taxpayers, but each proposal also comes with its own set of costs. Accordingly, they do not represent an exhaustive list but rather a starting point for the ongoing project of building a truly critical tax policy.

The first Part of the Article engages the multiple claims of neutrality within U.S. tax policy. Arguing that tax policy should be viewed as a component of fiscal policy, it uses the insights of both international tax equity initiatives and critical tax scholarship to make the case for greater transparency. Part II then

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cannot substantiate its claims because there is no national data set of taxpayer information that includes demographic information such as race, gender, or ethnicity. Federal income tax returns do not collect information on race because under prevailing tax policy the only salient distinguishing feature between taxpayers is income level.

<sup>37</sup> See generally Lisa Phillips & Miranda Stewart, *Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budgets*, 34 BROOK. J. INT'L L. 797, 843 (2009) (describing the advent of “gender budgeting”).

<sup>38</sup> In 1998, Beverly Moran proposed that Congress should be required to prepare a “Race Expenditure Budget.” Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?* 76 N.C.L. REV. 1629, 1634 (1998).

<sup>39</sup> See 42 U.S.C. §§ 4341-4347 (2011), requiring the development of the Environmental Impact Statement.

<sup>40</sup> In 2008, Iowa enacted legislation requiring a “minority impact statement” for all legislative action involving sentencing. Dana Boone, *Iowa to Require ‘Minority Impact Statements’ for Proposed Criminal Legislation*, IOWA INDEP. Apr. 17, 2008, available at <http://iowaindependent.com/2220/iowa-to-require-minority-impact-statements-for-proposed-criminal-legislation> (reporting on background of bill). The law gained support after statistics showed that Iowa led the nation in its rate of incarceration for African Americans. *Id.* The sponsor of the bill called the impact statement “a remarkable step in addressing the special circumstances of Iowa’s minority population.” *Id.* For more information on the Iowa minority impact statement, see *infra* text accompanying notes 288-92.

moves to consider the construction of the critical lens. It discusses how to determine which characteristics or group identifications are salient for purposes of tax policy, recognizing that these conclusions can evolve and change over time and across cultures. It also applies the lens to three different examples of bias common in tax matters: explicit, implicit, and discretionary bias. Part III proposes ways to enforce or implement the critical lens through policy innovations or safeguards that draw on longstanding institutional practices and procedures. These proposals include: (1) enhanced information collection; (2) the creation of a diversity expenditure budget; and (3) the requirement of a diversity impact statement. A brief conclusion acknowledges the additional costs and considerations involved with each of these proposals and reiterates that this is only the beginning of a much longer conversation regarding how to develop an informed, transparent, and responsive critical tax policy: one that recognizes that the goal of equity does not demand the denial of difference.

### I. THE COSTS OF FALSE NEUTRALITY

It goes without saying that the choices that a society makes regarding what, whom, and when to tax can reveal quite a bit about what a society values.<sup>41</sup> In the United States, our tax policy does not inquire as to the effects of taxation on historically disadvantaged groups or marginalized populations, but instead focuses solely on income level. This post-identity approach reflects a strong commitment to equality of opportunity and the desirability of an identity-blind society. It also has obvious advantages for economic modeling.<sup>42</sup> It does not, however, reflect the lived experience of millions of individuals for whom

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<sup>41</sup> See, e.g., Marjorie E. Kornhauser, *Through the Looking Glass With Alice and Larry: The Nature of Scholarship*, 76 N.C. L. REV. 1609, 1609 (1998) (noting that “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”).

<sup>42</sup> With respect to the theory of optimal taxation, Linda Sugin observed:

Users of the model can input various patterns of income distribution and efficiency costs of taxation to evaluate alternative tax regimes. The model is amenable to different definitions of distributional fairness and can adjust to accommodate specific limitations in tax design that may arise from political or administrative constraints. Because of the model’s wide range and flexibility, the optimal tax literature is extensive, and offers insights on many fundamental tax policy issues, including the two most paradigmatic—progressivity and choice of tax base.

Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 TAX L. REV. 229, 229 (2011).

numerous and overlapping identity markers—race, ethnicity, gender, sexual orientation, gender identity—continue to have social and political salience.

The importance of these identity characteristics are not lost on policy makers in a number of other contexts, such as labor and employment, health care, and housing. In each of these areas, federal policy specifically addresses the impact of legislative and regulatory choices on historically disadvantaged groups and marginalized populations.<sup>43</sup> A critical approach to tax policy maintains that, as a component of a larger “blueprint” of collective goals and priorities, taxation should acknowledge the continued relevance of identity characteristics, existing disparities, and persistent inequities. Moreover, it should recognize that the failure to take these considerations into account can lead to unintended consequences—facially neutral tax policy can sometimes reinforce and reify the very inequities that it currently chooses to ignore.

This Part engages the multiple claims of neutrality that combine to construct the prevailing understanding of tax exceptionalism.<sup>44</sup> It first discusses the spending function that is inherent within the current structure of the personal income tax and the transparency gains afforded by the tax expenditure concept. It then focuses on the neutrality fictions inherent in traditional tax policy and the growing international consensus regarding the important connection between taxation and equality goals. A final section explores the critical tax theory movement in greater detail and describes its major contributions, as well as the less than welcoming reception it has received from mainstream tax scholars committed to taxpayer neutrality.

#### A. All Part of a Larger “Blueprint”

In 2011, the federal government received \$2.3 trillion in revenues, of which \$1.1 trillion came from the personal income tax.<sup>45</sup> However, the amount that the federal government *could* have collected through the personal income tax was considerably higher—almost twice that amount. Budget estimates for 2011 show that the federal personal income tax distributed to taxpayers over \$965 billion in

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<sup>43</sup> For a discussion of the many instances where the federal government collects and uses demographic information, see *infra* text accompanying notes 221-32.

<sup>44</sup> The term tax exceptionalism is most often used to refer to a longstanding argument that Treasury Regulations should not be granted the same degree of judicial deference as directed under *Chevron*. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984). For a discussion of tax exceptionalism and the belief that “tax is different” see *supra* note 3.

<sup>45</sup> Jonathan Schwabish & Courtney Griffith, *The U.S. Federal Budget*, Congressional Budget Office, <http://www.cbo.gov/sites/default/files/cbofiles/attachments/budgetinfographic.pdf> (last visited Mar. 31, 2013). The revenue from the personal income tax represented 7.3% of GDP. *Id.*

tax expenditures,<sup>46</sup> representing instances where the federal government chose not to collect revenue in order to further other important social or economic policy goals.<sup>47</sup> Tax expenditures are sprinkled liberally throughout the tax code in the form of exclusions, deductions, and credits. In each case, the decision to forego revenue represents a form of indirect spending, such as when the federal government chooses to subsidize home ownership through the mortgage interest deduction or subsidize health care through the medical expense deduction.<sup>48</sup>

In the 1970s, Stanley Surrey lobbied strenuously to have this indirect spending represented in the federal budget.<sup>49</sup> Recognizing that the amounts in questions were significant, Surrey argued that the federal government's choice to forego revenue to which it is entitled is equivalent to spending.<sup>50</sup> The Congressional Budget and Impoundment Control Act of 1974 adopted Surrey's tax expenditure concept and required the creation of a tax expenditure budget to accompany the regular direct-spending budget.<sup>51</sup> Organized by budget function, the tax expenditure budget is designed to both give policymakers important distributional information, as well as to make them more accountable for the indirect spending that they authorize through the tax code.<sup>52</sup> As a theoretical construct, tax expenditure analysis is now widely accepted,<sup>53</sup> although

<sup>46</sup> Donald B. Marron, *How Large Are Tax Expenditures?*, TAX NOTES 1597 (March 28, 2011), <http://www.taxpolicycenter.org/UploadedPDF/1001526-Expenditure-Estimates.pdf> (last visited Mar. 31, 2013).

<sup>47</sup> See Surrey & McDaniel, *supra* note 33, at 228 (explaining that tax expenditures "[w]hatever their form . . . essentially represent government spending for the favored activities or groups").

<sup>48</sup> The mortgage interest deduction is allowed under section 163(h) of the I.R.C. §163(h) (2012). The medical expense deduction is allowed under section 213 of the IRC.

<sup>49</sup> SURREY, *supra* note 13.

<sup>50</sup> Surrey and McDaniel explained that tax expenditures are:

departures from the normal tax structure, designed to favor a particular industry, activity, or class of persons. Tax subsidies partake of many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax, or special rates. Whatever their form, these departures from the "normative" income tax structure essentially represent government spending for the favored activities or groups through the tax system rather than through direct grants, loans, or other forms of government assistance.

*Id.* at 228.

<sup>51</sup> The Treasury Department published its first tax expenditure budget in 1968. *Id.* at 226.

<sup>52</sup> In addition, since 1972 the Staff of the Joint Committee on Taxation has produced its own tax expenditure list annually. Joint Committee on Taxation, *Estimates Of Federal Tax Expenditures For Fiscal Years 2012-2017*, Feb. 1, 2013, available at <https://www.jct.gov/publications.html?func=startdown&id=4504> (last visited Nov. 6, 2013).

<sup>53</sup> Surrey & McDaniel, *supra* note 33, at 227 (reporting in 1979 that there had been "a rapid and expanding recognition of that role the tax expenditure concept has in tax policy issues and budget policy issues").

commentators have continuously questioned the appropriate way to distinguish tax expenditures from the more structural components of the income tax.<sup>54</sup> The increased transparency resulting from this wide acceptance does not seem to have dampened the appeal of tax expenditures. In 2011, the total amount of the personal income tax expenditures exceeded the defense budget.<sup>55</sup>

There are numerous reasons why such high levels of indirect spending are orchestrated through the personal income tax—some pragmatic and some ideological. On the pragmatic side, the existing infrastructure of the tax system allows Congress to engage in spending programs without the start-up costs associated with new bureaucracy.<sup>56</sup> The complexity of the tax code also affords legislators the opportunity to hide subsidies for special interests far from the prying eyes of watchdog groups.<sup>57</sup> From an ideological perspective, some policy makers might find it preferable to provide an indirect benefit to taxpayers, rather

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<sup>54</sup> Even its critics recognize that “[t]ax expenditure analysis has produced useful information for legislators and tax policymakers, highlighting potential tax reforms and revenue raisers.” Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, YALE L. J., ONLINE, May 24, 2011, <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/winn-and-the-inadvisability-of-constitutionalizing-tax-expenditure-analysis>. See also Douglas A. Kahn, *A Proposed Replacement Of The Tax Expenditure Concept And A Different Perspective On Accelerated Depreciation*, FLA. STA. U. L. REV. (forthcoming 2013). When the Joint Committee on Taxation reconsidered its definition of a tax expenditure in 2008, it concluded

[the] principal utility [of the tax expenditure concept] appears to have been as a tool of tax policy and tax distributional analysis. The rhetoric of tax expenditure analysis, and the economic reasoning that underlies that rhetoric, in fact can provide a successful framework by which to judge the fairness, efficiency and administrative consequences of many “incentive” proposals. Policymakers further can look to tax expenditure analysis to provide insight into “base broadening” and similar measures.

Joint Committee on Taxation, *A Reconsideration of Tax Expenditure Analysis*, May 12, 2008 available at <https://www.jct.gov/publications.html?func=startdown&id=1196> (last visited Apr. 1, 2013).

<sup>55</sup> JONATHAN SCHWABISH & COURTNEY GRIFFITH, THE U.S. FEDERAL BUDGET, CONGRESSIONAL BUDGET OFFICE, available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/budgetinfographic.pdf>. The revenue from the personal income tax represented 7.3% of GDP. *Id.*

<sup>56</sup> See Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1166 (1993) (arguing that “a tax subsidy may be more efficient than an equivalent direct spending program because such a subsidy uses the pre-existing tax system to communicate federal policy at relatively low marginal cost”).

<sup>57</sup> *Id.* at 1168 (noting a critique that tax expenditures were “not subject to the same scrutiny as direct monetary expenditures”).

than a direct transfer payment.<sup>58</sup> Whatever the reason, the use of tax expenditures shows no signs of abating, even as fundamental tax reform has called into question the longevity of some of the more popular tax expenditures, such as the exclusion for employer-provided health insurance or the mortgage interest deduction.<sup>59</sup>

Even with the high levels of indirect spending within the tax code, federal tax policy adheres to a strong presumption of taxpayer neutrality under which the only relevant factor is income level. As a result, the federal government can annually “spend,” in the form of tax expenditures, an amount greater than the total defense expenditures without any ability to account for who benefits. The myth of taxpayer neutrality means that not only does tax policy fail to track the distribution of tax burdens, but it also fails to track the allocation of benefits. Although this post-identity stance is useful for purposes of economic modeling, it is inconsistent with a more nuanced concern for equity expressed in other areas of federal policy, such as labor and employment, housing, and health care. In all of these areas, federal policy acknowledges that certain identity markers and classifications—such as race, ethnicity, gender, sexual orientation, and gender identity—continue to have social, political, and economic salience. Notwithstanding significant civil rights gains, this continued salience means that efforts to promote equity will at times require attention to difference.

### *B. Hidden Choices and Embedded Values*

Despite the real life importance of differences, assumptions of neutrality abound in tax policy. There are frequently-voiced concerns over revenue neutrality,<sup>60</sup> marriage neutrality,<sup>61</sup> and the general overarching goal of tax

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<sup>58</sup> The relief efforts following Hurricane Katrina provide an example of the preference for indirect tax relief. The initial attempt to provide emergency relief through debit cards was roundly criticized. Jordan Weissman, *Did Katrina Victims Really Spend Their Relief Money on Gucci Bags and Massage Parlors?* THE ATLANTIC, (Oct. 31, 2012), available at <http://www.theatlantic.com/business/archive/2012/10/did-katrina-victims-really-spend-their-relief-money-on-gucci-bags-and-massage-parlors/264377/>. Those attempts were followed by a comprehensive disaster tax relief bill, but many of its provisions represented significant departures from normal tax policy and procedure, such as allowing the victims to report the storm losses they incurred in 2005 on their 2004 amended tax returns in order to speed the refund. Katrina Emergency Tax Relief Act (P.L. 109-73).

<sup>59</sup> The mortgage interest deduction for a personal residence is provided under IRC § 163(h). The exclusion for employer-provided health insurance is found in IRC § 104. Both have been targeted in recent discussions on tax reform. Ezra Klein, *Tax Reform is Going to Be Really, Really Hard*, WASH. POST (Aug. 10, 2012) (asserting the “vast swaths of tax expenditures are essentially off guard”), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/08/10/tax-reform-is-going-to-be-really-really-hard>.

<sup>60</sup> Any large scale revamping of the tax system typically proceeds under the direction that the result must be “revenue neutral.” See Daniel Shaviro, *Tax Reform Implications of the Risk of a*

neutrality—meaning that a tax system should not distort economic decision making.<sup>62</sup> In addition to these explicit claims of neutrality, the very language of taxation is premised on an assertion of neutrality and objectivity that is reinforced by the quasi-scientific character of the Internal Revenue Code and its voluminous Treasury Regulations.<sup>63</sup> Unlike other areas of law, the bounded universe of the tax code appears to offer clear answers and solutions.<sup>64</sup> In an almost mechanical manner, Revenue Rulings recite facts, apply the law unfettered by doubt or ambiguity, and pronounce generally applicable outcomes. The emphasis on objective facts and economic reality conveniently looks past individual differences and distinctions among taxpayers—with the exception of income level. The resulting “patina of neutrality”<sup>65</sup> can obscure the normative choices and value judgments that undergird contemporary tax policy. It can also retrench existing disparities and persistent inequities.

### 1. Taxpayer neutrality

One core neutrality principle that often remains unstated is that of taxpayer neutrality—the belief that identity characteristics are irrelevant for tax purposes.<sup>66</sup> Instead, taxpayers are viewed in the aggregate, as abstractions arranged by income level, which is itself an artificial construction of the tax code.<sup>67</sup>

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*U.S. Budget Catastrophe*, 50 U. LOUISVILLE L. REV. 577, 583 (2012) (noting that the “the dominant tax reform design has emphasized revenue neutrality, to be achieved by offsetting the revenue gain from base-broadening by lowering income tax rates).

<sup>61</sup> For the classic statement on marriage neutrality, see Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1395-96 (1975).

<sup>62</sup> STEUERLE, *supra* note 17, at 10.

<sup>63</sup> See McCaffery, *supra* note 8, at 1 (“The mainstream tax policy academy legitimated the structure of tax with a rhetoric of fairness, neutrality, and common sense.”).

<sup>64</sup> Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 767 (2004) (noting that “[i]n the traditional narrative, the Code is facially neutral and progressive; it seems to benefit and burden all groups and, on the whole, to be tilted in favor of the less fortunate because it demands less of them”).

<sup>65</sup> Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 486-87 (1987). She argues persuasively that economic analysis “lends a patina of neutrality, because economics—particularly neoclassical economics—is viewed by many non-economists (and even by some economists) as a ‘science,’ and therefore as factual and objective.” *Id.*

<sup>66</sup> See Infanti, *supra* note 21, at 1206 (noting the “homogenizing effect”). In terms of non-identity based characteristics, the Code does take into account important factors such as, homeownership, head of household status, and marital status. It also provides special relief in the form of a higher standard deduction for taxpayers who are blind or 65 years of age or older. I.R.C. § 63(c)(3) (2006).

<sup>67</sup> Charles O. Galvin, *Taking Critical Tax Scholarship Seriously—A Comment*, 76 N.C. L. REV. 1749 (1998). Galvin rejected the inquiries of critical tax theory and argued that “[a] better course

Discussions regarding distributional concerns, questions of public welfare, and the all-important quest for the optimal tax base do not consider the incidence of taxation based on race or gender or ethnicity—only income level. With the exception of critical tax theory, even progressive critiques of the tax system tend to focus primarily on macro questions of economic or distributional justice that accept the notion of taxpayer neutrality.<sup>68</sup>

The single focus on income level intentionally ignores other points of difference that continue to have social meaning and salience—race, gender, ethnicity, disability, sexual orientation, gender identity—and deems them to be irrelevant. As a result, tax policy is developed and implemented without regard to any number of characteristics that may have a bearing on an individual's tax benefit or burden. The Report of President Obama's Economic Recovery Advisory Panel (PERAP) provides an example of this type of policy making.<sup>69</sup> Tasked with simplifying the tax system in 2009, PERAP was directed by the President not to propose any reform that would raise "taxes on families with income of less than \$250,000 a year."<sup>70</sup> Although PERAP's final recommendations complied with this directive, its report acknowledged that it "did not try to hold all taxpayers harmless in the options we evaluated."<sup>71</sup> To the contrary, its report admitted that "revenue neutrality by income class might result in increases or decreases in tax liability for subgroups or individual taxpayers

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is to achieve neutrality by the attainment as nearly as possible of a pure Haig-Simons comprehensive model or a pure consumed income model." *Id.* at 1749.

<sup>68</sup> See, e.g., Sugin, *supra* note 42, at 231. Linda Sugin presents a sophisticated and nuanced critique of optimal tax theory based on a "philosophical understanding of fairness that incorporates the role of taxation into a broader conception of a just society." She observes that

A fair tax must satisfy the full range of demands that a just society places on government exercising its coercive power over individuals. Applying that philosophical approach to tax fairness reveals significant deficiencies in the assumption that a tax on ability to earn is truly optimal as a matter of justice.

*Id.*

<sup>69</sup> PERAP TAX REPORT, *supra* note 4. PERAP was assigned three separate tasks: "simplifying the tax system, improving taxpayer compliance with existing tax laws, and reforming the corporate tax system." *Id.* The President's Economic Recovery Advisory Panel (PERAP) is an outside advisory panel comprised of academics, business leaders, and former government officials. Jeff Zeleny, *Panel to Advise Obama on Economy*, N.Y. TIMES (Feb. 7, 2009), [http://www.nytimes.com/2009/02/07/business/07web-econ.html?\\_r=0](http://www.nytimes.com/2009/02/07/business/07web-econ.html?_r=0). PERAP is currently called the President's Council on Jobs and Competitiveness. Sheryl Gay Stolberg and Anahad O'Connor, *Volker Out, Immelt In On Economic Board*, N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2011/01/21/business/economy/21volcker.html>.

<sup>70</sup> PERAP TAX REPORT, *supra* note 4, at v.

<sup>71</sup> *Id.* The Report continued that "it would be impossible to do without substantial costs in terms of lost revenues." *Id.*



within each income class—that is, revenue neutrality might result in ‘winners’ and ‘losers.’”<sup>72</sup> Despite this reality, PERAP urged Congress to “select changes that are desirable on their merits and not worry about the distributional effects of each of them individually.”<sup>73</sup>

The principle of taxpayer neutrality not only says that the distributional impact of the PERAP’s recommendations are irrelevant, it also ensures that they are impossible to measure because taxpayer data broken down by race, ethnicity, or gender does not exist. As noted earlier, there is an emerging international consensus that, in spite of the common assumption, taxation is far from neutral. In many ways, the international tax equity research supports the fundamental insights of critical tax theory, but it employs economic research, rather than critical theory to make its case. It uses country-specific methodologies that take into account the structure of the domestic tax system, as well as other institutional concerns.<sup>74</sup> Its central conclusion is that policy makers “need to be mindful that tax policies do not place undue burdens on the poor or the marginalized.”<sup>75</sup> In other words, policy makers must look through the false neutrality of taxation to see the actual taxpayers and determine who bears the burdens and who reaps the benefits.

## 2. Equity and efficiency

The overriding commitment to taxpayer neutrality within traditional U.S. tax policy is reinforced by the all-important guiding principles of equity and efficiency.<sup>76</sup> Equity involves comparisons between and among taxpayers; whereas efficiency refers to the choices taxpayers make. In the personal income tax context, equity is usually expressed as two distinct yet related considerations:

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<sup>72</sup> *Id.* PERAP suggested that “entire package of options selected should be evaluated by the Treasury or the Joint Committee on Taxation (JCT) to see what impact it has on tax liability by income class.” *Id.*

<sup>73</sup> *Id.* The Report concluded that

If, as seems likely, the package raises taxes for some income groups and lowers them for others, this could be offset by adjustments to the standard deduction, tax rates or other provisions. Of course, even if the rates are adjusted to be revenue neutral in each income class, there will be individual taxpayers who gain and lose. We did not try to hold all taxpayers harmless in the options we evaluated, and we were not asked to do so by the President. It would be impossible to do so without substantial costs in terms of lost revenues.

*Id.*

<sup>74</sup> Grown and Valodia, *supra* note 23.

<sup>75</sup> UNDP, *Issues Brief*, *supra* note 10, at 4.

<sup>76</sup> The third principle is the ease of administration or simplicity. STEUERLE, *supra* note 17, at 10.

horizontal equity and vertical equity.<sup>77</sup> Horizontal equity maintains that similarly situated taxpayers should be treated the same.<sup>78</sup> Vertical equity recognizes that a progressive rate structure demands that higher income taxpayers pay a greater amount of tax, and it also recognizes that higher income taxpayers will (and should) be treated differently.<sup>79</sup> For purposes of both horizontal and vertical equity, difference/sameness is measured solely in terms of income level.<sup>80</sup>

Of course, there is nothing inexorable about using income level as the primary distinguishing feature between and among taxpayers. The decision that income level is the only important distinguishing characteristic represents a normative choice that privileges economic production and masks other differences.<sup>81</sup> As Tony Infanti has observed, the choice of income “sanitizes the debate over tax fairness—cleansing it of uncomfortable discussions of racism, sexism, heterosexism, and disability discrimination.”<sup>82</sup> Income level is also a relatively unstable characteristic because it is necessarily a product of the very system that it is then used to evaluate. Thus, questions of equity take on a very bounded nature because a tax system is considered equitable if it treats similarly situated taxpayers the same, but whether or not taxpayers are considered the “same” is a function of the tax law and how it chooses to measure income.

The goal of efficiency, sometimes referred to as tax neutrality, also reflects normative choices and embedded values that are by no means inexorable. Efficiency holds that a tax system should minimize tax distortions,<sup>83</sup> but it typically only seeks to measure these distortions with respect to market-based decision making. Accordingly, the concept of efficiency begs the questions of what constitutes a *market-based* decision, and where does one draw the line between personal decision making and economic decision making?<sup>84</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 11. Vertical equity could also address whether higher income taxpayers capture a disproportionate share of certain tax benefits.

<sup>80</sup> See Seto and Buhai, *supra* note 29, at 1073–74 (asserting that traditional tax theory has “almost no capacity to deal with differences—other than differences of income—in taxpayers’ abilities to pay taxes”).

<sup>81</sup> See Infanti, *supra* note 21, 1195 (“This represents a normative choice to consider economic differences—and only economic differences—in determining the fairness of a tax whose larger purpose is to allocate the burden of funding our government and of paying for public services.”).

<sup>82</sup> *Id.* at 1209 (“By assuming a far more homogeneous population than the one that actually exists, horizontal and vertical equity screen from the tax policy debate many issues relating to race, ethnicity, gender, sexual orientation, and disability, and they tend to transmute any remaining issues into ones of economic class.”).

<sup>83</sup> Tax expenditures and tax incentives violate this rule because they are designed to change taxpayer behavior.

<sup>84</sup> Karen Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 S. CAL. REV. L. & WOMEN’S STUD. 223 (1998) (considering whether

For example, the combination of the joint filing provisions and the progressive rate structure can produce a disincentive for married women to enter (or re-enter) the workforce due to the stacking effect.<sup>85</sup> Does this disincentive raise an efficiency concern or is it merely a private non-market choice?<sup>86</sup> Similarly, the federal estate tax provisions include an unlimited marital deduction for amounts payable to a surviving spouse, including amounts structured as a “qualified terminable interest property” (QTIP) that do not grant the surviving spouse substantial ownership rights.<sup>87</sup> Some commentators have argued that these QTIP provisions encourage the higher wealth spouse not to leave his property outright to the surviving spouse but instead to leave the survivor a more limited interest in the property.<sup>88</sup> Does the incentive provided by this tax-advantaged option raise efficiency concerns or does it merely reflect a personal estate planning decision?<sup>89</sup>

### C. Critical Tax Theory and Scholarship

Critical tax theory emerged as a distinct area of scholarship almost two decades ago.<sup>90</sup> It has clear roots in the tradition of critical legal studies,<sup>91</sup> as well

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discrimination awards should be excluded from gross income as part of the cost of doing business).

<sup>85</sup> Staudt, *supra* note 27 (discussing how the tax laws deter women from entering the paid labor market).

<sup>86</sup> *Smith v. Commission*, 40 B.T.A. 1038 (1939), *aff'd*, 113 F. 2d 114 (2d Cir. 1940) (denying the deductibility of child care costs as a business expense).

<sup>87</sup> I.R.C. §2056(b)(7) (2006).

<sup>88</sup> Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN’S L. J. 301 (1996).

<sup>89</sup> Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1734 (1998) (rejecting argument QTIP shows “respect” for “wives and widows”).

<sup>90</sup> Infanti and Crawford, *supra* note 35, at xxi (writing in 2009 that “[i]n the last fifteen years, there has emerged a small but steady stream of scholarship that . . . constitutes . . . ‘critical tax scholarship’”). Professor Grace Blumberg is widely considered to have written the first comprehensive outsider critique of the Tax Code in a 1971 law review article. Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 48 (1971). *See also* Marjorie J. Kornhauser, *A Legislator Named Sue: Re-Imaging the Income Tax*, 5 J. GENDER RACE & JUST. 289, 325 (2002) (referring to Professor Blumberg as the “mother of this area”); Zelenak, *supra* note 32, at 1574 (calling her early article a “pioneering work of feminist tax analysis”).

<sup>91</sup> Critical perspectives were fairly late to surface in the field of taxation. In contrast, the areas of criminal law, constitutional law, contracts, environmental law, and property law all had a rather robust output of critical scholarship starting in the late 1970s. *See generally* RICHARD W. BAUMAN, *CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE* (1996). Several reasons have been given for this late start, not the least of which is that scholars who were generally interested in issues of social justice were put off by the highly technical nature of tax and its apparent remove

as feminism and other methods of outsider scholarship, such as critical race studies and queer theory.<sup>92</sup> Leveled largely as a critique of the existing U.S. tax structure,<sup>93</sup> critical tax theory has challenged the presumed objectivity and neutrality of a tax theory based primarily on economic modeling.<sup>94</sup> It has also taken issue with many of the specific claims of neutrality discussed in the previous section. By challenging the objective neutrality of the tax code, critical tax theory attempts to look beyond the homogenizing effect of classification based on income,<sup>95</sup> and instead, it seeks to “put a face on America’s tax returns.”<sup>96</sup> Central to this undertaking is the recognition that “tax is political”<sup>97</sup> and not merely a set of abstract economic principals.<sup>98</sup>

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from daily matters. Crawford and Infanti, *supra* note 35, at xxii. Tax scholars, on the other hand, were typically not trained in critical analysis, but favored economic analysis as the preferred lens through which to evaluate tax law and policy. It took a new generation of tax scholars to apply the lessons of critical theory to the byzantine world of taxation.

<sup>92</sup> Although it is difficult to categorize the divergent voices of the critical tax scholars, they all share a common understanding that “legal doctrine and legal institutions are contingent products in an evolutionary process of social change.” BAUMAN, *supra* note 91, at 29. Speaking of the larger field of critical studies, Bauman also remarks on the difficulty of categorization given the “heterogeneity of the movement.” *Id.* at 3. In this way, the critical tax scholars can trace their roots directly to the larger and earlier field of critical legal studies that rejects law’s neutrality and the existence of determinative rules that produce objective and predictable adjudications. *Id.* at 33.

<sup>93</sup> Critical tax scholarship focuses primarily on the federal personal income tax, although some commentators have discussed the estate and gift tax, as well as the rules governing retirement accounts and social security payroll taxes. *See generally*, Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385 (2007) (addressing pensions); Staudt, *supra* note 27 (addressing social security wages).

<sup>94</sup> Taking issue with a leading critic of critical tax theory on the question of objectivity, Marjorie Kornhauser wrote:

[The critic’s] vision of detached and disinterested may be the empirical study with its scientific approach, because science is frequently viewed as the ultimate representative of Objective Truth in our culture . . . . To use only science, or some other “detached and disinterested” technique, is to silence other viewpoints behind a mask of unanimity and objectiveness. Not only is this oppressive, but it denies everybody of the insights, knowledge, and possible solutions that the alternative communities can provide.

Kornhauser, *supra* note 41, at 1623-26.

<sup>95</sup> *See* Infanti, *supra* note 21, at 1206 (noting the “homogenizing effect”).

<sup>96</sup> TAX FOUNDATION, PUTTING A FACE ON AMERICA’S TAX RETURNS: A CHARTBOOK, (2012), available at

[http://taxfoundation.org/sites/taxfoundation.org/files/docs/putting\\_a\\_face\\_on\\_americas\\_tax\\_returns\\_chartbook.pdf](http://taxfoundation.org/sites/taxfoundation.org/files/docs/putting_a_face_on_americas_tax_returns_chartbook.pdf).

<sup>97</sup> Infanti and Crawford, *supra* note 35, at xxi. *See* Kornhauser, *supra* note 41, at 1627 (“In the tax world, this approach means that we must constantly be aware that the tax laws reflect social and

Following the lead of critical legal studies, critical tax scholarship has recognized the law as a complex social, political, and economic process—an act of social construction that has unique constitutive powers.<sup>99</sup> To put this insight in a tax context, one of the most long-standing topics of tax scholarship has been the quest for the ideal tax base.<sup>100</sup> According to a critical perspective, however, the tax base does not exist *a priori*. It cannot precede the law but rather, is a creation of the law. When the tax law defines the tax base, it also constitutes the base. In this way, society would not be said to *choose* an optimal tax base. Society *constitutes* a tax base through the process of legislation, regulation, judicial interpretation, compliance, and enforcement.<sup>101</sup>

In rejecting blanket claims of neutrality, critical tax scholars have focused instead on exploring the role tax laws play in the construction of social meaning and exposing explicit and implicit bias in the tax code.<sup>102</sup> Critical tax scholars have also stressed the connection between taxation and broader questions of social justice and progressive causes.<sup>103</sup> These scholars have taken a special

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political choices, not just economic ones, and that all these choices have different impacts on different groups.”).

<sup>98</sup> Marjorie Kornhauser explains that “economic analysis has had a long tradition of obscuring the normative underpinnings of economic theories of tax.” Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 486 (1987).

<sup>99</sup> It is a complex social, political, and economic process. It is a social construction that has unique constitutive power due to many factors, not the least of which is that law exists as the command of the sovereign. Critical legal theory views the deployment of law as the exercise of constitutive power such that “all legal reasoning involves the creation of meaning rather than the discovery of meanings already present in such materials.” BAUMAN, *supra* note 91, at 33. Critical legal theory openly challenged the once majestic notion that the rule of law existed as an autonomous entity, separate from those who create it, interpret it, and are subject to it.

<sup>100</sup> The theory of optimal tax policy was developed by economist James Mirrlees for the purpose of determining how progressive an income tax should be if the system’s goal is maximization of welfare. *See* Mirrlees, *supra* note 22.

<sup>101</sup> From a critical point of view, any claim of tax exceptionalism—the notion that tax law is different from general law must be attributed to (or illustrated by) something other than the inherent nature of tax law. *See* Nancy J. Knauer, *Legal Fictions and Juristic Truths*, 23 ST. THOMAS L. REV. 1 (2010) (responding to claims of tax exceptionalism resulting from the “inherent fictions in tax law”).

<sup>102</sup> *See* Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV 1 (1994) (discussing the role of the corporate charitable contribution deduction and the marketing advantage of the “halo effect”).

<sup>103</sup> Infanti and Crawford, *supra* note 35, at xxi (noting that critical tax theory seeks “to educate nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive social movements”). *See also* Kornhauser, *supra* note 41, at 1609. (explaining that “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”).

interest in the numerous ways tax laws impact “traditionally disempowered groups such as people of color; women of all colors; lesbian, gay, bisexual, and transgender people; low-income and poor individuals; the disabled; and nontraditional families.”<sup>104</sup> To this end, they have spent considerable time discussing the more obviously gendered or otherwise exclusionary provisions of the tax code such as the marital provisions,<sup>105</sup> as well as the exclusion of same-sex couples from the joint filing provisions.<sup>106</sup> Critical tax scholars have also revealed implicit bias by re-examining such seemingly neutral and arcane provisions as the Earned Income Tax Credit (EITC) paid to the working poor,<sup>107</sup> the marital deduction QTIP under the federal estate and gift tax,<sup>108</sup> employer-provided pension plans,<sup>109</sup> and the so-called “Nanny Tax.”<sup>110</sup> In each instance, critical tax theorists have endeavored to illustrate how existing tax law and policy can “reflect and even reify discrimination based on race, gender, sexual orientation, class, disability or family structure.”<sup>111</sup>

The efforts of critical tax scholars to bring an outsider perspective to tax policy and question the base premise of taxpayer neutrality have often been met with stiff and sustained resistance from mainstream tax scholars who write primarily from an economics or public welfare perspective.<sup>112</sup> As a result, critical

<sup>104</sup> Infanti and Crawford, *supra* note 35, at xxi.

<sup>105</sup> See Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993). See also Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L. J. 63 (1993) (critiquing the income pooling rationale of the joint filing provisions).

<sup>106</sup> Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998).

The exclusion of same-sex couples from the marital provisions is intentional. As a result, there is nothing hidden or covert about the heterosexist bias of the tax code. There is no neutral principle at work. The rationale for the exclusion is not that same-sex couples do not pool their resources like opposite-sex married couples. Instead, the rationale for the exclusion is based on the beliefs that a same-sex couple is not a family, that no civilized society has ever countenanced such unions, and that our Judeo-Christian heritage forbids them.

*Id.* at 233.

<sup>107</sup> See, e.g., Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).

<sup>108</sup> See, e.g., Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L. J. 301 (1996).

<sup>109</sup> See, e.g., Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385 (2007).

<sup>110</sup> See, e.g., Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1 (1999).

<sup>111</sup> Infanti and Crawford, *supra* note 35, at xxi.

<sup>112</sup> By 1998, critical tax writings had attracted sufficient attention that the *North Carolina Law Review* dedicated a Symposium issue to critical tax theory—or more accurately, to a *critique* of

tax theory has remained essentially a critique—a view from the margin that can both inform and illuminate—but it has failed to find a wide audience among tax scholars or application for its insights within tax policy.<sup>113</sup> From the outset, critical tax scholarship was derided by mainstream tax scholars for being trendy, divisive, and less than rigorous.<sup>114</sup> Its authors were accused of selection bias<sup>115</sup> and spreading conspiracy theories.<sup>116</sup> They were faulted for trying to find

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critical tax theory. *See, e.g.,* Zelenak, *supra* note 32; Dodge, *supra* note 32. The Symposium issues also included works by critical tax scholars, many of whom expressed surprise that their work was met with such resistance given that the observations of critical tax theory seemed “obvious.” Beverly Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629 (1998).

The thing that is the most surprising about this entire Symposium is that there is a symposium at all. Many of the matters discussed in *A Black Critique of the Internal Revenue Code* and the other articles highlighted here are obvious. Our tax system does more than tax revenues. It also tries to shape, punish, and reward behaviors. The Code is subject to influence. Blacks and whites know very little about one another, and whites essentially hold the power to tax. What would make any one of us think that the Code would not have rules that favored whites over blacks?

*Id.* at 1637.

<sup>113</sup> *See* Michael A. Livingston, *Women, Poverty, and the Tax Code: A Tale of Theory and Practice*, 5 J. GENDER RACE & JUST. 327, 330 (2002). Livingston explains, “Although many tax scholars are more sympathetic, the largest numbers have simply ignored the critical tax endeavor, leaving women’s and minorities’ concerns somewhat peripheral to the broader tax subject.” *Id.*

<sup>114</sup> *See* Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1770 (1998). Jensen argues that tax academics should be able to “evaluate the merits of legal policy without using trendy (and divisive) language, conspiratorial theories, otherworldly standards[.]” *Id.*

<sup>115</sup> *See* Zelenak, *supra* note 32, at 1578 (asserting that “problems of one-sidedness and incomplete analysis are more common in the critical tax literature than in the general academic tax policy literature”).

<sup>116</sup> *See* Dodge, *supra* note 32, at 1729 (noting that he had “some bones to pick with feminist scholarship in this area, namely, its innuendos of a male chauvinist plot”). *See also* Knauer, *supra* 28, at 234 n. 517.

The recent commentary on critical tax scholarship has pointed disapprovingly to a conspiracy stance, despite attempts to explain that no one thinks that the members of Congress are staying up at night trying to devise ways to increase the incidence of taxation on African Americans. In many ways, of course, the systemic racism that can lead to the unremarkable nature of the provisions outlined by Moran and Whitford is even more insidious and more difficult to address than vocal racism.

*Id.*

“hidden” discrimination.<sup>117</sup> In many instances, the opponents seemed to be completely flummoxed by the clear lack of solutions offered by the critical tax theorists.<sup>118</sup> Some appeared vaguely insulted by the assertion that tax law would necessarily reflect existing biases and existing inequities because in the opponents’ view, tax law was no different from any other type of law.<sup>119</sup> In many circles, critical tax scholarship was dismissed as “mere critique,”<sup>120</sup> and its resulting policy interventions were labeled as “troubling” or “underdeveloped”—or in some instances even “dangerous.”<sup>121</sup>

Much of the criticism directed at critical tax scholarship came from an identity-blind position under which race, gender, and other identity characteristics have no place in tax policy.<sup>122</sup> Under an identity-blind paradigm, any suggestion that tax policy should examine its impact on specific groups was criticized as an

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<sup>117</sup> Zelenak, *supra* note 32, at 1579 (reporting “the impression the authors set out on the sort of search for hidden discrimination”). On the topic of “hidden discrimination,” Zelenak charged: “[w]ithin 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.” *Id.* at 1578. For a response to this point, see Leo P. Martinez and Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective*, 22 U. FLA. J. L. & PUB. POL’Y 377, 387 (2011) (noting that “we persist in believing that highlighting racial inequities in the Code is a useful task because exposing racial inequalities is the best avenue for promoting discourse with respect to whether such inequalities can in fact be justified.”).

<sup>118</sup> Marjorie Kornhauser responded directly to this criticism, noting:

[A]ll scholarship need not (and does not) produce solutions. Before a solution can be found, a problem must be identified. Critical tax theory, like other outsider theory, is especially good at identifying problems. A better solution may not be possible; sometimes there is no way to solve one problem without creating another. Yet critical tax theory’s different perspective is still useful . . . . It will remind us, as we must be reminded, that our solutions are partial and evolving.

Kornhauser, *supra* note 41, at 1626-27.

<sup>119</sup> See Erik M. Jensen, *supra* note 114, at 1762 (“If racial subordination is really so pervasive that it exists even when legislators are drafting facially neutral tax statutes, with the best of intentions, what in the world are people of good will to do? Indeed, can there be any people of good will?”).

<sup>120</sup> Zelenak, *supra* note 32, at 1524 (arguing that “mere critique without a workable solution does nothing to better anyone’s situation”). For a response see Nancy C. Staudt, *Tax Theory And “Mere Critique”: A Reply To Professor Zelenak*, 76 N.C. L. REV. 1581, 1581 (1998) (referring to the “single-minded focus on solutions” as “both ironic and bizarre”).

<sup>121</sup> Zelenak, *supra* note 32, at 1532; 1560; 1571. See also *id.* at 1540 (stating that “an explicitly sex-based system can only be a disaster . . . remarkable for its capacity to offend almost everyone”).

<sup>122</sup> See Galvin, *supra* note 67, at 1749. Galvin argued that “A tax system should be neutral in its effect on each citizen’s decisionmaking. Therefore, assuming a democratic ideal of a free society with equal opportunity for all, the framers of tax policy should strive for a system that is blind as to gender and color.” *Id.*



inappropriate form of special pleading that was directly contrary to the principle of equity.<sup>123</sup> Mainstream tax scholars warned that attempts to correct for implicit bias in the tax code would give rise to a “nightmare of dilemmas” and produce considerable discontent among taxpayers and policy makers.<sup>124</sup>

When mainstream tax scholars engaged critical tax scholars on the merits, it was mostly on the question of numbers. Mainstream tax scholars argued that critical tax scholars had not proven that tax laws have a disparate impact on marginalized groups, especially when viewed within the larger progressive rate structure,<sup>125</sup> or when taking into account other entitlement programs. They also claimed that the continuing progressivity of the tax code evidenced an overriding intent, as a matter of public policy, to benefit low-income taxpayers rather than to penalize disadvantaged groups.<sup>126</sup> Accordingly, mainstream tax scholars argued that any claims of bias were necessarily misplaced because the income tax, by its very nature, served a broader redistributive goal.<sup>127</sup>

Despite this inauspicious reception, many of the insights of critical tax theory now find support in international practices such as gender mainstreaming and gender-sensitive budgeting.<sup>128</sup> Moreover, the prime assertion of critical tax theorists that tax is political has received widespread national attention in connection with *United States v. Windsor*, the groundbreaking U.S. Supreme Court case that challenged the constitutionality of the Defense of Marriage Act

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<sup>123</sup> See Zelenak, *supra* note 32, at 1540 (asserting that “an explicitly sex-based system can only be a disaster.”).

<sup>124</sup> Galvin, *supra* note 67, at 1749 (“I agree with Professor Zelenak that any attempt to tailor the system to meet the criticisms of feminists or racial groups rapidly becomes a nightmare of dilemmas that are just not resolvable”). According to Galvin, “One needs only to observe lifestyles of friends, colleagues, neighbors, and relatives, and one becomes keenly aware that to design a tax regime to meet the gender and race considerations of each case would create a statutory maze of confusion many times worse confounded than the current system.” *Id.*

<sup>125</sup> See, e.g., Schmalbeck, *supra* note 36, at 1834.

<sup>126</sup> *Id.* (“[T]he tax is progressive, which must greatly favor African-Americans in light of their significantly lower average incomes . . . the progressivity of the tax system is a far more important characteristic from an African-American viewpoint than are any of the characteristics Moran and Whitford consider in their article.”).

<sup>127</sup> See, e.g., James D. Bryce, *A Critical Evaluation of the Tax Critics*, 76 N.C. L. REV. 1687, 1687 (1998) (expressing incredulity at the attacks by women and African-Americans on the income tax, which “[t]hroughout its history in the United States, . . . has been an instrument for redistributing income”).

<sup>128</sup> See generally UNDP, *Issues Brief*, *supra* note 10 (describing the relationship between gender and taxation as a method to combat poverty). In addition, Cambridge University Press released a comprehensive reader in critical tax theory in 2009 that recognizes the field as a “distinct mode of inquiry.” INFANTI & CRAWFORD, *supra* note 35, at xxi. Critical tax theorists have also forged connections with kindred spirits writing in other more progressive fields, such as law & sexuality and family law.

(DOMA).<sup>129</sup> As it turns out, one of the most important civil rights cases of this generation was a tax case involving the exclusion of same-sex married couples from the marital deduction provisions under the federal estate tax.<sup>130</sup>

## II. CHOOSING A CRITICAL LENS

This section focuses on the choice and construction of a critical lens that will enable policy makers to identify explicit and implicit bias within the tax system, as well as inform how they exercise their discretion. As discussed in the previous section, existing bias is often obscured by the misplaced belief in the inherent neutrality of taxation. Thus, the first step in developing a critical lens is to reject tax exceptionalism and recognize that sometimes it is necessary to go in search of hidden bias in order to promote equity. Although consistent with the recommendations of critical tax theory, this intuition regarding hidden bias is also supported by an emerging international tax equity consensus that acknowledges the important role taxation can play in re-enforcing existing disparities and persistent inequality.<sup>131</sup>

The international consensus is primarily directed at questions of gender equity. However, it is possible to imagine similar inquiries proceeding along any number of identity axes, depending on the points of difference or inequality deemed significant within a given country.<sup>132</sup> Accordingly, the second step in developing a critical lens is identifying which significant differences or inequities policy makers should consider, while simultaneously recognizing that they will necessarily evolve and change over time. This section first discusses how to make that determination. It then applies the critical lens to three instances of bias in the tax code: one explicit, one implicit, and one resulting from an exercise of interpretive discretion. In each case, the critical lens offers a mode of analysis that challenges the myth of taxpayer neutrality, but it does not prescribe a specific legislative or regulatory safeguard. The third and final step in developing a critical lens is to create an enforcement mechanism. Part III proposes a potential range of safeguards and auditing procedures that all draw on accepted institutional

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<sup>129</sup> United States v. Windsor, 133 S. Ct. 2675 (2013).

<sup>130</sup> See Adam Liptak & Peter Baker, *Justices Cast Doubt on Benefits Ban in U.S. Marriage Law*, N.Y. TIMES (MAR. 27, 2013) <http://www.nytimes.com/2013/03/28/us/supreme-court-defense-of-marriage-act.html>.

<sup>131</sup> See generally UNDP, *Issues Brief, supra* note 10 (describing the relationship between gender and taxation as a method to combat poverty).

<sup>132</sup> See, e.g., Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 3 (2009) (proposing a method to identify society groups singled out for consideration). In connection with her proposal for a legislative impact statement, Anita Krishnakumar sets forth a detailed procedure to identify a “red flag list” of identity groups or characteristics. *Id.* at 27–29. She advocates the creation of a non-partisan committee to select and periodically review the groups. *Id.* at 28–29.

traditions and constraints: enhanced data collection, the creation of a diversity expenditure budget, and the requirement that all major tax measures must be accompanied by a diversity impact statement.

*A. Identifying the Axes of Difference.*

A core value of critical tax policy is the understanding that taxation is not neutral. To the contrary, it often involves clear “winners and losers” that are obscured by the construct of taxpayer neutrality—the assumption that the only meaningful distinction among taxpayers is income level.<sup>133</sup> International economists have shown numerous ways that taxation can interact with gender norms and patterns of subordination to skew the incidence of taxation along identity groups and thereby reinforce existing inequalities.<sup>134</sup> Critical tax policy urges policy makers to acknowledge and address the connection between taxation and inequality by examining taxation through a critical lens, one which foregrounds relevant identity characteristics and prompts policy makers to ask difficult questions. By viewing taxation through this critical lens, policy makers would be better able to evaluate the impact of a given tax structure on social inequalities and determine what, if any, remedial measures would be necessary or desirable. Therefore, a critical lens makes taxpayer differences visible and holds policy makers accountable for their choices.<sup>135</sup>

Although the majority of the international tax equity research has focused on gender, there are numerous other identity characteristics or points of difference that could also be relevant when evaluating tax policy for bias. Critical tax theorists, writing from the vantage point of critical race studies, LatCrit, feminist legal theory, disability studies, or queer theory, have explored many of these characteristics and raised questions related to race, ethnicity, gender, disability, sexual orientation, and gender identity.<sup>136</sup> In an effort to illustrate the prevalence of implicit bias in the tax code, several critical tax theorists have used the heuristic of an ideal legislature comprised entirely of outsiders.<sup>137</sup> They argued

<sup>133</sup> See PERAP TAX REPORT, *supra* note 4.

<sup>134</sup> See generally MUMFORD, *supra* note 12, at 1 (“There is a view that to deploy tax law for any instrumental purpose somehow detracts from its purity and causes it to function less well as a system of tax”). Mumford explains that “[t]he project of this book is to argue . . . that the tax system should be deployed to militate against economic discrimination against women.” *Id.*

<sup>135</sup> The adoption of a critical lens, therefore, also advances the interests of transparency and better budgeting advocated by the tax expenditure concept. See SCHWABISH & GRIFFITH, *supra* note 55 (describing transparency gains).

<sup>136</sup> See generally CRITICAL TAX THEORY: AN INTRODUCTION, *supra* note 11 (an anthology with over fifty articles either written from a critical tax perspective or responding to it).

<sup>137</sup> See, e.g., Kornhauser, *supra* note 90, at 294–97 (imagining a tax system designed and implemented by women following an “ethic of care”); Moran & Whitford, *supra* note 26, at 780–81 (describing a “Black Congress” and the tax changes it might recommend).

that a “Black Congress” or a “legislator named Sue” would reflexively adopt a critical lens when approaching issues of public policy and taxation.<sup>138</sup> Although this might be true, the question remains: What should be done in the case of a less than ideal decision maker who does not come hardwired with a critical lens?

In the absence of an intuitive appreciation for the salience of difference, a critical lens provides policy makers a prompt to consider distributional issues across identity groups and consider identity characteristics that may be relevant for tax policy purposes. This section is concerned mainly with the construction of the lens, and Part III of this Article discusses various enforcement procedures and safeguards to aid in the implementation of the critical lens. The adoption of a critical lens will make certain taxpayer characteristics visible that were intentionally obscured under the myth of taxpayer neutrality. Instead of simply viewing taxpayers in income bands, a critical lens allows policy makers to evaluate the actual incidence of tax broken down by membership in a particular identity group.

Consistent with current federal policy, a critical lens for tax policy would most likely include race, gender, and perhaps ethnicity and disability.<sup>139</sup> In the United States, there is wide agreement that the identity characteristics of race and gender continue to carry significant social meaning that is weighted with discrimination and bias.<sup>140</sup> Federal, state, and local policies include robust anti-discrimination protections for race and gender; although, stronger protections remain in place for race.<sup>141</sup> Federal policies also extend anti-discrimination protections based on disability and age.<sup>142</sup>

With respect to other points of difference, such as sexual orientation or gender identity, there are varying degrees of agreement at the federal level and

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<sup>138</sup> See Moran & Whitford, *supra* note 26, at 752 (noting that “it is likely that blacks rarely used income averaging.”) *Id.* For example, Moran and Whitford note that “it is likely that blacks rarely used income averaging.” Moran and Whitford, *supra* note 26, at 752. They reason that a “Black Congress” would not bother to enact pro-taxpayer income averaging because a “Congress oriented solely to the interests of blacks would never have perceived the original wrong that income averaging was intended to cure.” *Id.* at 752–53.

<sup>139</sup> For a discussion of the federal government and demographic data collection based on identity group or characteristics, see *infra* text accompanying notes 221- 32.

<sup>140</sup> See, e.g., Title VII, The Civil Rights Act of 1964, 42 U.S.C. § 2000 (2012) (extending protection in employment based on race and sex).

<sup>141</sup> For example, classifications based on race are subject to strict scrutiny for equal protection purposes, whereas classifications based on gender receive only heightened scrutiny.

<sup>142</sup> See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012) (extending federal anti-discrimination protections based on disability); The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2012) (extending anti-discrimination in employment on account of age).

considerable variation among the states.<sup>143</sup> Federal policy has not wholeheartedly endorsed equal rights for individuals regardless of sexual orientation or gender identity, although public support on both counts has increased significantly over the last several years.<sup>144</sup> As a result, sexual orientation and gender identity may represent two points of difference that would be included looking forward. It is also possible that there might be other groups who would warrant special attention in terms of tax policy, such as veterans.<sup>145</sup>

Once the critical lens is calibrated to capture the points of difference deemed relevant to tax policy, it remains to be seen how it should be imposed. Part III discusses three enforcement measures that would require legislative or executive action. However, it is also possible to urge individual decision makers to adopt a critical lens and invite them to look beyond the myth of taxpayer neutrality. Legislators could then take this perspective with them into deliberations, and agency officials could draw on it when issuing guidance. At its most basic, a critical lens prescribes an appreciation for difference and the continuing disparities that exist in terms of access to and participation in various social, political, and economic benefits and activities. On an individual level, a critical lens requires a degree of cultural competence and diversity awareness.<sup>146</sup>

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<sup>143</sup> Currently, federal protections do not exist in employment, housing, or public accommodations on account of sexual orientation or gender identity. At the state level, there are seventeen states and the District of Columbia that prohibit discrimination in employment based on sexual orientation and gender identity. Four additional states prohibit discrimination based on sexual orientation, but not gender identity. HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES, July 22, 2013, *available at* [http://www.hrc.org/files/assets/resources/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf).

<sup>144</sup> Peter Baker, *Same-Sex Marriage Support Shows Pace of Social Change Accelerating*, N.Y. TIMES (May 12, 2012) [http://www.nytimes.com/2012/05/11/us/same-sex-marriage-support-shows-pace-of-social-change-accelerating.html?\\_r=0](http://www.nytimes.com/2012/05/11/us/same-sex-marriage-support-shows-pace-of-social-change-accelerating.html?_r=0) (noting “the dizzying pace of social change”).

<sup>145</sup> For example, veterans who are disabled or who serve on active duty during certain specified times are entitled to hiring preferences for federal employment. *See* 5 U.S.C. § 2108 (2012). *See also* U.S. DEP’T OF LABOR, VETERANS’ PREFERENCE OPERATIONS MANUAL (Apr. 22, 2010), *available at* [http://www.dol.gov/vets/vms/Volume%20XII/vp\\_ops\\_manual.pdf](http://www.dol.gov/vets/vms/Volume%20XII/vp_ops_manual.pdf) (last visited Apr. 5, 2013).

<sup>146</sup> The Office of Minority Health, Department of Health and Human Services, uses the following definition of “cultural competency”:

Cultural and linguistic competence is a set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professionals that enables effective work in cross-cultural situations. ‘Culture’ refers to integrated patterns of human behavior that include the language, thoughts, communications, actions, customs, beliefs, values, and institutions of racial, ethnic, religious, or social groups. ‘Competence’ implies having the capacity to function effectively as an individual and an organization within the context of the cultural beliefs, behaviors, and needs presented by consumers and their communities.

Although cultural competency is a widely accepted professional norm in the fields of health care, social work, education, and human relations,<sup>147</sup> it has found little application beyond these largely service-oriented fields.<sup>148</sup> Perhaps it is time to urge our policy makers to evidence that same appreciation for difference and ability to interact with individuals from diverse backgrounds that we expect from our doctors, nurses, teachers, and HR directors.

Of course, some people will object to the idea of imposing a critical lens as identity politics run amuck. For conservatives who oppose affirmative action and support “racial privacy” laws, any attempt to analyze tax expenditures based on race will look suspiciously like racial favoritism and the institutionalization of entitlements.<sup>149</sup> From a quite different point on the political spectrum, there are others who might object on the grounds that the critical lens represents a step backward at a time when we should be moving toward a public policy that embraces post-identity politics.<sup>150</sup> For the post-identity critic, the goal of public policy should be to dismantle identity—not to introduce it into an area that traditionally has been identity-free. Addressing this second point, it is important to note that the proposal for a critical lens is not incompatible with aspirations for a post-identity society. The critical lens recognizes that identity is a social construction but also argues that in certain circumstances public policy should continue to take these identity classifications into account. Where difference remains marked by inequality, efforts to ignore the difference will simply leave inequality.

### B. *Explicit and Implicit Bias in the Personal Income Tax*

Any tax system can contain instances of both explicit and implicit bias. Explicit bias should be easier to see because it refers to a tax provision that is

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*What Is Cultural Competency?*, THE OFFICE OF MINORITY HEALTH, available at <http://minorityhealth.hhs.gov/templates/browse.aspx?lvl=2&lvlID=11> (last visited Apr. 4, 2013) (internal citations omitted).

<sup>147</sup> See, e.g., MARYANNE R. JEFFREYS, *TEACHING CULTURAL COMPETENCY IN NURSING AND HEALTH CARE* (2d ed. 2010) (nursing); *CULTURALLY COMPETENT PRACTICE: A FRAMEWORK FOR UNDERSTANDING DIVERSE GROUPS AND JUSTICE ISSUES* (Doman Lum, ed., 4th ed. 2011) (social work); JEAN MOULE, *CULTURAL COMPETENCE: A PRIMER FOR EDUCATORS* (2d ed. 2012) (education).

<sup>148</sup> See, e.g., MARYANNE R. JEFFREYS, *TEACHING CULTURAL COMPETENCY IN NURSING AND HEALTH CARE* (2d ed. 2010) (nursing); DOMAN LUM, *CULTURALLY COMPETENT PRACTICE: A FRAMEWORK FOR UNDERSTANDING DIVERSE GROUPS AND JUSTICE ISSUES* (Doman Lum, ed., 4th ed. 2011) (social work); JEAN MOULE, *CULTURAL COMPETENCE: A PRIMER FOR EDUCATORS* (2d ed. 2012) (education).

<sup>149</sup> For a discussion of the “racial privacy” movement see *infra* text accompanying notes 242-48.

<sup>150</sup> For a discussion of the multi-racial movement and the post-identity perspective see *infra* text accompanying notes 232-44.

outright discriminatory or exclusionary on its face. For example, in Morocco, married taxpayers file individually, but all dependent allowances for children are allocated to the husband, thereby reducing his effective rate of tax and denying the wife the deduction.<sup>151</sup> This practice represents an explicit preference based on gender. When explicit bias is based on deeply embedded practices, however, it may be difficult to recognize because it reflects an affirmative policy choice—it is intentional.<sup>152</sup> In other words, a policymaker using a critical lens to identify gender bias within a tax code may not find the fact that marital filing provisions exclude same-sex partners to be remarkable because until recently the exclusion of same-sex couples from the institution of marriage was taken as a given.<sup>153</sup>

As its name implies, implicit bias is not evident on the face of the tax code.<sup>154</sup> The myth of taxpayer neutrality makes it impossible for policy makers to evaluate the incidence of taxation along identity group lines. Accordingly, tax policy can lead to unintended consequences where the tax code ends up reinforcing existing disparities or creating undesirable incentives. These unintended consequences would qualify as implicit bias—the natural result of a system where “tax legislation intersects with . . . relationships, norms, and economic behavior.”<sup>155</sup> An example of implicit gender bias would be where a tax code privileges a certain type of economic behavior that is more often associated with men.<sup>156</sup>

The critical lens adopted by policy makers should be sensitive to both implicit and explicit bias, as well as instances where a discretionary interpretation might reinforce or reflect existing inequalities. The three following examples deal with each of these instances individually: explicit bias, implicit bias, and discretionary bias. Each case involves either sexual orientation or gender identity, recognizing that both identity characteristics are presently outside the traditional groups recognized in federal policy.

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<sup>151</sup> See UNDP, *Issues Brief*, *supra* note 10, at 6. This is the default rule. *Id.* The wife may claim the allowances if she can show that her husband and children are dependent on her earnings. *Id.*

<sup>152</sup> The marital provisions and same-sex couples represents a clear example of intentional exclusion in US tax policy. See Knauer, *supra* note 28, at 233.

<sup>153</sup> This is an example of heteronormativity. *Id.* at 133 (defining heteronormativity as “the largely unstated assumption that heterosexuality is the essential and elemental ordering principal of society”). See also Chrys Ingraham, *The Heterosexual Imaginary: Feminist Sociology and Theories of Gender*, in QUEER THEORY/SOCIOLOGY 169 (Steven Seidman ed., 1996) (defining heteronormativity as “the view that institutionalized heterosexuality constitutes the standard for legitimate and prescriptive sociosexual arrangements”).

<sup>154</sup> See MUMFORD, *supra* note 12, at 3 (cautioning that the question of implicit bias “necessarily involve subjective judgments about appropriate economic behaviour”).

<sup>155</sup> UNDP, *Issues Brief*, *supra* note 10, at 4.

<sup>156</sup> *Id.*

### 1. Explicit bias – the marital filing provisions

Anyone looking for explicit bias in the tax code directed toward LGBT taxpayers need go no farther than Section 1 where the tax tables establish a different and, in many instances, more favorable rate structure for married taxpayers.<sup>157</sup> The struggle for marriage equality in the United States has largely proceeded on a state-by-state basis.<sup>158</sup> Thirteen states and the District of Columbia currently recognize same-sex marriage.<sup>159</sup> An additional seven states extend all the equivalent rights and obligations of marriage to same-sex couples but call the resulting status by another name, such as civil union or domestic partnership.<sup>160</sup> Despite these gains, the vast majority of states continue to have laws prohibiting same-sex marriage.<sup>161</sup>

Until recently, the Defense of Marriage Act (DOMA) mandated that for all federal purposes marriage was restricted to “a union between one man and one woman.”<sup>162</sup> As a result, a same-sex couple who was married and lived in a

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<sup>157</sup> IRC § 1(a);(c).

<sup>158</sup> *Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN (Dec. 10, 2012), available at [http://www.hrc.org/files/assets/resources/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map.pdf) (last visited July 25, 2013).

<sup>159</sup> In addition to the District of Columbia, the thirteen states are: California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Vermont, and Washington. *Id.*

<sup>160</sup> The seven states with a status equivalent to marriage are: Colorado, Hawaii, Illinois, New Jersey, Nevada, Oregon, and Rhode Island. *Id.*

<sup>161</sup> Thirty-one states have laws prohibiting marriage equality or have amended their state constitutions to prohibit marriage equality. Some states have both statutory and constitutional prohibitions. *Statewide Marriage Prohibition Laws*, HUMAN RIGHTS CAMPAIGN, available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-prohibitions\\_6-10-2014.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-prohibitions_6-10-2014.pdf). The following twenty-eight states have constitutional amendments prohibiting marriage equality: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wisconsin. *Id.* Nineteen of these states have very aggressive anti-marriage laws that ban not only marriage equality, but also the grant of any of the so-called “incidents of marriage.” *Id.* The states with these “super DOMAs” are: Alabama, Arkansas, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Virginia, and Wisconsin. *Id.* In addition to the twenty-nine states with constitutional amendments, the following six states prohibit same-sex marriage by statute: Hawaii, Illinois, Indiana, Pennsylvania, West Virginia and Wyoming. *Id.*

<sup>162</sup> Enacted in 1996, DOMA provides that for all federal purposes marriage is only between one man and one woman. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7.

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the



jurisdiction that recognized same-sex marriage was nonetheless considered “unmarried” for federal tax purposes.<sup>163</sup> The 2013 United States Supreme Court case, *U.S. v. Windsor*, successfully challenged the section of DOMA that defined marriage at the federal level.<sup>164</sup> The case involved a surviving spouse who was required to pay \$363,000 in additional estate tax on the death of her spouse because their marriage was not recognized for federal tax purposes, even though it was recognized by their state of domicile.<sup>165</sup> As noted earlier, the widespread public interest surrounding the *Windsor* case illustrates a core intuition of critical tax policy, namely that “tax is political.”<sup>166</sup>

As long as DOMA was in force, the married same-sex couples who lived in the jurisdictions that recognize marriage equality were not considered married for federal tax purposes.<sup>167</sup> However, even after the definitional section of DOMA was declared unconstitutional, it remained unclear whether married same-sex taxpayers who reside in the non-marriage states would be considered married under the traditional domicile rule that pre-dated DOMA.<sup>168</sup> Under that rule,

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United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

*Id.*

<sup>163</sup> The income tax rates are married, head of household, unmarried, and married filing separately. IRC § 1 (a)-(d).

<sup>164</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013). *U.S. v. Windsor* only challenged section 3 of DOMA, which provides the definitional section quoted above. Defense of Marriage Act, 1 U.S.C. § 7. Section 2 of DOMA purports to allow states to refuse to recognize same-sex marriages performed in sister states. Defense of Marriage Act, 28 U.S.C. 1738C.

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

*Id.*

<sup>165</sup> Edith Windsor married her long-time partner, Thea Spyer in Canada in 2007. *Windsor*, 133 S. Ct. at 2689. At the time of Thea’s death in 2009, the couple lived in New York, and New York recognized their marriage. *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See Kornhauser, *supra* note 65 (discussing the assertion that “tax is political”).

<sup>168</sup> See *Estate of Steffke v. Comm’r of Internal Revenue*, 538 F.2d 730, 736-37 (7th Cir. 1976), *cert. denied sub nom. Wisconsin Valley Trust Co. v. Comm’r of Internal Revenue*, 429 U.S. 1022 (1976) (decedent’s spouse remained married to her first husband as a result of an invalid Mexican divorce); see also *Estate of Goldwater v. Comm’r of Internal Revenue*, 539 F.2d 878 (2d Cir.

taxpayers are considered married for federal tax purposes if they are legally married in their state of domicile.<sup>169</sup> Ultimately, the Internal Revenue Service declined to follow the more narrow “state of domicile” rule in favor of a more expansive “state of celebration” rule, which recognizes all legally married same-sex couples.<sup>170</sup>

Since *Windsor*, the Internal Revenue Service has also taken the position that same-sex couples who have entered into equivalent status relationships, such as civil unions or domestic partnerships, are not considered married for federal tax purposes nor are the same-sex couples who live in non-recognition states and cannot travel to marry in another state.<sup>171</sup> Accordingly, despite the favorable result in *Windsor*, the marital provisions in the federal tax code will likely continue to exclude some same-sex couples until all states recognize same-sex marriage.<sup>172</sup>

The absence of formal equality for same-sex couples under the tax code has been a frequent topic in critical tax scholarship.<sup>173</sup> It has also served as a point of departure for larger discussions involving the marital provisions that run throughout both the income tax and the estate and gift tax. When viewed in their totality, the marital provisions can be somewhat confusing, especially when attempting to measure their impact on the income tax liability of same-sex couples. The reason for the confusion is that the marital provisions do not necessarily produce a net benefit for all married couples.<sup>174</sup> With respect to the

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1976), *cert. denied sub nom.* Lipkowitz v. Comm’r of Internal Revenue, 429 U.S. 1023 (1976) (decendent remained married to first spouse because Mexican divorce was invalid).

<sup>169</sup> IRC §7703(a)(1). With respect to marriage, the IRC provides rules regarding the timing of marriage but not regarding the substantive question of when a marriage is valid. An individual is considered married during a given tax year provided the individual is married on the last day of the taxable year. *Id.*

<sup>170</sup> Rev. Rul. 2013-17, *available at* <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf> (last visited Sept. 11, 2013).

<sup>171</sup> *Id.* In addition, some states, such as Wisconsin, prohibit couples from going out of state to secure a marriage that would violate the laws of their domicile. 12 WISC. STAT. § 765.04 (2013). In Wisconsin, the marriage is void and the couple is subject to criminal prosecution, with penalties of a fine up to \$10,000 and up to nine months in prison. 12 WISC. STAT. § 765.30 (2013).

<sup>172</sup> The *Windsor* case did not mandate same-sex marriage nation-wide. It only challenged the constitutionality of DOMA. *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012). The case that had the potential to mandate same-sex marriage nationwide was *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>173</sup> *See, e.g.*, Patricia A. Cain, *Taxation of Domestic Partner Benefits*, 45 U.S.F. L. REV. 481 (2010); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2004); Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 CAP. U. L. REV. 387 (2002); Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677 (2000); Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471 (1997).

<sup>174</sup> Knauer, *supra* note 28, at 133-34.

personal income tax, the effect of the married-filing-jointly rate schedule on a couple's income tax liability before and after marriage will depend on the distribution of earnings within the couple.<sup>175</sup> If both partners are relatively equal earners, then the couple might actually experience a net increase in their tax liability when they marry.<sup>176</sup> This effect is the so-called "marriage penalty."<sup>177</sup> On the other hand, if the partners earn disparate amounts, they will likely receive a "marriage bonus" when they marry.<sup>178</sup>

Given that it is not always clear when the tax code will benefit marriage or when it will penalize marriage, many mainstream tax scholars openly dismissed the work of the critical tax scholars who were writing in this area because they could not definitively demonstrate that same-sex couples would be better off financially under a joint filing regime.<sup>179</sup> These objections reveal a telling disconnect between the two groups. Whereas the mainstream tax scholars interpret being "better off" as necessarily paying less tax, the critical tax scholars were more concerned with questions of formal equality. They advocated for the inclusion of same-sex couples in the marital provisions—for better or worse.<sup>180</sup>

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Not all couples see their federal income tax liability increase upon marriage. In fact, many more see it decrease, experiencing a marriage tax bonus. When viewed in their entirety, the seemingly discordant rules offer a composite picture of marriage. The rules reflect, for better or worse, a view of marriage as an economic unit, a fundamental unit of society, and an intimate association whose members may not deal with each other at arm's length.

*Id.*

<sup>175</sup> MCCAFFERY, *supra* note 8, at 19 (discussing the importance of the distribution of earnings within a couple).

<sup>176</sup> *Id.* at 17 (describing the extent of the "marriage bonus").

<sup>177</sup> *Id.* at 19 (explaining that the "marriage penalty" is really a "secondary-earner penalty").

<sup>178</sup> *Id.* at 16 (referring to these couples as the "Traditionals").

<sup>179</sup> For example, Steve Johnson argued that tax scholarship addressing same-sex couples should not advance proposals for reform until it "convincingly demonstrates that, on net, the failure to recognize same-sex couples as married hurts them by imposing substantially higher federal income tax liabilities on them." Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N. C. L. REV. 1771, 1179 (1998). He notes that unless scholars first answer the distributive question, any reforms designed to help same-sex couples could end up benefitting them doubly. *See id.* at 1774. If including same-sex couple would result in "special rights," Johnson reasons that scholarly "interested in equality" would have to consider "how to reform the Code detrimentally to same-sex couples . . . not how to reform it beneficially to them." *Id.*

<sup>180</sup> Tony Infanti responded directly to Johnson's objections. Infanti, *supra* note 28, at 765. He wrote:

As a gay man, I was puzzled at how equal treatment could be boiled down to a simple cost-benefit analysis. How could Johnson have ignored the ways in

For critical tax scholars who view taxation as political, it was easy to see the non-recognition of same-sex marriages and partnerships as an infringement on the right to full participation in civil society—regardless of the net financial impact.<sup>181</sup> Under this view, taxation is more than a simple calculation of tax due. The income tax system represents the primary way that individuals interact with the federal government. Despite how much Americans might like to complain about paying taxes, the United States has one of the highest tax compliance rates for any nation in the world. Americans are trained to report each year to the federal government, their gains and losses—both financially and personally. Taxpayers report whether they sold or bought a house, whether they were married or divorced, whether they had a child, and whether their spouse died.

Working from this more expansive view of taxation, critical tax scholars argued that the preoccupation with whether same-sex couples were financially disadvantaged by individual filing missed the point. The objection was primarily one of exclusion—of remedying a point of explicit bias. Under DOMA, same-sex couples who were legally married in their state of residence had to file jointly for state income tax purposes but then disaggregate their income and expenses in order to file their federal income taxes individually. For their federal taxes, they had to use the “unmarried” tax schedule and then sign their individual returns under penalties of perjury. In some instances, same-sex couples may get a benefit from being required to file individually, but in other cases there will be a penalty. Edith Windsor, for example, had to pay \$363,000 in additional federal estate tax because the IRS would not recognize her marriage to her long-time partner and wife. In either case, the principle of exclusion remains—an example of explicit bias that “has no effect, other than to lessen the status and human dignity of gays and lesbians . . . and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.”<sup>182</sup>

## 2. Implicit bias – “qualifying child”

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which the Code stigmatizes gays and lesbians and attempts to force them into the closet? Can any net tax benefit really make up for the patently unequal and discriminatory treatment visited by the federal government upon gays and lesbians through the medium of the Code? Put another way, can my recognition as a full member of society be bought at the cheap price of an exemption from the marriage penalty and from the various attribution and loss disallowance rules that apply to married couples?

*Id.*

<sup>181</sup> *Id.* (weighing “the cheap price of an exemption from the marriage penalty” with equality)

<sup>182</sup> *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012).

The federal income tax provides a number of benefits for taxpayers who are raising children, including dependency exemptions, child credits, the favorable head of household filing status,<sup>183</sup> and dependent care credits.<sup>184</sup> In 2004, the varying definitions of “child” for all of these provisions were coordinated under the single definition of a “qualifying child.”<sup>185</sup> The definition is very expansive and includes many relationships that would not be respected for probate purposes, such as “stepchildren” and “foster children.”<sup>186</sup> Notwithstanding its expansive nature, it does not take into account the more than one million children who are being raised in the United States by same-sex couples, many of whom live in states where the non-biological parent or non-adoptive parent is unable to formalize his or her relationship with the child.<sup>187</sup> This exclusion is not the result of DOMA, but rather an unintended consequence that could have been avoided (or openly acknowledged) if the provision had been drafted through a critical lens.

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<sup>183</sup> Taxpayers who qualify as a head of household, as defined under section 2 of the Internal Revenue Code, are eligible for an increased standard deduction and favorable tax rates. An unmarried taxpayer is eligible for head of household filing status only when the taxpayer maintains a household for at least one other qualifying relative. A same-sex partner cannot qualify as a “qualifying relative.” I.R.C. § 2 (2006).

<sup>184</sup> Taxpayers are also entitled to a generous per child tax credit. I.R.C. § 24. (2006). The child must be under the age of 17. I.R.C. § 24(c)(1). The maximum credit is \$1000 for each child, and it is phased out for higher income taxpayers. I.R.C. § 24(b)(1)-(2).

<sup>185</sup> The Working Families Tax Relief Act of 2004 (“WFTRA”) sets a uniform definition of a qualifying child. Prior to the WFTRA, the definition of a qualifying child was not consistent throughout the Internal Revenue Code, and there were competing definitions in effect for purposes of dependency exemption, the child credit, the dependent care credit, the favorable head of household filing status, and the EITC. The lack of uniformity created considerable confusion on the part of taxpayers, and the new definition was considered a significant gain in terms of simplicity. The chair of the ABA Section of Taxation wrote to members of the House Ways and Means Committee to praise them for taking “an important and concrete step toward simplification.” Letter from Kenneth W. Gideon, Chair of the ABA Section of Taxation, to members of the House Comm. on Ways & Means and Senate Comm. on Fin. (Oct. 18, 2004), *available at*

<http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2004/041018hr1308.authcheckdam.pdf>. The letter noted that simplification measures such as this were “critically important for an effective federal tax system.” *Id.*

<sup>186</sup> I.R.C. § 152(f)(1) (2006).

<sup>187</sup> Doris Nhna, *Same-Sex Couples: U.S. Demographic Snapshot*, NATIONAL JOURNAL (June 18, 2012), <http://www.nationaljournal.com/thenextamerica/statistics/same-sex-parents-u-s-demographic-snapshot-20120618> (last visited Nov. 16, 2013) (estimating number of children); *Parenting Laws: Second Parent or Stepparent Adoption*, HUMAN RIGHTS CAMPAIGN (Aug. 2, 2013), [http://www.hrc.org/files/assets/resources/parenting\\_second-parent-adoption\\_082013.pdf](http://www.hrc.org/files/assets/resources/parenting_second-parent-adoption_082013.pdf). In jurisdictions where second parent adoption is not available, non-biological co-parents are at a distinct disadvantage and the child is denied the security of having two legally recognized parents. A second-parent adoption allows a second parent to adopt a child without the “first parent” losing any parental rights. In this way, the child comes to have two legal parents. The effect of the adoption is to grant the non-biological parent equal rights in custody and visitation matters.

Separate and distinct from whether a child's same-sex parents are considered married for federal tax purposes, the uniform definition of "qualifying child" precludes a non-biological parent from claiming a number of tax benefits available to taxpayers with "qualifying children,"<sup>188</sup> if the parent lives in one of the eight states that does not allow second parent adoption.<sup>189</sup> Although the uniform definition of "qualifying child" was intended to be expansive, LGBT families living in these states will be ineligible to claim tax benefits that are designed to help taxpayers maximize the resources that are available for their children. These tax benefits, such as the EITC, are especially targeted to lower income, working families.<sup>190</sup>

In an effort to reflect economic reality and the changing face of the American family, the uniform definition of "qualifying child" adopts a functional view of family, rather than the overly formal iterations of family often reflected in the probate code and other laws.<sup>191</sup> Despite the broad reach of the statute, it is clear from IRS guidance that the definition of "qualifying child" does not extend to a non-biological child whom the taxpayer is co-parenting without some other indicia of relationship.<sup>192</sup> In the absence of a statutorily approved relationship marker, a non-biological co-parent is merely acting *in loco parentis* and the child

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<sup>188</sup> I.R.C. § 152(c). A child may count as a "qualifying child," if the child is the taxpayer's: child, stepchild, foster child, sibling, stepsibling, or descendant of any of the above. I.R.C. § 152(f)(1). An adopted child is considered a "child," and includes a child who has been "placed with the taxpayer for legal adoption by the taxpayer." I.R.C. § 152(f)(1)(b).

<sup>189</sup> *Parenting Laws*, *supra* note 187. In twenty-one states, second-parent adoption is available to same-sex couples state wide. *Id.* Eight states have obstacles to second-parent adoption for same-sex couples and the availability of second-parent adoption is unclear in the remaining states. *Id.*

<sup>190</sup> President George W. Bush signed the "qualifying child" legislation when he was on the campaign trail in Des Moines, Iowa. George W. Bush, President of the United States, *Remarks on Signing the Working Families Tax Relief Act of 2004 in Des Moines, Iowa* (Oct. 4, 2004), [http://www.presidency.ucsb.edu/ws/index.php?pid=72771#a\\_xzz1Y3IXzJAD](http://www.presidency.ucsb.edu/ws/index.php?pid=72771#a_xzz1Y3IXzJAD). During his remarks, President Bush singled out the Hintz family in Clive, Iowa for special mention. President Bush noted that the parents, Mike and Sharla, were frugal and always thought carefully about purchases and priorities for their four children. *Id.* Needless to say, President Bush did not he realize that he was holding up a youth pastor who had plead no contest to a charge of sexual exploitation brought by a counselor. Michael Hintz, *Ex-Omaha Pastor Charged in Iowa*, WQWT NEWS (Dec. 8, 2004, 7:51 PM), <http://www.wowt.com/home/headlines/1137247.html>.

<sup>191</sup> In order to count as a "qualifying child," the child must satisfy four tests: (1) relationship; (2) age; (3) residency; and (4) support. I.R.C. § 152(c). The relationship test is the most relevant for purposes of this discussion. It provides that the child must be the taxpayer's son, daughter, brother, sister, step-brother, step-sister, or a descendant of any such individual. I.R.C. § 152(c)(2). An individual legally adopted by the taxpayer, or an individual who is lawfully placed with the taxpayer by an authorized placement agency for legal adoption by the taxpayer, is treated as a child of the taxpayer by blood. I.R.C. § 152(f)(1)(b). A foster child who is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction is treated as the taxpayer's child. I.R.C. § 152(f)(1)(c).

<sup>192</sup> I.R.C. § 152(c).

does not qualify.<sup>193</sup> In the case of a taxpayer who is co-parenting in a state that does not allow second-parent adoption, the inability to claim the child as a “qualifying child” for purposes of the child credit, the head of household filing status, or the EITC can have significant tax consequences, especially if the non-biological parent is the primary wage earner.<sup>194</sup>

If the uniform definition of “qualifying child” had been considered through a critical lens that took into account the effect of the provision on minority populations, marginalized groups, and the diversity of the families, it would have been possible to see the disparate impact that the definition would have on the children being raised by same-sex couples in states without second parent adoption. Assuming this disparate impact was undesirable, the problem could have been fixed through a slight modification in the statutory language recognizing a biological or adoptive parent’s partner.<sup>195</sup> Even after the enactment, a comprehensive regulatory review conducted through a critical lens would catch the same problem, and the situation could easily be remedied through administrative action.<sup>196</sup>

### 3. Interpretive discretion – medical treatment

In 2006, the IRS disallowed Rhiannon O’Donnabhain’s medical expense deduction for hormone treatment, sex-reassignment surgery, and breast

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<sup>193</sup> See Internal Revenue Serv., *Publication 501: Exemptions, Standard Deduction, and Filing Information* (2012). Note this would not affect two unmarried co-habitants if they were both the parents of the child. In that case, both parents qualify and the parent with the higher income can claim the child.

<sup>194</sup> The inequities created under the uniform definition of a “qualifying child” have the effect of penalizing families who choose to have one parent in the work force and the other caring for the children full-time. It further disadvantages couples and their children by limiting the choice of which parent will be a full-time caregiver. Although similarly situated married couples may choose which parent will fulfill that role without consequence, same-sex couples, as well as other unmarried couples, face negative tax consequences for the same decision. I.R.C. § 152(c).

<sup>195</sup> It is clear that a dependent same-sex partner does not count as a “qualifying relative” for purposes of qualifying for the favorable head of household filing status. As a result, the higher income partner will not qualify for head of household filing status solely on account of a financially dependent partner. However, the higher income partner can qualify if there is also a “qualifying child” in the household. A child will satisfy the relationship test if the child is a biological child, or an adoptive child, a stepchild, or even a foster child, but not if the child is the child of the taxpayer’s partner. I.R.C. § 152(c)(2).

<sup>196</sup> The Office of Personnel Management (“OPM”) is currently considering adopting an expansive definition of child that would include non-biological children who are being co-parented by same-sex parents for purposes of federal employees health insurance. OFF. OF PERSONNEL MGMT., *GUIDE TO ADOPTION AND FOSTER CARE PROGRAMS FOR FEDERAL EMPLOYEES*, 10 n.80 (July 2012), available at <https://www.opm.gov/policy-data-oversight/worklife/reference-materials/adoption-benefits-guide-1.pdf> (last visited Nov. 16, 2013).

reconstruction surgery on the grounds that the treatment and surgery were “cosmetic” and did not qualify as “medical treatment” within the meaning of the statute.<sup>197</sup>,<sup>198</sup> The determination of whether the expenses qualified for the deduction depended on how the IRS chose to interpret the Code and Regulations in light of Ms. O’Donnabhain’s particular circumstances. There were no statutory or regulatory provisions expressly dealing with medical treatment and transgender taxpayers. At the time, there was also no IRS Guidance that addressed the issue.<sup>199</sup> Despite reports that similar medical expense deductions had been allowed in the past on an ad hoc basis, it was by all accounts a case of first impression.<sup>200</sup>

Unlike the immediately preceding examples involving the marital provisions and the definition of “qualifying child,” the denial of Ms. O’Donnabhain’s tax deduction was not an instance of explicit or implicit bias. Instead, it provides an example of how cultural competency on the part of IRS officials is crucial to a fair and equitable administration of the tax laws. The denial of the deduction was based on shockingly outmoded and uninformed views of gender identity, and it was roundly criticized by medical experts, as well as by LGBT advocacy organizations.<sup>201</sup> If the officials reviewing Ms. O’Donnabhain’s

<sup>197</sup> Taxpayers are allowed a deduction for medical expenses paid during the taxable year that are not compensated for by insurance or otherwise to the extent that such expenses exceed 7.5 percent of adjusted gross income. I.R.C. § 213 (2006). The statute specially provides that “cosmetic surgery” does not qualify as “medical care.” I.R.C. § 213(d)(9). Cosmetic surgery is defined as “any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.” I.R.C. § 213(d)(9)(b). Cosmetic surgery does not include a “surgery or procedure [which] is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.” I.R.C. § 213(d)(9)(a).

<sup>198</sup> O’Donnabhain v. Comm’r, 34 T.C. 134 (2010).

<sup>199</sup> The IRS acquiesced after the Tax Court ruled in favor of the taxpayer on two out of the three expenses she sought to deduct. Internal Revenue Serv., Action on Decision, IRB 2011-47 (Nov. 21, 2011).

<sup>200</sup> See Paul Caron, *Tax Court to Decide Deductibility of Sex-Change Operation*, TAXPROFBLOG (July 18, 2007), [http://taxprof.typepad.com/taxprof\\_blog/2007/07/deductibility-o.html](http://taxprof.typepad.com/taxprof_blog/2007/07/deductibility-o.html) (noting a 1983 case where father deducted travel costs related to son’s gender reassignment).

<sup>201</sup> For example, Dr. Marshall Forstein, an associate professor of psychiatry at Harvard Medical School remarked, “It’s absolutely clear that transgender identity is a condition discussed in diagnostic manuals. It seems the IRS is now in the business of practicing medicine without a license.” Anthony Faiola, *Woman Suing IRS Over Sex-Change Tax Claims*, Oct. 7, 2007, WASH. POST (Oct. 7, 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/30/AR2007093001194.html>. Gender Identity Disorder is a stabled medical disorder described under section 302.85 of the *Diagnostic and Statistical Manual of Mental Disorders-IV*, the authoritative handbook used for the diagnosis of mental disorders. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV* 537-38 (4th ed. 1994). Despite this widespread level of recognition, the Internal Revenue Service described the medical treatment as “controversial.” See *infra* note 210.



2001 tax return had employed a critical lens that included gender identity, the dispute could have been avoided.<sup>202</sup>

Shortly after she received her refund check, Ms. O'Donnabhain was notified that her income tax return was being audited.<sup>203</sup> When the audit examiner disallowed her medical expense deduction on the grounds that it was "cosmetic" in nature, Ms. O'Donnabhain requested reconsideration by the regional IRS Appeals Office.<sup>204</sup> The appeals officer then requested and received advice from the Chief Counsel's Office of the IRS that affirmed the denial of the deduction, representing the final decision by the IRS.<sup>205</sup> The Chief Counsel's Advice Memorandum (CCA) rested its decision on the bare assertion that "whether gender reassignment surgery is a treatment for an illness or a disease is controversial."<sup>206</sup> This statement is directly at odds with the great weight of medical opinion on the subject, which was not addressed in the CCA. Even more disturbing, however, was that the source cited in support of the statement was an article from a religious blog.<sup>207</sup> Indeed, the article from the blog was the *only*

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<sup>202</sup> Although not possible to measure the emotional costs to Ms. O'Donnabhain, it may be worth noting that the Tax Court awarded her attorneys' fees. Ed Whelan, *Obama IRS's \$250,000 Giveaway to GLAD*, NAT'L REV. ONLINE, (Dec. 1, 2010) <http://www.nationalreview.com/bench-memos/254261/obama-irs-s-250000-giveaway-glad-ed-whelan> (noting O'Donnabhain's attorneys were awarded \$250,000 in costs by agreement of the parties).

<sup>203</sup> Faiola, *supra* note 201 (describing the taxpayer as "a former construction engineer from a devout Irish Catholic family in Boston").

<sup>204</sup> O'Donnabhain v. Comm'r, 134 T.C. 34 (2010).

<sup>205</sup> Internal Revenue Serv., Chief Counsel Advice Memorandum, 200603025 (Oct. 14, 2005). The Chief Counsel Advice Memorandum (CCA) states, "Whether gender reassignment surgery is a treatment for an illness or disease is controversial." *Id.* It continues: "For instance, Johns Hopkins Hospital has closed its gender reassignment clinic and ceased performing these operations." In support for these propositions, the CCA cited to *First Things*, which is "an interreligious, nonpartisan research and education institute whose purpose is to advance a religiously informed public philosophy for the ordering of society." *Masthead*, FIRST THINGS, <http://www.firstthings.com/masthead> (last visited Mar. 29, 2013). The citation used to support the disallowance was to the following article currently available in the archive section of the website maintained by First Things: Paul McHugh, *Surgical Sex*, FIRST THINGS (Nov. 2004) <http://www.firstthings.com/article/2009/02/surgical-sex--35> (last visited Mar. 29, 2013). On March 29, 2013, the advertisements that framed the article included one for the DVD boxed-set "Catholicism" and another for the Sacred Heart Major Seminary that was looking for a "candidate for Old Testament and Biblical Languages." *Id.* After citing the blog post, the CCA concluded: "In light of the Congressional emphasis on denying a deduction for procedures relating to appearance in all but a few circumstances and the controversy surrounding whether GRS is a treatment for an illness or disease, the materials submitted do not support a deduction." Chief Counsel Advice Memorandum 200603025. The CCA found that the deduction could not be allowed in the absence of an "unequivocal expression of Congressional intent that expenses of this type qualify under section 213." *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

authority cited in the CCA to support its conclusion that medical treatment for gender identity disorder is “controversial.”<sup>208</sup>

Ms. O’Donnabhain appealed to the Tax Court, where the court ultimately allowed the deduction for hormone treatment and sex-reassignment surgery, but disallowed the deduction for breast reconstruction on the grounds that it was “cosmetic.”<sup>209</sup> The IRS acquiesced the following year.<sup>210</sup> The Tax Court decision, however, was not unanimous, and some of the concurring and dissenting judges openly expressed their discomfort with the fact of Ms. O’Donnabhain’s particular point of difference.<sup>211</sup> In his concurrence, Judge Holmes bristled at the “crash course on transsexualism that this case has forced on us.”<sup>212</sup> He also faulted the majority opinion, saying that it “drafts our Court into culture wars in which tax lawyers have heretofore claimed noncombatant status.”<sup>213</sup>

The discontent expressed by the judges on the Tax Court suggests that the imposition of a critical lens will not be without critics. However, this resistance also illustrates why cultural competency is so necessary in the context of discretionary decision making. At each juncture along the way—audit, appeals, Chief Counsel’s Office, and the Tax Court—Ms. O’Donnabhain was forced to explain her difference and why it mattered.

### III. DESIGNING CRITICAL TOOLS

As discussed in Part II, applying a critical lens to tax policy involves three steps. First, it is necessary to refute the myth of taxpayer neutrality. Second, it is essential to establish which identity characteristics are relevant, recognizing that

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<sup>208</sup> By choosing to rely on outmoded and discredited medical research, the CCA rejected the taxpayer’s argument that the surgery was medically necessary to treat a condition listed in the *Diagnostic & Statistical Manual IV* and that surgical intervention is a medically accepted standard of care.

<sup>209</sup> *O’Donnabhain v. Comm’r.*, 134 T.C. 34, 70, 72-73 (2010). The majority disallowed the deduction for breast augmentation surgery on the grounds that it was cosmetic surgery. IRC § 213(d)(9). Amounts paid by taxpayers for breast reconstruction surgery following mastectomy for cancer, as well as for vision correction surgery, are considered deductible medical care expenses. *Id.* at 90-91. The IRS has also allowed a medical expense deduction for the cost of a hair transplant for 24 year old who suffered from premature baldness. *See Mattes v. Comm’r.*, 77 TC 650 (1981).

<sup>210</sup> *O’Donnabhain v. Comm’r.*, 134 T.C. 34 (2010), action on dec., 2011-47 I.R.B. (Nov. 21, 2011), available at <http://www.irs.gov/pub/irs-aod/aod201103.pdf>.

<sup>211</sup> *See* Anthony C. Infanti, *Dissecting O’Donnabhain*, TAX NOTES, Mar. 15, 2010, at 1403, 1404-05 (concluding that “it will be difficult for LGBT taxpayers to walk away from reading these opinions harboring any hope that they will get a hearing in the Tax Court that is unaffected by their sexual orientation or gender identity”).

<sup>212</sup> *O’Donnabhain*, 134 T.C. at 86 (Holmes, J., concurring).

<sup>213</sup> *Id.* at 85.

the different classes of characteristics will necessarily change and evolve over time. Third, it is important to consider the procedural and more practical aspects of how the critical lens should be administered or even enforced—to ask where it fits in the policymaking process. Is it simply an auditing procedure that will evaluate whether remedial steps are desirable when bias is identified in the tax system? Or is it a process that can be included at the outset to avoid a situation such as the under-inclusive uniform definition of a “qualifying child?” What about the exercise of agency discretion that was so hopelessly misinformed in *O'Donnabhain*? Can a constructive critical lens be imposed on all agency action?

This Part discusses these thorny procedural issues and proposes three different measures, all of which are based on existing legislative and administrative institutional traditions and procedures. These measures are: (1) enhanced information collection; (2) the creation of a diversity expenditure budget; and (3) the requirement of diversity impact statements. Although the diversity expenditure budget and the diversity impact statement are separate proposals that could be adopted independently, the enhanced information collection is the necessary first step in this process. Without adequate data, it will continue to be impossible to construct models to measure the impact of taxation on inequality in the United States.

One of the earliest detractors of critical tax theory, Larry Zelenak, famously complained that “mere critique without a *workable solution* does nothing to better anyone’s situation.”<sup>214</sup> Although his characterization of critical tax theory as “mere critique” misapprehends the nature of critical theory, his emphasis on a *workable solution* is worth repeating. Each of the proposals described below carries with it certain negative externalities that range from reifying artificially constructed categories of race to placing additional costs on an already cumbersome rulemaking process. They are only designed to be the starting point of a larger conversation—a point of departure for future study and debate. They represent logical solutions based on existing institutional patterns and practices. If they are not feasible to implement because the political will is lacking or the cost is too great, then those choices should be acknowledged rather than justified under the mantle of taxpayer neutrality.

#### A. *Good Policy Requires Good Data*

Simply put, *good policy requires good data*. Critical tax policy requires enhanced data collection that will allow policymakers to evaluate and measure the impact of taxation on existing disparities by reference to identity group classifications. The IRS currently does not collect demographic data such as race,

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<sup>214</sup> Zelenak, *supra* note 32, at 1524 (emphasis added). For a response, see Staudt, *supra* note 120, at 1581 (referring to Zelenak’s “single-minded focus on solutions” as “both ironic and bizarre”).

ethnicity, gender, sexual orientation, or gender identity.<sup>215</sup> Although various census initiatives capture some of this information, it is not cross-referenced with federal income tax records.<sup>216</sup> Social Security records provide another source of demographic information, but they are also not cross-referenced with tax files.<sup>217</sup> As a result, the information necessary to engage in a critical analysis of the tax code is currently not available.

There are several possible ways to remedy this situation. The most straightforward would be to allow taxpayers to provide identifying characteristics on their tax returns. The IRS would then be able to code tax returns for demographic characteristics and produce a statistical analysis of tax burdens and benefits based on race, ethnicity, or whatever characteristics it chooses to query. It would also be possible to collect tax information through the Census or cross-reference tax and census data or tax and social security data.<sup>218</sup> There are numerous objections to each method given the growing debate over the desirability of the collection of public racial and ethnic information by government entities, but a full discussion of the most effective way to collect data is well outside the scope of this article.<sup>219</sup>

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<sup>215</sup> The U.S. Individual Income Tax Return only inquires regarding two very specific points of disability and age: whether the taxpayer is 65 years of age or older and whether the taxpayer is blind. INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, *U.S. Individual Income Tax Return Form 1040*, OMB No. 1545-0074, available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf>. Both of these points are necessary to determine whether the taxpayer is entitled to a higher standard deduction. INTERNAL REVENUE SERV., *Tax Guide for Seniors*, Publication 554, ch. 4 (2012), available at <http://www.irs.gov/publications/p554/ch04.html>.

<sup>216</sup> See Moran & Whitford, *supra* note 26, at 757-58. Moran and Whitford engaged in their own statistical analysis to determine the impact of the tax code on black taxpayers. They “analyzed data about lifestyle differences using race and income alone as relevant categories.” They also analyzed and reported about “black/white lifestyle differences after controlling for a limited number of additional characteristics of SES [socioeconomic status].” *Id.*

<sup>217</sup> See Moran, *supra* note 38, at 1633. Moran notes:

However, a study that measures compliance in addition to tax liability requires either race-coded returns or sophisticated taxpayer surveys. Tax returns are not race-coded and there are no compliance studies by race that address the questions we raise in *A Black Critique of the Internal Revenue Code*. Although tax returns are not coded by race, they can be cross-matched by race through Social Security numbers. However, cross-matching against Social Security numbers requires security clearance.

*Id.*

<sup>218</sup> *Id.* (discussing “sophisticated taxpayer surveys”).

<sup>219</sup> See, e.g., U.S. Comm’n on Civil Rights, *Briefing on the Consequences of Government Data Race Collection Bans on Civil Rights*, May 17, 2002, available at <http://www.law.umaryland.edu/marshall/usccr/documents/civrightsbrief51702.pdf> (last visited Apr. 5, 2013).

### 1. Taxpayer neutrality and the collection of demographic data

The failure to capture demographic information reflects the strong commitment to taxpayer neutrality that was discussed in greater detail in Part I. When combined with the bounded nature of tax policy, the commitment to taxpayer neutrality creates an impenetrable tautology where the only significant distinguishing feature among taxpayers is income level and, because of that, income level is the only distinguishing characteristic that the IRS collects and analyzes. Many of the criticisms of critical tax theory exploited this tautology, arguing that critical tax scholars could not make broad based evaluative statements without reliable data.<sup>220</sup> The criticism, however, merely highlights the Catch-22 created by the blanket assumption of taxpayer neutrality. If the only salient distinction among taxpayers is income level, then it makes sense to only analyze taxpayer data based on income level. However, if taxpayer data is only collected and analyzed based on income level, there is no possible way to establish that there are other salient features that warrant attention.<sup>221</sup>

By contrast, agencies across the federal government regularly collect and use demographic data relating to race, ethnicity, disability, and gender.<sup>222</sup> Beyond these recognized categories, the Department of Health and Human Services has recently announced that it will start collecting data on sexual orientation and gender identity for certain purposes.<sup>223</sup> Even the Department of the Treasury collects demographic data on race for some non-tax related purposes, such as the Home Affordable Modification Program.<sup>224</sup> In some instances, the data collection is mandated in order to measure compliance with anti-discrimination laws, but in

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<sup>220</sup> See, e.g., Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1823 (1998).

<sup>221</sup> In other words, starting from a strong presumption of taxpayer neutrality mandates that there is no possible way to test the original presumption because any data that could potentially undermine the presumption has been deemed irrelevant and, as a result, does not exist.

<sup>222</sup> Federal public policy has been race and diversity conscious since the mid-1960s.

<sup>223</sup> U.S. Dep't of Health & Human Services, *Affordable Care Act to Improve Data Collection, Reduce Health Disparities*, June 29, 2011, available at <http://www.hhs.gov/news/press/2011pres/06/20110629a.html> (last visited Apr. 5, 2013). Under Section 4302 of the Affordable Care Act, data collection efforts to understand health disparities relating to race, ethnicity, sex, primary language and disability status are required. However, the Secretary has authority to require additional standards. HHS has announced that it will integrate questions on sexual orientation into national data collection efforts by 2013 and begin a process to collect information on gender identity. *Id.*

<sup>224</sup> Applicants and homeowners in the Home Affordable Modification Program ("HAMP") program are requested, but not required, to provide race and ethnicity information in order to obtain a mortgage modification. *Making Home Affordable Data File Summary*, MAKINGHOMEAFFORDABLE.GOV (Jan. 31, 2011), available at [http://www.treasury.gov/initiatives/financial-stability/reports/Documents/MHA%20Data%20File%20Summary\\_new.pdf](http://www.treasury.gov/initiatives/financial-stability/reports/Documents/MHA%20Data%20File%20Summary_new.pdf).

other instances it is used to track and address existing disparities. Given that taxation is a component of the broader fiscal policy and includes significant spending items in the form of tax expenditures, the IRS's lack of interest in demographic differences in terms of its burdens or benefits seems out of step with the practices of other federal agencies.

Federal public policy has been diversity-conscious since the mid-1960s when the passage of landmark civil rights legislation made reliable demographic data essential for enforcement purposes. For example, Title VII of the Civil Rights Act of 1964 mandated equal treatment in the workforce and created the Equal Employment Opportunity Commission ("EEOC") to monitor compliance with the law.<sup>225</sup> To assist in its enforcement efforts, the EEOC imposed reporting requirements on certain employers regarding the race and ethnicity of their employees.<sup>226</sup> Similarly, the Department of Housing and Urban Development collects data to measure compliance with the Fair Housing Act of 1968.<sup>227</sup> Indeed, the collection of demographic data relating to race and ethnicity became so widespread, that the Office of Management and Budget (OMB) later formalized the standards to be used for all federal purposes when collecting data on race or ethnicity in Directive 15.<sup>228</sup>

Beyond enforcement efforts, information collection is essential to many federal programs that are funded based on data from the decennial Census, including programs that promote equal employment opportunities and those that assess racial disparities in health and environmental risks.<sup>229</sup> Demographic data is also necessary to monitor compliance with the Voting Rights Act and the bilingual election rules.<sup>230</sup> There are also obligations imposed on local governments, which are required to identify underserved segments of the population, such as those requiring medical services under the Public Health Service Act.<sup>231</sup> Demographic data is also necessary to ensure that financial institutions are meeting the credit needs of minority populations under the Community Reinvestment Act.<sup>232</sup> When the OMB last revised Directive 15, it

<sup>225</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (2012).

<sup>226</sup> *Id.*

<sup>227</sup> Catherine Lee & John D. Skrentny, *Race Categorization and the Regulation of Business and Science*, 44 LAW & SOC'Y REV. 617, 618 (2010) (explaining that "in 1965 this agency issued a regulation requiring all businesses with at least 100 employees to fill out a form, the EEO-1, that categorized all employees based on their employer-perceived identities as white, black, 'Spanish-American,' 'Oriental,' or 'American Indian'").

<sup>228</sup> *Id.* at 617-19 (describing the history of OMB Directive 15).

<sup>229</sup> *Definition: Ethnic Groups*, UNITED STATES CENSUS BUREAU, available at <https://ask.census.gov/faq.php?id=5000&faqId=7557>.

<sup>230</sup> Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.*

<sup>231</sup> Public Health Service Act, 42 U.S.C. §§ 201 *et seq.*

<sup>232</sup> Community Reinvestment Act ("CRA"), 12 U.S.C. §§ 2901 *et seq.*

organized an interagency working group that was comprised of representatives from thirty different agencies that utilized demographic data in their program development and implementation,<sup>233</sup> representing the breadth of data collection efforts across the federal government.

## 2. Too much, too little, or not at all

Despite the fact that there is a long history at the federal level of collecting demographic data for the commendable purpose of furthering civil rights, the practice has recently been the subject of sustained criticism from a variety of interests. LGBT advocacy organizations have increasingly argued that sexual orientation and gender identity should be queried on the Census and other national surveys, such as the National Health Interview Survey administered by the National Institutes of Health.<sup>234</sup> Multiracial advocates have argued for the expansion of racial categories or have rejected them completely.<sup>235</sup> The proponents of “racial privacy” have also argued against the use of racial categories but on starkly different grounds.<sup>236</sup> Accordingly, any proposal to increase data collection for tax purposes would likely encounter criticism on a number of fronts.

At first glance, the objections of LGBT advocacy groups seems easy to remedy—simply add a query regarding sexual orientation and gender identity to all relevant national data sets. By advocating in favor of extending diversity-conscious federal policies to include LGBT individuals, LGBT organizations accept the importance of demographic data as an effective way to monitor civil rights protections.<sup>237</sup> However, the country remains deeply divided over issues

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<sup>233</sup> See Kim M. Williams, *Racial Statistics and Race-Conscious Public Policy*. TAUBMAN CENTER POLICY BRIEF, May 2007, at 3, available at [http://www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/williams\\_new.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/williams_new.pdf) (last visited Apr. 5, 2013) (describing the inter-agency working group). See also Lee & Skrentny, *supra* note 227, at 618 (In terms of the range of agencies collecting data, Lee and Skrentny noted that “[t]he National Institutes of Health (NIH) Revitalization Act of 1993 required the NIH to establish guidelines for including women and minorities in clinical research—called the Inclusion Mandate, which the agency implemented in 1994.”).

<sup>234</sup> National Coalition for LGBT Health, *LGBT Inclusion in Federal Health Surveys*, (Dec. 2010), available at [http://lgbthealth.webolutionary.com/sites/default/files/LGBT%20Inclusion%20in%20Surveys\\_0.pdf](http://lgbthealth.webolutionary.com/sites/default/files/LGBT%20Inclusion%20in%20Surveys_0.pdf) (last visited Apr. 5, 2013).

<sup>235</sup> See Williams, *supra* note 233 (describing the goals of the “multi-racial movement”).

<sup>236</sup> Patricia J. Williams, *Racial Privacy*, THE NATION, June 17, 2002 (describing the “racial privacy movement”).

<sup>237</sup> The President of the Human Rights Campaign explained that data collection was necessary to “understand if the country is meeting the public-policy needs of [LGBT] Americans.” Carroll Morello, *Census Count of Same-Sex Couples to Stir Policy Fights*, WASH. POST, Sept. 19, 2009

related to LGBT civil rights, suggesting that the inclusion of sexual orientation and gender identity would not be without controversy. For example, leading up to the 2010 Census, the Census Bureau took the position that it would not be able to “count” the same-sex couples who reported that they were “married,”<sup>238</sup> because to do so would violate DOMA.<sup>239</sup> Even if it were possible to get a consensus that sexual orientation and gender identity should be included in the critical lens and, therefore, data on sexual orientation and gender identity should be collected, there remains considerable disagreement and uncertainty regarding how best to pose questions that would capture the full range of LGBT lives and identities.<sup>240</sup>

In contrast to the LGBT groups who want to be included in the data collection, there are other groups who want to be able to opt out of the data collection. The multiracial movement that began in the 1990s argued that the racial categories reflected on the Census and prescribed through OMB’s Directive 15 were overly reductive by forcing individuals to choose a single identity category.<sup>241</sup> The movement was successful, in part, by getting OMB to endorse a “mark one or more” (MOOM) approach such that respondents can now choose more than one category to reflect intersecting or multiple identities.<sup>242</sup>

Related to the multiracial objection, there is also a post-racial or post-identity critique that argues against the collection of racial and ethnic data by the federal government on the grounds that it reinforces a socially constructed category of difference that has historically been used as a tool of subordination.<sup>243</sup>

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(quoting Joe Solmonese, then-President of the Human Rights Campaign). *See also* Williams, *supra* note 233, at 2 (explaining that “in the 1960s, racial classifications became useful for the purpose of enforcing and monitoring civil rights laws”).

<sup>238</sup> Morello, *supra* note 237 (explaining the controversy).

<sup>239</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7).

<sup>240</sup> *See* Gary J. Gates, *LGBT Identity: A Demographer’s Perspective*, 45 LOY. L.A. L. REV. 693 (2012).

<sup>241</sup> Williams, *supra* note 233 (“The American multiracial movement is best known for its advocates’ efforts, throughout the 1990s, to add a “multiracial” category to the 2000 census.”).

<sup>242</sup> *Id.*

<sup>243</sup> Kimani Paul-Emile, *The Regulation of Race in Science*, 80 GEO. WASH. L. REV. 1115, 1131-1132 (2012). Paul-Emile provides the following definition of race in the context of biomedical research:

Race is a social construct, which means that racial categories, the meaning we attach to these categories, and the way we determine which individuals will be assigned to these categories, are all driven by social, cultural, and historical practices, and are not determined *a priori* by genetics. We assign certain meanings (e.g., stereotypes and attitudes) to the racial categories we have constructed, which inform the ways individuals and groups are perceived.

*Id.* *See also* IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*



The post-identity concern is that the continued deployment of outmoded and artificial categories by the federal government has the effect of naturalizing race, and racializing certain government policies and practices. The response to the post-racial critique is that although race is socially constructed, it continues to have social, political, and economic consequences and meaning.<sup>244</sup> As a result, “racial pragmatism” would dictate that salient identity characteristics continue to be taken into account for purposes of building a diversity-conscious policy that remains aware of the limitations and dangers inherent in the act of characterization.<sup>245</sup>

The racial privacy movement also objects to the collection of demographic data by the government but on very different grounds. The movement started as an outgrowth of the anti-affirmative action movement that had argued successfully in the 1990s against preferences based on race, gender, and ethnicity.<sup>246</sup> The racial privacy movement, however, takes that argument against racial or ethnic preferences one step further. It asserts that the government should not collect information on race or ethnicity in the first instance—let alone use it for preferences. The racial privacy movement asserts that the collection of such information by the government violates privacy rights by compelling an individual to divulge racially identifying information.<sup>247</sup> In 2004, California voters defeated Proposition 54 that would have prohibited state and local governments from using race, ethnicity, color, or national origin to classify current or prospective students, contractors or employees in public education, contracting, or employment operations.<sup>248</sup> Although the initiative was defeated, it still garnered over three million votes.<sup>249</sup>

The racial privacy movement posed a direct challenge to civil rights protections and safeguards by claiming that the government should be prohibited

(NYU Press 1st ed. 1996).

<sup>244</sup> Paul-Emile, *supra* note 243, at 1131. As Paul-Emile observes, “the overwhelming consensus among geneticists majority is that ‘among modern humans, there’s no such thing as race.’” (quoting Joseph L. Graves, Jr., Ph.D., Dean of University Studies and Professor of Biological Sciences, North Carolina Agricultural & Technical State University).

<sup>245</sup> Paul-Emile endorses “racial pragmatism in the biomedical . . . context.” *Id.* at 1168. He concludes: “This Article argues that federal regulations must allow for the use of racial categories in biomedical studies. However, they must do so in a way that does not allow researchers to jeopardize individual and public health or reify outmoded, pejorative, and stigmatizing notions of racial distinctions.” *Id.* at 1173.

<sup>246</sup> See Glenn C. Loury, *When Color Should Count*, N.Y. TIMES (July 8, 2002) (arguing in favor of “modest violations of race blindness that yield significant reductions in racial inequality”), available at <http://www.nytimes.com/2002/07/28/opinion/when-color-should-count.html>.

<sup>247</sup> *Id.*

<sup>248</sup> 2003 California State-Wide Special Election: Proposition 54, CAL. SECRETARY OF STATE, <http://vote2003.sos.ca.gov>Returns/prop/mapR054.htm> (last visited Apr. 5, 2013).

<sup>249</sup> *Id.*

from collecting demographic data. Without reliable data, it would be impossible to enforce anti-discrimination laws or measure disparities.<sup>250</sup> In some ways, racial privacy could also describe the current “don’t ask, don’t tell” policy in place for taxpayer information.<sup>251</sup> Willful blindness of the type mandated by Proposition 54 or practiced under the myth of taxpayer neutrality does not change the reality of inequality or the persistence of bigotry and bias. When asked to comment on Proposition 54, the American Association of Sociologists explained that “refusing to employ racial categories for administrative purposes and for social research does not eliminate their use in daily life, both by individuals and within social and economic institutions.”<sup>252</sup>

### B. Diversity Expenditure Budget

A diversity expenditure budget would make visible the allocation of tax benefits by race, gender, ethnicity, and whatever other classifications were included in the critical lens. In 1998 Beverly Moran called for Congress to create a “Race Expenditure Budget” that would “parallel the annual Tax Expenditure Budget” and show “what racial disparities exist in the enjoyment of tax benefits.”<sup>253</sup> Her proposal clearly presaged the growing call for “gender-sensitive”

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<sup>250</sup> For example, in 1996 California voters approved ballot initiative Proposition 209, which prohibited state government institutions from considering race, sex, or ethnicity, specifically in the areas of public employment, public contracting, or public education. B. Drummond Ayres, *Affirmative Action Battle Moves to the Courts*, N.Y. TIMES, Dec. 1, 1996. The success of Proposition 209 was followed by the 2003 U.S. Supreme Court cases, *Gratz v. Bollinger* and *Grutter v. Bollinger* that challenged the race-based admissions policies at the University of Michigan. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>251</sup> Patricia J. Williams, *Racial Privacy*, THE NATION (May 30, 2002), available at <http://www.thenation.com/article/racial-privacy>.

<sup>252</sup> AM. SOCIOLOGICAL ASS’N, STATEMENT OF THE AMERICAN SOCIOLOGICAL ASSOCIATION ON THE IMPORTANCE OF COLLECTING DATA AND DOING SOCIAL SCIENTIFIC RESEARCH ON RACE (2003) available at [http://www2.asanet.org/media/asa\\_race\\_statement.pdf](http://www2.asanet.org/media/asa_race_statement.pdf) (last visited Apr. 5, 2013). The American Sociological Association supported data collection because:

[A] large body of social science research documents the role and consequences of race in primary social institutions and environments, including the criminal justice, education and health systems, job markets, and where people live. These studies illustrate how racial hierarchies are embedded in daily life, from racial profiling in law enforcement, to ‘red-lining’ communities of color in mortgage lending, to sharp disparities in the health of members of different population groups.

*Id.*

<sup>253</sup> Moran, *supra* note 38, at 1634. In an earlier article with William Whitford, Moran had forcefully argued that “Ignoring the impact that the Internal Revenue Code has on black welfare is a tradition that must stop.” Moran & Whitford, *supra* note 26, at 803.

budgeting,<sup>254</sup> but it chose race as the distinguishing feature and used the familiar concept of the tax expenditure budget as a point of reference.<sup>255</sup> A diversity expenditure budget would broaden Moran's call for a "Race Expenditure Budget" to include gender, sexual orientation, gender identity, and potentially other identity groups as well.

As explained in Part I, the tax expenditure budget was mandated by Congress in 1974.<sup>256</sup> The President's annual budget submission to Congress is required to contain a list of tax expenditures, prepared by the Treasury Department.<sup>257</sup> The Joint Committee on Taxation also prepares its own tax expenditure budget.<sup>258</sup> The addition of demographic information would allow policymakers (and voters) to see how tax expenditures, such as the mortgage interest deduction, are allocated across identity groups. By disrupting the blanket assumption of taxpayer neutrality, the diversity expenditure budget would directly further the original goals of the tax expenditure budget, namely increased transparency and better budget management.<sup>259</sup> It would also treat tax expenditures more in line with other types of fiscal programs where the federal government expresses concerns over disparities and unequal access.

A diversity expenditure budget also finds support in the concept of "gender budgeting" that has been implemented in a number of countries.<sup>260</sup> Popularized after the 1995 United Nations Fourth Congress on Women in Beijing, gender budgeting is designed to further distributive transparency.<sup>261</sup> The Platform of Action adopted at the Fourth World Conference on Women called on governments to "[f]acilitate, at appropriate levels, more open and transparent budget processes"<sup>262</sup> and mandated "the integration of a gender perspective in

<sup>254</sup> See Phillips & Stewart, *supra* note 37, at 843 (describing the advent of gender-sensitive budgeting).

<sup>255</sup> When Surrey sought to make visible a form of indirect spending that was otherwise hidden within the tax code, his goal was to improve the budgeting process by requiring policymakers to acknowledge openly the various preferences and subsidies that represented departures from the structural provisions of the code. See Surrey & McDaniel, *supra* note 33.

<sup>256</sup> The Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601-688 (1974).

<sup>257</sup> Surrey & McDaniel, *supra* note 33.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Phillips & Stewart, *supra* note 37, at 843 (discussing gender-sensitive budgeting). For an overview of Gender Responsive Budget Initiatives, see generally U.N. Women, *U.N. Women Initiatives*, GENDER RESPONSIVE BUDGETING, [http://www.gender-budgets.org/index.php?option=com\\_content&view=article&id=15&Itemid=187](http://www.gender-budgets.org/index.php?option=com_content&view=article&id=15&Itemid=187) (last visited Apr. 5, 2013).

<sup>261</sup> Phillips & Stewart, *supra* note 37, at 843. See also Rep. of Fourth World Conf. on Women, Sept. 4-15, 1995, U.N. Doc. A/CONF.177/20/Rev.1 (1996); U.N. Women, *GENDER RESPONSIVE BUDGETING*, <http://www.gender-budgets.org> (last visited Apr. 5, 2013).

<sup>262</sup> Rep. of Fourth World Conf. on Women, Sept. 4-15, 1995, U.N. Doc. A/CONF.177/20/Rev.1

budgetary decisions on policies and programs.”<sup>263</sup> A “gender-sensitive budget” is designed to question fiscal policy that is presumed to be neutral and explore its impact in light of gender roles and the differing economic status of men and women.<sup>264</sup>

Gender budgeting is a component of a larger move toward “gender mainstreaming” that has gained international acceptance and could provide a useful model for the development and implementation of a critical lens not only for tax policy, but for all domestic fiscal policy.<sup>265</sup> Consistent with the goals of critical tax policy, gender mainstreaming focuses on revealing false neutrality. For example, a report on gender mainstreaming from the Council of Europe, recommends that efforts should first focus on points widely held to be “gender-neutral,” saying the results will be “eye-opening.” The report stated:

It might be useful to start with gender mainstreaming policy areas that are habitually labelled as gender-neutral. All policy areas which affect the daily life of citizens, such as transport policies, urban policies, [and] social policies are definitely important, although this is often not recognised. The same goes for research policies, because this is an important area to generate knowledge. Mainstreaming these policy areas might be very efficient, given the eye-opening effect it will produce. This effect will be very useful for convincing policy-makers and people of the need for gender mainstreaming, even when basic gender equality seems to be achieved.<sup>266</sup>

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(1996). *See also* Commonwealth Secretariat, GENDER AFFAIRS DEP’T, DEBBIE BUDLENDER ET AL., GENDER BUDGETS MAKE CENTS: UNDERSTANDING GENDER RESPONSIVE BUDGETS 1 (2002).

<sup>263</sup> Phillips & Stewart, *supra* note 37, at 845. The immediate response from the United Nations and other international entities was to provide support for a wide range of “gender budgeting” projects.

<sup>264</sup> *Id.* at 843. Phillips & Stewart note, “A variety of methods are used to reveal and analyze the differential impacts of taxes and spending on women and men, in terms of both the distribution of costs and benefits, and behavioral effects (for example, marginal choices between paid and unpaid labor, or the effectiveness of business incentives).” *Id.*

<sup>265</sup> Martha Fineman, *Beyond Identities: The Limits of An Antidiscrimination Approach To Equality*, 92 B.U. L. REV. 1713 (2012). *See also* Equal. Div., Directorate Gen. of Human Rights, Council of Eur., *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices* 23 (2005), available at

<http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender->

[mainstreaming/EG\\_S\\_MS\\_98\\_2\\_rev\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG_S_MS_98_2_rev_en.pdf) (providing a comprehensive review of gender mainstreaming, including reports on various governments' processes) (last visited Apr. 5, 2013).

<sup>266</sup> Fineman, *supra* note 265, at 1740 (quoting Equal. Div., Directorate Gen. of Human Rights, Council of Eur., *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of good Practices* 23 (2004), available at

Turning back to critical tax policy, a diversity expenditure budget would provide crucial information for policy makers. As a component of the budgeting process, it would greatly advance transparency goals. With the information provided by the diversity expenditure budget, policymakers would have access to distributional data broken down by relevant demographics characteristics. Whether they choose to act on the data or not, they would at least have to acknowledge the distributional effects. The diversity expenditure budget could be implemented by an act of Congress like the original tax expenditure or instituted through executive action that would direct the Department of Treasury to prepare as an optional budget to reflect these certain distributional concerns.

### *C. Diversity Assessment Statement*

Although a diversity expenditure budget would allow for reflection on the part of policy maker, a diversity impact statement described below could conceivably act as a filter or check for all major government actions. A diversity impact statement would be to evaluate governmental actions before they are implemented in order to determine the potential for disparate impact on the different identity groups defined by race, gender, ethnicity, and whatever other classifications were included in the critical lens. In this way, a diversity impact statement would help policy makers avoid the unintended consequences that can arise when implicit bias becomes incorporated in the tax code. The diversity impact statement could be restricted to taxation or extended more broadly. Similarly, it could be limited to regulatory action or extend to legislative action as well.

The concept of a diversity impact statement finds support in the well-established practice of imposing various value-based requirements or safeguards on legislative and agency action.<sup>267</sup> Starting in the 1970s, the legislative and executive branches both began to impose requirements on agency action that were designed to ensure that it was consistent with other broadly held federal policies.<sup>268</sup> These requirements were sometimes in the form of “impact assessments” or

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[http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG\\_S\\_MS\\_98\\_2\\_rev\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG_S_MS_98_2_rev_en.pdf) ).

<sup>267</sup> Although some impact assessments have applied to legislative action, the majority have been designed to curtail agency power.

<sup>268</sup> The most well-known impact assessment is the environmental impact statement. The International Association for Impact Assessment (“IAIA”) defines an environmental impact assessment as “the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made.” *What is Impact Assessment?*, INT’L ASS’N OF IMPACT ASSESSMENT (Oct. 2009) available at [http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA\\_web.pdf](http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf) (last visited Feb. 9, 2013).

could also take the form of balancing tests.<sup>269</sup> Over the years, these value-specific policy lenses have included environmental risks,<sup>270</sup> respect for federalism,<sup>271</sup> respect for the family,<sup>272</sup> concern over takings issues,<sup>273</sup> and the impact of regulation on small businesses.<sup>274</sup> These “impact assessments” or “impact statements”<sup>275</sup> required the agency to undergo a process of evaluation designed to predict the effect of proposed federal agency action on a pre-defined set of values or standards.<sup>276</sup> Accordingly, “impact assessments” have the power to impose specific value checks on otherwise value-blind policy, and they represent a familiar way to implement the critical lens that is essential to critical tax policy.

Perhaps the most well-known impact assessment is the Environmental

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<sup>269</sup> See, e.g., The Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 864 (1980) (codified as amended at 5 U.S.C. §§ 601-612) (mandates consideration of impact of proposed regulations on small businesses and other small entities). Early in his first term, President Reagan expanded executive control over rulemaking with Executive Order 12,291. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 3 C.F.R., 1981 Comp., p. 127 (Feb. 17, 1981). This Executive Order required federal agencies to take regulatory action only if, “the potential benefits to society for the regulation outweigh the potential costs to society.” *Id.* Agencies were also instructed to submit to the Office of Management and Budget (OMB) a “regulatory impact analysis” of the potential costs and benefits for any proposed rule likely to be economically significant. *Id.*

<sup>270</sup> See the Nat’l Environmental Policy Act, 42 U.S.C. §§4321-4347d, requiring the development of the Environmental Impact Statement.

<sup>271</sup> Exec. Order No. 12,612, 52 Fed. Reg. 41,685, 3 C.F.R., 1987 Comp., p. 252 (Oct. 26, 1987). Executive Order 12,612 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) Imposes substantial direct compliance costs on State and local governments and is not required by statute, or (ii) preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order.

<sup>272</sup> Exec. Order No. 12,606, 52 Fed. Reg. 34,188, 3 C.F.R. 1987 Comp., 241 (Sept. 9, 1987) (entitled “The Family”).

<sup>273</sup> Executive Order 12,630 addressed the New Right’s belief that individual private property rights were being eroded by the actions of the federal government. Exec. Order No. 12,630, 53 Fed. Reg. 8859, 3 C.F.R., 1988 Comp., 554 (Mar. 15, 1988). It ordered agency action to take into account the “obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment.” *Id.* To some extent, impact assessments such as these do not really break any new ground. In many cases, agencies are simply being urged to comply with the demands of the U.S. Constitution.

<sup>274</sup> The Regulatory Flexibility Act (“RFA”), 5 U.S.C. § 601 *et seq.*, generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The key requirement of the law is that federal agencies must analyze the impact of their regulatory actions on small entities (small businesses, small non-profit organizations and small jurisdictions of government) and, where the regulatory impact is likely to be “significant”, affecting a “substantial number” of these small entities, seek less burdensome alternatives for them.

<sup>275</sup> The statute requires an agency to include a statement on “the environmental impact” as well as alternatives to the proposed course of action. 42 U.S.C. § 4332(C)(i) and (iii) (2013).

<sup>276</sup> 42 U.S.C. § 4332(C).

Impact Statement (“EIS”), which was introduced by the National Environmental Policy Act of 1969 (“NEPA”).<sup>277</sup> NEPA required federal agencies to prepare an Environmental Impact Statement (“EIS”) in advance of certain agency actions “significantly affecting the quality of the human environment” in order to assess their potential impact.<sup>278</sup> An EIS is required to describe:

- 1) the environmental impacts of the proposed action;
- 2) any adverse environmental impacts that cannot be avoided should the proposal be implemented;
- 3) the reasonable alternatives to the proposed action;
- 4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
- 5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.<sup>279</sup>

Designed as a tool to enhance federal decision-making, the goal of the EIS is to make sure that federal agency action is based on informed and thorough analysis that takes environmental concerns into account.<sup>280</sup> The supersonic Concorde provided the first major test for the EIS,<sup>281</sup> when environmental advocates successfully stalled its introduction to U.S. airspace in the 1970s.<sup>282</sup> Immediately after the perceived success of the environmentalists, progressive family advocates lobbied for an impact statement requirement for any government

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<sup>277</sup> The Nat’l Environmental Policy Act of 1969, P.L. 91-190, § 2, 83 Stat. 852 (codified as 42 U.S.C. § 4321, *et seq.*). The first widely publicized application of the new EIS requirements was the successful delay of the Super Sonic Transport (SST), also known as the Concorde. Robert B. Donin, *Safety Regulation of the Concorde: Realistic Confinement of the National Environmental Policy Act*, 8 TRANSP. L. J. 47 (1976). Environmentalists objected to the potential for noise pollution, as well as the plane’s impact on the ozone, its lack of fuel efficiency, and its safety risks. Walter Sullivan, *Experts Fear Great Peril if SST Fumes Cool Earth*, N.Y. TIMES, Dec. 21, 1975, at 32. After a period of public comment, the Secretary of Transportation provisionally approved SST flights from the two airports, but called the decision “difficult and close.” Robert B. Donin, *Safety Regulation of the Concorde: Realistic Confinement of the National Environmental Policy Act*, 8 TRANSP. L. J. 47 (1976) (quoting Secretary of Transportation, William T. Colman, Jr.).  
<sup>278</sup> 42 U.S.C. § 4332(C).

<sup>279</sup> *Id.*

<sup>280</sup> See generally SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 5 (1984) (assessing whether environmental impact statements have institutionalized “a greater sensitivity to environmental risks in the federal bureaucracy”).

<sup>281</sup> Donin, *supra* note 277.

<sup>282</sup> Although the Concorde was eventually approved, its flights were sharply curtailed in terms of both location and number and environmentalists consider it to have been a huge success.

action affecting the family.<sup>283</sup> However, the concept of an impact statement proved to have no ideological limits and the family impact statement was eventually taken over by advocates of “traditional values” during the Reagan administration.<sup>284</sup> At the same time, a number of safeguards representing conservative values were imposed by both Congress and the executive branch.<sup>285</sup> More recently, there has been increased progressive interest in the concept, and recent proposals have included an “interest impact statement”<sup>286</sup> and a “constitutional impact statement.”<sup>287</sup> There has also been interest expressed at the state level.<sup>288</sup> Iowa, for example, has imposed the requirement of a “minority impact statement” whenever there is proposed legislation regarding sentencing.<sup>289</sup>

The example of Iowa’s minority impact statement as it applies to sentencing illustrates the importance and strength of demographic data. The impact statement legislation was introduced after statistics showed that Iowa ranked first among the states in its rate of incarceration for African Americans but had the third lowest rate of incarceration rate for white prisoners.<sup>290</sup> A closer

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<sup>283</sup> Robin S. Maril, *Regulating The Family: The Impact Of Pro-Family Policymaking Assessments On Women And Nontraditional Families*, BALT. L. REV. (forthcoming 2013).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Krishnakumar, *supra* note 132, at 30 (“Once a committee has submitted a legislative proposal and ‘interest impact’ statement to CBO/GAO, that entity then should be required to prepare an impact report evaluating: (1) the impact in qualitative and, if possible, quantitative terms, that the bill is expected to have on List groups; and (2) the benefits the bill is expected to confer on other groups.”).

<sup>287</sup> See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L. J. 1277, 1310-11 (2001) (explaining a two-step procedure for all bills that would require a “constitutional impact statement”).

<sup>288</sup> Iowa became the first state to enact a minority impact statement in 2008. U.S. State News, *Gov. Culver Signs Nation’s First Racial Impact Sentencing Bill*, Apr. 22, 2008 (issuing statement of Iowa Public Defender). When the Iowa minority impact statement bill was signed into law, the Iowa Public Defender noted that “Iowa is the first state to pass legislation examining the racial and ethnic impact of new criminal justice policies.” *Id.* He also observed that “Bills to enact minority impact statements are . . . pending in Connecticut and Illinois [and] [l]ast year, Oregon was the first state to introduce similar legislation.” *Id.* The impact statement concept has also been suggested in other areas, such as Medicaid. See, e.g., Michael Campbell, *Did I Do That? An Argument for Requiring Pennsylvania to Evaluate the Racial Impact of Medicaid Policy Decisions Prior to Implementation*, 82 TEMP. L. REV. 1163 (2010) (recommending that “prior to publication of proposed regulations, the Medicaid agency first assesses the racial impact of its proposed policies and then presents these findings publicly”).

<sup>289</sup> *Gov. Culver Signs Nation’s First Racial Impact Sentencing Bill*, U.S. STATE NEWS, Apr. 22, 2008, 2008 WLNR 10805010 (explaining that the law “provides a means for legislators to anticipate any unwarranted disparities and enables them to consider alternative policies to accomplish the goals of legislation without causing undue negative effects on public safety”).

<sup>290</sup> Criminal Justice & Juvenile Planning, *Minority Impact Statements: One Approach to Racial Disparity in the Criminal Justice System*, available at



inspection of the data showed that the point of departure was not in the rate of arrests or even convictions but that it occurred at the sentencing phase.<sup>291</sup> The minority impact statement is required to accompany any legislation related to a “public offense, sentencing, or parole and probation procedures.”<sup>292</sup> The statement must include:

- 1) any disproportionate or unique impact of proposed policies or programs on minority persons in Iowa;
- 2) a rationale for the existence of programs or policies having an impact on minority persons in Iowa; and
- 3) evidence of consultation with representatives of minority persons in cases where a policy or program has an identifiable impact on minority persons in Iowa.<sup>293</sup>

The specific requirements imposed through these impact statements represent a belief that the imposition of a predetermined policy lens can effectively direct and guide the development and implementation of policy. The articulation of impact is also consistent with the growing international commitment to gender mainstreaming that explores ways to develop an independent and official assessment of the gendered implications and consequences of specific plans or proposals.<sup>294</sup> Following the existing models, a proto-typical diversity impact statement would include the following:

- 1) the demographic impact of the proposed policies or actions;
- 2) any disproportionate or unique impact of the proposed policies or actions on designated minority populations;

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[http://www.jrsa.org/events/conference/presentations-09/Phyllis\\_Blood.pdf](http://www.jrsa.org/events/conference/presentations-09/Phyllis_Blood.pdf) (last visited Apr. 4, 2013). See also Marc Mauer & Ryan S. King, *Uneven Justice: States Rates of Incarceration by Race and Ethnicity*, July 2007, available at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf) (last visited Mar. 31, 2013).

<sup>291</sup> Criminal Justice & Juvenile Planning, *Minority Impact Statements: One Approach to Racial Disparity in the Criminal Justice System*, available at [http://www.jrsa.org/events/conference/presentations-09/Phyllis\\_Blood.pdf](http://www.jrsa.org/events/conference/presentations-09/Phyllis_Blood.pdf) (last visited Apr. 4, 2013).

<sup>292</sup> The legislation also required any application for a grant from a state of Iowa agency to include a minority impact statement. Iowa Code § 8.11 (2013). The law defines “minorities” as “individuals who are women, persons with a disability, African Americans, Latinos, Asians or Pacific Islanders, American Indians, and Alaskan Native Americans.” Iowa Code § 8.11.2.b. (2013).

<sup>293</sup> Wayne Ford, *Bills Push ‘One Iowa’ In Studying Minority Impact With Grants, Crime*, DES MOINES REGISTER (IOWA), Apr. 1, 2008, at 11W.

<sup>294</sup> Phillips & Stewart, *supra* note 37 (describing gender mainstreaming).

- 3) reasonable alternatives to the proposed policies or actions that do not have a disproportionate or unique impact on designated minority populations;
- 4) the rationale for the existence of policies or actions having a disproportionate or unique impact on designated minority populations; and
- 5) the relationship between such policies or actions and the long-term goals of tax reform, including considerations of equity, efficiency, and ease of administration.

A diversity impact assessment would obviously impose an additional cost on federal decision making.<sup>295</sup> One thing to consider is the level of specificity that would be required by the diversity impact assessment. On one hand, it would not be desirable to have a completely pro forma impact assessment.<sup>296</sup> On the other hand, too much detail could prove to be an unnecessary drag on the legislative and regulatory process. Regardless of the degree of detail and specificity required, the notion of an impact assessment offers a formal way to impose a critical lens on federal policy making.

#### CONCLUSION

This Article outlines the essential framework of Critical Tax Policy—a new method of inquiry that incorporates the insights of a growing international tax equity movement as well as the observations of critical tax scholars who write from a diverse range of outsider perspectives. Such a project is timely given the renewed calls for fundamental tax reform in the wake of the Global Recession and accompanying austerity measures. Critical Tax Policy challenges the multiple assumptions of neutrality that undergird our present system of taxation and recognizes that facially neutral tax policy can reinforce existing inequities and

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<sup>295</sup> The imposition of a diversity impact statement would greatly increase the paperwork burden. Under the Paperwork Reduction Act of 1995 (PRA), the Office of Management and Budget (OMB) is required to report to the Congress on the paperwork burden imposed on the public by the Federal Government and on efforts to reduce that burden. Since the enactment of the original Paperwork Reduction Act of 1980, OMB has complied with this reporting requirement by issuing an Information Collection Budget (“ICB”). The 2012 ICB reports on the paperwork burden imposed on the public during fiscal year 2011 and explores other issues pertaining to the implementation of the PRA. Office of Budget and Management, *Information Collection Budget 2012*, (2012), available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb\\_2012.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2012.pdf) (last visited Apr. 5, 2013).

<sup>296</sup> Maril, *supra* note 283 (noting that the requirement of the Family Impact Statement was often pro forma and conclusory).

biases. It also acknowledges the constitutive role of tax policy in the larger “blueprint for the aims and ambitions of the nation state.”<sup>297</sup>

The overriding goal of Critical Tax Policy is to make tax policy more informed, transparent, and responsive to the needs of individual taxpayers. This Article suggests a number of ways that the development of tax policy would differ (both procedurally and substantively) if critical perspectives were incorporated from the earliest stages. It engages instances of explicit and implicit bias in existing tax provisions and the potential for bias in the case of discretionary actions. Specifically, this Article proposes three policy innovations or safeguards that draw on longstanding institutional practices and procedures: (1) enhanced information collection; (2) the creation of a diversity expenditure budget; and (3) the requirement of a diversity impact statement.

All of these proposals would further the goals of Critical Tax Policy, but each of them comes with a separate set of costs and countervailing policy concerns. Accordingly, they do not represent a definitive way to implement the addition of a critical lens. At best, they should be regarded as a starting point in the ongoing project of building an informed, transparent and responsive approach to tax policy that incorporates considerations of difference and acknowledges its potential role in the perpetuation of inequality.

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<sup>297</sup> MUMFORD, *supra* note 12, at 3 (crediting Joseph Schumpeter with the observation regarding the budget function).